

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD**

CRIMINAL APPEAL NO.91 OF 2017

Sakharam S/o. Sitaram Bhise,
Age : 25 years, Occu. Agriculture / Labour,
R/o. Sukliveer, Tq. Kalamnuri,
Dist. Hingoli.

.... Appellant
(Accused)

VERSUS

The State of Maharashtra
through Police Station Officer,
Police Station, Akhada Balapur,
Tq. Kalamnuri, Dist. Hingoli.

... Respondent

...

Smt. Yogita M. Kshirsagar-Thorat, Advocate (appointed) for the
Appellant
Shri. S. G. Sangle, APP for respondent/State.

.....

**CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.**

Dated : September 10, 2020

ORAL JUDGMENT [Per Ravindra V. Ghuge, J.] :-

1. The appellant/accused is before this Court in view of his conviction by the impugned Judgment & Order dated 21-02-2012 delivered by the learned Additional Sessions Judge, Hingoli in Sessions Trial Case No. 72/2010 for having committed offences punishable u/s 376 & 302 of the Indian Penal Code (hereinafter referred to as "IPC"). He is directed to suffer rigorous imprisonment

for seven years and pay a fine of Rs. 500/-, in default suffer rigorous imprisonment for three months, for the offence committed u/s 376 of the IPC. He has also been convicted for the offence committed u/s 302 of the IPC and is directed to suffer imprisonment for life and pay a fine of Rs. 500/-, in default suffer rigorous imprisonment for three months. Both the sentences are to run concurrently and time spent by the accused in Jail owing to his arrest on 30-03-2009, is directed to be set off.

2. We have heard the learned advocate for the appellant and the learned APP on 08-09-2020, 09-09-2020 and 10-09-2020. With their assistance, we have gone through the appeal paper-book threadbare and the judgments cited.

3. The case put up by the prosecution before the Trial Court can be summarized as under:

- a. Ranjana, wife of the complainant – Yeshwant, is the deceased who has been subjected to offences punishable u/s 376 and 302 of the IPC. The appellant-accused Sakharam Sitaram Bhise is a resident of the same village Sukliveer. On 28.03.2009, the complainant was away from his village since he was plying an Auto/ Goods Transporting Vehicle. On 29.03.2009, in between 06.00 to 06.30 pm, he received a call from an acquaintance by name Arvind Mhatre informing him

that his wife has fallen ill and he should reach Fatepur (Kharab). The distance was about 7 kms., and the complainant reached Fatepur (Kharab) at about 07.00 pm.

- b. The daughter of the complainant, PW3 Kalpana, informed him that the deceased had gone to the forest adjoining the village at about 02:00 pm., for collecting firewood. Since she did not return for quite sometime till evening, she contacted her closest friend Ms. Bali, PW4 to go searching for her. They found the deceased with head injuries inflicted by stones and her face and skull smashed. The complainant therefore informed the Police Post at Dongarkada, which is within the jurisdiction of the Akhada Balapur Police Station.
- c. Later on, after the FIR was registered, Kalpana told the complainant that Sakharam, present appellant, was seen by Kalpana and Bali near a pit adjacent to the Odha/Streamlet. He was pelting stones in the pit. These two girls saw him within a distance of about 100 ft. and as he belonged to the same small village, they could identify him. When Sakharam saw these two girls, he hurriedly left the area and fled. These two girls proceeded searchingly and on reaching the pit, they found that the deceased was lying in the pit with stones having been hit on her head. Both were terrified and ran back to the village to inform the relatives and the villagers. Being in a state of shock, these two girls found it difficult to correlate the presence of Sakharam,

instantaneously as the only information that they gave to the relatives was that Ranjana was found dead.

- d. The police began investigation and a sniffer dog from the Dog Squad available, was brought to the spot. A stick (Gahari Tree) which had blood stains and a large stone which was used for smashing the skull of the deceased with blood stains, were found. The dog handler guided the dog to smell the said articles at the spot and after the dog had sniffed around, he started sniffing a path from the Nala and went to one Akhada nearby. An Akhada in rural areas in this part of the state is a sort of a small hut used for storing agricultural equipments and as a residence for a servant working for the agriculture field owner. One wooden cot was lying in front of the hut. The sniffer dog reached the Akhada, sniffed around, intensely sniffed the cot and started barking towards the cot. A panchanama called as the Dog Handler Panchanama was drawn.
- e. After a post-mortem was carried out on the body of the deceased, the Medical Officer opined that the death had occurred due to strangulation associated with head injuries.
- f. On the available information, the Police arrested the accused Sakharam on 30.03.2009. While in custody, he offered a memorandum statement, Exh. 35 & 36, which indicated to the Investigating Officer that Sakharam had hidden the Mani-Mangalsutra of the deceased and his clothes. He led the Investigating Officer to the Akhada

and he dug-out a stone below a tamarind tree behind the wooden cot under which he had hidden the Mani-Mangalsutra. He brought out the said ornament and handed it over to the Police. He then went inside the Akhada and brought out his Pink Manila shirt and Chocolate Brown full pant. Both these articles were taken into possession by the police. A muddemal statement was recorded and a panchanama was carried out. These articles were brought to the Police Station and were sealed by following the prescribed procedure.

g. The accused was subjected to medical test and the articles that were seized during the investigation, were sent to the Chemical Analyzer for analysis. Blood stains on the clothes of the accused, matched his blood group 'A'. The blood on the stick and the stone matched with the blood group of the deceased which was "B". In the chemical analysis, semen stains found on the petticoat of the deceased, matched with the blood group of the accused which is "A".

h. After the charge-sheet was filed in the court, the accused was read out the charges and explained to him in his mother tongue Marathi. He denied the charges and pleaded not guilty. He claimed to be tried for the charges levelled upon him. After the trial was concluded, the accused was convicted on both counts.

4. With the assistance of the learned advocate, we have gone through the impugned Judgment delivered by the Trial Court.

The following witnesses were examined before the trial Court : -

- PW1 - Panch witness Uttam Kundlik Kurwade.
- PW2 - Complainant husband of the deceased - Yeshwant Subhash Kurwade.
- PW3 - Daughter of the deceased Kalpana Yaswant Kurwade.
- PW4 - Friend of PW3, Bali, daughter of Sakharam Shitale.
- PW5 - Dr. Shivaji Munjaji Digraze, Autopsy Surgeon.
- PW6 - Panch witness - Chandrakant Dhondiba Dhule before whom the accused had made a statement that he would handover the Mani-Mangalsutra and the clothes which he had concealed in the Akhada.
- PW7 - Photographer - Rajeshwar Suryakant Vyawahare.
- PW8 - The Carrier Constable (Muddemal Article nos. 1 to 11) - Nilesh Jivan Mangrulkar.
- PW9 - Dr. Sheshrao Madhavrao Narwade, Medical Officer at the Primary Health Centre, Akhada Balapur, who examined the accused to the extent of his capacity to perform sexual intercourse.
- PW10 - Tulshiram Bhujangrao Kadekar, a person residing in the same village who had seen the accused going towards the forest on 29.03.2009.
- PW11 - The Police Head constable-Khizerpasha s/o Khaja Ismaeel.
- PW12 - Investigating Officer - Namdeo Laxman Vasudeo, who had retired on the day his deposition was recorded.

5. The defence taken by the accused was of complete denial and he claimed that he was not the person who has committed the offence of rape and the murder of the deceased. He has not led evidence to the extent of his whereabouts on 29.03.2009 in between 02:00 pm to 06:00 pm. He has not taken an *alibi*. He has denied of being the employee of the owner of the agricultural field and the Akhada, who is the brother of PW10.

6. The learned advocate for the accused has strenuously contended that the accused has nothing to do with the incident that has occurred and that he was arrested merely on suspicion, though his name did not appear in the FIR, in the early hours on 30.03.2009. The statement of PW3, daughter of the deceased, and the additional statement of PW2-first informant, was recorded on 05.04.2009. Since the accused was arrested on 30.03.2009, a story was cooked up by the surviving husband and his daughter to implicate the accused and evidence was manipulated to ensure the conviction of the accused.

7. She further submits that some villagers had gathered around the body purportedly after PW3 and PW4 ran back to the village with the information of the death of Ranjana. The Sarpanch,

Up-sarpanch and some villagers who had gathered at the spot, were not examined. The first complaint lodged by the husband PW2 was against an unknown person and he registered his supplementary statement on 05.04.2009 based on hearsay information given to him by the daughter of the deceased.

8. It is then canvassed that, the receipt of handing over of the body, known in Marathi as “Prate Poch Pawati” dated 30.03.2009 indicated that, the ornaments owned by the deceased were also handed over to the husband. Therefore, the story of the accused leading the police to the tamarind tree behind the cot at the Akhada to dig out the Mani-Mangalsutra and hand it over to them, is a fictitious story and record has been manufactured.

9. That, the Dog Squad Panchanama is of no assistance to the prosecution since the sniffer dog, as claimed by the police, had led them to the cot and the Akhada. It is the contention of the accused that he was not employed at the Akhada and was not using the cot found at the Akhada. The employer of the Akhada namely Maruti Kadekar, was not examined and this, therefore, is a vital missing link in the chain of events. This aspect assumes significance as the conviction of the accused is solely based on circumstantial evidence and there is no eye-witness.

10. That, PW1 is closely known to PW2. PW3 is the daughter of the deceased. PW4 is the closest friend of PW3. All these persons are interested witnesses and hence they cannot be relied upon and their testimony is untrustworthy. So also, the delay caused in recording the additional statement of PW2 and the statement of PW3, is a serious deficiency. The time lag between the date of incident and the recording of statement after four days is fatal to the case of the prosecution.

11. It is then canvassed that, the principle of “Last Seen Together” is not attracted as there is no witness who could claim that he saw the accused and the deceased together. PW10 claiming to have seen the accused going towards the forest, is insignificant as the said testimony would not lead to a conclusion that the accused was the only person after the deceased, to have traveled to the forest on 29.03.2009. Such testimony would not prove that the accused had gone to the forest and had committed the crime.

12. It is then canvassed that, as the statements of the owner of the Akhada, Sarpanch, Up-sarpanch and villagers who had gathered near the body were not recorded, the prosecution has miserably failed in proving the guilt and the investigation is rendered faulty and deficient. Such grave lapses amount to lacuna in

investigation and faulty investigation is not enough for convicting the accused on hearsay evidence.

13. Reliance is placed by the appellant on a recent view of the Hon'ble Apex Court in the matter of **State of Uttarakhand Vs. Jainail Singh** reported in AIR 2017 SC 5353, to support the contention that the High Court of Uttarakhand had set aside the judgment of the trial Court and acquitted the accused on the ground of faulty investigation and the Hon'ble Apex Court refused to interfere with the judgment of the High Court. The Hon'ble Apex Court found that the infirmities recorded by the High Court, especially the fact that the weapon (pistol) allegedly used in the crime, was not produced before the Magistrate and was also not sent for forensic examination, rightly led the High Court to conclude that there was no evidence as regards the bullet allegedly fired by the accused through the said pistol which hit the victim on his temple. In the absence of the report of a Ballistic Expert, the source of the bullet was not proved. Hence, the Hon'ble Apex Court agreed with the findings of the High Court of upsetting the judgment of conviction awarded to the accused.

14. Reliance is then placed upon the judgment of the Hon'ble Apex Court in the matter of **K. Sukumaran Versus State of**

Kerala reported in 2000 (10) SCC 365, wherein the accused was acquitted of the charge u/s 302 since the Hon'ble Apex Court noticed that there were no eye-witnesses to the alleged homicidal death and the prosecution could not prove the charge. It is, therefore, canvassed that without strong evidence in such a serious case of rape and murder, conviction cannot be handed down to the accused merely on the basis of suspicion.

15. The appellant has then relied upon **Devi Lal Vs. State of Rajasthan** and **Babu Lal Vs. State of Rajasthan** (both accused), reported in AIR 2019 SC 688, to buttress the contention of the appellant that if circumstantial evidence emerging from the investigation is doubtful, it would not be enough evidence to prove the offence. The court must conclude on the basis of evidence that the offence has been committed by the accused and should not convict a person on the ground that the offence "may have been" committed by the accused. It is strenuously contended by the learned advocate for the appellant that the offence of rape u/s 376 of the IPC is not proved by any evidence. She relies upon the Post-mortem report Exh. 28, which was carried out from 11:30 am to 01:00 pm on 30.03.2009. It is pointed out at entry no. 15 with regard to injuries to the external genitalia and it is canvassed that the absence of injuries would prove that there was no offence of rape

committed by the accused.

16. It is then canvassed that, there were rumours of an unknown person, said to be a psychopath, having committed certain offences on women and murders in the cluster of villages including Sukliveer. The deceased may have been murdered by such a psychopath. The accused is implicated in the crime by the police only to establish that they have investigated the crime and have solved the case.

17. Insofar as the presence of semen on the petticoat of the deceased which matches the blood group of the accused is concerned, it is contended that the matching of the blood group would not establish the presence of the accused at the scene of the crime and his involvement in committing the offence. Such a piece of evidence is not enough to convict the accused as an innocent person cannot be convicted on the basis of such insignificant evidence.

18. It is further contended that the daughter of the deceased, PW3 could not have identified the accused from a distance of about 100 ft. The accused is unnecessarily made a suspect and his conviction is on account of a serious error in judgment.

19. The learned APP - Shri. S. G. Sangle has drawn our attention to the evidence, in much details. His contentions can be summarized as under:

- a. There is only a single forest near the said village which belongs to the Forest Department. The residents of the village travel to the forest for collecting firewood. The deceased used to collect such firewood as a part of her daily chores. According to her daughter-PW3, she left for collecting firewood at about 02:00 pm, and traveled to the forest. Since she did not return till dusk, PW3 became anxious. Her father PW2 was away from the village and she did not find any elder in the family at the given time so as to be accompanied to search for her mother. PW3 is about 17 years of age and she found it appropriate to request her friend PW4 to accompany her to the forest.
- b. It has come in evidence of PW3 that after she entered the forest with PW4, she started calling out to her mother by shouting Aai (a way of calling out a mother in rural Marathi language). While searching for her mother, both these girls who are below the age of 18 years, reached the area adjacent to a Talav (a place where small quantity of water accumulates and which is smaller than a lake). It can be called as a 'Pond'. From a distance of about 100 ft., they identified Sakharam, the accused, who was dropping large stones into a pit. After both the girls saw the accused and could identify him as well as the colour and pattern of his clothes, the

accused noticed that these girls have come closer and after seeing the two girls close-by, he hurriedly moved away from the pit and fled.

- c. These two girls, who at the spur of the moment did not correlate what they saw with their missing mother, moved ahead and as they came closer to the pit, they found somebody lying inside the pit. Upon peeping into the pit, PW3 identified the person to be her mother by her dress. There were stones on her face. They were so terrified that they impulsively ran back to the village and alerted the villagers.
- d. The Id. APP has referred to the map which is a part of the spot panchanama / crime spot details, Exh. 15/1. He submits that, after PW2 came to the village and informed the police, the spot panchanama was carried out. At a distance of about 9 ft., from the place where the body lay, blood stains were found on the path. At about 3 ft., from the spot of the blood stains, an underwear was lying. Around the same place, a stick smeared with blood was found. Near such stick, the firewood that was collected and kept together by the deceased, was located. A cloth smeared with blood was found a little ahead of the underwear. At a slight distance ahead of the cloth, one chappal was found and the second chappal worn by the deceased was found at a distance of about 4 ft., from the body. The body was found in a pit having depth of about 5 ft., which was a sort of a dried waterfall. The photographs of the body have also been placed on record.

- e. The Id. APP canvasses that PW3 & PW4 are girls of a tender age. They saw the accused, as has come in evidence and then they noticed that the body of the deceased was dumped in a pit. By way of a natural reaction, they rushed back to the village to seek help. Further investigation led to the actual cause of death. The deceased was raped by the accused, was strangulated to suppress her resistance and was killed in order to silence her. The accused smashed the face and the skull of the deceased with stones in order to make sure that the victim has died so that there would be no evidence. It was purely a coincidence that as he was smashing the skull of the victim by dumping stones into the pit, PW3 and PW4 saw him actually performing the said act. They can, therefore, be termed as natural witnesses. This is a very strong evidence.
- f. The Id. APP has then drawn our attention to the deposition of each witness. He has read the testimony of the witnesses as have been recorded, threadbare and he contends that the chain of events, as are necessarily required in criminal jurisprudence as to prove the offence committed by the accused, is complete.
- g. By referring to the post-mortem report, he contends that the death of the deceased has been caused by strangulation with hands and a cloth. The act of the accused of smashing the skull of the victim with stones was with an intention of ensuring the death of the deceased.

- h. He has referred to the surface wounds and other injuries found and recorded in the PM report which indicates contusion over the neck in upper part on both sides of the neck, extending behind the ears, mid-line to right side 17 cm and mid-line to left side 18 cm with 1 cm breadth. Bleeding was seen in the muscle and sub-cutaneous tissue. Multiple abrasions over the back of the body, over the trunk, upper extremities and lower extremities. There were injuries on the chest and there is muscle bleeding below the right breast. The skin over the right buttock was peeled. There were serious injuries with multiple fractures on the face and skull bone. The brain matter was exposed out of the skull. There were fractures on the mandible seen on the left side just by the side of midline. There was fracture of rings 2, 3 and 4 seen in the midline of the larynx, trachea and bronchi. Blood was seen in the eyes below the conjunctiva. Blood was also oozing from her nose, mouth and ears and the whole face was stained with blood.
- i. He therefore contends that a cloth was tightened with severity around the neck of the victim which led to fracture injuries on the larynx, trachea and bronchi. A stick used by the accused to assault the victim was seen at the scene of crime with blood of the deceased. As the victim was hit with heavy stones, there were multiple fractures on the entire face, skull bone and the brain matter had oozed out of the skull. Since the accused raped the victim on the rough soil and then dragged her

body after strangulating her, to be dumped into the pit, the flesh over the right buttock was also peeled of.

- j. With the above injuries and on account of the severity of the assault, the death of the deceased was caused by strangulation and smashing of the face/skull, is established.
- k. The medical test of the accused, who was 25 years of age, indicated that he was capable of sexual intercourse. The presence of the semen of the accused on the petticoat of the victim, clearly establishes that the accused had raped the victim. Absence of traces of semen on the vaginal swab would not mean that rape had not been committed. The bladder of the victim was completely empty which would indicate that she may have lost control over her bladder while being strangulated or at the time of death and the gush of urine may have flushed out the semen from the vagina.
- l. It is submitted that the chain of events to establish that the accused has committed both the offences is complete beginning with, (1) the statement of PW10 who saw the accused going to the forest, (2) the daughter PW3 and PW4 having personally seen the accused at the pit while dumping stones inside the pit, (3) the post-mortem report establishing presence of semen, (4) the cause of death, (5) the accused handing over the Mani-Mangalsutra and his clothes that he wore when he committed the crime, (6) the matching of the blood stains of the accused on his clothes, and (7) the

presence of semen of the accused on the petticoat of the victim.

- m. In addition, he adds that the sniffer dog, an animal who cannot be manipulated or tutored or misled, sniffed the body and the articles found at the spot of the crime and moved towards the Akhada by following a smell track and reached the cot at the Akhada which was proved to be used by the accused, completes the chain of circumstantial evidence.
- n. He relies upon the following judgments;
 - [i] **Namdeo Versus State of Maharashtra**
2007 (14) SC 150
 - [ii] **State of West Bengal Versus Mir Mohammad Omar**
2000(8) SCC 382
 - [iii] **Gagan Kanojia & Anr. Versus State of Punjab**
2006(13) SCC 516
 - [iv] **Kalu Alias Laxminarayan Versus State of Madhya Pradesh**
(2019) 10 SCC 211
 - [v] **Bhulakiran Koiri Versus The State**
1970 Cri LJ 403
 - [vi] **Navaneethakrishnan v. State of Inspector of Police**
AIR 2018 SC 2027

20. We have perused the impugned judgment threadbare and have found that the evidence recorded through the witnesses, has been extensively adverted to by the ld. trial Court. We have also gone through the testimony of all witnesses and have perused the documents exhibited. We are, therefore, dealing with the grounds

raised by the appellant in the light of the oral and documentary evidence.

INTERESTED WITNESSES AND MURDER OF RANJANA

21. The learned counsel for the appellant has laid a heavy stress upon the blood relationship between PW2/PW3 and the deceased. She has based her contention on the aspect of interested witnesses to the extent of PW4 as well on the ground that she was a close friend of PW3 and is likely to be tutored. She submits that, the evidence of these three witnesses has to be looked at with a suspicious eye as PW3 and PW4 can be easily tutored by the father so as to strengthen the case against the accused. The burden of proving an offence is heavy and would lie on the shoulders of the prosecution. The accused is not cast with the burden of proving his innocence. The prosecution would have to establish that the deposition of PW2, 3 & 4 can withstand the test of interested witnesses.

22. We find from **Namdeo** (supra) that, the Hon'ble Apex Court has held that a case of murder can also be proved on the sole testimony of a witness. Such a testimony should be credible and should carry such weight that the court is convinced of the guilt being proven purely on the basis of the quality of evidence of a sole

witness. The Hon'ble Apex Court also proceeded to consider the interest of a particular witness in facilitating the conviction of an accused. It is held that the nexus or relation of the witness with the complainant to nail the accused will have to be deeply scrutinized. A son or a daughter of a murdered victim could be an eye-witness and the mere relation between such a witness with the deceased cannot be a basis for discarding the testimony of such witness for being 'interested' in the conviction of an accused. If such testimony is corroborated with other pieces of evidence and can withstand the allegation of "interested witness", such testimony need not be discarded.

23. The conclusion of the Hon'ble Apex Court in Namdeo (supra) set out in paragraph nos. 30 to 36, read thus:

30. In **Darya Singh & Ors. v. State of Punjab, (1964) 3 SCR 397**, this Court held that evidence of an eye witness who is a near relative of the victim, should be closely scrutinized but no corroboration is necessary for acceptance of his evidence.

31. Speaking for the Court, Gajendragadkar, J. (as His Lordship then was) stated:

"There can be no doubt that in a murder case when evidence is given by near relatives of the victim and the murder is alleged to have been committed by the enemy of the family, criminal Courts must examine the evidence of the interested witnesses, like the relatives of the victim, very carefully. But a person may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. In that case, the fact that the witness was related to the victim or was his friend, may not necessarily introduce any

infirmity in his evidence. But where the witness is a close relation of the victim and is shown to share the victim's hostility to his assailant, that naturally makes it necessary for the criminal Court to examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it. In dealing with such evidence, Courts naturally begin with the enquiry as to whether the said witnesses were chance witnesses or whether they were really present on the scene of the offence. If the offence has taken place as in the present case, in front of the house of the victim, the fact that on hearing his shouts, his relations rushed out of the house cannot be ruled out as being improbable, and so, the presence of the three eye-witnesses cannot be properly characterised as unlikely. If the criminal Court is satisfied that the witness who is related to the victim was not a chance-witness, then his evidence has to be examined from the point of view of probabilities and the account given by him as to the assault has to be carefully scrutinised. In doing so, it may be relevant to remember that though the witness is hostile to the assailant, it is not likely that he would deliberately omit to name the real assailant and substitute in his place the name of enemy of the family out of malice. The desire to punish the victim would be so powerful in his mind that he would unhesitatingly name the real assailant and would not think of substituting in his place the enemy of the family though he was not concerned with the assault. It is not improbable that in giving evidence, such a witness may name the real assailant and may add other persons out of malice and enmity and that is a factor which has to be borne in mind in appreciating the evidence of interested witnesses. On principle, however, it is difficult to accept the plea that if a witness is shown to be a relative of the deceased and it is also shown that he shared the hostility of the victim towards the assailant, his evidence can never be accepted unless it is corroborated on material particulars." (emphasis supplied).

32. In **Dalbir Kaur (Mst.) v. State of Punjab, (1976) 4 SCC 158**, the accused killed his own father and real brother over a property dispute. Eye-witnesses to the 'gruesome, brutal and unprovoked' double-murder were near relatives of the deceased. It was, therefore, contended that they were 'interested'

witnesses and their evidence should not be accepted for holding the appellants guilty.

33. Negating the contention, upholding the order of conviction, and referring to Dalip Singh, this Court stated;

"There can be no doubt that having regard to the fact that the incident took place at midnight inside the house of Ajaib Singh, the only natural witnesses who could be present to see the assault would be Jaswant Kaur and her mother Shiv Kaur. No outsider can be expected to have come at that time because the attack by the appellants was sudden. Moreover a close relative who is a very natural witness cannot be regarded as an interested witness. The term "interested" postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or for some other reason. Such is not the case here. In the instant case there is absolutely no evidence to indicate that either Jaswant Kaur or Shiv Kaur bore any animus against the accused."

34. In **Kartik Malhar v. State of Bihar, (1996) 1 SCC 614**, this Court considered several leading cases on the point and said:

"On a conspectus of these decisions, it clearly comes out that there has been no departure from the principles laid down in Vadivelu Thevar's case (supra) and, therefore, conviction can be recorded on the basis of the statement of single eye witness provided his credibility is not shaken by any adverse circumstances appearing on the record against him and the Court, at the same time, is convinced that he is a truthful witness. The Court will not then insist on corroboration by any other eye witness particularly as the incident might have occurred at a time or place when there was no possibility of any other eye witness being present. Indeed, the Courts insist on the quality, and, not on the quantity of evidence". (emphasis supplied).

35. Recently, in **Harbans Kaur v. State of Haryana, 2005 (1) Apex Criminal 527: (2005) 9 SCC 195**, the conviction of the accused was challenged in this Court, inter alia, on the ground that the prosecution version was based on testimony of relatives and hence it did not inspire confidence.

Negating the contention this Court said:

"There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."

36. From the above case-law, it is clear that a close relative cannot be characterised as an 'interested' witness. He is a 'natural' witness. His evidence, however, must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the 'sole' testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

[Emphasis supplied]

24. We find that the testimony of PW2, 3 and 4 is strengthened by the articles seized during investigation. If the testimony of each of these three witnesses is to be individually analyzed, it would clearly appear that PW2 - complainant has plainly mentioned in his complaint that he had received a call to return to the village, he visited the spot of the crime upon his return and he proceeded to the police station to lodge his complaint without naming any accused. Thus, he appears to have acted truthfully and did not name the accused since at that point in time, he was unaware as to who was the accused. Gradually after his daughter PW3 regained composure and could gather herself to think about the whole issue, that it dawned upon her that it was Sakharam who was the person who was dumping stones in the pit and as soon as these

two girls peeped into the pit, they could find the face and the skull of the victim smashed by the stones.

25. We can perceive the huge amount of shock and loss of a mother that the 17 year old witness must have suffered and her state of mind in the time that followed the gruesome death of her mother. There is nothing before us to convince us, inasmuch as, our conscience does not permit us to believe that PW3 would want the actual culprit to go scotfree and seek conviction of the accused allegedly, as per the submissions of the appellant, due to the tutoring of her father.

26. From the evidence before us, we find that the sequence of events have unfolded. The evidence of PW10 that he saw the accused traveling towards the forest and that the accused was an employee of his brother and was residing in the Akhada, cannot be ignored. In the face of this piece of evidence, the accused could have brought forth the evidence to establish that he had a different source of income and his employment with the brother of PW10 was not his source of income. He could have examined the alleged employer to disprove the theory of the prosecution. He did not choose to do so.

27. The connectivity in the chain of events is proved by PW3 and 4 who also travelled to the same forest in search of the

deceased and found the accused dumping stones into a pit, at a distance of about 100 ft. The strength in the chain is further enhanced by their testimony that as they peeped into the pit, they saw the stones that had crushed the face and the skull of the deceased. They had actually seen the accused throwing stones in the pit to smash the face/skull of the victim.

28. We do not find material before us to discard the testimony of PW6, who recorded the disclosure of the ornament and clothes of the accused u/s 27 of the Evidence Act. The accused had led the police to the Akhada, to the cot lying in front of the Akhada and then to the tamarind tree behind the cot. The accused digging out the ornament hidden under a stone under the tamarind tree is an evidence which became available on account of the disclosure by the accused. We find corroboration in the evidence brought on record in the form of the sniffer dog. The services of sniffer dogs in various departments like the Police and the Military are well recognised. These sniffer dogs can dig out live humans and dead bodies from beneath collapsed buildings or in mines or even buried under snow. Their natural strength is their power of smell. The sniffer dog sniffed at the spot of crime and sniffed his way right upto the Akhada and he stopped near the cot. In his sign language, he started barking at the cot. PW10 has deposed that the accused used to reside in the

Akhada and used to sleep on the said cot. All these pieces of evidence, if read together, convince us that the accused has not been implicated and made a scapegoat.

29. “A dead man tells no tales”. The accused, in order to ensure that the victim should not be alive to narrate her ordeal to her relatives and villagers, found it advantageous to silence her forever by smashing her face and skull with stones. This scene of dumping stones in the pit was seen from 100 ft. by PW3 and PW4. They saw the accused turn around and see them and on noticing them, he fled from the scene. These two girls peeped into the pit and found the body of the deceased.

30. The dragging of the body from the spot where the accused had strangled her upto the pit where he dumped her, has also been recorded in the panchanama. As such, we are of the view that the trial Court has not committed any error in concluding that the accused had killed the victim.

OFFENCE OF RAPE U/S 376 IPC

31. With our conclusion as above, that the accused was involved in the crime, we have to consider as to whether the accused could have been convicted for the offence of rape u/s 376 of the IPC.

There is no dispute as regards the post-mortem report of the deceased that the vaginal swab did not show traces of semen of the accused. The spot panchanama indicates that the underwear of the deceased was removed and was flung on the ground. Her chappals were found at two places away from the underwear and away from each other. A cloth with her blood stains was also found in the vicinity where the crime had occurred. The firewood collected by the victim to be carried back home was also at the scene of offence. There is enough evidence to indicate that the accused was assaulted.

32. The post-mortem report indicates no injuries to the external genitalia and there was no purging. Plenty of surface injuries and wounds waist upwards were noticed and their dimensions have been set out in details under clause 17, 18, 19, 20 and 21 in the report. Insofar as the offence of rape is concerned, we find that there are no injuries on and around the private part of the victim. Most of the injuries are from the waist upwards. Strangulation with a cloth and probably the use of hands is apparent from the medical record as well as the testimony of witnesses. Traces of semen were not found in the vagina of the deceased. The learned APP submits that, the bladder was empty as per the PM report and since the contents of the bladder may have been released on account of loss of control owing to the strangulation or at the time of death, it may have washed away

the traces of semen. He concedes that the soil sample in order to prove urination where the crime was committed, is not available.

33. We have referred to a book prescribed for medical students titled as 'Act of Defecation-Ganong's, Pg. 476, 23rd edition' and DeJong's Book of Neurologic Examination, 6th edition. We find that, in such cases where there is extreme risk to life, an event termed as the vasovagal shock occurs. Reasons like sudden unexpected events and extreme risk to life can trigger off a vasovagal attack. Outburst of the vessel tone leads to manifestation of function of organs like the bladder and rectum dramatically leading to micturation and defecation. Contraction of Detrusor muscle is caused through parasympathetic innervations of bladder and relaxation of external sphincter of the bladder.

34. In the above backdrop, the issue would be, whether a victim is likely to lose control on the urinary bladder at the time of death, that would result in washing away the traces of semen. We are scrutinising this aspect in view of the fact that there is no evidence of actual penetration by the accused and there are no signs of a sexual intercourse committed by him. Due to sexual intercourse, the semen enters into the vagina. Normal urination in a normal course, does not lead the urine to enter the vaginal canal. The position of Urethra is about 1 to 2 cms above the vaginal canal. The

vulval opening is always closed as the anterior and the posterior walls of the vagina remain adhering to each other. It is only during a sexual intercourse that the opening occurs. The urethral aperture from where the urine passes is above the vaginal orifice and during micturation, the flow of urine comes out in a gush from the urethra forming a jet.

35. The reason for involuntary passage of urine occurs due to strangulation, hanging and spinal injury. Any injury to the spinal cord above the thoracic level leads to development of “reflex bladder”. The reflex bladder automatically empties under the effect of reflex generated act of detrusor muscle level of bladder.

36. In the above backdrop, we find that with the constriction of the vulval passage, there is no scope for the urine to enter a place where the semen can be deposited. We do not claim to have medical knowledge to observe conclusively that a heavy gush or flow of urine would not enter the vulval passage. What we find on the basis of material available is that, had there been an actual intercourse resulting in ejaculation by the accused, it would have led the autopsy surgeon to notice presence of semen inside the vaginal canal.

37. Considering the above, we are of the view that, there is an element of doubt as to whether the accused had intercourse with the deceased and ejaculated inside the vagina. We are unable to conclude with certainty that the accused did commit intercourse with the deceased. It is uncertain as to whether he penetrated the vagina of the deceased. Because of her strong resistance, he ejaculated outside the vagina and therefore the stains of his semen are found on her petticoat which was around her waist. It is only that her underwear was removed. As such, we grant the benefit of doubt to the accused and hold that the offence of rape punishable u/s 376 IPC is not proved.

38. However, we find that Section 511 of the IPC deserves to be invoked in this case. There certainly was an attempt by the accused to commit rape. Seeing a lonely lady of a young age of 32 alone in the forest, the accused attempted to rape her. Without actual penetration, ejaculation can not occur inside the vagina. But the trace of semen on her petticoat indicates that he ejaculated while attempting to rape her. As such, an attempt to commit an offence u/s 511 of the IPC is established, though the said provision was not invoked by the police authority.

39. With our above conclusions, we are convinced that the accused attempted to rape the victim. Considering several external injuries on her buttocks and waist upwards on her back, could be signs of stiff resistance. The injury of 1 cm. width and 18 cm. length from the throat to her left side and 17 cm. from the throat to the right side with the fracture of the rings 2, 3, 4 in the mid line of the larynx, trachea and bronchi, would indicate strangulation of the victim with the piece of cloth which also carried her blood stains. The accused attempted to rape her and her resistance was sought to be neutralised by strangulating her so as to reduce the resistance with the intention that the body would fall weak and she would succumb to his lust. In this process, the accused ended up in strangulating the victim and being unsure as to whether she has actually died or not, he dragged the body over a distance of 9 ft and dumped her in the nearest dry pit available. He then pounded her face and skull with stones.

CIRCUMSTANTIAL EVIDENCE

40. Both the learned counsel have placed reliance upon reported judgments on appreciation of circumstantial evidence. We find that the first judgment which is said to be a classic exposition on appreciation of circumstantial evidence, is *Hanuman Govind Nargundkar and anr vs. State of M.P.* reported in *AIR 1952 SC 343* delivered by the Hon'ble Apex Court (three Judges Bench).

Considering the effect of Section 367 of the Cr.P.C., it was observed that, while dealing with circumstantial evidence, the rules specifically applicable to such evidence must be kept in focus. A case in which only circumstantial evidence is available, always gives rise to the danger that “conjecture or suspicion may take the place of legal proof”. In cases based on only circumstantial evidence, the entire circumstances from which the conclusion of guilt is to be drawn should, in the first place, be clearly established and all facts so established should be consistent only with the hypothesis of the guilt of the accused.

41. It would be apposite to reproduce paragraph 10 of the judgment in **Hanuman** (supra) as under:

“10. Assuming that the accused Nargundkar had taken the tenders to his house, the prosecution, in order to bring the guilt home to the accused, has yet to prove the other facts referred to above. No direct evidence was adduced in proof of those facts. Reliance was placed by the prosecution and by the courts below on certain circumstances, and intrinsic evidence contained in the impugned document, Ex.P-3A. In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof and therefore it is right to recall the warning addressed by Baron Alderson, to the jury in *Reg. v. Hodge*, ((1838) 2 Lewil 227), where he said :-

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters to overreach and mislead, itself to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

It is well to remember that in cases where the 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, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, 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. In spite of the forceful arguments addressed to us by the learned Advocate-General on behalf of the State we have not been able to discover any such evidence either intrinsic within Ex. P-3A or outside and we are constrained to observe that the courts below have just fallen into the error against which, warning was uttered by Baron Alderson in the above mentioned case.”

42. In **Gagan Kanojiya** (supra), the Hon’ble Apex Court was dealing with a case of kidnapping and murder of two children for ransom, based purely on circumstantial evidence. While concluding on the point of appreciation of circumstantial evidence, the Hon’ble Apex Court observed in paragraph no. 9 and 10 as under;

“9. The prosecution case is based on circumstantial evidence. 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 everyone 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 forwarded 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."

43. The Hon'ble Apex Court had an occasion to deal with yet another case of **Krishnan v. State represented by Inspector of Police** reported in (2008) 15 SCC 430, in which the issue of conviction on circumstantial evidence was considered. After appreciating the evidence of the witnesses and the medical record, it was observed in paragraph 15, 16, 17 and 18 as under:

"15. Before advertng to the above stated arguments advanced by the learned counsel for the parties, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with

the commission of the offences and the prosecution case entirely rests on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:-

- (i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (ii) those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;
- (iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and
- (iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. [See *Gambhir v. State of Maharashtra* (1982) 2 SCC 351 : 1982 SCC (Cri) 431 : AIR 1982 SC 1157.

See also *Rama Nand v. State of Himachal Pradesh* (1981) 1 SCC 511 : 1981 SCC (Cri) 197 : AIR 1981 SC 738, *Prem Thakur v. State of Punjab*, (1982) 3 SCC 462 : 1983 SCC (Cri) 88 : AIR 1983 SC 61, *Earabhadrapa v. State of Karnataka*, (1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446, *Gian Singh v. State of Punjab*, 1986 Supp. SCC 676 : 1987 SCC (Cri) 223 : AIR 1987 SC 1921 and *Balvinder Singh v. State of Punjab* (1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350.

16. As far back as in 1952 in *Hanumant Govind Nargundkar v. State of M.P.* [AIR 1952 SC 343], it was observed thus: (AIR pp. 345-46, para 10)

“10.It is well to remember that in cases where the 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, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, 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."

17. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra* (1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are (SCC p. 185, para 153) :
 - (i) 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;
 - (ii) 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;
 - (iii) the circumstances should be of a conclusive nature and tendency;
 - (iv) they should exclude every possible hypothesis except the one to be proved; and
 - (v) 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.
18. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.*, (1996) 10 SCC 193 : 1996 SCC (Cri) 1205, wherein it has been observed thus: (SCC pp. 206-07, para 21)

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence."

In Sashi Jena v. Khadal Swain, (2004) 4 SCC 236 : 2004 SCC (Cri) 1077, this Court again reiterated the well-settled principle of law on circumstantial evidence.

44. As such, we are called upon to test as to whether the chain of events is so complete that it does not 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. We are also required to assess that there should be no missing links and the 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. We also have to find out as to whether two inferences are available and in such a case, the one in favour of the accused must be accepted.

45. As observed above, we are of the view that, the prosecution could not bring on record evidence to prove that the accused actually committed rape as defined u/s 375 IPC. The medical evidence does not indicate that the accused has committed an offence u/s 376. The medical evidence also does not indicate penetration and ejaculation inside the vagina. Traces of semen are found only on the petticoat. Thus, the trial Court, in our considered view, has

committed an error in holding that the accused had raped the victim. We have therefore given the benefit of doubt to the appellant.

**DELAY IN RECORDING ADDITIONAL STATEMENT OF PW2 AND
STATEMENT OF PW 3 & PW4**

46. The ld. advocate for the appellant has strenuously criticized the delay caused by the Investigating Agency in recording the additional statement of the informant PW2 and the statements of PW3 and PW4. It is her contention that, registration of the FIR on 30.03.2009 followed by the arrest of the accused on suspicion at 08:45 pm on the same day and the delayed recording of the statements of PW2 (additional) and PW3 & 4, are fatal to the case of the prosecution. Per contra, the ld. APP has contended that the initial shock and terrifying experience of the two girls is bound to shake them to such an extent that they would not be in a state of mind to cool down and narrate the entire sequence. After the funeral on 30.03.2009, they have gradually narrated what they saw to the complainant. The evidence recorded indicates that as the police were investigating, they gathered knowledge about the presence of the accused and by the night of 30.03.2009, the accused was arrested.

47. The issue posed by the appellant is as regards whether the complainant has utilized the time of about four days for tutoring his daughter to create a story against the accused. We find from the

evidence of PW3 and PW4, who are natural witnesses, that they both had gone searching for the deceased in the forest. This indicates that they were aware that the deceased used to collect firewood from the said forest. There is no material on record, inasmuch as, the accused has not put forth a story of he having inimical terms or strained relations with the complainant or that there was any specific reason for the complainant to implicate the accused and orchestrate his conviction.

48. The core issue is, that the complainant has lost his wife in the said crime and whether he would be interested in accusing the appellant and seek his conviction without there being any previous enmity. We do not find any circumstances which would indicate falsehood on the part of the complainant and PW3 and PW4. So also, the contention of the appellant of being implicated will have to be tested in juxtaposition with the evidence that has been recorded and brought before the trial court through investigation. A sudden shock of the brutal death of the mother is bound to shake PW3. The police having gathered information as a part of their investigation, made them believe that the suspect could be the accused. In interrogation, the accused aided the police for recovering his clothes and the ornament. The Mani-mangalsutra of the deceased was also in his possession and was recovered at his instance. As such, we do

not find that the delay in recording the statements of PW3 and PW4 would be fatal to the case of the prosecution in proving the involvement of the accused in committing the crime.

DEFECTIVE INVESTIGATION

49. The appellant has relied upon the case of **Sukumaran** (supra) to support her case that the presence of the blood stains of the accused on his clothes allegedly used while committing the crime, would not prove the offence against the accused. So also, reliance is placed on **Jairnail Singh** (supra) to contend that defective investigation is a significant issue and that would give rise to a serious doubt and benefit of such infirmities should be given to the accused. The Id. APP has relied upon **Mir Mohammad Omar** (supra) wherein the Hon'ble Apex Court has held that every investigation in a criminal case cannot be completely foolproof and completely flawless. It is almost impossible to come across a single case wherein the investigation can be said to be absolutely flawless. The circumstances and evidence on record are to be considered in totality while concluding as to whether the guilt is proved or not. Merely because there may be a flaw or a lapse in the investigation, would not *ipso facto* be a basis for concluding that the entire evidence be discarded only because there is a flaw in the investigation. The flaw or defect in investigation should be of such a

magnitude that the entire case of the prosecution, notwithstanding the evidence brought on record, would collapse.

50. In our view, on account of the time lag in recording the statements of PW3 & PW4, would not be a ground to demolish the entire investigation considering the quality of the evidence before us. In **Mir Mohammad Omar** (supra), the Hon'ble Apex Court observed in paragraph nos. 40, 41 and 42 as under:

“40. The Division Bench of the High Court instead of dealing with the circumstances of the case and issues involved made only some general comments and after castigating the investigating officers in severe language reached the final part of its judgment upholding the conviction under Section 364/34 Indian Penal Code and reduced the sentence to the period which the convict had already undergone. The Division Bench used unkind remarks against the investigating officer saying "investigation of the case was perfunctory and suffered from serious lacuna and irregularity".

41. Learned Judges of the Division Bench did not make any reference to any particular omission or lacuna in the investigation. Castigation of investigation unfortunately seems to be a regular practice when the trial courts acquit accused in criminal cases. In our perception it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Efforts should be made by courts to see that criminal justice is salvaged despite such defects in investigation. Courts should bear in mind the time constraints of the police officers in the present system, the ill-equipped machinery they have to cope with, and the traditional apathy of respectable persons to come forward for giving evidence in criminal cases which are realities the police force have to confront with while conducting investigation in almost every case. Before an investigating officer is imputed with castigating remarks the

courts should not overlook the fact that usually such an officer is not heard in respect of such remarks made against him. In our view the court need make such deprecatory remarks only when it is absolutely necessary in a particular case, and that too by keeping in mind the broad realities indicated above.

42. In the present case we have not come across any such serious flaw in the investigation which had affected the case or which would have impaired the core of the prosecution case justifying or warranting the pejorative remarks made by the Division Bench of the High Court against the investigating officers.”

[Emphasis supplied]

51. We are, therefore, of the considered view that the time lag does not have the magnitude and effect adverse to the investigation so as to destroy the quality of evidence brought before the trial Court. We do not find any such serious flaw in the investigation which would impair the core of the prosecution case and convince us to discard the entire evidence brought on record.

52. Applying the principles or the tests for assessing whether the guilt has been fully established by virtue of circumstantial evidence, we are of the considered view that the testimony of the witnesses beginning with the movement of the accused towards the forest and culminating with the discovery and recovery of the necklace worn by the victim, proves the offence committed. While testing the denial of the accused that he never made such a statement, we find that such plain denial is completely neutralized by the fact that the panchanama of the stone below the

tamarind tree and recovery of the necklace and the clothes clearly outweigh such denial and do not give rise to any other inference than the conclusion that he had hidden the necklace that he removed from the body of the victim. The evidence of the sniffer dog is in corroboration and strengthens the conclusion drawn by the trial Court which we approve of. We are conscious of the fact that, the purported confession given by the accused in the police station, is of no consequence and we therefore do not given much importance to the same. However, it cannot be overlooked that the accused led the police to the tamarind tree and dug out the Mani-Mangalsutra from below a stone. It is not the case of the accused that this article belonged to him or that it was planted by the police under the tamarind tree and a make believe picture was created of unearthing the article as if by way of a discovery and recovery under the guidance of the accused.

53. In view of the above, this appeal is partly allowed. The impugned judgment to the extent of the conclusion that the accused committed rape on the victim punishable u/s 376 of the IPC, is set aside. Instead, the offence committed by the accused, while murdering the victim, in attempting to rape her which was the actual cause leading to her murder, would attract Section 511 of the IPC and will have to be read with Section 376 of the IPC. We are,

therefore, reducing the sentence of seven years awarded by the trial court to the accused u/s 376 IPC to half of the sentence in view of the Section 511 of the IPC. This sentence shall run concurrently with the sentence awarded by the trial Court to the accused for the murder of the victim punishable u/s 302 of the IPC, which stands confirmed. Fine of Rs. 500/- imposed by the trial court for the conviction of the accused u/s 376 IPC, is maintained.

54. This court had appointed Smt. Yogita M. Kshirsagar-Thorat on behalf of the appellant-accused. We record our appreciation for the assistance rendered by her and the learned APP - Shri. S. G. Sangle. We are quantifying the fees of advocate Smt. Yogita M. Kshirsagar-Thorat at Rs. 15,000/- to be paid by the High Court Legal Services Sub-Committee, Aurangabad.

[B. U. DEBADWAR]
JUDGE

[RAVINDRA V. GHUGE]
JUDGE