RESERVED
AFR

Court No. - 46

Case :- CAPITAL CASES No. - 5 of 2021

Appellant :- Bal Govind Alias Govinda
Respondent :- State of U.P.
Counsel for Appellant :- From Jail,Vinayak Mithal
Counsel for Respondent :- A.G.A.

Hon'ble Manoj Misra,J.
Hon'ble Sameer Jain,J.

(Delivered By Manoj Misra, J)

1. The appellant – Bal Govind alias Govinda was tried in Special Sessions Trial No. 198 of 2020 and by the order of Special Judge, Pocso Act /Additional District & Sessions Judge, Jaunpur dated 06.03.2021 has been convicted under Sections 302, 376 AB, 201, 363 of the Indian Penal Code (for short IPC) and under Section 5/6 of Protection of Children from Sexual Offences Act, 2012 (for short POCSO Act) and, by order dated 08.03.2021, awarded punishment as follows:

(i) Death sentence for offence punishable under Section 302 I.P.C;
(ii) Death sentence for offence punishable under Section 5/6 Pocso Act (as amended by Act No.25 of 2019);
(iii) Seven years R.I. and Rs. 5,000/- fine for offence punishable under Section 363 I.P.C. with a default sentence of one year;
(iv) Seven years R.I. and Rs. 5,000/- fine for offence punishable under Section 201 I.P.C. with a default sentence of one year.

All sentences to run concurrently.

2. As death sentence was awarded, a reference (i.e. Reference No.4 of 2021) was made to the High Court under Section 366 Cr.P.C. for confirmation of death penalty. The appellant, who is in jail, expressing his inability to engage a counsel of his choice, requested for submission of his appeal against the order of

conviction and sentence. As a result, the Superintendent District Jail, Jaunpur wrote a letter to the Secretary Legal Services Authority, Jaunpur to present a Jail appeal on behalf of the appellant. In furtherance whereof, the Secretary, Legal Services Committee, High Court Allahabad, by letter dated March 20, 2021, after examining the claim of the appellant that he was not in a position to engage a counsel to submit his appeal, appointed Sri Vinayak Mithal Advocate from the panel as a counsel to represent the appellant and submit appeal and submissions on behalf of the appellant before the High Court. Whereafter, this appeal against the aforesaid judgment and order of conviction and sentence was reported and registered as Capital Cases No.5 of 2021, and admitted, on 05.07.2021, for hearing.

INTRODUCTORY FACTS

3. (i) The prosecution case was instituted on a thumb marked written application i.e. Exb. Kha-1, dated 08.08.2020, submitted by Kolai @ Bakey Lal i.e. the father of the deceased, which was registered as first information report (for short FIR) (Exb. Ka-3) on 08.08.2020, at 10:30 hrs, at Police Station (for short P.S.) Madhiyahun, District Jaunpur; the Chik FIR reflects the name of the place of occurrence as village Kumbh about 8 km away from the police station. In the FIR, it is alleged: (i) that informant's daughter Reshmi Saroj (the deceased), aged 11-12 years, was enticed away by Musahar Balgovind @ Govinda, a resident of district Chandauli, who stays in his *Sasura*l (in-laws place) at village Kumbh, and Nandu Musahar, a resident of village Kumbh, district Jaunpur, on 06.08.2020 at about 8.00 p.m; (ii) that the informant and his family members were searching for Reshmi but she could not be found; and (iii) that on 08.08.2020, upon information that body of a girl has been found in a Maize field of Munni Lal son of Niranjan, the informant went to the spot, with fellow villagers, and found the body of his daughter (Reshmi). The FIR was registered for offences punishable under Sections 363, 302 and 201 I.P.C. against the

appellant and Nandu Musahar. The inquest proceeding as per the record commenced on 08.08.2020 at about 16.30 hrs and completed by 19.00 hrs. Inquest report (Exb. Ka-1) was prepared by Ramdavar Yadav (PW-7). Inquest witnesses were Kolai Saroj (informant); Sonu Saroj; Sushil Saroj (PW-3); Pradeep Kumar (PW-4); and Ramakant Saroj. In the inquest report it was observed that the body of the deceased had a blue colour Kurti and a torn dirty white colour undergarment. The body and the clothes were sealed and sent for post-mortem / forensic examination. Sample of bloodstained earth and plain earth from where the body was recovered was taken and a memo was prepared on 08.08.2020 by Prabhari Nirikshak Trivenilal Sen (PW-11). On 09.08.2020, at about 3:35 pm, autopsy was conducted by Doctor Ashok Kumar Baudhist (PW-9) and an autopsy report (Exb. Ka-5) was prepared.

(ii) According to the autopsy report, following anti-mortem injuries were noticed: Contusion over mouth, nose, cheek and chin. In addition to above, whole body was found swollen with skin peeling off; foul smell present; putrefaction started; and maggots coming out. Whole vagina, labia majora, minora including clitoris were found swollen and hymen was found old healed ruptured. Two vaginal smear slides and swab were prepared and handed over to the constable. The estimated time of death was three days before. Mouth was found half open; larynx, vocal chords and hyoid bone was found intact. Oesophagus, trachea, bronchial tree, pleura cavities, etc were found congested and it was noticed that the skin of the abdomen was peeling off. Stomach contents had semi digested food; small intestine had gases; and large intestine had gases with faecal matter. According to the Doctor, the cause of death was due to asphyxia as a result of anti-mortem smothering and throttling.

(iii) The appellant was arrested on 09.08.2020 from village Bisauli in district Chandauli. On his confession to the police that he had been wearing the same dress which he had worn at the time of the incident, the lower half of his dress was taken and sealed for

forensic examination.

(iv) An undated report (Paper No. 25 Ka-2) of Forensic Laboratory, U.P., Ramnagar, Varanasi was obtained in respect of: (a) bloodstained earth and plain earth lifted from the spot where the body of the deceased was found; (b) lower half garment of the accused; (c) slide and swab; and (d) dress pieces of the victim. The chemical examination of the bloodstained earth, slide and the dress pieces of the deceased disclosed presence of blood. There was human blood found on the slide and the clothes of the deceased whereas the blood found in the mud had disintegrated therefore, its nature could not be determined. The lower half garment of the accused did not show presence of blood and all the samples examined did not show presence of spermatozoa or semen.

4. The investigation was conducted by Trivenilal Sen (PW-11) but charge-sheet (Exb. Ka-6) was submitted by Ghanshyam Shukla (PW-10). The appellant alone was charge-sheeted whereas the other accused Nandu Mushar was exonerated.

5. The Special Judge, Pocso Act /First Additional Sessions Judge, Jaunpur framed charge of offences punishable under Sections 363, 302, 201, 376 A B I.P.C. and Section 5/6 Pocso Act against the appellant. The appellant denied the charges and claimed for trial.

PROSECUTION EVIDENCE

6. On commencement of the trial, the prosecution examined the following witnesses:-

(i) **PW-1-** Pooja i.e younger sister of the deceased and daughter of the informant - Kolai. Her deposition was recorded on 12.01.2021. Her age in the statement is recorded as about 6 years old. She stated on oath that she does not remember the date of the incident; that on the date of the incident she and her elder sister (Reshmi) were on way to the Bazaar when Govinda (the appellant) bought her a toffee and sent her back and he went away with her

elder sister; that she knows Govinda, who does brick baking work; that her sister went with Govinda and never returned; that her mother searched for her sister in the night but her sister could not be found; that in the morning, villagers found her sister's body in a maize field, then her father and mother got information; that her father thereafter went to the police station to inform the police about death of her elder sister; that a number of policemen had come and had taken the body of her sister; that the police had asked her about her elder sister going with Govinda; and that Govinda killed her sister.

In her cross-examination, she stated that she is not literate and she does not know her age.

No further question was put to her.

It be noted that this witness does not disclose the time when she allegedly went with her sister (the deceased) and the accused (the appellant) and was offered a toffee.

(ii) **PW-2-** Chandrabali. He stated that Kolai Saroj (i.e. deceased's father) was his *pattidar*. He narrated the prosecution story that the appellant took the deceased at about 7 pm for toffee; that at that time her younger sister was with her; that the appellant sent back her younger sister after getting her toffee, etc. He stated that the appellant is a resident of district Chandauli; that Nandu Musahar is his *Saala* (wife's brother); that the appellant is of bad character; and that in connection with his work of brick baking appellant resides with his wife's brother (Nandu Musahar).

In his cross-examination held on 12.1.2021, he stated that the deceased (i.e. his niece) and her family resided separate; that in connection with his work as a welder, on a daily basis, he goes to Jaunpur in the morning, where he works there from 10 am, and returns back home by 6 pm. His work place is about 18 km away.

In his cross-examination held on 19.1.2021, he stated that he neither met Govind @ Govinda (the accused) nor Kolai (deceased's

father) on 6th; that on 8th he came to know about the death of Kolai's daughter while he was going to Jaunpur, between 9 and 9.30 am; that on getting the information he went to the spot, where already 100-150 people were there and the police had arrived and, by that time, it must have been 10 am; that the police had taken the body in a vehicle; that the villagers had staged a protest demanding the body back but the body was handed over on the next day from the mortuary; that at the time the villagers were making protest, none seemed to be informed as to how the deceased died. He further added that Govinda (the appellant) is addicted to liquor but denied the suggestion that because he used to take liquor, Govinda has been named. He admitted that he does not know as to how Kolai's daughter died.

(iii) **PW-3-** Sushil Kumar. In his statement-in chief, he stated that on 06.08.2020, his fellow villager's (i.e. Kolai's) daughter-Reshmi, aged 11 years, was enticed away by Balgovind who used to stay at his *Sasural* (Nandu Mushar's house); that Balgovind had lured Reshmi under the pretext of getting her a toffee and thereafter he took her to Munni Lal's maize field where he committed rape on her and strangulated her and also poured acid on her so that she could not be recognized; that PW-3, as well family members of Reshmi, searched for her but she could not be found; that on 08.08.2020, in the morning, her body was discovered in the field of Munni Lal; that information of recovery of the body was given by PW-3 to the police; that the police arrived at the spot and, on the same day night, the police arrested the appellant from Chandauli where the appellant has his house; that information about appellant's arrest was given by the police; that PW-3 has witnessed the inquest proceeding.

In his cross-examination, he stated that though he had received information that Kolai's daughter had gone missing but, as a village Pradhan, he had not given any information to the police as he suspected that she might have gone somewhere and would return. But when she did not return, on the next day, by dialling 112,

information was given. Later, he changed his version and stated that on 06.08.2020 itself he gave information to the police regarding involvement of Balgovind @ Govinda by dialling 112. He stated that on 06.08.2020, he saw Balgovind taking away Reshmi.

In his cross-examination, held on 08.02.2021, he stated that on 08.08.2020 he received information about the incident at about 6 am. On receipt of information he immediately went to the spot and within next 10 minutes, the police also arrived. He stated that the police conducted inquest proceeding and took away the body. His signatures are there on the inquest report.

It be noted that this witness does not disclose the time when he saw the appellant (accused) with the deceased or her sister.

(iv) **PW-4** - Pradeep Kumar. He stated that he, with others, had been searching for the girl. In the morning, on information, he went to the spot to find her dead. He witnessed the inquest proceeding.

In his cross-examination, he admitted that he is not a witness of the incident. First, he stated that the inquest was carried out at the place where the body was recovered but, immediately, thereafter he stated that it was held at the police station.

(v) **PW-5** - Head Constable Dev Kumar Yadav. He stated that he was posted at P.S. Madhiyahun on 08.08.2020; that, in the morning, he received information that at village Kumbh, missing girl's body has been found; that, upon receipt of the information, he took the Panchayatnama register, other papers, materials and left for the spot with constable Satyam Singh, lady constable Mamta and Sub Inspector Ramdawar Yadav; that the Sub Inspector completed inquest proceeding and sealed the body in a kit-bag which was handed over to him and constable Satyam Singh for being taken to the mortuary; that on 09.08.2020, the body was handed over to the doctor at the mortuary and till the time the body was handed over to the doctor, it was kept secured and no one was able to even touch it.

In his cross-examination, he stated that he had reached the spot at 9.30 am and that he does not remember the exact time by which they had brought the body to the police station.

(vi) **PW-6** - Dilip Kumar @ Ajay: He stated that he has a Kirana Shop; on 06.08.2020, at about 7 pm, when he was about to close his shop, Govinda @ Balgovind (appellant) came to his shop with one girl and purchased a packet of biscuit worth Rs. 5, at that time, he could not recognize the girl but, later, when the body was recovered he came to know that that girl was Kolai's daughter (Reshmi) who had come to the shop with the appellant. He stated that ordinarily his shop remains open till 8 pm but due to lockdown directions, his shop had to be shut by 7 pm.

In his cross-examination, he improved his statement by stating that both daughters of Kolai had come to his shop at that time and that Govinda (appellant) had purchased salted snacks, toffee and biscuit also, and had sent back the younger daughter, after giving her toffee, and had taken Reshmi with him. He stated that he cannot tell as to where Govinda had taken Reshmi. Only the third day, he came to know that the girl who was with him has been murdered. He stated that he could not decipher the age of the girl who was there as it was evening time but Kolai's daughter, who was murdered, was there with Govinda at that time. He denied the suggestion that he is telling a lie.

(vii) **PW-7** - Ramdawar Yadav. He stated that information of the murder, upon discovery of the body, was received from Kolai i.e. father of the deceased-Reshmi, at 10.30 am, on 08.08.2020. Whereafter, on registration of the FIR, he along with head constable Dev Kumar, constable Satyam Singh reached the spot where a number of persons had gathered. He proved the inquest report.

In his cross-examination, he stated that inquest proceeding started at 4.30 pm and was completed by 7 pm.

(viii) **PW-8** - Mahendra Tiwari. He stated that he was posted at P.S.

Madiyahun as a constable on 08.08.2020; on that day, at about 10.30 am, Kolai @ Bankelal son of Banke Saroj had brought a written report and, thereafter, he had put his thumb impression on the report, by using the Ink pad taken from him, and gave the same to the Station House Officer (SHO). On the direction of the SHO, a chik FIR was prepared and entry was made on the computer. A free copy was delivered. He proved the chik FIR, which was marked as Exibit Ka-3, and the GD entry of the report, which was marked as Exb. Ka-4.

In his cross-examination, he stated that there were 4-5 persons with Kolai Saroj. The report was not written in front of him. The FIR was submitted to the SHO and on his direction, the report was entered. He denied the suggestion that the time mentioned in the FIR is not the correct time of lodging the report. He also denied the suggestion that information about the incident was received at the police station from some other person.

On court's order dated 17.02.2021, PW-8 was again produced on 20.02.2021 to prove the thumb impression of Kolai on the written report, which was marked Exb. Kha-1.

(ix) **PW-9** - Dr. Ashok Kumar Baudhist. He disclosed that he had conducted the autopsy on 09.08.2020. He proved the contents of the autopsy report.

On 03.03.2021, PW-9 was again examined on the order of the Court dated 01.03.2021. He stated that on internal examination of the vagina, labia majora/ minora, clitoris of the deceased, upon finding swelling, old healed ruptured hymen, two vaginal slide smear were taken to confirm whether she was sexually assaulted. He stated that they were sent to forensic laboratory Lucknow but he has not seen the forensic report.

(x) **PW-10** - Ghanshyam Shukla. He stated that he took over charge of P.S. Madiyahun on 16.08.2020 and took over investigation of the case. After collecting the materials and

examining the papers in respect of the investigation already carried out, he submitted charge-sheet under his signature against Balgovind @ Govinda S/o Ram Lal Banwasi, R/o Village Pura, P.S. Sakaldiha, district Chandauli, which was exhibited as Exb Ka-6. He proved the dispatch of the plain and blood stained earth, undergarment of the accused, clothes of the victim and slides prepared at the time of the autopsy for forensic examination.

In his cross-examination, he stated that it was his predecessor who had sent the material for forensic examination and by the time he submitted charge-sheet, the forensic examination report had not been received. He stated that he did not send any reminder letter to the forensic laboratory.

(xi) **PW-11** -Triveni Lal Sen. He stated that upon registration of the case, he carried out investigation; that when he had arrived at the spot, a large number of people had already gathered; that Sub-Inspector Ram Dawar Yadav and S.I. Deepti Singh were ordered to proceed with the inquest; after completion of the inquest proceeding, body was sent for post-mortem; that, on the same day, he recorded the statement of the scribe of the FIR, namely, constable Mahendra Tiwari, and Kolai (the informant); that, on the same day, he also prepared site plans (Exb. Ka-7 and Exb. Ka-8) on the directions of the informant and lifted samples of bloodstained and plain earth from the spot where the deceased's body was found; that, thereafter, he conducted search/raid/operation to apprehend the accused and, on 09.08.2020, he arrested the accused from Bisauli Mushar Basti; that, on 10.08.2020, he recorded statement of witnesses Pooja Saroj (PW1) and Sonu Saroj; that on 12.08.2020 he recorded statement of Dr. Ashok Kumar Baudhist; clarificatory statement of Kolai; and statements of Sushil Kumar, Ramakant, Pradeep Kumar, etc; and on 14.08.2020, he prepared the memo of dispatch of the materials for forensic examination.

In his cross-examination, he stated that in the written report there were two accused, one Bal Govind @ Govinda (the appellant)

and the other was Nandu **(**Bal Govind wife's brother) but as no sufficient evidence was found against Nandu, his name was removed from the accused column. He denied the suggestion that to save Nandu, the appellant has been framed. He also denied the suggestion that the accused Balgovind @ Govinda had left village Kumbh since before the date of the incident to go to his native village and has been falsely implicated.

In addition to above, the court examined head constable Shailendra Kumar Yadav, as a court witness **(CW-1)**, who stated that the informant Kolai @ Bankelal died on 21.09.2020 regarding which, a death certificate was provided by the Gram Pradhan of the Gram Panchayat concerned.

7. After closure of the prosecution evidence, incriminating material emanating from the prosecution evidence was put to the accused-appellant for recording his statement under Section 313 Cr.P.C.The accused-appellant in his statement under Section 313 Cr.P.C. denied the incriminating material against him; claimed that he has been framed to save the real culprit; and that the witnesses have falsely deposed against him due to enmity.

SUMMARY OF TRIAL COURT FINDINGS

8. The trial court found the following circumstances against the accused-appellant proved: (i) that the deceased was aged below 12 years; (ii) that on 06.08.2020, the accused took the deceased under the pretext of getting her a toffee, which is established by the testimony of PW1; (iii) that PW1 also accompanied them up to a distance but was sent back by the accused after getting her a toffee; (iv) that PW-6 is an independent witness from whose shop the accused purchased toffee, etc for the deceased and PW1; (v) that the deceased was last seen alive with the accused when he purchased toffee etc for her and her sister (PW1) and thereafter the deceased did not return; (vi) that in the morning of 08.08.2020 deceased's body was recovered from a maize field about one and one-half km away; (vii) that the post mortem examination disclosed

ruptured hymen and smothering which indicated that she was ravished and then murdered; (viii) that the accused resides at his *Sasural* at village Kumbh, namely, the village where the incident took place, but ran away to district Chandauli from where he was arrested on 09.08.2020; (ix) that all these circumstances, in absence of explanation, complete the chain to rule out all other hypothesis than the conclusion that the accused took the deceased and her sister (P.W.-1) by offering them toffee, sent back her sister (PW1), ravished the deceased and then killed her. Upon finding that the accused was aged 25 years and the deceased was aged below 12 years, concluded that the case warranted a death penalty.

9. We have heard Sri Vinayak Mithal for the appellant; Sri Amit Sinha, learned A.G.A., for the State; and have perused the record.

SUBMISSIONS

10. Sri Vinayak Mithal, on behalf of the appellant, submitted as follows:

(a) The contents of the FIR cannot be read in evidence because its author was not examined. Thus, the testimony of the witnesses examined during the course of trial can draw no support from the FIR.

(b) That from the testimony of PW-2, PW-3 and also PW-7, it is clear that the police had arrived at the spot, when the body was found, much before 10 am in the morning, that is before the lodging of the FIR, and a large number of people had gathered, which is suggestive of the fact that prosecution case was developed to ward off pressure on the police to solve the case. Therefore, the prosecution story is a cooked up story just to solve out the case.

(c) That the forensic examination of the lower garment of the accused did not disclose presence of blood or spermatozoa and there is no DNA matching report linking the appellant with any incriminating material recovered from the spot or from the body or clothes of the victim.

(d) That the evidence of the appellant being last seen alive with the deceased provided by PW-1; PW-3; and PW-6 does not at all inspire confidence for the following reasons:-

(i) PW-1 is a child witness, aged 6 years, and before recording her statement the Court did not adopt precautionary tests to ascertain whether she understands the gravity of her statement and was a competent witness. Otherwise also, PW-1 did not remember the date of the incident. She also did not disclose the time when she was in the company of the accused and her elder sister (the deceased). Further, her statement is not in sync with the prosecution case as, according to the prosecution case, body of the deceased was found two days after she went missing whereas, according to her, next day, in the morning, body was found. She also appears tutored because even though she is not a witness of any act of assault on her sister by the accused but she states that her sister was murdered by the accused. Therefore, in absence of corroboratory evidence of her mother or father, that could have supplied meaning to her disjointed thoughts in reference to the facts in issue, not much reliance can be placed on her testimony. Further, she is a vulnerable illiterate child who does not even know her age as could be gathered from her statement in cross-examination and, above all, whether she had accompanied the deceased up to the toffee shop, on that fateful day, is neither disclosed in the FIR, allegedly lodged by her father, nor in the site plan prepared at the instance of her father by the police.

(ii) PW-3, though in his cross-examination states that he saw appellant taking away the deceased on 06.08.2020 but does not disclose the time when he saw them together. Therefore, his testimony is inconsequential. Further, he stated that he gave information to the police by dialling 112 but the same is not confirmed by the police. Moreover, his testimony is not confidence inspiring inasmuch as at one stage he states that he did not consider it necessary to report about the girl having gone missing as he

thought that she might return; whereas, at another stage of his statement he stated that he had reported to the police by dialling 112.

(iii) In so far as the testimony of PW-6-Dilip Kumar is concerned, his testimony does not inspire confidence inasmuch as in his statement-in-chief, he only says that Govinda (i.e accused-appellant) had come with a girl whom he could not recognise whereas, during cross-examination, he improves upon his statement to state that Govinda had come with two girls, one was sent home after getting her a toffee, etc. and the other girl, he took away. This improvement in his testimony suggests that there was a deliberate attempt on his part to show the presence of the other girl also, as he had failed to disclose her presence in his statement-in-chief. Other than that, it appears from his statement that he could not recognise the girl though, later, after the body was recovered, he thought that it was that girl. His testimony thus appears to be a mixture of guess work, knowledge and thought therefore, it is not of much value.

(e) That the entire prosecution evidence is silent as to whether any effort was made to find out the victim at the house of Nandu Musahar with whom the appellant allegedly resided. Moreover, the prosecution has suppressed a vital witness, namely, the mother of the deceased, who could have thrown light on the issue whether PW-1, or any body else, had given information at home that the accused-appellant had taken the deceased.

(f) That the delay in lodging even a missing report, and lodging of FIR only after arrival of police on spot, on discovery of the body, proves fatal to the prosecution case. Because, if there had been information as to with whom the deceased had left on 06.08.2020, on her having not returned home, missing report would have been lodged earlier and the informant would not have waited till the discovery of her daughter's body. Thus, nobody saw the accused-appellant taking the deceased.

(g) Even assuming that the deceased had been with the accused

during any time of that day, in absence of evidence that the place from where the body was recovered was in close proximity to the place where she was last seen alive with the accused, nothing much turns on that evidence, particularly, when the body was recovered two days later. Therefore, intervening circumstances, such as involvement of some other person, cannot be ruled out. Under the circumstances, the chain of circumstances is not complete as to rule out all other hypothesis than the guilty of the appellant.

(h) The view of the court below that the appellant had absconded is incorrect because he was arrested from his native village on 09.08.2020, next day of recovery of the body and lodging of the FIR; and there is nothing on record that there was any declaration under section 82 CrPC.

(i) The forensic reports do not confirm rape or the involvement of the appellant to link the appellant with the crime.

(j) In the alternative, it was submitted that even assuming that the appellant was guilty of the offence, it is not a case, rarest of rare in nature, warranting death penalty.

11. **Per contra,** Sri Amit Sinha, learned A.G.A., submitted that PW-1 though may be a child witness but no question has been put to her to discredit her testimony. A child witness is as much a competent witness as any other witness unless the Court considers that the child is unable to understand the nature of his or her deposition. Once, the court proceeds to record the testimony of a child witness it could be presumed that the court considers the child as a competent witness and therefore the testimony of the child would have to be tested on its own merit and it cannot be discarded merely because it comes from a child. He submits that PW-1 has not been cross-examined on relevant particulars, namely, that she had accompanied the accused and her elder sister (the deceased) up to the toffee shop whereafter she was not seen alive; and that the accused sent her back after giving her a toffee. As this particular part of her statement has not been subjected to cross-examination, it

would be deemed to be correct and therefore her subsequent statement that in the morning her sister's body was found would not render her statement unreliable because she doesn't specifically say that body was found on the next day morning. Moreover, her testimony finds corroboration from the testimony of PW-6. Further, the autopsy report indicates that the death probably occurred three days before, meaning thereby, that it could have taken place in the night of 06.06.2008 when the deceased was last seen alive with the accused and, therefore, the burden was on the accused to explain whether he parted company with the deceased. As no explanation was offered by the accused, his conviction is justified. He further submits that the statement of some of the prosecution witnesses that the police had arrived early morning is not sufficient to discredit the FIR because the inquest report carries the details of the case number registered pursuant to the FIR including the name of the person who had given the information to the police. He submits that even assuming that the vaginal smear did not disclose presence of spermatozoa that, by itself, would not be sufficient to discard the charge of rape as the hymen was found ruptured and there was swelling on the private parts. He, therefore, submits that the conviction of the appellant is justified and since it is a case of rape and murder of a minor by luring her with a toffee, the death penalty awarded should be confirmed.

ANALYSIS

12. Before we proceed to weigh the rival submissions and analyse the evidence on record, we may remind ourselves that we are dealing with a case based on circumstantial evidence. It is well settled that to sustain a conviction, where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and

they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of circumstances so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused **(vide Hanumat Govind Nargundkar & Anr. V. State of Madhya Pradesh, AIR 1952 SC 343; Sharad Birdhichand Sarda V. State of Maharashtra, (1984) 4 SCC 116).** In **Vijay Shankar V. State of Haryana, (2015) 12 SCC 644,** the Supreme Court following its earlier decisions in **Sharad Birdhichand Sarda (supra)** and **Bablu V. State of Rajasthan, (2006) 13 SCC 116,** in respect of a case based on circumstantial evidence, held that *"the normal principle is that in a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established; that these circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation of hypothesis other than that of the guilt of the accused and inconsistent with their innocence"*.

13. Ordinarily, the circumstance of the deceased being last seen alive with the accused may alone not be sufficient to record conviction (v**ide Nizam V. State of Rajasthan, (2016) 1 SCC 550; Navneetakrishnan V. State, (2018) 16 SCC 161; and Kanhaiya Lal v. State of Rajasthan, (2014) 4 SCC 715)**. But, it is an important link in the chain of circumstances that would point towards the guilt of the accused with some certainty. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person

other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is long gap and possibility of other persons coming in between exists (**vide State of U.P. V. Satish, (2005) 3 SCC 114)**. Similar is the view taken in **Ramreddy Rajesh Khanna Reddy & Another V. State of A.P., (2006) 10 SCC 172**, where, following the decisions in **State of U.P. V. Satish (supra)** and **Bodhraj V. State of J & K, (2002) 8 SCC 45**, in paragraph 27 of the judgment, it was held that *"the last seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. Even in such cases the courts should look for some corroboration."*

14. Bearing in mind the legal principles noticed above, we now proceed to analyse the evidence to find out whether the prosecution is successful in its endeavour of proving the appellant guilty. Before we proceed to analyse the testimony of the prosecution witnesses we must bear in mind that this is a case based on the last-seen theory explained above. Other than that there is no eye witness account of the offence or recovery of incriminating material or forensic evidence to link the appellant with the crime.

15. In this case, the last seen theory has been applied by the prosecution on the basis of the testimony of P.W-1; P.W.-3 and P.W.-6.

16. P.W.-1 is a child aged six years. On her competence as a witness an objection has been taken by the learned counsel for the appellant by stating that the court below did not put questions to her to test her mental understanding with regard to the duty of speaking the truth; and have straight away proceeded to record her statement.

17. In ***Rameshwar Vs. State of Rajasthan: AIR 1952 SC 54*** it

was held that every witness is competent unless the Court considers he is prevented from understanding the questions put to him, or from giving rational answers by reason of tender years, extreme old age, disease whether of body or mind, or any other cause of the same kind. It was held that there is always competency in fact unless the court considers otherwise. The court observed that it is desirable that judges and magistrates should always record their opinion that the child understands the duty of speaking the truth and state why they think that, otherwise the credibility of the witness may be seriously affected, so much so, that in some cases it may be necessary to reject the evidence altogether. But whether the Magistrate or Judge really was of that opinion can be gathered from the circumstances when there is no formal certificate. It was observed that as a matter of prudence a conviction should not ordinarily be based on the uncorroborated evidence of a child witness. It was further observed that the rule is not that corroboration is essential before there can be a conviction but as a matter of prudence there is necessity of corroboration except where the circumstances make it safe to dispense with it. The Court, however, cited with approval observations made by the Privy Council that it is not to be supposed that any judge would accept as a witness a person who he considered was incapable not only of understanding the nature of an oath but also the necessity of speaking the truth when examined as a witness.

18. In ***Panchhi and others Vs. State of U.P. (1998) 7 SCC 177*** it was observed that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others tell him and thus a child witness is an easy prey to tutoring. In ***Dattu Ramrao Sakhare and others Vs. State of Maharashtra (1997) 5 SCC 341*** it was observed that a child witness if found competent to depose to the facts, and is reliable, such

evidence could be the basis of conviction. Even in the absence of oath the evidence of a child witness can be considered provided that such witness is able to understand the question and able to give rational answers thereof. In ***Suryanarayana Vs. State of Karnataka (2001) 9 SCC 129*** it was observed that if the child witness stood the test of cross-examination and there is no infirmity in her evidence, in absence of any allegation of tutoring or using the child witness for ulterior purposes of the prosecution, it can be relied upon as the basis for conviction. In that case the sole witness was a girl aged four years at the time of the incident and six years at the time of her deposition before the trial court. In ***Suresh Vs. State of U.P. (1981) 2 SCC 569***, the Apex Court made certain observations with regard to the child psychology. It was observed that children, in the first place, mix up what they see with what they like to imagine to have seen and besides, a little tutoring is inevitable in their case in order to lend coherence and consistency to their disjointed thoughts which tend to stray. In ***State of U.P. Vs. Ramesh and another (2011) 4 SCC 786*** it was held that every witness is competent to depose unless the court considers that he is prevented from understanding the question put to him, or from giving rational answers by reason of tender age etc. Only in case there is evidence on record to show that a child has been tutored, the Court can reject his statement partly or fully. An inference as to whether child has been tutored or not, can be drawn from the contents of his deposition.

19. From the decisions noticed above, the legal principle deducible is that a child witness is as much a competent witness as any other witness but, as a rule of prudence, before recording the testimony of a child, the court must undertake an exercise to find out whether the child understands the duty of speaking the truth. Where such an exercise is not done it may be presumed that the witness was competent to testify though, from the contents of his or her deposition, an inference may be drawn whether the testimony is an outcome of tutoring.

20. Bearing in mind the aforesaid legal position, we may now proceed to examine and evaluate the statement of PW-1. PW-1, a child aged six years, is put by the prosecution to utilise the last seen theory to draw conviction by proving that on the date of the incident, PW-1, the deceased and the appellant were together and that the appellant sent back P.W.-1 after getting her a toffee while he took away the deceased with him; whereafter, the deceased was not seen alive. Noticeably, PW-1 has not been questioned by the court to record its opinion whether PW-1 understands the duty of speaking the truth, yet, PW-1 has been administered oath. Assuming that there is a presumption that judicial and official acts are regularly performed, we, now, proceed to evaluate the merit of PW-1's testimony. PW-1 does not speak of the date and time when she was with her sister (the deceased) on way to the Bazaar and was offered a toffee by the appellant. Though she stated that since thereafter her sister is missing but, assuming that we accept the testimony of this witness as it is, in absence of disclosure of the date and time when she was with the deceased and the appellant, it could be anybody's guess whether she is referring to the date and time relevant to the fact in issue or of some other day and time when she might have been offered toffee by the accused-appellant. No doubt, she opens her narration by relating it to the date of the incident but, unless the day is qualified by the time also, it would be unsafe to come to a definite conclusion as to whether her testimony would fit in the scheme of events justifying a conclusion that thereafter, the deceased was not seen alive by any one who may have had in normal course of events opportunity to see the deceased. This we say so, because in absence of disclosure of date and time in the testimony of PW-1, her statement leaves the Court guessing whether she had been with the appellant and the deceased during noon or after noon or any other time of that day which may not be relevant to the fact in issue. It could also be possible that the two girls might have been together in the noon or afternoon of that day and might not have had the opportunity to see each other thereafter.

Likewise, it could also be possible that the two girls, as PW-1 statement is, might be on way to the Bazaar when the appellant met them and got her a toffee. This possibility gains probability from the circumstance that it is not the case of P.W.-1 that she and her sister (the deceased) were taken by the accused-appellant from home to have toffee. Of course, more meaning could have been lent to P.W.-1's testimony had her mother or father been examined to pin point as to when she returned after having toffee and informed her parents about the appellant having taken her sister (the deceased) with him. But, unfortunately, neither father nor mother of PW-1 has been examined. At this stage, we may observe that if, in her testimony, P.W.-1 had disclosed the name of the toffee vendor, then, probably, from the statement of that toffee vendor, we could have made an effort to figure out the time when she was with the accused-appellant and her deceased sister. But since she has not disclosed as to from whose shop the appellant got her a toffee, the time when she was allegedly with the deceased and the appellant cannot be fixed from the testimony of P.W.-6, particularly, when no evidence has been led to demonstrate that there is no other toffee seller in the village than P.W.-6. Thus, on a careful scrutiny of her testimony, notwithstanding that she was not subjected to multiple questions in her cross-examination, we find very little in her statement on the basis of which we may conclude that the deceased was last seen alive in the company of the appellant on or about the evening /night time of 06.08.2020.

21. The statement of PW-3 is equally inconsequential to carry the last seen theory forward as he also does not disclose the time as to when he saw the deceased in the company of the appellant.

22. Now, comes the statement of P.W.-6, the shop keeper, for evaluation. He, in his statement-in-chief, speaks of the accused-appellant visiting his shop with one girl whom he could not recognise though, later, when the body of the girl was recovered he could connect it with that girl. In his cross examination, he improves his

stand and says that on that evening there were two girls with Govinda (accused-appellant) at his shop and both were daughters of Kolai (informant); one, he sent back after giving her toffee, etc and the other he took away. PW-6 could not tell in which direction the accused-appellant went with that other girl. Further, in his cross examination, he stated that on the third day he came to know that the girl which Govinda had brought to his shop was killed. When asked about the age of the girls, he stated that it had turned dark and, therefore, he could not guage the age of those girls. When we read his statement as a whole, it appears to us that he is not certain that Govinda was with that girl who had died though he thinks so from the subsequent turn of events. Keeping in mind that PW-6 makes a material improvement in his statement during the course of cross-examination, as noticed above, as also that his deposition is based more on his thoughts than knowledge, PW-6's testimony does not inspire our confidence to record with conviction that the accused-appellant was with the deceased in the evening/night of 06.08.2020. Such an evidence may, at best, create suspicion but would not partake the character of proof.

23. Having found the evidence of the deceased being last seen with the accused-appellant in the evening of 06.08.2020 not convincing, we shall now notice another aspect of the matter. None of the witnesses state that in the evening/night of the date of the incident or the day following the incident, they made a search at the house of Nandu Musahar with whom, allegedly, the accused used to reside. There is also no evidence that during the search for the victim, Nandu Musahar was questioned by any of the fellow villagers with regard to the whereabouts of the accused-appellant. Noticeably, PW-1 states that in the evening her mother had made a search for her sister. PW-1 does not make a statement with regard to her father joining her mother in that effort. Importantly, it does not appear from the statement of investigation officer (PW-11) that he recorded the statement of victim's mother. Admittedly, the father of the victim,

namely, the informant, expired and was not examined and so was the mother of the victim, even though it has not come on record that she has also died. Further, there is no eye witness account of the rape/murder and there is also no eye witness account of the accused-appellant having been seen near the spot where the body was found, either with, or without, the deceased, on or about the probable time of death of the deceased. Under these circumstances, though the prosecution could succeed in proving that the first information report was lodged but, the witnesses examined by the prosecution, in absence of examination of the first informant or his wife, could not establish with certitude the allegation in the FIR that the deceased was taken by the appellant on 06.08.2020 at about 8.00 p.m. And, in any view of the matter, the prosecution evidence could not complete the chain of circumstances to prove the guilt of the accused-appellant by excluding all other hypothesis.

24. We may now examine the matter from another angle that is whether the allegations made in the FIR were on the basis of own knowledge of the informant or were made at the instance of the police on strong suspicion to solve out a sensitive case. In this regard, it be noticed that according to the police witnesses the FIR was lodged at about 10.30 AM on 08.08.2020. But, from the statement of PW-3, Susheel Kumar, the village Pradhan, made during the course of cross examination, it appears that he received information of recovery of the body at about 6 AM and immediately thereafter he went to the spot and, within 10 minutes, the police also arrived. Further, from the statement of PW-2, Chandra Bali (uncle of the deceased), made during the course of his cross examination on 19.01.2021, on August 8, 2020 while he was going to Jaunpur in connection with his work, between 9-9.30 AM, on getting information in respect of discovery of the body, he went to the spot where already 100-150 people had gathered and the police had arrived. He stated that by that time it must have been 10 AM. He stated that the villagers had staged a protest and were demanding the body back

and at that time none seemed to have information as to how the deceased had died. PW-5, Head Constable Dev Kumar Yadav, in his cross-examination, stated that he had reached the spot at 9.30 AM and that he does not remember the exact time by which they had brought the body to the police station. PW-4, Pradeep Kumar, the witness of the inquest proceeding, during his cross examination, initially stated that the inquest was carried out at the place where the body was recovered, but, immediately thereafter, stated that it was held at the police station. PW-8, Mahendra Tiwari, who had been a Constable at P.S. Madiyahun and had entered the written report in the General Diary, during his cross examination, stated that there were 4-5 persons with Kolai Saroj (the informant); the report was not written in front of him; the FIR was submitted to the SHO; and on his direction, the report was entered. A suggestion was put to him that the time mentioned in the FIR is not the correct time of lodging the report and that information about the incident was received at the police station from some other source/person. Though, he denied both the suggestions but from the circumstances emanating from the evidence discussed above, it is clear that information about discovery of the body of the victim in a Maize field of Munni Lal was received early in the morning of August 8, 2020 whereas, the FIR was lodged after the police had arrived at the spot. Assuming that the police, on an informal information in respect of discovery of a body, had arrived even before the FIR was registered, what is relevant is that 100-150 people who were there at the spot were not aware about the genesis of the crime and were protesting. Thus, there must have been immense pressure on the police to solve out the case. When we bear all this in mind, we apprehend that the accused appellant was named on mere suspicion, and not on evidence, to solve out the case, particularly, when neither a missing report nor an FIR was lodged till after expiry of few hours from the discovery of the body, even though, allegedly, the victim had been missing since the evening of 06.08.2020. Our apprehension expressed above, could have been dispelled if the informant or his

wife in their testimony had explained the delay in lodging the report. But as neither the informant nor his wife has been examined, the delay is fatal to the prosecution case, particularly, when there is no convincing and clinching substantive evidence on record.

25. Another circumstance that now remains to be considered, which has been found incriminating by the trial court, is, whether by his conduct in leaving the village Kumbh i.e. the place of incident and going to Chandauli, the accused appellant had reflected a guilty mind. In this regard, the prosecution evidence is that the accused-appellant in connection with his work had been residing with his *Saala* (brother in law) Nandu at village Kumbh but, after the incident the accused-appellant escaped to his native village in district Chandauli, from where he was arrested on 09.08.2020. It is the prosecution case that this conduct reflects a guilty mind. This evidence, firstly, by itself is not sufficient to record conviction; secondly, there is nothing on record to show that any one had noticed the accused-appellant leaving the village in the night of the incident or soon thereafter; thirdly, it has not been shown that the accused-appellant had evaded arrest raids or summons or warrants and that coercive processes had to be issued to secure his arrest; and, fourthly, the appellant was arrested from his own house in district Chandauli, where his presence was natural. Thus, in absence of any clinching evidence that he was seen in the night leaving the place from where the body was recovered or seen running away from the village soon after the alleged crime, merely because the accused-appellant was arrested on the next day from his own village is not a determinative factor from which we may infer that the accused-appellant held a guilty mind.

26. Having noticed, discussed and analyzed the entire prosecution evidence, we are of the firm view that the prosecution evidence may, at best, give rise to a suspicion against the appellant but fails to prove the circumstances of a conclusive nature and tendency from which we may, with certitude, hold that the accused

has committed the crime. At this stage, we may remind ourselves of the observations made in paragraph 153 of the celebrated judgment in **Sharad Birdhichand Sarda's case (supra)** where it was observed that the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established. The court while laying emphasis on the above legal principle relied on a judgment of the Supreme Court in **Shivaji Sahabrao Bobade and another v. State of Maharashtra, (1973) 2 SCC 793** where it was observed "*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*." The aforesaid legal principle was noticed and reiterated by a three-judge Bench decision of the Supreme Court in **Devi Lal v. State of Rajasthan, (2019) 19 SCC 447** wherein, in paragraphs 18 and 19 of the judgment, it was held as follows:-

> *"18.On an analysis of the overall fact situation in the instant case, and considering the chain of circumstantial evidence relied upon by the prosecution and noticed by the High Court in the impugned judgment, to prove the charge is visibly incomplete and incoherent to permit conviction of the appellants on the basis thereof without any trace of doubt. Though the materials on record hold some suspicion towards them, but the prosecution has failed to elevate its case from the realm of "may be true" to the plane of "must be true" as is indispensably required in law for conviction on a criminal charge. It is trite to state that in a criminal trial, suspicion, howsoever grave, cannot substitute proof.*
>
> *19. That apart, in the case of circumstantial*

evidence, two views are possible on the case of record, one pointing to the guilt of the accused and the other his innocence. The accused is indeed entitled to have the benefit of one which is favourable to him. All the judicially laid parameters, defining the quality and content of the circumstantial evidence, bring home the guilt of the accused on a criminal charge, we find no difficulty to hold that the prosecution, in the case in hand, has failed to meet the same."

27. For the foregoing reasons, we have no hesitation in holding that the prosecution has failed to prove the charges for which the accused-appellant was tried and, therefore, the judgment and order of the court below is liable to be set aside. As a result whereof, the reference to affirm the death penalty is rejected. The appeal of the appellant is **allowed**. The judgment and order of the trial court is set aside. The appellant is acquitted of all the charges for which he has been tried and convicted. The appellant shall be released from jail forthwith, unless wanted in any other case, subject to compliance of the provisions of 437-A Cr.P.C. to the satisfaction of the trial court below.

Let a copy of this order along with the record be sent to the court below for information and compliance.

Order Date :- 18.11.2021
Sunil Kr Tiwari/AKShukla