

**Court No. - 46****Case :-** CAPITAL CASES No. - 170 of 2013**Appellant :-** Ashok**Respondent :-** State Of U.P.**Counsel for Appellant :-** Apul Misra**Counsel for Respondent :-** Govt. Advocate, P.K. Shukla

Connected with

Reference No. 02 of 2013

**Hon'ble Amar Saran,J.****Hon'ble Bachchoo Lal,J.***(Delivered by Hon'ble Amar Saran J*

This Capital Appeal has been filed against a judgement and order dated 24.12.2012 passed by the Additional Sessions Judge (SC and ST Act), Bareilly convicting and sentencing the appellant to life imprisonment under section 376 IPC, seven years R.I. under section 201 IPC and a fine of Rs. 25,000/-, life imprisonment under section 3(2)5 of SC and ST Act and a fine of Rs. 25,000/-. In case of default in payment of fine, the appellant was to undergo further imprisonment of one year under section 376 IPC, six months under section 201 IPC and six months under section 3(2)5 of SC and ST Act. The appellant was also awarded death sentence under section 302 IPC.

A Criminal Reference under section 366(1) of the Code of Criminal Procedure has been sent by the learned Sessions Judge for confirmation of the death sentence.

In short, the prosecution case was that on 27.5.2009, at 9.00 AM, the deceased Km. Meera Devi, aged 10 years had gone to the pasture for grazing her goats. Her cousin Vivesh, aged 6 years had also gone along with her. As Km. Meera Devi became thirsty, they had gone to the tube well of Munish Pal at about 10.00 AM, which was operated by the appellant Ashok, for drinking water. With an evil intent Ashok forcibly caught hold of Meera and took her into the *Kothri* (room) adjoining the tube well and committed rape on her and thereafter he murdered her. There were injuries on her private parts. Ashok thereafter hid the dead body in a haystack in that room. When Vivesh returned home at about 11.00 a.m., without Meera, then the informant Heera Lal, the father of the deceased enquired from Vivesh about the whereabouts of Meera Devi. Vivesh told him that Meera had gone to the tube well to drink water and after that he did not know where she had gone. After this, the informant proceeded to the tube well and enquired from Ashok about Meera, who gave evasive replies. Then he searched in the room at the tube well and found her dead body under the haystack. Finding an opportunity, Ashok gave the informant and witnesses a slip and ran away from the spot. The informant thereafter proceeded to the police station Bhuta, which was 21 Kms away, where he lodged the report on 27.5.09 at 2 pm.

PW 6, Clerk-Constable Tejpai Singh prepared the check FIR and registered a case at case crime No. 259 of 2009, under sections 376, 302, 201 IPC and 3(2) 5 of SC and ST Act against the appellant and made the necessary GD entries at 2 p.m. on the same day (i.e. 27.5.09).

PW 7, SI Harikesh Tiwari, reached the spot and took out

the body from the *Kothri* of the tube well and conducted the inquest on it. He also removed the *Tahmat*, which was tied on the neck of Meera Devi and prepared a recovery memo (Ext. Ka 15). He also collected Meera's frock, which was bloodstained and prepared its recovery memo (Ext. Ka 14).

PW 8, Shri Daya Ram Chaudhary, C.O. Faridpur started the investigation of this case on 27.5.2009. He made necessary entries of the report and all other papers, such as inquest, photo lash, challan lash, report of R.I. etc. and also recorded the statements of the witnesses of inquest and recovery memos etc.

The post-mortem was conducted by a panel consisting of Dr. Anil Kumar Agrawal, Dr. M.K. Shukla and Dr. Sarika Singh on the directions of the District Magistrate, Bareilly on 27.5.2009 at 11.45 PM.

The deceased was about 10 years in age. The time of death was about half a day. The body was average built. Eyes were closed, mouth was partially opened. Rigor mortis was present in upper and lower limbs and there was no sign of decomposition. Wheat grains and dust were present on all the side of the body and perineum and inside the vagina. Some digested food material was coming out from the nose and mouth.

The following ante-mortem injuries were seen:

1. Multiple abrasion at right side of chest in an area of 6 x 4 cm.
2. Multiple abrasion in front and both sides of upper parts of neck, just above the glottis and 5 cm below the chin in an area of 11 cm in transverse direction and 5 cm in the

vertical direction.

3. Multiple abrasion at the back of left elbow in area of 4 cm x 2 cm.
4. Multiple abrasion in area of 3 cm x 2 cm at natal cleft.
5. Multiple abrasion on both labia majora with rupture of hymen and interior vaginal wall. Blood clots seen in vaginal and inner aspect of labia majora.
6. Abrasion present on right side of anal opening with tear of posterior lateral wall on right side of anal canal.

On internal examination, the doctors found that the brain, larynx, both lungs were congested with fracture of both the cartilages of the larynx. Right side of the heart was full and left was empty. There was 100 gms of semi digested food in the stomach. Small intestine was filled with gas and fluid whereas the large intestine contained gas and faecal matter. The gall bladder was congested. The Spleen which weighed 70 gms was congested. Kidneys weighed 180 gms and both were congested.

Two vaginal slides and swabs were taken, sealed and handed over to the constable.

PW 9 Dr. Anil Agarwal who conducted post mortem on the deceased did not express any opinion whether the deceased had been raped, but he only noted that the cause of death was asphyxia as a result of throttling. PW 5 Dr. Sarika Singh, and PW 3 Dr. Manoj Kumar Shukla who also expressed second and third opinions in this case regarding the ante-mortem injuries have however seen signs of rape on the deceased.

On 28.5.2009 at 2.20 PM, the appellant was arrested. He was interrogated and thereafter he got the underwear and slipper of the deceased Meera Devi recovered from an *almirah*, which was kept in the room of the tube well when he was taken to the tube well by the investigating officer and the accompanying police personnel. The clothes of the appellant (white pant, one ready made nylon vest, and beige coloured underwear, which had spots of blood on front were also taken into possession and recovery memo of the same (Ext. Ka 17) was prepared by SI Harikesh Tiwari on the dictation of the investigating officer. On the pointing out of the informant Heera Lal, site plan of the occurrence was prepared by the investigating officer (Ext. Ka 18). After recording the statements of other witnesses and after completing the necessary formalities, the charge sheet was submitted (vide Ext. Ka 19).

The frock, slippers and underwear of the deceased, and the pant, underwear and vest of the appellant were sent to the Forensic Science Laboratory, Lucknow, which submitted a report (Ext. Ka 20) dated 31.10.09 indicating that blood was found on all the aforesaid items, except the vest of the appellant. On the frock and underwear of the deceased and on the pant of the appellant there was human blood. On the underwear of the appellant and the deceased spermatozoa and human semen were seen. But no semen or spermatozoa were found on the other four items.

PW 1, Heera Lal deposed that he was a crafts man (*Shilpkar*). His daughter Meera Devi, aged 10 years had gone with his nephew Vivesh, aged 6-7 years for grazing goats on 27.5.2009 at about 9.00 a.m. to the Jungle. When she became

thirsty at about 10.00 a.m., she had gone to the tube well of one Munish Pal, which was operated by the appellant Ashok. Ashok caught hold of her, dragged her into a room of the tube well, committed rape on her and then killed her by throttling her. There were injuries on her private parts. The appellant had hidden her corpse in a haystack. At about 11.00 a.m. when Vivesh returned home without Meera Devi, then this witness enquired from Vivesh, who disclosed that Meera had gone to the tube well for drinking water. After that he did not know about her whereabouts.

Then the witness proceeded to the tube well and enquired from Ashok, who disclosed that Meera had come to the tube well, had drunk water and gone away and he had no other information. He was accompanied by PW 4, Ram Singh, PW 10 Naresh and one Rana Singh Chauhan. Maiku also reached the spot. On search, they found the corpse of Meera Devi under the haystack in the inner room of the tube well. At that time Ashok made good his escape. A large number of villagers had gathered. Leaving his daughter's corpse on the spot, he had gone to the police station where he met Mohd Irfan, resident of village Bhagwatpur, to whom he dictated the report.

PW 2, Vivesh, aged 10 years (on the date of examination, i.e. 18.11.2011), was tested by the trial judge regarding his mental capacity to understand questions and to give evidence. On being satisfied about his competence to depose, his evidence was recorded by the Trial Judge. This witness disclosed that the incident had taken place two years and two months earlier. Meera was the daughter of his elder uncle. They had gone to graze goats in the Jungle. It was pre-noon,

when they became thirsty. They had then gone to the tube well of Munish Pal where both drank water. After that when they tried to leave, then Ashok caught hold of Meera, took off Meera's panty who cried out, Vivesh ran out of fear and came home. He disclosed these facts to his uncle. Ashok had strangled Meera. He identified Ashok in Court as the person who had committed the crime.

PW 4 Ram Singh deposed that Meera, daughter of Heera Lal had gone to graze her goats in the Jungle near the tube well of Munish Pal. Heera's nephew by relation Vivesh, aged 8 years accompanied her. Ashok was operating the tube well where Meera and Vivesh had gone to drink water. Then Ashok had caught hold of Meera in an indecent manner, forcibly taken her in a room at the tube well and committed rape on her and caused injuries to her. When Vivesh informed Meera's father Heera Lal about these facts at about 11.00 a.m., then Heera Lal narrated these facts to this witness and Naresh, Chunni Lal, Maiku and Ram Singh Chauhan and they all proceeded together to the tube well. There they met Ashok. Heera enquired from Ashok about Meera. He stated that Meera had come to drink water, but he did not know where she has gone thereafter. Then they started searching for Meera at the tube well and they found her corpse in a haystack in the *Kothri*. In the meantime Ashok ran away from the spot.

PW 10, Naresh has also substantially reiterated the version of PW 4 Ram Singh. He also accompanied the informant Heera Lal to the tube well and narrated as to what had transpired in the the encounter of Ashok with Heera Lal and the other witnesses.

We have heard Shri P.N. Mishra, learned Senior counsel

for the appellant and Shri Akhilesh Singh, learned Government Advocate and have perused the written arguments submitted by the parties.

Shri P.N. Mishra, learned counsel for the appellant did not dispute the fact of commission of rape on the deceased or that the cause of her death was homicidal.

Shri Mishra however contended that PW 2 Vivesh was a child witness and his evidence as an eyewitness was largely based on imagination and was not reliable. In the FIR the informant, PW 1, Heera Lal has stated that after Vivesh returned at 11.00 a.m., Heera Lal enquired about the whereabouts of Meera from him and Vivesh informed him that Meera had gone with him to drink water at the tube well. Thereafter he did not know what happened to her. There was no direct evidence of rape, murder of the deceased and concealment of the dead body by the appellant. The disclosure of Vivesh, PW 2 during trial that he had seen the appellant catching hold of Meera, undressing her and taking her inside and also strangulating her were based more on the imagination of Vivesh, than what he saw by himself and was contrary to his earlier disclosure that Meera had gone to the tube well to drink water and he did not know what happened to her after that. If this witness had seen these developments, he would have rushed to his house immediately to inform his parents and Meera's parents and he would not have come home after an hour at 11.00 a.m. This renders it probable that someone else could have committed the rape and murder in the meantime. The presence of Ashok, the appellant at the tube well when the witnesses went there to make enquiries from him regarding the whereabouts of Meera was improbable

as he had ample time to run away. Also once the witnesses had found the corpse in the haystack in the *Kothri*, when the appellant was present there, they would not have allowed the appellant to escape and would have apprehended him at that spot itself. His non-apprehension at the spot suggests that the appellant was not present at the time the witnesses arrived at the tube well.

It is further contended that not much weight could be placed on the recovery of the underwear and slipper of the deceased on the pointing out of the appellant because no identification of these articles by the witnesses was conducted. Also there was no proof that the *Tahmat* which was tied around the neck of Meera belonged to the appellant. The incriminating circumstances were not specifically put to the appellant under section 313 Cr.P.C. The incriminating circumstances could, therefore, not be used against the appellant in view of the law laid down by the Apex Court in the cases of *Ashraf Ali Vs. State of Assam, 2008 Cri.L.J. 4338* and *S. Harnam Singh Vs. State, AIR 1976 SC 2140*.

Alternatively it is argued that in any case the sentence of death awarded to the appellant was excessive and this case could not be considered as the rarest of rare case. Also the Trial Judge has given no finding as to the possibility or otherwise of rehabilitation and reformation of the accused especially when the appellant has no previous criminal antecedents.

On the other hand, the learned Government Advocate contended that the circumstances of this case clearly establish the complicity of the appellant in the offence. There was no reason for the child witness Vivesh, PW 2 to have falsely

nominated the appellant for having committed the crime, even if part of the testimony of Vivesh wherein he has deposed in his evidence that he had seen the appellant catching hold of Meera, taking down her underwear, her raising a cry and then Ashok strangulating her, could be the result of this child witness imagination as suggested by the learned counsel for the appellant. But so far as the other part of the statement that he had left Meera at the tube well where they had gone to drink water where Ashok was present is concerned, there was no reason to disbelieve that part of his evidence. The FIR when read as a whole suggests that Vivesh had disclosed about the presence of Ashok at the tube well. Therefore the informant Heeral Lal had immediately proceeded to the tube well to make inquiries from him. The admission of the appellant before the witnesses that Meera had come to drink water at his tube well, but his suggestion that the deceased had gone away thereafter, was a strong circumstance against the appellant, as the appellant had given a false statement, and the corpse of the deceased was found hidden in the haystack in the room where he was present, on the search by the witnesses at that time.

It is further contended that more significantly, the allegation of rape against the appellant is corroborated by the fact that the appellant was arrested the subsequent day after the crime on 28.5.2009. He was made to take off his clothes, which included his pant, black nylon vest and mustard coloured underwear which had blood spots on its front. Also the slippers and underwear of the deceased which the appellant had got recovered had blood stains. As per the Forensic laboratory report, the appellant's and the deceased's underwear

contained human blood and semen.

It is also argued that even though the circumstances and evidence were put to the appellant in a composite manner and the circumstances were not separately put to the appellant, but it could not be said that the appellant was unaware of the circumstances against him. There was no miscarriage of justice so as to entitle the appellant for acquittal on this ground alone. There was no reason for the false implication of the appellant by the witnesses Heera Lal, Vivesh and Ram Singh, whose testimonies are unshaken and intact. Looking to the gravity of the crime where a 10 years old girl had been brutally raped and thereafter murdered, the death sentence was the only proper sentence in this case.

Why the appellant did not run away from the tube- well after the incident is a matter for speculation as it is entirely possible that the appellant may have thought that his running away might have given rise to suspicion against him, or he may have thought that no search would immediately be made in the tube well or in the room where the dead body was concealed under the haystack or that he could have browbeaten the informant, the father of the deceased, (who was an impoverished crafts man belonging to the Scheduled castes), not to search the premises at that time, or that he might have been waiting for an opportune time to remove the dead body. Also there was nothing unnatural in the appellant running away at the time when the witnesses were busy hunting for the body inside the *kothri* at the tube well.

**Analysis of evidence and contentions:**

An analysis of the evidence and arguments shows that

there is no dispute about the fact that the deceased had been raped and thereafter done to death and that the cause of her death was homicidal.

The question is whether the identity of the appellant is fixed as the author of the crime.

So far as the contention of the appellant's counsel that the evidence of the child witness Vivesh could not be implicitly relied on and he had at least partly relied on his imagination, as some of the details regarding the manner of incident were absent from the FIR. It may be mentioned that the law describing how the evidence of a child witness needs to be appreciated has been clearly enunciated in a catena of decisions of the Apex Court. Thus in *Suryanarayana v. State of Karnataka, (2001) 9 SCC 129, at page 132* it has been held in paragraph 5:

*Admittedly, Bhavya (PW 2), who at the time of occurrence was about four years of age, is the only solitary eyewitness who was rightly not given the oath. The time and place of the occurrence and the attending circumstances of the case suggest no possibility of there being any other person as an eyewitness. The evidence of the child witness cannot be rejected per se, but the court, as a rule of prudence, is required to consider such evidence with close scrutiny and only on being convinced about the quality of the statements and its reliability, base conviction by accepting the statement of the child witness. The evidence of PW 2 cannot be discarded only on the ground of her being of tender age. The fact of PW 2 being a child witness would require the court to scrutinise her evidence with care and caution. If she is shown to have stood the test of cross-examination and there is no infirmity in her*

*evidence, the prosecution can rightly claim a conviction based upon her testimony alone. Corroboration of the testimony of a child witness is not a rule but a measure of caution and prudence. Some discrepancies in the statement of a child witness cannot be made the basis for discarding the testimony. Discrepancies in the deposition, if not in material particulars, would lend credence to the testimony of a child witness who, under the normal circumstances, would like to mix-up what the witness saw with what he or she is likely to imagine to have seen. While appreciating the evidence of the child witness, the courts are required to rule out the possibility of the child being tutored. In the absence of any allegation regarding tutoring or using the child witness for ulterior purposes of the prosecution, the courts have no option but to rely upon the confidence inspiring testimony of such witness for the purposes of holding the accused guilty or not.* (Underlining added).

Likewise in *Panchhi v. State of U.P.* (1998) 7 SCC 177, *Prakash v. State of M.P.*, (1992) 4 SCC 225, *Baby Kandayanathil v. State of Kerala*, (1993) Supp (3) SCC 667, *Raja Ram Yadav v. State of Bihar*, (1996) 9 SCC 287, and *Dattu Ramrao Sakhare v. State of Maharashtra*, (1997) 5 SCC 341, and more recently in *Shivashranappa v. State of Karnataka*, (2013) 5 SCC 705, where the aforesaid case law has been approved, it has been held that there is no law that the evidence of a child witness cannot be acted upon without corroboration. However greater circumspection is required for evaluating the evidence of a child witness, because a child is susceptible to being tutored and swayed by others. However the law that the evidence of a child witness requires adequate

corroboration before it can be relied upon is more a matter of practical wisdom than of law.

We find that in the present case, even if it could be said that some part of the testimony could be the product of the child's imagination, as the child may not have seen the entire incident, but it could not be said that the child witness PW 2, Vivesh had been tutored to nominate the appellant immediately after the crime for any ulterior reason. Also as we shall presently show that there are a number of circumstances which are sufficient for linking the appellant with this crime in a convincing manner.

Here it may be noted that the FIR was lodged at 2.00 PM on 27.5.2009 at PS Bhuta, which was 21 Kms from the place of incident. Vivesh, PW 2, the child witness had returned home at about 11.00 a.m. and informed that Meera had gone to drink water at Munish's tube-well which was operated by the appellant. Thereafter the complainant PW 1 Heera Lal along with PW 4 Ram Singh and PW 10 Ram Naresh had gone to the tube well, and made enquiries from the appellant Ashok, who gave evasive replies. On search in the tube well *kothri* the dead body of Meera was found hidden under a haystack and Ashok finding an opportunity had fled from the spot. The entire version was thereafter mentioned in the FIR, which was lodged within 3 hours of Vivesh communicating the fact of the deceased having gone to drink water at the tube-well which the appellant was operating, and after a number of subsequent steps had been taken by Heera Lal, PW 1, the father of the deceased. The FIR was therefore extremely prompt and does not appear to be the product of any tutoring or external suggestion.

In our view the appellant's counsel has torn a few lines from the FIR where it is mentioned that when the informant's nephew reached home at about 11 a.m, but Meera did not return, then he questioned Vivesh who disclosed that Meera had gone to the engine tube well to drink water, after that he did not know about her whereabouts. But in the context of the entire FIR, where it is mentioned that immediately thereafter this witness went to the tube well and enquired from Ashok, who used to operate the tube well about his daughter, Ashok did not give a proper answer. Then they found Meera's body covered under a heap of hay in the tube well *kothri*, and at that time Ashok fled away from the tube well. From these averments it is clear that Vivesh had informed the informant regarding the presence of the appellant Ashok at the tube well, hence Heera Lal immediately proceeded there for making inquiries from the appellant. It is because a condensed language is used in an FIR, which is not required to be an encyclopaedia, that the details of the disclosure made by Vivesh to Heera Lal were not mentioned therein. We find that no suggestion was given, nor was any explanation sought from the informant Heera Lal, PW 1, as to why he had not specifically mentioned in that part of the FIR where he referred to the disclosure of Vivesh on his inquiries regarding Meera, as to whether Vivesh had only told him that Meera had gone to the tube well and thereafter Vivesh did not know about her whereabouts, and that Vivesh had no knowledge of the presence of the appellant at the tube well at that time. The reason for not seeking this clarification from the informant was because on a complete reading of the FIR, the inference is unavoidable that Vivesh had disclosed about the presence of

the appellant Ashok at the tube well to the informant, when Meera went to drink water there. This is also what Vivesh had stated in Court in his evidence.

Significantly specific questions have been put to Vivesh PW 2 as to whether he returned to his goats after drinking water at the tube well? To which Vivesh replied in the affirmative. Vivesh was also questioned as to whether Meera had returned with Vivesh? To which Vivesh had replied in the negative. When Vivesh stated that Ashok had taken Meera into the room, a question was put to Vivesh, as to whether he had run away at that time. To this Vivesh answered "yes." From this cross-examination it is apparent that the appellant admits his presence at the tube well and the joint arrival of Meera and Vivesh there.

There was also no good reason why the appellant would have been falsely nominated for this crime if he had no concern with the incident.

The appellant has not even disputed that he was running the tube well. On a query by the witnesses PW 1, Heera Lal, PW 4, Ram Singh the appellant had admitted that Meera had come to drink water in the morning, but she had gone away thereafter. The appellant had also falsely stated to the witnesses PW 1 Heera Lal, PW 4 Ram Singh and PW 10 Naresh that the deceased had gone away after drinking water, which statement was contradicted when the corpse of the deceased was found lying under the haystack in the *Kothari* of the tube well by the witnesses. There is no reason to disbelieve this part of the testimony of the witnesses, nor was there no reason why PW 1 Heera Lal, PW 4 Ram Singh and PW 10 Naresh would have invented such an admission by the appellant that

the deceased had come to the tube well or that she had subsequently gone away. No specific suggestion was given to these two witnesses that the appellant had not made any admission before them that Meera had come to drink water, but had gone away. This false version of the appellant that the deceased had gone away after drinking water (when her body was found under the haystack) was a very important additional circumstance to link the appellant with this crime.

The recovery of the underwear and slippers of the deceased (Ext. Ka 16) from the *almirah* of the *Kothari* at the instance of the appellant when he was arrested on 28.5.2009 (one day after the incident), which contained blood, (the underwear of the deceased even contained human blood, human semen and spermatozoa) as per the report of the Forensic Laboratory Lucknow dated 31.10.2009 (Ext. Ka 20), of which he has offered no explanation save by making a general denial and offering a suggestion that the recovery was false and fabricated, is another circumstance to link the appellant with this crime.

However, the most significant circumstances which strongly connects the appellant with this crime was the presence of human blood on the appellant's underwear on his arrest by the police on 28.5.09 as noted in the recovery memo (Ext. Ka 17). According to the report of the Forensic Science Laboratory (Ext. Ka 20) dated 31.10.09 the frock, underwear of the appellant and deceased, and the appellant's pant contained blood. More specifically, according to the forensic report, both the underwear of the appellant and the deceased contained human blood. There was no explanation as to how the appellant's underwear contained human semen and more

particularly human blood.

We may next examine the merit of the contention of the learned counsel for the appellant that the individual circumstances had not been put to the appellant under section 313 Cr.P.C. and that the evidence has been compositely put to the accused-appellant, hence the same needs to be eschewed.

So far as the two Apex Court decisions, *Ashraf Ali Vs. State of Assam, 2008 Cri.L.J. 4338* and *S. Harnam Singh Vs. State, AIR 1976 SC 2140* cited by the appellant's counsel are concerned, these decisions admit that even if the specific circumstances are not put to the accused is a curable irregularity, unless it is shown that as a consequence the accused was prejudiced in not being made aware of the circumstances against him. Merely by not putting the circumstances to the accused separately in his statement under section 313 Cr.P.C ( s. 342, in the Old 1898 Code) it cannot be presumed that there has been a miscarriage of justice. However in their peculiar facts and circumstances, in the two cited cases the Supreme Court had held that the accused had been prejudiced by not putting the separate circumstances to him.

In the instant case we find that a reference has been made to the memo of the clothes worn by the accused (Ext. Ka 17) regarding which (question No. 2 ) in the 313 Cr.P.C. was framed and also the report of the Forensic Science Laboratory (Ext. Ka 20). The I.O., PW 8, C.O. Faridpur, Sri Dayaram Chaudary, has also specifically stated in his evidence that when the accused was arrested on 28.5.2009, one day after the incident, then his clothes were taken into possession by the police, whose recovery memo was prepared (Ext. Ka 17) on

the dictation of this witness. The recovery memo clearly noted the presence of blood on the front side of the mustard underwear of the appellant. The clothes which the accused was wearing had been taken into possession and were sent to the Forensic Science Laboratory. The Laboratory report (Ext. Ka 20) indicated the presence of blood and semen on the underwear of the deceased and appellant. The reply of the appellant to these queries was simply that the said reports had been prepared in a fabricated and wrongful manner.

In this context in *Shivaji Sahabrao Bobade and another Vs. State of Maharashtra, (1993)2 SCC 793*, Hon'ble Krishna Iyer, J speaking for the Bench, observed that even where an omission has been committed by the trial Judge in not specifically putting any question regarding the point of presence of blood on the pant of the appellant - which was an important requirement of a criminal trial, however not putting of the circumstance does not *ipso facto* vitiate the trial, unless the prejudice caused to the accused is shown. Also according to this ruling (and some other law reports that have followed this three judge decision) it is even possible to ask the appellant's counsel to state as to what possible explanation the accused could offer for such incriminating circumstances: The relevant lines in *Shivaji Sahabrao Bobade* read:

*"Where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the Court must ordinarily eschew such material from consideration. It is also open to the appellate Court to call upon the counsel for the accused to show what explanation the accused has*

**as regards the circumstances established against him but not put to him** and if the accused is unable to offer the appellant Court any plausible or reasonable explanation of such circumstances, the Court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial Court he would not have been able to furnish any good ground to get out of the circumstances on which the trial Court had relied for its conviction. In such a case, the Court proceeds on the footing that though a grave irregularity has occurred as regards compliance with Section 342 Cr.P.C. the omission has not been shown to have caused prejudice to the accused.” (Underlining and emphasis added by us).

Likewise in paragraph 13 in *State (Delhi Administration) Vs. Dharampal (2001)10 SCC 372* it has been held:

“Thus it is to be seen that where an omission, to bring the attention of the accused to an inculpatory material has occurred, that does not ipso facto vitiate the proceedings. The accused must show that failure of justice was occasioned by such omission. Further, in the event of an inculpatory material not having been put to the accused, the appellate court can always make good that lapse by calling upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against the accused but not put to him.” (Underlining added by us)

Again in *Paramjeet Singh alias Pamma Vs. State of Uttrakhand )2010)10 SCC 439*, it has been held that although section 313 Cr.P.C. makes it obligatory for the Court to put a question on the circumstance against him so as to offer him an opportunity to explain the same, but it was not enough for an

accused to show that he has not been questioned or examined on a particular circumstance, instead he has to show that non-examination has actually and materially prejudiced him and resulted in failure of justice.

In the light of the observations in the aforesaid law reports we had specifically questioned Shri P.N. Mishra, learned Senior counsel for the appellant as to what explanation the accused could possibly offer for the presence of human blood and semen (as confirmed by the Forensic laboratory (Ext. Ka 20) on the underwear that the appellant was wearing which was taken into possession by the police the next day after the incident on his arrest (vide Ext. Ka 17). On this point the learned counsel for the appellant failed to give any explanation on behalf of the appellant. In his written arguments which were sought by us on conclusion of arguments we also find no explanation. In our view it may be possible to conceive that the presence of semen on the underwear of the appellant, may be due to a spontaneous emission, but the presence of human blood on the underwear of the 29 year old married appellant, which was taken into possession the next day after the crime, cannot be assumed to spontaneously come into existence, particularly if the underwear of the deceased who was last seen with the appellant also contained blood and semen. It was for the accused to offer an explanation of this strong incriminating circumstance against him, but no explanation has been furnished either by the appellant or his counsel.

It is also significant that although a suggestion was given to the I.O., PW 8 Sri Dayaram Chaudary in his cross-examination that the appellant had not got the slippers and

underwear of the deceased recovered, which suggestion was however refuted by the witness, but no suggestion was even given that his clothes (including the semen and bloodstained underwear), which the appellant is said to have been wearing at that time, had not been taken into possession by this witness when he arrested the appellant.

In the light of the aforesaid circumstances we find that ample opportunity existed for the accused or his counsel to offer a possible explanation for the presence of semen and especially blood on his under wear. We find no explanation, but only a blanket reply that the said material had been foisted on the appellant in a false and fabricated manner. We are thus left with no option but to conclude that there is no acceptable explanation for this circumstance, and the accused has not been able to show what prejudice has been caused to him by questioning him generally and compositely and not individually about this feature, viz. the presence of blood on the underwear (as found in the recovery memo – Ext. Ka 17 as confirmed by the forensic report (ext. Ka 20), and evidence of PW 8, the I.O. on this point. The non explanation or blanket denial is thus a significant incriminating circumstance for linking the appellant with the crime.

The incriminating circumstances against the appellant may be summarized as follows:

- 1.The 10 year old deceased Meera had gone along with her 6 year old cousin brother PW 2 Vivesh to graze her goats in the pasture land near the tube well of Munish Pal.
- 2.The deceased and Vivesh had gone at about 10 a.m. to drink water at the tube well of Munish Pal which was being operated by the appellant Ashok.

3. Vivesh had returned home at about 11 a.m. and given information regarding the deceased going to the tube well of Munish Pal which the appellant was operating and her disappearing thereafter. Thus there was evidence of the appellant and the deceased being recently seen together

4. The improvements in the testimony of the child witness Vivesh about how the appellant had disrobed the deceased or taken her inside and throttled her which facts were not mentioned in the FIR may have been improvements based on the child's imagination. But the substratum of the child's story that it was the appellant who had last met the deceased rings true and there was no reason for the child being tutored to falsely name the appellant for this crime in the prompt FIR of this case.

5. The informant, PW 1 Heera Lal accompanied by PW 4 Ram Singh and PW 10 Naresh and other villagers thereafter visited the tube well run by the appellant Ashok. On their questioning the appellant admitted that the deceased child Meera Devi had come to the tube well, but that he claimed that she had gone away thereafter. This explanation was patently false as the witnesses Heera Lal, Ram Singh, Naresh and others had found the corpse of Meera Devi hidden under the hay stack in the same room. Meanwhile the appellant absconded from the spot. Not only did the appellant fail to give any explanation as to what happened to the deceased after she was last seen together with the appellant by PW 2 Vivesh, the child witness, but he has given a false explanation regarding her whereabouts, that she had gone away whereas the dead body was found concealed under the hay stack in the same room.

6. The deceased had abrasions and injuries on different parts of

her body and the cause of her death was asphyxia due to throttling. The Doctors also found signs of the deceased having been raped.

7.The appellant was arrested on 28.5.09. He got the blood stained slippers and underwear of the deceased recovered from an *almirah* in the room adjoining the tube well. His clothes, (which included his pant, underwear, and vest) were also taken into possession by the police.

8.The police had found blood stains on the front of his underwear, and the FSL had found blood on the pant, underwear and vest of the appellant, and on the slippers and underwear of the deceased. The FSL had also found seminal stains on the appellant and the deceased's underwear.

9.Most significantly neither the appellant, nor even his counsel in the High Court on our questioning had been able to give any explanation for the presence of seminal stains and more importantly human blood stains on the appellant's underwear at the time of his arrest, which was admittedly collected by the police.

The chain of circumstances for showing the involvement of the appellant in this crime is thus complete, and the circumstances unmistakably connect the appellant with the crime, and give rise to only an inference of the involvement of the appellant in this crime, and cumulatively the circumstances are inconsistent with any hypothesis of the innocence of the appellant.

One last question remains as to whether it would be appropriate to confirm the sentence of death awarded to the appellant or whether it would be more appropriate for this Court to replace the sentence of death with a sentence of imprisonment for life.

The trial Judge has awarded a sentence of death in this case, holding that this case involved the murder of a hapless little child, who must have been the star (i.e. the darling) in the eyes of her parents. He referred to the Delhi gang rape case which had shocked the conscience of the country, the general public and the Parliament, and that the maximum penalty of death is required for crushing such crimes of sexual violence against women.

Whereas it is true that deterrent punishments are required to be awarded for such crimes of sexual violence and homicide of innocent victims, especially if the victim happens to be a little child, as in this case. But the latest trend in penology, as reflected in the movement from retributive and deterrent to reformatory justice, the worldwide trend to abolish the death penalty, and the clear injunction in the pronouncements of the Apex Court and this Court to award the death penalty only in the rarest of rare exceptional case, where the other option of awarding the normal life sentence is unquestionably foreclosed, after looking at the prisoners antecedents and after a careful balancing of the aggravating and mitigating circumstances, giving maximum weightage to the latter, cannot be lost sight of. In the Constitutional bench decision, *Bachan Singh vs. State of Punjab*, (1980) 2 SCC 684 which was even cited by the trial judge, the Apex Court has enjoined giving importance to the antecedents of the prisoner, apart from the gravity of the crime, for reaching the conclusion whether only a death sentence was appropriate. One important mitigating circumstance to be taken into account was whether the accused had a previous criminal history, or whether there was any material to suggest that his reform was wholly improbable

and that he was likely to commit such crimes in future. The appellant's lawyer before the trial Court appears to have raised these points, regarding the absence of criminal antecedents of the accused, and his having a three year old child at the time of judgement, but although noticed, these points have not been considered by the trial Judge, except by referring to the dastardly nature of the crime. Another factor which has not been taken into account is that the crime committed by the appellant does not appear to have been a cold, and calculated crime, where he had enticed the victim, but more probably one that appears to have been committed when the victim suddenly arrived at his tube well, when losing all power of self control, the appellant appears to have committed rape on the girl, and thereafter to have throttled the girl and then clumsily tried to conceal her dead body under the hay stack, to prevent his being exposed for the crime, when the witnesses arrived and questioned him about the whereabouts of the girl. In somewhat similar circumstances, in *Amit v State of U.P.*, (2012) 4 SCC 107, where a 3 year old girl had been murdered by a 28 year old man, the Court converted a sentence of death to a sentence of life imprisonment, to run for the whole life of the prisoner, as he had no criminal antecedents, and it was not likely that the accused would repeat the offence. Thus it was mentioned in the decision in para 22:

*"In the present case also, we find that when the appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes*

*in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764 we convert the death sentence awarded to the appellant to imprisonment for life and direct that the life sentence of the appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons."*

In *Raju v State of Haryana, (2001) 9 SCC 50*, the appellant had committed the rape and murder of the 11 year old deceased after enticing her with toffees. On his arrest, his shirt and and pant had bloodstains and his underwear had blood and seminal stains. The accused gave no explanation of the blood stains. The Supreme Court held that the as the appellant appeared to have acted without premeditation in giving two brick blows to the deceased after she threatened to expose him, and had no criminal antecedents, and it could not be concluded that he would be a danger to society, the sentence of death awarded by the Courts below was commuted to a sentence of imprisonment for life.

In *Amrit Singh v. State of Punjab, (2006) 12 SCC 79*, where a 6 or 7 year old child was raped and murdered by the 31 year old accused, the Apex Court had converted the sentence of death to life imprisonment holding that this was not the rarest of rare case and the crime may have been committed because of a momentary lapse, on part of the the accused on the seeing the girl at a secluded place, and the deceased may have been gagged inadvertently, without any intention to kill her. Paragraphs 21 and 22 of the law report

read:

*"21. The opinion of the learned trial Judge as also the High Court that the appellant being aged about 31 years and not suffering from any disease, was in a dominating position and might have got her mouth gagged cannot be held to be irrelevant. Some marks of violence not only on the neck but also on her mouth were found. Submission of Mr. Agarwal, however, that the appellant might not have an intention to kill the deceased, thus, may have some force. The death occurred not as a result of strangulation but because of excessive bleeding. The deceased had bleed half a litre of blood. Dr Reshamchand Singh, PW 1 did not state that injury on the neck could have contributed to her death. The death occurred, therefore, as a consequence of and not because of any specific overt act on the part of the appellant.*

*22. Imposition of death penalty in a case of this nature, in our opinion, was, thus, improper. Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of the appellant, seeing a lonely girl at a secluded place. He had no premeditation for commission of the offence. The offence may look heinous, but under no circumstances, can it be said to be a rarest of rare cases."*

In *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, (2011) 2 SCC 764 there was a difference of opinion of the two Judges who had heard the case on the sentence to be awarded. Accordingly the matter was referred to a larger

Bench which observed that as the accused was about 27 years of age who had raped and killed a child studying in a school in Class IV, but as there was no finding regarding the possible reformation and rehabilitation of the appellant and the possibility of his becoming a useful member of society on being given the opportunity, hence the proper course in the case would be to substitute the sentence of death with a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons. Paragraphs 9 and 10 of the law report at SCC page 767, read as follows:

*"9. Both the Hon'ble Judges have relied extensively on Dhananjay Chatterjee case,(1994) 2 SCC 220 . In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so.*

*10. We are, therefore, of the opinion that in the light of the findings recorded by Ganguly, J. it would not be proper to maintain the death sentence on the appellant." Both the Hon'ble Judges have relied extensively on Dhananjay Chatterjee case,(1994) 2 SCC 220 . In this case the death*

*sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so."*

In *Akhtar v. State of U.P.*, (1999) 6 SCC 60, for the rape and murder by gagging of a young girl, who the appellant came across at a lonely place, the sentence of death awarded to the accused was converted to one of life imprisonment and it was observed in paragraph 3 at SCC pp. 62-63:

*"3. ... But in the case in hand on examining the evidence of the three witnesses it appears to us that the appellant-accused has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the appellant-accused found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death."*

In *Mohd. Chaman v. State (NCT of Delhi)* (2001) 2 SCC 28, where the 30 year old accused had raped and killed a one-and-

a-half year old child, even after describing the crime as heinous, and that the appellant had no control over his carnal desires, the Apex Court had converted the death penalty to one of imprisonment for life holding that a humanist approach needed to be followed and it could not be held that the appellant was such a dangerous person who would endanger the community. It was held at page 40 of SCC para 25:

*"25. Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: whether the case can be classified as of a 'rarest of rare' category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in Bachan Singh, (1980) 2 SCC 684, Machhi Singh, (1983) 3 SCC 470 and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the 'rarest of rare cases' deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment."*

In *Surendra Pal Shivbalakpal v. State of Gujarat*, (2005) 3 SCC127 which was a case where an impecunious 36 year old U.P. migrant labourer had raped a young girl after being rebuffed by her mother for demanding sexual favours, in which the death penalty awarded to the accused was converted to life imprisonment as there was no material for showing that the appellant was involved in any other case or that he would be a menace to society. In para 13 it was held (SCC p. 131):

*"13. The next question that arises for consideration is whether this is a 'rarest of rare case'; we do not think that this is a 'rarest of rare case' in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case."*

Learned G.A. on the other hand in his written arguments placed reliance on *Mohd. Mannan v State of Bihar*, (2011) 5 SCC 317, *Rajendra Prahladrao Vasnik v. State of Maharashtra*, (2012) 4 SCC 37, and *Shivaji v State of Maharashtra*, (2009) 3 SCC (Cri) 146, where the Apex Court has held that on balancing the aggravating with the mitigating circumstances, the only punishment that would suffice in those cases looking to the brutality of the crimes, was a sentence of death.

In *Mohd. Mannan*, a 7 year old girl had been done to death by a 43 year old mason who was working in the house.

He had sent the victim child to buy betel to a shop after winning her trust. He thereafter followed her to the shop, and took her away on a bicycle to a lonely spot, where he murdered her after causing various injuries to her for satisfying his lust. None suspected his evil designs, as the victim was a thin unattractive girl barely four feet in height. The Apex Court noticed the brutality of the crime and considered the appellant a menace incapable of reform.

In *Rajendra Prahladrao Vasnik* a 3 year old girl had been lured away on the pretext of buying her biscuits away by a 31 year old man with a false identity who had and won the trust of a poor family. Thereafter the girl had been brutally raped, and there were bleeding injures on her nose and mouth, and on her private parts. There were even bite marks on her chest. The deceased was then left in a naked condition in an open field.

*Shivaji* was a case where the 9 year old daughter of a poor maid who had been deserted by her husband, was lured by the appellant, a married teacher with 3 children, who had won her trust with the promise of giving her fuel wood and who was thereafter raped and then murdered by being assaulted on the abdomen with a sharp edged weapon and then strangulated with a rope.

It is apparent that the facts and circumstances of each of these cases is quite different. In these cases after winning the trust of the victim or her family a minor girl has been lured, raped and then done to death by a wily assailant after some cold blooded planning. In the present case it appears that the appellant came upon the victim girl all of a sudden, and probably after losing control over his senses, he may have

committed the dastardly crime. After which he tried to hurriedly conceal the offence by hiding the victim under some straw in the room, which crime was readily exposed by the informant and other persons who arrived soon thereafter.

In the recent decision of the Apex Court, *Shankar Kisanrao Khade v State of Maharashtra*, (2013) 5 SCC 546, its earlier decision in *Sangeet v. State of Haryana*, (2013) 2 SCC 452, was reiterated and it was observed that the appropriateness of the "balancing test" of balancing the aggravating and mitigating circumstances, the aggravating circumstances being the circumstances of the crime, and the mitigating circumstances being the circumstances of the criminal needed to be reconsidered, as these distinct and unrelated factors could not be put on the same scale. Hon'ble K.S.P. Radhakrishnan J in his opinion in *Shankar Kisanrao Khade* noted that even where the aggravating circumstances were extremely grave, only if the mitigating circumstances relating to the accused were zero percent, i.e. there was complete absence of any circumstance favourable to the accused with regard to his personal antecedents, could the case be considered one where the death penalty might be justified. Even then it needed to be considered whether it was the rarest of rare case where only a death penalty was appropriate. In *Shankar Kisanrao*, the 52 year old appellant had enticed a 12 year old moderately intellectually challenged girl living with her grandmother, and then repeatedly sodomized and raped her before strangulating her. However as the appellant had only been earlier implicated for the murder of his wife and also in a case under section 380/ 457 IPC, but was not convicted in those cases, hence the Apex Court

considered the High Court allegation against the appellant of having criminal antecedents not to have been established, and the case in hand was therefore not considered the rarest of rare cases for award of the death penalty. Justice Radhakrishnan in paragraphs 37,38 and 39 of the law report specifically faulted the judgements in *Mohd. Mannan*, *Rajendra Prahladrao Vasnik* and *Shivaji* for applying the "balancing test."

In his separate opinion Justice Madan B. Lokur has observed in paragraph 123 of the law report, that the possibility of reform or rehabilitation of the appellant was not ruled out by any expert evidence in *Mohd. Mannan*, and in *Shivaji*, unlike some other cases the conviction being based only on circumstantial evidence was not held to be a mitigating factor.

In the aforesaid background we are of the opinion that this is not the rarest of rare cases, where the special reasons exist for only awarding the death penalty and where the other option of awarding a sentence of imprisonment for life is unquestionably foreclosed.

In *Shankar Kisanrao Khade* the Apex Court had directed that the life sentence (after commutation of the death penalty) for murder and the life sentence for rape and the sentences under other provisions run consecutively and not concurrently. However, we see some difficulties in making the sentences run consecutively and not concurrently, as under section 386(b)(iii) Cr.P.C. it is clarified that whereas in an appeal from conviction, the nature and extent of the sentence may be altered, "but not so as to enhance the same."

In another similar case of rape and murder of an eighteen year old girl, by a young painter working in the house, who

was suddenly overwhelmed by a sense of lust, and who after committing the murder tried to conceal the corpse in a trunk in the house, this Court in *Sanjay Kumar v State of U.P.*, (2012) 77 ACC 65 after relying on the decisions in *Ramraj v State of Chattisgarh*, (2010) 1 SCC 573, *Mulla v State of U.P.*, (2010) 3 SCC 508, and *Rameshbhai Chandubhai Rathod (2) v State of Gujarat* (2011) 2 SCC 764, had commuted the sentence of death, to a sentence of imprisonment for life for the remainder of the appellant's life subject to the clemency powers of the President or Governor under Articles 72 or 161 or the State's powers of remission under the relevant statute. In an appeal preferred against the said judgment in *State of U.P. v Sanjay Kumar*, reported in (2012) 8 ACC 537, the Apex Court after reviewing the case law on the point, had regarded this approach of the High Court as finding an appropriate *via media*, for situations where the Court may be loath to impose a sentence of death for any extenuating circumstances, and yet may feel that the routine sentence for life which in practice works out to a sentence of 14 years or 20 years in view of guidelines framed by the State was grossly inadequate or disproportionately small. For such offences, the sentencing or the Appellate Court for proportionate sentencing whilst doing away with the death sentence in a particular case, could impose a sentence even extending for the prisoner's entire remaining natural life, or for a fixed term over and above the mandatory 14 years actual jail term under section 433 A Cr.P.C, subject to the State retaining its powers of exercise of clemency or for granting remission, in a *bona fide* and non-arbitrary and objective manner.

On these considerations we are of the view that the

judgement of the trial judge convicting the appellant as above be upheld. However the death sentence awarded to the appellant under section 302 IPC is commuted to a sentence of imprisonment for life, which is to run for the remainder of the appellant's natural life, subject to a *bona fide* exercise of the clemency powers of the President or Governor or the powers of remission of the State under the appropriate statutory provisions. The remaining sentences awarded by the trial Court are upheld. The Reference for confirming the death sentence is rejected.

Appeal partly allowed.

Date: 28. 11.2013

Ishrat/as