

Musa Singh Vs. State

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Court : Delhi

Decided On : Jul-08-2013

Judge : Reva Khetrapal

Appellant : Musa Singh

Respondent : State

Advocate for Pet/Ap. : Mr. S.K. Sethi, Ms. Ritu Gauba

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI + CRL.A. No. 1053/2010
MUSA SINGH Through: Appellant Mr. S.K. Sethi, Advocate. Through:
Respondent Ms. Ritu Gauba, APP. versus STATE % Date of Decision : July 08,
2013 CORAM: HON'BLE MS. JUSTICE REVA KHETRAPAL HON'BLE MS.
JUSTICE SUNITA GUPTA JUDGMENT : REVA KHETRAPAL, J.

1. Challenge in the present appeal is to the sentence of life imprisonment for the offences punishable under Sections 302 and 377 IPC, the sentence of 5 years rigorous imprisonment for the offence punishable under Section 363 IPC and 3 years rigorous imprisonment for the offence punishable under Section 411 IPC and varying amounts of fine for the aforesaid offences, in default the Appellant to undergo further imprisonment.

2. The prosecution case in a nutshell is that on 19.04.2006, the Appellant/accused Musa Singh abducted and sodomised a boy named Vishal aged 5-6 years and

caused his death by hitting him with a brick on his head. PW1 Seema in this regard lodged a complaint at Police Station Shalimar Bagh on the basis of which ASI Urmilla (PW15) registered FIR (FIR No.280/06) Ex.PW1/A. A day later, that is, on 20.04.2006, PW18 Constable Babita received a call informing that a dead body of a male child aged about 5-6 years is lying in the room under water tank in front of Railway Track, Gali No.2, Rajasthani Udyog Nagar, Jahangir Puri. PW18 Constable Babita recorded this information in the PCR Form Ex.PW18/A. The information was further passed to Police Station Jahangir Puri where HC Raj Rani (PW9) recorded this information vide DD No.17 (Ex.PW9/A). PW23 SI Rajesh Kumar posted at Police Station Jahangir Puri and PW17 HC Suraj Bhan on receipt of DD No.17 at about 10:15 A.M. went to the spot. PW23 SI Rajesh Kumar flashed this message to various Police Stations. The message was also sent to Police Station Shalimar Bagh where missing report had been lodged by the mother of the child, on the basis of which FIR Ex.PW1/A was registered on 19.04.2006. SI Ravinder Singh (PW22) was informed by the duty officer P.S. Shalimar Bagh that a message has been received from PS Jahangir Puri that a dead body of a male child aged about 5 to 6 years has been found. On receipt of this information, SI Ravinder (PW22) along with Seema (PW1), Raj Kumar (PW2) and Kamlesh (PW4) reached the spot, that is, Gali No.2, Rajasthani Udyog Nagar, near water tank, Railway line, Jahangir Puri and identified the dead body as that of Vishal. At the spot, SI Rajesh Kumar (PW23) was already present. SI Rajesh Kumar called the crime team and after inspection by the crime team, he lifted sealed and seized cement brick with blood stains (Ex.PW17/A), earth control (Ex.PW17/B), blood sample from spot (Ex.PW17/C) and chappals of the deceased (Ex.PW17/D). Postmortem on the dead body was got conducted (Ex.PW19/A). In the postmortem, the doctor opined that there was forceful penetration of anal canal by a fully erected penis and the cause of death was cranio-cerebral damage resulting from blunt force. Time since death was approximately 24 hours. Three days later, on 23.04.2006 the accused was arrested at the instance of Seema (PW1) vide arrest memo Ex.PW1/C and his personal search was conducted vide memo Ex.PW1/D. From his formal search, a mobile phone belonging to the mother of the deceased boy was also recovered from the possession of the accused. The phone was seized vide seizure memo Ex.PW1/B. Thereafter Constable Naresh PW28

brought accused Musa Singh to the Babu Jagjivan Ram Memorial Hospital for his examination. On completion of investigation, the charge sheet was filed.

3. The accused was charged for the offences punishable under Sections 363/377/302/411 IPC. Prosecution in order to bring home the guilt of the accused examined 29 witnesses. The statement of the accused was recorded under Section 313 Cr.P.C. in which the accused admitted that PW1 Seema with her son was residing at the house of Om Parkash in Gali No.9, Shalimar Bagh, Delhi along with her husband Rajkumar (PW2), but denied having committed the offences aforesaid and stated that he had been falsely implicated at the instance of the complainant due to enmity. He stated that he wanted to lead evidence in his defence, but subsequently defence evidence was closed without examining any witness.

4. The learned trial court on the basis of the circumstantial evidence adduced by the prosecution witnesses held that the prosecution had established the guilt of the accused for the offences punishable under Sections 363, 377, 302 and 411 IPC and convicted him accordingly.

5. The learned trial court based the conviction of the accused on the following circumstances: (i) Evidence of last seen; (ii) Recovery of mobile phone from the possession of the accused immediately after the commission of offence; (iii) Recovery of blood stained brick used as weapon of offence at the instance of the accused; (iv) Detection of blood on the clothes of the accused. (v) Detection of human semen on the clothes of the deceased child.

6. On behalf of the Appellant, it was contended that the aforesaid chain of circumstantial evidence relied upon by the prosecution to bring home the guilt of the accused was not a complete one and several links were missing from the said chain, necessitating the setting aside of the judgment of the learned trial court. It was urged that there can be no manner of doubt that where a case under Section 302 IPC is entirely based upon circumstantial evidence, an onerous burden is cast upon the prosecution to prove beyond a shadow of doubt that a composite chain of evidence regarding the causes and the circumstances relating to the death of the accused is formed, which unerringly points the finger of accusation at the

accused and is consistent with no other hypothesis except that of the guilt of the accused. The learned counsel for the accused in support of this contention relied upon the case of Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116. In the said judgment, which is locus classicus on the law relating to circumstantial evidence, the following dicta was laid down, which is heavily relied upon:

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. It may be noted here that this Court indicated that the circumstances concerned must or should and not may be established. There is not only a grammatical but a legal distinction between may be proved and must be or should be proved as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793. 1973 Cri LJ 178. where the observations were made: Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between may be and must be is long and divides vague conjectures from sure conclusions, (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

7. To the same effect are the decisions of this Court in Tanviben Pankajkumar Divetia Vs. State of Gujarat (1997) 7 SCC 156. State (NCT of Delhi) Vs. Navjot Sandhu (2003) 6 SCC 641. Vikram Singh Vs. State of Punjab (2010) 3 SCC 5. and Aftab Ahmad Ansari Vs. State of Uttaranchal (2010) 2 SCC 583.

8. In Aftab Ahmad Ansari (Supra), the Supreme Court observed as under:- (SCC, Page

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

9. Since there can be no dispute with this proposition of law, we proceed to examine the circumstances relied upon by the prosecution seriatim on the aforesaid premise, dealing with each circumstance and testing the same on the touchstone of the panchsheel formulated in the case of Sharad Birdhichand Sarda (supra). CIRCUMSTANCE OF LAST SEEN 10 The last seen evidence in the present case is that of PW4 Kamlesh, the brother of PW2 Rajkumar, father of the deceased. PW4 has deposed: .On 19.4.06 at about 6.30/7.00 a.m. I saw accused present in the court taking away Vishal aged 5/6 years who was son of my brother Raj Kumar. I saw the accused taking away Vishal outside Gali No.9, Shalimar Village. I asked the accused where he was going at such early hours. He laughing replied that they were going for morning walk. The accused and Vishal went towards phatak side.

11. PW4 Kamlesh in his subsequent testimony, inter alia, stated that when he saw the accused taking away the child, the accused was wearing the same red pyjama and light yellow check shirt which he was wearing at the time of his arrest and which were seized by the police vide memo Exhibit PW4/A. As regards the clothes of the child, on being asked PW4 stated that the child had worn an underwear and

a shirt but he did not remember the colour of the underwear. The child was in the lap of the accused and was happy.

12. Learned counsel for the Appellant has assailed the aforesaid testimony of PW4 Kamlesh on the following grounds: (i) The name of PW4 does not figure in the First Information Report lodged with the police; (ii) None has been produced from the neighbourhood or that gali to corroborate the testimony of PW4 that the deceased was last seen in the company of the accused though PW1 Seema, mother of the deceased, in her complaint to the police had clearly stated that the neighbours had informed her that the accused had taken away the child; (iii) It is improbable that after so many days the accused would be wearing the same clothes which he was wearing on the day of the incident; and (iv) The witness (PW4) was not able to properly describe the clothes worn by the deceased child and the colour thereof in that he stated that the child was wearing shirt and underwear when he was last seen with the accused whereas he was actually wearing a shirt and knicker.

13. In order to properly appreciate the last seen evidence of PW4 Kamlesh, it is proposed to first examine the testimony of PW1 Seema, mother of the deceased and PW2 Rajkumar, father of the deceased, before dealing elaborately with the testimony of PW4 Kamlesh. PW1 Seema testified that on 19.4.2006, she got up at about 6.30 a.m. and found that her son Vishal, aged about 4 years who had slept with her in the night was not present in the house. She searched for him in the neighbourhood and the neighbours told her that they had seen accused Musa Singh taking away her son. She checked her mobile phone and the same was also missing. At about 7.00 a.m., she talked to the accused from the nearby PCO booth and he told her that her son was with him. She along with her husband went to the police station and lodged a report. To be noted at this juncture that the aforesaid testimony of PW1 Seema is on the same lines as her initial statement recorded by the police on the basis of which First Information Report (Ex.PW1/A) was lodged. In her further testimony, she added that on the same day her husband also talked with the accused and requested him to return his son but the accused refused to do so. In her cross-examination, she stated that she could not give the names of the neighbours who had told her that the accused had taken away her son. On

being asked, she stated that her husband had telephoned the accused from the STD booth in Gali No.9 at 7.30 a.m. and she had telephoned the accused from the STD booth in Gali No.7 at 8.00 a.m. and she had lodged report regarding the taking away of her son by the accused in Police Station Shalimar Bagh at about 2.00 p.m. Her husband (PW2 Rajkumar) and her sister Sheela had accompanied her at that time.

14. Adverting to the testimony of PW2 Rajkumar, which corroborates the testimony of PW1 Seema, he stated that on 19th April, 2006 at about 7.00 a.m. his wife Seema woke him up and told him that his son Vishal, aged about 4 years and her mobile phone make Nokia were missing from the house. He along with his wife started searching for his son. Someone from the locality told them that their son had been abducted by accused Musa Singh, who is brother-in-law (jija) of his wife. At about 7.30 a.m., he made a telephone call to the accused from the STD booth of Naveen Verma (PW3) and accused told him that his son and mobile phone were with him. In the course of his cross-examination, the witness stated that his wife (PW1) and Kamlesh (PW4) had accompanied him at the time of lodging report with the police regarding taking away of his son. Much has been said by learned counsel for the accused with regard to this statement made by PW2 Rajkumar. The contention of counsel is that while PW2 says that PW1 Seema and PW4 Kamlesh had gone with him to lodge First Information Report, PW1 Seema stated that PW2 Rajkumar and Sheela (wife of the accused) had gone with her to the police station. The inference sought to be drawn is that PW4 Kamlesh was nowhere in the picture when the police report was lodged and his evidence that he had last seen the deceased boy being taken away by the accused person was, therefore, wholly unbelievable. It is also contended that the fact that no neighbour of PW1 and PW2 has been examined by the prosecution to corroborate the testimony of PW4 Kamlesh with regard to the deceased having been last seen in the company of the accused, nor in fact any of the neighbours could be named by PW1 and PW2, throws further doubt on the veracity of the prosecution version. PW4 Kamlesh is the real brother of PW2 Rajkumar and hence planted by the prosecution to buttress the case of the prosecution for dearth of any other evidence to substantiate the Last Seen Theory of the prosecution.

15. At the outset, we note that though undeniably PW4 Kamlesh is the real brother of PW2 Rajkumar and brother-in-law of PW1 Seema and thus a close relative of the deceased, this cannot be construed in our opinion as taking away from the credibility of his deposition. There is no such law that the deposition of a close relative even if otherwise found to be credible is to be discarded and cannot be relied upon. In the instant case, in the backdrop of the testimonies of PW1 Seema and PW2 Rajkumar, the last seen evidence of PW4 Kamlesh must be viewed as a vital link in the chain of circumstances explainable only on one hypothesis: that the Appellant was guilty of killing the deceased. PW4 Kamlesh has given a graphic description of the manner in which the accused was taking away the child in his lap and has also stated that he asked the accused as to where they were going and the accused replied that they were going for a morning walk. The deposition of PW4 has also withstood the test of cross-examination and there has emerged nothing on record to discredit his testimony in any manner. A mere bald suggestion was put to him that he had not seen the accused taking away the child, which needless to state was denied by the witness.

16. With regard to the emphasis placed by learned counsel for the accused on the fact that PW4 Kamlesh is not named in the First Information Report, which finds no mention of the child having been last seen in his company, we are not inclined to attach undue importance to this fact for it is trite that a First Information Report is not to be treated as an encyclopedia with regard to the crime committed by the offender but merely as a piece of information to the police regarding the commission of a crime.

17. As regards the contention that none has been produced from the neighbourhood or gali to corroborate the testimony of PW4, it is noteworthy that no neighbour has been named in the First Information Report and it is possible that the witness was referring to the general buzz in the neighbourhood. Even otherwise, no adverse inference can be drawn from the fact that no neighbour has stepped into the witness box to depose against the accused since it emerges from the record that the accused happens to be residing in the same neighbourhood. The growing tendency of those who reside in the neighbourhood to distance themselves from the problems of a neighbour and in particular those relating to

crime and law enforcement is well known and Courts while noticing that this is possibly on account of an instinct for self-preservation from time to time have rued the fact that members of the general public are not forthcoming qua criminal offences and offenders.

18. With regard to the contention of the Appellants counsel that it is improbable that the accused was still wearing the same blood stained clothes which he was wearing on the day when he abducted the child, we find no merit in this as well. The accused was well aware of the fact that he had committed a heinous crime and was on the run from the police. In such circumstances, he could hardly have been expected to go back to his house for a change of clothes. Concealment of his person from the eyes of the police officials must have been predominant in his mind. As a matter of fact, his whereabouts were informed by the secret informer to the police on his venturing out to the theka to consume liquor, resulting in his apprehension.

19. A lot of emphasis has also been placed by learned counsel for the accused on the fact that as per PW4 Kamlesh, the child was wearing a shirt and underwear when he was last seen by PW4 with the accused, whereas in fact he was wearing knickers and a shirt and that PW4 was also not able to give the colour of the clothes of the child. In this context, the learned trial Judge has in our opinion pertinently noted that PW4 when he had seen the accused with the child never knew that he was seeing the child for the last time and might have to depose about the clothes of the child. Hence the discrepancy in telling whether the deceased was wearing knickers or underwear, which is not, in any manner, a major discrepancy.

20. Thus, on an overall conspectus, in our opinion, the testimony of PW4 Kamlesh with regard to last seen cannot be discarded for any of the reasons aforementioned, more so as it has emerged unscathed after cross-examination and is cogent and credible and there is nothing on record to suggest that he was in any manner inimical to the accused. We however note the fact that a rather extraordinary suggestion was given to this witness to the effect that he was falsely implicating the accused so that he could conveniently live with the wife of the

accused. Given the fact that it is nobody's case that there was any illicit connection between the witness and the wife of the accused, the suggestion to our mind was quite off the mark and to no end. We are thus unable to discern any cogent reason for interfering with the finding of the trial court that it stands proved that PW4 Kamlesh had seen the accused taking away the child in the early hours of the morning, and this circumstance forms a vital link in the chain of circumstances sought to be established by the prosecution to bring home the guilt of the accused.

21. The reliance placed by the learned Additional Public Prosecutor in this regard upon the judgments rendered in *Amitava Banerjee vs. State of West Bengal* (2011) 12 SCC 55 and *Shyamal Ghosh Vs. State of West Bengal* (2012) 7 SCC 64 is apposite. In *Amitava Banerjee* (Supra), the deceased Babusona was last seen by witnesses in the park talking to the appellant and shortly thereafter going with the appellant on his bicycle in the same direction, that is, the direction of the jungle. The Court after analyzing the testimonies of the last seen witnesses and finding that there was nothing to discredit their version or render them unreliable, held that the deceased having been last seen with the appellant around the time he was killed is a circumstance which together with other circumstances proved in the case was explainable only on one hypothesis that the appellant was guilty of killing the deceased. In the case of *Shyamal Ghosh* (supra), it was laid down that once the last seen theory comes into play, the onus is on the accused to explain as to what happened to the deceased after they were together seen alive and if the accused fails to render any reasonable/plausible explanation in this regard then the court can rely upon the Last Seen Theory.

RECOVERY OF MOBILE PHONE 22 The second circumstance in the chain of circumstances sought to be established by the prosecution to prove the guilt of accused is the recovery of the mobile phone of PW1 Seema from the person of the accused at the time of his arrest. As already stated above, PW1 Seema in her complaint, on the basis of which FIR was recorded as Ex.PW1/A, had clearly stated that her mobile phone was missing from the house. She reiterated this in her testimony in Court and stated that she had made a call on her mobile phone to the accused from the PCO booth and was told by the accused that her son was with him. PW2 Rajkumar in his testimony also stated that he had spoken with the accused on the mobile phone of his wife by making a call from the nearby STD booth of Naveen Verma.

The latter was examined as PW3, who however stated that though he had been running STD booth for the last 6 to 7 years in Gali No.9, Shalimar Village and the number of the local phone at his shop is 27492353, he did not remember as to whether anyone had come to his shop for making a telephone call on 19.4.2006. He was declared hostile and cross-examined by the learned APP but to no avail. PW6 Rajinder Pal from whose STD booth PW1 Seema had made a call also did not support the case of the prosecution except to the extent that he stated that he had a STD booth near his vegetable shop and that his children were running the said STD booth, who had told him that on 19th April, 2006 Seema (PW1) had come to the STD booth to make a call.

23. Notwithstanding the testimonies of PW3 Naveen Verma and PW6 Rajinder Pal, in our opinion, the prosecution has successfully established on record through the testimony of PW8 Davinder Kumar that mobile phone bearing No.9350431941 was the mobile phone of PW1 Seema, which was purchased by her second hand from the shop of PW8. The latter categorically stated in the witness box that in the month of March, 2006 he had sold one Nokia mobile Model 2280 having connection of Reliance network to one Seema, wife of Rajkumar for a consideration of ` 100/-, and the number of the said mobile phone which he had purchased from another lady for ` 700/-, was 9350431941. He also proved on record the receipt with regard to the sale of the said mobile phone (wrongly numbered as Ex.PW1/A) and identified the mobile phone as Ex.P1.

24. The factum of PW2 Rajkumar having called from the STD Booth of PW3 Naveen Verma also stands established from the testimony of PW20 Vishvabendhu Govil from Reliance Infocom Ltd. who proved on record the call details from Mobile No. 9350431941 from 17.4.2006 to 19.4.2006 as Ex. PW20/B, apart from proving on record the information provided by him to the Investigating Officer regarding the name and particulars of MDN (Mobile Directory Number) 9350431941 as Ex.PW20/A. The call details proved on record by the witness clearly show that a call was made from telephone No.27492353 at 7:38:43 hours to mobile phone No.9350431941. PW3 Naveen Kumar though hostile to the prosecution has specifically stated that the number of the telephone installed at his telephone booth is 27492353. Thus, this call was presumably made by PW2 Rajkumar as

testified by the witness. So far as the owner of the other STD booth, namely, PW6 Rajinder Pal is concerned, though hostile, he admitted that his children had told him that Seema (PW1) had come to make a telephone call. The call details further establish that on the same day at 8:6:12 hours and 8:8:38 hours respectively two calls were made to mobile phone No. 9350431941 which presumably were the calls of PW1 Seema.

25. Then again, PW1 Seema in her testimony has clearly deposed about the recovery of the mobile phone from the pocket of the shirt of the accused in her presence in the evening of 24.4.2006 when the accused was arrested. The accused also does not deny the recovery of the mobile phone of PW1 Seema from his possession as is evident from a suggestion given by counsel for the accused to PW1 Seema, reply to which is as follows: It is wrong to suggest that my mobile phone was not stolen or that I gave the same to the accused or that I took some money from him for my needs.

26. PW4 Kamlesh also bore testimony to the recovery of the mobile phone Ex.P1 from the pocket of the shirt of the accused and identified the same as the mobile phone belonging to his bhabhi/PW1 Seema. SI Rakesh Kumar (PW24), Constable Naresh (PW28) and Inspector Satvir Singh (PW29) [IO] are the police officials who corroborated the testimonies of PW1 and PW4 in this regard. Per contra, there is nothing on record to substantiate the version of the accused that the complainant had given his mobile phone to him. In the circumstances, we are of the considered opinion that the recovery of the mobile phone Ex.P1 belonging to the mother of the deceased from the possession of the accused immediately after the commission of the offence establishes yet another vital link in the chain of circumstances pointing to the guilt of the accused. RECOVERY OF BLOOD STAINED BRICK AT THE INSTANCE OF THE ACCUSED 27 The case of the prosecution in this regard is that the accused upon his arrest made a disclosure statement (Ex.PW24/B) and got recovered the brick with which he had hit on the head of the boy which was seized vide memo Ex.PW24/D. Recovery of the brick has been established by the prosecution by examining PW1 Seema, PW4 Kamlesh, PW24 SI Rakesh Kumar, PW28 Constable Naresh and PW29 Inspector Satvir Singh. This brick was also sent to the FSL for analysis and the FSL result (Ex.PW11/A) shows that blood of

human origin was found on the brick. Some confusion is sought to be created by the Appellants counsel by contending that brick (Ex.P8) was planted upon the accused to implicate him as is evident from the fact that it was a half brick whereas the brick produced in Court was found to be 2/3rds of the brick and not half. This, to our mind, is not of much importance as it is no ones case that the dimensions of the brick were measured. The fact that this brick was recovered at the instance of the accused from the bushes outside the room from which the dead body was recovered coupled with the fact that PW24, PW28 and PW29 whose testimonies we find to be reliable and trustworthy have deposed about the recovery of the brick at the instance of the accused, conclusively proves that the brick was recovered pursuant to the disclosure made by the accused.

28. An argument was sought to be raised on behalf of the Appellant that the blood group could not be ascertained and, therefore, the recovery of the blood stained brick cannot be taken to be a circumstance against the accused. Relying upon the judgments of the Supreme Court in *State of Rajasthan Vs. Teja Ram and Others* (1999) 3 SCC 50. and *Gura Singh Vs. State of Rajasthan* (2001) 2 SCC 205. the learned Additional Public Prosecutor contended to the contrary. In *Teja Rams* case (Supra), one of the circumstances which the trial court relied on as incriminating against the accused was the recovery of two axes (kulhadis). On the strength of the statements of two of the accused persons, the said axes (kulhadis) were subjected to chemical examination and the result was that both the axes (kulhadis) were found stained with blood. However, when they were further subjected to test by the serologist, the blood on one axe was found to be of human origin while the blood stain on the other axe was found to be so disintegrated that its origin became undetectable. A Division Bench of the High Court of Rajasthan declined to act on the evidence relating to the recovery of axes for the reason that human blood could be detected only on one of them while the origin of the blood on the other was not established, there was room of entertaining doubt as to the real person whose blow with the axe would have caused the injury. The Supreme Court finding the reasoning of the High Court unsustainable, opined as under: 25. Failure of the serologist to detect the origin of the blood due to disintegration of the serum in the meanwhile does not mean that blood stuck on the axe would not have been human blood at all. Sometimes it happens, either because the stain is

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

29. In the case of Gura Singh (supra), the prosecution proved beyond doubt the recovery of the blood stained chadar (sheet) belonging to the Appellant and kassi, the weapon of offence on the basis of the voluntary disclosure statement made by the accused, who was charged with the offence of patricide and had allegedly smashed the skull of the deceased with the kassi. Both the trial court as well as the High Court held that the prosecution had successfully established the making of the disclosure statements by the Appellant and the consequent recovery of the weapon of offence and chadar at his instance. The serologist and chemical examiner found the chadar (sheet) and other items to be stained with human blood. However, the origin of blood stains on the kassi and other items like the shoes of the accused could not be determined on account of disintegration with the lapse of time. The contention was sought to be raised on behalf of the Appellant that the prosecution had failed to connect the accused with the commission of crime and the judgments of the Supreme Court in Prabhu Babaji Navle Vs. State of Bombay, AIR 195.SC 5.and Raghav Prapanna Tripathi Vs. State of U.P, AIR 196.SC 7.pressed into service. Rejecting the aforesaid contention, the Supreme Court held that the effect of the failure of the serologist to detect the origin of blood due to disintegration in the light of the aforesaid cases was considered by this court in Teja Rams case (supra) and in view of the authoritative pronouncement of this court in the said case, there was no substance in the submission of the learned counsel for the Appellant that in the absence of the report regarding the origin of the blood, the trial court could not have convicted the accused.

30. In the instant case, the FSL report Exhibit PW11/A establishes the existence of blood on the brick, which was used as the weapon of offence and the report of the serologist Ex. PW11/B shows that the blood was of human origin and this clinches the issue. The failure of the serologist to detect the classification/grouping of the blood cannot go to the benefit of the accused.

31. We may add that the medical evidence on record further corroborates the fact that the cause of death in the instant case was cranio-cerebral damage resulting from blunt force impact. Not even a suggestion was put to the doctor who proved on record the postmortem report, namely, PW19 Dr. Kulbhushan Goel that craniocerebral damage which resulted in the death of the deceased could not have been caused by the brick Ex.P8. Before parting with this aspect, however, we may note that reliance was placed on behalf of the Appellant on the judgments of the Supreme Court rendered in *Dudh Nath Pandey vs. State of Uttar Pradesh*, (1981) 2 SCC 16. and *Bakhshish Singh vs. State of Punjab*, (1971) 3 SCC 182. We are unable to appreciate as to how the said judgments can afford any benefit to the accused. In the case of *Dudh Nath Pandey* (supra), the Supreme Court while affirming the conviction of the Appellant merely noted that evidence of the recovery of the weapon of offence, i.e., pistol at the instance of the Appellant could not by itself prove that he who pointed out the weapon wielded it in offence. In the case of *Bakhshish Singh* (supra), the only incriminating evidence against the Appellant was that he had pointed to the place where the dead body of the deceased had been thrown and in the circumstances the Supreme Court rightly concluded that even if he was not a party to the murder the Appellant could have come to know the place where the dead body of the deceased had been thrown and accordingly proceeded to set aside the conviction. These cases can have no application to the facts of the present case where the prosecution does not seek to inculcate the Appellant solely on the basis of recovery of the weapon of offence or for that matter the dead body which in the present case in any event was not recovered at the instance of the Appellant, but on the basis of a chain of incriminating circumstances. The recovery of the blood stained brick at the instance of the accused is but a link albeit an important one in the chain of circumstances put together by the prosecution for the purpose of eliminating the hypothesis of innocence of the accused and in our opinion this link stands

conclusively proved through the testimonies of the prosecution witnesses noted above. DETECTION OF BLOOD ON THE CLOTHES OF THE ACCUSED 32 The next link in the chain of circumstances sought to be proved by the prosecution to bring home the guilt of the accused is the detection of blood on the clothes of the accused. The aforesaid circumstance is duly proved by the testimony of PW4 Kamlesh, who categorically stated that the accused was wearing red pyjama and a yellow check shirt at the time of his apprehension, which were the very same clothes worn by the accused while taking away the child on the morning of 19.4.2006. PW24 SI Rakesh Kumar, PW28 Constable Naresh and PW29 Inspector Satvir Singh (apart from PW4 Kamlesh) are witnesses to the recovery of the said clothes from the person of the accused and their seizure. The clothes of the accused along with other incriminating material containing blood, semen, etc. were sent to the FSL and as per FSL report (Ex.PW11/A) blood was detected on Ex. 7b, viz., the shirt of the accused, which on serological examination was found to be blood of human origin as set out in FSL report Ex.PW11/B.

33. On behalf of the accused, the recovery of the blood stained shirt, stained with human blood, is sought to be assailed on two grounds. The first is that it is highly improbable that the accused was still wearing the same blood stained shirt and pyjamas on 24 th April, 2006 when he was arrested which he was wearing on the morning of 19th April, 2006. We have already dwelt at length on this aspect and it need not detain us any further. The second is that PW1 Seema though she stated that she was a witness to the arrest and personal search of the accused, nowhere in her testimony stated that she was witness to the seizure of the blood stained clothes of the accused. As regards the second contention, suffice it to state that PW1 Seema though has stated in her testimony that she had signed the arrest and personal search memos (Ex.PW1/C and 1/D) never ever claimed to be a witness to the seizure of the clothes of the accused or to have signed the seizure memo pertaining thereto (Ex.PW4/A). The contention that PW1 Seema was required to be a witness to the seizure of the clothes of the accused is equally meaningless. At this juncture, it may be noted that the police had seized the clothes, viz. pyjama and shirt of the accused only for the reason that according to PW4 these were the same clothes which the accused was wearing when he saw him taking away the child Vishal. Though found to be dirty by the police, no blood

stains could be detected by the police on the clothes. It was only in the FSL that blood was detected on the shirt of the accused. The grouping of the blood could not be done possibly on account of putrefication of the sample, but according to the FSL result blood of human origin was found on the shirt. On medical examination of the accused vide MLC Ex.PW12/A, there was no injury found on the person of the accused and no explanation has been given by the accused as to how his shirt came to be blood-stained. We may also profitably venture to add that the accused in his statement under Section 313 Cr.P.C. did not deny that the clothes belonged to him nor denied that he was not wearing the said clothes at the time of commission of the offence, though stated that the clothes had been recovered from his house and not from his person. Thus, we affirm the findings of the learned trial court that the detection of human blood on the clothes of the deceased is yet another vital link in the chain of circumstances to inculcate the accused. The fact that no explanation was offered by the accused when this incriminating evidence was put to him clearly points towards his guilt and is inconsistent with the hypothesis of his innocence.

DETECTION OF HUMAN SEMEN ON THE CLOTHES OF THE DECEASED CHILD 34 According to the case of the prosecution, the child was subjected to sodomy before death. The postmortem report (Ex.PW19/A) affirms the fact that the minor child was sodomised in a brutal manner, which is proved on record by PW19 Dr. Kulbhushan Goel. As per him, postmortem findings are consistent with forceful penetration of anal canal by a fully erected penis. The factum of carnal intercourse is further affirmed by the report of the FSL (Ex.PW11/A), as per which human semen was detected on Ex.3a being the knickers of the child which however yielded no reaction as to grouping [as per FSL report (Ex.PW11/B)] possibly on account of putrefication of sample with the passage of time. Suffice it to say that the detection of human semen on the clothes of the deceased child is yet another circumstance linking the accused with the commission of the crime.

MOTIVE 35 A very intriguing argument was put forth before us with regard to motive for the commission of the crime by the accused. Learned counsel for the Appellant with all the force at his command contended that no motive has been established by the prosecution to nail the accused. He contended that there was no need for the accused to commit such an act, he being a married man with two children. PW1 Seema and PW2 Rajkumar, on the

other hand, categorically deposed that when they called the accused and requested him to return their son, he told them that he had abducted their son Vishal because of their giving shelter in their house to his wife and children. Accused also threatened on the telephone that he would teach such a lesson to them that they would not forget the same throughout their lives. No suggestion was put to these witnesses to falsify their stand with regard to the motive attributed by them to the accused, though a number of suggestions were put to them with the object of proving that the wife of the accused, namely, Sheela was having illicit relations with PW2 Rajkumar amongst several other persons. If this be so, presumably this would have been motive enough for the commission of the crime. However, the accused in his statement under Section 313 Cr.P.C., as to why prosecution witnesses had deposed against him stated that they were having enmity towards him, that complainant was having quarrel with her husband and she used to drop her children to his house and he had refused to keep them as he was not having ample source of income. If this be so, it surpasses imagination as to why suggestion after suggestion was put to PW1 and PW2 with regard to the illicit relations of the wife of the accused with all and sundry including PW2 and her misdemeanors. Be that as it may, there is no denying the fact that whatever be the cause there was enmity between the accused on the one hand and the parents of child on the other, which impelled the accused to commit the dastardly act. The real reason for the enmity seems to us to be the one testified to by PW1 and PW2 and we accordingly accept the explanation of these witnesses with regard to the motive for the commission of the offence. CONCLUSION 36 A number of other contentions were sought to be raised by Appellants counsel in a last ditch effort to demolish the case of the prosecution to the effect that no independent or public witness was joined in the investigation, no DNA test was conducted, no dog squad was called, no finger prints were found at any of the places, no liquor bottle had been recovered by the investigating agency, etc. We do not propose to dwell on these aspects for the reason that it needs no reiteration that any defects or lacunae left in the investigation cannot work to the benefit of the accused. Time and again, it has been emphasized by the Apex Court that if investigation is tardy or replete with loopholes the sins of the investigating agency cannot be visited upon the victims or complainants, as the case may be. To allow this to happen

would be to subvert the judicial process and to shower reward on the wrong doer and heap abuse on the head of the victim/s for no fault of theirs.

37. Before parting with the case, we note that PW13 Ms. Swati Suri, Finger Print Expert, Finger Print Bureau, Malviya Nagar, Delhi, who examined the finger print of Musa Singh testified that he was a previous convict in four cases, two cases of which were of PS Jahangir Puri, one under Section 25 Arms Act and the other under Section 397 IPC, one case of PS Vikas Puri under Section 380 IPC and one case of PS Badli under Section 25 Arms Act. The report of the witness to this effect was placed on record as Ex.PW13/A. Thus, quite clearly, the accused is of a criminal bent of mind who on account of the ill-will borne by him against PW1 and PW2 wrought vengeance against their five years old son.

38. In the aforesaid factual scenario, we have no hesitation in concluding that the circumstances established by the prosecution, dealt with hereinabove, are wholly inconsistent with the hypothesis of innocence of the accused, who kidnapped a very small child, had carnal intercourse with him and thereafter did away with him. We therefore see no reason to interfere with the impugned judgment and order.

39. Resultantly, the appeal fails and is dismissed. REVA KHETRAPAL JUDGE
SUNITA GUPTA JUDGE July 08, 2013 km

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