

IN THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH.

CRA-D-241-DB-2014 (O&M).
Date of Decision: 12.01.2024.

Gurpreet Singh @ GopiAppellant.

VERSUS

State of PunjabRespondent.

CORAM : HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL
HON'BLE MR. JUSTICE LALIT BATRA

Argued by: Mr. J.S. Lalli, Advocate for appellant.

Mr. Iqbal Singh Mann, Deputy Advocate General, Punjab.

LALIT BATRA, J.

This criminal appeal has been preferred by appellant/convict-
Gurpreet Singh @ Gopi, impugning the legality of judgment of conviction
and order of sentence both dated 25.09.2013 rendered by learned Additional
Sessions Judge, Jalandhar, vide which appellant was held guilty and
convicted for the commission of offence punishable under Sections 302 and
376 IPC, in case FIR No.222 dated 08.10.2011 under Sections 302 and 376
IPC, Police Station Adampur, District Jalandhar and was sentenced as
under:-

Offence Under Section	Sentenced to Rigorous Imprisonment	Fine	In default of payment of fine
376 IPC	Ten years	Rs.10,000/-	Four months RI
302 IPC	Life Imprisonment	Rs.20,000/-	Six months

Trial Court ordered that both the sentences shall run
concurrently.

2. As per prosecution version, on 08.10.2011 at about 7:00 AM, complainant-Karnail Singh son of Mehanga Singh alongwith his son Gurpreet Singh had gone to their fields on a tractor and were ploughing the fields and after finishing one round, when they reached on the other side of the field, complainant-Karnail Singh noticed that on the corner of the field, dead body of a girl aged about 12-13 years was lying and having a *Chunni* around her neck. It appeared that someone had killed that girl by strangulation with *Chunni* and she was in naked condition. Complainant-Karnail Singh went to village and informed the Sarpanch. On query, it transpired that girl was victim-deceased (name not disclosed in view of law laid down in case "State of Punjab v. Gurmit Singh" 1996(1) R.C.R. (Criminal) 533), sister-in-law of Bimal Rajak son of Rajinder Rajak, resident of Bihar, a migrant labour residing in the house of Pakhar Singh and the said girl went to purchase household goods on 06.10.2011 at 5:00 PM from her house but she did not return. Bimal Rajak accompanied by his wife-Sulekha Devi went to the fields of complainant and identified the deceased. After leaving Bimal Rajak and Sulekha Devi near the dead body, when complainant-Karnail Singh alongwith Sucha Singh, Sarpanch were going to inform the police, they met Inspector/Station House Officer Angrej Singh (Investigating Officer/PW-10), who recorded statement (Ex.PA) of Karnail Singh (complainant/PW-1) and on the basis of said statement, FIR (Ex.PA/2) was lodged by the police. Inspector/SHO Angrej Singh (PW-10) reached at the site of occurrence and inspected the spot. Inquest proceedings (Ex.PP) were conducted and dead body was identified by PW-3 Bimal Rajak and Upinder Sah. Strands of hair found from the hands (fists) of

victim-deceased were taken and after converting it into a sealed parcel bearing seal having inscriptions 'AS', it was taken into police possession, vide recovery memo Ex.PK, which was attested by Assistant Sub Inspector Sulakhan Singh and Head Constable David Masih. One mould of left foot print lifted from the place near the dead body by Sub Inspector Jaswinder Kaur, Finger Print Bureau, Jalandhar, was taken into police possession, vide recovery memo Ex.PL and was attested by ASI Sulakhan Singh and HC David Masih. Rough site-plan (Ex.PQ) of place of occurrence was prepared and statements of concerned witnesses were recorded. Case property was deposited with the MHC of Police Station.

On 08.10.2011, Bimal Rajak got recorded his statement before the police that he alongwith his family members was living at village Diyantpur. Victim-deceased, aged about 12-13 years, sister-in-law of Bimal Rajak, was also living with them. On 06.10.2011 at about 5:00 PM, victim/deceased was sent by her sister to purchase vegetables from Rajewal and when she did not return, they searched her. Enquiry was made from the grocery shop of Rajewal and it was informed that victim-deceased had come but after taking the goods she had gone back. Since whereabouts of victim/deceased could not be traced out, on 07.10.2011, Sulekha Devi wife of Bimal Rajak got a report registered in Police Station Adampur. Bimal Rajak further stated that on 08.10.2011 in the morning hours, he came to know that dead body of victim was lying in the field of eucalyptus trees outside the village and that field belongs to Karnail Singh son of Mehanga Singh of village Diyantpur. Bimal Rajak alongwith his wife reached the place of occurrence where inquest proceedings qua body of deceased were carried

out and the dead body of victim was identified. Bimal Rajak also stated that he is fully sure that his sister-in-law (victim-deceased) was murdered by accused Gurpreet Singh @ Gopi son of Baljit Singh, resident of village Diyantpur, who had been keeping an evil eye on her since long.

Application (Ex.PB) bearing date 08.10.2011 was moved by Investigating Officer with request made to Senior Medical Officer, Civil Hospital, Jalandhar, for conducting post-mortem examination on the body of victim-deceased and also to report as to whether any sexual assault was committed on her person. On 09.10.2011, post-mortem examination on the body of victim was conducted by Board of Doctors comprising Dr. Des Raj (PW-2) and Dr. Varinder Kaur (PW-11), vide Post-Mortem Examination Report Ex.PD. In the opinion of the Board, injuries on the body of deceased were *ante mortem* in nature in the form of congestion of face and light coloured constriction in groove around the neck and congested lungs. Cause of death was asphyxia and spinal cord injury and shock. Vaginal swabs were also collected to detect the possibility of sexual assault on the person of victim-deceased. After post-mortem examination, dead body and belongings of deceased, copy of PMR, police inquest papers, two sealed parcels and one envelop containing a request to Chemical Examiner, Kharar, Punjab, were handed over to police.

On 09.10.2011, Investigating Officer had conducted raids to nab accused Gurpreet Singh and on the same day statement of Prem Pal, Lambardar, regarding alleged extra-judicial confession made before him by accused Gurpreet Singh, was recorded.

On 10.10.2011, accused-Gurpreet Singh @ Gopi was arrested

and personal search memo (Ex.PS) was prepared. On 11.10.2011, appellant/accused suffered disclosure statement (Ex.PN) and in pursuant to his disclosure statement, he got recovered one pair of sport shoes of white colour, which were converted into a sealed parcel bearing seal having inscription 'AS', which was taken into police possession, vide recovery memo Ex.PO and was attested by ASI Sulakhan Singh and HC David Masih. Site-plan (Ex.PO/1) of the place of recovery of pair of shoes was prepared.

On 13.10.2011, appellant/accused was produced in the Court. Application (Ex.PT) was moved in Court with the request to take sample of hair of appellant/accused, which was allowed, vide order Ex.PT/1 and then in the presence of learned Magistrate, hair sample of appellant/accused were taken and said sample hair were converted into a parcel sealed by learned Magistrate with his seal bearing inscriptions 'APS', which was taken into possession, vide memo (Ex.PU) and was attested by HC David Masih. Thereafter, case property was deposited with the MHC of Police Station.

On 25.11.2011, above said sealed parcels were got deposited by HC Gurmeet Singh in the Office of Chemical Examiner Laboratory, Mohali, and receipt regarding deposit thereof was given to the MHC of the Police Station.

Vide Chemical Examiner Report dated 27.12.2011 (Ex.PF), in respect of vaginal swab and vaginal slide of victim-deceased, spermatozoa were detected therein and after having seen the above said report, above said doctors gave the opinion that the possibility of sexual intercourse having been taken place cannot be ruled out. Vide Rapat No.14 dated

03.01.2012 (Ex.PV), offence under Section 376 IPC was added and special reports were sent to quarters concerned.

Statements of witnesses were recorded. Scaled site-plan (Ex.PW5/A) of place of occurrence was got prepared.

3. After completion of investigation, final report as envisaged under Section 173 Cr.P.C. (*Challan*) was presented against the accused in the Court. It is pertinent to mention here that after presentation of *Challan* in the Court, FSL Report dated 09.01.2012 (Ex.PW) regarding hair allegedly collected from the hands (fists) of victim-deceased and sample hair of appellant/accused, was received with the result that the exhibits (Hair) contained in parcels A and B are Human Hair and show similar characteristics. Apart from that, FSL Report dated 24.02.2012 (Ex.PZ) regarding impression of left footwear (Ex.C-1) stated to be lifted from the scene of crime and pair of footwear (shoes) (Ex.T-1 and T-2) stated to be that of appellant/accused, was received with the result that the impression of left footwear marked as exhibit C-1 contained in parcel C is from the left fellow of footwear of appellant/accused Gurpreet Singh, marked Ex.T-1 contained in parcel 'T'.

4. Finding a *prima facie* case, accused was charge-sheeted for the commission of offence punishable under Sections 302 and 376 IPC, to which he pleaded not guilty and claimed trial.

5. To substantiate its case, prosecution has examined PW-1 Karnail Singh (complainant), PW-2 Dr. Des Raj, SMO Incharge, Bholath, Kapurthala, PW-3 Bimal Rajak (brother-in-law/Jija of victim-deceased), PW-4 Prem Pal, Lambardar, PW-5 Dalip Singh (Draftsman), PW-6 Head

Constable Gurmeet Singh, PW-7 Head Constable Dilbagh Singh, PW-8 Assistant Sub Inspector Sulakhan Singh, PW-9 Head Constable Lakhwinder Singh, PW-10 Inspector Angrej Singh (Investigating Officer) and PW-11 Dr. Varinder Kaur (Medical Officer). After tendering FSL Reports (Ex.PW and Ex.PZ) and giving up remaining witnesses being unnecessary, learned Public Prosecutor closed the prosecution evidence.

6. After closure of prosecution evidence, statement of accused as envisaged under Section 313 Cr.P.C. was recorded, wherein all the incriminating material/evidence were put to him, but he had denied all the allegations levelled against him. Accused had stated that he is innocent and has been falsely implicated. Bimal Rajak was having illicit relations with his sister-in-law (victim-deceased) and this information was given to him by his sister. Bimal Rajak was working in the house of Inspector Angrej Singh and, thus, he has been falsely implicated in this case by fabricating the proceedings and planting false recovery.

7. In his defence evidence, accused has examined his sister Rajbir wife of Onkar as DW-1, Mohinder Singh son of Khushiya Ram as DW-2 and further examined himself as DW-3. Thereafter, accused closed his defence evidence.

8. On appreciation of evidence, learned Trial Court convicted and sentenced accused-Gupreet Singh @ Gopi (appellant herein), for the commission of offence punishable under Sections 302 and 376 IPC, vide judgment of conviction and order of sentence both dated 25.09.2013, as detailed above.

9. We have heard learned counsel for the appellant as well as

learned State counsel and critically examined the evidence available on the record.

10. Learned counsel for appellant *inter alia* contended that learned Trial Court has passed the impugned judgment without appreciating the evidence in right perspective. Instant case is based on circumstantial evidence and there is no direct evidence against the appellant. The circumstantial evidence has several missing links and does not point towards the guilt of the appellant. The deposition of star witnesses of the prosecution are contradictory on material points which are fatal to the prosecution case. PW-4 Prem Pal, Lambardar, before whom alleged extra-judicial confession was rendered by appellant/accused, has not supported the cause of prosecution. Though allegations of sexual assault on the person of victim-deceased have been levelled against appellant/accused but on account of appellant not having been medico-legally examined and further the fact that no DNA profiling was got prepared to match the alleged spermatozoa recovered from the vaginal swabs of victim-deceased with that of appellant, above said version falls to the ground. Further, there is no opinion on the record that appellant was capable of performing intercourse. The forensic evidence collected against the appellant/accused during the course of investigation was not scientifically and legally proved and therefore could not be used as a circumstance against the appellant. Even otherwise, there was inordinate delay in sending the sample parcels to FSL for analysis which created dent in the cause of prosecution. Further, expert witnesses from Forensic Science Laboratory to prove FSL Reports (Ex.PF, Ex.PW and Ex.PZ) were not examined. Though in terms of admission made

by PW-8 ASI Sulakhan Singh place of occurrence was photographed by Photographer of the Police Department but those photographs were not produced in evidence by Prosecuting Agency simply for the reason that those photographs did not depict true state of affairs. The appellant has been falsely implicated and wrongly convicted on the basis of evidence which is materially discrepant/deficient and does not satisfy the legal requirements. Judgment of conviction is based upon conjectures and surmises.

Learned counsel further argued that learned Trial Court has not taken into consideration the defence version and discarded the same without any cogent reasons. He further urged that since prosecution version is discrepant on material particulars and the fact that it is full of infirmities, thus, prosecution has utterly failed to prove its case beyond shadow of reasonable doubt and consequently judgment of conviction and order on quantum of sentence are liable to be set aside and resultantly appellant is entitled to be acquitted of charges levelled against him.

11. On the other hand, learned State counsel has vehemently argued that prosecution has proved its case against the appellant by leading cogent and convincing evidence. While rebutting the cause of appellant, he further contended that from the testimonies of PW-1 Karnail Singh (complainant), PW-3 Bimal Rajak (brother-in-law of victim-deceased) and the circumstantial evidence led by the prosecution, it is proved on the record that accused committed rape on the person of victim and then murdered her. The defence version was rightly discarded by learned Trial Court having no iota of truth therein. Thus, learned State counsel urged that appellant was rightly convicted and sentenced by learned Trial Court for the commission

of offence punishable under Sections 302 and 376 IPC.

12. While having due regard to the contentions of learned counsel for the appellant and learned State counsel, it is observed that in the present case, prosecution has mainly relied upon circumstantial evidence.

13. Hon'ble Supreme Court in Chenga Reddy v. State of A.P. 1996(10) SCC 193, has observed as under:-

"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."

14. In Padala Veera Reddy v. State of A.P. 1990(2) RCR (Criminal) 26, it was laid down by Hon'ble Supreme Court that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

- (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*
- (3) 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*
- (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of 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.”

15. In **State of U.P. v. Ashok Kumar Srivastava** 1992(3) R.C.R. (Criminal) 63 (SC), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

16. Sir Alfred Wills in his admirable book '**Wills' Circumstantial Evidence' (Chapter VI)** lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

17. There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested by the touchstone of law

relating to circumstantial evidence laid down by Hon'ble Supreme Court as far back in 1952.

18. In Hanumant Govind Nargundkar v. State of M.P., AIR 1952 SC 343, Hon'ble Supreme Court observed as under:-

"It is well to remember that in case where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be 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."

19. A reference may be made to a later decision of Hon'ble Supreme Court in Sharad Birdhichand Sarda v. State of Maharashtra, 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 of lacuna in the prosecution cannot be cured by a false defence or plea. The conditions precedent in the words of Hon'ble Supreme Court, before conviction could be based on circumstantial evidence must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

- (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*
- (3) the circumstances should be of a conclusive nature 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.*

20. Keeping in view above said settled proposition of law, there is no doubt that conviction can be based solely on circumstantial evidence, but it should be tested by the touchstone of law relating to circumstantial evidence. 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 be in the first instance 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.

21. The said principles have also been followed in

Navaneethakrishnan vs. State by Inspector of Police (2018) 16 SCC 161
and Rahul vs. State of Delhi Ministry of Home Affairs & Anr., 2023(1)
SCC 83.

22. Having considered the submissions made by learned counsel for the parties and after careful perusal of record of the case, we are of the considered opinion that prosecution has failed to prove the charges levelled against appellant/accused and reasons thereof are enumerated as under:-

(i) The case is based on circumstantial evidence and it is incumbent upon the prosecution to complete the chain of circumstances. Allegedly, victim-deceased went missing at about 5:00 PM on 06.10.2011. PW-3 Bimal Rajak, brother-in-law of victim-deceased, categorically stated that as victim-deceased did not return, hectic search was made to locate her whereabouts but to no avail. On the next day (07.10.2011), Bimal Rajak alongwith his wife Sulekha Devi had approached Sarpanch of the village and went to Police Station Adampur, to lodge the missing report of victim-deceased. However, a bare perusal of the record reveals that no such missing report is available there. Even otherwise, PW-10 Investigating Officer has nowhere mentioned about lodging of any missing report either by Bimal Rajak, Sulekha Devi or Sarpanch of the village. A perusal of testimony of Investigating Officer (PW-10) reveals that he was unaware of missing of victim-deceased and he came to know about the alleged occurrence only on the information of Karnail Singh (PW-1) and Sucha Singh,

Sarpanch when they both met him on 08.10.2011 at Bus Stand Kathar. In this scenario, it appears that though victim-deceased went missing since evening hours of 06.10.2011, no sincere effort was made at the instance of Police Agency to locate her whereabouts despite the fact that matter was brought to its notice on 07.10.2011. As a matter of fact, after registration of FIR on 08.10.2011, during the course of inquest proceedings qua body of victim-deceased conducted under Section 175 Cr.P.C., statement of Bimal Rajak (Ex.PG) was recorded on 08.10.2011, wherein he narrated that some unknown person had killed his sister-in-law (victim) by strangulating her with *Chunni*. It is pertinent to mention here that on the same day (08.10.2011), statement of Bimal Rajak under Section 161 Cr.P.C. (Mark-X) was recorded by the Investigating Officer, wherein for the first time he alleged that since appellant/accused was having an evil eye on victim, he was quite sure that appellant/accused had committed her murder. It will not be out of place to mention here that except above said narration of allegations, no other circumstance depicting involvement of appellant/accused in the commission of alleged offence was disclosed by Bimal Rajak in his statement recorded under Section 161 Cr.P.C. However, when Bimal Rajak stepped into the witness-box as PW-3, stated that on 06.10.2011 he alongwith appellant/accused and one more person had consumed liquor and he left the house of appellant/accused at

3:00 PM and on the way back to his house he was offered lift on motorcycle by appellant/accused. At this juncture, a careful scrutiny of testimony of DW-2 Mohinder Singh is quite relevant, as said defence witness has categorically stated that on 06.10.2011 he alongwith Bimal Rajak had gone to the house of appellant/accused and after having contributed Rs.50/- each, they had consumed liquor. Allegedly, victim-deceased alongwith her nephew (*Bhanja*) had left her house at about 5:00 PM on 06.10.2011 to purchase some domestic articles and though her nephew had come back but victim-deceased did not return. PW-3 Bimal Rajak further stated that on reaching his house, he came to know that victim-deceased was missing. Above said witness has specifically stated that the day victim-deceased went missing, appellant had visited his house at about 8:00 PM and then he had taken them to his house where they slept. PW-3 Bimal Rajak has specifically stated that he was suspecting appellant in the commission of offence as throughout he was helping him. It is relevant to point out here that during cross-examination, PW-3 Bimal Rajak has stated that no report was lodged with the police or the Panchayat that appellant was having an evil eye on the victim. Though Sulekha Devi, sister of victim-deceased, was cited as prosecution witness but she was not examined by the Prosecuting Agency and she was given up as unnecessary witness for the reason best known to it. In this scenario, while

taking into account initial statement of Bimal Rajak (PW-3) recorded on 08.10.2011 during inquest proceedings where he categorically stated that victim has been killed by some unknown person and further in view of narration of his testimony as PW-3, as detailed above, all these facts lead to inference that as appellant was assisting Bimal Rajak during the course of missing of victim, suspicion as alleged that he (appellant) was involved in the commission of offence in question, has no footing to stand as suspicion, however strong, cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond a reasonable doubt.

(ii) One of the circumstances which has been pressed into service against appellant pertains to recovery of strands of hair from the hands (fists) of victim-deceased. As per prosecution version, above said strands of hair were compared with sample strand of hair of appellant and since on forensic analysis both sets of hair were human hair and show similar characteristics, thus, involvement of appellant in the commission of offence was shown. However, in the instant case, recovery of strands of hair from the hands (fists) of victim-deceased is doubtful for multiple reasons. Firstly, it was incumbent upon the Investigating Agency to get the scene of crime photographed as well as videographed to depict exact state of affairs. Though no effort was made by Prosecuting Agency to examine any Photographer and to prove on record

any photograph of scene of crime but in terms of admission made by PW-8 ASI Sulakhan Singh, it is quite evident that place of occurrence was photographed by Photographer of the Police Department. For this reason, above said witness when confronted with photographs (Ex.D1 to Ex.D5) categorically admitted that above said photographs were clicked in his presence by the Photographer of their department. Apart from above, Investigating Officer (PW-10) when confronted with photographs (Ex.D1 to Ex.D5) categorically admitted that above said photographs were of the place of occurrence. A bare perusal of photographs (Ex.D1 to Ex.D5), it nowhere reveals that any photographs were clicked to show strands of hair in fists of victim-deceased and further taking out strands of hair from fists of victim-deceased. To show veracity in the cause of prosecution, it was incumbent upon the Investigating Officer to ask the photographer to click the photograph of victim-deceased showing strands of hair in her hands (fists). Further, photographs were required to be clicked at the time of opening of fists of victim-deceased and taking of strands of hair. In case of sexual as well as fatal assaults, it is quite natural that victim would apply so much force to release her from the clutches of assailant and in that sequence in case victim had pulled the hair of assailant with such force then strands of hair would come out with a resultant injury on the head of assailant and at the same time finger nail clippings of victim might be having some

particles of blood as well as skin of the assailant. PW-2 Dr. Des Raj, one of the members of Medical Board, who conducted post-mortem examination on the body of victim-deceased, has categorically stated that they did not find any blood in the nails of the victim or in her hands. It is pertinent to mention here that there is no medical evidence on the record to show that appellant had sustained any injury on head on account of pulling of his hair in a forcible manner. Investigating Officer (PW-10) when confronted with photograph (Ex.D4) stated that some ladies were sitting at some distance from the dead body and he had recorded the statement of Sulekha Devi, who is seen at point 'A' in photograph (Ex.D4). Though in the photographs (Ex.D1 to Ex.D5), number of persons including Sulekha Devi, sister of victim-deceased, have been shown present near or around the scene of crime but no such independent witness was associated by the Investigating Officer at the time of alleged recovery of strands of hair and that too from the fists of victim-deceased. PW-3 Bimal Rajak, who was associated during the course of inquest proceedings and admittedly identified the dead body of victim-deceased at the scene of crime, has nowhere uttered even a single word about recovery of strands of hair from the hands (fists) of victim deceased. In this view of the matter, as Sulekha Devi, was also present at the scene of crime, she could have been joined as witness to depict that a recovery of strands of hair was effected from the fists of victim-

deceased. However, a bare perusal of recovery memo of strands of hair (Ex.PK) reveals that neither Bimal Rajak nor Sulekha Devi were joined as witnesses to substantiate said aspect. Only official witnesses were joined in the said alleged recovery. In the absence of any photograph taken during the course of alleged recovery, absence of any blood or skin in the finger nail clippings of victim-deceased, the fact that Bimal Rajak (PW-3) who was present at the scene of crime has nowhere stated about alleged recovery of strands of hair from the fists of victim-deceased and further the fact that no witness except official one were joined during the course of alleged recovery, it creates doubt that any strands of hair were recovered from the fists of victim-deceased from the scene of crime. It is relevant to point out here that in the inquest proceedings (Ex.PP), which were conducted at the scene of crime, though other details of injuries on the person of victim-deceased have been mentioned therein but there is no reference of recovery of strands of hair from the fists of victim-deceased. In this scenario, alleged recovery of strands of hair from the fists of victim-deceased and that too at the scene of crime falls flat.

During the course of investigation, sample strand of hair of appellant was taken with the permission of the Court and then strands of hair allegedly recovered from the fists of victim-deceased and sample strand of hair of appellant were sent to FSL for analysis and in terms of FSL Report (Ex.PW),

the result of examination was that Parcels A and B are Human Hair and show similar characteristics. No expert witness of FSL was examined to prove that for the comparison of hair which methodology was applied. It is simply mentioned that Parcels A and B contained Human Hair and show similar characteristics. It appears that comparison of hair was not conducted through the DNA procedure. In case similarities were in respect of morphological and microscopical characteristics, which is not even evident from FSL Report (Ex.PW), even then the morphological and microscopical characteristics test is not a sure test for arriving at a conclusion that two sets of hair belong to one and the same person. To support our view, we are placing reliance on the decision of Kerala High Court in the case of **George Chariyan and Ors. v. State of Kerala, 1989(3) Crimes 238**. In that case the Court observed that the hair analysis has not yet developed into a perfect science. This fact is accepted by all major authors of Medical Jurisprudence. Similar view was expressed in the case of **Neeraj v. State of M.P., 1991 Crl.L.J. 2549**, where in similar circumstances CFSL reported that hair were similar. The Court observed that there is a distinction between “similarity” and “identity”. There can be similarity but the identity can still be different. In the present case, result of analysis is that the sample hair and the alleged strands of hair recovered from the fists of victim-deceased were similar. Expert has not opined that the identity

of the hair was the same or that the origin was from the same source. Identity of the hair being not established, it cannot be said that sample hair and strands of hair allegedly recovered from the fists of the victim-deceased were of the same person. Similarity of hair does not conclusively prove that the hair came from the same origin or of the same source. This has been so held in case of Mantu @ Sunin Kumar Bhuyan v. State, 1984(2) Crimes 815. On the same lines is the judgment of Calcutta High Court in the case of Himangshu Pahari v. State, 1986 CrI. L.J. 622. Once the recovery of strands of hair from the fists of victim-deceased has been doubted, it would be unsafe to record a conviction on the basis of said recovery on the ground that it matched with sample hair of appellant.

(iii) Another circumstance which has been pressed into service against appellant pertains to recovery of impressions of left fellow of footwear of appellant lifted from the scene of crime as shown in the FSL Report (Ex.PZ). Allegedly, one mould of left foot print was lifted from the scene of crime near the dead body of victim as shown in the recovery memo (Ex.PL). Investigating Officer (PW-10) in his examination-in-chief has categorically stated that one mould of foot print was lifted from near the dead body and the same was taken into police possession, vide recovery memo (Ex.PL) which was attested by ASI Sulakhan Singh and HC David Masih. It is pertinent to mention here that Investigating Officer (PW-10)

has nowhere stated that above said mould of foot print was ever converted into a sealed parcel. At this juncture, a careful scrutiny of testimony of PW-8 ASI Sulakhan Singh is quite relevant. Above said witness has categorically stated that one mould of left foot print was lifted from near the dead body and was taken into possession, vide memo Ex.PL which was attested by him and HC David Masih. This witness has not uttered even a single word that mould of left foot print was ever converted into a sealed parcel. Allegedly, mould of left foot print was deposited with HC Dilbagh Singh (PW-7), MHC of Police Station Adampur. HC Dilbagh Singh when stepped into the witness-box as PW-7 has categorically stated that he did not remember the nature of container of parcels in which shoe mould were sealed, again stated that it was not sealed. Even the recovery memo (Ex.PL) does not mention about sealing of parcel. In this view of the matter, it is quite evident on the record that the parcel wherein mould of left foot print was kept it was never sealed. There is another material lacuna in the lifting of mould of left foot print during the course of investigation. Though Investigating Officer (PW-10) during his examination-in-chief stated that one mould of foot print was lifted from near the dead body, which was taken into police possession, vide memo Ex.PL in the presence of ASI Sulakhan Singh and HC David Masih but during cross-examination when confronted with photograph (Ex.D3), where police officials are

shown standing wearing shoes, he (PW-10) explained that mould of foot had already been lifted by Sub Inspector Jaswinder Kaur in his presence. Above said mould of left foot print was taken into police possession, vide recovery memo Ex.PL. A bare perusal of recovery memo (Ex.PL) reveals that in the presence of Inspector Angrej Singh (IO), ASI Sulakhan Singh and HC David Masih, mould of left foot print was lifted by SI Jaswinder Kaur, Finger Print Bureau, Jalandhar. It is pertinent to mention here that once in terms of recovery memo (Ex.PL), mould of left foot print from the spot near the dead body of victim was lifted by SI Jaswinder Kaur, an expert in that field, it was incumbent upon the Prosecuting Agency to cite SI Jaswinder Kaur as a necessary witness. However, a bare perusal of the record reveals that neither SI Jaswinder Kaur was cited as prosecution witness nor any effort was made by Prosecuting Agency to examine her as witness. Once mould of left foot print was allegedly lifted from the scene of crime by SI Jaswinder Kaur, she was the best witness to disclose as to what kind of mould either of left foot print, as mentioned in the recovery memo (Ex.PL) or impression of left footwear, as shown in the Parcel C (Marked as exhibit C-1 by FSL) which was sent to FSL, was lifted from the scene of crime. Failure on the part of Prosecuting Agency to examine SI Jaswinder Kaur leads to ambiguous situation that though mould of left foot print was allegedly lifted from the scene of crime on

08.10.2011, vide recovery memo (Ex.PL), whereas impression of left footwear stated to be lifted from the scene of crime, was received by the FSL for analysis. It is relevant to point out here that “foot print” pertains to print or impression of “bare foot”, whereas impression of footwear cannot be termed as impression or print of bare foot. There is complete difference of articles shown to be “mould of left foot print” and “impression of left footwear” and as such above said ambiguity cannot be reconciled in any manner. As discussed above, though photographer of Police Department was deputed to click photographs of scene of crime but no effort was made by Investigating Agency to get the photographs clicked in respect of lifting of mould, if any, from the scene of crime. It was incumbent upon the Investigating Officer (PW-10) to ask the photographer to click the photographs of material courses of investigation at the scene of crime. Due to non-examination of material witness SI Jaswinder Kaur coupled with absence of any photograph of lifting of any mould from the scene of crime and further the fact that alleged mould of left foot print was never converted into sealed parcel, it can be conveniently held that there was every possibility in the interpolation of material (parcel) which was ultimately sent to the FSL for analysis. Once “mould of left foot print” was allegedly lifted from the scene of crime, vide recovery memo Ex.PL, in this scenario, FSL Report (Ex.PZ) which dealt with articles having

“impression of left footwear” stated to be lifted from the scene of crime and “pair of footwear (shoes)” stated to be of appellant leads to ambiguity as at no point of time “mould having impression of left footwear” was ever lifted from the scene of crime. Resultantly, FSL Report (Ex.PZ) is of no use to the cause of prosecution. In this scenario, above said circumstance falls flat.

(iv) Vide application dated 08.10.2011 (Ex.PB), Investigating Officer had requested the medical authorities to conduct post-mortem examination on the body of victim-deceased and to report as to whether victim was subjected to sexual assault or not. During the course of post-mortem examination, vaginal swabs/ slides were prepared to determine the possibility of sexual assault, if any, on the person of victim-deceased. Report of Chemical Examiner (Ex.PF) was received on 27.12.2011 detailing therein that spermatozoa were detected in vaginal swab/vaginal slides and after obtaining opinion of doctors concerned that the possibility of sexual intercourse having been taken place cannot be ruled out, offence under Section 376 IPC was added, vide Rapat No.14 dated 03.01.2012 (Ex.PV) in the instant case FIR. In this scenario, it was incumbent upon the Investigating Officer to get the appellant/accused medically examined at the time of his arrest in pursuant to provisions of Section 53 of Cr.P.C. However, no such course was adopted by the Investigating Officer. This is a

serious flaw on the part of Investigating Officer on his failure to subject the appellant to medical examination by a medical practitioner. No explanation, much less any reasonable explanation, has been offered for such a serious flaw on the part of the Investigating Officer.

Section 53(1) of the CrPC enables a police officer not below the rank of sub-inspector to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the facts which may afford such evidence, whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence.

By Act 25 of 2005, a new Explanation was substituted under Section 53, in the place of the original Explanation. The Explanation so substituted under Section 53 by Act 25 of 2005 reads as follows:-

“Explanation.—In this section and in Sections 53A and 54—

(a) “examination” shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) “registered medical practitioner” means a medical

practitioner who possess any medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register.”

In cases where the victim of rape is alive and is in a position to testify in court, it may be possible for the prosecution to take a chance by not medically examining the accused. But in cases where the victim is dead and the offence is sought to be established only by circumstantial evidence, medical evidence assumes great importance. The failure of the prosecution to produce such evidence, despite there being no obstacle from the accused or anyone, will certainly create a gaping hole in the case of the prosecution and give rise to a serious doubt on the case of the prosecution. In the instant case, where the victim is not alive, failure on the part of prosecution to subject the appellant to medical examination is certainly fatal to the prosecution case as for want of DNA profiling, spermatozoa detected in the vaginal swab/vaginal slides of victim-deceased could not be matched. Apart from above, on account of failure of medical examination of appellant, injury, if any, sustained by him on his head on account of pulling of his hair by victim-deceased, did not come into limelight.

(v) Prosecution has propounded the circumstance that appellant had made extra-judicial confession regarding his involvement in the commission of offence in question before

Prem Pal (PW-4). However, when Prem Pal stepped into the witness-box as PW-4, he totally denied the said version and as such above said circumstance has paled into insignificance.

(vi) Though strands of hair allegedly collected from the fists of victim-deceased and mould of left foot print allegedly lifted from the scene of crime on 08.10.2011; after post-mortem examination on body of victim-deceased, vaginal swab and vaginal slide collected on 09.10.2011; pair of footwear (shoes) stated to be of appellant recovered on 11.10.2011 and sample of hair of appellant/accused taken in Court on 13.10.2011, however, above said parcels were sent to Chemical Examiner, Mohali, for analysis after inordinate delay on 25.11.2011 and during this period these remained in the *Malkhana* of the Police Station and in these circumstances, the possibility of tampering with the samples collected could not be ruled out. There is another material lacuna which casts a doubt that HC Dilbagh Singh (PW-7), the then MHC of *Malkhana* of Police Station, with whom case property remained lying deposited w.e.f. 08.10.2011 till 24.11.2011, did not bring Registers No.19 and 21 in the Court to show that on which date above said parcels were deposited in the *Malkhana* of Police Station. Even above said witness has failed to give the details of each entry and serial numbers entered in the registers in respect of deposit of said parcels. Apart from above, admittedly, Investigating Officer (PW-10) had received back his seal bearing inscriptions

'AS' from ASI Sulakhan Singh on 09.10.2011 and as such it was quite possible for the Investigating Officer to make interpolation, if any, in the sealed parcels as the entire case property was sent to Chemical Examiner, Mohali, for analysis on 25.11.2011. In this view of the matter, the possibility of tampering with the samples collected could not be ruled out.

23. In view of the facts and circumstances of the case and the evidence available on record, it can be easily concluded that prosecution has failed to complete the chain of circumstances. Thus, none of the pieces of evidence relied on as incriminating by the learned Trial Court, can be treated as incriminating pieces of circumstantial evidence against the appellant/accused. Realities of truth apart, the fundamental and basic presumption in the administration of criminal law and justice delivery system is the innocence of the alleged accused and till the charges are proved beyond reasonable doubt on the basis of clear, cogent, credible and unimpeachable evidence, the question of indicting or punishing an accused does not arise, merely carried away by heinous nature of the crime or the gruesome manner in which it was found to have been committed. Though the offence is gruesome and revolts the human conscience but an accused can be convicted only on legal evidence which is totally missing in this case. Thus, prosecution has failed to prove the charges levelled against appellant/accused beyond the shadow of reasonable doubt.

24. As a sequel to above said findings, appeal is allowed and accordingly judgment of conviction and order on sentence both dated 25.09.2013 passed by learned Trial Court are set aside. Resultantly,

appellant/accused is acquitted of charges levelled against him by giving him benefit of doubt and he is directed to be set free forthwith, if not required in any other case.

25. Pending application, if any, also stands disposed of.

(Anupinder Singh Grewal)
Judge

(Lalit Batra)
Judge

12.01.2024
jitender

Whether speaking/ reasoned : Yes/ No

Whether Reportable : Yes/ No