

**Court No. - 46 /Reserved**

Case :- CAPITAL CASES No. - 2899 of 2011

Appellant :- Nem Singh @ Mula

Respondent :- State Of U.P.

Counsel for Appellant :- Shyam Kishore Yadav, Apul Misra

Counsel for Respondent :- Govt. Advocate

Along with

Criminal Reference No. 10 of 2011

Connected with

Case :- GOVERNMENT APPEAL No. - 4681 of 2011

Petitioner :- State Of U.P.

Respondent :- Avadhesh

Petitioner Counsel :- Desh Ratan Chaudhary/GA

Hon'ble Amar Saran,J.**Hon'ble Bachchoo Lal,J.**

(Delivered by Hon'ble Amar Saran, J)

A judgement dated 9.5.2011, passed by the Sessions Judge, Mainpuri convicting the appellant to death sentence under section 302 I.P.C and rigorous imprisonment for 12 years under section 376(2) (f) I.P.C and a fine of Rs. 25,000/, and in default of payment of fine, one year additional sentence, has been challenged by means of this capital appeal, preferred by the appellant. A reference under section 366 Cr.P.C for confirming the death sentence has also been sent by the trial court. The co-accused Awadhesh

was acquitted by the same judgement, under sections 376 and 302/34 I.P.C, against which acquittal a government appeal has also been preferred by the State. But the said government appeal has not yet been admitted nor has any notice been issued to the accused-respondent Awadhesh.

The prosecution case was that Sangeeta aged about 10 years and her younger sister Vineeta aged about 8 years were grazing their goats and bullocks in their field on 15.4.2002. As their goats had strayed into the field of appellant Nem Singh, the appellant and the co-accused Awadhesh strangulated her with an *Angauchha*. When Sangeeta did not return in the night, then her father Ram Autar Singh made an extensive search for her. In the morning Vineeta fearfully disclosed that the appellant Nem Singh and the co-accused Awadhesh had beaten Sangeeta in their field at about 5 p.m. because her goats had entered into their wheat field. They chased Vineeta away along with the goats. The co-villagers Virendra Singh and Ashok Kumar had seen Sangeeta along with the appellant Nem Singh and the co-accused Awadhesh in the field. Her dead body was lying in the field.

The report of this incident was lodged by PW-1, Om Prakash, the uncle of the deceased at the police station

Onchha on 16.4.2002 at 3.30 P.M and a case was registered under section 302 I.P.C at crime No. 96 of 2002 at the said police station by PW-5 HC Sudhir Kumar, who made the necessary G.D. Entry.

PW-4 S.O Swami Dayal in whose presence the FIR was lodged started the investigation of the case. He visited the village Antupur, where the incident had taken place. The corpse of the deceased was lying in the wheat field. After conducting the inquest, he sent the dead body for autopsy along with necessary documents. He recorded the statement of witnesses and conducted the spot inspection. He collected blood stained and plain earth from the place where the deceased was found lying.

The post-mortem was conducted by Dr. Santosh Kumar PW-6 on the dead body of Km. Sangeeta, aged about 10 years, on 17.4.2002 at 3.30 P.M. The death had taken place about two days earlier. The body was average built. *Rigor Mortis* had passed off from all over body. The Body was swollen up. There were blisters present at places, the skin had peeled off, and the features were blotted. The tongue was present between the teeth and was swollen up. The Eyes were bulging in the eye sockets. Conjunctiva was congested, cornea was hazy. Feacal matter was coming out

through the anal orifice .

The following ante-mortem injuries were found:

1. Ligature mark all around neck x 2 cm in width, present 1 cm below thyroid cartilage. The subcutaneous tissues under the mark were ecchymosed. Ligature mark horizontally placed.

2. On examination of external genitals, hymen and vaginal orifice was torn up, blood clot present.

Larynx was congested and tracheal rings broken. Left and right lungs were congested and right side heart was full and left side was empty. Stomach contained semi-digested food. The small and large intestine were half filled with faeces and gases. Liver, spleen and both kidneys were congested, gall bladder was half filled. Bladder was empty. Death was due to asphyxia as a result of ante-mortem strangulation. Dr. Santosh Kumar PW-6 sent the vaginal smear slides to the pathologist.

On 17.4.2002, PW-4 Swami Dayal arrested the appellant Nem Singh, who confessed to his crime and stated that he had strangled the deceased with an *Angaucha*. He had dragged Sangeeta's corpse and hidden it in the field of Jogendra Singh. He had

thereafter taken out the *Angauchha* from the neck of the deceased and hidden it in the “*Samp*” of the public tube well and that he could retrieve the same. The I.O thereafter took the appellant to the tube-well, where he entered the under ground “*Samp*” and took out the *Angauchha* and gave it to the I.O. It had some blood spot on it, and was marked as Ext. 3. The I. O also collected the plain and blood stained earth which were marked exhibits 1 and 2. He also collected the frock and underwear of the deceased which were marked as Exts. 4 and 5. On 28.4.2002, he collected the pathology report. The vaginal smear report of PW-8 Dr. R.D. Yadav showed that the smear slide contained spermatozoa.

PW-7, SI Rajendra Prasad Misra, S.O. Ghiror commenced the investigation of this case on 29.4.2002. He perused the steps for investigation taken by the earlier I.O. On 14.5.2002, he visited the village and recorded the statements of Om Prakash and other persons including Ashok Kumar. On 28.5.2002, he recorded the statement of Ram Naresh. On finding the evidence against the appellant Nem Singh to be sufficient, he submitted a charge sheet

under section 302, 201 and 376(2) I.P.C. on 5.6.2002. On 2.7.2002, after seeking permission from the court, he recorded the statement of Awadhesh, and finding the material against Awadhesh to be sufficient, he submitted a charge sheet against him on 4.7.2002 under sections 302, 376 and 201 I.P.C. Apart from the aforesaid formal witnesses, five witnesses of fact PW-1, Om Prakash (informant), PW-2 Ashok Kumar, PW-3 Km. Vineeta, PW-9, Ram Naresh and PW-10, Meena Devi, mother of the deceased have been examined in this case.

PW-1 Om Prakash has reiterated his FIR and disclosed that on 15.4.2002, his niece Sangeeta aged 9-10 years had gone to their field for grazing her goats. She was accompanied by her younger sister Vineeta. He was present nearby. He left the two girls and had gone to another field, and had asked the girls to later join him there, but when it became evening and the girls did not come to him, he thought that they may have collected the goats and gone home. Before returning home, he even checked the field where the girls were grazing the goats but they were not there. Then he returned home and he met Vineeta and she

told him that the appellant had caught hold of Sangeeta in his field and chased away the goats. It was 5.30 P.M at that time. The co-accused Awadhesh was also present in the field. The whole night he searched for Sangeeta but she could not be found. The next morning at 7.00 A.M, he caught hold of Nem Singh at his field and asked him whether he had seen Sangeeta. At first Nem Singh denied having seen Sangeeta but when the witness threatened him that he would report the matter to the police, then the appellant brought him to the field of Jogendra Singh, where the corpse of Sangeeta was lying. At that time, Germain Singh, Harmukh, Anil Kumar, Ravindra Singh and Ramesh Chandra were present, who had caught hold of Nem Singh. The informant thereafter came home and dictated the report to Sarvesh and handed over the written report to the police. He further mentioned that he had given an earlier report to the police which had been torn up by HC Sudhir Kumar. That report had mentioned that there were injuries on the private part and neck of the deceased. The report contains the name of both Awadhesh and the appellant Nem Singh. He had complained about this

matter to the Collector, Mainpuri, who had sent him to the C.M.O with his complaint. Thereafter, the C.M.O had got the post-mortem conducted by two doctors. After the post-mortem, he had returned home with his daughter's corpse and got her cremated. Then he got the investigation changed.

PW-2 Ashok Kumar had deposed that on 15.4.2002 at about 5 or 5.30 P.M, while returning home after attending to his wheat crops he was passing by the appellant's field, when he saw him misbehaving with Sangeeta. The appellant Nem Singh had caught hold of Sangeeta, who was shouting. When he had admonished him for his conduct with Sangeeta, then out of his fear, the appellant Nem Singh had released Sangeeta. Thereafter PW 2 returned home leaving Sangeeta and her sister Vineeta at the spot. The next day, he learnt that Sangeeta's corpse had been found. He did not disclose the incident of the previous day to anyone as no one asked him about it. The next day, when he returned to Nem Singh's field, he saw the corpse of Sangeeta lying in Jogendra Singh's field and a number of persons were assembled there. Om Prakash had caught hold of Nem Singh. Then he

admonished the appellant Nem Singh for not listening to his previous day's advice and for killing a minor girl. At the time of incident, the deceased was about 9 or 10 years old and Vineeta was about 7 years in age. PW-3, Vineeta aged 7-8 years was examined on 12.5.2003. A preliminary examination of Vineeta was made by the trial judge for satisfying herself that she was in a fit condition to give her statement. Vineeta thereafter deposed that her sister had been murdered during day time. On being asked whether she was at home at that time, Vineeta did not give any reply. She claims to have recognized the appellant and co-accused Awadhesh, who belong to her village. When she was asked whether the appellant and Awadhesh did anything with Sangeeta, she was silent. Then she stated that the appellant Nem Singh alias Moola had beaten her sister with a "Daranti" but when Moola murdered Sangeeta, she was not there. In her cross-examination, when she was asked whether she had seen him beat her sister, she had answered in the affirmative.

PW-9, Ram Naresh deposed that the deceased had been murdered 8 years earlier. After 3 or 4 days of the

incident, he was sitting in the house of Updesh Kumar. The appellant Nem Singh came there and told him that he had committed a mistake as he had murdered Sangeeta and that they should get the dispute compromised. He also disclosed having committed rape on Sangeeta. He claims to have given an affidavit in this regard before the C.J.M (Paper no. 18A/1). He denied having given any statement to the I.O but when confronted with his statement, he stated that he did not know how the statement was recorded. He further stated that only Nem Singh had come to him and he had made no disclosure about Awadhesh. The father of Sangeeta also did not disclose the name of Awadhesh. He admitted that Awadhesh was his nephew by relation.

PW-10 Smt. Meena, mother of the deceased had deposed that on the date of incident, her two daughters had gone to graze their goats at about 12 or 1.00 P.M. Vineeta had returned with the goats but Sangeeta had not come back. Vineeta had told her that the appellant Nem Singh alias Moole had stopped Sangeeta near his field. When Om Prakash had come in the evening, she told him that Sangeeta had been

caught hold of by the appellant. Then the whole night they had made a search for Sangeeta. The next morning they had again made a search. The corpse of Sangeeta was found in the field of Jogendra Singh. There were marks on her neck and some blood was coming out from her private parts and neck. She stated this fact to the I.O but he started shouting and did not let her give this evidence. She later learnt that the appellant had murdered Sangeeta. She denied giving any statement under section 161 Cr.P.C. to the I.O. She further stated in her cross examination that Ashok was her "*chachera Dewar*". On returning from the field, Vineeta had told her about the incident with her sister. Her husband was not present at that time as he had gone out in connection with some invitation. He returned the next day. He learnt that the I.O. had not lodged the correct report.

The appellant Nem Singh denied all the allegations levelled against him in his statement under section 313 Cr.P.C. He claims to have been falsely implicated due to enmity and village *parti-bandi*. He further stated that Ram Naresh and Meena Devi were not eye witnesses of the incident and that they had deposed on the basis of legal advice. Likewise the

other acquitted co-accused Awadhesh also denied the allegation against him in his statement under section 313 Cr.P.C and claims to have been falsely implicated due to enmity and village *parti-bandi*. He further mentioned that Meena Devi had deposed on the basis of advice.

We have heard Sri P.N. Mishra, Senior Advocate along with Sri Rahul Mishra for the appellant and Sri Akhilesh Singh, learned Government Advocate along with Sri Anant Tiwari, learned A.G.A for the State.

Sri P.N. Mishra, learned counsel for the appellant submitted that this was a case of circumstantial evidence and the chain of circumstance was not complete for establishing the complicity of the appellant in this offence. The star witness Vineeta , the younger sister of the deceased Sangeeta could not be relied upon at all and her testimony was of no assistance to the prosecution. Likewise, Ashok Kumar PW-2, who was the *Chachera Dewar* of Meera Devi PW-10, the mother of the deceased and who claims to have been passing on that way at about 5.00 P.M. on the date in question when he saw the appellant misbehaving with Sangeeta. He has also not been relied upon as he did not make any disclosure that he had seen the deceased and her sister along with the appellant on the same evening,

even though a search was being made for the deceased. He claims that Nem Singh was present on the next morning when he reached the field of Jogendra Singh and saw the dead body of Sangeeta and Om Prakash (informant) had caught hold of Nem Singh. Then he reminded Nem Singh of his admonition not to misbehave with Sangeeta the previous evening and complained about what he had done. The evidence of PW-1 that he had caught hold of the appellant the next morning on 16.4.2002 and on his pointing out, the dead body of Sangeeta was discovered from the field of Jogender Singh could not be relied upon as the Investigating Officer clearly deposed that he apprehended the appellant only on 17.4.2002. As a matter of fact the dead body was discovered lying on the field of Jogendra Singh by the witnesses and the appellant was not present at that time. The evidence of PW-9 Ram Naresh, who deposed to the extra judicial confession by the appellant on 28.5.2002 could not be relied upon because the appellant had been arrested within two days of the incident on 17.4.2002 and therefore, he was not available for making such an extra judicial confession to Ram Naresh after 3 or 4 days of the incident. There was also no reason why the appellant could have made the extra judicial confession to

this witness when this witness Ram Naresh was present with Updesh Kumar at the latter's house. His 161 Cr.P.C statement was also belatedly recorded on 28.5.2002. The recovery of *Angauchha* from the *samp* of the public tube-well which is said to have some blood at the ends could not be relied upon as there was no reason for the appellant to have kept the *Angauchha* under the *samp* and it appears to be a plant. Also there is no serologist report that there was any blood on this "*Angauchha*".

The investigation in this case was perfunctory as no effort was made for conducting a smegma test on the penis of the appellant as absence of smegma might have indicated recent intercourse by the appellant. There was no other corroborative circumstance. All the witnesses produced in this case are related and partisan and no independent witnesses were examined. The appellant had been roped in out of suspicion and appear to have been falsely implicated because there is a tendency to nominate someone as an accused when such a crime is committed, because the human mind resists treating a crime as unsolved. For this proposition, learned counsel relied upon the Apex Court decision in *Shankarala Gyarsilal Dixit v. State of Maharashtra*, AIR 1981 SC 765

Learned Government Advocate on the other hand argued that from the F.I.R itself the appellant and the co-accused Awadhesh had been named and no dispute could be raised regarding their identity. There was adequate evidence of last seen of the appellant and co-accused along with deceased Sangeeta and there is recovery of a dead body and *Angauchha* at the instance of the appellant. For some minor defects in the investigation, the prosecution case could not be disbelieved. There was no reason why the appellant had been falsely implicated in this case if they had not committed this grave crime. The chain of circumstance for establishing the complicity of the appellant in this offence is complete.

The points which arise for determination in this case are:

1. Whether it has been established that the deceased had been raped and murdered.
2. Whether identity of the appellant and co-accused Awadhesh have been fixed on the basis of the evidence of last seen and recovery of the body and *Angauchha* at the instance of appellant and the evidence of extra judicial confession.
3. Whether the investigation is reliable and the effect of the nature of investigation.

4. Whether the chain of circumstance is complete and what is the effect of the contention that there was no reason for falsely implicating the appellant and co-accused.
5. Whether the acquittal of co-accused Awadhesh had been properly recorded.

Findings on the points for determination:

A. Whether the deceased had been raped and murdered: Although in this case in the FIR, there was no allegation of rape and even the FIR was registered only under section 302 I.P.C at case crime No. 96 of 2002 on 16.4.2002. However, PW-10 Meena Devi, mother of the deceased claims to have made a complaint at P.S. Kotwali against the I.O for having torn out the first report and also for not taking down the correct report. In this regard the the informant has moved repeated applications. A letter (Ext. Ka-2) to National Human Right Commission, New Delhi was also sent by Om Prakash, which alleges that the fact that the deceased had been raped by the appellant was suppressed. The investigation appears to have been changed and it was admitted by the second I.O. PW-7 R.P. Mishra that the case proceeded on the

basis of the second report. In the inquest also no injury on the private parts of the deceased are noted but it is only mentioned that there was bleeding from the nose and mouth of the deceased. However, the post-mortem report clearly reveals that on the examination of external genitalia the hymen and vaginal orifice were torn and blood clots were present. The pathology examination of the vaginal smear slide by PW-8 Dr. R.P. Yadav also confirmed that spermatozoa was present on the vaginal smear of the deceased. In this background, the allegation of rape stands established. Thus the first circumstance stands established, that this was clearly a case of rape and homicidal death of Sangeeta.

B. Whether the identity of the appellant and co-accused in this crime had been fixed:

It may be noted that even if the initial I.O was disinclined to show this case as a case where rape was committed, as the complainant and his sister-in-law, Meena Devi, the mother of the deceased were insisting. It would not imply that the name of the appellant or the co-accused Avadhesh was being suppressed, as the names of the appellant Nem Singh

and the co-accused Awadhesh are clearly present in the existing FIR. Even if it was presumed that the I.O was trying to help the accused Awadhesh that by itself could not lead to the contrary inference, that the appellant or the co-accused Awadhesh had committed this crime. For coming to a decision on that point the nature of the evidence adduced for connecting the appellant and the co-accused with this crime would still need to be examined.

For fixing the identity of the appellant and the co-accused as authors of this crime, the last seen evidence of Km. Vineeta the 7 or 8 years old sister of the deceased and PW-2 Ashok Kumar has been adduced. We find that no reliance could be placed on the testimony of Km. Vineeta as she claims that the appellant Nem Singh alias Mula had beaten her sister with a *Daranti*, but in the next line she stated that she was not there at that time. Again in her cross-examination she says that she saw the appellant assaulting her sister with a *Daranti*. However, there is no incised injury of *Daranti* on the body of deceased. Also if Vineeta had spoken of the involvement of the appellant and the co-accused in this crime to her mother Meena Devi or to the informant, the witnesses would have first gone to the residence of the

appellant and made enquiries about the deceased, rather than blindly searching for her in the field the whole night.

Likewise, the evidence of Ashok PW-2 on the issue of last seen is not very reliable. He claims to have been passing near the field of Nem Singh at 5 or 5.30 P.M. on the date in question, when he saw Nem Singh misbehaving with Sangeeta who was crying. On his intervention, the appellant Nem Singh had left Sangeeta. On the next day, he claims to have seen the dead body of deceased Sangeeta in the field of Jogendra Singh and to have protested to the appellant Nem Singh as to what he had done and why he had not heeded his advice the previous day to stop misbehaving with Sangeeta. We, however, find that blood was lying on the ground near the head of Sangeeta in the field of Jogendra, where the body was lying. This place was 21 paces from the field of the the appellant Nem Singh. It was more likely that the deceased was murdered in this field of Jogendra itself, instead of her body having been subsequently shifted there, because had the rape taken place in the appellant's field, there was little likelihood of blood being found in Jogendra Singh's field as very little discharge of blood from the nose, mouth and from the vaginal orifice, could be expected in a case of strangulation

and rape. PW 2 Ashok has also not mentioned in his 161 Cr.P.C statement that he was passing by that way after harvesting his crops. He suggested that he had left behind his father and one Virendra Singh and four Mazdoors at the field but none of those witnesses either saw the incident or have come forward to give evidence in this case. More importantly as PW-10, Meena Devi mother of the deceased has stated that Ashok Kumar PW-2 was her *Chachera Dewar*, and even though she was searching for her missing child the entire night, but this witness did not disclose to her at that time that he had seen the appellant misbehaving with the deceased Sangeeta on the same evening. Therefore, reliance cannot be placed on the evidence of last seen of both these witnesses.

In this regard in *State of Orissa v. Brahmananda Nanda*, (1976) 4 SCC 288, it has been held by the Apex Court that non-disclosure of the name of the accused for 1 ½ days after the incident was considered the most important reason for discarding the testimony of the witness when the accused was not a known criminal, and the police officer who was related to the witness had arrived the next day after the incident. Likewise in *Jagir Singh v. State (Delhi)*, (1975) 3 SCC 562, *Alil Mollah v. State of W.B.*, (1996) 5

SCC 369 and in *Maruti Rama Naik v. State of Maharashtra, (2003) 10 SCC 670*, the same view has been reiterated, and doubts have been expressed on the reliability of witnesses who have not disclosed the name of the accused to the bystanders, police or to others at the earliest opportunity even after witnessing the incident.

So far as the discovery of Sangeeta's corpse at the instance of the appellant is concerned, only the informant Om Prakash PW-1 had deposed to this fact that on the day subsequent to the crime at about 7.00 A.M, he had caught hold of Nem Singh on his field, and thereafter Nem Singh had taken him to the spot in Jogendra Singh's field which was at a distance of 21 paces from his field where the dead body was lying. We are of the view that the appellant was unlikely to be present at 7.00 A.M in his field, if he had committed this crime on the previous day. Also according to PW-1 Om Prakash, Harmukh, Anil Kumar and Ravindra had caught hold of Nem Singh, yet none of these witnesses have been examined to support this version. If the appellant had been caught hold of by these persons, he would have been handed over to the police straight way and would not have been arrested on 17.4.2002 by the police from his house. Further, if the informant PW-1 Om Prakash had

lodged the report at 3.30 P.M he would have clearly mentioned therein that the dead body had been discovered at the instance of the appellant, but the report merely mentions that the body was lying in the field. Therefore, this version of the discovery of dead body at the instance of the appellant appears to be concocted.

In *Shankarala Gyarsilal Dixit v. State of Maharashtra*, AIR 1981 SC 765 where the appellant was found sleeping in the Court yard of his house and the corpse of the raped and murdered girl was found in the bathroom of that house, and even the mother and sister had blamed the appellant for the crime, the allegation of the presence of the appellant at that place was disbelieved because the police had arrested the accused the subsequently, and he was not handed over by the witnesses to the police immediately thereafter. A similar situation obtains in the present case, where the appellant is said to have got the corpse of the deceased recovered from the Joginder's field, yet he was arrested by the police from his house on the subsequent day.

We also find it difficult to understand why if the appellant had strangled the deceased with an *Angauchha*, he would unnecessarily untie it, and would have hidden it in the *samp* of the public tube well for getting it discovered before

the police under section 27 of the Evidence Act after being arrested by PW 4 S.I. Swami Prasad, when he could easily have left it on the neck of the deceased. Also if indeed the *Angauchha* contained the blood spot which this witness claims to have seen, we fail to understand why the I.O would not have sent the *Angauchha* to the serologist for confirmation of the blood stain. In these circumstances, this evidence of recovery of *Angauchha* at the instance of appellant appears to be unreliable and the same appears to have been foisted on the appellant only for the purpose of linking him with this crime, in view of the other weaknesses of the prosecution evidence.

Again the evidence of extra judicial confession before PW-9 Ram Naresh does not inspire confidence. Ram Naresh had stated that 3 or 4 days after the crime, the appellant had gone to the house of Updesh Kumar with whom this witness was sitting at that time, when the appellant told them that he had committed a mistake by raping and murdering the deceased and that he should try to get the matter compromised. He has even given an affidavit to this effect before the C.J.M (paper no. 18A/1). He however, disputes the correctness of the statement under section 161 Cr.P.C recorded by the I.O. It is well settled that an extra judicial

confession is a weak kind of evidence and unless there are good reasons for placing implicit reliance on it, or it is corroborated by independent circumstances, it is a tenuous basis for showing the complicity of the accused. In the present case there are no good reasons why the appellant would have gone to the house of Updesh Kumar for the purpose of making this extra judicial confession before PW 9 Ram Naresh and Updesh Kumar. The said Updesh Kumar has also not been produced in Court for supporting this version. Most significantly, this extra judicial confession is said to have been given 3 or 4 days after the incident, whereas the appellant had already been arrested on the second day after the crime. The 161 Cr.P.C statement of this witness, Ram Naresh was also recorded after one and a half months on 28.5.2002. Therefore, we are of the view that this extra judicial confession also does not help in establishing the complicity of the appellant in this crime.

C. The nature of investigation and its effect:

We also feel that the investigation does not appear to have been conducted in a sincere and fair manner. If the appellant after his arrest had been subjected to medical examination as was permissible under section 53 Cr.P.C which

provides for medical examination of the arrested accused by a police officer, if in the opinion of the officer the examination could give some clues about the crime. Then it could have been determined whether there was absence of smegma or presence of the female's epithelial cells on the penis of appellant, which may have been suggestive of recent intercourse, which may have provided some independent corroboration regarding the complicity of the appellant. Some efforts ought also to have been made for examining other witnesses, who have been shown to be present such as Updesh Kumar or Virendra, who had accompanied Ashok Kumar or Ashok Kumar's father or the *Mazdoors*. It appears that too readily the I.O has sought to foist the complicity in this crime on the appellant by possibly fabricating a recovery of an *Angauchha* recovered from the "samp" of the tube-well at the appellant's instance. There was no reason for the appellant untying the *angaucha*, from the neck of the deceased, if indeed it had been used for

strangulating the deceased and for placing it at the point from where its recovery at the instance of the appellant was shown. Again there could have been some corroboration of this claim, if the *Angaucha* which the I.O. claimed showed some blood stains, had been sent to the Forensic Laboratory for confirmation of this fact. But his failure to send the same to the laboratory suggests that the I.O. might have realized that the so called recovered *angaucha* had nothing to do with the crime, and an inference could legitimately be drawn under section 114(g) of the Evidence that the I.O.'s failure in not seeking this evidence from the forensic laboratory suggested that the I.O. realized that this evidence would have been unfavourable to the prosecution, and his claim that the *angaucha* contained blood may not have been confirmed by the serologist. It therefore appears that because the FIR was lodged naming the appellant, the I.O has only proceeded to implicate the appellant without caring to verify from the independent sources

and to analyse all the circumstances and necessary corroborative checks for ascertaining whether the appellant was indeed the author of this crime. This may have been done in order to enable the I.O. to shield himself from criticism by showing that this grave crime had been solved. But where the option in such cases of rape and murder of minor girls is usually the death penalty as has been awarded in this case, we think that the evidence (or the lack of it) adduced in this case is not enough for "snuffing out a life." Great care and circumspection is required for recording in a case such as the present involving the rape and murder of a minor child, where the normal punishment is a capital sentence as opposed to merely a sentence of imprisonment for life. The failures of investigation then cannot be considered as mere defects in the investigation, and inferences cannot automatically be drawn against the accused regarding their complicity in the offence on that basis alone. There is still need to arrive at a finding of guilt on a concrete

evaluation of the quality of the evidence adduced.

D. Whether the chain of circumstances is complete, and the possible reasons for false implication.

1. The 5 golden principles (the *panchsheel*) relating to the law on circumstantial evidence have been aptly enunciated in paragraph 152 in *Sharad Birdichand Sarda v State of Maharashtra, AIR 1984 SC 1622* as follows:

“152(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622)* where the following observations were made :

"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court

can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

The trial judge has recorded 14 circumstances for establishing the complicity of the appellant in this crime. The said 13 circumstances are as follows:

1. Sangeeta and Vineeta had gone to graze their goats in the field.
2. Only Vineeta had returned back with her goats. Sangeeta did not return.

3. Vineeta informed that Mule alias Nem Singh had detained Sangeeta because the goats while grazing had entered in his wheat field.
4. The family members searched for Sangeeta throughout the night. In the morning they apprehended accused Nem Singh and at his instance recovered the dead body of Sangeeta with ligature marks on the neck and signs of rape on her genitals.
5. The dead body of Sangeeta was recovered from the wheat field of Jugendra Singh hidden inside the standing wheat crop at the instance of accused Nem Singh.
6. The field of Jugendra Singh is adjacent to the field of accused Nem Singh.
7. From the place where the rape was committed and to the place where the dead body of Sangeeta was found, the wheat crop was found to be crushed and trodden.
8. The witnesses had seen the accused Nem Singh catching hold of Sangeeta in his field and molesting her. They had asked Nem Singh about that, but as Sangeeta was a child, they thought that Nem Singh might have been playing with her.

9. Accused Nem Singh confessed to his guilt after his arrest and at his instance the police recovered a piece of 'Angochha' from an under ground water tank with blood-stains present on it.
10. The confession of accused Nem Singh followed by recovery of weapon of the murder (the *angaucha*) at his instance is admissible in evidence.
11. The doctor, during post mortem had found the hymen ruptured and ligature marks present on her neck.
12. The vaginal smear of Sangeeta was sent for pathological examination and sperms were found in it.
13. All the witnesses of fact have supported the prosecution version in their testimony. All of them are throughout cogent and consistent during their cross-examination. Their statements have been found trustworthy and reliable by this Court as regards the complicity of accused Nem Singh in this case.
14. None of them (the witnesses) has assigned any other role to accused Avadhesh except his presence in the field in the evening.

Out of these, several circumstances do not point to the complicity of the appellant but only relate to the fact that someone had an opportunity to commit the rape and murder

of the deceased and that the deceased had actually been murdered and also raped. The circumstances which may be used for linking the appellant with this crime would be circumstances 3,4,5,6, 8 and 9.

We have already pointed out the weaknesses of the last seen testimony of PW-3 Km. Vineeta and PW-2 Ashok Kumar regarding detaining of Sangeeta by the appellant because of non-disclosure of this fact on the same evening, because of which a search for the deceased was conducted through out the night, and even no visit was paid to the house of the appellant for inquiring about her whereabouts. Again we have pointed out how the apprehension of the accused Nem Singh the next morning and recovery of dead body at his instance was false as he was arrested not on 16.4.2002 as claimed by the informant PW-2 Om Prakash but he was actually arrested on 17.4.2002 by the police. Also the crime appears to have been committed in the field of Jogendra Singh and not in the field of appellant Nem Singh because of presence of blood near the body in Jogendra Singh's field which was inconsistent with the crime having been committed in the field of Nem Singh and the body being subsequently shifted to the field of Jogendra Singh. The body appears to have been found by the

witnesses themselves in the absence of the appellant and a false case appears to have been foisted on the appellant for having got the corpse discovered.

Likewise, we have expressed a doubt regarding the *Angauchha* being recovered from the public tube-well at the instance of appellant which had blood stains on it by pointing that there was no reason why the appellant would have hidden the '*Angauchha*' there. Also the failure of I.O to send the *Angauchha* for confirming whether the so called blood spot was actually a blood stain casts a doubt on the fairness of the investigation. We have further explained that the extra judicial confession was not reliable and that the investigation appears to be unreliable, and an attempt has been made by introducing these circumstances for buttressing a weak case.

For these reasons we are unable to hold that the chain of circumstances in this case are so complete that they exclude any other hypothesis but the hypothesis of guilt against the accused and that the facts showing the involvement of the accused in this crime are unerringly established, and that this Court can reach the inference that in all likelihood the accused and the accused alone "must" have committed this crime, and not merely that they "may"

have committed the crime, and we are not in agreement with the finding of the trial judge that the circumstances unmistakably point to the complicity of the appellant in this offence.

The reasons for the false implication of the appellant could be one, the need of the police to show that it had worked out this grave crime, so as to avoid public ire. Two, there is a tendency of the human mind when faced with a brutal crime to resist the feeling that the guilt for the same cannot be foisted on someone, which object is accomplished that someone is held liable for a crime usually on the basis of strong suspicion. It would be appropriate to refer to the observations in two Apex Court judgements for meeting this query as to why the witnesses in such cases depose against the accused if he has no hand in the crime.

In *AIR 1981 SC 765 : (1981 Cri LJ 325) Shankarala Gyarsilal Dixit v. State of Maharashtra* it was observed in paragraph 33:

"Our judgment will raise a legitimate query : If the appellant was not present in his house at the material time, why then did so many people conspire to involve him falsely? The answer to such question is not always easy to give in criminal cases. Different motives operate on the minds of

different persons in the making of unfounded accusations. Besides, human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions."

Likewise in AIR 1983 SUPREME COURT 61 "Prem Thakur v. State of Punjab" it has been noted in paragraph 11.

"The High Court could not but be aware of the principle that in a case which depends wholly upon circumstantial evidence, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged. That is to say, the circumstances relied upon as establishing the involvement of the accused in the crime must clinch the issue of guilt. Very often, circumstances which establish the commission of an offence in the abstract are identified as circumstances which prove that the prisoner before the Court is guilty of the crime imputed to him. An a priori suspicion that the accused has committed the crime transforms itself into a facile belief that it is he who has committed the crime. Human mind plays that trick on proof of the commission of a crime by resisting the frustrating feeling that no one can be identified as the author of that crime. In the case before us, there is no doubt that five persons were murdered. Unquestionably, every effort had to

be made to find out who committed those murders. But the duty is not done by holding someone or the other guilty somehow or other. In the instant case, the circumstances attendant upon the incident militate entirely against the conclusion that the five murders were committed by the appellant. The very pattern of the crime belies that conclusion. We are unable to share the High Court's view that the evidence showing "that the appellant was present with the deceased persons on the evening of Nov. 8, 1980 and he was then missing from there on the next morning proves the offences alleged against the appellant beyond any shadow of doubt". (Underlining added)

D. Propriety of the acquittal of co-accused Awadhesh

The trial judge has acquitted the co-accused Awadhesh regarding whom a government appeal has been preferred on the ground that none of the witnesses have assigned any role to Awadhesh except showing his presence at the field on the fateful evening along with the appellant Nem Singh.

Although in the paper filed by Ram Naresh (paper no. 18A/1), PW-9 Ram Naresh had stated that both the accused persons had made an extra judicial confession to him but he denied executing the said paper and submitted that he did not know why Awadhesh's name was mentioned in the

affidavit. In Court he had only named the appellant as the person who had approached him for helping him in getting a compromise effected by the complainant party. He also specifically stated in his cross examination that Nem Singh had not said anything about the presence of co-accused Awadhesh. The father of Sangeeta had also not named Awadhesh as a participant in this crime. These are the additional circumstances for showing the non-involvement of co-accused Awadhesh. The other reasons indicated above regarding the weaknesses in the prosecution testimony apply with equal force to the case of the acquitted co-accused Awadhesh. Therefore, we see no illegality or impropriety in the order acquitting Awadhesh.

In the totality of the circumstances appraised above, we are of the view that the prosecution has failed to garner sufficient reliable material and evidence for establishing the complicity of the appellant and the acquitted co-accused in this crime. The result is that the order of the trial judge convicting and sentencing the appellant as above is set aside. The appellant is in jail. He should be set at liberty unless he is wanted in connection with any other case. However we direct that prior to his release the concerned trial Court shall in accordance with section 437 A Cr.P.C,

require the appellant Nem Singh to execute bail bonds with sureties to its satisfaction enforceable for 6 months for ensuring his presence before the Apex Court in case his appearance is required, if an appeal against this judgment is preferred before it.

Parting remarks: Directions for improving investigations in rape and murder cases.

It is with a sense of anguish that we have been constrained to record a finding of acquittal in this case, which has troubled our conscience immensely. A 10 year old girl child has been brutally raped and murdered. From the first day, the police seemed reluctant to show this crime to be a crime of rape and murder, and have only registered the case as one under section 302 IPC (ignoring section 376 IPC), possibly to avert public criticism that there was a break down of law and order in the area. It was only after the aggressive insistence of the informant and her husband, and approach to the D.M., NHRC and other authorities that the charge of rape was also included. The result was that a close examination of the genitals and other parts of the appellant's body after his arrest on the second day, (i.e. on 17.4.2002) might have shown absence of smegma, or presence of epithelial cells or perhaps even scratch or other

marks or indicators which might have provided support to the prosecution case. Gross negligence was shown by the I.O. in not sending the *angaucha* to the Forensic Science Laboratory for confirming whether it showed any blood stain.

We therefore make the following suggestions:

1. Whenever there is the slightest suspicion (which is probable in the case of the apparently reasonless murder of a little girl child, corroborated by injuries on her body, especially to her private parts) the police should not hesitate in registering the crime also under section 376 IPC, and not show the crime only as a murder.
2. The medical examination by a Registered Medical Practitioner (RMP) of the arrested accused whose examination may provide ground for suggesting his involvement in the rape crime, be got immediately conducted by the Investigating officer, not only in compliance of s. 53 Cr.P.C. (as mentioned above), but also u/s s. 53 A (1) as specifically provided by Act 25 of 2005 for rape related offences.
3. Under s. 53 A (2) Cr.P.C. the RMP shall immediately examine the accused noting the name and address of the accused and the person producing the accused.

Age of the accused, marks of injury on the accused's person, material collected from the accused's person for DNA profiling, details of other material particulars, reasons for conclusions, exact time of commencement or examination. The report has to be forwarded to the I.O and through him to the Magistrate concerned u/s 173(5)(e) Cr.P.C. The "Examination" u/s 53(2), Explanation (vide Act 25 of 2005) includes examination of blood, blood stains, semen, swabs in case of sexual offences and finger nail clippings by the use of modern scientific techniques including DNA profiling and other tests considered necessary by the RMP. A similar procedure for examination of the living victim of rape, subject to her own or guardian's consent, within 24 hours has been provided by s. 164 A (vide Act 25 of 2005).

4. Under section 157(1) proviso, (inserted Criminal Procedure Amendment Act 5 of 2009) the statement of the victim of rape is to be recorded at her residence or a place of her choice, and preferably by a woman police officer in the presence of her parents, guardians, near relatives, or a local social worker.
5. The supervisory Circle or other senior officer should

ensure that the I.O. registers cases where there are reasons to suspect that rape has also been committed also under section 376 IPC and to ensure that the above requirements are strictly observed. It may be pointed out that by newly introduced section 166 A IPC (*vide* CrI. Law Amendment Act 2013) the failure of a public servant to record the rape FIR or wrongly requiring attendance of the victim at the police station can invite a rigorous imprisonment from 6 months extending to two years. The supervising officer must also ensure that modern scientific and forensic techniques are fully utilized in investigations of rape cum murders.

6. By section 173(I A) introduced by Amendment Act 5 of 2009 the investigation with regard to a child rape is to be completed within 3 months of the report at the police station.

These suggestions are additional to the suggestions for making more stringent enforcement of gender sensitive laws and for utilization of modern forensic techniques, increased creation and utilization of DNA facilities especially in rape cum murder cases of girl children that have already been emphasized in two earlier DB decisions in Criminal Capital

Apeal (Jail) No. 2531 of 2010, *Bharo vs. State of U.P.*, decided on 6.9.11, and Capital Case No. 863 of 2011, *Chhotu @ Ajay v. State of U.P.*, decided on 18.4.13, as also the directions issued in the on-going PIL, Crl. W.P. (PIL) No. 1797 of 2011, *Mohd. Qasim v. Union of India and others*, for improving investigations in U.P., and for making investigations gender sensitive, in the order dated 23.5.2013. The copy of the present judgment be also forwarded within a week to the Principal Secretaries, Home and Law, U.P. and to the DGP, U.P. for compliance and for submission of their compliance reports in Crl. W.P. (PIL) No. 1797 of 2011, *Mohd. Qasim v. Union of India and others* on its next listing. The R.G. is directed to place the copy of the present judgment in the said on-going writ petition forthwith. Subject to the aforesaid observations the Capital Appeal preferred by the appellant Nem Singh is allowed and the Reference under section 366 Cr.P.C sent by the trial judge is rejected. The Government Appeal against the acquittal of Awadhesh is dismissed

Order Date :- 9.7.2013

sfa/