

Sher Singh Vs. State of U.P.

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SooperKanoon Citation : sooperkanoon.com/476957

Court : Allahabad

Decided On : May-16-2008

Reported in : 2008CriLJ4540

Judge : Amar Saran and ;Shiv Shanker, JJ.

Appellant : Sher Singh

Respondent : State of U.P.

Disposition : Appeal dismissed

Judgement :

Amar Saran, J.

1. This criminal capital appeal, which is connected with reference No. 5 of 2007, under Section 366 of Code of Criminal Procedure sent by the learned Sessions Judge, Firozabad, has been filed against the judgement and order dated 22.1.2007 passed by the learned Additional Sessions Judge, Fast Track Court No. 1, Firozabad whereby the appellant has been convicted and sentenced to death and a fine of Rs. 1000/- under Section 302 IPC and in case of default in payment the appellant was to undergo one year simple imprisonment; ten years RI and a fine of Rs. 1000/- under Section 376 IPC and in case of default the appellant was to undergo one year simple imprisonment; seven years RI and a fine of Rs. 1000/- under Section 201 IPC and in case of default the appellant was to undergo six

months additional imprisonment.

2. As this appeal was sent from jail, by order of this Court dated 16.4.2007 Shri S.F.A. Naqvi was appointed as amicus curiae.

3. We have heard Shri S.F.A. Naqvi, learned amicus curiae who has ably represented the appellant and the learned Additional Government Advocate and perused the judgement and evidence on record.

4. The prosecution case in a nutshell was that Smt. Asha, the mother of the two and a half years old deceased Km. Nikki, had returned to her residence in Mohalla Shiv Nagar, district Firozabad from her Maika in village Nagau on 2.5.2005 at about 9.45 A.M. She was residing in the house of Kedar Nath Sharma, who was the uncle (Tau) of the informant Purshottam Sharma father of Nikki. The informant Purshottam Sharma used to reside in the third floor of the house. In the portion of the house occupied by Kedar Nath Sharma's son Dinesh, there was a bangle making factory and a flour mill. About 25-30 persons from different places used to work there for making bangles. The appellant Sher Singh used to work in the flour mill. Km. Nikki had gone to the shop of Dinesh for getting some toffees and Gutkha on the fateful day at about 10.30 A.M. after taking permission from her mother. When Nikki did not return for a long time, then the informant and his wife became suspicious. They gave this information to Kedar Nath Sharma and his son Dinesh and other acquaintances. All the persons then made a search for the girl in the Mohalla, bus stand, railway station etc., but she could not be traced. At about 5.00 P.M. when the complainant returned home, then Kedar Nath Sharma disclosed that when Nikki has gone back from the shop after taking toffees and Guthka, then the appellant Sher Singh was holding her hand and saying that he would drop her upstairs. The labourers Babloo and Sahab Singh, who used to work in the factory have disclosed that they had also seen Sher Singh holding Nikki's hand and taking her towards the stairs of the Talghar (basement) at about 11.00 A.M. Sher Singh disappeared at about 1.00 P.M. When the informant searched for his daughter in the Talghar (basement), they saw her dead body lying under the basket there. Blood was coming out from her private parts and a string was tied around her neck. There was an injury below her right ear. The informant

was suspicious that his daughter had been murdered after being raped by Sher Singh. The informant Purshottam then got the report scribed by Shiv Dutt and lodged the report at police station Uttar, district Firozabad at 6.40 P.M. on 2.5.2005.

5. A case was registered against the appellant at case crime No. 112 of 2005, under Sections 302/376/201 IPC by HM Todi Singh, who prepared Chik report (Ext. ka. 17) and made the GD entries (Ext. Ka-18).

6. P.W. 6, SSI Bhaiya Lal, who was present at the police station Uttar commenced the investigation of the case and recorded the statement of HM Todi Singh and the informant Purshottam Sharma and conducted the inquest (Ext. Ka. 3) on the dead body of the deceased and after sealing the same, it was handed over to Constable Mool Chandra and Munshi Lal. He also prepared the relevant papers for post-mortem (Ext. ka 4 to 7) and inspected the spot on the pointing out of the informant and prepared the site plan (Ext. Ka. 8). He also prepared the fards of the string, which was tied around the neck of the deceased, the packet of Raj Bahar Guthka, slipper and basket, under which the deceased was lying. He handed over the basket in the Supardgi of Dinesh. He also collected plain and blood stained pieces of concrete from the place of incident, and the recovery memo (Ext. Ka. 10) was prepared. The fard of the underwear worn by the deceased was also prepared (Ext. ka 11). On 3.5.2005 he recorded the statements of Asha, Kedar Nath Sharma and the labourers. He recorded the statement of the accused-appellant Sher Singh, who was arrested by SI Veerpal Singh, SHO of the police station on 3.5.2005 from the house of Satya Prakash in village Hamani Pur at 10.30 A.M. He also took into possession the underwear of Sher Singh. After obtaining the post-mortem report and examining the other witnesses, he submitted the charge sheet on 23.5.2005 (Ext. Ka. 12).

7. The post-mortem on the body of the deceased Nikki was conducted by Dr. Memi Chandra at 10.30 A.M. on 3.5.2005 at the mortuary in Firozabad. The girl was about two and a half years in age. She had an average built body. Rigor mortis was present in both limbs and had passed off the neck. The doctor found the following ante-mortem injuries:

1. Ligature mark 24 cm long x 1 cm circulating the neck completely 4 cm below to the chin like depressed mark placed horizontally, reddish place in ilia with ecchymosed margins, hard and deep.
2. Lacerated wound 7 cm x 3.5 cm on the right side of face x bone deep close to right ear.
3. Abraded contusion 3 cm x 2.5 cm on the right side of face just below to right eyelid.
4. Lacerated wound 5 cm x 1.5 cm on the left little finger x bone deep.
5. Abraded contusion 3.5 cm x 1 cm on the middle of left back 3 cm away from mid line.
6. Lacerated wound 5 cm x 2 cm on the middle side of left sole close to base of big toe.
7. B/L contusion 3 cm x 1.5 cm on the labia minora. Vaginal hymen was torn and lacerated. Rectovaginal fistu 5 cm x 2 cm was present. Secretion present in vagina and on labia minora.
8. The internal examination revealed fracture of hyoid bone. The membranes, brain, larynx, trachea and bronchi were congested. Trachea was also fractured. Right and left lungs were both congested. Lips were also congested. Mouth closed, eyes half open, oesophagus was congested. There was about 2 ounces of pasty food in the stomach and semi digested food and gases in the small intestine. In the large intestine there was faecal matter and gases. Liver and gall bladder were also congested. The gall bladder was half full. Spleen and kidneys were congested. In the opinion of the doctor the death was due to asphyxia as a result of ante-mortem strangulation and rape.
9. The plain and blood stained earth, plastic bag, underwear of Nikki, underwear of appellant Sher Singh, frock of Km. Nikki and black thread were sent to the forensic laboratory, Agra and the report of the Assistant Director, forensic laboratory, Agra dated 21.7.2005 showed that blood was present on the blood stained earth, frock

and black thread. No blood was found on the underwear of the appellant. On the frock of Km. Nikki and underwear of the appellant spermatozoa was seen, but no spermatozoa was seen on the underwear of Km. Nikki. Human blood was found on the frock and black thread. However, classification of the sperm on the underwear of the appellant and the frock of the deceased and on the blood stained earth, frock and black thread of Km. Nikki did not result in any definite opinion.

10. On 8.9.2005 the charge was framed against the appellant under Section 302 IPC for having committed the murder of the deceased Km. Nikki, under Section 376 IPC for commission of rape on her and under Section 201 IPC for concealing the dead body in the Talghar (basement).

11. The appellant pleaded not guilty to the charges and claimed to be tried.

12. This is a case of circumstantial evidence. The prosecution has examined four witnesses of facts, P.W. 1, the informant, Purshottam Sharma, P.W. 2, Babloo, P.W. 3 Sahab Singh and P.W. 4 Kedar Nath Sharma.

13. Five formal witnesses have also been examined in this case. They are P.W. 5, Dr. Nemi Chandra, who conducted the post-mortem examination on the body of the deceased as mentioned above. P.W. 6, Bhaiya Lal, the investigating officer, who prepared the site plan and conducted the inquest as described above. P.W. 7, Shiv Dutta Parashar, who scribed the FIR. P.W. 8, HC Todi Singh, who prepared the chik FIR and made the relevant G.D. entries. P.W. 9, SHO Virpal Singh, who arrested the appellant from the house of Satya Prakash at 10.30 A.M. on 3.5.2005.

14. Purshottam Sharma, P.W. 1 has deposed that he used to do the work of making bangles. At the time of incident, his family consisted of his wife and two children, of whom the elder was Nikki, aged two and a half years and a son aged one year. On 2.5.2005, the date of incident his wife had returned at 9.30 A.M. from her Maika in village Nagau, district Firozabad to their residence in Mohalla Shiv Nagar where she used to reside in the residence of his tau in the third floor. In the middle portion of the house his tau Kedar Nath Sharma resided. In the bottom portion, the work done was of cutting of bangles and running of a flour mill. Labourers from different places used to work in the bangles factory and the

appellant Sher Singh used to work in the flour mill. At about 10.30 A.M. on the fateful day, Km. Nikki had gone down to get toffees and Guthka, but when she did not return for a long time, Purshottam was informed by his wife, whereupon he disclosed this fact to others and searched for their daughter, but she could not be traced out. At 5.00 P.M. when he returned after the search, then Kedar Nath Sharma disclosed that when Nikki was returning after getting the toffees and Guthka, he saw the appellant Sher Singh holding her hands and saying that he would reach her. The labourers Babloo and Sahab Singh also saw Sher Singh holding the hand of the deceased and taking her towards the stairs of the Talghar (basement). Sher Singh disappeared from the place at about 1.00 p.m. on that day. When they searched for the girl in the Talghar they found her dead body lying under a basket. Blood was coming out of her private parts and a string was tied around her neck. Her underwear was lying separately. Some stool had come out in the underwear. Sher Singh had committed rape on his daughter and murdered her and hidden her body under the basket and then left the place without telling anybody. He got the report scribed by Parashar and lodged it at the police station.

15. P.W. 2, Babloo, the next witness of fact disclosed that on 2.5.2005, he used to do the work of cutting bangles in the factory of Pandit Kedar Nath Sharma where 20-25 persons used to work. In the house itself, there was a flour mill and a shop. The flour mill was being operated by the appellant. At about 10.30-11.00 A.M. on 2.5.2005 he and his companion Sahab Singh had come out of the factory for drinking tea and when they came out of the gallery and reached the main gate, they saw Sher Singh holding the hands of Nikki and taking her in the direction of the Talghar. After that these witnesses left for tea and on return they became engaged in their work. On the same day at about 5.00 P.M. when their work was over, they learnt that the girl was missing. Then he and Sahab Singh disclosed that they had seen Sher Singh feeding Nikki with something on the first step of the Talghar. When he had gone to collect his cycle, then he saw an underwear, toffee, Guthka and a slipper lying there and the dead body of Nikki was lying under a basket. Purshottam and the other relations of Nikki had also gone down with him in the basement. The cheek of Nikki was bitten and blood was coming out of her private parts and there was some stool on her underwear. Thereupon these people concluded that Sher Singh had murdered her.

16. P.W. 3, Sahab Singh has deposed that on 2.5.2005 at about 10.30-11.00 A.M. he was coming out with his friend Babloo to drink tea. Then he saw Sher Singh taking Nikki in the direction of the basement. These two then proceeded to take tea and after return they joined their work. At about 5.00 P.M. when the girl was not found, then they told the father of the girl about Sher Singh taking the girl towards the basement. In the evening the labourers were collecting their cycles, then they saw a slipper lying there. When they made some search, they saw the girl lying on one side and blood was coming out from her private parts. Then they were convinced that Sher Singh was responsible for this incident.

17. P.W. 4, Kedar Nath Sharma has disclosed that at about 10.30-11.00 A.M. on 2.5.2005 Purshottam's daughter had come to his shop for getting toffees and Guthka. He gave her toffees and Guthka. His servant Sher Singh was standing there and he said that he would drop Nikki and he caught hold of Nikki's hand and took her inside. After that this witness left for market. At about 5.00 P.M. when he returned, then Purshottam and other workers were looking for Nikki. He then disclosed the aforementioned facts to Purshottam. Sahab Singh and Babloo also arrived there, who disclosed that they had seen Sher Singh taking Nikki towards the Talghar. Sher Singh was not present at that time. All the persons went to the basement, where they saw Nikki's slipper, toffees, Guthkha and Nikki's dead body covered by a basket. There was an injury on Nikki's cheek and blood was coming out from her private parts. Then he became convinced that Sher Singh has raped and murdered her.

18. In his statement under Section 313 Cr.P.C. the appellant disclosed that the witnesses were falsely deposing against him on the basis of enmity and suspicion. Some unknown person had committed the crime and because there was some dispute over payment with Kedar Nath Sharma, hence the informant has falsely implicated him on the basis of suspicion.

19. To a question whether he had been convicted in an earlier case for committing rape with a girl of his village Phulan Devi for which he had been awarded 10 years sentence and he was on bail in the said case and about which he had made a disclosure to P.W. 6, Bhaiya Lal, the appellant replied that he was awarded 7

years sentence in that false rape case in which he was on bail. He denied that he had disclosed to P.W. 6, Bhaiya Lal that he had been sentenced to ten years imprisonment.

20. It is argued by Shri S.F.A. Naqvi, learned amicus curiae for the appellant that chain of circumstances in this case are not so clinching and complete so as to lead to only one inference that it was the appellant and appellant alone, who was responsible for the rape and murder of the deceased child. The dead body was not recovered at the instance of the appellant. Learned Counsel for the appellant has relied upon a number of cases of the Apex Court [viz. State of Goa v. Sanjay Thakran : (2007)3SCC755 ; Padala Veera Reddy v. State of A.P. : AIR 1990 SC79 ; Kailash Potlia v. State of A.P. : 1995 CriLJ4183 ; Balwinder Singh v. State of Punjab : 1996 CriLJ883 ; Ram Reddy Rajesh Khanna Reddy and Anr. v. State of A.P. : AIR 2006 SC1656 ; Sunny Kapoor v. State (UT of Chandigarh) : 2006 CriLJ2920] and this Court [viz. Hashmat Ali Kodhi v. State of U.P 2004(48) ACC 175, Mani Ram v. State of U.P. 2004 (48) ACC 767] for establishing this proposition.

21. As Kedar Nath Sharma, P.W. 4, who was the house owner and from whom an enquiry was made as per the FIR about the disappearance of the girl, yet from the FIR it appeared that he had disclosed to the informant Purshottam, the father of the deceased that he had last seen the deceased Nikki with the appellant and they proceeded to search for Nikki in the nearby mohalla, bus stand, railways station etc. There is no evidence that the semen, which was found on the underwear of the appellant corresponded with the semen found on the frock of the girl child. After committing the crime, there was no reason for the appellant to remain present at the spot for two hours as was admitted by the prosecution witness. The medical examination of the appellant was not done for examining whether he had injuries etc. to corroborate the allegation of rape.

22. It was further argued that the appellant has been falsely implicated and case was foisted on him because there was some money dispute between the appellant and Kedar Nath Sharma. There was no reason why the appellant would be there and not have run away to be meekly arrested on the next day, i.e. 3.5.2005.

23. On the other hand learned Additional Government Advocate contends that the circumstances are sufficiently clear and adequate to connect the appellant with the offence. There was no good reason why the appellant would be implicated for this offence if he had no concern with it.

24. The deceased was last seen with the appellant at about 11.A.M. by Babloo, P.W. 2, Sahab Singh, P.W. 3 and Kedar Nath Sharma, P.W 4. Babloo and Sahab Singh were also labourers in the factory where the appellant used to work in the premises. The appellant absconded from the factory at about 1.00 P.M. The appellant admitted of having been earlier convicted in a rape case of Kannauj.

25. The explanation is present in the evidence of Kedar Nath as to why the disclosure about the deceased having been last seen with the appellant had not been made to the informant P.W. 1. As semen was seen on the appellant's underwear when he was arrested and semen was also found on the frock of the deceased, the failure of the appellant to explain the presence of semen stains on his underwear was a circumstance against him and mere failure of the prosecution for getting a DNA test done for elucidating whether the semen on the frock of the deceased and semen on the underwear of the appellant was the same, would not result in demolition of the prosecution case.

26. As the deceased was last seen with the appellant the burden lay on the appellant to explain the circumstances as to how the deceased had died.

27. The principles for appreciating a case of circumstantial evidence have been aptly enunciated in the case of Padala Verabira Reddy v. State of AP 1989 Supp (2) SCC 706, in paragraph 10, on pages 710-711, which we respectfully adopt. The principles laid down are as follows:

10. (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.

28. It would be appropriate to first examine the case laws cited by the learned Counsel for the appellant.

29. We find that in the case of *State of Goa v. Sanjay Thakran and Anr.* (Supra) there was an appeal before the Apex Court against an order of acquittal recorded by the appellate High Court, which had observed that chain of circumstance to establish that either of the two accused alone or with the common intention of each other have committed the dreadful crime of murder of the newly married couple, was based on suspicion, which could not take place of evidence. Furthermore, P.W. 14 had stated that one of the accused and one of the deceased were present inside one of the rooms of the hotel. From this it was apparent that this accused had no role in the murder of the deceased. Also it was observed by the Apex Court in Sanjay Thakran's case that the High Court had rightly held, that it was unlikely that the appellant who was in his late 30s, was able to overpower the deceased, who was not only well built but also about 10 years younger and taller than him. Further, when the body of the deceased was recovered, it had no clothes on it, except an undergarment and the High Court and the Apex Court held that it is highly unlikely that a single person would not only forcefully drowned the deceased in the shallow beach water but also forced him to take out all the clothes and ornaments which he was wearing at that time especially when the post-mortem report also does not mention any serious injury on any of the vital parts of the deceased to support the prosecution version. In these circumstances, the recovery of some incriminating material from the accused persons, was discarded. There was also a sufficient time gap between the instances when the accused persons were last seen together with the deceased persons, and in the absence of

any other corroborative piece of evidence to complete the chain of circumstances to fasten the guilt on the accused, recoveries of common place items, which did not bore any distinguishing marks were also discarded. Doubts have also been expressed on the fairness of the investigation in the case of Sanjay Thakran.

30. The facts of the case in Padala Veera Reddy v. State of A.P. (Supra) are distinguishable from the facts of the present case. Tested in the light of the principles enunciated in paragraph 10 of the aforesaid decision, which has been cited herein above, it could not be said that in Padala Veera Reddy's case the circumstances were so clear and cogent to firmly establish the guilt of the accused and the tendency unerringly pointed towards the guilt of the accused or that cumulatively they could form such a complete chain where there could be no escape from the conclusion that within all human probability the crime was committed by the accused and none else or that the evidence was incapable of explanation on any hypothesis other than that of the guilt of the accused. In the first place, it was an appeal in the Apex Court against acquittal of the accused recorded by the appellate High Court. Furthermore, the Court concluded that there was no evidence of maltreatment of the deceased by the accused-respondent and from the mere circumstance that a false explanation of his presence in the marriage party and production of a certain suicide note of the deceased was not sufficient to reverse the findings of acquittal and to reach an inference of the guilt of the accused.

31. The case of Kailash Potlia v. State of A.P. (Supra) was also distinguishable because in that case, it was specifically observed by the Apex Court that evidence of extra-judicial confession did not inspire confidence as the witness of extra-judicial confession had stated that though he had gone near the dead body and found some person there, he did not disclose the alleged confession to anyone at that time. No judicial confession under Section 164 Cr.P.C. was recorded. P.W. 22, the recovery witness was disbelieved because he did not even know the place of recovery and the other Panch witness was not examined to corroborate his evidence. If the evidence of extra-judicial confession and recovery are excluded, then mere presence of the appellant near the scene of occurrence at mid-night, and an injury on his finger was considered too weak a piece of evidence to

complete the chain to connect the appellant with the occurrence.

32. The case of Balwinder Singh v. State of Punjab (Supra) is also distinguishable as in that case it was observed by the Apex Court that the circumstance of last seen together was not established beyond reasonable doubt, inasmuch as there was five days delay in lodging the FIR from the day when the wife was asserting to have last seen the accused with her daughters and her conduct as a mother of remaining silent when the accused had taken the daughters away after her telling that he was taking them away for killing them was unnatural and the extra judicial confession was surrounded by suspicious circumstances as the complaint was lodged by the person to whom the accused was alleged to have made the confession, after a delay of three days and the fact relating to the recovery of the dead body or the alleged disclosure statement by the accused was held not to be reliable.

33. In the case of Ram Reddy Rajesh Khanna Reddy v. State of A.P. (Supra) it was also observed that suspicion, however, grave, cannot be a substitute for a proof, which must be based on reliable evidence. The acquittal was recorded because the statement of P.W. 9, an alleged eyewitness was recorded three days after the incident by the police and P.W. 8 the witness of motive for the quarrel, was also examined two days after the incident. No test identification parade was held. P.W. 6, the auto driver, in whose auto the appellants were alleged to have driven to the deceased's house, was examined after three years and three months and he deposed that the words written on his auto were 'Suverna' and not 'Swathi' as disclosed in the FIR and hence the identity of the auto mentioned by the first informant was held doubtful. Also his conduct in not going to the police station to lodge the FIR though he was related to one of the police officers, and waiting for someone to scribe the same on road, makes his story doubtful. Furthermore, it was a mystery as to how P.W. 1 could name all the accused in the FIR since he had neither stated in the FIR nor in his deposition in the court that he knew the appellants. Moreover, as he had not met P.W. 8 before lodging the FIR, there was no reason for him to know about the alleged quarrel between the appellants and the deceased. The evidence of other PWs neither appeared credible nor corroborating each other. The delay of arrest of the appellants was also not

explained. Further, why the FIR was dispatched at 6.45 A.M. when the incident took place at 10.30 P.M. on the previous night and the court was situated in the same town is also difficult to understand. Exact time of death has also not been proved. Also the evidence of last seen together was held unreliable because the time when the deceased was seen together with the appellants was not so short as to exclude the possibility that anyone else had committed the crime in the interim period.

34. In *Sunny Kapoor v. State of UT of Chandigarh* (Supra), it was held that the links in a chain so as to point guilt of the accused alone and nobody else was not complete. It was observed that if there was any common intention at all, it was only to loot the valuables belonging to the deceased and not to murder him and in the absence of any charge under Section 397 IPC, it was difficult to hold the appellants guilty of commission of murder, inasmuch as it has not been proved as to who had strangled the deceased. Also, in the absence of any evidence that all of the accused were present at the time when the deceased was strangled, a charge under Sections 302/34 IPC could not have been brought home. It was further held that the extra judicial confession to a person whom the accused did not know from before was unlikely and it was not relied on.

35. The case of *Hashmat Ali Kodhi v. State of U.P.* (Supra) is also distinguishable because in that case also there was evidence that the 10 year old deceased had been subjected to an unnatural offence and had been strangled. Because interrogation of the witness of last seen P.W. 4, the companion of the deceased, was done only after 15 days and the FIR, which was lodged by the father of the deceased after 15 days in respect of missing of his son and that there was no explanation of the delay. He also did not mention that P.W. 4 had told him that the deceased had gone along with the appellant. P.Ws 2 and 3, the other witnesses of last seen were not interrogated by the investigating officer. Therefore, it was held that the mere circumstance of recovery of the rope on the pointing out of the appellant was not sufficient for establishing the complicity of the appellant in that case of circumstantial evidence.

36. The case of Mani Ram v. State of U.P. (Supra) is also distinguishable because in that case only the deceased and the appellant were seen going together more than 24 hours prior to the recovery of the corpse of the deceased and that there was no other material to connect the appellant with the incident. In those circumstances the Supreme Court held that in such a case this material will only give rise to suspicion and no more.

37. Per contra, learned Additional Government Advocate has placed reliance upon the decisions of the Apex Court in Surendra Pal Shiv Balakpal v. State of Gujarat : 2004 CriLJ4642 . In that case the appellant offered Rs. 150/- to the informant, the mother of the deceased, who was a widow and his landlady seeking sexual favours from her, but he had been repulsed in this effort. In the night P.W. 2 was sleeping along with her two minor daughters on a cot lying outside the room. At about midnight she felt cold and went inside and at 1.00 A.M. when she returned, she found the deceased, her daughter, missing. She immediately started to search for her daughter. P.W. 7, informed her that he had seen the appellant carrying a child on his shoulder, although he could not identify the child. The dead body of the deceased was found floating on a pond and a lacerated wound on the private parts of the deceased was found by the doctor. The hymen was completely ruptured. The doctor opined that the victim died due to asphyxia. From the shirt, vest, pants and underwear of the appellant blood stains were seen and in the underwear there were blood stain marks with semen. The appellant could not offer any explanation for these incriminating circumstances. Although the recovery of the dead body at the instance of the appellant was doubted as some incongruity was noted in the inquest, but the Apex Court found the evidence sufficient for confirming the conviction of the appellant. However, the Apex Court substituted imprisonment for life in place of the death sentence awarded by the courts below noticing that the appellant was an impecunious labourer from U.P. and it could not be said that he would be a menace for society in future.

38. The second case relied upon by the learned AGA is Bablu alias Mubarik Hussain v. State of Rajasthan (2007)2SCC (Cri) 590. In that case the appellant was charged for the murder of his wife and four minor children. The circumstances for establishing his guilt were an extra judicial confession that the appellant had

made before Murad Khan, P.W. 1, Bablu Kalva, P.W. 2 Mohd. Sharif, P.W. 3 and Alladeen, P.W. 4, which was accepted by the Apex Court. The presence of the appellant in the house and the recovery of the ear ring of his wife from his possession, led the Court to hold that there was no reason for the neighbour and P.W. 2, who was the brother of the accused-appellant to make untruthful statements that the appellant had made an extra judicial confession before them. On the question of sentence, even the plea of the appellant that the crime had been committed in a fit of drunkenness, was not held to be a mitigating circumstances for commuting the sentence of death given by the lower court and the High Court to a sentence of imprisonment for life by the Apex Court.

39. Another case relied on by the learned Additional Government Advocate was State of U.P. v. Satish : 2005 CriLJ1428 . In this case the acquittal of the appellant by the High Court for the murder of his six year old school going child was reversed and the death sentence awarded by the trial court restored. The dead body of the child was lying in the field with blood oozing from her private parts and there were marks around her neck. Three persons had seen the accused near the place of occurrence between 1 and 2 P.M. Two of them, P.Ws 3 and 5 had seen the accused carrying the deceased on a bicycle. P.W. 2 stated that he had seen the accused in a perplexed state at 2.00 p.m. near the place where the dead body of the deceased was found. The recovery of the accused's underwear as also the undergarment of the deceased during investigation were treated as discoveries under Section 27 of the Indian Evidence Act. The High Court had, however, reversed the conviction, awarded by the trial court, by holding that the examinations of P.Ws 3 and 5 after a long time rendered their versions unacceptable and improbable. The prosecution had not offered any explanation for such delayed examinations. Secondly, the name of the accused was not mentioned in the FIR; and thirdly, the presence of the accused as deposed by P.W. 2 near the place of occurrence could be regarded as a suspicious circumstance, but was not determinative. The Apex Court disagreeing with this approach of the High Court, held that it was the duty of the cross-examiner to have questioned the investigating officer as to why there was delay in examination of the witnesses and in the absence of such cross-examination, the defence could not take any advantage of the delay. The Apex Court also observed that there was

no suggestion either to P.Ws 3 or 5 that they have not seen the accused and the deceased together and even no question was asked about that aspect in the cross-examination and that cross-examination had only been directed on the aspect of the recovery of the undergarments of the accused and the deceased. As the time when the accused and the deceased were seen together by the witnesses 3 and 5, i.e. at about 1.00 or 2.00 P.M. on the date of occurrence and the recovery of the dead body the next morning at 6.00 A.M. from the field of Mool Chandra, was considered to be sufficiently short for the Apex Court to arrive at the conclusion that it was the accused and the accused alone, who was responsible for the murder of the deceased.

40. We, have referred at some length to the decisions cited by the appellant's counsel and by the learned AGA, just to show that depending on the facts of the particular case, the Supreme Court has in some instances held the circumstantial evidence sufficient to record the conviction similar to a case where there is reliable direct evidence, whereas in other cases it has not found the evidence sufficiently reliable for upholding the complicity of the accused in an offence. Therefore it is all a question of appreciation of evidence of each case and the authorities can only be taken as pointers for appreciating the evidence on different points and cannot be said to be laying down general rules for deciding such cases irrespective of the peculiar facts and circumstances of a particular case.

41. The contention raised by the learned Counsel for the appellant that in the FIR lodged by Purshottam, P.W. 1, the father of the deceased, mentioned that although an enquiry was made from P.W. 4, Kedar Nath Sharma, the house owner about the disappearance of the girl, but he does not appear to have disclosed to the informant that he had seen the deceased Nikki in the company of the appellant at that time. Although in his evidence P.W. 4 had stated that Nikki had come to his shop at about 10.30 or 11.00 A.M. on 2.5.2005 for getting toffee and Gutkha. His servant, Sher Singh, the appellant was standing there and he stated that he would drop Nikki and thereafter he caught hold of Nikki's hand and took her inside. After this, this witness left for market. At about 5.00 P.M., when he returned, then Purshottam and other workers were looking for Nikki, then he disclosed the aforementioned facts to Purshottam.

42. As the FIR was lodged only on 2.5.2005 at 6.40 P.M. after the informant and others had returned from the bus stand, railway station and other places searching for Nikki and then they were informed by P.W. 4, Kedar Nath Sharma and the labourers P.W. 2 Bablu and P.W. 3 Sahab Singh that they have seen the girl Nikki going with Sher Singh in the direction of basement at about 11.00 A.M., they they searched for the deceased in the basement and found her dead body lying under a basket. Here, we think that a single line at one point of the FIR that after the girl had disappeared at 10.30 AM when she had gone down to get toffee and Gutkha, the informant had disclosed this fact to Kedar Nath and others before commencing search for the girl, it cannot affirmatively be said that the informant had met Kedar Nath Sharma in the morning itself specially when P.W. 4 himself had stated that after giving toffee and and Gutkha to Nikki, who was accompanied by the appellant he had gone away to market.

43. Also in his cross-examination P.W. 1 has clarified that when he came to the shop, then only Dinesh was present, who stated that he had no knowledge about Nikki and that Kedar Nath Sharma, who runs the factory and flour mill often goes out and he was out at that time.

44. Even if, it is assumed for the sake of arguments, that Kedar Nath Sharma was present when the informant came down looking for his daughter and had already seen the appellant near Nikki when she was buying toffee and Gutkha, he may not have given too much importance to the fact as the appellant was a worker in his flour mill and only after the other witnesses Bablu and Sahab Singh also claimed to have seen the appellant going along with Nikki in the direction of basement and the dead body of the girl was discovered from the basement, that the significance of the appellant being present with Nikki at the shop may have struck him. At any rate such a minor discrepancy can have no significant impact on the credibility of the prosecution case as a whole.

45. The learned Counsel for the appellant has stated that the underwear of the appellant and the underwear of the girl were not sent for serological examination for confirming whether semen found on the frock of the girl child corresponded with the semen found on the appellant's underwear. However, for this lapse on the

part of the investigating officer, we find no reason to disbelieve the prosecution case. It is the prosecution version that spermatozoa and human blood were seen on the frock of the girl and after the appellant was arrested on 3.5.2005 from the house of Satya Prakash at 10.30 A.M. his underwear was taken in possession, which also revealed seminal stains and no explanation had been given by the appellant about the presence of seminal stains on the frock of the girl and on his underwear, although he denies being arrested from his house, but he nowhere states that seized did not belong to him.

46. It is also well settled that for a mere irregularity or lapse in the process of investigation, the prosecution case cannot be thrown overboard if the evidence is otherwise reliable.

47. Again, we find no merit in the contention of the learned Counsel for the appellant as to why the appellant remained present at the spot for two hours as was admitted by the prosecution witnesses. It may be that after committing the crime if the appellant had immediately disappeared, he could have entertained the impression that stronger suspicion could be cast on him. So he may have decided to clean up the flour mill, which he used to run on the premises and to leave the place two hours thereafter so that his departure from the place may appear more natural, and he may have thought that the other labourers would be going into the basement only later in the evening when they go there to collect their bicycles, by which time he would have made good his escape from the spot. But these are all matters where we can only speculate because we have no means for knowing how the mind of a criminal really works. Non-visit of the appellant to the place of work the next day when he may have feared being severely questioned and his admitted apprehension from the house of one Satya Prakash in village Humaunpur are other circumstances pointing to the complicity of the appellant in this offence.

48. Again the mere failure to get the appellant examined for showing whether he had any injury on his penis or other parts of his body to corroborate the allegation of rape, could not damage the prosecution case to any significant extent as admittedly, the child, who was raped and murdered was only a two and a half year

old child and under such circumstances, there was little reason to think that the appellant would necessarily have received any injury in committing rape on her.

49. So far as the contention that the appellant was falsely implicated because there was some money dispute of the appellant with Kedar Nath Sharma, there is no substance in this contention as no evidence had been adduced by the appellant in defence for establishing this fact. He does not mention the period when such a dispute over 'Len Den' took place with Kedar Nath Sharm.

50. So far as P.W. 1, Purshottam, the informant is concerned, he has suggested no reason why he was being falsely implicated in this offence.

51. So far as P.W. 2 is concerned, it has only been suggested to him in his cross-examination that as he was a labourer of Kedar Nath Sharma, hence he had falsely implicated him.

52. Even otherwise, for a mere money dispute over payment of wages etc. any person would go to the extent of falsely implicating the appellant for such a heinous crime if he had no concerned with that crime.

53. In his appeal from jail, the appellant has given quite a different reason for his false implication that it was the informant, who had kept his wife, hence he had falsely implicated him and has mentioned this as a ground for preferring the appeal. This also shows bogus nature of the appellant averments for his having been falsely implicated over the 'len den' issue with Kedar Nath Sharma.

54. We have also seen that within 4 or 5 hours of the deceased child having been seen with the appellant, her dead body was recovered in the basement. There is no undue delay between the two points, i.e. the period when the appellant was last seen with the deceased and the body was recovered and in such circumstances the burden lay on the appellant to explain this circumstance as held in the case of State of U.P. v. Satish (Supra), as to the circumstances of the disappearance of the child and the mere denial of the appellant about the circumstances will not suffice. This circumstance of being last seen with the appellant soon before recovery of her dead body, and failure of the appellant to explain the same is

therefore a strong circumstance for establishing the complicity of the appellant in this crime.

55. We dismiss the appeal in view of the following circumstances, viz.

1. The appellant was last seen with the deceased at about 10.30 to 11.00 A.M. by P.W. 4 Kedar Nath Sharma at his shop where the deceased had gone to get toffee and Gutkha.

2. The appellant was also last seen with the deceased going in the direction of the basement by the witnesses P.W. 2 Bablu and P.W. 3 Sahab Singh, who were the labourers in the factory on the premises.

3. The disappearance of the appellant from the place at about 1.00 P.M. on the date of incident.

4. Recovery of the dead body in the basement in which direction the appellant was seen going along with the deceased, a few hours before the discovery of the body there.

5. The absence of explanation by the appellant about the recovery of the dead body of the deceased in such circumstances.

6. Presence of blood and spermatozoa on the frock of the deceased and the presence of spermatozoa stains on the underwear of the appellant when he was arrested the next morning.

7. The disappearance of the appellant from the place at about 1.00 P.M. and his remaining absent the next day until he was arrested from the house of Satya Prakash in village Humaunpur on 3.5.2005.

8. The absence of any reason for Purshottam, the informant, P.W. 1 and witnesses P.Ws 2 and 3 and P.W. 4 Kedar Nath Sharma for falsely deposing against the appellant.

9. Admitted conviction of the appellant for the rape of a girl of his village namely Phullan Devi, for which he was awarded 7 years sentence and in which case he

was on bail. Although as held in the case of Surendra Pal Shiv Balak Pal (Supra) in paragraph 9 that 'previous conduct also though not strictly admissible in evidence would prove that the appellant was prone to do such crime. The Sessions Judge as well as the High Court appreciated the evidence in the correct perspective and found the appellant guilty and we do not find reasons to disbelieve this finding.'

10. The confirmation of the post-mortem report that the cause of death was asphyxia as a result of strangulation by thread and the girl was also subjected to rape and an attempt was made thereafter to conceal the evidence by leaving the dead body in the basement in a basket which confirms the charge under Section 201 IPC.

56. However, one final question remains as to what would be the appropriate sentence to be awarded in this case.

57. We think that that in the case of Surendra Pal Shiv Balak Pal (Supra) the allegations were no less grave than the present case. The allegations in Surendra Pal Shiv Balak Pal were that the appellant had been making overtures towards the mother of the child for sexual favours which she had repulsed. He thereafter committed rape on the girl child and strangled her and there were semen and blood stains on the underwear of the appellant, which were not explained by the appellant. Yet because the appellant was a labourer in impecunious circumstances, the Apex Court had deemed it appropriate to convert the sentence of death to a sentence of life imprisonment.

58. There is another line of decisions of the Apex Court where on an examination of the evidence and circumstances of a case, whilst maintaining the conviction of the appellant under Section 302, but looking to one or two minor shortcomings in the state of evidence collected, they have felt that the evidence was not good enough for 'putting out a life,' and the Apex Court has then proceeded to alter the conviction from one of death to imprisonment for life. In this connection it would be useful to extract the following passage from, paragraphs 59 and 60 in Shankar v. State of T.N. : 1994 CriLJ3071 :

Learned Counsel for the State, on the other hand, submitted that A-3 has also participated in the murders of D-1 to D-3 along with A-1 and A-2 and his case also stands on the same footing in awarding death sentence. But one other aspect which has been highlighted by the learned Counsel for the appellants is that the quality of the evidence relied upon for holding A-3 guilty of murder charge also has to be taken into account in awarding death sentence and his further submission is that so far as the individual participation of A-3 in the murders of D-2 and D-3 is concerned, there is only the evidence of PW 1 and in respect of murders of all the three i.e. D-1 to D-3, the retracted confessions of A-1 and A-2 are there but one cannot be used for corroborating the other mutually and therefore the quality of evidence is not of such high degree in respect of the nature of participation by him to which the Court can give that high value to impose death sentence. We see force in this submission. We may at this juncture refer to a discrepancy in the evidence of PW 1 who deposed about the murders of D-2 and D-3 only. In the chief-examination, PW 1 deposed that A-3 tightened the neck of D-3 with a towel and held his legs. But in the cross-examination, when confronted, he stated that A-3 did not hold the legs of D-3. We are only pointing out this discrepancy in the evidence of PW 1 who is an accomplice in view of the fact that his evidence alone qualitatively has to be taken into consideration in respect of the nature of individual participation of A-3 for awarding death sentence. There is no other evidence as to the actual nature of participation of A-3 in the murders of D-2 and D-3 apart from that of PW 1, though there is enough of corroborating evidence in general for the purpose of inferring common intention in respect of the offences punishable under Sections 302/34 IPC. In the case of A-1 and A-2 there are their own individual retracted confessions which can be acted upon regarding their individual roles. They no doubt involve A-3 also but attribute actual participation only in the murders of D-1 to D-3 and in general along with others in the murders of A-4 to A-6. However, we are of the view that those retracted confessions of co-accused cannot be taken into consideration for assessing the nature of participation of A-3 for the purpose of deciding whether his case is one of the rarest of rare cases.

60. This Court in *Dudh Nath Pandey* case(1981) 2 SCC 166 while reducing the death sentence to imprisonment for life observed thus: (SCC p. 175, para 22)

...if witnesses on whose evidence the life of an accused hangs in the balance, do not choose to reveal the whole truth, the Court, while dealing with the question of sentence, has to step in interstitially and take into account all reasonable possibilities, having regard to the normal and natural course of human affairs.

59. Likewise in Suresh case(1981) 2 SCC 569 taking into account the quality of evidence, this Court observed thus: (SCC p. 574, para 11)

The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life.

60. From this point of view we think it is not safe to confirm the death sentence of A-3.

61. Likewise this extract from para 11 of Suresh v. State of U.P. : 1981 CriLJ746 , may be usefully perused:

11.Coupled with these considerations is the fact that the basic evidence in the case is of a child of five who answered many vital questions with a nod of the head, one way or the other. A witness who, by reason of his immature understanding, was not administered oath and who was privileged, by reason of his years, not to make his answers in an intelligible and coherent manner is unsafe to be trusted wholesale. We cannot also overlook, what Shri L.N. Gupta highlighted, that Sunil's statement was recorded about 20 days later. There is valid reason for the delay, namely, his state of mind (he was a witness to the murder of his mother and an infant brother) and the state of his body (he was gagged as a result of which his clavicle was fractured). Children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. The extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life.

62. Although considering the brutality of the crime with a very small child, we would have ex facie taken the view that the proper sentence in this case should

only be death and the other option was foreclosed, but in view of the fact that one or two lapses have been committed by the investigating office in failing to establish that the spermatozoa found on the frock of the deceased and on the underwear of the appellant was of the same person (i.e. the appellant) by means of a DNA test or otherwise, absence of medical examination of the appellant, we think the evidence is not sufficient in this case for 'putting out a life' and for awarding the death sentence for the crime, although the evidence is sufficient to establish the guilt of the accused for an offence under Section 302 IPC. In our view this is not a fit case for confirming the sentence of death, and it cannot be held that the other option of awarding life sentence is unquestionably foreclosed.

63. In this view of the matter, the appeal is accordingly dismissed with the modification that the sentence of death and the fine of Rs. 1000/- awarded to the appellant under Section 302 IPC is converted to a sentence of imprisonment of life. The fine awarded under the aforesaid section is maintained. The sentence of ten years RI and a fine of Rs. 1000/- under Section 376 IPC and the sentence of seven years RI and a fine of Rs. 1000/- under Section 201 IPC are also maintained. All the sentence shall run concurrently.

64. With these modifications this appeal is dismissed. The reference No. 5 of 2007 sent by the District Judge under Section 366 of the Code is also rejected.

65. Office is directed to send a copy of this order to the Chief Judicial Magistrate, Firozabad for information to the accused through the Superintendent of Jail, Firozabad.