

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment Reserved on: November 03, 2017*
Judgment Delivered on: November 18, 2017

+ **CRL.A. 541/2014**

SEESH PAL Appellant
Through: Mr.S.B.Dandapani, Advocate

versus

STATE Respondent
Through: Ms.Kusum Dhalla, APP for the
State with Inspector Om Dutt
Vats & SI Samrat Khatiyan PS
Harsh Vihar

CORAM:

HON'BLE MS. JUSTICE PRATIBHA RANI

HON'BLE MS. JUSTICE REKHA PALLI

PRATIBHA RANI, J.

1. The appellant Seeshpal was prosecuted for commission of offence punishable under Section 363/376/302/201 IPC. The Trial Court vide its judgment dated 27th September, 2013 and order on sentence dated 5th October, 2013 passed in Sessions Case No.16/2011 (in case FIR No.175/2010 registered at PS Harsh Vihar) held the appellant guilty for the above charges and sentenced him as under:

- (i) U/S 363 IPC RI for 7 years and fine of ₹5,000/-. In default of payment of fine RI for 1 month.
- (ii) U/S 376 IPC Sentenced for Life Imprisonment and fine of ₹5,000/-. In default of payment of fine, RI for 1 month.
- (iii) U/S 302 IPC Sentenced for Life Imprisonment and fine of

₹5,000/-. In default of payment of fine, RI for 1 month

- (iv) U/S 201 IPC RI for 3 years and fine of ₹2,000/-. In default of payment of fine RI for 15 days.

All the sentences were ordered to run concurrently.

2. FIR No.175/2011 under Section 363 IPC was registered on the basis of statement made by PW-2 Smt. Pinki – mother of the child victim who visited PS Harsh Vihar on 25th November, 2010 and reported that her daughter 'D' (name withheld to conceal her identity), aged about 3 ½ years had been missing since 24th November, 2010 and that she was playing in the gali. At about 1:00 PM when PW-2 could not see her daughter in the gali, she tried to search for her at the nearby places and also with her relatives. On not being able to find her daughter 'D', she personally visited the police station to lodge the missing report. After giving description of her daughter and the clothes she was wearing, PW-2 also stated that some unknown person might have taken her away with some wrong intention. On her above complaint Ex.PW-2/A, the FIR Ex.PW-1/A was registered under Section 363 IPC and investigation was conducted by Inspector Dheeraj Singh (PW-9) who sent wireless transmission (WT) message and also informed DMPU.

3. On 25th November, 2010 when the Investigating Officer Insp.Dheeraj Singh (PW-9) along with women Constable Parmila (PW-15) reached the place from where the child got missing, Smt.Nemwati (PW-3) resident of B-1/929, Gali No.34, Harsh Vihar, Delhi informed that she had seen the child with Seeshpal who was

known to her being relation of her neighbour Satbir Singh (PW-19) and also of Mahipal (father of the deceased), resident of A-Block, Harsh Vihar. On 24th November, 2010 at about 12 noon appellant Seeshpal was seen taking the child 'D' by holding her finger towards Bhopura and she thought that he might be taking her for buying a toffee for her and she came to know about missing of the girl child only at that time.

4. On getting this clue, raid was conducted at the native place of Seeshpal from where police came to know from his son that Seeshpal had gone to Delhi to meet his brother Mahipal (father of child victim) and had not returned thereafter. On 29th November, 2010 as Inspector Dheeraj Singh proceeded on leave, the investigation was transferred to Inspector K.K.Upadhyay. The appellant Seeshpal who was apprehended on the basis of the secret information was interrogated and he made disclosure statement. The appellant disclosed that on 24th November, 2010 when he came to meet Mahipal and saw his daughter playing outside the house of Sh.Satbir Singh (PW-19), he took the child on the pretext of buying toffee. He brought the girl child to Bhopura Gaon and in the bushes of Gopal Dham under a tree of *Beri*, he committed wrong act. When the child said that she would tell her mother, due to fear, he pressed her neck, killed her and threw her body on the side of the tree of *Beri* on the *sarkandas*.

5. At the instance of the appellant the dead body of the child was recovered from inside Anand Green Nursery, Nagpal Farm Hosue which was accessed by him through a broken boundary wall. The proceedings relating to recovery of the dead body at the instance of the

appellant were also got videographed through PW-18 Sh.Chhatarpal Singh. Crime team was also summoned to examine the scene of the crime which was also photographed. The dead body was sent for post-mortem. The appellant was also sent for the medical examination. After completion of investigation, the appellant was sent to face trial.

6. The appellant was charged for committing the offences punishable under Sections 363/376/302/201 IPC to which he pleaded not guilty. The prosecution in order to bring home the guilt, examined 21 witnesses as well produced large number of documentary evidence including the videography of the recovery of the dead body at the behest of the appellant. The plea of the appellant in the statement under Section 313 Cr.P.C. is of denial simpliciter and of false implication. He has not examined any witness in his defence. On the basis of the oral and documentary evidence including last seen evidence, recovery of dead body at the instance of the accused and the medical and scientific evidence produced by the prosecution, learned Trial Court held that all these circumstances complete the chain which points towards the guilt of the appellant and accordingly convicted him and sentenced in the manner aforesaid.

7. Feeling aggrieved by his conviction and sentence awarded to him in this case, the appellant Seeshpal has preferred this appeal.

8. We have heard Mr.S.B.Dandapani, learned counsel for the appellant and Ms.Kusum Dhalla, learned APP for the State. Learned counsel for the appellant has also filed written submissions.

9. Mr.S.B.Dandapani, learned counsel for the appellant, on instructions, has submitted that the appellant does not dispute that the child 'D' aged about 3 ½ years was brutally raped and strangled. The contention raised on behalf of the appellant is that from the evidence led by the prosecution the guilt of the appellant has not been proved beyond reasonable doubt and the chain of circumstantial evidence is not complete so as to unerringly point out towards the guilt of the appellant. Therefore, he deserves to be given benefit of doubt. The learned counsel for the appellant has questioned the credit worthiness of last seen evidence (testimony of PW-3 Nemwati) contending that why she remained silent till the police reached the spot to investigate the matter. A lot of hue and cry must have been raised in the locality after the child got missing on 24th November, 2010 at about 1:00 PM but PW-3 Nemwati did not inform the family of the deceased that the child was taken by Seeshpal. Thus, silence of PW-3 Nemwati till 25th November, 2010 has to be to the advantage of the appellant so as to extend him the benefit of doubt.

10. Learned counsel for the appellant has also contended that the child 'D' got missing on 24th November, 2010 at about 1:00 PM. As per PW-3 Nemwati she had seen the child being taken away by the appellant and going towards Bhopura. The dead body of the child has been recovered on 29th November, 2010 and postmortem has been conducted on 30th November, 2010. As per postmortem report, the time since death is five days, meaning thereby that the murder might have been committed on 25th November, 2010. Thus, it cannot be said that the time gap between the date of missing of the child and her

death was so short so as to rule out the presumption that no other person could have committed the offence. It has also been contended that learned Trial Court made a factual error in calculating five days from the date of post mortem conducted on 30th November, 2016 thereby assuming that the date of kidnapping which is 24th November, 2010 and the date of death coincides. Further the place of occurrence is a farm house duly guarded by the chowkidars. PW-17, Sh.Heera Lal, Caretaker/Chowkidar of the farm house has been examined. When the farm house was duly guarded by the chowkidar, it was not possible for the appellant to take the child along with him without being noticed by the chowkidar and this also creates doubt in the prosecution case.

11. Learned counsel for the appellant has also contended that if Pinki was informed by PW-3 Nemwati prior to registration of FIR, that deceased was seen by her going with Seeshpal, then why she did not name him in the FIR, has remained unexplained by the prosecution. As per the complainant PW-2 Pinki, the appellant was a bad character hence possibility of his false implication due to that reason cannot be ruled out. PW-3 Nemwati stated that some persons were playing cards but none of them has been examined as witness to the 'last seen' evidence. No public witness was joined even at the time of arrest of the accused and the DNA report also did not conclusively prove that he was the offender. The appellant did not abscond and remained in Delhi which fact was confirmed by his son to the police when Delhi Police went to his native place in search of him.

12. Learned counsel for the appellant while contending that the evidence led by the prosecution to prove that the dead body of the child was recovered on the disclosure of the statement of the appellant, has to be disbelieved for the reason that no public witness was joined when the body was found. The appellant during his examination under Section 313 Cr.P.C. denied having made the disclosure statement or that the dead body was recovered at his instance. The recovery of the dead body was videographed but there is no material to ascertain that the video was played in the Court at the stage of evidence or was seen by the Court. The Court relied upon the videographer's evidence that the body was discovered at the instance of the accused/appellant but the learned ASJ did not record/specifically mention that he had seen the video and satisfied himself about the veracity of the police claim.

13. Learned counsel for the appellant has submitted that for not preparing the site plan of the place from where the deceased got missing and for non-filling the missing persons form, the IO was indicted by the learned Trial Court.

14. Learned counsel for the appellant also contended that body of the deceased was found at Anand Green Nursery, Nagpal Farm, Govind Dham, Bhopura Road, Loni, U.P. This place did not belong to or was in the possession of the accused. It is a private farm house guarded by chowkidars Heera Lal and Om Prakash. They would have noticed the accused taking the victim inside. Merely because the deceased was seen by PW-3 Nemwati in the company of the appellant is not sufficient to convict him in view of the decision of the Hon'ble

Supreme Court in Anjan Kumar Sarma and others v. State of Assam, AIR 2017 SC 2617.

15. In the decision Anjan Kumar Sarma and others v. State of Assam (Supra) relied upon by learned counsel for the appellant, the missing girl was a fully grown up girl who developed intimacy with one Jit Kakati and when she was with him for a considerable time, her brother was informed about her spending considerable time in bungalow at Sangsua Tea Estate. Her brother visited the bungalow and found her sitting with Jit Kakati and the brother questioned the conduct of Jit Kakati who expressed his intention to marry her and all the accused alongwith deceased left the bungalow on two motorcycles. Subsequently, when she could not be located, it was recorded that she had eloped with Jit Kakati and thereafter her whereabouts were not known. It was in the given facts of the case, it was held that the circumstances of last seen together alongwith the absence of satisfactory explanation were not sufficient for convicting the accused.

16. Here in the instant case, the victim is 3½ years old girl and the accused is her paternal uncle who was about 45 years old at the time of incident and the child was seen in his company by the neighbour (PW-3 Smt.Nemwati).

17. Ms.Kusum Dhalla, learned APP representing the State has, however, supported the judgment of the learned Trial Court, convicting the appellant for committing the offence punishable under Sections 363/376/302/201 IPC and the sentence awarded thereunder, on the plea that when the police party raided the native place of the appellant, he was not found present in the village. Rather it was

informed by his son that he had gone to Delhi to visit Mahipal (father of the deceased) and this fact is not denied even by the appellant. It has also been contended that the 'last seen' evidence in this case is credible as the statement of PW-3 has been corroborated by the fact that, on the disclosure of the appellant the dead body has been recovered from Anand Green Nursery, Nagpal Farm House deep inside which was away from public view. The postmortem report confirmed that the child was subjected to rape before being strangled. There were 15 ante-mortem injuries on her body, vagina and anal. The hymen was torn completely with only few tags present at 12, 3, 6, 11 o'clock position extending beyond the margin.

18. We have gone through the material placed on record with the assistance of learned counsel for the parties. The prosecution has examined 21 witnesses which include the complainant, PW-3 Nemwati of 'last seen' evidence as well to prove the recovery of dead body on his disclosure, statement of videographer, police officials forming part of the investigating team at different stages, crime team officials as well the medical and scientific evidence i.e. post-mortem report and FSL result.

19. PW-2 Smt. Pinki is mother of the child victim who on 24th November, 2010 along with her daughter 'D' (deceased) visited the house of PW-19 Satbir Singh. PW-3 Smt. Nemwati, who on 25th November, 2010 on seeing the police party near the place from where the child got missing, informed that she had seen the deceased child being taken by Seeshpal, who was also known to her as relative of PW-19 Satbir and she thought that he was taking her to buy a toffee

for her. PW-19 Satbir Singh proved the visit of the complainant PW-2 Pinki along with her daughter 'D' to his house on that day and also that 'D' went missing when she was playing outside his house.

20. PW-9 Inspector Dheeraj Singh is the first IO who was posted at PS Harsh Vihar on 25th November, 2010 and was directed by the SHO to conduct the investigation in case FIR 175/2010. He along with Constable Promila, complainant PW-2 Pinki visited the place from where the child got missing and PW-3 Nemwati made statement before him about the deceased being last seen with Seeshpal, the appellant.

21. PW-13 Inspector K.K.Upadhyay took over the investigation of this case on 29th November, 2010. He along with his team apprehended the appellant, on the basis of the secret information, on 29th November, 2010 and after arresting him vide arrest memo Ex.PW-6/A, interrogated him and recorded his disclosure statement as Ex.PW-6/C. Pursuant to the disclosure statement made by Seeshpal he led the police party to Anand Green Nursery, Bhopura, Ghaziabad and pointed out Anand Green Nursery, Nagpal Farm House, Gopal Dham and through a broken portion of the boundary wall, he led the police party inside the nursery and pointed out the place where he had committed rape and thrown the dead body.

22. When the dead body was recovered, the pajami of the child was down towards knees and there were multiple injuries on her face and other parts of the body. The proceedings were videographed. Heera Lal (PW-17) the chowkidar/caretaker of the said farm also reached on seeing the police party. Crime team was summoned and site was also

got photographed from PW-5 Ct. Shyam Lal and SOC Report (scene of crime report) Ex.PW-4/A was delivered to him. After conducting necessary proceedings including identification of the dead body by the uncle of the deceased PW-16 Ravinder, body was sent for post-mortem.

23. PW-18 Chhatarpal Singh is the videographer who stated that on 29th November, 2010 he was called by the police for videography and he along with the police and the accused Seeshpal accompanied the police in Gypsy. The accused Seeshpal led the police towards Anand Green Nursery, Nagpal Farm House and pointed *beri ka ped* (tree) and the place where the dead body of female child, aged about 3 years was lying. At that time the pajami of the deceased was half down. He prepared the CD of videography on 7th December, 2010 and handed over the same to the police (Ex.P-7) and original DVC (Ex.P-8).

24. PW-17 Heera Lal, chowkidar/caretaker of the farm had corroborated the above facts.

25. PW-8, Dr. Meghali Kelkar, Senior Demonstrator, UCMS & GTB Hospital has conducted the postmortem on the dead body of child victim. She has proved the postmortem report as Ex.PW8/A and five inquest papers which were initialed and numbered by her as Ex.PW8/B1 to B5.

26. No doubt that in a case based on circumstantial evidence, to bring home guilt beyond reasonable doubt, the prosecution has to establish that the circumstances proved, lead to one and the only conclusion towards the guilt of the accused. The circumstances from which an inference of guilt is sought to be drawn are to be cogently

and firmly established and must unerringly point towards the guilt of the accused. In other words the circumstances so proved must form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else.

27. In the case Aftab Ahmad Ansari vs. State of Uttaranchal (2010) 2 SCC 583, it was held as under:-

'In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts, by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be.

There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.'

28. In the decision reported as Md.Mannan @ Abdul Mannan vs. State of Bihar (2011) 5 SCC 317, the appellant was last seen going with the deceased on a bicycle. The dead body of the child was recovered on the basis of the disclosure statement made by him. The Apex Court after considering the circumstantial evidence of the grandfather of the deceased who had last seen the deceased going on the bicycle of the appellant and thereafter she never returned, on the basis of another witness who had seen the appellant getting the child seated on his bicycle on the chowk and another witness who had seen the appellant along with the deceased on the bicycle and the disclosure statement made by the appellant leading to the recovery of the dead body, held as under:

‘15. From the evidence of the aforesaid witness it is evident that the appellant was working as a mason in the house of the grandfather of the deceased, PW.8 Debi Kant Jha and the deceased was sent by him to the betel shop to get betel.

Evidence of the prosecution witnesses further prove beyond all reasonable doubt that appellant proceeded towards the betel shop few minutes after the deceased left and it was the appellant who was last seen with the deceased going together on a bicycle. There is overwhelming evidence which proves beyond any shadow of doubt that the statement given by the appellant led to the recovery of the dead body of Kalyani from the field. In our opinion, the circumstances so proved unerringly point towards the guilt of the appellant and the chain is so complete that there is no escape from the conclusion that the crime was committed by the appellant and none else. Accordingly we uphold the conviction of the appellant.’

29. In the light of the above principles, the circumstantial evidence available on record has to be examined.

30. It is a case where there is no eye-witness to the occurrence and the prosecution sought to bring home the charge on the basis of 'last seen' and circumstantial evidence. These are:

(i) The appellant Seeshpal is related as brother to Mahipal, father of the deceased, and both of them are from the same village.

(ii) The appellant Seeshpal came to Delhi from his village to meet Mahipal.

(iii) PW-19 Satbir Singh is maternal uncle of Mahipal who is father of the deceased. PW-2 Pinki along with her daughter 'D' visited the house of Satbir Singh on 24th November, 2010 and the child 'D' was playing in the gali.

(iv) PW-3 Nemwati, immediate neighbour of Satbir knew not only Satbir but also his relatives including the complainant PW-2 Pinki, her daughter 'D', her husband Mahipal as well as appellant Seeshpal as relative of Satbir Singh.

(v) PW-3 Nemwati had seen the appellant Seeshpal going towards Bhopura with 'D' holding her finger. She thought that he was taking her to buy some toffee etc. for her.

(vi) PW-2 Pinki when realized that her daughter was missing, tried to search for her everywhere and on not being able to find, reported the matter to the police next day.

(vii) On seeing the police party at the spot on 25th November, 2010, the first clue about the missing child came from PW-3 Nemwati who

informed that the child was seen in the company of the appellant who was taking her towards Bhopura.

(viii) Raid by the police party at the village of the appellant revealed that he was in Delhi to see his brother Mahipal, father of the deceased.

(ix) The appellant was arrested on 29th November, 2010 and on the basis of the disclosure statement made by him, dead body of the child was recovered from Anand Green Nursery, Nagpal Farm House. Recovery of the dead body at the instance of the appellant/accused Seeshpal was duly videographed by PW-18 Chhatarpal Singh.

(x) In the video film, which was played in the Court on 3rd November, 2017 in presence of appellant and his counsel, the appellant was seen getting down from the police Gypsy and thereafter leading the police party towards Anand Green Nursery, Gopal Dham. He could also be seen leading the police party to a boundary wall made of bricks but broken at many places and at one place, it was so low (at ground level) that the appellant just crossed the boundary wall to lead the police party to the inner portion of the Nursery which was dense green area with bushes and trees all around like a jungle. It could be seen that the appellant was taking the three police officials deep inside the green area and pointing out the place under a tree where he did '*galat kaam*' with the girl child and also the place where he threw the girl child. One police officer was seen asking as to whether he had thrown the girl child alive or dead to which he was answering that since the girl was saying that she would inform her mother, he killed her and threw her. Thereafter, the appellant could be seen moving ahead and at some distance in the dense green area,

upper portion of the body of the girl child could be seen lying there with lots of insects/flyes on her face. Her body was partially hidden under leaves and when the police party and the appellant reached closer to the body of the girl child, her lower portion was also visible which was in the same condition as could be seen in photographs Ex.PW5/1 to 20. The body of the girl child was uncovered from her private part and blood thereon was also visible as her *pyajami* was lowered towards her knees.

31. The appellant had taken the child to the nursery/farm house by accessing through a broken boundary wall. Thus, he could not have been seen by the guards of the farm house namely Heera Lal and Om Prakash.

32. PW-8 Dr.Meghali Kelkar has stated that on 30th November, 2010 she conducted postmortem on the dead body of child victim 'D' aged about 3½ years having height 99 cms and weight 15 Kg and found as follows:

'On general observation it was a dead body of a girl wearing grey sweater, pink jacket top and pink pyjama and wrapped in a plastic body bag. Mud stains, weeds, grass present all over the clothes and body. Pink pyjama was pulled down upto the mid thigh. Bluish ink like stains present on the pyjama and palms. Clothes were intact, eyes were closed, cornea were opaque, conjunctivae were congested, petechial haemorrhages were present. Fecal soiling was present. Rigormortis was passed off. Greenish black discolouration was present all over the body. Face was bloated and abdomen distended due to putrefaction. Loosening of scalp hairs and teeth were present. Peeling of skin present. Mouth partially open. Tongue protruding out of mouth. Both lips were

edematous, congested and abraded. Erythema of inner thighs were present. Soddening of the palms were present.

External antemortem injuries:

Injury No.1 Multiple scrap abrasions in and area of 14 x 4 cm present on lower face, chin and sub mental region.

Injury No.2 Reddish blue contusion present on right side neck.

Injury No.3 Reddish blue contusion four in numbers lying obliquely in a line in an area of 7x2 cm on right side face.

Injury No.4 Reddish blue contusion oval in shape present on right side neck.

Injury No.5 Reddish abrasion present on right side neck.

Injury No.6 Reddish blue contusion oval in shape present on left side upper neck.

Injury No.7 Reddish abrasion present on left side abdomen.

Injury No.8 Reddish scratch abrasions present on right wrist.

Injury No.9 Reddish abrasion present on right wrist lateral aspect.

Injury No.10 Multiple scratch abrasions in an area of 8.6 x 5 cm present on nose and around mouth.

Injury No.11 Multiple lacerations present on inner surface of both lips.

Injury No.12 Reddish Abrasion present on vulva

Injury No.13 Reddish Abrasion present on right grain

Injury No.14 Reddish Abrasion present on right grain

Injury No.15 Reddish Abrasion present on left grain.

Internal examination:

Scalp, skull - NAD (No abnormality detected)

Brain was liquified

Neck - Extravasation of blood was present in the soft tissues and muscles on both side of neck.

Osteocartilaginous structure were NAD.

Ribcage - NAD

Lungs, Heart, Liver, Spleen, Kidneys were soft and flabby.

Stomach contain 100 ml yellowish fluid. Walls NAD.

Intestines contains gases of putrefaction. Walls soften.

Genetalia, Labia, Majora edematous, widely gaped with exposing underlying congested, reddish abraded, reddish blue contused, labia minora, hymenal tags and vaginal mucosa. Swabs were taken from various sites and smears slides were prepared. Hymen torn completely with only few tags present at 12, 3, 6, 9, 11 o'clock position extending beyond the margin. Complete circumferential tears of anal mucosa just internal to orifice which was dilated 2.5 x 2.5 cm with flattening of the anal rugae and exposing underlying anal mucosa.

OPINION: Time since death about five days.

Cause of death: Asphyxia as a result of antemortem manual strangulation. There were signs of recent vaginal and anal (word anal not mentioned in postmortem report) penetration, however, swabs and smears were kept for analysis of presence of semen and semen grouping.

Articles preserved:

a. Sealed pullanda containing No.1 sexual assault examination kit with envelopes containing debris, body fluid, nail clipping/scrapping, in between fingers, plucked scalp hairs, breast swab, vaginal secretion, cervical mucus, culture specimen, vaginal washing, rectal swab, oral swab, inner clothing (pyjama), two blood vials. 2. Envelope containing outer clothing were sealed and handed over to the police along with sample seal to the police.'

33. In the instant case the DNA report is not negative and no opinion could be given due to non-availability of DNA profile of exhibit 'lj2' & 'ln2'. In the decision reported as Ramnaresh and Ors. vs. State of Chhattisgarh (2012) 4 SCC 257, the report of FSL was inconclusive but not negative and it was held that it could not provide any material benefit to the accused.

34. No doubt there is a delay of one day in lodging of FIR but it is proved from the testimony of the PW-2 Pinki, mother of the child that she reported the matter to the police when her efforts to search her daughter at her own level failed.

35. In **Balram Singh & Anr. v. State of Punjab, 2003 (11) SCC 286**, it was observed by the Supreme Court that if the ocular evidence adduced by the prosecution is worthy of acceptance the element of delay in registering the FIR/complaint or sending the same to the jurisdictional Magistrate by itself would not in any manner weaken the prosecution case.

36. The contention of the learned counsel for the appellant that appellant was a bad character and due to this reason he has been

falsely implicated in this case is liable to be rejected as in that event he had no reason to visit the house of the complainant at Delhi nor he would have been welcomed there. Further in case the complainant had any intention to implicate the appellant, she would have named him in the FIR and would not have stated that some unknown person might have kidnapped her daughter.

37. In the instant case, inability of the prosecution to prove the motive or non-existence of the motive to commit the murder of the girl of tender age i.e. 3 ½ years is hardly of any significance. The intention of the accused to kill the child victim when she stated that she will inform her mother could be seen in the videography. Thus, the intention to hide his crime was apparently the motive for committing the murder of child victim as he was well known to the deceased and her family.

38. The postmortem in this case was conducted on 30th November, 2010 at about 11:00 AM and approximate time of death has been given as 'about five days'. Merely because learned Trial Court had noted that the dead body was recovered on 29th November, 2010 and the child was found missing from 24th November, 2010, counted five days therefrom, though the postmortem was conducted on 30th November, 2010, that itself is not sufficient to extend any kind of benefit to the appellant. It is by way of approximation that the time since death is opined to be about five days. The use of word 'about' does not indicate the exact date and time of the death.

39. The child was seen in his company on 24th November, 2010 and thereafter her dead body was recovered on 29th November, 2010.

Prior to that she was brutally beaten and sexually abused which is proved from the postmortem report of the child and the photographs of the child Ex.PW5/1 to 20. How long the appellant kept the child alive to satisfy his lust is a fact within his personal knowledge. The distance between the place from where the child got missing and the nursery/farm house in Ghaziabad is not too far so as to require long travelling. The appellant during hearing of the appeal informed that it was about fifteen minutes walking distance. From the statement of IO PW-13 Insp. K.K.Upadhyay, it is proved that the appellant had accessed entry into the farm house/nursery through a portion where the boundary wall was broken. Hence, the Chowkidar PW-17 Heera Lal, who had witnessed the recovery of the dead body at the instance of appellant, had no occasion to notice the appellant entering the nursery with the child who after sexually abusing her and causing several injuries, had strangled her and hidden her body on *sarkandas* partially covered with green leaves. But for the disclosure statement made by the appellant which led to the recovery of the body of 'D' at his instance from deep inside the jungle and hidden by branches of tree, the guard would not have come to know, so there was no occasion for the watchman to notice the entry of the appellant with a child and his exit alone after commission of the offence.

40. It is a well established legal principle that in cases based on circumstantial evidence, where a false explanation is offered by the accused during his examination under Section 313 Cr. PC. in respect of the facts duly established by the prosecution, the said false denial could supply a missing link in the chain of circumstances appearing

against him. The circumstances proved have been fully put to the accused under Section 313 Cr.P.C. wherein he had denied the entire case of the prosecution and preferred to enter his plea of simpliciter denial. This in turn means that the circumstances so proved beyond reasonable doubt are inconsistent with the accused's innocence and also show that he alone was the author of the crime.

41. The factum of taking away of child 'D' by the Appellant stood proved from the statement of PW-3 Nemwati who saw the appellant with the child.

42. PW-8 Dr.Meghali Kelkar who conducted the post-mortem of the deceased opined that deceased child was raped and murdered and there was presence of semen and 15 injuries on her body which were anti-mortem in nature. The Appellant has failed to explain what happened to the child thereafter till he got recovered the dead body of the child from Gopal Dham, Bhopura. PW-11 Dr.Devender Kumar, who examined the appellant had opined on the MLC Ex.PW-11/A that there was nothing to suggest that the appellant was unable to perform sexual intercourse. Thus, the accused who was last seen with the deceased on 24th November, 2010 had failed to explain as to where the child remained after being taken by him till he got her dead body recovered from the jungle in Anand Green Nursery, Nagpal Farm House, Gopal Dham, Bhopura. There is nothing to indicate that anybody else, other than the accused could commit the rape and murder of the deceased. The chain of circumstances of the case lead to the only hypothesis that the accused and the accused alone was the author of the crime. His simple denial of the entire case in itself is

also another circumstance to confirm the hypothesis that it was the Appellant only who authored this crime i.e. murder of child 'D'. Therefore the learned Trial Court rightly convicted him for committing offences punishable under Section 363/376/302/201 IPC. Thus, the conviction of the appellant for committing the offences punishable under Sections 363/376/302/201 IPC is upheld.

Life imprisonment till remainder of the natural life

43. In the instant case, the imprisonment of life was awarded to the appellant for committing offences punishable under Section 376/302 IPC.

44. On the 3rd November, 2017 while viewing the CD played in the Court, when the appellant was seen leading the police party for recovery of the dead body, the appellant was given notice to submit why the life imprisonment awarded to him for committing the offences punishable under Sections 376 IPC and 302 IPC should not mean the rest of his life. Ten days' time was given to him to file his response thereon.

45. Learned counsel for the appellant Mr. S.B.Dandapani has submitted his response contending that as per Section 386 (b)(iii) CrPC, in an appeal from a conviction, the appellate Court may with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the same. It has been further contended that if a substantial punishment for the offence has been given by the Trial Court, after taking due regard to all the relevant circumstances, there should be no interference by an appellate Court to the detriment of an accused, especially when there is no

appeal by the State for enhancement on ground of inadequacy of the sentence. It has also been contended that changing the life sentence to life sentence till the remainder of the natural life of the convict would amount to enhancement and therefore hit by the prohibition of S.386(b)(iii) of the Code of Criminal Procedure.

46. It is a case where a 3 ½ year old child accompanied the appellant, who was her uncle and after taking her on the pretext of giving her toffee, the appellant not only sexually abused her but also gave her beatings and strangled her to hide his crime. He was seen and heard in the Video recording that the child said that she would tell her mother so he killed her. The motive of the crime apparently is that after rape was committed, in order to hide his crime he committed murder of the girl child of tender age who was daughter of his brother.

47. After the amendment to Section 376 IPC, the offences punishable under Section 376(2) IPC have been made punishable with rigorous imprisonment for a term which shall not be less than ten years but which may extend to **imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life** and shall also be liable to fine.

48. Section 376(2) prescribes imprisonment for life which shall mean imprisonment for the remainder of such person's natural life and shall also be liable to fine.

49. In the instant case, the offence of rape committed by the appellant on 'D' was prior to the amendment to Section 376 IPC but even pre-amendment, the offence committed was under Section 376(2)(f) IPC and punishable with rigorous imprisonment for a term

which shall not be less than ten years but which may be for life and also liable to fine.

50. Offence punishable under Section 302 IPC is punishable with life imprisonment or death penalty. For the offences committed by the appellant/convict, the maximum extent of punishment of either life imprisonment or death is provided for under Section 302 IPC.

51. In the case Md.Mannan @ Abdul Mannan vs. State of Bihar (Supra), in somewhat similar circumstances, the Supreme Court, while maintaining the death penalty awarded by the Trial Court and confirmed by the High Court, held as under:-

'18. When we test the present case bearing in mind what has been observed, we are of the opinion that the case in hand falls in the category of the rarest of the rare cases. Appellant is a matured man aged about 43 years. He held a position of trust and misused the same in calculated and preplanned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 feet of height and such a child was incapable of arousing lust in normal situation. Appellant had won the trust of the child and she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and innocent child was made prey of the appellant's lust. The postmortem report shows various injuries on the face, nails and body of the child.

These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling.

The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no

doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate, is to inflict the death sentence which is natural and logical. We are of the opinion that appellant is a menace to the society and shall continue to be so and he cannot be reformed. We have no manner of doubt that the case in hand falls in the category of the rarest of the rare cases and the trial court had correctly inflicted the death sentence which had rightly been confirmed by the High Court.

19. In the result, we do not find any merit in this appeal and same is dismissed accordingly.'

52. Here in this case as per postmortem report Ex.PW-8/A the child victim who was niece of the appellant was just 3 ½ years old having height of 99 cms., hence incapable of arousing lust. She had been brutally beaten, murdered after a violent sexual assault, as evident from her post-mortem report. Even her cries could not be heard by anyone in that lonely thick forest.

53. The learned Trial Court has awarded life imprisonment to the appellant for committing the offences punishable under Section 376 IPC and 302 IPC.

54. In the case Duryodhan Rout vs. State of Orissa AIR 2014 SC 3345 various provisions as to what 'life imprisonment' means have been dealt with at length. The question raised before the Supreme Court was 'whether the order of the Trial Court and upheld by the High Court for the offence punishable under Section 376(f)/302/201 IPC shall run consecutively'. The question was answered as under:-

'16. Section 45 of the Indian Penal Code defines life as "The word "life" denotes the life of a human being, unless the contrary appears from the context".

The word "imprisonment" has not been defined either in the Code of Criminal Procedure or in the Indian Penal Code.

As per the General Clauses Act, 1897 Under Section 3(27) - "imprisonment" shall mean imprisonment of either description as defined in the Indian Penal Code. The definition of imprisonment under the General Clauses Act would, therefore, in case of life imprisonment mean imprisonment for life/imprisonment for the remainder of the convict's life.

We are not in agreement with submission made on behalf of the State that imprisonment for life has not been included in the definition of term 'imprisonment' Under Section 3(27) of the General Clauses Act, 1897.

17. Imprisonment for life is not confined to 14 years of imprisonment. A reading of Section 55 Indian Penal Code and Section 433 and 433A Code of Criminal Procedure would indicate that only the appropriate Government can commute the sentence for imprisonment of life for a term not exceeding fourteen years or exceeds the release for such person unless he has served at least fourteen years of imprisonment.

Section 57 of the Indian Penal Code merely relates to calculating fractions of terms of punishment by providing a numerical value of 20 years to life imprisonment.

Section 53 of the Indian Penal Code lists the punishments to which offenders are liable under the Code which reads as follows:

First-Death;

Secondly-Imprisonment for life;

Fourthly-Imprisonment, which is of two Descriptions, namely:

- (1) Rigorous, that is, with hard labour;*
- (2) Simple*
- Fifthly-Forfeiture of property;*
- Sixthly-Fine.*

Therefore, a person sentenced to life imprisonment is bound to serve the remainder of his life in prison unless the sentence is commuted by the appropriate Government in terms of the Section 55, 433 and 433A of the Code of Criminal Procedure.

18. In Gopal Vinayak Godse v. The State of Maharashtra and Ors. MANU/SC/0156/1961 : AIR 1961 SC 600, the Constitution Bench of this Court while dealing with the question as to whether there is any provision of law whereunder a sentence for life imprisonment, without any formal remission by the appropriate Government can be automatically treated as one for a definite period. In the said case this Court held:

5. If so, the next question is whether there is any provision of law where under a sentence for life imprisonment, without any formal remission by appropriate Government, can be automatically treated as one for a definite period. No such provision is found in the Indian Penal Code, Code of Criminal Procedure or the Prisons Act. Though the Government of India stated before the Judicial Committee in the case cited supra that, having regard to Section 57 of the Indian Penal Code, 20 years' imprisonment was equivalent to a sentence of transportation for life, the Judicial Committee did not express its final opinion on that question. The Judicial Committee observed in that case thus at p. 10:

Assuming that the sentence is to be regarded as one of twenty years, and subject to remission for good conduct, he had not earned remission sufficient to entitle him to discharge at the time of his application, and it was therefore rightly dismissed, but in saying this, Their

Lordships are not to be taken as meaning that a life sentence must in all cases be treated as one of not more than twenty years, or that the convict is necessarily entitled to remission.

Section 57 of the Indian Penal Code has no real bearing on the question raised before us. For calculating fractions of terms of punishment the section provides that transportation for life shall be regarded as equivalent to imprisonment for twenty years. It does not say that transportation for life shall be deemed to be transportation for twenty years for all purposes; nor does the amended section which substitutes the words "imprisonment for life" for "transportation for life" enable the drawing of any such all embracing fiction. A sentence of transportation for life or imprisonment for life must prima facie be treated as transportation or imprisonment for the whole of the remaining period of the convicted person's natural life.'

55. The Constitution Bench in the case Muthuramalingam and Ors. Vs. State rep. by Inspector of Police, MANU/SC/0783/2016 dealt with the question "as to whether the court can direct life sentence and terms sentences to run concurrently". The question was answered thus:-

"32. ...The Trial Court's direction affirmed by the High Court is that the said term sentences shall run consecutively. It was contended on behalf of the appellants that even this part of the direction is not legally sound for once the prisoner is sentenced to undergo imprisonment for life, the term sentence awarded to him must run concurrently. We do not, however, think so. The power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in Section 31 of the Cr.P.C. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with Section 31. The

converse however may not be true for if the Court directs the life sentence to start first it would necessarily imply that the term sentence would run concurrently. That is because once the prisoner spends his life in jail, there is no question of his undergoing any further sentence."

56. In view of the above, we clarify that the sentence of imprisonment for life awarded to the appellant for the offence under Section 376(2) IPC shall mean and be enforced as imprisonment for the remainder of his natural life.

57. The appeal is dismissed.

58. LCR be sent back alongwith copy of this order.

59. Appellant be informed through the concerned Jail Superintendent.

60. Copy of the order be also given dasti to learned counsel for the appellant.

PRATIHBA RANI
(JUDGE)

REKHA PALLI
(JUDGE)

November 18, 2017
'hkaur/st'