**ilyasuddIn Vs. State**

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**SooperKanoon Citation** : sooperkanoon.com/1119273

**Court** : Delhi

**Decided On :** Jan-21-2014

**Judge** : Sunita Gupta

**Appellant** : ilyasuddin

**Respondent** : State

**Advocate for Def.** : Ms. Richa Kapoor

**Advocate for Pet/Ap.** : Ms. Anu Narula

**Judgement** :

* IN THE HIGH COURT OF DELHI AT NEW DELHI Date of Decision:

21. t January, 2014 + CRL.A. 712/2011 ILYASUDDIN Through: ..... Appellant Ms. Anu Narula, Advocate versus STATE Through: ..... Respondent Ms. Richa Kapoor, APP % CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HONBLE MS. JUSTICE SUNITA GUPTA

JUDGMENT
: SUNITA GUPTA, J.

1. It is stated that human lust knows no bounds-if there is any truth in it, the present case is a glaring example of such lust. A tiny tot aged about 2-1/2 years has not only fallen a victim of the lust of the appellant but also lost his precious life

resulting in conviction of the appellant u/s 377/302 IPC in Sessions Case No.134/2008 u/s 377/302 IPC, P.S. Kapashera and sentenced to undergo imprisonment for a period of 10 years for offence punishable u/s 377 IPC and for imprisonment of life for offence punishable u/s 302 IPC and further directions not to release him before the expiry of 25 years. However, benefit of Section 428 Cr.P.C was given to him.

2. Succinctly stated, the case of the prosecution is as follows:- 3. On 12th March, 2008, on receipt of a call by Constable Mohan Das (PW-13) posted at Police Control Room from Dashrath to the effect that a child who was missing from the house of Jagmal Yadav had been found in a latrine and was in an unconscious state, Form Ex.PW-13/A was filled up and call was forwarded to the wireless operator. HC Satish Kumar(PW11) received the call from wireless operator of G-62, to the effect that the two year old child of Vinod Kumar is missing and has been found in a latrine in an unconscious state along with another person who was also in an unconscious state, recorded DDNo.30A Ex.PW11E and handed over the same to Constable Dharmender to be given to SI Jagdish Chander for inquiry. SI Jagdish Chander(PW19) along with Constable Dharmender reached bathroom No.4 in the house belonging to Jagmal Singh where Inspector S.D. Meena was already present along with the staff. Many persons were found present and accused Ilyasuddin, whose name was revealed later on, was found lying there under the influence of liquor and his pant and underwear were pulled down and his penis was protruding out and semen was also seen on his penis. Underneath the legs of Ilyasuddin, a boy aged about 2 years, whose name transpired as Suraj, S/o Sh. Vinod Kumar, was seen. Suraj was having marks of injuries on his lips, cheeks, left side of neck, right side of chest and on the left shoulder. It appeared that a wrong act had been committed with him as blood was seen on his anus. The underwear of the child was found lying at the side, on which also semen stains were there. On the floor, blood was seen and after taking photographs, both the accused and Suraj were sent in a PCR van to Safdarjung Hospital along with HC Sushil and ASI M.S. Yadav. Insp.Sukhdev Meena (PW20) along with Ct.Narsi went to the hospital and collected MLC of accused as well as of the child. No eye witness was found present at the hospital, as such, they returned back to the spot. Father of the child, namely, Vinod Kumar made a statement Ex. PW1/A, alleging,

inter alia, that he was residing in his house with his wife Sarita Devi and son Suraj as a tenant and is engaged in the work of ironing the clothes and his elder son resides at village Azamgarh with his parents. On 12th March, 2008, at about 7:00 pm, he was informed by his wife Sarita Devi at his shop that Suraj is missing. He started searching Suraj along with his wife but he could not be found. As such, they returned to their house at about 9:30-9:45 pm. They found many persons gathered at the bathroom and it transpired that a boy was lying there in the bathroom along with a man in an unconscious state and he found that his son Suraj along with some unknown person was there. Suraj was entangled in the feet of that unknown person whose name was revealed as Ilyasuddin. His pant and underwear were pulled down and penis was protruding out. There were bite marks on the lips and neck of Suraj. His underwear was lying on one side. There was blood on the anus of the child. This statement culminated in registration of FIR Ex.PW11A.

4. It is further the case of prosecution that crime team was called at the spot. SI Harender (PW8), In-charge, Crime team reached the spot. Photographs were taken and report Ex.PW8/A was prepared. Earth control vide Ex.PW1/D, semen vide Ex.PW1/J, blood stained pieces of floor vide Ex.PW1/F, underwear of Suraj vide Ex.PW1/E, semen along with broken pieces of floor vide Ex.PW1/K, were taken into possession. MLC of the victim Ex.PW14/A was prepared by Dr. Lalit Mohan, who declared him brought dead. Pubic hair of accused found on the body of the victim were handed over to the police which were seized vide memo Ex. PW16/A. His post-mortem was conducted by Dr. Arvind Thergaonkar who gave his report Ex.PW15A. Clothes of the deceased comprising of a off-white Tshirt which was torn and had blood stains, white baniyan with blood stains were sealed. Anal swab and blood gauze were also handed over to the Investigating officer of the case who seized the same vide memo Ex.PW12/A. The accused was arrested vide memo Ex.PW1/B. His MLC Ex.PW14/B was prepared by Dr. Sanjeev. His clothes were taken into possession vide memo Ex.PW1/G. He was also medically examined for ascertaining his potency and it was opined by Dr. Ajay Kumar vide report Ex.PW15B that there was nothing to suggest that the accused was incapable of performing sexual intercourse. After completing investigation, charge sheet was submitted against the accused.

5. Charge for offence u/s 377/302 IPC was framed against the accused, to which he pleaded not guilty and claimed trial.

6. In order to bring home the guilt of accused, the prosecution, in all, examined 20 witnesses. All the incriminating evidence was put to the accused while recording his statement u/s 313 Cr.P.C. He did not prefer to lead any defence evidence.

7. The learned Trial Court on the basis of circumstantial evidence adduced by the prosecution witnesses held that the prosecution had established the guilt of the accused for the offences punishable under Section 377 and 302 IPC and convicted him accordingly.

8. The learned Trial Court based the conviction of the accused on the following circumstances:(i) Evidence of last seen, (ii) Detection of blood on broken pieces of floor, shirt, baniyan, underwear of victim, shirt of accused, rectum swab of victim, (iii) Detection of semen on the penis of the accused, underwear of the victim, rectum slide of victim.

9. We have heard Ms. Anu Narula, Advocate for the appellant and Ms. Richa Kapoor, learned Additional Public Prosecutor for the State and have perused the record.

10. The submission of learned counsel for the appellant is basically three-fold:(i) the accused, in his statement recorded u/s 313 Cr.P.C. has stated that he was given a pepsi laced with liquor by one Sukhbir who was residing in the said colony and had given a party. Before that, he had never taken liquor. He went to urinate in the bathroom where he fell down and became unconscious. It was submitted that almost all the prosecution witnesses have admitted that accused was in a drunken position and even the medical report of the accused proved that he was under influence of alcohol. It was submitted that since the accused was under high intoxication, he did not even bolt the door of bathroom from inside when he went to urinate, and/or passed out completely at some stage either before or after he urinated and so under those circumstances, can he be said to be in such a state of mind where he had intention to commit unnatural sex?. Moreover, although as per the prosecution case, the semen was found on the penis of the accused, on the

floor and the underwear of the child but the semen was not on the anus of the child. As per FSL report, semen could not be detected on the floor, as such, at the most, it is a case of unsuccessful attempt of offence under Section 377 IPC. (ii) Even if it is presumed for the sake of argument that appellant is guilty of Section 377 IPC, no offence under Section 302 IPC is made out, inasmuch as, the appellant neither had any premeditation nor intention or motive to kill the victim. Keeping in view the highly inebriated state and the fact that the accused himself was in an unconscious state, it is quite impossible that he was either in any condition to form an intention, or was in the condition of knowing the consequences of his act. In fact, no external injury was found on the head of the child. The opinion of Dr. Sarvesh Tandon that death of the child is due to head injury and smothering which was caused by the clothes that he was wearing is not founded on any material and is clearly presumptuous. As such, Section 302 IPC is not made out. At the most, the case comes under Section 304-II IPC. (iii)Lastly, it was submitted that conviction under Section 377 and 302 IPC and his sentence for 25 years is unjust and is liable to be set aside.

11. Reliance was placed on Lalit Rai & Anr. vs. State, NCT of Delhi, 2013 IX AD (DELHI) 565; Suleman & Anr. (Mohd.) vs. State of Delhi, 2013 IX AD (DELHI) 60; Ezhilan @ Eshilarasan vs. State, (2007) 1 SCC (Cri) 48; State of AP vs. T. Prasanna Kumar, JT20027) SC635 State of Orissa vs. Dibakar Naik & Ors, (2002) 5 SCC323and Choturam vs. State of Rajasthan, 2003 Law Suit(Raj) 396.

12. Rebutting the submission of learned counsel for the appellant, it was submitted by Ms. Richa Kapoor, learned Additional Public Prosecutor for the State that the observations at the spot of occurrence, as deposed by the prosecution witnesses, medical evidence and the scientific evidence proves the case of prosecution beyond reasonable doubt that it was not a case of attempt to commit unnatural offence rather the act was complete. Further the factum of unnatural offence is proved by the presence of blood on the anus, semen and blood on the clothes of deceased, presence of semen on the floor and penis of the accused. Even offence under Section 302 IPC stands proved from the post-mortem report. The impugned judgment does not suffer from any infirmity which calls for interference and as such the appeal is liable to be dismissed.

13. We have given our anxious thoughts to the respective submissions of learned counsel for the parties and have perused the record.

14. Admittedly the case of prosecution is based on circumstantial evidence as there is no evidence on record that any of the witnesses examined by the prosecution has seen the actual commission of the crime.

15. In Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC116 which is locus classicus on the law relating to circumstantial evidence, the following dicta was laid down:

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 v. State of Maharashtra, (1973) 2 SCC793:

1973. Cri LJ1783where the 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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

16. To the same effect are the decisions of this Court in Tanviben Pankajkumar Divetia Vs. State of Gujarat, (1997) 7 SCC156 State (NCT of Delhi) Vs. Navjot Sandhu, (2003) 6 SCC641 Vikram Singh Vs. State of Punjab, (2010) 3 SCC56and Aftab Ahmad Ansari Vs. State of Uttaranchal, (2010) 2 SCC583 17. In Aftab Ahmad Ansari (Supra), the Supreme Court observed as under:

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

18. Since there can be no dispute with this proposition of law, we proceed to examine the circumstances relied upon by the prosecution and testing the same on the touchstone of the 'panchsheel' formulated in the case of Sharad Birdhichand Sarda (supra).

19. It is not in dispute that Vinod Kumar PW1 along with his wife PW5 Sarita and their 2-1/2 year old son Suraj(deceased) were residing as a tenant in room no.13 in the house of PW2 Jagmal Yadav at Kapashera. On the fateful day i.e. 12.03.2008 at about 7 p.m Sarita was in her room while Suraj was playing outside the room. After 5 minutes when she searched for Suraj she could not find him, as such, she went to her husband Vinod Kumar who was doing the work of ironing of clothes in Gali No.11 and informed him about the missing of the child. Both Vinod and Sarita started searching for Suraj but he could not be traced, as such they returned back to the house. Ajay PW3 was also residing as a tenant in the premises belonging to Jagmal Singh. He returned from his duties and came to

know that son of Vinod was not traceable. He also searched for the child but could not find him, as such he returned back to his room. In order to attend the call of nature, he went to the bath room where he found son of Vinod Kumar lying unconscious with his underwear removed and accused was also lying in a semi-naked condition along with the child. The chappal of accused was lying in the bathroom. The child had marks of abrasion on his cheeks and lips from which blood was oozing out. He raised alarm.

20. On hearing his alarm, Vinod Kumar along with his wife Sarita reached the bath room where he found his son lying naked and having teeth bite marks on his cheeks, neck and chest. Accused was also found lying almost in a naked condition. Blood was scattered in the entire bathroom. Underwear of his son was lying in the bathroom and there was blood on his anus. Accused was in drunken condition at that time. Sarita corroborated his version by deposing that at about 8.30 p.m. when she saw many persons gathered outside the bathroom she also went there and found her son lying unconscious with his underwear removed and accused was also lying there with his pant and underwear pulled down. Her son was lying under the thighs of the accused. Blood was found on the anus of her son and his face and other parts of the body were having teeth cut marks.

21. To the same effect is the testimony of PW6 Dashrath Singh who was having a kirana shop in the building of Jagmal Singh and was residing in front of that shop. On coming to know from some tenant that some persons had gathered outside bathroom No.4, he went there and found son of Vinod Kumar, aged about 2-1/2 years lying in an unconscious condition and having cut marks on his face and neck. There was blood on his anus. Semen was also found lying on the floor of the bath room. Suraj was lying underneath the thighs of accused. Underwear of Suraj had been removed which was found lying in the bath room. Pant and underwear of the accused was also pulled down. Semen was seen on the penis of the accused who was in semi conscious state. He further deposed that he had seen Ilyasuyddin in the morning of that day when he visited his relative who also resided in the building of Jagmal Singh. PW-2 Jagmal Singh also visited the bath room and gave confirmation to the testimony of these witnesses by deposing that son of Vinod was lying naked having teeth bite marks on his face, neck, cheeks and

chest and was sodomized. Accused was also lying naked in the bath room. He was in a drunken condition and in semi-conscious state. Police was called, who arrived at the spot.

22. It has further come on record that on receipt of call from wireless operator regarding the missing of a two year child and having been found in latrine in an unconscious state along with another person DD No.30A Ex PW11E was recorded by HC Satish Kumar who handed over the same to Const. Dharmender to be given to SI Jagdish Chander for enquiry. SI Jagdish Chander along with Const. Dharmender reached the place of incident and found the accused whose pant and underwear were lowered down and penis was protruding and a boy aged about 2-1/2 years whose underwear was lying aside, inside the bath room. To the same effect is the testimony of PW20 Insp.Sukhdev Meena, who, also on reaching the spot found the child aged about 2-1/2 years lying in the bath room. Underwear as well as pant of the accused was in lowered down position upto the knees. The child had cut marks on the cheek, chest and neck. HC Sushil Kumar, on receiving call from Control Room 15 regarding a man and a boy lying in an unconscious condition in a bathroom in the house of Jagmal Singh Yadav, behind DC Office, Kapashera, reached the spot and found SI Jagdish and SHO Kapashera there. He also testified regarding the boy aged about 21/2 years and a man lying unconscious in the bath room. The child was in a naked condition. The underwear of the accused was lowered down. Blood was oozing from the anus of the child. There were cut marks on the neck, lips and cheeks of the child. Semen was present on the penis of the accused. Child was lying in the feet of the accused and heads of both, the child and the accused were in the same direction. All these witnesses were subjected to cross examination but nothing could be elicited to dispel their testimony. All the witnesses have corroborated with each other. In fact when all the incriminating evidence was put to the accused while recording his statement u/s 313 Cr.P.C, he had admitted that he visited the premises belonging to Jagmal Singh Yadav while stating that one Sukhbir residing in the colony had given a party and he had gone to attend the party. He also admitted that Vinod Kumar was residing for last 4-5 years at room No.13 in the house of Jagmal Singh at Kapashera as a tenant along with his wife and son Suraj aged about 2-1/2 years. He did not deny the fact, rather he stated that it may be correct that the

child was not traceable and Vinod Kumar and his wife Sarita tried to search for the child till about 9.30 p.m but could not trace him. He admitted that he had gone to the bath room wearing his chappals and that his underwear was lowered down. The plea taken by him is that in the party he was given a pepsi laced with liquor. Prior to that, he had never taken liquor. When he had gone to urinate in the bath room in the house of Jagmal Singh, he fell down and became unconscious. He pleaded ignorance if semen was found on his penis or that he was found lying in the bath room along with deceased Suraj with his underwear removed.

23. Under the circumstances, presence of the accused along with the child, in the facts and circumstances narrated above, stands established from the testimony of the prosecution witnesses, coupled with the admission on the part of the accused.

24. The photographs Ex. PW201 to PW203 were taken by Insp. Sukhdev Meena which also depicts the situation in which the accused and the deceased were found in the bath room.

25. Crime team was called at the spot. SI Harender, Incharge Crime Team inspected the site and prepared the report Ex.PW8A and corroborated the version of the public witnesses as well as the police officials that blood was lying inside the bath room. A blue coloured blood stained underwear of the child was lying there. The underwear of the child was blood stained and blood and semen was seen in and outside the latrine.

26. The ocular testimony of the witnesses find corroboration from the medical evidence as it has come on record that after reaching the spot and taking photographs, both the accused as well as the child were sent in PCR van to Safdarjung hospital through HC Sushil and ASI M.S. Yadav. Dr. Lalit Mohan PW14 examined the child and declared him brought dead. On examination, he found following injuries on the person of the child:(1) 3 cm x 6 cm abrasion on left cheek with loss of skin in 3 cm x 3 cm area. (2) Bleeding from nose. (3) Multiple abrasion on forehead (4) Bruises on lower lip and chin. Laceration of lower lip. (5) Bruises on neck left side and left shoulder (6) Bruise on right side of chest below nipple. (7) Blood around anus. (8) Hair found in the pubic area and other body parts.

27. He prepared his MLC Ex.PW14A. After medical examination, hair collected from the pubic area were stored and sent for examination.

28. Accused was also examined by Dr. Sanjeev , who prepared his MLC Ex. PW-14/B according to which smell of alcohol was found present.

29. Post-mortem on the dead body of the child was conducted by Dr. Arvind Thergaonkar who gave the post mortem report Ex. PW15/A. As per the report, the following injuries were found:On external examination:1. Human bite mark oval shaped, with teeth marks on left side of neck 3 x 2 cm size.

2. Abrasions on front of chest oval shaped 4 x 3 cm.

3. Lacerations on upper lip inside with cut mark of mucosa 3 number.

4. Lacerations on lower lip inside, 2x1 cm size along with 3 numbers of teeth marks.

5. Abrasion on upper lip with contusion of 2 x 2 cm 6. Abrasion over chin 2 x 1 cm, irregular shape.

7. Contusion on nose 1 x 5 cm size.

8. Abrasions on left cheek 6 x 4 cm with lacerations 3 x3 cm size, abrasion is oval shaped and muscle deep.

9. Abrasion below left ear 2 x 2 cm size. 10.Abrasion on left shoulder 2 x 3 cm size oval shaped. Internal examination:1. Head:- effusion of blood seen in frontal and parietal region of scalp. Skull bones-NAD, Brain had tiny haemorrhages.

2. Neck and thorax:- no effusion of blood seen in the neck. Cartilages of neck were congested but intact. Lungs were congested.

3. Abdomen and Pelvis:- stomach was empty. Organs were NAD, Bladder and pelvis NAD. Local examination:- Anal examination: The anal examination showed 2 cm with blood discharges seen from anal orifice, consistent with sodomy.

30. It was opined that the cause of death was combined effect of smothering and head injury. Anal swab and slides were prepared, sealed and handed over along with blood gauge to the Investigating Officer of the case.

31. Potency test of accused Ilyasuddin was conducted by Dr. Ajay Kumar who gave his report Ex. PW-15/B and opined that there was nothing to suggest that he was not capable of performing sexual intercourse. Furthermore on local examination, no smegma at corona glandis were found.

32. Under the circumstances, the medical examination of the child reflected that besides receiving injuries on cheek, nose, forehead, lower lip, chin, neck and chest, blood was found around the anus and hairs were found in the pubic area and other body parts. The post mortem report pertaining to anal examination further proved that there was 2 cm. cut with blood discharge consistent with sodomy. The medical examination of accused proved the capability of the accused to perform sexual intercourse.

33. After medical examination of the child, hairs were collected from pubic area and handed over to HC Sushil Kumar which was seized by Insp.Sukhdev Meena vide seizure memo Ex. PW16/A. The anal swab of deceased and his clothes were handed over to police which were taken into possession. Blood sample gauze, clothes and pubic hair of the accused were sealed and handed over to the investigating officer of the case and all the samples and the articles seized from the spot were sent to FSL for examination.

34. As per the FSL report Ex.PX, blood was detected on the following items:(1) cemented pieces described as blood stained floor pieces(ex.1) (2) blood stained underwear of victim with pubic hair of accused(Ex.4) (3) one shirt having dirty brown stains(ex.6c)(i.e. of accused) (4) cotton wool swab on two sticks described as `rectum swab of victim(Ex.8). (5) brown gauze cloth piece described as `blood gauze of victim(Ex.9). (6) one babys baniyan having few brown stains(Ex.10a) (7) one baby shirt(Ex.10b) (8) brown gauze cloth piece described as `blood in gauze of accused)(Ex.11).

35. Human semen was detected on the following exhibits:(i) One underwear with few strands of hair described as `blood stained underwear of victim with pubic hair of accused (Ex.4). (ii) Two micro slides having faint smear described as rectum slide of the victim(Ex.7a and 7b).

36. As per biological report Ex.PX, on the basis of macroscopic and microscopic characteristics hair, Ex.4, i.e., blood stained underwear of victim with pubic hair of accused, Ex.12, i.e., bunch of black hairs described as pubic hair of accused and Ex.13, i.e., bunch of black hairs described as pubic hair of accused from victims body were found to be human in origin, and are similar in most of their characteristics.

37. Although the FSL result could not give the grouping/remarks, but that was probably for the reason that the incident took place on 12.03.2008, the samples were sent to FSL on 11.04.2009, however, the samples were examined and analysed after a considerable delay (inasmuch as the report is dated 29.05.2009) of more than one year. The delay in examination of the exhibits may be the reason as to why the grouping could not be given on the exhibits as it is opined no reaction/inconclusive.

38. A serious note was taken by Supreme Court in delay in examination of the samples by the Forensic Science Laboratories and therefore various guidelines were given in Thana Singh vs. Central Bureau of Narcotics, (2013) 2 SCC590directing the Centre as well as the State, to take special steps to establish State Level and Regional Forensic Sciences Laboratories and to make provision of facilities and resources so that the laboratories should furnish their reports expeditiously to the concerned agencies.

39. Be that as it may be, mere fact that grouping on the exhibits could not be opined, is not a factor which can benefit the accused in any manner.

40. In State of Rajasthan Vs. Teja Ram and Ors., (1999) 3 SCC507 one of the circumstances which the Trial Court relied on as incriminating against the accused is the recovery of two axes (kulhadis). On the strength of the statements of two of the accused persons, the said axes (kulhadis) were subjected to chemical

examination and the result was that both the axes (kulhadis) were found stained with blood. However, when they were further subjected to test by the serologist, the blood on one axe was found to be of human origin while the blood stain on the other axe was found to be so disintegrated that its origin became undetectable. A Division Bench of the High Court of Rajasthan declined to act on the evidence relating to the recovery of axes for the reason that human blood could be detected only on one of them while the origin of the blood on the other was not established, there was room of entertaining doubt as to the real person whose blow with the axe would have caused the injury. The Supreme Court finding the reasoning of the High Court unsustainable, opined as under:

25. Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is too insufficient or due to hematological changes and plasmatic coagulation that a serologist might fail to detect the origin of the blood. Will it then mean that the blood would be of some other origin?. Such guesswork that blood on the other axe would have been animal blood is unrealistic and far-fetched in the broad spectrum of this case. The effort of the criminal court should not be to prowl for imaginative doubts. Unless the doubt is of a reasonable dimension which a judicially conscientious mind entertains with some objectivity, no benefit can be claimed by the accused.

41. In the case of Gura Singh vs. State of Rajasthan, (2001) 2 SCC205 the prosecution proved beyond doubt the recovery of the blood stained 'chadar' (sheet) belonging to the Appellant and kassi, the weapon of offence on the basis of the voluntary disclosure statement made by the accused, who was charged with the offence of patricide and had allegedly smashed the skull of the deceased with the kassi. Both the Trial Court as well as the High Court held that the prosecution had successfully established the making of the disclosure statements by the Appellant and the consequent recovery of the weapon of offence and 'chadar' at his instance. The serologist and chemical examiner found the 'chadar' (sheet) and other items to be stained with human blood. However, the origin of blood stains on the kassi and other items like the shoes of the accused could not be determined

on account of disintegration with the lapse of time. The contention was sought to be raised on behalf of the Appellant that the prosecution had failed to connect the accused with the commission of crime and the judgments of the Supreme Court in Prabhu Babaji Navle Vs. State of Bombay, AIR 1956 SC51and Raghav Prapanna Tripathi Vs. State of U.P., AIR 1963 SC74were pressed into service. Rejecting the aforesaid contention, the Supreme Court held that the effect of the failure of the serologist to detect the origin of blood due to disintegration in the light of the aforesaid cases was considered by this court in Teja Ram's case (supra) and in view of the authoritative pronouncement of this court in the said case, there was no substance in the submission of the learned counsel for the Appellant that in the absence of the report regarding the origin of the blood, the Trial Court could not have convicted the accused.

42. In Ramnaresh & Ors. Vs. State of Chattisgarh, (2012) 4 SCC257 which was a case u/s 302/499/376 (2) (g) r/w Section 34 IPC, the plea was taken that the FSL report does not connect the accused with the commission of crime as the FSL report did not give the grouping of the blood/semen. Repelling the contention, it was held by Honble the Supreme Court that FSL report was inconclusive but not negative which would not provide the accused with any material benefit.

43. In the instant case, as per the FSL report, blood was detected on the shirt, banian, underwear and rectum of the deceased and shirt of the accused. Semen was found on the underwear of the victim and on the rectum slide of the victim. Besides that, blood as well as semen was found on the underwear of the victim with pubic hair of accused. Bunch of black hair described as pubic hair of accused were also found on the body of the victim. There is no challenge to the testimony of Dr. Lalit Mohan who collected hairs from the pubic area of victim or Dr. Sarvesh Tandon who proved post mortem report Ex.PW15A prepared by Dr. Arvind Thergaonkar who found blood stains on the T-shirt and baniyan of deceased and on anal examination found 2 cm cut with blood discharge from anal orifice, consistent with sodomy or the report of FSL, finding semen and blood as detailed above. These are clinching pieces of incriminating evidence operating against the accused.

44. Under the circumstances, the submission of learned counsel for the appellant that at the most, it was a case of attempt to commit unnatural sex is absolutely devoid of any substance, inasmuch as, Section 377 reads as under:

377. Unnatural offences.-- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life]., or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine. Explanation.- Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

45. The explanation appended to Section 377 IPC makes it clear that even penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this Section. Presence of blood on the anus and clothes of the deceased, presence of semen on the penis of the accused, absence of smegma at corona glandis of the accused, presence of semen on the rectum slide of the victim clearly proves that penetration was also done. Further as per the FSL report, Ex.13 were the bunch of black hair, which were, in fact, pubic hair of the accused, were found on the body of the victim and Ex.12 is the pubic hair of accused, which was also seen on the underwear of the victim (Ex.4) and as per the report, pubic hair of the accused contained in Ex.12 was found to be human in origin and are similar in most of their characteristics with the pubic hair found on Ex.4 and Ex.13. Thus, the pubic hair found on the body of the victim Suraj are pubic hair of Ilyasuddin which establishes beyond reasonable doubt that it is the accused who committed sodomy on the person of victim Suraj.

46. The plea taken by the accused that since he had never taken alcohol earlier and on the date of incident he had gone to attend the party given by one Sukhbir where he was given a pepsi laced with liquor and, therefore, he was under high intoxication and was not in such a state of mind where he had any intention to commit unnatural sex or commit the murder of the child, again is, devoid of substance, inasmuch as, although as per the testimony of the prosecution witnesses and medical report, the accused was found under the influence of alcohol but accused himself is not taking a plea that his case falls under Chapter

IV of Indian Penal Code providing for general exceptions and, more particularly, Section 85 which provides as under:

85. Act of a person incapable of judgment by reason of intoxication caused against his will.-- Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication, incapable of knowing the nature of the act, or that he is doing what is either wrong, or contrary to law: provided that the thing which intoxicated him was administered to him without his knowledge or against his will.

47. Bruises and bite marks on various parts of the body of the victim falsifies the defence that he became unconscious after entering the bath room. As per the post-mortem report, cause of death was smothering by the clothes which the deceased was wearing and head injury caused by hitting the head on blunt surface. The accused was found with the deceased in the bathroom in the circumstances discussed above. The offence of sodomy and murder was committed in one and the same transaction, therefore, court can legitimately draw a presumption not only of the fact that accused not only committed sodomy but also committed the murder. As such, it was the duty of the accused to explain the circumstances under which death of the victim occurred. {Vide Nika Ram Vs. State of Himachal Pradesh, AIR 1972 SC2077 Ganeshlal Vs. State of Maharashtra, (1992) 3 SCC106 Madhu @ Madhuranatha & Anr. vs. State of Karnataka, Crl. Appeal Nos. 1357/2011-1358/2011 and Criminal Appeal No.109/2013}.

48. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him and the Court must take note of such explanation even in a case of circumstantial evidence, to decide whether or not the chain of circumstances is complete {vide Musheer Khan @ Badshah Khan Vs. State of Madhya Pradesh, AIR 2010 SC762 Sunil Clifford Daniel Vs. State of Punjab, (2012) 11 SCC205 49. In Pudhu Raja and Anr. vs. State, (2012) 11 SCC1960 it was observed that it is obligatory on the part of the accused while being examined under Section 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence, in

order to decide, as to whether or not, the chain of circumstances is complete. When the attention of the accused is drawn to the circumstances that inculpate him in relation to the commission of the crime, and he fails to offer an appropriate explanation, or gives a false answer with respect to the same, the said act may be counted as providing a missing link for completing the chain of circumstances.

50. Then, in para No.13 it was concluded by the Hon'ble Supreme Court that:

13. ...The accused have not been able to properly or reasonably explain as to the legitimacy or origin of their possession of the articles carried by the deceased when he arrived from abroad at the airport at Chennai. In such circumstances, since the facts relating to the same being especially within the exclusive knowledge of the accused, the legislature engrafted a special rule in Section 106 of the Evidence Act, to meet certain exceptional cases in which not only it would be impossible but disproportionately difficult for the prosecution to establish such facts which are specially and exceptionally within the exclusive knowledge of the accused and which he could prove without difficulty or inconvenience. The appellants in this case have miserably failed to explain their lawful possession of those articles with them that really belonged to and were in the possession of the deceased when he landed at the air port at Chennai. Consequently, it was legitimate for the courts below, on the facts and circumstances of this case, to draw the presumption not only of the fact that they were in possession of the stolen articles after committing robbery but also committed the murder of the deceased, keeping in view the proximity of time within which the act of murder was supposed to have been committed and body found and the articles recovered from the possession of the accused....

51. Keeping in view the fact that the incident has taken place in the bathroom, where the accused was found along with the deceased and, as such, was last seen with the deceased, then under Section 106 of the Evidence Act, it was incumbent upon the accused to explain as to how the child sustained injuries. The statement of accused recorded under Section 313 Cr.P.C. is very relevant, inasmuch as, as stated above, he has not denied: (i) his presence in the bathroom with his pant and underwear in a pulled down condition. (ii) the deceased child

was lying in a naked condition and one of his leg was on the leg of Suraj; (iii) there were marks of teeth bite on his cheeks, neck, chest and blood was scattered in the bathroom; (iv) underwear of the deceased child was lying in the bathroom; there was blood on the anus of Suraj; (v) his shirt, pant and short were taken into possession; (vi) his pubic hair was found on the body of Suraj.

52. In fact, he has taken a false plea that he is impotent whereas as per the medical report (Ex.PW15/B), it was opined by the doctor that there was nothing to suggest that he was not capable of performing sexual intercourse. In pursuance to the questions as to why the witnesses have deposed against him or why this case was made out against him, he could not furnish any answer. As such, the circumstances viz. the accused being last seen together with the deceased in the bath room in the manner as narrated above, presence of blood and semen on the person of deceased for which no explanation is forthcoming coupled with the medical evidence which proves death to be homicidal and failure on the part of the accused to furnish any explanation pointing towards guilt of the accused are completely inconsistent with the plea of innocence as set up by the learned counsel for the appellant.

53. The various authorities relied upon by the learned counsel for the appellant that the accused had no intention to commit murder of the child and as such, the case does not fall under Section 302 IPC or at the most, falls under Section 304-II IPC is without any substance as all the authorities are to the peculiar circumstances appearing in those cases, inasmuch as, in Lalit Rai (supra), a sudden quarrel had taken place between the parties in which both the parties suffered injuries, as such, while upholding the conviction under Section 307 IPC, the sentence was converted from life imprisonment to 5 years rigorous imprisonment. Suleman (supra) was again a case where there was sudden arouse of passion and injuries were not on vital part of the body, as such, conviction was altered from Section 302 IPC to 304-I of IPC. Ezhilan @ Eshilarasan (supra) was a case where quarrel leading to the incident was not premeditated and injuries were, however, on vital parts of the deceased leading to his death, as such, the case was converted to Section 304-I IPC. T.Prasanna Kumar (supra) was an appeal for enhancement of sentence where on facts, it was found that there was no evidence

that the appellant who had sexual intercourse with the deceased did anything which any reasonable person would contemplate as being likely to cause injuries which would result in the death of the deceased, and, as such, the appeal was dismissed. In Dibakar Naik & Ors (supra) also, on factual scenario of that case, it was observed that intention to cause death could not be presumed. Choturam (supra) was a case where the factum of commission of sodomy was proved, however, the dead body was found floating on the water in well and there was no connecting evidence to show as to how the deceased was murdered and thrown after the incident of sodomy has taken place, as such, conviction for offence under Section 302/201 IPC was set aside. Things are entirely different in the instant case. The victim was only 2 years child. Various injuries were found on his person. As per the medical evidence, the cause of death was by smothering by the clothes which the deceased was wearing and head injury caused by hitting the head on blunt surface. As such, in view of the clinching evidence and our appraisal and analysis of the evidence on record, we have no hesitation to hold that prosecution has successfully established all the circumstances appearing in the evidence against the appellant by clear, cogent and reliable evidence and the chain of the established circumstances is complete and has no gaps whatsoever and the same conclusively establishes that the appellant alone committed the ghastly crime of committing unnatural offence with small child of 2 years and committing his murder on the fateful day in the manner suggested by the prosecution. All the established circumstances are consistent only with the hypothesis that it was the appellant alone who committed the crime and the circumstances are inconsistent with any hypothesis other than his guilt. It is most unfortunate that in order to fulfil his sexual lust, a small child aged about 2 years was made a target and in the process, he also took his precious life. Supreme Court in the sensational paedophilia case of Childline India Foundation and Anr. vs. Allan John Waters and Ors., (2011) 6 SCC261held as under:

Children are the greatest gift of humanity. Sexual abuse of children is one of the most heinous crimes. It is an appalling violation of their trust, an ugly breach of our commitment to protect the innocent.

54. On the facts and in the circumstances of the case, this Court is of the firm opinion that it is firmly established by the prosecution that accused committed sodomy with innocent Suraj and committed his murder. Therefore, he has been rightly convicted under Section 377/302 IPC. This finding of the learned Trial Court does not suffer from any infirmity which calls for interference.

55. The vexed question which now arises for consideration is: whether the facts of the instant case warrants the imposition of condition that appellant shall not be considered for being granted remission till he undergoes an actual sentence of 25 years.

56. This aspect of the matter was dealt with in Sangeet and Another vs. State of Haryana, (2013) 2 SCC452 where, after referring to various earlier decisions rendered by Honble Supreme Court, it was observed as under:

55. A reading of some recent decisions delivered by this Court seems to suggest that the remission power of the appropriate Government has effectively been nullified by awarding sentences of 20 years, 25 years and in some cases without any remission. Is this permissible?. Can this Court (or any court for that matter) restrain the appropriate Government from granting remission of a sentence to a convict?. What this Court had done in Swamy Shraddananda vs. State of Karnataka, (2008) 13 SCC767and several other cases, by giving a sentence in a capital offence of 20 years or 30 years imprisonment without remission, is to effectively injunct the appropriate Government from exercising its power of remission for the specified period. In our opinion, this issue needs further and greater discussion, but as at present advised, we are of the opinion that this is not permissible. The appropriate Government cannot be told that it is prohibited from granting remission of a sentence. Similarly, a convict cannot be told that he cannot apply for a remission in his sentence, whatever be the reason.

57. It was further observed that it is true that a convict undergoing a sentence does not have the right to get a remission of sentence, but he certainly does have a right to have his case considered for the grant of remission, as held in State of Haryana Vs. Mahender Singh (2009) 1 SCC (Cri.) 221 and State of Haryana Vs. Jagdish (2010) 2 SCC (Cri.) 806. Referring to Section 45 of the Indian Penal

Code, it was observed that this Section defines life as denoting the life of a human being unless the contrary appears from the context. Therefore, when a punishment for murder is awarded under Section 302 IPC, it might be imprisonment for life, where life denotes the life of the convict or death. The term of sentence spanning the life of the convict can be curtailed by the appropriate Government for good and valid reasons in exercise of its powers under Section 432 Cr.P.C. This Section statutorily empowers the appropriate Government to suspend the execution of a sentence or to remit the whole or any part of the punishment of a convict. The statute provides some inherent procedural and substantive checks on the arbitrary exercise of this power as embodied in Sub-section 2 to Sub-section 5 of Section 432 Cr.P.C. and Section 433A Cr.P.C. After referring to these provisions, it was observed that there is a misconception that a prisoner serving a life sentence has an indefeasible right to release on completion of either fourteen years or twenty years imprisonment. The prisoner has no such right. A convict undergoing life imprisonment is expected to remain in custody till the end of his life, subject to any remission granted by the appropriate government under Section 432 Cr. P.C which in turn is subject to the procedural checks in that section and the substantive checks in Section 433-A Cr.P.C. The death penalty awarded to the appellant was converted into a sentence of life imprisonment subject to the procedural and substantive checks as referred above. Substantially similar view was taken in Mohinder Singh Vs. State of Punjab, 2013 (2) Scale 24. Under the circumstances, curtailing the power of the appropriate Govt. to consider his plea of remission before the expiry of 30 years is impermissible.

58. In the case of Kaushal Singh Vs. State of NCT of Delhi, 194 (2012) DLT342and Rajinder Singh @ Raju Vs. The State, 2012 6 AD (Delhi) 196 also condition was imposed upon the convict that he shall not be considered for grant of remission till he undergoes an actual sentence of 20 years and 35 years respectively, which was modified to imprisonment of life only without any such condition.

59. The facts and circumstances of the present case also do not warrant imposition of such a condition. That being so, the sentence is modified only to the extent that the appellant will undergo life imprisonment which means till the end of

his life, subject to any remission granted by the appropriate Government under Section 432 Cr. P.C., which in turn, will be subject to procedural checks in that Section and the substantive check in Section 433A Cr.P.C.

60. The appeal is disposed of in the above terms, in modification of the order passed by the Trial Court. Copy of the order along with Trial Court record be sent back. (SUNITA GUPTA) JUDGE (KAILASH GAMBHIR) JUDGE JANUARY21 2014 rs/as