



was the first IO (PW-7). He recorded the statement of Dharmendra Kumar (PW-3) under section 161 CrPC on 27.2.2005. On the same day, he also recorded the statement of Ashfaq Ahmad (PW-5) under section 161 CrPC. The investigation was then transferred on 28.2.2005 to Arvind Kumar, the second IO (PW-8).

6. The Appellant was arrested on 3.3.2005 around about 4:15 hours. A pant and shirt (recovery memo Ex Ka-13) alleged to be worn by him at the time of the incident as well as TV, VCD player, and a cassette (CD) (recovery memo Ex Ka-14) were said to be recovered at his pointing on the same day.

7. The police submitted the charge-sheet and the case was committed to the sessions' court. It was registered as ST No. 444 of 2005.

8. The Additional Sessions judge, Court no.12, Bulandshahar (the ASJ) framed charge on 1.8.2005 under section 376 and 302 IPC.

9. Among the others, the followings are the material exhibits in the case:

- Plain soil Ex-1;
- Blood stained soil Ex-2;
- Ustara* Ex-3;
- Underwear of the Deceased Ex-4;
- Pant of Accused Ex-5;
- Shirt of Accused Ex-6;
- TV Portable (Nokia) Ex-7;
- VCD player (Boss) Ex-8;
- Two CDs Ex-9 and 10.

10. Among others, the prosecution filed the following documents:

- FIR dated 25.2.2005 Ex Ka-3;
- Written report dated 25.2.2005 Ex Ka-1;
- Recovery memo of blood stained and plain soil Ex Ka-10;
- Recovery memo of underwear Ex Ka-11;
- Recovery memo of *ustara* (Barber's razor) Ex Ka-12;
- Recovery memo of pant and shirt Ex Ka-13;
- Recovery memo of TV, VCD playe,r and cassette Ex Ka-14;
- Postmortem examination report Ex Ka-2;
- Report of *Vidhi Vigyan Prayogshala*, Lucknow (*the Prayogshala*) dated

22.6.2005 Ex Ka-16;

Report of the *Prayogshala* dated 15.7.2005 Ex Ka-17;

Site Plan with the index Ex Ka-5.

11. Among others, the prosecution examined the following witnesses:

Vijendra Singh (PW-1): Informant;

Smt. Babli (PW-2): Mother of the Deceased;

Dharmendra Kumar (PW-3): *Pradhan* of the village, deposed about extra judicial confession of the Appellant;

Dr. Sri Krishna Kumar (PW-4): Doctor, conducted the postmortem;

Ashfaq Ahmad (PW-5): Deposed that he saw the Appellant coming from the direction from where the dead body was found;

Rajendra Prasad Sharma (PW-6): Constable, recorded the FIR;

Anil Kumar Singh (PW-7): First Investigating Officer (IO);

Arvind Kumar (PW-8): Second IO;

Krishna Pal Singh (PW-9): Third IO.

12. The Appellant was examined under section 313 CrPC on 17.9.2007. He denied his involvement in the incident, the recovery, and stated that he was implicated because of the party politics in the village.

13. The ASJ by his judgement dated 18.8.2008 convicted the Appellant under section 376 and 302 IPC. The following sentence was awarded to him on 21.8.2008:

Death penalty and a fine of Rs.10,000/- under section 302 IPC;

Imprisonment of life with a fine of Rs.5,000/- under section 376 IPC.

Hence the present appeal.

14. This appeal was heard on 7<sup>th</sup> July 2010. There was no evidence on record to show that:

The cassettes (CDs) contained blue (pornographic) film; or

They could be played on the TV by the VCD player that was recovered.

The prosecution had taken no steps to prove it. This was important, as it might corroborate the EJC by the Appellant alleged to have been made to Dharmendra Kumar (PW-3). The case is based on circumstantial evidence and apart from the EJC the circumstantial links may be too weak to connect the Appellant to the crime.

15. Considering the importance of the matter, the court passed an order on 7.7.2010 requesting the Sessions Judge Bulandshahar to send the following case materials to this court:

- (i) Ext 9 and 10: CDs
- (ii) Ext 7: TV
- (iii) Ext 8: VCD player.
- (iv) Ext 3: *Ustara*.

16. The case materials were sent by the Sessions Judge, Bulandshahar and seal was opened on 8.7.2010 in front of the counsel for the parties.

- (i) There was no lead that could connect the VCD player to the TV. As such it was not possible to find out whether any CD could be played on the TV with the help of VCD player or not.
- (ii) We had reservation in seeing the contents of the CDs. We requested the counsel of the parties in the case to see the CDs and make a statement.

The counsel saw the CDs and stated that:

- One CD contained video of hard pornography; and
- The other CD contained video clips of scantily clothed girls, singing and dancing—soft pornography.

17. The TV is old black and white TV and the VCD player is of later technology. There was nothing on the record to show that a CD could be seen in the TV with that VCD player. The counsel for the Appellant requested us to find out whether the CD could be so played or not.

18. Considering the request made by the counsel for the Appellant, the TV and the VCD player were given to Sri DK Dwivedi, the In-charge Computer Centre, Allahabad High Court on 8.7.2010 to keep it in safe custody and report by the next date, if the CDs could be played on the TV with the help of the VCD player. The *ustara* and CDs were sealed again. In order to protect the CDs, they were sealed in a new plastic cover. The Appellant was also summoned for 14.7.2010.

19. On 14.7.2010, only the Appellant was permitted to see the CDs. The same day, Sri DK Dwivedi (CW-1) was examined as the court witness. He produced a lead with the help of which CD could be displayed on the TV with the help of VCD player. It was taken on record as Exhibit C-1.

20. The statement of the Appellant under section 313 CrPC was again recorded on 14.7.2010. He did not dispute the contents of the CDs (one being of hard pornography and the other being of scantily clothed singing and dancing girls) but again denied the recovery of TV, VCD player, and the CDs.

21. The counsel of the Appellant made a statement that they do not want to produce any evidence.

### **POINTS FOR DETERMINATION**

22. We have heard Sri JSP Singh and Sri Mohd. Umar Khan, counsel for the Appellant; Sri DR Chaudhary, GA and Sri Anand Tiwari, AGA for the State.<sup>1</sup> The following points arise for determination in the case:

- (i) Whether the Deceased was raped;
- (ii) Whether the Deceased was killed by the *ustara*;
- (iii) What are the circumstances against the Appellant?
- (iv) Whether the circumstances (other than those mentioned in point numbers 5 and 6) are proved?
- (v) Whether the extra judicial confession (EJC) is reliable;
- (vi) Whether the recovery is reliable;
- (vii) Whether the Appellant is guilty;
- (viii) In case the Appellant is guilty, what punishment should be given;

### **1<sup>st</sup> & 2<sup>nd</sup> POINTS: DECEASED WAS RAPED AND KILLED**

23. The prosecution case is that:

The Deceased had gone towards pond after her meal at about 11:00 - 12:00 hours on 24.2.2005;

Her dead body was found the next day;

She was raped by the Appellant and then killed.

24. The ante mortem injuries of the Deceased are as follows:

- (i) Incised wound 10 cm x 10 cm x vertebra level 2 cm upper level above cricoid cartilage and below up to sternum in front of neck. All the great vessels trachea apart, oesophagus vessels, skin are missing in front of neck

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<sup>1</sup> The counsel appearing in the case have corrected a part of the judgement under the headings (THE FACTS and POINTS FOR DETERMINATION) and ante mortem injury of the Deceased. They were checked by counsel for the parties. We are thankful to them. Yet, if there are any mistakes, they are ours.

in above mentioned area.

The report further records:

'On Genitals examination the hymen was lacerated and two fingers dilatation, two vaginal smear slide prepared for pathological test and sent to Senior Pathologist District Hospital. Cause of death was due to shock and haemorrhage as a result of ante mortem injury.'

25. Dr. Sri Krishna Kumar (PW-4) conducted the postmortem. He deposed that:

There was about 300 ml undigested food in the stomach;  
Hymen was torn and two fingers could easily enter inside the vagina;  
The tearing of hymen indicated incident of rape.

26. The Informant (PW-1) is the father of the Deceased. He deposed that:

A blood stained *ustara* was also found near the dead body;  
The dead body of the Deceased was found at about 14:00 hour on 25.2.2005;  
At that time, her neck was cut and underwear was removed and was lying near the dead body.

This indicates that the girl was naked from below.

27. The clothes of the Deceased were sent to the *Prayogshala* for examination. The *Prayogshala* sent its report (Ex Ka-16) on 22.6.2005. The report indicates that semen was found on the frock of the Deceased. This clearly indicates that the girl was raped.

28. Dr. Sri Krishna Kumar (PW-4) also deposed that:

Injury no. (i) was sufficient to cause death in ordinary course.  
The injury could be caused by *ustara*.

29. Injury no. (i) is an incised wound. The blood stained *ustara* was also found next to the dead body of the Deceased. The report of the *Prayogshala* (Ex Ka-16) shows that blood was found on the *ustara*. This indicates that it was used to commit the crime.

30. In our opinion, the prosecution has proved beyond reasonable doubts that the girl was raped and thereafter killed by *ustara*. The finding recorded by the trial court on point no.1 and 2 was also not challenged by the counsel for the Appellant. His

challenge was that the Appellant neither committed the rape nor the murder of the Deceased.

### **3<sup>rd</sup> POINT: CIRCUMSTANCES AGAINST APPELLANT**

31. No one saw the incident. The case is based on circumstantial evidence and the extra judicial confession. The law—when a case can be said to be proved against an accused on circumstantial evidence—has been established in different decisions (see below for citations)<sup>2</sup>. It is as follows:

- (i) The circumstances from which the conclusion of guilt is to be drawn must be established.
- (ii) 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.
- (iii) The circumstances should be of a conclusive nature and tendency.
- (iv) They should exclude every possible hypothesis except the one to be proved.

In substance, 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 probability the act must have been perpetrated by the accused.

32. The counsel for the State pointed out the following circumstances against the Appellant:

- (i) The Deceased after eating her food had gone towards pond at about 11:00-12:00 hours on 24.2.2005 to defecate;
- (ii) She was raped and killed there;
- (iii) The Appellant was seen coming from the side of the pond at about 11:00 - 12:00 hours on the same day;
- (iv) The Appellant was aged 28 years and was unmarried;
- (v) The Appellant was absconding since 25.2.2005 till his arrest.
- (vi) This circumstance consists of the following three parts:
  - (a) Recovery of a pant and a shirt has been made on the pointing of the Appellant;

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<sup>2</sup> The cases are: KT Palanisamy v. State of Tamil Nadu: AIR 2008 SC 1095, Arun Bhanudas Pawar Vs State of UP: 2008 (61) ACC 32, Sharad Birdhichad Sarda v. State of Maharashtra (SC): AIR 1984 SC 1662, Shivaji Sahabrao Bobade Vs State of Maharashtra: AIR 1973 SC 2622, Hanumant Vs State of MP: AIR 1953 SC 129.

- (b) The shirt had blood stains;
- (c) The pant contained soil which is similar to the soil where the dead body of the Deceased was found.
- (vii) The EJC of the Appellant before Dharmendra Kumar (PW-3);
- (viii) The TV, VCD player, and CDs containing blue film were found at the pointing of the Appellant.

#### **4<sup>th</sup> POINT: SOME CIRCUMSTANCES PROVED**

##### **i<sup>st</sup> to iii<sup>rd</sup> Circumstance Proved—Coming From the Same Direction**

33. Babli (PW-2) is mother of the Deceased. She deposed that:

The Deceased had gone towards the pond after eating her food at about 11:30-12:00 hours;

She had informed that she was going to defecate;

She never came back.

There is nothing in the cross-examination or evidence to disbelieve her statement.

The first circumstance is proved.

34. The second circumstance is proved while discussing points—1 and 2.

35. The prosecution examined Ashfaq Ahmad (PW-5) to prove the third circumstance. He deposed that:

At about 11:00-12:00 hours, he (PW-5) was going from his house towards the field;

He saw the Appellant coming from the side of the pond.

There is nothing in his cross-examination or evidence to disbelieve his statement.

The prosecution has proved the third circumstance as well.

36. In our opinion, the first three circumstances are proved.

##### **iv<sup>th</sup> Circumstance: Appellant, Young and Unmarried—Proved**

37. The age of the Appellant in the statement under section 313 CrPC before the court below is mentioned as 30 years. The incident took place two years before. The Appellant also appeared before us and gave his age as 35 years. He would be about 28 years of age at the time of the incident.

38. Babli (PW-2) is mother of the Deceased. She deposed that the Appellant was unmarried at the time of the incident. There is no cross-examination on this point.

39. In our opinion, the fourth circumstance is also proved.

**v<sup>th</sup> Circumstance: Absconded—Not proved**

40. The Informant (PW-1) and Babli (PW-2) deposed that:

A search for the Deceased was made in the evening of 24.2.2005 but the Deceased was not found;

The Appellant also searched for the Deceased on 24.2.2005;

The dead body of the Deceased was found on 25.2.2005 but at that time, the Appellant was not with the search party;

The Appellant was missing since 25.2.2005.

41. The Appellant is said to have made the extra-judicial confession in the morning (5:30 hours) before Dharmendra Kumar (PW-3). PW-3 said to have given his statement under section 161 CrPC before the first IO (PW-7), the same day. The first IO has not deposed anything that he tried to arrest the Appellant on the same day or he went to his house but could not arrest the Appellant as he was absconding.

42. The second IO (PW-8) was handed over the investigation on 28.2.2005. He arrested the Appellant in the morning of 3.3.2005 (4:15 hour) from his house.

43. The second IO (PW-8) deposed that:

The Appellant lives alone. His house is separate than his parent's house;

When PW-8 knocked the door of the Appellant in the morning of 3.3.2005, the Appellant opened the door himself.

The second IO is the prosecution witness. There is nothing in the evidence to disbelieve this part of his testimony.

44. The year 2005 was not a leap year. The month of February was of 28 days. The Appellant was unmarried and was living alone. There is nothing in the evidence that police repeatedly went to the Appellant's house but found it locked. Had the Appellant wanted to abscond then he could have run away anywhere creating problems for his arrest. He did not do so. He was part of search party on 24.2.2005. Merely for the reason that he was not part of search party on 25.2.2005, it cannot be said that he was absconding.

45. In our opinion the fifth circumstance is not proved.

**vi<sup>th</sup> Circumstance: Partly Proved**

46. The sixth circumstance relates to the pant and shirt alleged to be worn by the Appellant at the time of the crime. They are said to have been recovered at the pointing of the Appellant on 3.3.2005 (Recovery memo Ex Ka-13). This circumstance consists of three parts. The first part of the circumstance (vi)(a) namely whether the recovery is reliable or not will be considered while discussing point number (vi). At this stage, we will consider circumstance (v) (b) and (c) only.

47. In the recovery memo (Ex Ka-13), it is mentioned that there were spots of blood in the shirt and in the pant at the knee length, there were spots of soil as well as of green crop. This recovery was by second IO (PW-8). He also deposed that blood spots were on the shirt.

48. The shirt as well as the pant were sent to the *Prayogshala* for examination. The report of the *Prayogshala* (Ex Ka-16) indicates that no blood was found on the shirt and the pant. Nothing has been brought to our notice that in case blood spots were there then due to passage of time, the spots might not be found on the shirt at the time of its chemical examination.

49. In our opinion, in view of the chemical report, it cannot be said that there were blood spots on the shirt.

50. In the another report of the *Prayogshala* dated (Ex Ka-17), it is mentioned that soil found on the pant as well as plain and blood stained soil (found near the dead body of the Deceased) were microscopically inspected and distribution of soil molecules were considered. Both of them appeared to be similar. In view of this, the circumstance (iii) (c) can be said to be proved but the report merely says that they appear to be similar: there is no certainty.

**5<sup>th</sup> and 6<sup>th</sup> POINTS: DOUBTFUL—NOT PROVED**

51. There seems to be some debate;

Whether an extra judicial confession is a weak kind of evidence or not; and

Whether a conviction can be made on the basis of the same.

Nonetheless, it is settled<sup>3</sup> that a conviction can be made on the basis of an extra judicial confession, if,

It is voluntary; and

It is made to person who has no reason to depose falsely against the accused; and

It is corroborated by the other circumstance.

52. The counsel for the State submitted that:

- (i) The EJC of the Appellant is voluntary;
- (ii) Dharmendra Kumar (PW-5) has no reason to depose falsely. The Appellant could confess the crime before him for the following reasons:

PW-3 was *pradhan* of the village and an important person. A person may confess before him;

The Informant was a supporter of PW-3 in the election. The Appellant could have presumed that he could influence the Informant and the police;

- (iii) The EJC is corroborated from the following circumstances:

The injuries corroborate the manner of committing the crime as confessed by the Appellant;

In the confession, the Appellant had said seeing a blue film. A TV, VCD player, and two CDs were recovered at his instance;

The CDs could be played through VCD player in the TV as proved by Sri DK Dwivedi, Court witness (CW-1);

One of the CD, is hard pornographic and the other CD is soft pornographic.

53. It is correct that injuries conform to the extra-judicial confession but in the circumstances of the case, it cannot be said that the injuries corroborate the extra-judicial confession.

54. The dead body was discovered on 25.2.2005. Everyone had seen it. A blood stained *ustara* was also found next to the body. From the look of the body and *ustara* it was apparent that the girl was raped and then killed by *ustara*. It was also so reported in the FIR.

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<sup>3</sup> See: *Guru Singh vs State of Rajasthan*: 2001(2) SCC 205; *Sivakumar vs State*: (2006) 1 SCC 714 and *Gagan Kanojia vs. State of Punjab*: (2006) 12 SCC 516

55. The EJC is said to have been made on 27<sup>th</sup> morning. Everyone knew how the Deceased had died. Had the extra-judicial confession made prior to the finding of the dead body or the injuries were internal and not apparent from the appearance only then it could be said that the injuries corroborate the EJC. This is not a case here.

56. Out of the two CDs said to be recovered from the Appellant, one of them contains hard pornography and the other contains soft pornography showing scantily wearing clothes by singing and dancing girls. These CDs could be played in the TV by the VCD player said to be recovered. This is proved by Sri DK Dwivedi (CW-1) and they do corroborate the EJC provided the recovery is reliable.

57. We, not only have doubts about the recovery, but also about the EJC being made to Dharmendra Kumar (PW-3). Our reasons are explained in the succeeding paragraphs.

#### **Doubts—Regarding Recovery**

*(i) One cassette recovered but found two*

58. The recovery memo (Ex Ka-14) shows that along with the TV and VCD player, one cassette was recovered. The counsel for the Appellant submitted that recovery of CD is not reliable for the reasons that:

(i) Cassette is different from CD;

Cassette has a spool and a magnetic tape;

CD does not have tape but is a disc;

There are different in size and shape.

(ii) Even if cassette is taken to be CD then,

Recovery was of one cassette but two CDs were found in the sealed bundle;

There is no explanation as to how one cassette/ CD became two.

59. Cassettes and CDs are different items. Cassettes came into use much before the CDs but purpose of the both is same. The common man, in popular language, may use the word 'cassette' for the CD. In the recovery memo word 'cassette' is

mentioned, however, thereafter the word 'compact disc' (CD) is also used. The second IO (PW-8) had recovered it on 3.3.2005. He has also explained this in his cross-examination.

60. Considering the aforesaid aspect, the recovery cannot said to be unreliable on this ground.

61. The recovery memo records one cassette was recovered. It is not only in title of the recovery memo but also in its description too. The second IO (PW-8) has also deposed in his examination-in-chief that he had recovered one cassette. However, when the bundle was opened two CDs (case material Ex-9 and 10) were found.

62. In the cross-examination, the second IO was asked a question that in the recovery memo one cassette is mentioned but in the bundle two CDs Ex-9 and 10 were found. Yet, neither he, nor anyone else has explained how one CD had become two. In absence of any explanation from prosecution side, this creates doubts about the reliability of the recovery.

*(ii) Independent Witness Not Examined*

63. There are two recovery memos, one of pant and shirt (Ex Ka-13) and the other of TV, VCD player, and CD (Ex Ka-14). There are two independent witness in the recovery: Arvind Kumar and Niranjana. The name of the independent witnesses are mentioned in the recovery memos. The other witnesses in the recovery are police constables, who are said to have accompanied the second IO.

64. Arvind Kumar and the police constables have signed the recovery memos. In the recovery memos there are two thumb impressions. One thumb impression is of the Appellant. The other thumb impression is on the left side of the recovery memos. In the recovery memo of pant and shirt (Ex Ka-13), the other thumb impression is indicated to be of Niranjana. However in the recovery memo of TV, VCD player, and cassette (Ex Ka-14) there is no indication as to whose thumb impression it is.

65. The recovery memo of TV etc. (Ex Ka-14) records that there are two independent witnesses namely Arvind Kumar and Niranjana. This shows that the other thumb impression, where no description is recorded, is of Niranjana. In our opinion it is the thumb impression of Niranjana and by mistake it could not be so

indicated. The counsel for the State also did not dispute it.

66. There are two independent witnesses in the recovery memo. Both of them have not been examined as witnesses. No reason has been given as to why these witnesses were not examined. The Informant was a supporter of the *pradhan*. The *pradhan* himself deposed against the Appellant. There seems to be no reason why anyone would be afraid to depose in the court.

*(iii) No Time When It Was Recovered*

67. The recovery is said to have been made on the day of arrest itself but no time of recovery is mentioned in the memos. The second IO (PW-8) is alleged to have made the recovery. There is confusion regarding the time of recovery in his deposition.

68. The second IO (PW-8) deposed in the cross-examination that he started searching the Appellant's house at 10:00 hours on 3.3.2005 and then he recovered the clothes, TV, VCD player, CDs etc. He denied the suggestion that they were recovered at 6:30 hours.

69. At other place, the second IO (PW-8) again deposed that he neither wrote the time of recovery in recovery memos nor in the case diary.

70. The second IO (PW-8) was referred to his case diary. He saw that and deposed that it is mentioned that recovery was made at 6:30 hours. Why this discrepancy in his deposition? He had denied the specific suggestion of recovery being made at 6:30 hours.

71. The place of occurrence and the house of the Appellant are close by. The distance of the police station is about 4 km. The second IO (PW-8) deposed that he arrested the Appellant and took him to the police station and questioned him there, then he brought him back for recovery. This was not possible within two hours. It is for this that he had deposed that the recovery was at 10:00 hours and denied the suggestion that arrest was at 6:30 hours but in the case diary he noted down otherwise.

72. The second IO knew about the EJC at the time of arrest. TV etc. were recovered under the cot (recovery memo ka-14): it was there in the open. The

search should have been made then and there. They would have been recovered at that time. There was no necessity to go back to the police station and come back.

73. The oral evidence of the second IO (PW-8) regarding recovery does not inspire confidence. It appears to be paper transaction only.

74. In our opinion, the recovery is not reliable. The recovery of pornographic CD corroborates the EJC only if the recovery is reliable. In case recovery is unreliable then it does not corroborate the EJC.

75. Considering the aforesaid aspects, it cannot be said that the pornographic CD or it could be played on the TV with the VCD player, corroborate the EJC.

#### **Doubts—Regarding the ECJ**

##### *(i) No Reason to Make EJC—No Evidence Against Appellant Till That Time*

76. The statements of Dharmendra Kumar (PW-3) and Ashfaq Ahamad (PW-5) under section 161 CrPC were recorded in the afternoon of 27.2.2005. The EJC is said to have been made to Dharmendra Kumar (PW-3) at 5:30 hours in the morning. Till that time there was no evidence against the Appellant. This may be the first evidence against him.

77. Dharmendra Kumar (PW-3) has deposed the reason that Appellant came to him because everyone knew about his complicity in the crime. On the contrary there was nothing against the Appellant till that time. The reason deposed by PW-3 for the Appellant to make the EJC seems to be doubtful.

##### *(ii) Appellant Had No Reasons to go to PW-3, who had Reasons to Implicate*

78. The post of *pradhan* of the village was reserved for scheduled caste. The Informant as well as the Appellant are also of scheduled caste. They actively participated in the election. The Informant (PW-1) and Ashfaq Ahmad (PW-5) deposed that:

They had supported Dharmendra Kumar (PW-3) and he won the elections;  
The Appellant and his family members had supported Atar Singh, who was a candidate in the elections but lost to PW-3.

79. It is admitted to the prosecution that the Appellant had not supported

Dharmendra Kumar (PW-3) but the candidate opposing him. There is no evidence on record to show that the Appellant had patched up with PW-3 or he had become his confidant. There is no reason as to why the Appellant would go and make the EJC to PW-3 especially when he had opposed his elections.

80. The Appellant had opposed the election of PW-3. He had supported opponent of PW-3 in the election. PW-3 has all reasons to implicate the Appellant in the crime.

*(iii) PW-3—Dubious Character*

81. Dharmendra Kumar (PW-3) may be *pradhan* of the village but he appears to be person of dubious and shady character; he has criminal history: his deposition is not worthy of any credence. The cross-examination of PW-3 indicates the following instances:

- (i) PW-3 has denied the suggestion that Udaiveer and other had taken Maruti car on hire and he (PW-3) was involved in murder of driver of that car. He further denied that he absconded or his brother was arrested. Nevertheless, he admits that a case is pending against him in Ghaziabad.
- (ii) PW-3 denies the suggestion that he and his brother Jeetendra had abducted Shashi but admits that Shashi and Jeetendra committed suicide.
- (iii) PW-3 denies that he had kidnapped Geeta daughter of Patiram but admits that Patiram has instituted a case against him in this regard and that was pending.
- (iv) He denies the suggestion that he had beaten Kishan, Tejvir and there was a criminal case against him under section 323, 324 and 307 IPC.

82. Considering the above mentioned circumstances there is a doubt regarding extra-judicial confession as well as recovery by the police.

**7<sup>th</sup> and 8<sup>th</sup> POINT: APPELLANT NOT GUILTY**

83. The subsequent conduct of the Appellant is also relevant under section 8 of the Evidence Act. His conduct indicates that he was not involved in the case.

**Appellant's Conduct—Not Doubtful**

84. The Deceased was missing since 24.2.2005. The prosecution version as well as oral evidence is that they started searching the Deceased in the evening of 24.2.2005. The Informant (PW-1) and Smt Babli (PW-2) deposed that the Appellant

searched for the Deceased on 24.2.2005 alongwith them in the evening of 24.2.2005.

85. It is correct that the Informant (PW-1) and Babli (PW-2) also deposed that the Appellant was not in the search party on the next day namely 25.2.2005 and was missing but we have doubts about it. We have already held that the Appellant had not absconded. (See 4<sup>th</sup> POINT: SOME CIRCUMSTANCES PROVED, sub heading v<sup>th</sup> Circumstances: Absconded—Not Proved).

86. The Appellant was unmarried and living alone. Had he committed the crime then the normal tendency would be to abscond.

87. Ashfaq Ahmad (PW-5) deposed that:

The Appellant was coming from the side of the pond on a *kharanja* (road);  
Bus, *tongas*, *jugar*, tractor etc also keep on coming and going on this  
*kharanja*;

Many other persons were also coming and going at that time;

In his opinion, the condition of the Appellant was normal.

88. It has come in the evidence that pond is in an area of 10 bighas and villagers go there to attend the nature's call {statement of Dharmendra Kumar (PW-3)}. It is not a lonely place. The field of Ranvir Singh is adjacent to it {cross examination of the Informant (PW-1)}.

89. Ashfaq Ahmad (PW-5) deposed that many people were coming and going at that place, when he saw the Appellant coming. The Deceased had also gone to defecate on 24.2.2005. In such a situation, if the Appellant was also coming then it is not unusual: it does not give rise to any suspicion of his complicity in the crime.

90. The important thing in the deposition of Ashfaq Ahmad (PW-5) is his opinion. He deposed that in his opinion the condition of Appellant was normal. The prosecution case is that Appellant was coming back at that time after committing rape and murder of the Deceased. If this be the case then the condition of such a person would not be normal.

91. The fateful day was being celebrated as Ravidas Jayanti. There were functions and processions in the village. The Informant had also joined the procession and

came back in the evening. It was for this reason that search for the Deceased had started in the evening. Numerous persons had joined the functions and processions. The crime could have been done by anyone.

### **Blood in Shirt—Not Found**

92. The recovery memo of the pant and shirt is Ex Ka-13. In this, it is mentioned that there were blood spots on the shirt. But we have doubts about it. We have discussed this under heading '4<sup>th</sup> POINT: SOME CIRCUMSTANCE PROVED' sub heading 'vi<sup>h</sup> Circumstance: Partly Proved.'

93. All circumstances are not proved. Only circumstance one to three and fifth partly proved. The proved circumstances do not lead to the conclusion that the Appellant is guilty.

94. In our opinion prosecution has not been able to prove its case beyond reasonable doubts. The Appellant is entitled to benefit of doubt.

## **SHORTCOMING IN THE INVESTIGATION AND PROSECUTION:**

### **SOME SUGGESTIONS**

#### **Shortcoming—Investigation**

95. The prosecution case is and we have also upheld that the murder was committed by *ustara*. An explanation was also given as to why the Appellant would carry *ustara* to the pond. It is said in the EJC that he went to defecate and had taken *ustara* with him to remove hair from the private part.

96. The Deceased was nine year old girl. A girl of that age is not mature for sexual intercourse. It often cause injuries on the private part of the person trying to rape.

97. There is no evidence that the Appellant was medically examined after the arrest; atleast no medical report is available on the record. The prosecution should have got the Appellant examined. It would have indicated:

Whether the hair from the private parts were removed or not;

Whether there was any injury on his private part.

This would have strengthened the prosecution case.

98. The murder was committed by *ustara*: it must have finger prints. No effort was made by the prosecution to get the finger prints on the *ustara* to be compared with

the finger print of the Appellant.

99. Semen was found on the frock of the Deceased (report Ex Ka-16). DNA test of the semen might have indicated the complicity of the Appellant. This was also not done.

100. There is also no explanation as to why the aforesaid investigation was not conducted. Perhaps IO did not understand its importance or had no knowledge as to how to go about collecting evidence and getting expert opinion.<sup>4</sup> It would be good idea to emphasise and train the investigators regarding the same. A modern scientific approach to the investigation would undoubtedly lead to more satisfactory results.

#### **Shortcoming—Prosecution**

101. There has been some lapse while prosecuting the case before the court below. A VCD player, TV as well as pornographic CDs are said to be recovered. They would have corroborated the extra-judicial confession, had we upheld the recovery. However,

The prosecution never proved that from that VCD player a CD could be seen on the TV; or

The CDs were pornographic.

102. It is for the aforesaid reason that we had summoned the case materials and examined a witness. This ought to have been done in the trial court itself, otherwise the result might be the same as happened in the first case conducted by Samuel Leibowitz, the most talked about American criminal trial court lawyer in the second quarter of the 20<sup>th</sup> century (see **Appendix-1**).

103. These short comings can be overcome; it requires adequate training. This can be easily done in the training Institutes meant for training them. We recommend the authorities to consider these aspects while preparing training modules for them.

#### **CONCLUSIONS**

104. Our conclusions are as follows:

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<sup>4</sup> Modi's Medical Jurisprudence and Toxicology 23<sup>rd</sup> edition page 542 and 555 explain precautions to be taken in collecting and forwarding samples.

- (i) In a case based on circumstantial evidence, 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 perpetrated by the accused;
- (ii) An extra judicial confession, given voluntarily and corroborated with the other circumstances can be relied upon;
- (iii) In this case, there are doubts about recovery and extra-judicial confession;
- (iv) All circumstances are not proved. The circumstances that are proved do not necessarily lead to the conclusion of guilt of the Appellant. He is entitled to benefit of doubt.

105. In view of our conclusion, the appeal against the conviction dated 18.8.2008 and sentence dated 21.8.2008 passed by Additional Sessions Judge, court no. 12, Bulandshahar in ST No. 444 of 2005 is allowed. The reference is rejected. The Appellant is in jail. He may be released unless detained in some other case.

Date: 28.7.2010

BBL

### Appendix-1

Samuel Leibowitz was leading criminal trial court lawyer in US in the second quarter of the 20<sup>th</sup> century. His biography has been romanticised in the book 'Courtroom' by Quentin Reynolds.

Samuel's father had migrated from Romania. He was good in debating and elocution. On his fathers advice, he chose legal profession.

He began his practice as a brief less lawyer. This is exactly how most of the lawyers begin their careers. The courts generally appoint a new entrant as a friend of the court for the accused who are not able to afford services of a lawyer. It not only encourages them but they have the time too. This is how Leibowitz got his first case.

The accused in that case was charged for breaking open a saloon and stealing, money and liquor. The next day morning he was found drunk, in the drain, and with a key in his pocket by which he was suspected to have opened the lock of the saloon. He also confessed to the crime before the police. Unlike our country, where confessions before the police cannot be proved under sections 25 and 26 of the Evidence Act, in the US such confessions are admissible.

Leibowitz's colleagues advised him to confess the guilt of his client and opt for plea bargaining. He was in two minds:

- Should he admit the guilt of his client then the case would not be contested.
- In that event, he might not become famous; and
- If he did not then his client was likely to land up in the jail for longer period.

Leibowitz pondered over the case for many nights. This is how good lawyers work. They are not like the fictional character Perry Mason, who used to think as the case went on. In real life, good lawyers ponder, re-ponder, and then ponder again over the weak as well as strong points of their case. This was what Leibowitz did and then he gambled: it was like a punch in the dark; it might just hit the bull's eye.

When the case started, Leibowitz did not plead guilty. After the prosecution finished its case, the accused took the witness stand and deposed that he confessed to the crime because of the police torture. Then, Leibowitz asked, whether the District Attorney (the prosecuting counsel) (DA) had himself seen that

the key found in the accused pocket opened the locks of the saloon or not. If he had not, then he invited the Judge and the Jury to come along with him to see for themselves if the key opened the locks of the saloon or not. If it could not then he submitted that his client could not be held guilty.

The DA had not personally seen whether the key opened the lock or not. He debated about the risk involved. If the key did not open the lock then it would be very insulting. If it did, even then, at the most the accused would be convicted. There were thousands of such petty cases pending in the court and they had to be decided: was it worth spending the time? Considering the risk involved and the time factor, the DA chose to rest the case; so did the defence: and the jury did not take any time to acquit the accused.

After the case was over, Leibowitz tried to open the locks of the courtrooms with that key. It opened all the locks: it was a kind of master key.