SUPREME COURT OF INDIA

Aftab Ahmad Anasari

Vs.

State of Uttaranchal

Crl.A.No.836 of 2005

(J.M.Panchal and T.S.Thakur JJ.)

12.01.2010

JUDGEMENT

J.M.Panchal, J.

1. The appellant and one Mumtaz were prosecuted for commission of rape and murder of Yasmeen aged five years daughter of Nayeem Ahmad and for causing disappearance of evidence of those offences. The learned Additional District and Sessions Judge, First FTC Court, Nainital, by judgment dated January 7, 2004, rendered in Sessions Trial No.252 of 1998, convicted the appellant and Mumtaz under Sections 302, 376 and 201 of Indian Penal Code (IPC) and 2 imposed penalty of death sentence for commission of offence punishable under Section 302 IPC as well as R.I. for life for commission of offence punishable under Section 376 IPC and a fine of Rs.10,000/- in default R.I. for one year and R.I. for seven years and a fine of Rs.5,000/- in default R.I. for one year for commission of offence punishable under Section 201 IPC.

2. Feeling aggrieved, the appellant and Mumtaz preferred Criminal Appeal No. 36 of 2004 whereas Reference made under Section 366 of the Code of Criminal Procedure by the learned Additional Sessions Judge in view of death sentence passed against both the accused was registered as Criminal Reference 1 of 2004 before the High Court of Uttaranchal at Nainital. The Division Bench of the High Court, by judgment dated December 17, 2004, has rejected the Reference and partly allowed the appeal by acquitting accused Mumtaz but affirmed the conviction of the appellant under Sections 302, 376 and 201 IPC. The death penalty awarded to the appellant for commission of offence punishable under Section 302 IPC is modified and the appellant is sentenced to R.I. for life for commission of the offence punishable under Section 302 IPC. The High Court has further maintained sentence imposed on the appellant under Sections 376 and 201 IPC. The confirmation of the conviction of the appellant under Sections 302, 376 and 201 IPC by the High Court and imposition of different punishments for those offences, has given rise to the instant Appeal by Special Leave.

3. Mr. Nayeem Ahmad is resident at Mundia Pistor Village, Bajpur, District Udham Singh Nagar, Uttaranchal.

> "His daughter Yasmeen aged five years having fair complexion and round face, wearing frock, underwear and sleepers was playing near his house at about 5.00 p.m. in the evening of February 5, 1998. It was noticed that she was missing from the place where she was playing and, therefore, Nayeem Ahmad made frantic search about Yasmeen at the places of all his relatives but she could not be traced. As search made by him did not yield any result, he filed a missing report on February 6, 1998 at Bajpur Police Station mentioning, inter alia, that his daughter had disappeared while playing near his house and, therefore, steps be taken to trace her out. On February 8, 1998, Report (Exhibit Ka.2) was lodged at Bajpur Police Station by Shamim Ahmad who is real brother of Nayeem Ahmad stating, inter alia, that Yasmeen aged about five years daughter of his elder brother Nayeem Ahmad while playing near the house of Nayeem Ahmad had disappeared at about 5.00 p.m. in the evening of February 5, 1998 for which Nayeem Ahmad had lodged a missing report at the Police Station, but at about 6.00 a.m. on February 8, 1998, her dead body was found lying on the public way in front of the house of Haji Khursheed, son of Bashir Ahmad of village Bajpur and, therefore, legal action be taken. On receiving this information, concerned police personnel reached the place where dead body of the deceased was lying. The inquest on the dead body of the deceased was held and necessary arrangements were made for sending the dead body for post mortem examination. The post mortem examination was carried out on February 8, 1998. The examination revealed that the deceased was subjected to rape and thereafter strangulated. On February 9, 1998, the Investigating Officer, on the basis of the information given by the informer, arrested both the accused persons under Sections 302, 376 and 201 IPC. While in custody, the appellant and Mumtaz made disclosure statements to the Investigating Officer pursuant to which the appellant discovered one frock with blood marks, one white cotton underwear with black stripes having blood stains and one bed sheet of light green colour with plenty of blood marks from the house of sister of the appellant. The articles discovered were seized under a panchnama and sent to forensic science laboratory for analysis. The Investigating Officer recorded the statement of those persons who were found to be conversant with the facts of the case. On receipt of report from the analyst and on completion of investigation, the appellant and Mumtaz were charge- sheeted in the Court of learned Judicial Magistrate, First Class for commission of offences punishable under Sections 302, 376 and 201 IPC.
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> The offences punishable under Sections 302 and 376 IPC are exclusively triable by a Court of Sessions.
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> Therefore, the case was committed to the Court of learned Additional District and Sessions Judge, Nainital for trial.

The learned Judge framed necessary charges against the 6 appellant and Mumtaz for commission of offences punishable under Section 302, 376 and 201 IPC. The same were read over to them. They pleaded not guilty to the same and claimed to be tried. Therefore, prosecution examined seven witnesses and produced documentary evidence to prove its case against the appellant and Mumtaz. After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellant and Mumtaz the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statement as required by Section 313 of the Code of Criminal Procedure, 1973. In the further statements, the appellant and Mumtaz pleaded ignorance in respect of certain facts whereas in relation to some other facts their claim was that they were false. The appellant and Mumtaz had expressed desire to examine defence witnesses which was granted by the learned Judge. The appellant, therefore, examined DW1, Ms. Bilkis and DW2, Lakhbinder Singh alias Lakha in defence. The learned Judge noticed that the case was entirely resting upon circumstantial evidence. After holding that the deceased died a homicidal death, the learned Judge appreciated the evidence and held that four circumstances, namely, that (1) both the accused were seen by PW-3, Naseed Ahmad, at about 4.30 a.m. on 8.2.1998 fleeing away from near the place where the dead body of deceased Yasmeen was found after some time; (2) on the disclosure statement made by the appellant, blood stained frock and underwear of the deceased and blood stained bed sheet were recovered; (3) underwears of both the accused, seized, were stained with human blood and semen; and (4) extra- judicial confession was made by the appellant before PW-5, Anand Swaroop, are firmly established, to bring home guilt of the accused under Sections 302, 376 and 201 IPC. The learned Judge noticed that the chain of circumstances established was complete, cumulative effect of which was indicating that in all human probability, the offences were committed by the appellant and Mumtaz and by none other.

In view of abovementioned conclusions, the learned Judge convicted the appellant and Mumtaz under Section 302, 376 and 201 IPC. Thereafter, the learned Judge heard the appellant and Mumtaz on the question of sentence to be imposed on them for commission of abovementioned offences. The learned Judge noticed that this was the rarest of rare case falling within the purview of guidelines laid 2000 SC 177 and imposed death penalty on both the accused for commission of offence punishable under Section 302 IPC. The learned Judge further imposed punishment of R.I. for life and a fine of Rs.10,000/- and in default R.I. for one year for commission of offence punishable under Section 376 IPC. The learned Judge further imposed sentence of R.I. for seven years and a fine of Rs.5,000/- and in default R.I. for one year for commission of offence punishable under Section 201 IPC by judgment dated January 7, 2004. The imposition of death sentence resulted into Criminal Reference under Section 366 of the Code of Criminal Procedure, 1973. The appellant and Mumtaz also being aggrieved by the judgment of the Trial Court preferred Criminal Appeal No.36 of 2004 before the High Court of Uttaranchal at Nainital. The reference and appeal were heard together. The High Court on re-appreciation of evidence came to the

conclusion that three circumstances were proved by the prosecution, namely, (1) both the appellants were seen by PW3, Naseem Ahmad at about 4.30 a.m. on February 8, 1998 fleeing from near the place where the dead body of the deceased was found; (2) blood stained frock and underwear of the deceased and blood stained bed sheet were recovered pursuant to voluntary disclosure statement made by the appellant; and (3) extra judicial confession was made by the appellant before PW-5, Anand Swaroop. The Division Bench by judgment dated December 17, 2004 has partly allowed the appeal. The High Court has set aside the conviction of Mumtaz recorded by the Trial Court but confirmed the conviction of the appellant recorded by the Trial Court under Sections 302, 376 and 201 IPC. The High Court has further modified the sentence of death imposed on the appellant for commission of offence punishable under Section 302 IPC and awarded R.I. for life whereas sentences awarded for commission of offences punishable under Sections 376 and 201 have been confirmed."

4. This Court has heard the learned counsel for the parties and considered the documents forming part of the appeal. It is relevant to notice that the prosecution has not claimed that the rape and murder of the deceased was witnessed by anyone and no direct evidence regarding the same is adduced before the court. Admittedly, the whole case against the appellant rests on circumstantial evidence.

"The law relating to circumstantial evidence is well settled.

In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion howsoever strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of legal proof. However, it is no derogation of evidence to say that it is circumstantial.

Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail.

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

any reasonable ground for 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. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court. If the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case."

5. Having noticed the relevant principles governing a case based on circumstantial evidence, this Court proposes to consider the question whether the case against the appellant is proved. The appellant, at the time of incident was in his early 20's. He is resident of village Patia Nagla, P.S. Gatpur, Tehsil Thakurdwara, District Muradabad. His sister Ms. Bilkis, DW-1, was married to Kabir Ahmad of village Bajpur where the first informant is residing. The appellant used to visit and stay at the house of his sister. It may be mentioned that the Trial Court was of the view that four circumstances mentioned above were proved by the prosecution.

6. The fact that deceased Yasmeen was subjected to rape and died a homicidal death is not disputed before this Court by the appellant. This fact stands amply proved by the reliable testimony of Dr. J.S. Rawat, who performed autopsy on the dead body of the deceased and contents of post mortem produced at Exhibit Ka.5.

7. Similarly the fact that naked dead body of deceased Yasmeen with injuries was found lying at about 6.00 a.m. on 8.2.1998 in front of the house of Haji Khursheed is amply borne out from the trustworthy testimony of PW-1, Nayeem Ahmad, PW-2, Shamim Ahmad, inquest report Exhibit Ka.4 etc.

8. According to the Sessions Court and the High Court, one of the incriminating circumstances proved by the prosecution is that witness Naseem Ahmad had seen the appellant and another fleeing from near the place where the dead body of the deceased was found lying at about 4.30 am on February 8,1998. The learned counsel for the appellant submitted that the only witness produced by the prosecution to prove this circumstance is PW-3, Naseem Ahmad but the said witness does not speak of any source of light and his

silence of not telling this fact to the Investigating Officer at the time of holding of inquest is most unnatural and, therefore, the High Court had erred in placing reliance on his evidence. Elaborating this argument, it was submitted that the statement of Naseem Ahmad under Section 161 was recorded on February 9, 1998 after the arrest of the appellant and Mumtaz was effected and he does not say that he had seen the accused carrying dead body or dropping any object in front of the house of Haji Khursheed. It was pointed out that he is a close relative of the complainant who asserted that before the report of recovery of dead body was lodged by Shamim, he had told Nayeem and Shamim that he had seen the appellant and Mumtaz running away from near the place where the dead body was found lying but no such fact was stated in the report made by witness Shamim Ahmad and, therefore, his claim that he had seen the appellant fleeing from near the place where the dead body was found lying should have been disbelieved. What was stressed was that according to the said witness, he and Jakir were going to jungle for answering the call of nature and seen the appellant entering into the house of his sister but for the same reason, the appellant could have been out of his sister's house and, therefore, the appellant entering into the house of his sister could not have been treated as an incriminating circumstance. What was claimed was that neither this circumstance sought to be relied upon by the prosecution stands proved beyond doubt by witness Naseem Ahmad nor the same can be characterised as an incriminating circumstance and, therefore, the same should be ignored while appreciating the evidence against the appellant.

9. So far as the circumstance, namely, that the appellant and Mumtaz were seen fleeing away from near the place where the dead body of the deceased was lying is concerned, this Court finds that the prosecution has relied upon the testimony of PW2, Naseem Ahmad. After mentioning that younger daughter of his brother Nayeem had disappeared on February 5, 1998, the witness has mentioned that in the morning of February 8, 1998 at about 4.30 a.m. he himself and one Jakir were going towards jungle and when they reached near the house of Haji Khursheed, they had seen the appellant and Mumtaz running from near the house of Haji Khursheed and entering into the house of Kabir. It may be stated that Kabir is brother-in-law of the appellant, i.e., husband of Ms. Bilkis who is sister of the appellant.

> "The witness has claimed in his evidence that he was knowing Aftab, i.e., the appellant and Mumtaz before the incident. According to this witness, when they came back from the jungle at that time, they learnt that on the same day, dead body of daughter of Nayeem Ahmad was found near the house of Haji Khursheed.
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> This witness was subjected to searching cross- examination by the defence. In his cross examination, the witness stated that his house was located after two houses from the house of Haji Khursheed. According to him Jakir who is his brother-in-law had come to his house from village Mudia Kalan. During this cross-examination, the witness also explained that Jakir was real brother-in-law of Nayeem and, thus, deceased was niece of Jakir. What was maintained by the said witness was that both of them had proceeded to jungle at about 4.30 a.m. for answering the call of nature and had seen the appellant and Mumtaz while they were going to jungle. According to

this witness, the Investigating Officer had recorded his statement on the next day of recovery of the dead body. It was further stated by this witness in his cross-examination that the deceased was missing since February 5, 1998 whereas her dead body was found on February 8, 1998. The witness has further mentioned that by the time they had come back from the jungle, the dead body had already been found and one missing report was written on February 6, 1998 which was scribed and lodged by Shamim after the dead body was found. It was stated by him that he was not present at the time of writing of the report by Shamim but before the report was written, Shamim and Nayeem were told by him and Jakir that they had seen the appellant and Mumtaz running away from near the place where the dead body was lying. The witness further mentioned in his cross- examination that the report was scribed after arrival of sniffer dog called by the police. It was explained by the witness that sniffer dog had been brought at 7.30 a.m. The suggestion made by the defence that he had not seen anyone running away from near the place where the dead body was lying and was deposing falsely on account of relationship with Nayeem was emphatically denied by him."

10. A fair reading of the evidence tendered by this witness makes it evident that though he is relative of Nayeem, he has stated the facts seen by him in a simple manner and without any noticeable embellishments. If this witness wanted to implicate the appellant falsely in the case because of his relationship with the first informant, nothing prevented him from stating before the police and the court that he had seen the appellant carrying the dead body of the deceased and throwing the same near the house of Haji Khursheed.

11. However, this Court finds that he has not made any false claim/exaggeration in his testimony at all and stated that he had seen the appellant fleeing from near the place where the dead body was lying. The reason as to why in the early morning he was out of his house is stated by him, which this Court finds to be most natural. It could not be even remotely suggested by the defence that a constructed latrine was available in the house of witness Naseem Ahmad and, therefore, it was not necessary for him to move out of his house in the early morning of February 8, 1998 to go to jungle for answering call of nature. What is relevant to notice is that at the time when this witness had seen the appellant running away from near the place where the dead body was found, he had not learnt that the dead body was already found. Further, his house is located after two houses from the house of Haji Khursheed and the house of Ms. Bilkis, who is sister of the appellant and with whom the appellant was residing at the relevant point of time, is quite near to the house of Haji Khursheed. Therefore, the claim made by the witness that he had seen the appellant hurriedly entering the house of his sister sounds probable.

"No major contradiction and/or omission with regard to his earlier statement recorded before the police nor any other material could be brought on record by the defence to impeach his credibility. Merely because Shamim did not refer to the fact that he was told by Naseem Ahmad that Naseem Ahmad had seen the appellant running away

from near the place where the dead body was lying in his report to the police, cannot be a ground to disbelieve this witness.

The learned Judge of the Trial Court who had advantage of observing demeanour of this witness has found the witness to be truthful. The assertion made by the witness that the appellant and Mumtaz were known to him could not be disputed by the defence at all. It was claimed by this witness in terms before the Court that he had seen the appellant running away from near the place where the dead body was lying. When it was stated by the appellant that he had seen the appellant running away from near the place where the dead body was lying, it was for the defence to suggest that in the early morning of February 8, 1998, no source of light was available and, therefore, he could not have seen the appellant so running away. However, this Court finds that even remotely it was not suggested to the witness that there was no source of light and, therefore, he could not have seen the appellant running away from near the place where the dead body was lying. The plea that this witness maintained silence at the time when the inquest on the dead body of the deceased was held and did not tell the Investigating Officer that he had seen the appellant running away from near the place where the dead body was lying would indicate that he had not seen the appellant running away, is merely stated to be rejected. The occasion for this witness to tell the Investigating Officer that he had seen the appellant running away from near the place where the dead body was lying would arise only when the Investigating Officer was to record his statement under Section 161. The basic purpose of holding inquest on the dead body is to ascertain prima facie the nature of death and to find out whether there are injuries on the dead body or not. The inquest punchnama cannot be treated as statement of the witness recorded under Section 161 of the Code of Criminal Procedure wherein he is supposed to narrate the facts seen by him. Therefore, it is not true to say that he had maintained silence and had not told the Investigating Officer at the time of holding of the inquest that he had seen the appellant running away from near the place where the dead body was lying. The so called silence on the part of this witness cannot be considered to be unnatural at all nor the same makes this testimony doubtful in any manner. It is true that the appellant who was staying in the house of his sister cannot be said to have committed any unnatural conduct by entering into the house of his sister. However, it is not the case of witness Naseem Ahmad that he had seen the appellant calmly entering into the house of his sister.

What is mentioned by the witness is that he had seen the appellant running away from near the place where the dead body was found and hurriedly entering house of his sister.

The `running away' part attributed to the appellant could not be explained by him. In his further statement, it could not be explained by the appellant as to what made him running away from near the place where the dead body was found and hurriedly entering into the house of his sister.

> On reappraisal of the evidence of this witness, this Court finds that neither the Trial Court nor the High Court committed any error in placing reliance on the testimony of this witness for coming to the conclusion that one of the incriminating circumstances, namely, that the appellant was found fleeing from near the place where the dead body was found lying was satisfactorily proved."

12. Another circumstance sought to be relied upon by the prosecution is that the appellant had made voluntary disclosure statement pursuant to which blood stained clothes of the deceased were discovered. The disclosure statement was made by the appellant in presence of PW4, Rais Ahmad. To prove the recovery of clothes of the deceased, the prosecution has relied upon the testimony of two witnesses, namely, PW4, Rais Ahmad and PW7, Praveen Kumar Tyagi, the Investigating Officer. PW4, Rais Ahmad has stated that on February 8, 1998 Police had come to village Bajpur at about 3.30 p.m. and they had brought with them the appellant and Mumtaz. According to this witness, he and Lakhvinder Singh were standing at the place where the appellant was brought by the police. It is mentioned by the witness that police had called him and Lakhvinder Singh and asked them to accompany them. What is stated by the witness is that the appellant and Mumtaz led them to the house of Kabir and the appellant took out one sleeveless frock, one underwear and one green coloured bed sheet from the foodgrains room of the house of Kabir. The witness further stated that the abovementioned articles were kept hidden under the leaves and after taking out those articles, the appellant had told that these were the clothes of Yasmeen which he had concealed. It was further stated by the witness that seizure memo was prepared by the Investigating Officer on the spot and his signature was obtained thereon after it was read over to him. The witness identified his signature on the memo (Exhibit Ka.3). In his cross-examination, the witness stated that Shamim who is his elder brother was brother-in-law of the complainant.

> "According to this witness, the appellant used to live in the house of his sister. What was mentioned by the witness was that Shabnam, daughter of sister of the appellant, was of the age group of Yasmeen and he was not remembering correctly whether Kabir, i.e., brother-in-law of the appellant was living with his family in the house from which the appellant had taken out the clothes of the deceased. It was mentioned by the witness that the sniffer dog had first smelt the dead body and then the said dog had entered into house of Kabir and picked up the appellant. It was further stated by the witness that the dog did not pick up Mumtaz and after the smelling by sniffer dog, the police had arrested the appellant and Mumtaz in his presence. What is testified by the witness is that many persons had gone up to the police station and he had also gone to the police station where his signatures were obtained on Exhibit Ka.3 at about 4.00 p.m. The suggestion made to the witness by the defence that no clothes were recovered in his presence and that he was deposing falsely was emphatically denied by him."

13. The testimony of Investigating Officer makes it more than clear that after arrest, the appellant had made disclosure statement and willingness to show the place where the clothes of the deceased were concealed by him.

“This fact is also mentioned in Exhibit Ka.3 which was prepared contemporaneously. According to the Investigating Officer, he had made efforts to summon local witnesses from Akari Pistor but none had agreed to be a witness and, therefore, Rais Ahmad and Lakhvinder Singh were summoned to be panch witnesses on way to the place to be pointed out by the appellant where he had concealed the clothes of the deceased. According to this witness, the appellant and Mumtaz led the police party and the appellant took out clothes of the deceased, i.e., blood stained frock and underwear as well as one bed sheet from Kuria meant for storing foodgrains. The witness further stated that clothes of the deceased and bed sheets were kept in the western corner of the room. The witness also informed the Court that underwears of both the accused were seized and they appeared to be stained with semen at some places.

The argument that witness Rais Ahmad has not stated about the disclosure statement at all and, therefore, discovery of the clothes of the deceased should be disbelieved cannot be accepted. As explained by the Investigating Officer, the appellant and Mumtaz had made disclosure statement when they were at the police station.

The said fact is mentioned in the document prepared contemporaneously. As explained by the Investigating Officer, he had made efforts to summon two independent witnesses to act as panchas but none had shown willingness to do so and, therefore, he had requisitioned services of Rais Ahmad and another on way to the house of sister of the appellant from where the clothes of the deceased were recovered. The contention that that part of the disclosure statement showing that recovered frock and underwear were of the deceased and the bed sheet was one over which rape was committed cannot be read in evidence has no substance. In the leading case of Pulukuri Kottaya admissible in a disclosure statement has been explained by the Privy Council giving illustration as under :

"The statements to which exception is taken in this case are first a statement by accused No.6 which he made to the police sub-Inspector and which was reduced into writing, and is Exhibit "P." It is in these terms :

`The mediatornama written at 9 a.m. on 12.1.1945, in front of Maddineni Verrayya's choultry and in the presence of the undersigned mediators.

Statement made by the accused Inala Sydayya on being arrested.

About 14 days ago, I Kotayya and people of my party lay in wait for Sivayya and others at about sunset time at the corner of Pulipad tank.

We, all beat Beddupati China Sivayya and Subayya, to death. The remaining persons, Pullayya, Kotayya and Narayana ran away.

Dondapati Ramayya who was in our party received blows on his hands.

He had a spear in his hands. He gave it to me then. I hid it and my stick in the rick of Venkatanarasu in the village. I will show if you come. We did all this at the instigation of Pulukuri Kotayya.' (Signed) Potla China mattayya.

(") Kotta Krishnayya.

12th January, 1945. (Sgd.) G. Bapaiah, Sub-Inspector of Police.

The whole of that statement except the passage "I hid it (a spear) and my stick in the rick of Venkatanarasu in the village. I will show if you come" is inadmissible. In the evidence of the witness Potla China Mattayya proving the document the statement that accused 6 said "I Mattayya and others went to the corner of the tank-land. We killed Sivayya and Subayya" must be omitted.

A confession of accused 3 was deposed to by the police Sub-Inspector, who said that accused 3 said to him :

`I stabbed Sivayya with a spear, I hid the spear in a yard in my village.

I will show you the place."

The first sentence must be omitted. This was followed by a Mediatornama, Ex.Q.I, which is unobjectionable except for a sentence in the middle, `He said that it was with that spear that he had stabbed Boddapati Sivayya,' which must be omitted."

Thus, the part of the disclosure statement, namely, that he was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place.

The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the appellant pursuant to the voluntary disclosure statement made by the appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and, therefore, the recovery of the clothes should not be treated as an incriminating circumstances is devoid of merits. First of all, what is relevant to notice is that in the missing report, it was mentioned by Nayeem Ahmad that his daughter aged five years, who was wearing frock and underwear, was missing from near the house while playing.; Thus, the wearing of the frock and underwear was mentioned by the father of the girl at the first available opportunity. The statement by Nayeem, PW1, as well as statement made by Shamim, PW2, that there were no clothes on the dead body of the deceased

has gone unchallenged. Naturally, therefore, it was necessary for the Investigating Officer to find out as to where the clothes put on by the deceased were concealed.

What is relevant to notice is that Ms. Bilkis who is sister of the appellant and who is examined as DW1 mentioned in her testimony before the Court that the police had taken into custody the clothes belonging to her daughter Shabnam. However, the record of the case shows that the frock and the underwear recovered from the house of Ms. Bilkis pursuant to disclosure statement made by the appellant were blood stained. It was never the case of Ms. Bilkis that the frock and underwear recovered or seized by the police were blood stained and belonged to her daughter Shabnam. Further, the clothes were recovered pursuant to the voluntary disclosure statement made by the appellant on February 9, 1998 whereas Ms. Bilkis made claim that the clothes, which belonged to her daughter, were recovered and seized on September 30, 2003 when she was examined by the appellant as one of the defence witnesses. If the police had seized the clothes belonging to her daughter, Ms. Bilkis would not have maintained tacit silence for roughly about more than five years and would have made grievance before higher police officers or court within reasonable time.

A bare reading of her testimony makes it more than clear that she had come to depose before the Court to save the appellant who is her real brother and stated wrong facts for the first time before the Court. Her case that the police personnel had given 2 to 4 blows of stick to her and threatened her that she and her husband would be implicated in the case, does not inspire confidence of this Court. Further, Exhibit Ka.3 which is seizure memo of the clothes of the deceased recovered from the house of Ms. Bilkis pursuant to the disclosure statement made by the appellant, mentions that the frock recovered was made of terry-cotton fabric and its upper portion was white whereas lower portion was brown coloured and there were prints of flowers. The panchnama further indicates that it was sleeveless and stained with blood marks. Similarly, underwear discovered was made of cotton. It was white in colour with black stripes having blood stains. Though Bilkis who was examined as DW1 claimed that the clothes recovered from her house belonged to her daughter Shabanam, she could not give description of either frock or the underwear seized during the course of her testimony before the court. On overall view of the matter, this Court finds that it was satisfactorily proved by the prosecution that the frock and underwear, recovered from the house of DW1 Ms. Bilkis pursuant to the voluntary disclosure statement made by the appellant, belonged to the deceased."

14. Yet another circumstance relied upon by the prosecution is that the underwear of the appellant was stained with blood and semen. The fact that underwear put on by the appellant was seized under a panchnama is not disputed on behalf of the appellant at all. The High Court ignored this circumstance stating that the appellant was young and, therefore, find of semen stains was natural.

> "However, the High Court ignored the material fact that in normal course, the underwear would not have blood stains at all and, therefore, it was for the appellant to offer explanation as to under what circumstances stains of blood were found on his underwear, seized by the police during the course of investigation. The fact that the underwear of the appellant seized by the police had human blood stains is sufficiently proved by the contents of report of Chemical Analyst. The fact that the blood stained underwear put on by the appellant was seized after four days does not make any dent in the prosecution case on the ground that a person would not move with such blood stained underwear for 3 - 4 days. One cannot lose sight of the fact that those stains were not visible and even the Investigating Officer had stated that on examination the underwear put on by the appellant appeared to be stained with semen at some places. If blood stains are found on the shirt or pant of a person then normally such person would not move in the village with those clothes on, because stains of blood would be visible and noticed by anyone. However, it is almost difficult for anyone to notice stains of blood on underwear worn by a person. Further, the sense of cleanliness of a rustic villager cannot be ignored by the Court. While recording the statement of the appellant under Section 313 of the Code, it was put to him by the learned Judge that during the course of investigation his blood stained underwear was seized by the Police and his explanation was sought. In answer to the said question, it was never claimed by the appellant that the underwear seized was not blood stained and that another underwear was substituted in place of his underwear which was seized. Thus, this Court finds that the High Court was not justified at all in ignoring the circumstance sought to be relied upon by the prosecution that blood stained underwear of the appellant was recovered during the course of investigation."

15. Another circumstance sought to be relied upon by the prosecution is that the appellant made extra judicial confession before PW5, Anand Swaroop. The evidence of this witness shows that he was one of the panchas when inquest on the dead body of the deceased was held. During the course of his testimony, the witness identified his signature on the inquest report which was produced by the prosecution at Exhibit Ka.4. According to this witness, on February 23, 1998, he had been to Kasipur Court in connection with some work. What is asserted by the witness is that the appellant who is brother-in-law of Kabir had come to Court premises and told him near the shops that he and Mumtaz had killed Yasmeen after committing rape on her. The witness further asserted that the reason for making extra judicial confession by the appellant was that he was ex-pradhan of the village and the appellant was under an impression that the witness would be able to help him by approaching the police. This witness in no uncertain terms asserted before the court that he had told the Investigating Officer about the extra judicial confession made by the appellant.

> "In his cross-examination, the witness stated that police had recorded his statement only once. According to the witness, police had recorded his statement sometime between 23 to 29th February, 1998 in the village. What is mentioned by the witness in his cross-examination is that the appellant had come after February 23, 1998 and,

therefore, he had not thought it necessary to tell the police about the extra judicial confession made by the appellant.

The suggestion made by the defence that the police used to visit house of this witness daily or that the witness used to go to the police station daily, is denied by the witness. The manner in which this suggestion is made to the witness indicates that the appellant was entertaining a notion that the witness would be in a position to help him because the witness that the witness was going to the Police Station daily and policemen were also visiting him. In the cross- examination also, the witness maintained that the appellant had met him on February 23, 1998 in the court premises and neither the appellant nor Mumtaz was in the lockup nor inside the court room and that the appellant had made the confession near the shops. The witness explained to the court as to why he had gone to the court and according to him he had gone to the court premises to meet one Ashish Sharma, legal adviser of the bank for getting his brother's NOC prepared. The witness further mentioned before the Court that the appellant and Mumtaz had met him between 11.30 and 12 noon. The suggestion made by the defence that it was wrong to say that the appellant had made any confessional statement was emphatically denied by him. It may be mentioned that this witness in the cross- examination had stated that the appellant was not on talking or visiting terms with him before February 23, 1998 and, therefore, it was argued that there was no reason for the appellant to confide in this witness. However, what is relevant to notice is that the witness was ex-pradhan of Bajpur village. Ex-Pradhan certainly enjoys a status in a small village. The case of the defence was that the appellant was knowing that the witness was close to the police and was going to the Police Station daily. Under the circumstances, thinking that the witness would be able to render some help to him, the appellant had made extra judicial confession. The Court, on re-appreciation of evidence, finds that it is not brought on the record of the case that this witness was on inimical terms with the appellant. In fact, this witness does not belong to the community of the appellant and belongs to another community. There was no earthly reason for this witness to come to the court and depose falsely about the extra judicial confession made by the appellant. Though extra judicial confession is considered to be a weak piece of evidence by the courts, this Court finds that there is neither any rule of law nor of prudence that the evidence furnishing extra judicial confession cannot be relied upon unless corroborated by some other credible evidence. The evidence relating to extra judicial confession can be acted upon if the evidence about extra judicial confession comes from the mouth of a witness who appears to be unbiased and in respect of whom even remotely nothing is brought out which may tend to indicate that he may have a motive for attributing an untruthful statement to the accused. In *State of U.P. vs. M.K. Anthony*[1] this Court, while explaining the law relating to extra judicial confession, ruled that if the word spoken by the witness are clear, unambiguous and unmistakable one showing that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it, then after subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra judicial confession can be accepted and can

be the basis of a conviction. According to this Court, in such a situation, to go in search of corroboration itself tends to cause a shadow of doubt over the evidence and if the evidence of extra judicial confession is reliable, trustworthy and beyond reproaching, the same can be relied upon and a conviction can be founded thereon. Here, in this case, it is proved by the prosecution that PW5, Anand Swaroop was not on inimical terms with the appellant at all. After subjecting his evidence to a rigorous test on the touchstone of credibility, this Court finds that extra judicial confession referred to by the witness is reliable and is rightly accepted by the Trial Court and the High Court. The contention that when the appellant was being brought to the court, he was in custody and, therefore, the extra judicial confession referred to by PW5 would be hit by the provisions of Section 26 of the Evidence Act and could not have been received in evidence, cannot be accepted. As observed earlier, the record shows that the appellant and another were produced before the Court for extension of judicial remand. The appellant could not probablise his defence that he was in custody of police officer. He could not name the police officer who had brought him with Mumtaz to the Court premises for extension of judicial remand nor it is his case that to the hearing of the police officer who brought him to the court premises, he had made confessional statement before PW5.

On the facts and in the circumstances of the case, This Court is of the opinion that it is not probablised by the defence that the appellant was in custody of police officer while he had made extra judicial confession before PW5.

The evidence relating to extra judicial confession inspires confidence of this Court. On this point, there is concurrent finding by the courts below and no case is made out by the appellant to interfere with the said finding in the present appeal.

16. The net result of the above discussion is that the prosecution has proved satisfactorily and beyond shadow of doubt following facts:

"(1) The deceased went missing in the evening of February 5, 1998 when she was playing near her house.

(2) Her naked dead body was found at about 6 a.m. on February 8, 1998 lying on public way in front of house of Haji Khursheed.

(3) She was subjected to rape and died a homicidal death.

(4) The appellant was seen fleeing away from near the place where the dead body of the deceased was lying at about 4.30 a.m. on February 8, 1998.

(5) Blood stained frock and blood stained underwear of the deceased concealed in the house of sister of the appellant, were recovered pursuant to voluntary disclosure statement made by the appellant while in police custody.

(6) Underwear of the appellant seized during the course of investigation was found to be stained with blood and semen.

(7) The appellant made extra judicial confession before PW5, Anand Swaroop."

17. The cumulative effect of the abovementioned facts taken together is conclusive in establishing the guilt of the appellant. The chain of circumstantial evidence is complete and does not leave any reasonable ground for conclusion consistent with the innocence of the appellant. The chain of circumstances is such as to show that within all human probability the rape and murder of the deceased were committed by the appellant and none else and he had also caused disappearance of evidence of those offences. This Court further notices that this Court in *Vasa Chandrasekhar Rao vs. Ponna Satyanarayana & Anr*[2]. and *Geetha vs. State of Karnataka* [3] while explaining the law relating to circumstantial evidence has ruled that where circumstances proved are put to the accused through his examination under Section 313 of the Code and the accused merely denies the same, then such denial would be an additional link in the chain of circumstances to bring home the charge against the accused. As indicated earlier, it is proved by cogent and reliable evidence that the appellant had committed rape on the deceased and thereafter murdered her. Here in this case, the incriminating circumstances proved were put to the appellant while recording his statement under Section 313 of the Code of Criminal Procedure. In his further statement, recorded under Section 313, the appellant has merely denied the same.

"Therefore, such denial on the part of the appellant and failure to explain the circumstances proved will have to be treated as an additional link in the chain of circumstances to bring home the charge against the appellant. The circumstances proved establish the guilt of the appellant beyond reasonable doubt."

18. Thus, this Court does not find any substance in the appeal and the same is liable to be dismissed. Accordingly, the appeal fails and is dismissed.

[1] *AIR 1985 SC 48*
[2] *(2000) 6 SCC 286*
[3] *(2000) 10 SCC 72*