

Jag Mohan @ Birju Vs. State

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Court : Delhi

Decided On : Nov-15-1994

Reported in : ILR1995Delhi165

Judge : A.B. Saharya and; M.S.A. Siddiqui, JJ.

Acts : [Evidence Act, 1872](#) - Sections 14

Appeal No. : Criminal Appeal No. 87 of 1994 and Murder Reference No. 1 of 1994

Appellant : Jag Mohan @ Birju;The State

Respondent : State;jagmohan @ Birju

Advocate for Pet/Ap. : Rakesh Sherawat,; S.S. Gandhi and; P.S. Sharma, Advs

Judgement :

M.S.A. Siddioui, J.

(1) The sole accused in the case is the appellant in the appeal and respondent in the Murder Reference. He was tried for offences punishable under Sections 302, 363 and under Section 376(f) Indian Penal Code . by the learned Additional Sessions Judge, Shahdara, Delhi. He was sen Sauced to death under Section 302 I.P.C. He was also sentenced under Sections 363 and 376(f) Indian Penal Code . to undergo seven years rigorous imprisonment and life imprisonment respectively. The learned Additional Sessions Judge made a reference for confirmation of death

sentence and the accused also preferred an appeal against convictions and sentences and they are being disposed of by this common judgment

(2) Shorn of Verbiage, the prosecution case is that on 4-3-88 Kin. Anita aged about 4 years was found missing from her house. Next morning, her dead body was found outside house No. 31/500 of Om Parkash Public Witness 2 resident of Trilok Puri, which was identified by her father Bharat Singh (P.W.2). Om Prakash (P.W.2) informed the police. On this information to Sub Inspector, Chander Bhan (P.W. 22) Along with P. C. Rajender Singh (P.W. 18) came to the spot and prepared the inquest report (Ex. Public Witness 22/A) and sent the dead body for post mortem examination. Dr. Bharat Singh (P.W. 17), who conducted the post mortem, opined that Anita died because of shock resulting from excessive pain during sexual intercourse vide report Ex. Public Witness -17/A.

(3) On 17-8-88, Puran Singh (P.W. 15) Ram Kishan (P.W. 8) and Dalbir Singh (P.W. 15) apprehended the accused from the public latrine of block No. 9. Trilok Puri along with a minor girl namely km. Varsha aged 6 years in a compromising position. He was beaten up by the public assembled there. Upon questioning. the accused confessed that he had also kidnapped another minor girl. Thereafter, the accused was handed over to the police.

(4) While in custody, the accused made a disclosure statement (Ex. Public Witness /5/A) as a result whereof one blood stained piece of terrycot cloth (Ex. P-3), one soiled torn frock of white colour smeared with blood and semen (Ex. P-4) and one baby sized Baniyan smeared with blood and semen (Ex. P.5) were recovered from the Tirlokpuri drain vide seizure memo Ex. Public Witness 51 B. On that day, one bush-shirt (Ex. P-2) and a pant (Ex. P-1) belonging to the accused was also recovered from his possession vide seizure memo Ex. Public Witness -51C. Accused was sent for medical examination. Sample of the accused's semen was also taken. The aforesaid article Along with the deceased's vagina! swab taken by the Dr. Bharat Singh at the time of post mortem. examination were sent to the C.F.S.L.

(5) According to the report of the C.F.S.L. (Ex. P-10/A), blood was detected on the frock (Ex. P-4), the torn baby frock and the dirty baby shirt (Ex. P5) but semen

could not be detected on these articles. However, no blood was found on the deceased's pant (Ex. P.1) and the bush-shirt (Ex. P.2). The aforesaid articles Along with the vaginal swab, blood stained gauze and the cloth piece were also sent to the Serologist, who found human blood of B group on the cloth piece, baby shirt and the vaginal swab. He also found human blood of 'O' group on the blood stained gauze and the baby frock but the blood found on the frock. (Ex. P-4) did not give any reaction. Semen of 'B' group was also found. on the accused's paint, bush-shirt, baby shirt and the deceased's vaginal swab vide report Ex. Public Witness -IOI.B.

(6) After the usual investigation, a charge sheet under Sections 302/363/376 Indian Penal Code . was submitted against the accused. The prosecution examined 22 witnesses who spoke about various circumstances. The accused pleaded not guilty and stated that a false case has been foisted on him. Learned Additional Sessions Judge observed that the prosecution case rested on the following circumstances:-

(I)that on 4-3-88 about 10.30 P.M., the deceased Neeta was found missing from her house;

(II)that on 4-3-88, at about 11.30 P.M. Bachu Singh (P.W. 19) and Bheiya Lal (P.W. 20) saw the accused carrying a female child on his shoulder and that the accused enquired from them about a doctor. At that time the child was wearing the frock (Ex. P-4) and the accused was wearing the pant (Ex. P-1) and the bush-shirt (Ex. P-2).

(III)that on 5-3-88, the deceased's dead body was found lying in front of the house of Dr. Om Prakash (P.W.2).

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(IV)THATon 17-3-88 the accused was apprehended from a public latrine in Block No. 19, Trilok Puri. He was naked at that time and a minor child namely Versha aged about 6 years was lying on the floor. At that time, the accused had injuries on his neck and in the opinion of Dr. M. K. Mandal (P.W.9) the injuries were almost

about two weeks old. The accused has not given any Explanationn about these injuries.

(V)that the presence of these unexplained injuries on the neck of the accused clearly proves that he got these scratches on his neck and face while committing rape upon Neeta.

(VI)that on 17-3-88, the accused led the police to the house of Bharat Singh (P.W.3) from where he had kidnapped Neeta;

(VII)that on. 17-3-88, the accused made the disclosure statement Ex. Public Witness . 5/A) before the Investigating Officer (P.W.2) was a result whereof the frock (Ex. P.4.). one piece of cloth (Ex. P. 3) and one baby shirt (Ex. P. 5) were recovered from a Nallah vide seizure memo (Ex. Public Witness . 18jA) and the pant (Ex. P.1) and the bush-shirt (Ex. P.2) were also seized from the accused's possession vide seizure memo (Ex. Public Witness 5/C).

(VIII)that the aforesaid articles along with the vaginal swab of the deceased and the blood stained gauze were sent to the C.F.S.L. for examination. On examination, human blood of 'B' Group was found on the baby frock, cloth piece (Ex. P-3) baby shirt (Ex. P-5). blood stained gauze and the vaginal swab. In addition to this, semen stains of group 'B' were also found on the deceased's paint (Ex. P-1). bushshirt (Ex. P-2). baby shirt (Ex. P-5) and the. vaginal swab vide reports Ex. Public Witness 10/'A and Ex. P W10/B.

(IX)that on 18-3-88, the accused refused to participate in the identification parade to be conducted by the Metropolitan Magistrate. Shri Raghbir Singh Public Witness 16.

(7) Relying upon the said circumstances, learned Additional Sessions Judge held that they form a complete chain and bring home the guilt to the accused.

(8) Let us consider if the above circumstances have been proved beyond reasonable- doubt and if so, whether they are not only inconsistent with the innocence of the accused but also irresistibly lead to the conclusion that the victim had been raped and murdered by the accused.

(9) It is undisputed that on 4-3-88, the deceased Neeta, aged about 4 years, daughter of Bharat Singh Public Witness 3 was kidnapped, raped and murdered. It is also undisputed that on 5-3-88, at about 6 A.M. the deceased's dead body was found in front of the house of Om Parkash (P.W.2). The said facts also stand proved from the evidence of Bharat Singh (P.W.3), Raju (P.W.4), Pooran Singh (P.W.5), Ram Kishan (P.W.8), Dr. Bharat Singh (P.W.17), Constable Rajinder Singh (P.W. 18) and S.I. Chanderbhan (P.W. 22). No doubt, this murder is diabolical in conception and cruel in execution but the real and pivotal issue is whether the totality of the circumstances unerringly establish that the accused is the real culprit. We must make it clear that there is no direct evidence on record to connect the accused with the alleged crime and the prosecution case solely hinges on circumstantial evidence. It is trite law that when the evidence against an accused person, particularly when he is charged with a grave offence like murder, if it consists of only circumstantial and not direct oral evidence, it must be like a spider's web, leaving no exit for the accused to slip away. The various links in the chain, when taken in isolation, might not connect the accused with the commission of the crime but when taken together, must unmistakably point out the guilt of the accused. (Pandala Veera Reddy Vs. State of A.P. : AIR 1990 SC 79). Bearing in mind the above principle of law enunciated by the Apex Court, we shall scrutinise scrupulously and examine carefully the circumstances appearing in this case.

(10) The first circumstance relied on by the prosecution is that on the night intervening 4/5 March, 1938, the accused was seen carrying the deceased Neeta on his shoulder and he also enquired from Bachu Singh (P.W. 19) and Bheiya Lal (P.W. 20) about a doctor. Both the witnesses have stated that on 4-3-88 at about 11.30 to 12 in the night, they saw the accused carrying a female child on his shoulder and the accused had enquired from them about a doctor. In his cross examination, Bachu Singh (P.W. 19) has admitted, that he did not see the face of that child. However he has stated in his examination-in-chief that at that time, the child was wearing a frock (Ex. P.4) and the accused was wearing the pant (Ex. P.1) and the bush-shirt (Ex. P-2). Bheiya Lal (P.W. 20) deposed that at the relevant time, the accused was also looking for the parents of the said child. He further stated that the clothes of the child were smeared with mud and the accused had put the child on his cot. He has not given any description regarding the clothes

of the said child as well as that of the accused.

(11) It is pertinent to note here that on 5-3-88 at about 6 A.M. the deceased's dead body was found lying in front of the house of Dr. Om Prakash (P.W. 2). The inquest report (Ex. P.22/ A) prepared by S.I. Chandra Bhan (P.W. 22.) shows that some blood was oozing out from the deceased's mouth. The postmortem report (Ex. P.17/A.) shows that there was tear of vaginal wall at 5 O'clock position half inch long through which blood was oozing out. This clearly shows that the blood continued to flow from the deceased's vagina till the post mortem examination. Ur. Bharat Singh (P.W. 17) further opined that the deceased's death was due to shock resulting from excessive pain during sexual intercourse. Viewing the aforesaid evidence, it can safely be 'inferred that immediately after the sexual intercourse the blood must be gushing out of the deceased's vagina and when the accused was seen carrying the victim on his shoulder, then in that situation, the accused's clothes must have been smeared with blood and this would have been noticed by Bachu Singh (P.W. 19) and Bheiya Lal(P.W.20). Surprisingly, there is no such evidence on record. None of the said witnesses has deposed that he has noticed any trace of blood either on the body of the victim or on the clothes of the accused. There is not an iota of evidence on record to show that the Investigating Officer S.I. Chandra Bhan (P.W. 22) found any trace of blood either on the spot or on the place of recovery of the dead body.

(12) It is equally important that there was no trace of blood, as one would expect on the occasion, on the clothes of the accused We have from the lips of Bachu Singh (P.W. 19) that at that time the accused was wearing the pant (Ex. P.1) and the bush-shirt (P.2). The reports of the C.F.S.L. (Ex. Public Witness 10/A) clearly shows that there was no trace of blood on these clothes. The report of the Serologist (Ex. Public Witness 10/B) shows that even the blood found on the deceased's frock (Ex. P.4) did not give any reaction. These are telling circumstances which could not be lost sight of in appreciating the evidence of Bachu Singh (P.W. 19) and Bheiya Lal (P.W. 20). Somehow, the whole pattern of the story introduced through the said prosecution witnesses smacks of artificiality. .it is not at all amenable to reason that the accused had carried the dead body of title victim for medical treatment by a doctor or entrusting it to the' 'deceased's

parents as testified by Bachu Singh (P.W. 19) and Bheiya Lal (P.W. 20).

(13) Thus, the prosecution story that 'immediately after the alleged rape and murder, the dead body of the-victim was carried by: the accused in the manner deposed by Bachu Singh (Public Witness . 19) and Bheiya Lal (P.W.20) appears to us to be' practically bewildering 'as no one would venture to do such an act to create evidence against himself. It is not possible to believe such a theory which does not accord with probabilities even in a small measure.

(14) Learned Trial court did not take notice of these improbabilities and infirmities in the evidence and unjustifiably accepted the evidence of Bachu Singh (P.W. 19) and Bheiya Lal (P.W.

(15) The next circumstance relied on by the prosecution is that on 5-3-88, the dead body of Neeta was found, lying in front of the house of Dr. Om Prakash (P.W. 2). By itself, this circumstance would not lead the court to connect the accused with the alleged crime

(16) The third circumstance relied on by the prosecution is that on 17-3-88, the accused made a confessional statement (Ex. P.W. 5/A) before the LO. Chandra Bhan .(P.W. 22). to the effect that be can point out the house from where he had lifted the victim. In our considered opinion, the said statement amounts to inadmissible confession as it has nothing to do with discovery of any fact.

(17) The fourth circumstance relied on by the prosecution is that on 17-3-88, the accused was apprehended from an unused public latrine of Block No. 9. Trilok Puri along with another minor female child, namely Versha daughter of Ram Kishan (P.W.8) and at that lime the accused had unbuttoned his pant and Versha was lying naked. Prosecution witnesses Ram Kishan (P.W.8), Pooran Singh (P.W. 5), Dalbir Singh (P.W. 15) have deposed about the said facts. Learned trial court, relying upon the evidence of the said witness, has observed in the judgment that the said conduct of the accused indulging in similar act two weeks after the alleged incident showed Its modus opreandi i.e. 'to choose female children for his wildly lust'. Learned standing counsel for the State has strenuously urged that the said evidence is admissible under Section 14 of the Evidence Act. It is pertinent to note

here that 'the principle on which Section 14 of the Evidence Act is based is that when the intention of the accused is a relevant fact, evidence of similar transaction both prior and subsequent to the alleged offence, is admissible as evidence of intention. Thus, the operation of Section 14 *ibid* is confined to cases where the existence of state of mind or body is in issue. It cannot be extended to other cases where the question of guilt or innocence depends upon actual facts and not upon the state of mind or feelings. In the instant case the accused cannot be held guilty under Section 376 I.P.C. by showing that he committed similar offence other occasions. In our system of law trial of an accused on with a presumption of innocence. The evidence of the starts nesses would operate unfairly . 'against the accused by (-.reatin^ grave prej'lidice or suspicion without, being of anv re^ ^ ft.^}en(ial value' Consequently, we have no hesitation in excluding the, aforesaid portion of the evidence of these two witnesses from our consideration.

(18) The fifth circumstance relates to the presence of injuries on the neck of the accused. Dr. M. K. Mandal (P.W. 9) testified that on 18-3-88, he examined the accused and found three old scratch marks on his person vide report Ex. Public Witness 9/A. By itself, and in the light of the above discussed facts, this circumstance is insufficient to connect the accused with the alleged crime.

(19) The sixth circumstance relates to the accused's refusal to take part in the identification parade. It has come in the evidence of Shri Raghbir Singh (P.W. 16) that the accused had refused to take part in the identification parade. It is pertinent to note here that the evidence of Puran Singh (P.W. 5), Ram Kishan (P.W.8) and Dalbir Singh (P.W. 15) shows that on 17-3-88, the accused was apprehended by them from a public place and the accused had refused to join the identification parade on the ground that he had earlier been shown to the witnesses. Further, it appears from the evidence on record that the accused was taken from place to place after his arrest, for the extensible purpose of securing recovery of the articles Ex. P.1 to P5, but it is not said by any one that the face of the accused was covered when he was so paraded everywhere. Under these circumstancs, the accused's refusal to take part in the identification parade does not give rise to any adverse inference against him.

(20) The seventh circumstance relied on by the prosecution is the recovery of the victims baby shirt (Ex. P.3), frock (Ex. P-4) and a piece of cloth (Ex. P.5) said to have been used for cleaning her private parts, the accused's pant (Ex. P.I) and the bush-shirt (Ex. P.2) at the instance of the accused. This is the most vital link in the chain of circumstances sought to be proved by the prosecution.

(21) Investigating officer S.I. Chander Bhan (P.W.22) testified that on 17-3-88. the accused made disclosure statement Ex. P.5A to the effect that he can get recorded the clothes from Ganda Nallah and led him to a public drain behind block No. 30 and produced three pieces of clothes having blood stains and semen, which were seized vide seizure memo Ex. Public Witness 5D. Pooran Singh (P.W. 5) and Dalbir Singh (P.W. 15). who are attesting witnesses of the disclosure statement Ex. Public Witness -5A and the seizure memo (Ex. Public Witness 5D) also swear to the same effect. The disclosure statement (Ex. Public Witness -5A) recites that the accused made the following admissible statement before the Investigating Officers:- ' . . . I can also get recovered the piece of cloth stained with blood and semen which I had thrown on the side of the canal and the clothes which I was wearing on that day at the time of occurrence.').

(22) The disclosure statement (Ex, P. 5A) is conspicuous by the absence of any information leading to the discovery of the soiled torn frock and the soiled baby sized Banyan alleged to have been recovered at the instance of the accused vide seizure memo (Ex. Public Witness 5B). Learned counsel for the defense has forcefully assailed the findings recorded by the learned trial court relating to the disclosure statement (Ex. P-5A) alleged to have been made by the accused and the recovery of the aforesaid articles at the instance of the accused. His contentions are : (a) that the learned trial court has not only misconstrued the statement made by the accused but has used more of it than was permissible under Section 27 of the Evidence Act: (b) that properly read, the admissible portion of the statement, in the circumstances of the case. did not warrant an adverse inference against the accused.

(23) As demonstrated earlier, the disclosure statement (Ex. P-5A) does not show that the accused supplied any information leading to the discovery of the torn baby

frock or the baby Banyian, which were recovered vide seizure memo (Ex. Public Witness -5B) In the connection, we may usefully excerpt the following observations made by the Apex Court in Mohd. Inayatullah Vs . The State of Maharashtra reported in : 1976 CriLJ481 :

'.. . .The last but the most important condition is that only 'so much of the information' as relates distinctly to the fact thereby discovered is admissible. The rest of the information has to be excluded. The word 'distinctiy' means 'directly', 'indubitably 'strictly', 'unmistakably'. The word has been advisedly used to limit and define the scope of the provable information. The phrase 'distinctly' relates 'to the fact thereby discovered' (sic) (and?) is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the direct and immediate cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police. is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part and that part only. of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.'

(24) Bearing in mind the said proposition of law enunciated by their lordships, could it be held that the frock and the baby Banyian were recovered at the instance of the accused. The disclosure statement of the accused (Ex. Public Witness 5A) does not mention that the accused supplied any information relating to the discovery of the said articles. It is significant to note here that there is not an iota of legal cadence on the record to show that the place from where the aforesaid articles were recovered is the place of the alleged occurrence. The seizure memo (Ex. Public Witness 18A) shows that these articles were found lying in an. open place which is accessible to all and sundry. On the contrary the disclosure statement (Ex. Public Witness 5A) clearly shows that the accused made a statement leading to the recovery of apiece of cloth (Ex. P.5). The mere fact that the frock and the baby Banyian were also sized Along with the piece of cloth (Ex. P.5) does not prove that these (wo articles were recovered in consequence of the information given by the accused..

(25) We may also mention here that recovery of the torn frock and the baby Banyan from a place near the canal or drain becomes incriminating not because of their recovery at the instance of the accused but the element of criminality tending to connect the accused with the alleged crime lies in the authorship of concealment, namely, that the accused who gave the information leading to their recovery was the person who concealed them. Viewing the aforesaid circumstances, we are unable to support the finding recorded by the learned trial court that these two articles were recovered at the instance of the accused.

(26) It is pertinent to note here that the seizure memo (Ex. P.5) recites that the frock and the baby Banyan were stained with blood and semen. Both the articles were sent to the C.F.S.L. and report of the C.F.S.L. (Ex. Public Witness 10A) clearly shows that the semen was not detected on the torn frock alleged to have been recovered vide seizure memo (Ex. P-51B). Surprisingly, the report of Serologist: (Ex. P-10B) does not show the presence of semen stains on these articles. It is the Prosecution Case that the piece of cloth (Ex. P.5) was used by the accused for cleaning the private parts of the victim. It seems inconceivable that this piece of cloth could not have semen stains on it and the report of the C.F.S.L. (Ex P 10A) clearly negatives the presence of semen stains thereon. Even the report of the Serologist (Ex Public Witness 10B) is conspicuous by the absence of semen stains on the piece of cloth (Ex. P.5). Thus, the learned trial court was wrong in holding that semen was found on the said piece of cloth. Absence of semen stains on the piece of cloth (Ex. P.5) completely shatter; the prosecution story.

(27) Learned trial court seems to have been greatly impressed by the fact that the baby frock, piece of cloth (Ex. P.5), baby shirt (Ex. P. 3) and the accused's clothes namely, pant (Ex. P.1) and the bush-shirt (Ex. P.2) were stained with blood and semen. It is pertinent to note that in the instant case two frocks have been produced before the trial court and a material discrepancy has crept in the evidence regarding their identification. At the outset, we must make it clear that Bharat Singh (P.W.3). who is the father of the deceased. has not given any description of the frock worn by his daughter at the time of her disappearance from his house. Even the two frocks produced in the trial were not got identified by him

in the witness box. It is also not the case for the prosecution that at the time of her disappearance the deceased was wearing two frocks. How these two frocks are related to this case is shrouded in mystery. However, it has come in the evidence of Bachu Singh (P.W. 19) that the frock (Ex. P.4) is the same frock which the deceased child was wearing at the time of the alleged occurrence. Investigating Officer S.I Chander Bhan (P.W. 22) and the panch witness Pooran Singh (P.W. 5) want us to believe that on 17-3-88, the said frock (Ex. P.3) was recovered at the instance of the accused vide seizure memo (Ex. P.5B). The seizure memo(Ex. P-5,B) recites that one torn frock of white colour having the chintz print was seized from the spot. It is undisputed that on 5-3-88 the dead body of the victim was found in front of the house of Om Prakash (P.W.2). The inquest memo (Ex. P.22A) prepared on 5-3-88 clearly shows that the deceased was wearing a frock having chintz print. This clearly shows that design of both the frocks i.e. one found on the dead body of the victim on 5-3-88 and another recovered from the spot on 17-3-88 is identical. Learned trial court has held that the frock (Ex. -P.4) is the same frock which the deceased was wearing on the night in question. (vide para 24.2 of the judgment). It has also held that on 17-3-88. the same frock (Ex. P.4) was recovered at the instance of the accused (vide para. 34 of the judgment). In this view of the matter one may be tempted to infer that after committing the alleged crime the accused had thrown away the said frock (Ex. P.4) on the spot, which was ultimately recovered there from. But this does not fit in the story advanced by the prosecution because Bachu Singh (P.W. 19) wants us to believe that on the night in question at about 11.30 he had seen the child wearing the frock (Ex. P.4). That apart, if the frock (Ex. P.4) had been removed from the dead body of the victim after commission of the alleged crime then her dead body must have been found naked. Surprisingly the inquest memo (Ex. P. 22 A) prepared on 5-3-88 shows that the frock answering the description of the frock (Ex. P.4) was found on the dead body. It seems inconceivable that the same frock could be found on the dead body of the victim on 5-3-88 and recovered from the spot on 17-3-88 also.

(28) It is also pertinent to note here that a bare perusal of the post mortem report (Ex. P. 17A) leads to an irresistible conclusion that at the time of the sexual intercourse the blood must have been gushing out of the deceased's vagina and in that situation the frock worn by the victim must have been smeared with blood. It

has also come in the evidence of Dr. Bharat Singh (P.W.17) that the sample of the deceased's blood was also taken. Obviously the blood of the deceased was taken for examination to ascertain whether the blood found on the frock, cloth of piece (Ex. P.5) and the vaginal swab was her own blood. The sampled blood was sent to the Serologist who opined that the deceased's blood was of 'O' Group. (Vide report Ex. Public Witness 10B). It follows that the deceased's blood was of 'O' Group. The report of the Serologist (Ex. Public Witness 10B) further shows that the baby frock was found, stained with blood of 'O' Group. Strangely enough, the vaginal swab of the deceased contained blood of 'B' group (vide report of the Serologist (Ex. Public Witness 10B). The report of the Serologist further shows that the piece of cloth used for cleaning the deceased's private parts and the baby shirt (Ex P. 3) recovered from the spot were found stained with blood of 'B' Group. Under these circumstances, it can safely be held that the blood found on the piece of cloth (Ex. P.5), vaginal swab and the baby shirt (Ex. P.3) was not of the deceased's blood. The blood found on the other frock did not give any reaction. The net work constituted by the aforesaid facts leaves gaps of varied dimensions through which the accused can get out with equal facility.

(29) The last circumstance relied on by the prosecution is the presence of semen stains on the pant (Ex. P1) and the bush-shirt (Ex. P.2) recovered from the possession of the accused. Investigating Officer S.I. Chander Bhan (P.W.22) deposed that on 17-3-88. the pant (Ex. P.1) and bush-shirt (Ex. P.2) were recovered from the accused's Jhuggi vide seizure memo (Ex. Public Witness . 510. On this point, his testimony stands contradicted by Dalbir Singh (P.W. 15) who testified that on 17-3-88, at the time of his arrest the accused was wearing the pant (Ex. P. 1) and the bush- shirt (Ex. P.2). The semen of the accused was taken for examination to ascertain whether the semen found on his clothes as well as on the baby shirt (Ex. P.3) and the vaginal swab was his own semen. The report of the Serologist (Ex. Public Witness - 10B) shows that semen stains of 'B' Group were found on the pant (Ex. P.1) and the bush-shirt (Ex. P.2). We have from the lips of Dr. Tej Singh Vimal (P.W.7) that on 18-3-88, sample of the accused's semen was taken and sealed in a vial vide report (Ex. P. 71A). Sub-Inspector Chander Bhan (P.W. 22) testified that on 18-3-88, the said sample was seized by him vide seizure memo (Ex. Public Witness 6A) and the same was also sent to the

C.F.S.L. The report of the C.F.S.L. (Ex. Public Witness 10A) shows that an empty injection vial described as sample semen of the accused was received in the laboratory but the semen could not be detected in the vial. This is yet another circumstance which knocks the bottom out of the prosecution case. In these circumstances, we are clearly of the view that the presence of the semen on the clothes of the accused as well as on the baby shirt (Ex. P.5) and the deceased's vaginal swab cannot be an incriminating evidence against the accused. The learned trial court did not take notice of the aforesaid improbabilities and infirmities in the evidence and unjustifiably accepted the prosecution case. It has been observed by the Apex Court in *State of Punjab Vs . Jagir Singh* : 1973 CriLJ1589 :

'A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts.' . . . ' We regret to observe that in this case the approach made by the learned trial court was purely wooden, artificial and based on pure speculation, and we are not at all impressed by the process of reasoning adopted by the learned trial court.

(30) In the instant case, the prosecution has only bundled up some suspicious circumstances against the accused. Not an iota of reliable evidence is let into fix the guilt on the accused. On the contrary, there is an abundance of impossibilities in the case as put forward by the prosecution. The evidence brought against the accused is absolutely unconvincing and inherently improbable. There is no certainty either at the beginning or at the end, much less all along the way. It is a typical case of 'might be true' but not one of 'must be true'.

(31) Accordingly, we allow the appeal, set aside the appellant's conviction and acquit him of the offences punishable under Sections 302/363(f) Indian Penal Code . The appellant is in Jail. He shall be set at liberty forthwith, if not wanted in

any other cause. The Murder reference is answered accordingly.

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