

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.578 of 2016

Arising Out of PS. Case No.-28 Year-2013 Thana- SIMRI District- Darbhanga

Hassan Sarwar, S/o Nabi Karim, resident of village- Birdipur, P.S.- Simari,
District- Darbhanga

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Iqbal Asif Niazi, Advocate
For the Respondent/s : Mr. Abhimanyu Sharma, APP

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE HARISH KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE HARISH KUMAR)

Date : 21-06-2023

Heard Mr. Iqbal Asif Niazi, learned counsel for the appellant and Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State.

2. The present appeal has been preferred by the sole appellant assailing the impugned judgment of conviction dated 11.04.2016 and order of sentence dated 12.04.2016 respectively passed by learned 1st Additional Sessions Judge, Darbhanga in Sessions Trial No. 306 of 2013, arising out of Simri P.S. Case No. 28 of 2013 whereby the appellant has been held guilty and convicted under Sections 376, 302 and 201 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life



for charge under Section 302 of the Indian Penal Code and to pay fine of Rs.20,000/- (twenty thousand) and in default of payment of fine to undergo R.I. for five years. Further sentenced to undergo for ten years for the charge under Section 376 of the Indian Penal Code and to pay fine of Rs.10,000/- (ten thousand) and in default of payment of fine to undergo R.I. for three years. The appellant further sentenced to undergo R.I. for seven years under Section 201 of the Indian Penal Code and to pay fine of Rs.5,000/- (five thousand) and in default of payment of fine to undergo R.I. for two years. However, all the sentences referred above were directed to run concurrently.

3. As per the mandate of not disclosing identities of the victims of sexual offences under Section 228A of the Indian Penal Code, which ought to be observed even by this Court also, we are referring the name of the victim as 'X' or deceased or victim girl.

4. The prosecution case is based on the *fardbeyan* of the informant (PW-5) Shakila Khatoon recorded by (P.W.9) S.1. Amar Nath Sah, SHO of Simri police station on 14.03.2013 at 7:30 hours, alleging therein, that on 13.03.2013 at about 2.00 PM, the grand daughter of informant namely (X), aged about 8 years, went outside for playing, but she did not return home.



After making all efforts and hectic search, the victim could not be traced out. On the next morning at about 6.00 A.M. some villagers witnessed the dead body of grand daughter of informant lying at the bank of pond and blood was oozing from of nose of victim girl. It is further alleged that from the dead body it appears that someone after pressing mouth and neck committed murder of victim girl and threw her dead body in lonely place.

5. On the basis of fardbeyan of Informant (P.W.5) Simri P.S. Case No.28 of 2013 dated 14.03.2013 has been registered for the offence under Section 302 of the Indian Penal Code against unknown and accordingly formal FIR was drawn up.

6. The S.H.O. Simri Police Station Amar Nath Sah (PW.9) took up investigation of the case and visited at the place of occurrence, recorded statements of witnesses and sent the body of the deceased to Darbhanga Medical College and Hospital for postmortem examination. During the course of investigation Sections 376 and 201 of the Indian Penal Code were added by the order of the learned Chief Judicial Magistrate, Darbhanga on 23.03.2013. The investigating officer apprehended the accused and remanded in the case and after



completion of investigation submitted charge sheet/ final report under Section 173 of the Cr.P.C. against the accused/appellant for the offences under Sections 376, 302, 201 Indian Penal Code. On the basis of the aforementioned final report/charge-sheet, the learned Chief Judicial Magistrate, Darbhanga took cognizance of offences under Sections 376, 302 and 201 Indian Penal Code and committed the case to the Court of Sessions.

7. After commitment, charges under Sections 302, 376 and 201 Indian Penal Code were framed on 29.07.2013 against the accused/appellant. The charges were read over and explained to accused/appellant, which has been denied by him and pleaded not guilty and claimed to be tried.

8. At the trial, altogether 9 prosecution witnesses were examined to prove the charges against the accused/appellant.

P.W.- 1 is Nuzhat Jahan (mother of the deceased), P.W.-2 is Md. Kalam (neighbour of the informant), P.W.-3 is Shamima Khatoon (Cousin grand mother of victim), P.W.- 4 is Ishmat Aara (Aunt of victim). P.W.-5 is Shakila Khatoon (informant herself). P.W.-6 is Doctor, Vijay Pratap Singh. P.W.- 7 is Jayauddin Haider (Grand father of victim girl), P.W.- 8 is Surendra Paswan and P.W.- 9 is Amar Nath Sah (investigating



officer of the case).

9. The prosecution got exhibited the following documentary evidence. Ext.-1 Postmortem report, Ext.-2 signature of P.W.7 on seizure list. Ext. 2/A signature of Md. Sagir on seizure list. Ext.3 signature of P.W.-8 on seizure list, Ext.3/1 signature of Ejaj Ahmad on seizure list, Ext.4 Sanha Entry No. 289 dated 14.03.2013. Ext.5 fardbeyan of informant. Ext.6 Carbon copy of inquest report, Ext.7 to Ext.7/G, Ext.8 to Ext.8/B sight plan map of Place of occurrence. Ext.9 forwarding letter to FSL Bihar, Patna of seized articles. Ext. 10 FSL report dated 12.07 2013. Ext.10/1 report dated 17.07.2014. Besides above, the prosecution has produced and proved the material exhibit i.e. Ext.I plastic rope, Ext.II obscene novel, Ext.III Black T-shirt and Ext-IV phenyl bottle.

10. The defence has preferred not to adduce any oral evidence, but has produced and proved Ext.-A seizure list dated 14.03.2012, Ext.A/1 seizure list dated 16.03.2013, Ext.-B Sanha Entry No. 300. Ext.-B/1 Sanha Entry No. 312 and Ext.-B/2 Sanha Entry No. 315.

11. From the materials available on record, it appears that P.W.1 Nujhat Jahan is mother of the deceased. She supported the prosecution case and deposed that the alleged



occurrence took place on 13.03.2013 at 2.00 P.M. On the relevant time her daughter had gone to play, but she did not return home. Despite hectic search, her daughter could not be traced out and on the next day in morning, the dead body of victim was found at the bank of Bagla Pokhar. In her deposition, she also stated that blood was oozing from nose of her daughter and her clothes, including undergarments, were blood stained and on seeing the victim girl, it revealed that she was ravished. She further deposed that P.W.2 Md. Kalam revealed her that the deceased was seen accompanying with the appellant and thereafter dead body of victim girl was recovered. The Police recovered rope, bottle of phenyl, blood stained bed sheets and clothes from the house of the appellant. In her cross-examination, she further deposed that the appellant is her villager and his house is situated 10 Lagga away from her house. On the alleged day of occurrence she was at her Naihar and she came to know about disappearance of her daughter at 6.00 PM in the evening, but she is unable to disclose from where she got acquainted with the fact. She denied the suggestion that at the instance of villagers and on account of enmity she falsely implicated the accused/appellant.

12. P.W.2 Md. Kalam, who happens to be the



neighbour of the informant, has supported the prosecution case and in his deposition he has stated that the alleged occurrence took place 4 months ago at 2.00 PM when he was going to Chowk and witnessed that this appellant accompanying with victim girl was going towards his house, thereafter he went to Sasural. It is further stated that on the next day when he returned from his sasural and revealed the dead body of victim girl, soon thereafter he narrated the matter to the informant and mother of the victim. He identified the appellant in dock. In cross-examination he stated that when he was going to Chowk, there was no traffic on road. He further stated that the house of the appellant is situated about 15-20 houses from the house of victim girl.

13. P.W.3 Shamima Khatoon happens to be the cousin grandmother of deceased (X). She deposed that the alleged occurrence took place 4 ½ months back and on that day at 2.00 P.M. the victim girl, who had gone to play, could not be traced out despite all the efforts and on next morning dead body of victim was found at the bank of pond. She further stated that she came to know from Md. Kalam (PW.2) that deceased was murdered and her dead body was thrown at the bank of pond. She also claimed to identify the accused/appellant present in



dock. In cross-examination she stated that informant is her *Deyadin* and both of them residing in same courtyard. She further stated that the police seized blood from *verandah* of room situated in mobile tower, but she did not witness. She shown her ignorance that watchman of mobile tower was apprehended. In para 7 of her deposition, she stated that she came to know regarding disappearance of victim girl on next day and thereafter she learnt that the appellant after committing rape murdered the victim girl. She further admitted that she did not witness alleged occurrence and denied the suggestion that the accused/appellant has been falsely implicated at the instance of sasural people.

14. P.W.-4 Ismat Aara, who happens to be the aunt of victim girl. While supporting the prosecution case deposed before the learned trial court that on the alleged date of occurrence she along with others went to search, but the victim girl could not be traced out and on the next morning dead body of victim girl was found at the bank of Bagla pokhar. The dead body was brought in courtyard and blood was oozing from her nose and there were marks of wound on hand and legs. She came to know that accused/appellant after committing bad work murdered the victim girl. In cross-examination, she stated that



she is not known that from whom she learnt about the alleged incident. Further she denied the suggestion with regard to false implication of the accused/appellant in the case.

15. P.W. 5 Shakila Khatoon is the informant of the case, who supported the prosecution case. She testified that alleged occurrence took place 4 ½ months back. Her grand daughter (victim girl) had gone outside at 2.00 P.M. in order to play and did not return back home. Despite hectic search, the victim girl could not be traced out. She further stated that on the next day in the morning, the dead body of victim girl was found at the bank of Bagla pokhar, thereafter she rushed there and witnessed that blood was oozing from nose of victim girl and her both hands were tied. She further stated that on the next day Md. Kalam met with her and disclosed that appellant was seen accompanying with victim girl. Thereafter she accompanying with police went to the house of appellant and from the house of appellant rope, blood stained *ganji* and blood stained bottle of phenyl and bed sheet were recovered. She stated that appellant Hassan Sarbar after committed rape with victim girl committed her murder. Police recorded her fardbeyan and read over the contents and after understanding the same she put her thumb impression. She claimed to identify accused present in dock.



She corroborated her statement made before the police that at 2.00 PM. she went to the house of Sabra Khatoon and there is tower of Air Tel company nearby house of her cousin sister Sabra Khatoon in which there is room of guard and there is boundary wall around the tower and from where blood spot and bunch of hairs were found. In para. 6 she stated that on the day of recovery of dead body of victim girl the police apprehended guard Shambhu Paswan. She admitted that appellant Hassan Sarbar is cousin of husband of Sabra Khatoon and she denied the suggestion that the appellant had litigating term with the husband of Sabra Khatoon.

16. PW.6 Doctor Vijay Pratap Singh, who was posted as Tutor in Darbhanga Medical College and Hospital, Forensic Medicine and Toxicological Department conducted postmortem examination of the dead body of victim girl and found sands and dried mud over the body of deceased. He further noted the following findings.

(i) Blood stains were found present over lips and left nostril.

(ii) Circular bruise marks 2" x 1/2" over both wrist joint and both ankle joints.

(iii) Swelling 1 1/2" diameter was found over mid



frontal region.

(iv) Underlying scalp tissue showed 1 ½”x ½”
bruise area in the mid frontal region. Extradural and intracranial
haemorrhage was found caused by some hard and blunt object.

(v) All abdominal and thoracic viscera were found
congested. The right side of heart was full and left side of heart
was found empty. Uterus was normal. Vaginal orifice was
abraded. Hymen was found torn. Swabs from the vagina was
taken and examined under microscope and multiple dead
spermatozoa were found in the vaginal smear. Vaginal injury
was due to forceful sexual intercourse with emission.

17. The doctor opined above noted injuries over the
head was ante-mortem caused by hard and blunt object and
cause of death occurred due to intracranial haemorrhage and
shock. The doctor opined that there was forceful sexual
intercourse with emission with her and age of victim was opined
eight years. He proved postmortem report Ext.1. In cross-
examination the doctor corroborated that extradural and
intracranial haemorrhage caused underlying tense of abrasion of
mid frontal region was the cause of death of deceased and
vaginal injury was forceful intercourse with emission.

18. P.W-.7 Jayauddin is grandfather of victim girl.



He supported the prosecution case and stated in his deposition that he witnessed the dead body of victim (X). The Police seized blood stained small pieces of clothes, hair and thread from the land of accused situated adjacent to mobile tower and prepared seizure list. He put his signature (Ext.2) on the seizure list. He identified the accused/appellant present in dock.

19. P.W.-8 Surendra Paswan (seizure list witness) has testified the alleged occurrence. In his deposition he stated that the victim girl was ravished and rapped and her dead body was recovered from nearby place of Bagla pond and blood was oozing from nose. This witness further stated that the police had come and went to the house of appellant and apprehended him and on next day from the house of appellant bottle containing phenyl, rope, bed sheets and other articles were recovered. The police seized the aforesaid articles in his presence and he put his signature over the seizure list. In cross-examination this witness stated that the seized articles are not before him. He further stated that he put his signature on plain paper and thereafter contents on plain paper are written. He further admitted that the police had not recorded his statement.

20. P.W.-9 Amar Nath Sah is the investigating officer of the case. In examination-in-chief he has stated that on



14.03.2013 he was posted at Simri police station as SH.O. and on that day at 6.30 A.M. Dafadar Md. Taukir informed on mobile that dead body of a female child is lying at bank of Bagla pond whereupon he entered Sanha Entry No.289 dated 14.03.2013 and after constituting police party proceeded towards the place of occurrence where he recorded fardbeyan of Shakila Khatoon and he took up the charge of investigation of the case and also recorded restatement of informant and also prepared inquest report in presence of two independent witnesses. He also seized clothes, undergarments with blood stain of victim girl in presence of two independent witnesses and sent the dead body for post-mortem examination. He found spot of blood at the place of occurrence. He prepared sketch map of place of occurrence and after visiting place of occurrence he came to conclusion that after committing murder of deceased in another place her dead body was thrown near the pond in order to disappear the evidence. He inspected the dead body of deceased and found there were mark of tying with rope on both wrists and both legs. He recorded statements of witness Jakariya, Shakila Khatoon, Ishmat Aara and Jawed Alam. During course of investigation around the place of occurrence near Airtel tower two pieces of tiles with blood stained was



found and in presence of two independent witnesses he seized the aforesaid articles and sent the same to FSL for chemical analysis. He also prepared sketch map near the place of Airtel tower from where blood stained tiles were recovered. He also seized one pair of sandals from outside room of guard of Airtel tower and prepared seizure list and sent the same to FSL for chemical examination. In cross-examination he admitted that he sent the material exhibit to FSL for its chemical examination. He recorded re-statement of informant and also recorded the statement of Syara Khatoon and Sahnaj Begum. In para. 14 he corroborated that he inspected the room of Md. Hassan with expert team of FSL, Patna and collected swab and prepared seizure list. In para.15 he corroborated that on 14.03.2013 at 10.30 A.M. he recovered one bottle containing phenyl, one plastic rope, obscene novel, one shirt, one sandal from the room of accused and prepared the seizure list. He also took photograph from bed room of accused. He also recorded statement of witness Kalam, who supported the prosecution case and after completion of investigation found the case true under Sections 302, 376 and 201 of the Indian Penal Code against the appellant and submitted charge sheet. He denied the suggestion that he has not properly investigated the case and he has done in



favour of Informant.

21. After closure of the evidence of prosecution witnesses, the circumstances emerging in their evidences against the appellant were explained to the appellant in compliance of the requirement under Section 313 of the Cr.P.C.

- “प्रश्न :- क्या आपने गवाहों का ब्यान सुना है ?
उत्तर :- जी हाँ ।
प्रश्न :- आपके विरुद्ध अभिलेख पर साक्ष्य है कि आपने दिनांक 13.3.13 को 2 बजे दिन में मृतका आयसा उम्र करीब 8 वर्ष को ग्राम बिरदीपुर थाना सिमरी जिला दरभंगा में साक्षी सं०-2 के द्वारा आयसा खातून को आपके साथ देखी गयी, उसके बाद वह मृत अवस्था में आपके घर के कुछ दूर मोबाईल टॉवर के नजदीक बंगला पोखर पर पायी गयी ?
उत्तर :- जी नहीं ।
प्रश्न :- आपके विरुद्ध अभिलेख पर यह भी साक्ष्य है कि आप दि० 13.3.13 को ग्राम बिरदीपुर थाना सिमरी जिला दरभंगा स्थित अपने घर में सूचिका शकीला खातून की पोती आयसा खातून उम्र करीब 8 वर्ष के साथ बलात्कार किया एवं बलात्कार करने के बाद हत्या कर साक्ष्य मिटाने की नियत से आयसा की लाश को बंगला पोखर ग्राम-विरदीपुर थाना सिमरी जिला दरभंगा के फेंक दिया, बलात्कार की पुष्टि मृतिका के पोस्टमार्टम रिपोर्ट एवं विधि विज्ञान प्रयोगशाला के रिपोर्ट से हुई है ?
उत्तर :- जी नहीं ।
प्रश्न :- आपके विरुद्ध अभिलेख पर यह भी साक्ष्य है कि आयशा खातून की हत्या का साक्ष्य मिटाने की नियत से आपने अपने घर एवं कपड़े को फिनाईल से साफ किया तथा आपके घर से एक बोतल फिनाईल पिला रंग का प्लास्टीक का रस्सी पुराना अश्लील किताब एक काले रंग का टी शर्ट जिससे फिनाईल का गन्ध आ रहा था तथा रूई पर इकत्र किया हुआ स्वाव आपके शयन कक्ष के आलमीरा के पास मिला तथा मृतिका आयसा खातून का खून लगा हुआ चद्दी भी मिला जिसे पुलिस द्वारा बरामद किया गया ।
उत्तर :- जी नहीं ।
प्रश्न :- सफाई में कुछ कहना है ?
उत्तर :- मैं निर्दोष हूँ।”



22. Further the defence also produced and proved Ext.-A and Ext. A/1 seizure lists dated 14.03.2013, Ext.-B, B/1 and B/2 Sanha Entry No. 300 dated 14.03.2013, Sanha Entry No. 312 dated 15.03.2016 and Sanha Entry No. 315 dated 15.03.2013. Ext. C certified copy of the F.I.R. of Mahila P.S. Case No. 22 of 2013, Ext.D certified copy of the charge-sheet submitted in Mahila P.S. Case No. 22 of 2013, Ext. E S.D. Entry No.417 dated 14.08.2009 and Ext. E/1 S.D. Entry No.425 dated 14.08.2009.

23. The learned trial court having considered the materials on record vide judgment dated 11.04.2016 convicted the accused/appellant for the offences under Sections 302, 376 and 201 of the Indian Penal Code and vide order dated 12.04.2016 passed the order of sentenced, as fully described in para. 1 of this judgment.

24. The learned trial court while passing the judgment of conviction has taken note of the fact that on careful scrutiny of evidence of P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.9 and inquest report, post-mortem report, testimony of P.W.6 corroborated by Ext.7 Series and Ext.10 series as well as material exhibits referred above clearly established that the victim (X) was brutally raped and in that course various injuries



were caused to her and subsequently her hands and legs were strangled, as a result thereof she died. The learned trial court has also taken note of the fact that the accused/appellant was lastly seen in company of the deceased. However, in the statement recorded under Section 313 of the Cr.P.C. the accused failed to offer reasonable and convincing explanation as to when, why, where and in what circumstances he had parted with deceased. The learned trial court also taken note of the settled principle of law that when a fact is explainable and within special knowledge of accused/appellant, who faces trial and accused/appellant chooses not to offer explanation, it becomes an additional link in circumstances and when accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory of hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation as an additional link which completes the chain. The learned trial court found that the chain of circumstance that accused/appellant was last seen in company of victim girl and on next morning her dead body was found by the side of tank and from the house of accused rope, blood stained clothes, bed-sheets, naked novels recovered.



25. The learned trial court has taken further note of the fact that the defence of the accused that he has been falsely implicated in the case due to village politics has not been established inasmuch as the documents which were exhibited on behalf of the defence showing the matrimonial dispute, the accused has not filed any cogent and reliable evidence. Further P.W.3, cousin grandmother of the victim girl also corroborated the statements of P.W.1 and P.W.4 which are also consistent on the point that the victim girl went outside in order to play and thereafter disappeared and thereafter the dead body was found at the bank of tank. Further, the defence is not able to disprove the testimony of P.W.2, who disclosed that on the alleged day and time of occurrence while he was going to take Gutkha he witnessed the victim girl in company of accused. The learned trial court while convicting the accused/appellant also took note of the fact that P.W.6 (Doctor) in his deposition stated that the murder may be caused after commission of rape. The doctor found multiple dead spermatozoa in the vaginal smear and vaginal injury was due to forceful sexual intercourse with emission. The doctor also found circular bruise over both wrists and ankle joints and opined that it may be caused by tying some rope and positive evidence was available to suggest forceful



sexual intercourse with the victim girl. The doctor assessed the age of victim girl, as eight years. The material exhibits I to IV prove that the plastic rope, naked novel, black T. shirt and bottle of phenyl were recovered from the room of accused. Ext.6 (inquest report) proves that while preparing inquest report, the investigating officer found that blood was oozing from nose the deceased. Ext. 7 series prove that investigating officer obtained undergarments containing spot of blood of victim girl and the investigating officer also seized spot like blood from Airtel tower and also articles from the house of accused referred above. Ext. 10 series revealed that swab which was collected from the room of accused was of human blood.

26. On the basis of the aforesaid discussions, the learned trial court held that the victim (X) was raped by the accused/appellant and thereafter murdered and her dead body was smothered by accused and non-else with intention to cause disappearance of evidence.

27. The sole appellant on being aggrieved by the judgment of conviction and order of sentence preferred the present appeal and submits that the impugned judgment suffers from the legal as well as factual infirmities and the findings therein are perverse and liable to be set aside and the appellant



is liable to be acquitted. The submissions of the learned counsel for the appellant, inter alia, that the learned trial court failed to appreciate that there is not a single eye witness of the occurrence. He further submits that the learned trial has not considered the fact that blood stain spot and one thread of red colour were recovered from the place of Airtel Tower of Hassan Sahid and not from the land of the appellant, apart from the fact there is subsequent improvement and contradiction in the testimony of P.Ws. and the medical findings does not corroborate the allegation of rape. He also submits that P.W.2 Md. Kalam stated that the appellant was last seen with the deceased, but no other evidence was produced on record against the appellant connecting him with the alleged occurrence. He next submitted that the learned trial court failed to appreciate the fact that the witnesses examined by the prosecution are highly interested witnesses and inimical to the appellant. While concluding his submission, he vehemently submitted that the entire case is based upon circumstantial evidence, but the impugned judgment has over looked the distortion of chain in events and pronounced the same in haste and further there is no compliance of the mandatory provisions of Section 53-A of the Code of Criminal Procedure (hereinafter referred to as 'the



Cr.P.C.’) and failure to conduct the DNA test or carrying out DNA profiling would necessarily result in the failure of the prosecution case.

28. Learned counsel for the appellant in order to buttress his submission made reliance upon the judgments rendered by the Hon’ble Supreme Court in the case of **Rambraksh @ Jalim Vs. State of Chhattisgarh**, reported in **(2016) 12 SCC 251** on the point of last seen theory. It is submitted that a conviction cannot be recorded against the accused merely on the ground that accused was last seen with the deceased. Further reliance has been made on a recent judgment of the Hon’ble Supreme Court in the case of **Jabir Vs. The State of Uttarakhand** passed in **Cr. Appeal No(s). 972 of 2013** on the point of conviction on the basis of circumstantial evidence and last seen theory wherein the Hon’ble Supreme Court in para. 21 has been pleased to observe, which reads as under:

“21. A basic principle of criminal jurisprudence is that in circumstantial evidence cases, the prosecution is obliged to prove each circumstance, beyond reasonable doubt, as well the as the links between all circumstances; such 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; further, the facts so proved should unerringly point towards the guilt of the accused. 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.”

29. On the other hand Mr. Abhimanyu Sharma, learned APP for the State vehemently contested the arguments made on behalf of the learned counsel for the appellant and submitted that the judgment/order of conviction and sentence passed by the learned trial court is based on the testimonies of the prosecution witnesses and the material exhibits and thus the prosecution has been able to prove the charges beyond all its reasonable doubts. He further submits that there is complete chain of circumstances that accused/appellant was last seen in the company of victim girl and on the next morning dead body of the victim girl was found by the side of pond and from the house of accused rope, blood stained clothes, obscene novels, bottle of phenyl were recovered, apart from the aforesaid fact



the accused/appellant choses not to offer explanation when he was confronted with the specific question about the whereabouts of the victim, who had lastly seen accompanying the accused. Thus the accused/appellant did not throw any light upon the facts, which were specific within his knowledge and which could not support any theory of hypothesis compatible with his innocence, hence his failure to adduce any explanation, is an additional link, which completes the chain.

30. In order to appreciate the submissions made on behalf of the appellant this Court thinks it apposite to deal with the certain issues involved in the present matter. It is trite law that “solely on account of defects or short comings” and thus lapse or omission (purposeful or otherwise) to carry out DNA profiling in terms of Section 53-A of the Cr.P.C. by itself cannot be permitted to decide the fate of a trial for the offence of rape especially when it is combined with the commission of the offence of murder. The aforesaid issue with regard to examination of a person/accused of rape by medical practitioner has been elaborately dealt with the Hon’ble Supreme Court in the case of **Veerendra Vs. State of Madhya Pradesh**, reported in **(2022) 8 SCC 668** wherein three Judges Bench of the Court considering the earlier judgments has been pleased to hold that



in view of the nature of the provision under Section 53-A of the Cr.P.C. and the decision referred to hold that non-conduct of DNA profiling in terms of the provisions under Section 53-A Cr.P.C. is a flaw in the investigation. But then, it cannot be the sole reason in interference with the judgment of conviction if rest of the evidence is cogent enough to sustain the same. This Court thinks it apt to reproduce paragraph nos. 44, 45, 46, 49, 52 and 53 of the aforesaid judgment.

“44. Before advertng to the said issue, it is only proper to deal with a crucial contention of the appellant founded on Section 53-A of the Code of Criminal Procedure, which was added to the Code by Criminal Procedure Code (Amendment) Act, 2005 (Act 25 of 2005). The relevant portion of Section 53-A(1) reads thus :-

“[53-A. Examination of person accused of rape by medical practitioner.-(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the



Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.”

45. The above extracted provision under Section 53-A(1) Cr.P.C. would go to show that it provides for a detailed examination, [which term has been explained under Explanation (a) to Section 53-A Cr.P.C.], of a person accused of an offence of rape or attempt to commit rape, by a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of 16 km from the place where the offence has been committed, by any other registered medical practitioner. It is the said legal provision and the undisputed factual position of non-conduct of DNA profiling of the samples of the appellant that made him to take up the



contention of violation of Section 53-A Cr.P.C. In the said circumstances, he would further contend that there is absence of conclusive evidence to connect him with the samples taken from the body of the deceased. Certainly, non-conduct of DNA profiling in terms of the provisions under Section 53-A Cr.P.C., is a flaw in the investigation. But then, the question emerged from the aforesaid indisputable position of not holding DNA profiling is whether the conviction of the appellant for the said offences, is liable to be set aside on that sole score.

46. There can be no doubt with respect to the position that a fair investigation is necessary for a fair trial. Hence, it is the duty of the investigating agency to protect the rights of both the accused and the victim by adhering to the prescribed procedures in the matter of investigation and thereby to ensure a fair, competent and effective investigation. Even while holding so, we cannot be oblivious of the well-nigh settled position that solely on account of defects or shortcomings in investigation an accused is not entitled to get acquitted. In other words, it also cannot be the sole reason for interference with a judgment of conviction if rest of the evidence is cogent enough to sustain the same.

49. Krishna Kumar Malik's vs. State of



Haryana, (2011) 7 SCC 130 was rendered by a two-Judge Bench of this Court, wherein at paragraph 43 with respect to the matching of the semen, the following passage from Taylor's Principles and Practice of Medical Jurisprudence, 2nd Edn. (1965) was extracted thus :-

“Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods after emission when the fluid has been allowed to dry. Sharpe found identifiable spermatozoa often after 12 months and once after a period of 5 years. Non-motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months.”

52. Evidently, the three Judge Bench in Sunil Vs. State of M.P., (2017) 4 SCC 393 considered Krishna Kumar Malik's case



carrying such observations and finding before coming to the conclusion that:

“4. ... A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e., favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered’.

53. In view of the nature of the provision under Section 53-A Cr.P.C and the decisions referred to we are also of the considered view that the lapse or omission (purposeful or otherwise) to carry out DNA profiling, by itself, cannot be permitted to decide the fate of a trial for the offence of rape especially, when it is combined with the commission of the offence of murder as in case of acquittal only on account of such a flaw or defect in the investigation the cause of criminal justice would become the victim. The upshot of this discussion is that even if such a flaw had occurred in the investigation in a given case, the Court has still a duty to consider whether the materials and evidence available on record before it, are enough and cogent to prove the case of the prosecution. In a case which rests on circumstantial evidence, the Court has to consider whether, despite such



a lapse, the various links in the chain of circumstances form a complete chain pointing to the guilt of the accused alone in exclusion of all hypothesis of innocence in his favour.”

31. Further, the point for consideration before this Court, as submitted on behalf of the learned counsel for the appellant is as to whether it would be prudent to base the conviction solely on “last seen theory”. It is needless to observe that it has been established through a catena of the judgments of this Court that the doctrine of last seen, if proved, shifts the burden of proof to the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last seen with him. Failure on the part of the accused to furnish any explanation in this regard as in the case in hand, or furnishing false explanation would give rise to a strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances.

32. The Hon’ble Supreme Court on the issue of “last seen theory” in the case of **State of Rajasthan Vs. Kashi Ram**, reported in **(2006) 12 SCC 254**, in para 23 held as follows:

“23. It is not necessary to multiply with authorities. The principle is



well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd.,



AIR 1960 Mad 218:1960 CrL LJ 620.”

33. True it is that the Hon’ble Supreme Court in the case of **Nizam Vs. State of Rajasthan**, reported in **(2016) 1 SCC 550** held that it would not be prudent to pass conviction solely on “last seen theory”. This Court, obviously, sounded a caution that where time gap between “last seen” and “time of occurrence” is long it would be unsafe to base the conviction solely on the “last seen theory” and held that in such circumstances, it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution.

34. The case in hand where P.W. 2 Md. Kalam proved that the appellant was lastly seen with the deceased at about 2.00 P.M. and thereafter in the morning the dead body of the victim was found. The onus is upon the appellant to show that either he was not involved in the occurrence at all or that he had left the deceased at her home or at any other reasonable place. To rebut the evidence of last seen and its consequences in law, the onus was upon the accused to lead evidence in order to prove his innocence.

35. Now the question for consideration before this Court is as to whether the case in hand the time gap between last seen and the time of occurrence is long, which would be unsafe to base the conviction of the appellant.



36. The time gap between the accused person having been seen with the victim and death of deceased is quite proximate, as the postmortem report (Ext-1) reveals the time elapsed since death from the postmortem is 18-24 hours. It is needless to say that as per the aforementioned postmortem report, the postmortem was conducted on the dead body of the victim, at about 11.30 AM on 14.03.2013 and thus as per the report, the death would have been taken place in between 11.30 AM to 5.30 PM on 13.03.2013. Hence, the proximate time of crime and the circumstance of last seen together appears to be very thin. At this juncture, it would be apposite to refer the observations of the Hon'ble Supreme Court made in the case of **Amit @ Ammu Vs. State of Maharashtra**, reported in **(2003) 8 SCC 93**, especially paragraph 9 thereof, which reads as under:

“9. The learned counsel for the appellant has placed reliance on the decision of this Court by a Bench of which one of us (Justice Brijesh Kumar) was a member in Mohibur Rahman v. State of Assam, (2002) 6 SCC 715 for the proposition that the circumstance of last seen does not by itself necessarily lead to the inference that it was the accused who committed the crime. It depends upon the facts of each case. In the decision relied upon it has been observed that there may be cases where, on account of close proximity of place



and time between the event of the accused having been last seen with the deceased and the factum of death, a rational mind may be persuaded to reach an irresistible conclusion that either the accused should explain how and in what circumstances the victim suffered the death or should own the liability for the homicide. The present is a case to which the observation as aforesaid and the principle laid squarely applies and the circumstances of the case cast a heavy responsibility on the appellant to explain and in absence thereof suffer the conviction. Those circumstances have already been noticed, in which case such an irresistible conclusion can be reached will depend on the facts of each case. Here it has been established that the death took place on 28th March between 3 and 4 p.m. It is just about that much time that the appellant and the deceased were last seen by PW 1 and PW 11. No explanation has been offered in the statement by the appellant recorded under Section 313 Cr.PC. His defence is of complete denial. In our view, the conviction for offence under Sections 302 and 376 has been rightly recorded by the Court of Session and affirmed by the High Court.”

37. Admittedly, there is no direct evidence on the record to prove the charge of rape, murder and disappearance of the dead body and the prosecution case is based on circumstantial evidence, which starts from disappearance of the



victim girl and thereafter subjected to rape, murder and causing disappearance of the evidence.

38. In a case based on circumstantial evidence, the golden principles as enunciated by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra**, reported in **(1984) 4 SCC 116**, in para 153, is as follows:

“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established;

1. The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra, reported in (1973) 2 SCC 793) where the following observations were made:

“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between



‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”

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 and 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.”

39. The Apex Court in series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following test. It would also be relevant to quote here that “it is well settled that no one can be convicted on the basis of mere suspicion, though strong it may be.” Reliance may be taken note of the judgment rendered in the case of **Chandrakant Ganpat Sovitkar and Anr. Vs. State of Maharashtra**, reported in **AIR 1974 SC 1290**.

40. This Court has given anxious consideration to the submissions made on behalf of the parties, as also strenuously examined the materials available on record and



taken note of the relevant legal provisions and the mandate of the Hon'ble Supreme Court. The facts, which have been culled out from the aforementioned discussions, it is evident that the prosecution has successfully been able to prove that on the fateful day i.e. 13.03.2013, the appellant accompanying the victim girl was going towards his house at about 2.00 PM and thereafter neither the victim girl and the appellant was seen by anyone nor the defence has produced any witness/material to contradict this fact. Once the factum of last seen is proved, it certainly shifts the burden of proof to the accused placing on him the onus to explain what happened to the victim, who was last seen with him. This Court also cannot lose sight of the fact that the victim was aged about only eight years and she had not been in a position to make resistance, if she would have been over powered by a young man.

41. The highest court of the land time without number has observed that there can be no doubt with respect to the position that a fair investigation is necessary for a fair trial. Hence, it is the duty of the investigating agency to protect rights of both the accused and the victim by adhering to the prescribed procedures in the matter of investigation and thereby to ensure a fair, competent and effective investigation.



42. Even while holding so the Apex Court further observed that solely on account of defects or shortcomings in investigation, an accused is not entitled to get acquittal or in other words it also cannot be the sole reason for interference with a judgment of conviction, if rests of the evidences cogent enough to sustain the same. This Court tempted to quote one of the paragraph (para 41) of the judgment rendered by the Hon'ble Supreme Court in the case of **State of West Bengal Vs. Mir Mohammad Omar, (2000) 8 SCC 382.**

43. In the decision in **Mir Mohammad Omar's** case (supra), this Court held :-

“41. ... 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. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation.”

(Emphasis supplied)



44. Now this Court comes to the point of recovery where during the course of investigation, the investigating officer recovered one bottle containing phenyl, one plastic rope, obscene novel and slippers from the room of accused/appellant and prepared the seizure list form a link to complete the chain of circumstances in order to sustain the conviction.

45. It would be also important to refer that failure on the part of the accused to furnish any explanation as to when, why, where and what circumstance he had parted with the deceased, would give rise to a strong presumption against him and in favour of his guilt providing an additional link in the chain of circumstances, that too in a situation where the accused was confronted with the specific question and when from the house of the accused a bottle containing phenyl, plastic rope, obscene novel, Black T-shirt containing smell of phenyl, one pair of sandal were recovered, which have been proved by material Exts. I to IV. The investigating officer of the case also corroborated that he inspected the room of the accused/appellant (Md. Hasan Sarwar) with expert team of FSL, Patna and collected swab, which was of human blood, as per the FSL report contained in Ext. 10 series.

46. It would be also relevant to state here that the



FSL report further reveals that the thread collected from the AIRTEL Tower is different from the thread of frock and chaddi of the deceased. Further the said soil stuck on Chappals (slippers), recovered from the Tower is not similar to the soil collected from Pokhra.

47. From the examination of the appellant under Section 313 of the Cr.P.C. as noted above, it appears that without offering any explanation to the incriminating circumstances he has simply denied the same.

48. The doctor (P.W.6) in his deposition at para. 3 stated that murder may be caused after commission of rape and thus the prosecution has proved that the victim was murdered at different place and thereafter her dead body was thrown at the bank of Pokhar in order to cause disappearance of evidence of offence.

49. Further the doctor (P.W. 6), who conducted the postmortem of the dead body of the victim opined that there was forceful sexual intercourse with emission and in that course various injuries were found to her and the cause of death is said to be due to intracranial haemorrhage and shock.

50. There is no doubt that it is not a case of direct evidence, rather conviction of the accused/appellant is founded



on circumstantial evidence. It is well settled that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances should be conclusive and proved by the prosecution and moreover the circumstances from which the conclusion of guilt is to be drawn should be fully established and also be consistent with only one hypothesis i.e. the guilt of the accused.

51. The inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. The Court is under bounden duty to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt or not.

52. Now, reverting to the facts of the present case in light of the above stated principles this Court finds it appropriate to spell out the circumstances which would show that for the undisputable rape and murder of the deceased minor girl, the accused is not only the suspect but is also the person who has committed the crime.

Firstly; on 13.03.2013, at about 2.00 PM, the



deceased went out side for playing and thereafter she found disappeared.

Secondly; the accused was lastly seen in company of the deceased at about 2.00 PM on 13.03.2013.

Thirdly; in the morning of 14.03.2013 the dead body of the deceased was found by the side of the pond.

Fourthly; as per the post-mortem report, it reveals time elapsed since death from the post-mortem is 18-24 hours. Hence the death would have been taken place in between 11.30 AM to 5.30 PM on 13.03.2013, as the post-mortem on the dead body of the victim was conducted on 14.03.2013 at about 11.30 AM, thus the proximate time of crime and circumstances of last seen together appears to be quite proximate.

Fifthly; the material Exts. I to IV proved that the plastic rope, obscene novel, Black T-shirt and phenyl bottle were recovered from the room of the accused and during the course of inspection when the room of the accused was inspected by the investigating officer with the expert team of FSL they collected swab, which was of human blood, as per the report contained in Ext.10 series.

Sixthly; the failure on the part of the accused to offer any reasonable and convincing explanation as to when,



why, where and in what circumstances he parted with the deceased and when he was confronted with the further question regarding recovery of some incriminating material, instead of offering any explanation, he simply denied the same.

Seventhly; all the circumstances taken cumulative and on the careful scrutiny of the deposition of P.W.1, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.9, as has been elaborately discussed earlier, points unmistakably towards the guilt of the accused. Another aspect of the matter is that a minor child was helpless in the cruel hands of the accused, who took the child to his house and it can hardly be even imagined that what brutality and torture the minor child must have faced towards the commission of crime, as would be evident from the post-mortem report and the injuries described therein. The pain and agony caused to the deceased minor girl is beyond imagination and is the limit of viciousness.

53. Thus for the reasons aforementioned, this Court finds that the learned trial court has fully justified in law in awarding the punishment of imprisonment of life for an offence under Section 302 of the Indian Penal Code along with other punishment for other offences. This Court finds no justifiable reason to interfere with the judgment of conviction and order of



sentence in the impugned judgment.

54. Accordingly, the appeal stands dismissed.

(Harish Kumar, J)

I agree
Chakradhari Sharan Singh, J:

(Chakradhari Sharan Singh, J)

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