

\$~R-5

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

+ **CRL.A. 110/2015**

MOHD. MANGAN INSAN
@ MANGAN ALI @ ALI
@ MANGAT INSAN

..... Appellant

Through: Ms. Aishwarya Rao, Advocate

versus

THE STATE (NCT OF DELHI)

..... Respondent

Through: Mr. K.S. Ahuja, APP for State

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VINOD GOEL

JUDGMENT

% **03.07.2018**

Dr. S. Muralidhar, J.:

1. This appeal is directed against the impugned judgment dated 29th March 2014 passed by the learned Additional Sessions Judge ('ASJ'), SE-01 in SC No.36/2013 arising out of FIR No.225/2011 registered at PS Amar Colony convicting the Appellant for the offence punishable under Section 363/376/377/302 Indian Penal Code ('IPC') and the consequential order on sentence dated 7th April 2014 whereby:

- (i) For the offence punishable under Section 302 IPC, he was sentenced to undergo rigorous imprisonment for life and payment of fine of Rs.10,000/- and in default of payment of fine, to undergo further simple imprisonment for 30 days;
- (ii) For the offence punishable under Section 376 IPC, he was sentenced

to undergo rigorous imprisonment for seven years and payment of fine of Rs.5,000/- and in default of payment of fine, to undergo further simple imprisonment for 15 days;

- (iii) For the offence punishable under Section 377 IPC, he was sentenced to undergo rigorous imprisonment for five years and payment of fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for 15 days; and
- (iv) For the offence punishable under Section 363 IPC, he was sentenced to undergo rigorous imprisonment for five years and payment of fine of Rs.5,000/- and in default of payment of fine, to undergo simple imprisonment for 15 days.

All sentences were directed to run concurrently.

Charge

2. The charge against the Appellant was that at around 9:00 pm on 10th June 2011, at J.J. Indra Camp, S.N. Puri, he kidnapped the deceased minor, the three year old child of Shintu @ Shekhar (PW-6), from the lawful guardianship of her parents. He was also charged with having raped the minor girl in the bushes near the railway line near the wall of New Friends Colony. He was further charged with having committed carnal intercourse against the order of nature with the minor girl. Lastly, he was charged with murdering the minor girl at the aforesaid place and time.

Version of the father of child

3. The father of the child (PW-6) has stated that at around 7:30 pm, his son, Vinay (PW-8), accompanied by his daughter, the deceased minor, went to

the Mother Dairy booth at C-Market, S.N. Puri to buy milk. While PW-8 returned after 20 minutes, his daughter did not. Thereafter, PW-6 along with his wife, his brother Vijay (PW-1) and others searched for her but she could not be found even after an hour and a half. He thereafter lodged a complaint with the PP Sri Niwas Puri (Ex.PW-6/A) and continued searching for her.

4. According to PW-6, on the following morning, i.e. on 11th June 2011, at around 6 to 6.30 am, he was informed by someone that a child was found lying near the railway tracks. He then went there and found his daughter lying dead. She was naked with injury marks over her body. He then brought her back to his *jhuggi* and the police also reached there. Sub-Inspector ('SI') K.P. Shah (PW-24) joined the investigation of the case along with Inspector Govind Sharma (PW-25), who was the Station House Officer ('SHO') of PS Amar Colony. When they reached the house of PW-6, they found SI Subhash Chand (PW-20) already present there.

Investigation

5. Initially, PW-20 had registered FIR No.225/2011 at PS Amar Colony under Section 363 IPC on receipt of the complaint of PW-6 on 10th June 2011. At 7:00 am on the next morning, when PW-6 informed the police about the dead body of the child having been located, PW-20 reached there and then informed PW-25. Upon noticing several injury marks on the body of the deceased, the SHO altered the FIR to be one under Section 302 IPC and took up the investigation.

6. The crime team was called to the spot. It appears that the dead body of the

child was first taken to the Department of Medicine and Emergency at AIIMS at around 9:00 am on 11th June 2011 where it was first examined by Dr. Rajesh Routray (PW-22). He, however, did not examine the body in detail but referred the body for post-mortem examination which was performed ultimately by Dr. Raghvendra Kumar (PW-16).

Post mortem

7. The post-mortem examination was conducted at 2:30 pm on 11th June 2011 and as many as thirty-one injuries were noticed all over the body. These were in the form of contusions, abrasions, scratches, etc. Among the grievous injuries were the following:

“-----

16. Blood is present inside anus. Anus is dilated. Anal wall is seen contused. Two tears are present in anal sphincter, are at 6 o'clock position another at 7 o'clock position.

25. On dissection of neck extravasation of blood is seen. Muscles are seen contused. Neck lymph nodes and salivary glands are congested. Thyrohyoid complex is compressed and haematoma is present.

-----”

8. It was further noticed as under:

“ On dissection, of skull, defused subscalp haematoma is present over frontal region. On dissection of brain and meninges, diffuse subdural haematoma of about 50 cc in size is present over almost all the regions of brain also multiple petechiae are seen in white matter.

Blood was present in orbital and aural cavities. Tip of tongue was contused. Blood was present in trachea and bronchi. Both lungs were congested, upper lobe of right lung

was contused. Multiple abrasions and contusions were present over abdominal wall.

Large intestine was contused. Liver was congested. Spleen was contused. Right kidney was contused and perinephric haematoma was present. Both kidneys were congested. Muscles of Pelvic wall were seen contused. Urinary bladder and urethra were seen contused.

Genital organs: Labia majora, labia minora, vaginal wall, cervical wall were seen contused. Posterior fornix was torn, tear was seen in vaginal wall in posteriorly. Blood was present in vagina cervix and uterus. Uterus was contused. One foreign object (wooden piece) was recovered inside uterus and vagina. Hymen was also torn.

Below waist, no clothes were present and body was in nude condition. Blood stains were present over face, ear, nose genital region, scalp hairs and buttocks.”

9. The opinion expressed by PW-16 was that there was:

“Ante mortem strangulation combined with smothering and head injury. These were sufficient to cause death individually and combined effect in ordinary course of nature. There are injuries present over body and genital which were suggestive of natural sexual assault, unnatural sexual assault as well as “torture”. All injuries are antemortem in nature. The time since death in this case was about 16:00 hours.”

10. PW-16 collected the samples of the following and handed them over to the IO:

“Scalp hair, vaginal swab, anal swabs, blood in gauze, uterus in normal saline, foreign object (wooden piece) found inside vagina, uterus and clothes and articles as mentioned in the post mortem report.”

Arrest

11. On 12th June 2011, PW-25 recorded the statement of PW-8 and Master Vishal (PW-23) both of whom were about 5 years old at the time. They informed him that they had seen the Appellant take away the deceased at around 9:00 pm on 9th June 2011. According to PW-25, he then made efforts to locate the Appellant at his address but he was not there. The information given by the two children was that the Appellant was plying a rickshaw in the same area.

12. According to PW-25, on the intervening night of 14th-15th June 2011, on the basis of secret information, the Appellant was apprehended from the railway tracks near S.N. Puri. The Appellant is stated to have made a disclosure statement (Ex.PW-25/C).

13. The MLC of the Appellant (Ex.PW-13/A) was prepared by Dr. Hari Prasad (PW-13) and records that an abrasion of dark brown colour measuring 2 x 0.2 cm (parallel, two in number) was present over the middle of the chest in anterior aspect. It also mentions an abrasion of dark brown colour over the dorsal aspect of the forearm (left) near the elbow joint measuring 4 x 3 cm. PW-13 collected the blood sample of the Appellant in gauze, a penile swab with control, and the Appellant's underwear and pants and handed them over to the IO. Since the Appellant, in his disclosure statement, has purportedly named one more suspect, that person was also got medically examined by the IO. According to PW-25, during the investigation, nothing incriminating emerged against the said suspect.

14. It must be noticed at this stage that the reports of the Forensic Sciences Laboratory ('FSL') dated 21st September 2011 (Ex.PW-19/A, Ex.PW-19/B) showed that while human semen was detected on the underwear of the Appellant (Ex.17) it could not be detected on any of the other exhibits which included the underwear of the child. The blood detected on some of the exhibits, namely the blood stained earth, underwear and hair, were found to be of human origin but their grouping could not be detected. The blood found on the T shirt worn by the child was of blood group A which was her blood group. The blood sample collected from the Appellant was found to contain blood of group B. The semen stain on his underwear was also found to be of B group.

Trial

15. At the end of the investigation, the charge sheet was filed and by the order dated 17th November 2011, the trial Court framed charges against the Appellant in the manner indicated hereinabove.

16. Two of the key witnesses for the prosecution, i.e. PW-23 and PW-8, were children. PW-8 is the brother of the deceased minor and PW-23 is the witness who is said to have last seen the deceased minor in the company of the Appellant. Their depositions will be discussed in further detail hereafter.

17. When incriminating circumstances were put to the Appellant under Section 313 Code of Criminal Procedure ('Cr PC'), he denied them. He claimed to have been falsely implicated since he had a quarrel at a ration shop one month prior to the incident with PW-1 (Vijay), the brother of PW-6 who is the father of the deceased. However, no defence evidence was

led.

Impugned judgment of the trial Court

18. In the impugned judgment, the trial Court noted the argument made on behalf of the counsel for the Appellant that the FSL reports had not connected the Appellant with the offence. The trial Court observed that the FSL results may have been inconclusive due to many reasons including putrefaction of the samples, improper drawing of the samples, delay in sending the samples to the FSL, etc. It was held, therefore, that this cannot be a sole ground to acquit the Appellant when all other circumstances pointed to his guilt.

19. Further, the fact that neither the weapon of offence nor the rickshaw of the Appellant were recovered was also held not to weaken the case of the prosecution since his guilt stood proved by the statements of the PWs. The trial Court concluded that the prosecution had been able to prove the following circumstances:

- “1) The post mortem report of the deceased Ex.PW-16/A proves that the victim died of natural sexual assault, unnatural sexual assault as well of torture and 31 injuries are found on the person of the victim and all the injuries are opined to be ante mortem in nature;
- 2) The unshattered testimony of PW-23 prove that the deceased was lastly seen in the company of the accused;
- 3) The testimony of PW-2, PW-3 and PW-6 prove the presence of the accused near or around the place of incident around the time when the deceased had died;
- 4) There was no long time gap between the time when the deceased was seen in the company of accused and when she died and as such, it rules out any third party intervention;

- 5) The motive to commit murder was the lust of the accused and the quarrel with the uncle of the deceased for money which persuaded the accused to firstly commit rape as well as unnatural offence with the deceased; and
- 6) The tender age of 3 years of the victim child who because of her tender age is not capable to put much resistance and is a helpless victim.”

20. According to the trial Court, the circumstances proved formed a complete chain which pointed unerringly to the guilt of the Appellant. By a separate order on sentence, the Appellant was sentenced for each of the offences with which he was charged in the manner indicated hereinbefore.

21. This Court has heard the submissions of Ms. Aishwarya Rao, learned counsel for the Appellant, and Mr. K.S. Ahuja, the learned APP for the State.

Law relating to circumstantial evidence

22. This being a case of circumstantial evidence, it would be pertinent to recapitulate the law in this regard. The law is fairly well settled and the duties of the Court in evaluating such evidence have been reiterated on a number of occasions. In ***Mahmood v. State of UP (1976) 1 SCC 542***, the Supreme Court observed as under:

“It is well settled that in a case dependent wholly on circumstantial evidence, the Court before recording a conviction on the bias therefore must be firmly satisfied -

- (a) that the circumstances from which the inference of guilt is to be drawn, have been fully established by unimpeachable evidence beyond a shadow of doubt;
- (b) that the circumstances are of a determinative tendency unerringly pointing towards the guilt of the accused; and
- (c) that the circumstances, taken collectively, are incapable

of explanation on any reasonable hypothesis save that of the guilt sought to be proved against him.”

23. In *Tanviben Pankaj Kumar Divetia v. State of Gujarat (1997) 7 SCC 156*, the Supreme Court explained the law thusly:

“The principle for basing a conviction on the basis of circumstantial evidence has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The Court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the Court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof for sometimes, unconsciously it may happen to be a short step between normal certainty and legal proof. It has been indicated by this Court that there is a long mental distance between "may be true" and must be true" and the same divides conjectures from sure conclusions.”

24. In *Gagan Kanojia & Anr. v. State of Punjab (2006) 13 SCC 516*, the Supreme Court opined:

“9. ... Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available.

It is well settled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between 'may be true' and 'must be true'. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to his guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively.

10. We would proceed on the well-known principles in regard to appreciation of the circumstantial evidence which were noticed by the High Court in the following terms:

- 1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a 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.
- 2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.
- 3) There should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.

- 4) On the availability of two inferences, the one in favour of the accused must be accepted.
- 5) It cannot be said that prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.”

25. The Supreme Court in *Anjan Kumar Sarma v. State of Assam (2017) 14 SCC 359* summarized the legal position as follows:

- “(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established.
- (2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;
- (3) The circumstances should be of a conclusive nature of tendency;
- (4) They should exclude every possible hypothesis except the one to be proved; and
- (5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused [See: *Sharad Birdhichand Sarda v. State of Maharashtra (1984) 4 SCC 116*; *M.G. Agarwal v. State of Maharashtra AIR 1963 SC 200*].”

Appellant ‘last seen’ with deceased

26. The first circumstance sought to be proved by the prosecution is that of the victim being last seen in the company of the Appellant. In this regard, reliance has been placed on the evidence of the two child witnesses, PWs 8

and 23.

27. The brother of the deceased (PW-8) was five years old at the time of the incident and around seven years old at the time of being examined in Court. It must be noted at the outset that his statement under Section 161 Cr PC had already been recorded by the police. The learned trial Judge had recorded the statement of this witness without administering oath after satisfying himself that the witness was in a position to give clear and cogent answers.

28. In answer to the question as to whether PW-8 was accompanying his sister when she went missing, he answered:

“Ans: Yes. I do not remember the date, but on Friday at about 07.00 pm, I along with Shanno, Ansh and one more child had gone to the market to bring milk. The market at a little distance from our jhuggi. When we were coming back after bringing milk from the dairy, my sister Shanno was taken away by one Ali, who was residing in the same locality/jhuggis. Ali was residing at a distance of five houses away and used to ply a rickshaw. Ali told me that I should go away with the milk and he will come back after buying banana for Shanno. Ali had taken Shanno in a rickshaw. I became busy in playing and on the next date on Saturday, I saw the dead body of Shanno.

Q. Can you identify Ali?

Ans. Yes. Witness points out towards accused Mohd. Mangam Insan @ Ali, present in the Court.”

29. In his cross-examination, PW-8 accepted the suggestion that he had narrated facts as told to him by his father but an overall reading of the answer shows that he was also independently aware of the facts. He was specifically confronted with his previous statement to the police (Ex.PW-8/DA) regarding his identification of the accused. In response to the

question of whether he had seen the Appellant in the company of his uncle, PW-1, he answered as under:

“Ans. No.

(Confronted with portion A to B in the statement Ex.PW-8/DA of the witness recorded by the police, in response to the question as to how he came to know about the name Ali that he sometime used to roam with his Chacha Vijay). On asking whether he had told this fact to the police, witness admits this fact. He is again asked whether he had seen Ali roaming with his Chacha Vijay. He denies having seen Ali with Vijay. Ali had met Shanno on the way when I was bringing milk and took her away from the midway. Ali had not taken Shanno while she was playing outside. Child Vishal had not gone with me. He was not playing with me. He is residing in the neighbourhood. It is correct that I am deposing what has been told to me by my father. It is correct that I did not know Ali before my father had told me who he was.”

30. It was clear that although he did not know the Appellant, “many people used to call him as Ali”. Although the learned counsel for the Appellant submits that this child was at best a tutored witness and could not have spoken in the manner he did without being asked to do so by his father, there have been many aspects of the answers given by this child which indicate that he knew the facts even independent of his father asking him to depose to that effect. For instance, the witness makes it clear that the Appellant met the deceased minor when she was returning from the market having bought the milk and that the Appellant took her away then and not while the deceased minor was playing. In other words, this child has withstood the cross-examination.

31. At this stage, it would be appropriate for the Court to dwell upon the

legal position when it comes to evaluating the evidence of a child witness. In ***Dattu Ramrao Sakhare v. State of Maharashtra (1997) 5 SCC 341***, it was held as follows:

“A child witness if found competent to depose to the facts and a reliable one, such evidence could be the basis of conviction. In other words even in the absence of oath the evidence of a child witness can be considered under Section 118 of the Evidence Act provided that such witness is able to understand the questions and able to give rational answers thereof. The evidence of a child witness and credibility thereof would depend upon the circumstances of each case. The only precaution which the court should bear in mind while assessing the evidence of a child witness is that the witness CrI.A. 222/2002 Page 9 of 16 must be a reliable one and his/her demeanour must be like any other competent witness and there is no likelihood of being tutored.”

32. In ***Ranjeet Kumar Ram v. State of Bihar 2015 (6) SCALE 529***, it was observed:

“Evidence of the child witness and its credibility would depend upon the circumstances of each case. Only precaution which the court has to bear in mind while assessing the evidence of a child witness is that the witness must be a reliable one.”

33. In ***Nivrutti Pandurang Kokate v. The State of Maharashtra (2008) 12 SCC 565***, the Supreme Court highlighted the importance of the trial Judge having to be satisfied that the child understands the obligation of having to speak the truth and is not under any influence to make a statement. The Court explained:

“The decision on the question whether the child witness has sufficient intelligence primarily rests with the trial Judge who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination

which will tend to disclose his capacity and intelligence as well as his understanding of the obligation of an oath. The decision of the trial court may, however, be disturbed by the higher court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to tutoring and often live in a world of make-believe. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaken and moulded, but it is also an accepted norm that if after careful scrutiny of their evidence the court comes to the conclusion that there is an impress of truth in it, there is no obstacle in the way of accepting the evidence of a child witness.”

Evidence of PW-23

34. Keeping the above legal discussion in mind, this Court has examined the evidence of not only PW-8 but also that of PW-23 very carefully to determine whether there are any material inconsistencies or contradictions. PW-23 was another five year old child who happened to be easing himself on a garbage dump when he noticed PW-8 and his sister returning from Mother Dairy. When asked how he knew that the deceased has expired, PW-23 very clearly stated that he had seen the Appellant take away the deceased “by making her sit on a rickshaw at 8:00 pm. I was present near Khata at that time”. He specifically denied the suggestion that his parents had told him what he had to speak in Court. At one point, when asked specifically whether his parents had instructed him as to how he should depose in Court, he replied, “Yes. They had told me that court *mein jaa ke sahi sahi gawahi deni hai*”.

35. PW-23 was cross-examined on two separate dates, i.e. 9th October 2012

and 13th November 2012 and he remained consistent that it was the Appellant who took the deceased minor away on a rickshaw by telling PW-8 to go back home and that “he is going to fetch a banana for his sister”. Searching questions were put to PW-23 during the cross-examination but he remained firm. For example, he said:

“On the day, I had seen Shanno with Ali, I had gone to school. I had returned from the school at about 01:00 p.m. I had gone to *khatta*, which was situated near my residence. It is correct that there was darkness at 08:00 p.m. There was light coming from the electric pole. Electric pole is on the road near the *khatta*. That road goes towards Mother Dairy. All the vehicles including bus pass through the said road. I had not seen Shanno and Vinay, when they were going to bring milk from Mother Dairy. I had seen them when they were returning. Vinay was having ‘*dolchi*’ (pot) in his had. Shanno was present with Vinay. Vijay was going ahead whereas Shanno was coming behind him. I was sitting in the *khatta* and was doing latrine. It was wrong to suggest that Shanno and Vinay, both had gone together. Voln. Shanno had lacked behind whereas, Vinay had gone with the *dolchi* (pot). Then Ali had taken away Shanno on his rickshaw.”

36. This witness also knew that there was a quarrel between the Appellant and PW-1 but he was quick to deny the suggestion that PW-1 had told him about what he should speak in Court. He further stated, “It is wrong to suggest that I am deposing falsely at the instance of Vijay as a quarrel had taken place between Vijay and Ali”. He stated as under:

“I know Ali since long before. Ali was residing at the *jhuggies*, where Biharies reside. *Jhuggi* of Ali is at a distance from *khatta*. I had not seen Ali after he had gone on his rickshaw with Shanno. Police had not shown Ali to me after he was apprehended. Police had apprehended Ali from his *jhuggi* in the morning of the next day.”

37. While it appears that there might be a minor contradiction in that PW-23 has stated that the Appellant was arrested from his *jhuggi* while the IO has stated that he was arrested near the railway lines, this by itself cannot assail the reliability of the witness.

38. The conclusion is that the PWs- 8 and 23 have corroborated each other on all the material aspects and have stood firm during their respective cross-examinations. Particularly as far as PW-23 is concerned, it does not appear that he was told by anyone how he should depose in Court.

39. Learned counsel for the Appellant submitted that it was unusual that neither PW-8 nor PW-23 spoke to anyone about what they noticed on 10th June 2011 and about the deceased having been taken away by the Appellant. However, it is evident that as far as PW-23 is concerned, he seems to have disclosed the same to an aunt on the following morning at around 7:00 am. There could be many reasons why a child is unable to convey all that he has seen and noted. There is nothing put to either child in the cross-examination to elicit any particular reason why they did not disclose to their respective parents about what they had noted on 10th June 2011 qua the deceased. The Court is not satisfied that this one aspect of the children not speaking immediately about the deceased having been taken by the Appellant should result in their entire testimonies being discredited. Both child witnesses have been cross-examined extensively by the defence and nothing in their answers has come to light which even remotely suggests that they are speaking falsely. The Court is also unable to appreciate why two young children would want to falsely implicate anyone

at all, let alone the Appellant. The Court is therefore satisfied that the depositions of both child witnesses lend assurance to the Court of the important circumstance of the Appellant taking away the deceased minor in his rickshaw at around 8:00-9:00 pm on 10th June 2011 after which the child was found dead near the railway tracks.

40. The Appellant was also seen by at least two prosecution witnesses coming from the railway line side on the night of 10th June 2011. The first is Vijay, son of Kishan Pal (PW-2) (who incidentally has the same name as PW-1), a neighbour of PW-6 who saw the Appellant coming from the railway lines carrying a wooden stick. Likewise, Harish (PW-3), the brother of PW-6, also noticed the Appellant at around midnight, coming from the side of *theka* (liquor shop) and having a wooden stick. The Appellant was not seen thereafter till he was arrested on the intervening night of 14th/15th June 2011 on the basis of secret information.

Arrest proved

41. On the aspect of the arrest of the Appellant, the IO (PW-25) was subjected to intense cross-examination. Again, nothing that could help the Appellant emerged as a result. With the Appellant not volunteering any alternative version of where he might have been during this time, as he was not seen by anyone after 9 pm on 10th June, 2011 till when he was arrested, is another circumstance that works against the Appellant.

Motive established

42. The prosecution has also sought to establish the motive for commission of the offence as arising out of the quarrel that had occurred, between

Appellant and the brother of PW-6. While the Appellant has urged that this was the reason for his false implication, this circumstance actually works against the Appellant with even PW-23 speaking about it apart from PW-1 himself. Neither witness has been shown to be stating falsehood on this aspect.

Homicidal death

43. The medical evidence proves beyond all reasonable doubt that the death was homicidal. While learned counsel for the Appellant tried to persuade this Court that the FSL report does not connect the accused with the crime, the overwhelming evidence of the prosecution witnesses on all other aspects does prove beyond all reasonable doubt the other links in the chain of circumstances.

44. At this stage, it was pointed out by learned counsel for the Appellant that no attempt was made by the prosecution to have the wooden stick carried by the Appellant compared to the wooden piece found in the body of the victim. While this could be a lapse on the part of the investigating agency, the Court is satisfied that the other evidence on record more than sufficiently proves the case of the prosecution against the Appellant beyond reasonable doubt.

Chain of circumstances establishes guilt

45. The Court concurs with the trial Court on each of the circumstances forming the complete chain which have been held by the trial Court to have been proved beyond reasonable doubt by the prosecution. The circumstances that stand proved point unerringly to the guilt of the Appellant and no one

else in the commission of the crime.

Sentence

46. The crime in the present case is a ghastly one. A three year old girl has been subjected to extreme brutality and sexual violence resulting in a traumatic death. The Court is however surprised to find that the order on sentence dated 7th April 2014 of the trial Court is perfunctory. For an offence for which the alternative sentence is capital punishment, the trial Court does not even appear to have discussed or considered that possibility. It was necessary for the trial Court in a case as ghastly as this one to have paid greater attention to the aspect of sentencing keeping in view the various factors that have been discussed time and again in several judgments of the Supreme Court and this Court. Learned APP submitted that while there is no explanation why the State has not filed an appeal asking for the maximum punishment, he urged this Court to consider his oral request in that regard at this stage.

47. The Court is not inclined to consider the above plea of the State, without an appeal being filed by it and at a stage when the appeal of the accused has been finally heard and the judgment dictated. The Court notes that the Appellant here was represented throughout the trial by *amicus curiae*. The cross-examination of some of the key prosecution witnesses, other than the child witnesses, appears to be perfunctory. The Court is left with the impression that many more aspects of the case could have emerged had the accused been able to afford a lawyer of his choice.

48. Also, the question of awarding the maximum penalty entails a separate hearing and a detailed enquiry. The trial Court does not appear to have been conscious of the need to undertake the mandatory exercise of calling for a report of the probationary officer on the social background of the accused and his conduct in prison. There was thus no material available for a meaningful assessment of the aggravating and mitigating circumstances preceding the awarding of the maximum sentence. The State has not presented those relevant facts even at this stage.

Compensation to the family of the victim

49. While therefore the Court is not inclined to consider the plea for enhancement of the punishment, it notes with some consternation that the aspect of awarding compensation to the family of the victim has not been touched upon by the trial Court. The Court finds that no reference has been made by the trial Court to the victim compensation scheme that has been framed and the compensation that is payable to the victim in terms thereof under Section 357A Cr PC.

50. Therefore, the Court directs the Delhi State Legal Services Authority ('DSLISA') in terms of Section 357A (5) Cr PC to forthwith undertake an inquiry and within two months award and ensure disbursal of the appropriate compensation to the family of the victim in terms thereof.

51. For this purpose, a certified copy of this judgment will be delivered forthwith to the Secretary DSLISA with a further direction to submit a compliance report to this Court within three months from the date of receipt

of the certified copy of this judgment. If no such compliance report is forthcoming within the time stipulated, the Registry will place a note before the Court for further directions.

52. With the above observations, the appeal is dismissed but, in the circumstances, with no order as to costs. The trial Court record be returned forthwith together with a certified copy of this judgment.

S. MURALIDHAR, J.

VINOD GOEL, J.

JULY 03, 2018

mw