

**State Vs. Ramesh**

**State Vs. Ramesh**

**SooperKanoon Citation :** [sooperkanoon.com/689550](http://sooperkanoon.com/689550)

**Court :** Delhi

**Decided On :** Feb-12-1998

**Reported in :** 1998IIAD(Delhi)42; 1998CriLJ4233; 71(1998)DLT867; 1998(44)DRJ607

**Judge :** Devinder Gupta and; N.G. Nandi, JJ.

**Acts :** [Code of Criminal Procedure \(CrPC\), 1973](#) - Sections 100(4) and 366; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 302, 364, 376 and 377; [Evidence Act, 1872](#) - Sections 27

**Appeal No. :** Murder Reference No. 2/97 With Criminal Appeal No .396/97 And Criminal Appeal No. 402/97 Murder Refe

**Appellant :** State ;ramesh ;sunil

**Respondent :** Ramesh; State ; State

**Advocate for Pet/Ap. :** Mr. S.K.Aggarwal Standing Counsel (Criminal),; Mr.Raman Sahni, Adv. and;

**Judgement :**

ORDER

**N.G. Nandi, J.**

1. This Murder Reference under Section 366 of the Code of Criminal Procedure and the connected appeals arise from the judgment dated 17.5.1997 passed by the learned Additional Sessions Judge, Delhi. Two accused, the appellants in the present appeals, were charged and tried for the offence under Sections 376/302/364/377/34 of the Indian Penal Code. Appellant Ramesh has been awarded death sentence and appellant Sunil is sentenced to imprisonment for life under Section 302/34 I.P.C. Both of them have been sentenced to imprisonment for life for the offence under Sections 364/34; 376/34 and 377/34 I.P.C. and all the aforesaid sentences made to run concurrently.

2. Murder Reference No.2/97 is the reference made to this court by the Additional Sessions Judge, Delhi under Section 366 Criminal Procedure Code for confirmation of the death sentence awarded to the convict Ramesh, S/o Jaswant. Criminal Appeal No.396/97 is preferred by convict appellant Ramesh S/o Jaswant whereas Criminal Appeal No.402/97 is preferred by convict appellant Sunil S/o Leela Ram against the said judgment of conviction and sentenced to undergo imprisonment for life by the Additional Sessions Judge, Delhi.

3. The case revolves around the incident which is stated to have taken place between 11 A.M. and 9.30 P.M. on 5.9.1992. The prosecution case, as revealed, is that one Smt.Sharda W/o Daulat Ram was residing in jhuggi No.86, Daya Basti, Near Railway Line, Delhi and was working at a factory manufacturing tubelights, situated at Gali No.9, Factory Area, Anand Parbat; that on 1.9.1992 Sharda along with her daughter Anuradha aged four years came to the jhuggi of Tara Near Railway Line in front of Liberty Cinema for cleaning her jhuggi; that on 1.9.1992 and 4.9.1992, she did not report to her duty; that on 5.9.1992, she went to her duty from jhuggi of Tara and that Tara was to reach Sharda's jhuggi at Daya Basti along with Anuradha; that after the service hours, Sharda reached her jhuggi at Daya Basti at about 8 P.M. where Tara was present who asked her to prepare meals. Sharda inquired from Tara about Anuradha so that she can also take the meals whereupon Sharda was told that Sunil S/o Gyano Devi had come to her house situated at Punjabi Basti at about 11 AM/12 noon for the purpose of collecting utensils which were earlier taken by Sharda from Gyano Devi and Sunil took the utensils and Anuradha with him while Tara had gone to fetch milk and

when she returned, she found Anuradha and Sunil not in jhuggi whereupon Sharda, Tara and neighbour Gariba came to the house of Sunil at 9.30 PM at Punjabi Basti, Gali No.2 where Gyano Devi was also present; that on enquiry, Gyano Devi told Sharda that Anuradha was sleeping with Ramesh at the tin shed; that Sharda went upstairs where she found Sunil sleeping dead drunk on the first floor. Sharda proceeded to tin shed and found Anuradha lying stark naked with Ramesh; that Ramesh was awakened by her and was told that she was taking her daughter there from but Ramesh is stated to have told her that as it was too late in the night asked Sharda to let Anuradha sleep there and take her in the morning time but Sharda forcibly took her daughter down stairs; that Sunil had also awakened by that time and told Sharda that they had sent Anuradha to the heavens by making her drink liquor; that Tara and Gyano Devi were standing down stairs; that on asking, Gyano Devi gave frock and clothes of her daughter; that Sharda found her daughter breathless and she immediately brought her to L.N.J.P. Hospital at 11.40 P.M. where doctor declared Anuradha having been brought dead.

4. At 12.15 A.M. on 6.9.1992, a telephonic information was received from L.N.J.P. Hospital at Police Station Anand Parbat, Delhi to the effect that one Anuradha, D/o Daulat Ram, r/o Jhuggi No.86, Daya Basti, Zakhira Pul, Delhi found injured at Anand Parbat, Punjabi Basti was brought to the L.N.J.P. Hospital by her mother where doctor declared her dead vide C.R. No.80766 requesting deputing of some officer at the hospital. On receipt of this telephonic information, a report to that effect was entered in the Roznamcha and a copy of report was entrusted to S.I.Pyare Lal whereupon S.I.Pyare Lal went to L.N.J.P. Hospital and collected the M.L.C. of Anuradha; that Sharda was tried to be contacted in the hospital but could not be traced; that the dead body of Anuradha was sent to Mortuary of Maulana Azad Medical College; that at 11.30 A.M, complaint Ex.6/A given by Sharda was recorded and thereupon Rukka was sent at 1.35 P.M. for registration of the case and the F.I.R. was registered for the offences under Sections 364/302/34 I.P.C. and after the usual investigation, the accused were charge-sheeted and the charges were framed for the offences alleged by the Additional Sessions Judge; that both the accused persons denied the charges leveled against them; that the prosecution adduced oral as well as documentary evidence to bring the guilt home

to the accused; that the Additional Sessions Judge, appreciating the oral as well as the documentary evidence, the statements of both the accused persons recorded under Section 313 of the Criminal Procedure Code and the circumstances, found both the accused persons guilty for the offences charged against them and awarded death sentence to accused Ramesh for the offences under Section 302/34 I.P.C. and also sentenced both the accused persons to undergo imprisonment for life for the offence under Section 376/34 and 377/34 I.P.C, as pointed out above.

5. The Additional Sessions Judge has made this reference under Section 366 of the Criminal Procedure Code for the confirmation of the death sentence awarded to convict Ramesh. Both the convicts have also preferred separate appeals under Section 374 of the Criminal Procedure Code assailing the finding of guilt recorded against them and the sentences awarded on each count by the Additional Sessions Judge.

6. We have heard the arguments advanced by the learned counsel on behalf of the appellants convicts and the learned Standing Counsel for the respondent State and bestowed our careful consideration.

7. As far as the death of Anuradha, daughter of PW.10 Sharda is concerned, it has been opined by PW.1 Dr.Basant Lal who performed the post-mortem on the dead body of Anuradha that the cause of death is intra cranial damage consequent upon blunt force impact to head. The injuries, internal as well as external, noted in the post-mortem notes Ex.PW.1/A are stated to be ante-mortem and injury to head sufficient to cause death. There is no cross-examination by the defense as regards the homicidal death of deceased Anuradha. In view of this, it is established from the evidence on record that death of Anuradha is homicidal.

8. It may be noted at the outset that the conviction rests on circumstantial evidence as there is no direct evidence available with the prosecution and adduced in the case.

9. The law as regards the appreciation of circumstantial evidence has been clearly established by plethora of judgments of the Supreme Court and various High

Courts including this High Court. In order to record the finding of guilt on the basis of the circumstantial evidence, it is necessary that the chain of circumstances is so complete and clearly established so as to be consistent only with the hypothesis of the guilt of the accused and not being capable of Explanation on any other hypothesis and not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that the act must have been done by the accused and the accused alone. (Jahar Lal Das Vs . State of Orissa, : 1991 CriLJ1809 and Kamal Kumar v. State, 1995 JCC 264

In the incident that took place between 11-12 O'clock morning on 5.9.1992 to 9.30 O'clock in the late evening on 5.9.1992, victim Anuradha aged four years D/o PW-10 Sharda is stated to have been kidnapped and done to death by Ramesh and Sunil, the convicts.

10. It is the prosecution case that PW-10 Sharda had come to stay with PW-8 Tara a few days before the occurrence; that on the day of the occurrence, Sharda leaving the child Anuradha in the care and temporary custody of Tara went for her job; that at about 11 O'clock in the morning, Sunil came to the jhuggi of Tara for the purpose of collecting utensils which were earlier taken by Sharda from Gyano Devi, the mother of Sunil; that Sunil was about to take away Anuradha along with him by lifting her but Tara asked him to leave Anuradha there and thereafter she went to fetch milk from a nearby vendor and on her return, found Anuradha and Sunil along with the clothes and utensils of Sharda, missing; that at about 9.30 P.M, Sharda accompanied by Tara and PW.12 Gariba came to the house of Sunil; that Sharda went upstairs, first found Sunil lying dead-drunk on the first floor, there from she went to the tin shed and found her daughter Anuradha lying stark naked and by her side Ramesh was also found sleeping dead drunk; that Sharda lifted her daughter Anuradha from there, came down-stairs, found Anuradha breathless, taking the frock of Anuradha and a piece of cloth from Gyano Devi, the mother of Sunil, Sharda along with Gariba came to L.N.J.P. Hospital where Anuradha was declared brought dead.

11. It is suggested from the evidence of Sharda that she stays in jhuggi No.86, Daya Basti, Near Zakhira, owned by Tara as a tenant; that on 5.9.1992, she had

gone to work leaving her daughter Anuradha aged four years in the care and custody of Tara; that she returned at 8 P.M; that Tara asked her to prepare the food; that on asking about Anuradha, Tara told the witness that at about 12 O'clock noon, Sunil had taken away Anuradha in her absence and had also taken utensils saying that when witness returns in evening, she should go to his (Sunil's) place and take back Anuradha from there; that witness was also told by Tara that Sunil had lifted away Anuradha while Tara had gone to buy milk and in her absence, Sunil had taken away Anuradha along with clothes and utensils of Sharda; that Tara also told her that she had resisted and asked Sunil not to take away Anuradha in the absence of the witness and when Tara returned after taking milk, Anuradha and Sunil, both were found missing.

It is also deposed by Sharda that she had earlier stayed at the house of Sunil when the mother of Sunil was ill and that she had cordial relations with both the accused persons during her stay at the house of Tara; that she used to treat Sunil's mother as her mother; that she does not know the name of Sunil's mother; that Sunil and Ramesh are known to her as both were visiting her place with the brother-in-law (Devar) of the witness; that the mother of Sunil helped the witness in getting on rent the jhuggi belonging to Tara.

12. PW.8 Tara stated in her evidence that at the request of Gyano Devi, she gave her jhuggi to Sharda (PW.10) on rent; that Sharda had a daughter aged three years; that the accused persons used to come to Sharda's residence and stay there; that for 2/3 days, Sharda stayed with the witness at Sarai Rohilla with her daughter Anuradha; that thereafter the witness asked Sharda to attend her work; that Sharda left her daughter Anuradha with the witness at Zakhira and went to work; that at about 11 A.M, Sunil came to the witness and asked her to hand over Anuradha, the daughter of Sharda; that the witness was reluctant to hand over the girl to him; that Sunil insisted to take Anuradha and sat there; that the witness went to fetch milk nearby leaving daughter of Sharda at her house; that Sunil took away Anuradha and the clothes and utensils belonging to Sharda; that when the witness returned after 10/15 minutes, she did not find Sunil, Anuradha and the clothes and utensils of Sharda.

13. It is pertinent to note that according to Tara, Sunil came to her house at about 11 A.M. and asked her to hand over the daughter of Sharda named Anuradha. She was reluctant to hand over the girl to him but the accused Sunil insisted to take her and he remained sitting there. According to Tara, Sunil kept sitting in her jhuggi and she went to purchase milk leaving the child Anuradha and Sunil in the jhuggi. It may be appreciated that on Tara's own say Sunil was insisting on taking Anuradha with him to which Tara was not agreeable and she showed her reluctance. Still, however, Tara, for the reasons best known to her, chooses to go to purchase milk leaving Sunil and Anuradha in the jhuggi. When Sharda had left Anuradha in the care and temporary custody of Tara and when Sunil was insisting on taking Anuradha with him, Tara should have realised the consequences of leaving Anuradha in the jhuggi even when Sunil kept sitting in the jhuggi and preferred to go to purchase the milk. It may also be appreciated that the time is around 11/12 O'clock in the morning, ordinarily no time for the purchase of milk unless some guest had come in the jhuggi of Tara or for some such reason. According to Tara, when she returned after purchasing the milk, she found Sunil, Anuradha and clothes & utensils belonging to Sharda missing and Anuradha was taken away along with the clothes and utensils of Sharda taking advantage of her absence by Sunil who was closely known to her. The immediate reaction of a person, on sensing/suspecting the taking away of the child of some other person which was put in her care/custody, would be to make inquiry, especially about the missing of the child rather than wait till the return of the mother of the child around 8 O'clock in the evening. It is pertinent to note that it is not the say of Tara that she informed Sharda about the missing of the child and her suspicion on Sunil when Sharda returned in the evening. It is also not the say of Sharda that Tara, of her own, informed her about the incident when she returned in the evening but it is only on Sharda's asking in the evening, as per her evidence, Tara informs her about the incident. Now if Tara had suspected Sunil having taken Anuradha along with the clothes and utensils of Sharda, then Tara was expected to inform Sharda, who is the mother of the child, about the child having been suspectedly taken away during her absence but that is not to be done by Tara nor there is any Explanationn for the same. It may also be noted that Tara, in her examination-in-chief, deposes that Sharda inquired from her about her daughter and the witness

informed her that accused Sunil had taken her along with him stating that he was taking Anuradha to the factory of his Bhabhi Sharda. This part of the deposition of Tara falsifies her say that taking advantage of her absence, Sunil took away Anuradha along with the clothes and utensils of Sharda. It may also be seen that this part of the deposition of Tara does not suggest that Sunil also took along with him besides Anuradha, clothes and utensils of Sharda. Now if Anuradha was taken away from the jhuggi taking advantage of the absence of Tara, where was the question of Sunil telling Tara that he was taking Anuradha to the factory of his Bhabhi Sharda. This part of the evidence suggests as if Sunil had taken away Anuradha within the knowledge of Tara. Either the taking of Anuradha from jhuggi taking advantage of the absence of Tara may be true or Sunil having taken Anuradha along with him telling Tara that he was taking Anuradha to the factory of his Bhabhi Sharda.

14. Tara, in her evidence, has categorically stated that on her return to jhuggi after purchasing milk, Sunil was found missing from the jhuggi taking away Anuradha with him along with the clothes and utensils of Sharda. In the cross-examination, it is stated by her that she made inquiry from the neighbours who told her that accused Sunil had taken Anuradha with him and clothes and utensils also. It is not the say of either Tara or Sharda that on reaching the house of Sunil, they made any enquiry from Gyano Devi about the clothes and utensils of Sharda having been taken away along with Anuradha by Sunil. It is understandable that the enquiry about the child missing, if any, would be more important than the clothes and utensils. It may also be appreciated at the same time that it is not the say of Sharda, especially who had gone inside and to the first floor of the house and also to the tin shed in Sunil's house that her clothes and utensils were seen in the house of Sunil but she only asked for the frock of Anuradha and a piece of cloth from Gyano Devi. Tara in her evidence states that Sunil had come to take the utensils of Gyano Devi brought by Sharda. She also says that Sunil took away utensils and clothes of Sharda. Thus, it is not suggested by her as to what was the ostensible reason for Sunil to come to her jhuggi and under the pretext took away Anuradha with him. The evidence of Tara on the point of Sunil having come to her jhuggi and taking away Anuradha in her absence is contradictory. None from the neighborhood of Tara is examined to corroborate her say. Thus, the circumstance

of child Anuradha having been taken away from the jhuggi of Tara taking advantage of the absence of Tara cannot be said to have been established by any satisfactory and reliable evidence.

15. Coming to the circumstance of the find of Anuradha from the house of Sunil and she having been subjected to rape and carnal intercourse at this place, according to PW.8 Tara, Sharda went upstairs and brought her daughter in a naked condition. PW.10 Sharda in her examination-in-chief has stated that Gyano Devi, mother of Sunil told her that Anuradha was upstairs and was sleeping with Ramesh whereupon the witness went upstairs and found that her daughter Anuradha was lying with Ramesh without any clothes on her body. She took the child and brought her down stairs. PW.12 Gariba stated in his examination-in-chief that Sunil told Sharda that her daughter was sleeping on the first floor - upstairs. She brought her daughter from upstairs in her lap and told us (witness and Tara) that there is no blood in her. Sharda gave her daughter to the witness. The prosecution case is that Anuradha aged 4 years was subjected to rape and sodomy and was done to death. Admittedly, no blood or semen stains were found at the place of occurrence as there is no recovery of the same in course of the investigation.

16. The MLC of Anuradha, Ex.PW.11/A suggests the injuries as follows:-

- (i) multiple bruises all over body,
- (ii) old small circular scar mark on left lower leg medial side
- (iii) one very small circular scar mark on right thigh medial side.

PW.11, Record Clerk of L.N.J.P. Hospital has proved the MLC, Ex.PW.11/A pertaining to Anuradha. It is stated by the witness that Anuradha was medically summoned by Dr.Gajraj Singh and issued report Ex.PW.11/A and that the doctor declared Anuradha brought dead vide his endorsement.

17. The MLC of Ramesh, Ex.PW.18/A reads:-

'Number of bruises on back. No other mark of any external injury.

## Sexual Examination

Sexual organ and pubic hair well developed.

No abrasion or mark of injury seen on genitals.

No semen mark seen, smegma present no bleeding point on glans or swelling.

It is also suggested from the MLC Ex.PW.18/A that the alleged history was that of rape. PW.18, Dr.Amit has proved the MLC Ex.PW.18/A pertaining to accused Ramesh and it has been deposed that on examination, the witness found Ramesh to be competent to do sexual intercourse. It is not the say of PW.18 that injuries noted in the MLC Ex.PW.18/A would be possible by attempting or doing an act of rape and/or sodomy on a female child of tender age.

18. A perusal of Ex.PW.9/A, MLC of Sunil reads:-

'Exam of sexual organ sexual organs are well-developed - no abnormality is seen.

Pubic hair are well developed and meted.

There appears some abrasion on \_\_\_\_\_ and testis.

No fresh bleeding or swelling is seen.

On retraction of prepuce abrasion of glans of penis.

Swelling of glans of penis.

No bleeding point, if any, seen on glans.

Smegma is not present on glans of penis.'

PW.9, Dr.Lalit Kumar who has examined accused Sunil and proved MLC Ex.PW.9/A has only deposed that in his opinion, Sunil was capable of performing sexual intercourse. It is pertinent to note that PW.9 Dr.Lalit does not say that the injuries noted in MLC Ex.PW.9/A could be caused by attempting an act of rape and/or sodomy on a child around four years age.

19. It is in evidence that Anuradha was declared brought dead in L.N.J.P. Hospital and PW.1 conducted the post-mortem examination on the dead body of Anuradha which was brought by Constable Vinod Kumar. The post-mortem notes are to be found at Ex.PW.1/A. The external and internal injuries are noted therein and deposed to by PW.1. Injury No.26 refers to genitals whereas injury No.27 refers to Anus. It is also suggested from the evidence of PW.1 that Viscera has been sealed and preserved for Chemical analysis as there was suspicion of alcohol intake; that original post-mortem report, dead body, 11 inquest papers, sealed viscera box, sealed envelope containing vaginal and rectal swabs and slides, smear from vagina and rectum and sealed envelope containing blood soaked gauge was handed over to Constable Vinod Kumar of P.S.Anand Parbat. There is no cross-examination of PW.1 who opined the cause of death to be due to intra cranial damage consequent upon blunt force impact to head; that all injuries were ante-mortem and recent in duration. Injury No.1 i.e. injury to cheek was caused by bite. Injuries No.2 to 18 and 23 to 25 were caused by blunt object surface impact, injuries No.19 to 22 were caused by finger nails, burro wings as a result of forcible grip. Injury No.26 i.e. injury to genitals were as a result of forcible sexual intercourse, injury No.27 i.e. injury to anus was caused by annul intercourse. Injury to head was sufficient to cause death in the ordinary course of nature and caused by blunt object/surface impact.

20. It is suggested from Ex.PW.17/H, CFSL report that the semen and spermatozoa with reference to rectal and vaginal swab and slide is absent. It need hardly be said that in a charge of sodomy, stains of semen constitute important evidence. Great weight must, therefore, be attached to the Chemical examiners report.

As deposed by PW.10 Sharda, Ex.6 and 7 are the pant and shirt of Ramesh recovered vide memo Ex.PW.10/J. The CFSL report Ex.PW.17/H suggests that the parcel-3 contained Ex.3A and 3B i.e. one pant and one full sleeve bush shirt. The results of analysis contained therein suggest no semen detected on Ex.3A and 3B. The result of analysis does not suggest blood having been detected on Ex.3A and 3B.

It is deposed by PW.Sharda that vide recovery memo Ex.PW.10/K, one pant, nicker and shirt of Sunil were recovered and taken into possession. Said clothes are stated to be Ex.P-3 to Ex.P-5. Ex.PW.17/H suggests that Parcel-2 contained Ex.2A, 2B & 2C and they are nicker, pant and full sleeve bush shirt respectively. Results of analysis did not suggest Ex.2A, 2B and 2C contained any semen having been detected thereon nor it is suggested that the blood was detected on any of these exhibits.

It is also deposed by Sharda that vide memo Ex.PW.10/G, the nicker of deceased Anuradha was recovered at the instance of accused Ramesh. Said nicker is stated to be Ex.1, as per Ex.PW.17/H. The results of analysis suggests that the blood was detected on Ex.1 and the same was human blood of 'O' group. Ex.5A(i) and Ex.5B(ii) are the blood stained gauge and the control gauge respectively. Ex.5A(i) as per Ex.PW.17/J was found to contain human blood of 'O' group whereas Ex.5A(ii), the control gauge, the species of origin and the ABO group of the blood could not be ascertained as it did not suggest any reaction to the various serological techniques.

Ex.5B(i) and 5B(ii), as per Ex.PW.17/H are the cotton wool swab on a stick described as 'Rectum Swab' and micro slide having whitish smear in the middle described as 'Rectal Slide' respectively. The result of analysis reveal that Ex.5B(i) and Ex.5B(ii) did not suggest semen. Ex.5C(i) and Ex.5C(ii), cotton wool swab on a stick and micro slide having whitish smear described as 'Vaginal Slide' as per the results of the analysis did not suggest semen. Thus, it would be seen from the CFSL report that only Ex.1 and Ex.5A(i) suggested human blood of 'O' group and the clothes of either of the accused did not suggest any blood stains nor semen could be detected.

The proposition that as in rape so also in an unnatural offence even the slightest degree of penetration is enough and it is not necessary to prove the plea of the carnal intercourse by the emission of seed *Gorakh Daji Ghadge v. State of Maharashtra*, 1980 CLJ 1380 cannot be disputed. It will be the force applied which may lead to the presence or otherwise of the emission of seed.

21. The evidence of PW.1 Dr.Basant Lal suggests that there were as many as 27 external injuries on the dead body noticed in course of the post-mortem examination; that all these injuries were recent and ante-mortem; that the bleeding from vagina and anus was found present; that time since death was about 36 to 48 hours. Then, the doctor deposed about the external injuries noticed. It may be appreciated that even after 36 to 48 hours of the death, bleeding from vagina and anus was found present. External injuries No.1 to 25 are in the nature of abrasions all over the entire body including the chest, elbow, abdomen, nipple, knee, upper front of right leg, middle outer of right lower leg, middle front of right leg, middle front outer aspect of right thigh, upper front of both thighs and pubic region, front aspect interrupted at places, middle outer of right arm, right elbow, outer back of right elbow, upper back of right forearm, right upper lip, right lower lip, multiple abrasions in oval fashion on the middle of left cheek, multiple abrasions on the bees of nose and near both alae, etc. External injuries No.25 to 27 have been referred to earlier, so, we do not repeat the same.

22. The post-mortem examination was conducted on 7.9.1992 at 12 noon. The incident took place between 12 noon to 9.30 in the late evening of 5.9.1992. The MLC Ex.PW.11/A was prepared at 11.40 P.M. in the LNJP Hospital on 5.9.1992. As pointed out earlier, nothing was recovered from the place of incident or even the blood stains noticed at the place of incident. If on 7.9.1992 at 12 O'clock in the noon, while performing the post-mortem examination, the blood from vagina and anus was found present on external examination at least on 5.9.1992 at the place of occurrence, there would be some blood. Even at the time of MLC at 11.40 PM on 5.9.1992, the doctor who examined Anuradha soon after the incident as per the prosecution, the bleeding would have been noticed by the doctor concerned but nothing of the sort is mentioned in the MLC Ex.PW.11/A.

23. It is surprising that as many as 27 external injuries noted in the post-mortem notes Ex.PW.1/A would go unnoticed while examining the dead body of Anuradha in the hospital for the preparation of MLC, Ex.PW.11/A. Some of the external injuries, as per PW.1 would be visible by mere look since they are to be found on lips, cheek, chest, knee, thigh, etc. yet the same is not to be found noted in MLC Ex.11/A. It may also be appreciated that PW.10 Sharda had taken the injured to

the hospital and was present in the hospital.

24. The case history given by Sharda is deceased having been beaten up by two persons. In the case of Pattipati Venkaiah v. State of Andhra Pradesh, 1985 SC C 464 it is held that the doctor in the hospital is not concerned with as to who is the assailant since the doctor is concerned with the cause of injury in order to ascertain whether it is a medico legal case or not and with medical aid to the deceased.

It is submitted by learned Standing Counsel for the respondent/State relying on the decision in the case of P.Babu & Others v. State of Andhra Pradesh, 1993 CLJ 3547 that non mentioning the names of Ramesh and Sunil in the MLC, Ex.PW.11/A cannot discredit PW.Sharda since Injury Certificate issued by the doctor was not a statement made by PW.Sharda since the entries in the injury certificate would not amount to a statement. In the instant case, MLC Ex.PW.11/A suggests 'beating given by two persons'. If the number of persons could be given by PW.Sharda to the doctor, the names of those two persons, stated to be known to her, could have easily been given if she was really sure that these two persons are the culprits. The principle enunciated in the above two decisions would have been applicable had there been no reference to the number of persons at all except that beating by unknown persons/opposite party not specifying the number of persons involved.

It may be appreciated that PW.10 Sharda does not give the names of the assailants to the doctor in the hospital. In case of Devinder v. State of Haryana, 1997 SCC 750 it is held that injured/eye witness giving all details and particulars about injured and the account of the incident, not disclosing at the earliest opportunity the names of the accused, accused would be entitled to benefit of doubt.

25. In the case of Rehmat v. State of Haryana, 1997 CLJ764 dealing with non-mentioning of the names of the assailants in the medical papers at the Primary Health Centre, it is held that ordinarily in a medico legal case, the doctor is supposed to write down the history of the injured and not mentioning the name of the assailant in the medical papers in the Primary Health Centre in a medico legal

case, the conviction of the accused would be liable to be set aside.

26. As observed earlier, Ex.PW.17/A is copy of the report No.16/A of the Daily Diary dated 5-6.9.1992 maintained at Police Station Anand Parbat, Delhi. Perusal of the same suggests that this telephonic information received from JPN Hospital at Police Station Anand Parbat suggests that one Anuradha D/o Daulat Ram r/o Jhuggi No.86, Daya Basti, Zakhira Pul, Delhi was 'found' injured at Anand Parbat, Punjabi Basti was brought to the JPN Hospital by her mother where doctor declared her dead. Thus, the information received at Police Station was that Anuradha who was found injured at Anand Parbat, Punjabi Basti, was brought to the JPN Hospital by her mother where doctor declared her dead. It would be seen that the information received/ recorded by the Duty Constable Om Prakash at JPN Hospital is the basis of Ex.PW.17/A. It is pertinent to note that the register which is required to be maintained at the hospital by the Duty Constable in medico legal cases is not forthcoming on record. We are at a loss to understand as to why the register maintained in the hospital by the Duty Constable wherein the information received by the Duty Constable either from the doctor or the injured or the relative or the person accompanying the injured/dead body, as the case may be, in medico legal cases, required to be noted down, is not coming forth on record and why the prosecution has only produced Ex.PW.17/A the information received/recorded at Police Station Anand Parbat and not by Duty Constable Om Prakash received in LNJP Hospital. Perusal of the trial court record namely list of witnesses suggests the Duty Constable Om Prakash No.1719/C JPN Hospital, Delhi having been shown as a witness at Seriall No.19. It is also suggested from the said list of witnesses that witness No.19 Duty Constable Om Prakash has been given up by the learned public prosecutor conducting the case in the trial court. There does not seem any ostensible reason as to why Duty Constable Om Prakash was given up. It is not made known to the court whether Duty Constable Om Prakash was not available, for any reason, to give his evidence before the trial court.

27. In the case of Jagir Singh v. State of Delhi reported in 1975 SCC 129 it has been held that non-disclosure of name of the assailant claimed to be previously known at the first possible instance while admitting deceased in the hospital and reporting the incident to police constable on duty would be an unnatural conduct

after admitting the deceased in the hospital and the conviction cannot be based on such testimony. The Supreme Court in the case before it set aside the current finding of guilt.

In the instant case, assailants Ramesh and Sunil both are very intimately known to Sharda, the mother of deceased Anuradha, as disclosed from the evidence. We are not prepared to believe that no entry was made in the register maintained by the Duty Constable at the LNJP Hospital at or around the time of the admission of Anuradha in the hospital. It can be appreciated that the primary concern of Sharda, being the mother of Anuradha, would be to give her medical treatment immediately but after Anuradha was admitted in the hospital and when she was being examined by the doctor on duty at least at that time or at least the time after Anuradha was declared dead, Sharda could have disclosed the names of Ramesh and Sunil who were intimately known to her much prior to the incident. This conduct of Sharda, if she had lifted Anuradha from the house of Sunil in the condition and the circumstances as sought to be contended by the prosecution, is highly unnatural. On the contrary, the reaction of a mother under such circumstances would be to disclose the names of the wrong doers at the earliest. It can be safely presumed that since the MLC, Ex.PW.11/A is prepared around 11.40 PM on 5.9.1992, the entry in the register kept in JPN Hospital would be around 11.30 PM to 11.45 PM or thereabout which would be soon after the occurrence as according to the prosecution, Anuradha was lifted from the house of Sunil around 9.30 PM keeping a margin for the distance to be covered from Anand Parbat to JPN Hospital. The evidence discloses that Sharda has not disclosed the names of Ramesh and Sunil as the assailants at the earliest opportunity available to her.

28. It may be appreciated that according to the prosecution case, it was around 9.30 PM that Sharda lifted Anuradha from tin shed (second floor) where she was lying without clothes and Ramesh was sleeping by her side dead drunk, in the house of Sunil. MLC Ex.PW.11/A suggests that Sharda was very much in the hospital around 11.40 PM same night. The dead body of Anuradha was sealed and sent to the mortuary on that very night.

29. Ex.PW.17/A suggests that on the basis of the telephonic information received at 12.25 AM on 5/6.9.1992 from the hospital, a report to that effect was entered in the Roznamcha and a copy of the report was entrusted to S.I.Pyare Lal who left for hospital along with Constable Khem Chand. PW.17 S.I.Pyre Lal has stated in his evidence that on 5/6.9.1992 DD No.16/A Ex.PW.17/A was entrusted to him for enquiry. On receipt of the DD, the witness along with Constable Khem Chand went to JPN Hospital where he collected the MLC of Anuradha; that the dead body of Anuradha was sent to the Mortuary of Maulana Azad Medical College; that Sharda was not in the hospital till 11.30 A.M. on 6.9.1992 and she met the witness at the Mortuary of Maulana Azad Medical College and the witness recorded her statement Ex.PW.6/A.

PW.7 Constable Khem Chand deposed in his evidence that on 6.9.1992 the witness along with I.O. had gone to JPN Hospital at about 12.30 noon (this seems mistaken, it should be night instead of noon). The I.O. collected MLC of the injured who had been declared dead by the doctor. No parent or legal heir of deceased was found in the hospital despite search. The witness then went to the spot at Jhuggi No.86, Daya Basti, Delhi. At 11.30 AM, Ex.PW.6/A of the mother of the deceased was recorded.

30. It would be seen that according to the prosecution, Sharda was not available till 11.30 AM on 6.9.1992 and her statement Ex.PW.6/A could be recorded only at 11.30 AM on 6.9.1992. It is suggested from the evidence that there is a delay of more than 14 hours in recording the statement Ex.PW.6/A. According to PW.7 and PW.17, they searched for Sharda but she could be traced at 11.30 AM on 6.9.1992 in the Mortuary of Maulana Azad Medical College. PW.10 Sharda has deposed in her evidence on examination that 'the doctor at JPN Hospital told her that her daughter Anuradha was dead. Police came there. I gave my statement to the police which is Ex.PW.6/A.' Thus, according to Sharda, police came there i.e. in JPN Hospital after the doctor had declared Anuradha dead and she gave her statement Ex.PW.6/A to the police. Sharda does not say in her evidence that after Anuradha was declared dead by the doctor in JPN Hospital, she went to her house or to some other place and that she was not available in the hospital or in her house at 86, Daya Basti and that the police met her for the first time in the

Mortuary of Maulana Azad Medical College around 11.30 AM on 6.9.1992. If Sharda was searched by PW.7 and PW.17 and if she was not available firstly in the JPN Hospital, secondly at her house during the night of 5/6.9.1992 and then till 11.30 AM on 6.9.1992, then it becomes necessary for the prosecution to get the delay in recording the statement Ex.PW.6/A till 11.30 AM on 6.9.1992, explained through the evidence of Sharda since Sharda would be the best person to say as to where was she between 12.30 AM till 11.30 AM on 6.9.1992. It need hardly be said that it is not for the defense to ask Sharda as to where was she between 12.30 AM and 11.30 AM on 6.9.1992 since it would be the duty of the prosecution to explain the delay in the recording of the FIR. It need hardly be said that unexplained inordinate delay in recording Ex.PW.6/A, the statement of Sharda, would be fatal to the prosecution case.

31. On behalf of the respondent/State, reliance has been placed on the case of State of Punjab Vs . Gurmeet Singh & Others, : 1996 CriLJ1728 . While appreciating the testimony of prosecutrix, a victim of an offence under Section 376 IPC, the Supreme Court held that in sexual offence, delay in lodging of the FIR can be due to variety of reasons, particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is further held that even if there is some delay in lodging the FIR in respect of offence of rape, if it is properly explained and the Explanationn is natural in the facts and circumstances of the case, such delay would not matter. The principle enunciated cannot be disputed even for a moment. In the instant case, the deceased, stated to have been taken from the house of Sunil around 9.30 PM, was brought dead to the hospital around 11.30 PM whereas the FIR Ex.PW.6/A is recorded at 11.30 AM next day. Still, however, the delay in filing the FIR is not explained much less properly.

While dealing with a case of delay in recording the complaint wherein the occurrence took place at 1.30 P.M, injured admitted to the hospital, S.I. received intimation at 2.45 P.M, FIR recorded at 4.50 P.M, the Supreme Court in the case of Harpal Singh v. State of Haryana, 1997 CLJ 3561 held that pedantic view should be avoided. We are in agreement with this proposition. In the case before

the Supreme Court, delay was of 3 hours and 20 minutes whereas in the instant case, the delay is of 14 hours, again not explained at all by Sharda.

32. According to PW.17, Ramesh made disclosure statement Ex.PW.10/F and led the witness PW.10 Sharda and S.I.V.K.Kalia to House No.2/33, Gali No.2, Punjabi Basti, Anand Parbat, Delhi and got recovered underwear, a scale of iron from the aala of his house. Both the articles were recovered and taken into possession vide Ex.PW.10/G. It is further stated that accused Sunil made disclosure statement Ex.PW.10/C in presence of PW.10 and S.I.V.K.Kalia and led the witnesses to the first floor of House No.2/33, Gali No.2, Punjabi Basti, Anand Parbat, Delhi and got recovered a Karsi/large size spoon which was recovered and taken possession into vide memo Ex.PW.10/D. It may be seen from the above that the disclosure statement Ex.PW.10/F and Ex.PW.10/C and the consequent discovery of the articles vide recovery memos Ex.PW.10/G and PW.10/C respectively were in presence of the investigating officer PW.17 and S.I.V.K.Kalia and PW.10 Sharda, the complainant, mother of the deceased. Perusal of Ex.PW.10/C, PW.10/D, PW.10/F and PW.10/G suggest that the a attesting witnesses thereto are Sharda, w/o Sh.Daulat Ram (PW.10) and S.I. V.K.Kalia, P.S.Anand Parbat. Thus, it is pertinent to note that there is no independent attesting witness to the disclosure statement alleged to have been made by the two accused persons and the witnesses to the disclosure and the consequent discovery of the case properties are highly interested persons namely the mother of the deceased and a police officer equivalent in rank to PW.17 who is the investigating officer.

33. In the case of Harish Chander @ Billa v. State, 1995 (2) C.C.C 503 , it has been held by the Division Bench of this court that the discovery under Section 27 of the Indian Evidence Act in presence of subordinate police officer where the I.O. is taking his subordinate constable as a witness for the incriminating discovery, then the same becomes very doubtful. It may be seen that PW.17 is a S.I. whereas one of the attesting witnesses Mr.V.K.Kalia is also a S.I, a police officer of equivalent rank. It need hardly be said that in order to lend assurance that the investigation has been proceeding in fair and honest manner, it would be necessary for the I.O. to take independent witnesses to the discovery under Section 27 of the Indian Evidence Act and not taking independent witnesses and

taking highly interested persons and police officers as the witnesses to the discovery would render the discovery at least not free from doubt. The object of sub-Section (4) of Section 100 of the Code of Criminal Procedure is to ensure an honest and genuine search and to prevent trickery by 'planting' the things to be 'found' at searches. 'Respectable' occurring in Sub-Section (4) of Section 100 of the Code means in substance impartial and independent persons not connected with official dom or police whose evidence may be relied upon.

34. It may also be appreciated that PW.1, as pointed out above, has noted number of external injuries on the person of deceased Anuradha. The opinion is death due to intra cranial damage consequent upon blunt force impact to the head and that the injury to the head was found sufficient to cause death and injury No.2 to 18 and 23 to 25 were caused by blunt object/surface impact. Thus, according to PW.1, blunt force impact to the head must have been caused. It is pertinent to note that the case properties namely iron scale and karsi stated to have been discovered under Section 27 of the Indian Evidence Act have not been shown either to PW.1 or PW.11 in order to suggest whether any of the injuries found on the dead body could have been caused by both or any of the case properties.

In the case of Ishwar Singh Vs . State of Uttar Pradesh, : 1976 CriLJ1883 , it has been held that it is the duty of the prosecution and no less of the court to see that the alleged weapon of the offence, if available, is shown to the medical witness and his opinion invited as to whether all or any of the injuries on the victim could be caused with that weapon. Failure to do so may sometimes cause aberration in the course of justice.

In the instant case, in the absence of the opinion of the medical expert and the absence of other evidence suggesting the causing of the injury because of the attempted sexual intercourse or cranial intercourse and/or the Karsi/scale, it is difficult to say with certainty whether the injury/injuries was/were caused by iron scale or the karsi or both and/or because of forceful carnal intercourse, as alleged by prosecution.

35. Thus, it would be seen that the prosecution has not been able to show by satisfactory reliable evidence the circumstance of the find of Anuradha from the tin

shed of House No.2/33 which is the house of Sunil and also Ramesh and Sunil having subjected Anuradha to sexual intercourse and/or cranial intercourse so as to cause intra cranial damage having blunt impact to the head. If the intra cranial damage is consequent upon the blunt force impact to head culminating into the death of Anuradha, as opined by PW.1, then in that case, in our opinion, there would be forceful penetration and the presence of semen/blood would become essential.

36. There can be no disagreement with the proposition that the evidence of witnesses though partisan if corroborated by other evidence can be relied upon as held in the case of Harpal Singh v. State of Haryana, 1997 CLJ3561. In the instant case, PW.8 Tara and PW.12 Gariba are partisan and their evidence cannot lend corroboration to Sharda, PW.10 since one tainted/partisan witness cannot corroborate other tainted/partisan witness. The corroboration has to be from independent evidence.

37. Coming to the extra judicial confession stated to have been made by Sunil in his house on 5.9.1992 around 9.30 P.M, as stated by PW.Tara, PW.Sharda and PW.Gariba, it has been the prosecution case that all the three persons reached the house of Sunil in Gali No.2, Punjabi Basti. Gyano Devi first met them and on inquiry from her about Anuradha, they were told that Anuradha was sleeping with Ramesh in the tin shed and Sharda went upstairs where she found that Sunil was sleeping dead drunk on the first floor. Thereafter, Sharda went to the tin shed where she found Anuradha lying without clothes with Ramesh. Thus, according to the prosecution case, Tara and Gariba remained down stairs and Sharda went upstairs, found Sunil dead drunk on the first floor.

38. It is suggested from the evidence of Sharda and Tara that Tara and Gariba did not go inside the house of Sunil and they remained on the ground floor portion. Tara, in her examination-in-chief, has stated that Gyano Devi opened the door, Sharda inquired from her about her daughter but she showed her ignorance about the girl and when Sharda again inquired about the girl, accused Sunil told them that they had made her sleep forever. It is pertinent to note that Tara does not say that Sunil looked/appeared having consumed liquor much less dead drunk.

According to the evidence of Tara, that when Sharda again inquired about the girl, it was accused Sunil who told them that they had made her sleep for ever and thereafter Sharda went upstairs on the first floor meaning thereby that Sharda went to the first floor after accused Sunil is stated to have made the confession which would suggest that Sunil was on the ground floor, at least not on the upper storey or first floor and not in a drunk condition when Sharda within the hearing of Tara and Gariba made inquiry about her daughter from Gyano Devi, and Sunil made the statement.

39. PW.12 Gariba, S/o Pokar Ram stated in his evidence that along with Tara and Sharda, the witness came to the house of Sunil by foot in Punjabi Basti, Anand Parbat; that on Tara giving call to the mother of accused Sunil, the door of the house was opened; that 'we' went on the first floor of the house and found that Sunil was sleeping on a cot; that Sharda inquired about her daughter from Sunil on which accused Sunil told her that her daughter had been made to sleep forever after giving her liquor; that Sunil told Sharda that her daughter was sleeping on the first floor up stair.

Sharda stated in her evidence that on her request Gyano Devi opened the door and let her (Sharda) in; that she told her that Anuradha was upstairs and was sleeping with Ramesh. It may be recalled here that Tara in her evidence has stated that on inquiry about the girl from Gyano Devi, it was accused Sunil who told about Anuradha. Tara does not say that Gyano Devi told her that Anuradha was upstairs and that she was sleeping with Ramesh. Sharda further states in her evidence that she went upstairs and found that her daughter Anuradha was lying with Ramesh without clothes on her body and that Ramesh was drunk and sleeping. When she started to leave with her daughter Anuradha, Ramesh tried to prevent by saying that she should take Anuradha in the morning; that Sunil also woke up in the mean-time and he interrupted by saying 'MAINE TERI LADKI ANURADHA KO DAARU PILA KE PARLOK BHEJ DIYA HAI'. This part of the evidence suggests that Sunil must be on the first floor/near the tin shed, though not specifically stated so by Sharda but certainly suggesting at the same time that Sunil was also sleeping and made the extra-judicial confession at the time when Ramesh was telling Sharda to take Anuradha next day morning. It may be recalled

that according to Gariba, they went to the first floor which Tara and Sharda do not depose. Gariba does not say that Sunil was sleeping dead drunk but he only says he was sleeping on the cot. It is also stated by Gariba that Sharda inquired about her daughter from Sunil which neither Tara nor Sharda states.

40. In the F.I.R, Ex.PW.6/C, it has been stated that Gyano Devi met the complainant Sharda at the house of Sunil at Punjabi Basti from whom the complainant inquired about Anuradha whereupon she (Gyano Devi) told that Anuradha was sleeping with Ramesh at the tin shed and complainant Sharda went upstairs where she found that Sunil was sleeping dead drunk on the first floor and thereafter Sharda went at tin shed where she found Anuradha lying without clothes with Ramesh. Thus, it would be seen that in the deposition Sharda has stated to the effect that Sunil was on the first floor who woke up when Ramesh was talking to her and told that Anuradha had been sent to heavens by making her drink liquor. As far as the presence of Sunil on the first floor of the house is concerned, the same is contradictory since Tara does not support Sharda that Sunil was on the first floor when they reached his house. On the contrary, she has said that it was only after Sunil replying about the daughter of Sharda that Sharda went upstairs. The extra-judicial confession stated to have been made by Sunil, according to Tara, was made by him on the ground floor before Sharda went upstairs i.e. to the first floor whereas according to Tara, the same was on the ground floor before Sharda went upstairs and it is only after Sunil made this extra-judicial confession that Sharda went upstairs. It may be appreciated that it is not the presence of Sunil either on the ground floor or the first floor which would be significant but it is the making of the extra-judicial confession by Sunil, as sought to be contended by the prosecution.

41. Admittedly, Tara did not go to the first floor portion. If Sharda is to be believed on Sunil making extra-judicial confession, then the presence of Sunil has to be on the first floor and if Tara is to be believed about the Sunil making extra-judicial confession, then the presence of Sunil has to be on the ground floor before Sharda went upstairs i.e. to the first floor.

Ex.PW.13/A is the scaled site plan pertaining to the place of occurrence proved in the evidence of PW.13 S.I.Manohar Lal who has stated to the effect that on 14.11.1992, on the request of SHO Harpal, the witness visited the spot i.e. Punjabi Basti, Gali No.2, House No.2/33 and on his direction and at the pointing out by PW.10 Sharda, W/o Daulat Ram, the witness took rough notes of the place of occurrence and later on prepared the scaled map Ex.PW.13/A which is signed by the witness at point 'A'. In Ex.PW.13/A, point 'A' is stated to be the place on the second floor of tin shed where accused Ramesh, along with deceased Anuradha was found sleeping according to Sharda. Thus, as per Ex.PW.13/A, the place of occurrence is on the second floor which is a tin shed which is also the say of Sharda. Point 'B' is shown to be the place in the first floor room where accused Sunil was found sleeping. Thus, the two places point 'A' and 'B' are on different floors namely second floor and first floor respectively. Ex.PW.17/E is the site plan stated to have been prepared at the instance of Sharda, as deposed by PW.17 S.I.Pyare Lal, the investigating officer. Perusal of Ex.PW.17/E suggests point 'A' to be the first floor portion where Sunil was found sleeping on the cot whereas point 'B' is the tin shed on the roof of the first floor where Anuradha was found lying by the side of Ramesh. Thus, Ex.PW.13/A & Ex.PW.17/E clearly suggest that the place where Sunil was sleeping was on the first floor whereas the place where Anuradha was found lying and Ramesh found sleeping by her side was in the tin shed over the roof of the first floor, call it a tin shed or second floor.

42. It is pertinent to note that nothing appears to have been found/recovered either from the first floor or the tin shed (second floor) suggesting the liquor having been brought at the place by Sunil and/or Ramesh. As far as the presence of Sunil and he having made extra-judicial confession is concerned, looking to the contradictory evidence of PW.8 Tara, PW.10 Sharda and PW.12 Gariba, it cannot be said with any reasonable certainty that Sunil was present either on the first floor or on the ground floor and that he made extra-judicial confession, as sought to be suggested by the prosecution within the hearing of Tara only or within the hearing of Tara, Sharda and Gariba or Gariba and Sharda since according to Sharda, Tara and Gariba remained down stairs whereas according to Gariba, all of them went to the first floor.

43. It may be appreciated that according to the extra-judicial confession stated to have been made by Sunil, Anuradha was sent to heavens by making her drink liquor. It is pertinent to note that neither Sharda nor Tara or Gariba state in the evidence that when Sharda brought Anuradha to the down stairs in the house of Sunil, Anuradha was smelling liquor suggesting she having been made to consume liquor, as deposed by the prosecution witnesses. Ex.PW.11/A is the MLC of Anuradha. Perusal of the same does not suggest Anuradha having been made to take liquor or the smell of alcohol from her mouth. According to Sharda, Ramesh and Sunil both were dead drunk. The MLC of Sunil, Ex.PW.9/A and MLC of Ramesh Ex.PW.18/A of 7.9.1992 around 10.30 P.M, more than 48 hours after the incident do not suggest either of them having consumed liquor. There is no other evidence suggesting the presence of alcohol in the blood of Anuradha or Sunil or Ramesh. It may also be appreciated that there is no incriminating evidence recovered from the place of the incident suggesting the liquor having been brought at the place of the incident and/or consumed. Thus, it would be seen that the investigating agency did not act on the basis of the extra-judicial confession and the extra-judicial confession stated to have been made by Sunil does not lead any further inasmuch as there is no evidence including medical evidence even suggesting Anuradha having been made to take liquor. Under the circumstances, we are inclined to hold that there is no reliable and satisfactory evidence regarding making of extra-judicial confession by Sunil.

44. One glaring thing which needs mention is that in FIR, Ex.PW.6/C, it has been specifically stated by Sharda that on 5.9.1992 at about 9.30 P.M, she along with Tara and her neighbour Gariba arrived at the house of Sunil situated at Punjabi Basti, Gali No.2 where Gyano Devi met here over there from whom she inquired about Anuradha whereupon she (Gyano Devi) told that Anuradha was sleeping with Ramesh at the tin shed and she (Sharda) went upstairs. Thus, in the FIR, name of Gyano Devi, mother of Sunil has been disclosed as the person who told Sharda that Anuradha was sleeping with Ramesh at the tin shed in the house of Sunil whereupon Sharda went up-stairs. Thus, the basis/reason for Sharda going upstairs and finding Anuradha lying by the side of Ramesh is the statement stated to have been made by Gyano Devi. But for the said statement of Gyano Devi, Sharda would not have known that Anuradha was sleeping with Ramesh in the tin

shed which is on the upper floor of the house. It does not appear that in course of the investigation Gyano Devi's statement has been recorded by the investigating agency and Gyano Devi cited as the witness in the charge sheet. When the name of Gyano Devi was disclosed in the FIR as having revealed the fact of Anuradha sleeping on the tin shed/upper floor of her house with Ramesh and which led Sharda to the upper floor i.e. tin shed and wherefrom Anuradha is said to have been taken by Sharda and brought down stair and then to the hospital, it was all the more necessary on the part of investigating agency to examine Gyano Devi to establish the fact of Sharda having been directed to tin shed and Anuradha having been found lying in the tin shed with Ramesh and there from Anuradha having been taken by Sharda and brought to down stair in the house of Gyano Devi where Tara and Gariba were waiting for Sharda. The link leading Sharda to the tin shed is missing in the instant case for want of examination of Gyano Devi, as aforesaid. As observed earlier, PW.8 Tara is partisan and inimical to Sharda, PW.12 Gariba do not inspire any confidence since he appears to have been cooked up only for the purpose of providing corroboration to the say of Tara and Sharda, being a neighbour of Sharda and interested.

45. The conduct of Tara does not appear consistent with her say that taking advantage of her absence from jhuggi or that within her knowledge, that Sunil took away Anuradha, as well as Tara does not search for Anuradha at all nor does she of her own tells Sharda when she returned from work.

As far as Sharda, mother of the victim is concerned, her conduct is inconsistent with her say that Sunil made extra-judicial confession, she took Anuradha lying by the side of Ramesh from the house of Sunil, inasmuch as she does not discuss the names of Sunil and Ramesh to the Duty Constable or the doctor in the JPN Hospital and not explaining the delay in giving statement, Ex.PW.6/A till 11.30 A.M. in Maulana Azad Medical College mortuary.

46. It is the settled principle of law that in a case of circumstantial evidence, motive for committing the offence is most relevant. In the instant case, according to the prosecution, the motive for the accused persons to commit the offence is that one of the accused Ramesh wanted to marry Sharda and had proposed marriage to

Sharda. According to the prosecution, deceased Anuradha was an obstacle in the way of Ramesh to marry Sharda and with this motive the offence has been committed. At the first blush, this argument would appear attractive but on close scrutiny, the hollowness is exposed. It may be appreciated that Sharda in her examination-in-chief has stated that she had cordial relations with both the accused persons during her stay at the house of Tara; that on one occasion accused Ramesh had proposed to her that she should marry him; that the witness declined the offer of marriage as she was already married and was having children. In the complaint Ex.PW.6/A, it has been stated by Sharda that before her arrival at the jhuggi at Daya Basti, she remained at the house of Sunil for four days where she developed illicit relations with Sunil and his uncle's son namely Ramesh and Ramesh proposed her to marry him but she refused his proposal as she was already married; that Sunil also insisted her to marry with Ramesh but she refused that. Tara, in her evidence, has stated that Sharda was having her daughter aged about three years with her besides her son. Thus, the evidence of Sharda and Tara suggest that Sharda had more than one child and besides daughter Anuradha, she had a son also and according to Sharda, she declined the proposal of her marriage with Ramesh because she was already married and was having children. Now, taking the say of the prosecution at the best with regard to the motive, by doing away with Anuradha, the purpose could not have been achieved as Sharda had at least other child namely a son, as suggested from the evidence of Tara and Sharda both and the obstacle would not only be the presence of daughter Anuradha but the presence of the other child/children and also the marriage of Sharda with Daulat Ram. Thus, the evidence with regard to motive is not only very weak but not satisfactory and trustworthy. We are, therefore, of the view that the prosecution has not been able to establish sufficient motive on the part of Ramesh and/or Sunil for committing the murder of Anuradha, daughter of Sharda.

In the case of State (Delhi Admn.) v. Gulzarilal Tandon, 1979 CLJ1057 it has been observed that in cases where the case of the prosecution rests purely on circumstantial evidence, motive undoubtedly plays an important part in order to tilt the scale against the accused.

47. The above discussion reveals that the prosecution has not been able to establish the circumstances, firstly of Sunil having come to the jhuggi of Tara on 5.9.1992 around 11 A.M. or the circumstance of Sunil having taken Anuradha from the jhuggi of Tara either taking advantage of the absence of Tara from her jhuggi or 'taking' within the knowledge of Tara. The so called taking of Anuradha by Sunil is nothing but an inference on the part of Tara which is inconsistent with her conduct subsequent thereto, as pointed out above. Secondly, the prosecution has not been able to establish by cogent and reliable evidence the circumstance of the find of Anuradha from the tin shed in the house of Sunil where Anuradha is stated to be lying without clothes on her body by the side of Ramesh who was stated to be sleeping there dead drunk nor the prosecution has been able to establish the extra judicial confession stated to have been made by Sunil before Tara, Gariba and Sharda for the reasons aforesaid and the subsequent conduct of Sharda is inconsistent with her say implicating Sunil and Ramesh with the incident. For these reasons, we are of the view that since the chain of circumstances relied on by the prosecution is not that complete, conclusive and clearly established so as to be consistent only with the hypothesis of the guilt of Sunil and/or Ramesh and not being capable of Explanation on any other hypothesis since the state of evidence, as pointed out above, would render the prosecution version not free from doubt entitling both the convicts/appellants to the benefit of doubt and, therefore, it cannot be said that the conclusion consistent with the guilt of the appellants alone could be justifiably recorded for the reasons aforesaid. Under the circumstances, the finding of guilt recorded by the trial court deserves to be set aside.

48. In the result, both these appeals are allowed and the conviction recorded and the sentence imposed in FIR No.198/92 P.S.Anand Parbat qua both the appellants are set aside and they are acquitted of the charges leveled against them. The appellants in both the appeals are ordered to be set at liberty forthwith, if not required in any other case. Crl.Reference No.2/97 is answered accordingly.