State Of Uttarakhand & Others Vs Jai Prakash & Others

Court: Uttarakhand High Court

Date of Decision: Jan. 7, 2020

Acts Referred: Evidence Act, 1872 â€" Section 106
Code Of Criminal Procedure, 1973 â€" Section 43, 164, 313, 366
Indian Penal Code, 1860 â€" Section 201, 302, 376AB, 377
Protection Of Children From Sexual Offences Act, 2012 â€" Section 6

Hon'ble Judges: Alok Singh, J; Ravindra Maithani, J

Bench: Division Bench

Advocate: V.K. Jemini, P.S. Uniyal, Siddharth Sah, Manisha Bhandari

Final Decision: Dismissed

Judgement

Ravindra Maithani, J

1. I have had the benefit of reading the judgment of Brother, Alok Singh, J. I concur with the conclusion, but I still elaborate my own views in arriving

at the conclusion.

2. Facts have already been disclosed. The victimÃ¢â‚¬â„¢s parents, were labourers, who were residing in the makeshift huts at the construction site. She

was nine years old. Her uncle, aunt and their two sons were also staying near to their hut. On the fateful day, victim was playing with her cousins.

Suddenly, she went missing. A search was made and finally her dead body was recovered from the hut of the appellant. It was hidden below the

empty sacks and other articles. A report was lodged and after investigating charge-sheet submitted against the appellant. After trial, by the impugned

judgment and order, the appellant has been convicted and sentenced.

3. On behalf of the appellant, learned counsel would argue that it is a case of false implication; appellant is also a labourer and he was a soft target.

He has been falsely implicated in the case. The following points/arguments have been raised on behalf of the appellant:-

(i) FIR is not reliable; it is in contradiction to the averments made in the inquest report.

(ii) There were no marks of injury on the genital of the appellant. It goes to the root of the matter and falsifies the prosecution case.

(iii) There have been divergent versions about the colour of the underwear of the victim, which doubts the statement of the witnesses.

(iv) Recovery of hair from the fist of the victim is totally doubtful.

(v) Forensic Science Laboratory (for short Ã¢â‚¬Å“the FSLÃ¢â‚¬) Report is not reliable, because the prosecution has not proved, as to how, the hair were

taken, preserved, stored and transmitted to FSL. It is not proved that the process was intact.

(vi) Similarly, with regard to semen, it is argued that PW5 Dr. R.C. Arya, examined the appellant on 29.07.2018, but he could not get the sample of his

semen. Prosecution has not even shown, as to when the semen of the appellant was extracted. Therefore, it is also doubtful as to how the semen of

the appellant was sent for forensic examination.

(vii) The prosecution has not proved, that the other articles sent for forensic examination were kept safely and transmitted properly.

(viii) The appellant did not run away after the incident; his conduct shows that he is innocent; the dead body was first detected by PW3 Mohd. Nayyar

Alam. It is he to explain as to how the victim died?

(ix) PW11 and PW12 both are cousins of the victim; they are interested and child witnesses; they are prone to coaching and tutoring; their statement

cannot be relied upon.

4. It is argued that the prosecution utterly failed to prove the charges against the appellant. The appellant ought to be acquitted of the charges.

5. In support of arguments, learned counsel placed reliance upon the principles of law, as laid down in the case of Rahim Beg and another Vs. State of

U.P., AIR 1973 SC 343 and Devi Lal Vs. State of Rajasthan, 2019 (1) N.C.C. 541. In the case of Rahim Beg (supra) HonÃ¢â‚¬â„¢ble Supreme Court,

inter-alia, held that Ã¢â‚¬Å“according to Dr. Kativar, Medical Officer of District jail Rae Bareli, if a girl of 10 or 12 year who is virgin and whose hymen is

intact is subjected to rape by a fully developed man, there are likely to be injuries on the male organ of the man. No injury was, however, detected by

the doctor on the male organ of any of the two accused. The absence of such injuries on the male organs of the accused would thus point to their

innocence.Ã¢â‚¬â€¹ (para 26).

6. In the case of Devi Lal (supra), HonÃ¢â‚¬â„¢ble Supreme Court has held that while scrutinizing the circumstantial evidence, a Court has to evaluate it

to ensure the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. In this case, the

HonÃ¢â‚¬â„¢ble Supreme Court referred to the principle of law as laid down in the case of Sharad Birdhichand Sarda Vs. State of Maharashtra 1984 (4)

SCC 116, Sujit Biswas Vs. State of Assam, 2013 (12) SCC 406 and Raja alias Rajinder Vs. State of Haryana, 2015 (11) SCC 43.

7. On the other hand, learned State counsel would argue that prosecution has been able to prove the case beyond reasonable doubt. Learned State

counsel raised the following points:-

(i) The witnesses of fact are very natural and reliable.

(ii) Appellant ran away after the incident; he had criminal history and his conduct is relevant. The appellant was last seen with the victim and

thereafter, the victim was found dead.

(iii) The dead body of the victim was found in the hut of the appellant. The fact that the victim died was within the special knowledge of the appellant.

The burden was upon him to prove, as to how did the victim die? Reference has been made to Section 106 of the Indian Evidence Act, 1872.

(iv) FSL report is positive and corroborates the prosecution case.

(v) Inquest was prepared on the same day, when the dead body of the victim was recovered and the hair were recovered from the fist of the victim.

The appellant was arrested subsequent to it. There were no chances of planting hair.

(vi) Colour of underwear of the victim is not so material and whatever colours have been stated by the witnesses does not falsify the prosecution

case.

8. It is argued that there is no substance in the appeal and it deserves to be dismissed and death sentence should be confirmed.

9. The prosecution has relied upon the following events to prove the guilt and/or to complete the chain of events indicating that it is the appellant and

the appellant alone, who committed the ghastly crime.

(i) On the date of incident, in the noon, the victim was playing with her cousins PW11 and PW12. The appellant took the victim as well as PW11 and

PW12 in his hut, where he gave 10 rupees note to each one of them to purchase something for them. The appellant asked PW11 and PW12, both

cousins of the victim, to go out from the hut to purchase the things. The appellant detained the victim with him in the hut.

(ii) The appellant was staying with PW6 Yogesh and Suresh in the hut. On the date of incident, at about 12:30 in the noon, PW6 Yogesh came to the

hut and saw the victim and two other children with the appellant. Soon thereafter, the victim went missing.

(iii) PW13 aunt of the victim had seen the appellant taking her children and the victim in his house at about 12:00-01:00 in the noon.

(iv) PW1 father of the victim went to the appellant and inquired about his daughter, the victim. Appellant told it to him that the victim had already left.

(v) PW3 Mohd. Nayyar Alam searched for the victim and he found the dead body of the victim in the hut of the appellant below the empty sacks and

other articles. Inquest was prepared.

(vi) Hair were found from the fist of the deceased and it match with the DNA of the appellant.

(vii) From the place of occurrence, some articles were recovered like blanket, jacket, undershirt etc. and clothes of the victim and slides were handed

over by PW4 Dr. Chirag Bahuguna, who conducted the post mortem of the deceased. All these articles were sent for forensic examination. The FSL

report confirms the involvement of the appellant. DNA has confirmed it.

(viii) The medical evidence supports the prosecution case. PW4 Dr. Chirag Bahuguna found various injuries on the private parts of the victim.

10. PW1 is the father of the appellant. According to him, on 28.07.2018, his daughter, the victim was playing with her cousins. They were staying in

the huts on the construction site. They are labourers. Appellant is also a labourer. At lunch, when they searched for their daughter, she was missing.

When her cousins were questioned, they revealed it that the appellant had taken them and the victim to his hut and gave 10 rupees to each of them for

purchasing something for them. The appellant detained the victim with him and let her cousins to go for purchase. A search was made, but the victim

could not be located. The appellant, on being asked, had told that he had given 10 rupees to the victim and she had already left. CCTV footage was

seen, in which, the victim could not be seen. Then, on a search having been made, the dead body of the victim was found in the hut of the appellant

below the sacks of cement and other articles. Meanwhile, the appellant ran away. This witness proved the FIR Ex. A1. According to him, a blanket,

undershirt, four empty bottles of liquor and a jacket was also recovered from the place of incident and a recovery memo prepared. There were marks

of injuries on the dead body of the victim. This witness was the Punch in the inquest. He has also stated about the date of birth of the victim, which,

according to this witness is 20.10.2008.

11. PW8 mother of the victim corroborates the statement of PW1, father of the victim. She proved the copy of the Adhar Card of the victim, which

reveals her date of birth.

12. PW11 and PW12 both are child witnesses. The court first ascertained their competency to depose and thereafter, recorded their statements.

According to both these witnesses, on the date of incident, they were playing with the victim. The appellant took them to his hut, gave 10 rupees to

each of them and sent these two witnesses out from the hut, but detained the victim. They have also stated that when the victim was not traceable,

upon a search, her dead body was found in the hut of the appellant.

13. PW13 is aunt of the victim and mother of PW11 and PW12. According to her, on that date, she had seen the appellant taking her two children and

the victim in his hut. Her children had told it to her that the appellant gave 10 rupees to each of them and sent her children out from the hut, but

detained the victim.

14. There is another witness, who was also residing in the same hut, in which, the appellant was staying. He is PW6 Yogesh. According to him, on

28.07.2018, the appellant had not gone for work. He had bought liquor. At about 12:30 in the noon, when this witness came back to his house to get

the machine, he saw the appellant with the victim and two children. Again, when this witness alongwith his brother came for lunch, he saw the

appellant asleep after having liquor. Subsequently, they came to know that the dead body of the victim was hidden by the appellant in their hut.

15. PW2 Kulbhushan is the Contractor with whom the victimÃ¢â‚¬â„¢s parents and the appellant were working. According to him, when he was told

about missing of the victim, he reached at the construction site, inquired from the labourers, and checked the CCTV footage. They saw PW11 and

PW12 (the children of PW13 the aunt of the victim) on the footage, but could not locate the victim. This witness directed his operator PW3 Mohd.

Nayyar Alam to search for the victim. PW3 Mohd. Nayyar Alam telephoned him that the dead body of the victim was lying below the empty sacks of

cement and other articles in the corner of the hut of the appellant. Thereafter, this witness wrote an FIR Ex. A1, under the dictation of PW1 the

father of the victim. He has also proved his statement recorded under Section 164 of the Code of Criminal Procedure, 1973 (hereinafter referred to as

Ã¢â‚¬Å“the CodeÃ¢â‚¬â€).

16. PW3 Mohd. Nayyar Alam is the person, who under the direction of PW2 Kulbhusan, the Contractor, searched the hut of the appellant and found

the dead body of the victim there. He is also the witness of the inquest and also confirmed his statement recorded under Section 164 of the Code.

17. It is PW5 Sub Inspector, Laxmi Joshi, who prepared the inquest. According to her, ants were creeping on the mouth of the victim; the tongue was

struck beneath the teeth; on the right palm, there was a contusion; on the private parts there were marks of assault; on the back, there were marks of

friction and injury; faecal matter was out on her pajama; underwear was lowered, which was grey in colour; the victim had a red coloured T-shirt with

flowers on it and blue cloured shorts. Near the dead body, 10 rupees note was also found. This note alongwith blanket and white undershirt as well as

hair from the hands of the victim and other articles were taken into custody and memo prepared.

18. PW10 Sub Inspector, Raj Vikram Singh Panwar is another witness of recovery. It is he, who prepared the recovery memo Ex. A19. He has

stated about it.

19. The post mortem of the victim was conducted on 29.07.2018 by PW4 Dr. Chirag Bahuguna. He found following injuries on the dead body and

recorded them in the post mortem report. This witness has stated about it and proved the post mortem report Ex. A5.

Ã¢â‚¬Å“Tongue inside mouth, eyes closed congested; Vagina 2 to 3 finger can be poured easily inside the vagina without resistance; Hymen torned with

reddish margin suggestive of recent trauma; Post wall of vagina tear present 0.5 cm in length; This is suggestive of forceful penetration. Anal mucosa

show reddish inflamed surface, suggestive of penetrative trauma; this (these?) injury (injuries?) are suggestive of sexual assault. Multiple crescentic

shaped contusion and abrasion (reddish) present over face suggestive of nail trauma.

Right upper arm- bluish contusion 6 x 5 cm; left shoulder back side- 3 contusion marks 1 cm each in length; left side of back 3 x 1 cm. Abrasion 7 cm

below scalp; Multiple abrasions over lower back 17 x 7 cm; multiple (reddish) contusion on inner side of thigh; right side 18 x 8cm. Left side 19 x 10

cmÃ¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦..Ã¢â‚¬â€‹

20. According to PW4 Dr. Chirag Bahuguna, the vagina was damaged due to forceful penetration and since there was redness and inflammation on

the rectum, it suggests that there was penetration in the anus also. On the face of the victim, there were marks of abrasion, which were caused by

nails. On her neck, there were marks of pressing by fingers. There were other injuries on the neck, suggesting that it was pressed by the fingers.

According to PW4 Chirag Bahuguna, the cause of death was manual throttling by hands causing asphyxia.

21. The prosecution also proved the medical examination report of the appellant. It has been proved by PW15 Dr. R.C. Arya. According to him, on

29.07.2018, the appellant was produced before him for examination. There was no mark of injury in the genital region; sample of blood, pubic hair,

undergarments were sealed and given to the police. According to this witness, despite efforts, semen of the appellant could not be extracted. He

proved the report Ex. A19.

22. PW16 Sub Inspector, N.S. Rathore is the Investigating Officer in the case. He has proved the site plan. According to him, on 31.07.2018, sample

of blood of the appellant was taken before the court and was sent for forensic examination.

23. PW17 Dr. Manoj Kumar Agarwal is Scientific Officer, FSL Dehradun. He proved the FSL report.

24. It is a case based on circumstantial evidence. The law is settled that in the case of circumstantial evidence, the chain of events should be complete

and indicate that it is the accused and accused only who has committed the offence. Last seen, theory is also a part of it. It is one of the events in the

chain. In the case of Navneethakrishnan Vs. State by Inspector of Police, (2018) 16 SCC 161, HonÃ¢â‚¬â„¢ble Supreme Court, inter alia, held that the last

seen theory is very important even in the chain of circumstances to establish the guilt of the accused, but it all alone is not sufficient to prove the guilt

and it requires corroboration. The Court held as hereunder:-

Ã¢â‚¬Å“22. PW11 was able to identify all the three accused in the court itself by recapitulating his memory as those persons who came at the time when

he was washing his car along with John Bosco and further that he had last seen all of them sitting in Omni van on that day and his testimony to that

effect remains intact even during the cross-examination in the light of the fact that the said witness has no enmity whatsoever against the appellants

herein and he is an independent witness. Once the testimony of PW11 is established and inspires full confidence, it is well established that it is the

accused who were last seen with the deceased specially in the circumstances when there is nothing on record to show that they parted from the

accused and since then no activity of the deceased can be traced and their dead bodies were recovered later on. It is a settled legal position that the

law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the

accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of circumstances that would completely

establish and/or could point to the guilt of the accused with some certainty. However, this evidence alone cannot discharge the burden of establishing

the guilt of the accused beyond reasonable doubt and requires corroboration.Ã¢â‚¬â€‹

25. In the case of Nizam and another Vs. State of Rajasthan (2016) 1 SCC 550 ,HonÃ¢â‚¬â„¢ble Supreme Court, inter alia, held that Ã¢â‚¬Å“the case of the

prosecution is entirely based on the circumstantial evidence. In a case based on circumstantial evidence, settled law is that the circumstances from

which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances

should be complete, forming a chain and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent

only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.Ã¢â‚¬â€‹ (Para 8)

26. In the case of Ganpat Singh Vs. State of Madhya Pradesh (2017) 16 SCC 353, the HonÃ¢â‚¬â„¢ble Court has held as hereunder:

Ã¢â‚¬Å“9. Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦ In a case which rests on circumstantial evidence, the law postulates a twofold requirement. First, every link in the chain of

circumstances necessary to establish the guilt of the accused must be established by the prosecution beyond reasonable doubt. Second, all the

circumstances must be consistent only with the guilt of the accused. The principle has been consistently formulated thus:

Ã¢â‚¬Å“ The normal principle in a case based on circumstantial evidence is that the circumstances from which an inference of guilt is sought to be drawn

must cogently and firmly established; that those 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 on any hypothesis other than that of the guilt of the

accused and inconsistent with his innocence.Ã¢â‚¬ See Sharad Birdichand Sarda v. State of Maharashtra, (1984) 4 SCC 116) : 1984 SCC (Cri) 48;7

Ramreddy Rajesh Khanna Reddy v. State of A.P., (2006) 10 SCC 172: (2006) 3 SCC (Cri) 512 T;rimukh Maroti Kirkan v. State of Maharashtra,

(2006) 10 SCC 681, p. 689, para 12 : (2007) 1 SCC (Cri) 80 ;Venkatesan v. State of T.N. (2008) 8 SCC 546, P. 460, para 8 : (2008) 3 SCC (Cri) 546;

Sanjay Kumar Jain v. State of T.N., (2008) 8SCC 456, p. 460, Para 8 : (2008) 3 SCC (Cri) 546S; anjay Kumar Jain v. State of Delhi, (2011) 11 SC

733, p. 737, para 13 : (2011) 3 SCC (Cri) 608; Madhu V. State of Kerela, (2012) 2 SCC (Cri) 892; Munna Kumar Upadhyay v. State of A.P., (2012)

6 SCC 174. P. 188, para 25 : (2012) 3 SCC (Cri) 42 and Vivek Kalra v. State of Rajasthan, (2014) 12 SCC 439 : (2014) 6 SCC (Cri) 782

27. In the instant case, two children, with whom, the victim was playing soon before she went missing were her cousins, they are PW11 and PW12,

both children. It is settled law that the evidence of the children should be taken with little care and caution to see that they are not tutored. In the case

of Bhagwan Singh and others vs. State of M.P., (2003) 3 SCC 21, HonÃ¢â‚¬â„¢ble Supreme Court has cautioned about accepting the evidence of the

child witness; the Court held as hereunder:

Ã¢â‚¬Å“22. It is hazardous to rely on the sole testimony of the child witness as it is not available immediately after the occurrence of the incident and

before there were any possibility of coaching and tutoring him. See: Paras 14-15 of State of Assam vs. Mafizuddin Ahmed (1983) 2 SCC 14. In that

case evidence of child witness is appreciated and held unreliable thus:

14. The other direct evidence is that deposition of PW7, the son of the deceased, a lad of 7 years. The High Court has observed in its Judgment:-

Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦..the evidence of a child witness is always dangerous unless it is available immediately after the occurrence and before there were any

possibility of coaching and tutoring.Ã¢â‚¬â€‹

28. It is argued that the FIR and the inquest are contradictory. Reference has been made to the statement recorded in the inquest that when PW1

father of the victim was at the police station to seek assistance, he got a telephone call from PW3 Mohd. Nayyar Alam that the dead body of the

victim is located in the hut of the appellant, in a corner, below the empty sacks of cement. It is argued that according to the FIR, when the dead body

was found, thereafter, the FIR was lodged. There appears to be no contradiction at all. What is written in the inquest is that when PW1 father of the

victim was seeking police assistance, he got a telephone call from PW3 Mohd. Nayyar Alam that the dead body has been recovered. Then, they

reached at the place of incident and found the dead body. The FIR is lodged thereafter. In the FIR also it is stated that when the dead body of the

victim could not be located, a search was made and it is PW3 Mohd. Nayyar Alam, who found the dead body in the hut of the appellant. PW1 father

of the victim has also stated about it. There is no contradiction. PW3 Nayyar Alam and PW2 Kulbhushan corroborate the version of the FIR and also

corroborate the statement of PW1 father of the victim. These statements are, in no manner, inconsistent to the averments made in the inquest.

29. Undoubtedly, the victim was brutally sexually assaulted. In the inquest, which was prepared soon after the recovery of the dead body, the injuries

have been mentioned. They were also on the private parts of the victim. PW 4 Dr. Chirag Bahuguna has categorically stated about the injuries, which

were found on the dead body. There was forceful penetration into her vagina as well as in the anus. She was killed by manual throttling. The question

is, who did it?

30. At this stage, the age of the victim has to be seen. According to her father, PW1 she was born on 20.10.2008. He has proved her school records.

PW8 the mother of the victim has proved her Aadhar Card Ex. A15. In it, her date of birth is written 20.10.2008. PW9 Prasoon Shukla is the Head

Master of the Government Primary School, Raud, where the victim had taken admission in class 1st in the year 2014. He proved the admission form

Ex. A16 and certificates given by this witness Ex.A17 and Ex. A18. In all these documents, the date of birth of the victim is recorded as 20.10.2008.

In the record of first school, in which, the victim took admission, her date of birth is recorded as 20.10.2008. The admission form is signed by the

father of the victim. PW1 the father of the victim has also confirmed it. According to him, his daughter had studied in the Government Primary School,

Raud. It is proved that the date of birth of the victim is 20.10.2008. Therefore, this Court is of the view that prosecution has been able to prove that

the date of birth of the victim is 20.10.2008. The incident occurred on 28.07.2018. Victim had yet not completed 10 year of age; she was a girl of 9

years on the date of incident.

31. In the FIR, it is categorically stated that on the date of incident, the victim was playing with her cousins and soon thereafter, she went missing.

Both her cousins PW11 and PW12 have categorically stated that it is the appellant who had detained the victim with him in his hut.

32. PW6 Yogesh has corroborated the statements of PW11 and PW12. He has found the victim along with PW11 and PW12 in his hut with the

appellant, when at about 12:30 in the noon, he came into his hut to get a machine. Later on when he came for lunch, he found that the appellant had

liquor and was sleeping.

33. PW13 the mother of PW11 and PW12 has also confirmed that it is the appellant, who took the victim with him. The statements of PW6, PW11,

PW12 and PW13 are inspiring confidence. They have been cross examined, but nothing has been elicited in their cross examination, which may create

even an iota of doubt in their credibility. It is the appellant, who took the victim with him in his hut. It is the appellant, who also took alongwith him

PW11 and PW12, cousins of the victim in the hut and gave each of them 10 rupees. PW11 and PW12 had left the hut, but the victim unfortunately

could not escape from the clutches of the appellant.

34. In this case, the appellant himself appeared as a witness. He has admitted that on the date of incident, he was on leave. He took liquor, drank it

along with PW6 Yogesh and his brother Suresh. Thereafter, he was under intoxication and did not go for work. According to him, he was taken at

Police Station and then he learnt that the dead body of a girl was found in the hut, where he was staying. It is not the statement of the appellant in any

other examination like under Section 313 of the Code. The statement of the appellant is evidence. It confirms the prosecution case and corroborates it

that on the date of incident, the appellant was in his hut, this is what the prosecution witnesses have stated. Appellant himself has admitted and

corroborated the prosecution case to a certain extent that on the date of incident, he had liquor and he did not go for work. It is the appellant,

according to the prosecution, who took the victim, PW11 and PW12 in to his hut. He let PW11 and PW12 to leave the hut, but detained the victim

with him. The victim was subsequently found dead in the hut. She had injuries on her body.

35. PW3 Nayyar Alam found the dead body in the hut of the appellant. His statement has been corroborated by the statements of PW2 Kulbhushan,

PW1 father of the victim, PW8 mother of the victim, PW11 and PW12, both cousins of the victim and PW13 aunt of the victim. PW5 Laxmi Joshi,

Sub Inspector prepared the inquest. She also corroborates that the dead body was found in the hut of the appellant. There is no doubt that the dead

body of the victim was found in the hut of the appellant.

36. The appellant ran away soon after the incident. He was arrested on 29.07.2018 In fact, PW16, N.S.Rathore, the Investigating Officer has proved

the pen drive containing CCTV footage of the area along with certificates of the owner, who was managing the CCTV to the effect that the footage

is genuine. This certificate is Ex.A28. The pen drive was run in the court on 06.08.2019. PW16 N.S.Rathore has stated that on that date, he could

locate cousins of the victim, namely, PW11 and PW12 on the footage, but the victim was not traceable. This is another piece of evidence, which

supports the statements of PW11 and PW12 that the appellant let them go after giving 10 rupees each and detained the victim with him in his hut; The

statement of the witnesses that on the fateful day the appellant had liquor; he took the victim and PW11 & PW 12 with him in his hut. He gave 10

rupees to each one of them for purchasing something for them; he let PW11 and PW12 go out of the hut but detained the victim with him; When the

victim could not be found, a search was made; appellant gave false explanation that the victim had already left his hut; the dead body of the victim

was found in the hut of the appellant with 10 rupees note near to it, are inspiring confidence. It is also wholly reliable statement of the witnesses that

on that day only the appellant had stayed in his hut and the other co-occupants namely, PW6 Yogesh and Suresh had gone for work. The statements

of the witnesses on this aspect are reliable, credible and corroborating to each other. There is no doubt about it.

37. It is argued that there has been no mark of injury on the genital of the accused, which belies the prosecution case. Reference has been made to

the principle of law as laid down in the case of Rahim Beg (supra). It is true that in the case of Rahim Beg (supra), HonÃ¢â‚¬â„¢ble Supreme Court noted

that, in case, a well developed man rapes a young girl of 10 to 12 years, the absence of injuries on the male organs would point towards the innocence.

The Court did not lay down as a rule that in all cases where injuries are not found on the genital of the accused, in the cases of rape of a girl of tender

age, the accused shall be held innocent. Each case depends upon its own facts.

38. It is a case of sexual assault upon a girl of nine years. Her vagina was ruptured, torn apart. There were injuries on her anus as well. The accused

is a man of 32 years. PW15 Dr. R.C. Arya examined him on 29.07.2018, but did not find any injury on his genital. But, merely because there was no

injury, it cannot be said that the appellant did not commit the offence. There are circumstances, which Ã¢â‚¬Å“proves beyond reasonable doubtÃ¢â‚¬ to the

extent of Ã¢â‚¬Å“absolute certaintyÃ¢â‚¬ that the appellant has committed the offence. These circumstances are speaking louder than any direct evidence of

the commission of rape and murder.

39. Great emphasis has been laid on behalf of the appellant about the colour of the underwear. It is argued that the underwear is implanted. There has

been inconsistency about the colour of the underwear of the victim. PW1 father of the victim would say that the colour of the underwear of the

deceased was grey. PW3 Mohd Nayyar Ahmad, who first located the dead body of the deceased would also say that he witnessed the inquest. In the

inquest, the colour of underwear is recorded as grey. It is PW5 Sub Inspector, Laxmi Joshi, who prepared the inquest. She has stated the colour as

grey. PW8 mother of the victim has stated that the colour of the underwear was green and in the FSL report, the colour is noted as brown. It makes

no difference. No such questions have been put to any witness about the variation in colour of underwear. Specifically PW16 N.S. Rathore is the

Investigating Officer. He could have been in a position to explain it. Had it been done? The Court would have observed the colour of the underwear.

In any case, it is not material. It does not doubt the prosecution case.

40. An argument has also been raised with regard to the competence of PW11 and PW12 the child witnesses. It is argued that the Court did not

ascertain as to whether they were capable to depose before the Court or not? It is true that PW11 and PW12 both children have been examined and

to ascertain their competence, the questions put to them has not been, as such, noted in their deposition. Had the trial court recorded the questions put

to these witnesses and their answers before satisfying that they are competent, it would have helped this Court to ascertain the level of satisfaction of

the learned Court below for recording their statements. But the fact remains that the learned court below has recorded that questions were put to

these witnesses and the Court arrived at a conclusion that they are competent to be examined as witnesses. The age of PW11 has not been recorded

by the learned court below. The assessment could have been recorded. The witnesses expressed ignorance about his age. But, he was studying then

in Class-2nd. Having considered the observations made by the learned court below, while recording the statements of PW11 and PW12, this Court is

of the view that the court below had satisfied about the competence of these witnesses before recording their statements. Had there been any doubt

about their competence, on behalf of the appellant, questions would have been put to these witnesses, but no such questions were put to them. They

replied to the questions put to them in their cross examination. Nothing is elicited in their cross examination, which may in any manner, doubt their

credibility.

41. It is also argued that the appellant did not run away from the place of incident. The incident happened on 28.07.2018. It is stated by the witnesses

that the appellant had run away from the place of incident. PW2 Kulbhushan has categorically stated that when the dead body of the deceased was

recovered from the hut of the appellant, he instructed the labourers to catch the appellant. But, he absconded and could not be apprehended. Appellant

was arrested on 29.07.2018. His conduct is also relevant. He ran away after the incident. It is established and proved.

42. On behalf of the appellant, it is also argued that it was the burden of PW3 Mohd. Nayyar Alam to tell as to how did the deceased die. Because, it

is he who first located the dead body. This argument is baseless. Though PW3 located the dead body, but the dead body was found in the hut of the

appellant, which he was sharing with PW7 Yogesh and Suresh. On the date of incident, i.e. on 28.07.2018, the appellant had not gone for work, he

had liquor with him, which he drank. He lured the victim, took her in his hut. He was seen with the victim girl. He was seen the victim girl taking into

his hut. The victim girl was found in his hut with marks of injuries. She was brutally sexually assaulted. She was dead. It was the appellant who had

special knowledge as to how did the deceased die. Burden was upon him. He was the occupant of the hut when the victim was there and when she

was assaulted and killed. The appellant has not stated anything. On the other hand, prosecution has proved that it is the appellant who sexually

assaulted and killed the deceased.

43. Argument has been advanced that PW11 and PW12 both are tutored witnesses. It is not a case, which depends upon the testimony of PW11 and

PW12 alone. There are many circumstances and many witnesses as well. Apart from PW11 and PW12, their mother PW13 has also seen the

appellant taking the victim with him in his hut. It is PW6 Yogesh, co-occupant of the hut of the appellant, who had on that date at about 12:30 in the

noon seen the appellant in the company of the victim. Appellant as a witness also admitted that he was in the hut on that date. PW11 and PW12 were

open for cross examination. Surprisingly, only one question to ask to PW12 in his cross examination. Even PW11 was not much cross examined. It is

true that a child witness is prone to coaching and tutoring. The court should be little cautious in accepting the evidence of the child witness. But, in the

instant case, the evidence of PW11 and PW12 is not the sole evidence. There are immense evidence other than the evidence of PW11 and PW12.

Other evidence corroborate the evidence of PW11 and PW12. They are not tutored child witnesses.

44. An argument has been raised that PW11 and PW12 are interested witnesses. It is not a rule that the evidence of interested witness should be

discarded. Rule of prudence requires that such evidence should be carefully accepted. After careful scrutiny of the evidence of PW11 and PW12, the

Court is of the view that they are wholly reliable witnesses.

45. Prosecution tried to rely upon that the hair found from the fist of the deceased and the other articles, which were taken from the hut of the

appellant. The clothes of the victim and biological samples were sent for forensic examination and report confirms DNA match. It is true that

according to FSL report, the DNA of the appellant match with the DNA found on the other articles, including the clothes of the victim.

46. PW17 Dr. Manoj Kumar Agarwal, Scientific Officer, FSL Dehradun proved the FSL report, which is Ex. A43. It concludes as hereunder:

CONCLUSION

The DNA test performed on the exhibits provided is sufficient to conclude that,

1. The DNA obtained from the Exhibits Ã¢â‚¬" 4 and 5 (hair recovered from deceased and underwear of accused) are from a single male human source

and matching with the DNA obtained from the Exhibit-24 (blood sample of accused).

2. The DNA obtained from the Exhibit Ã¢â‚¬" 9 (underwear of deceased) is matching with the DNA obtained from the Exhibits Ã¢â‚¬" 23 and 24 (blood

sample of deceased and blood sample of accused).

3. The DNA obtained from the Exhibits Ã¢â‚¬" 13, 14, 15, 16, 17, 18, 19, 20 and 22 (throat swab, throat slide, internal vaginal swab, internal vaginal slide,

internal vaginal swab, internal vaginal slide, internal anal swab, internal anal slide and nails clipping of victim) are from a single female human source

and matching with the DNA obtained from the Exhibit Ã¢â‚¬" 23 (blood sample of deceased).

47. What is the effect of DNA report? How is it to be evaluated? How the expertÃ¢â‚¬â„¢s examination should be considered? These and many more

aspects have been examined by this Court in the case of State Vs. Akhtar Ali (Criminal Reference No. 1 of 2016) and connected cases and this

Court on the basis of settled principle of law (Bhagwan Das and another Vs. State of Rajasthan, AIR 1957 SC 58,9 Kamti Devi (Smt.) and another

Vs. Poshi Ram (2001) 5 SCC 311, Wasudeo Badwaik Vs. Lata Nandlal Badwaik and another, (2014) 2 SCC 576, Kamalanantha and others Vs. State

of Tami Nadu (2005) 5 SCC 194, Pantangi Balarama Venkata Ganesh Vs. State of Andhra Pradesh (2009) 14 SCC 60,7 Santosh Kumar Singh Vs.

State through CBI (2010) 9 SCC 747, Mukesh and another Vs. State (NCT of Delhi) and others, (2017) 6 SCC 1) held as hereunder:-

Ã¢â‚¬Å“(i). Expert opinion should be respected.

(ii). Court should not ordinarily substitute the opinion of the expert merely on the basis of collecting some passages from other text books without

seeking explanation of the expert on those texts.

(iii) The result of a genuine DNA test is scientifically accurate.

(iv) Precautions are required to be taken to ensure proper DNA examination.

(v) The DNA report deserves to be accepted unless absolutely dented and for non-acceptance of the same, it has to be established that there have

been no quality control or quality assurance. If the sample is proper and if there is no evidence as tampering of the samples, the DNA test report is to

be accepted.

(vi) The Court should not venture on its own to discredit the opinion of an expert on the basis of certain texts and books, without putting these texts

and books to the expert and taking his opinion thereon.

(vii) If questioned, the Court may examine the methodology or data collection or the process involved in the DNA examination. The questioning should

begin with the expert.

(viii) The expert opinion and its basis are relevant to be accepted without analysis unless it is demonstrated that the report is dented.Ã¢â‚¬â€‹

48. Undoubtedly, DNA report as scientific evidence is accurate unless it is shown that it is dented. But, Court cannot on mere production of DNA

report would presume that it is accurate. At least, prosecution has to show that the biological evidence was properly taken, safely stored and

transmitted to the FSL. Who took the blood sample, undergarments and pubic hair of the appellant from PW15 Dr. R.C. Arya, when he after

examination of the appellant took them in to custody? There is no evidence to this effect. According to medical report A-19, Police Constable CP

1290 Puneet Kumar was accompanying the appellant for medical examination. Where did C.P. 1290 Puneet Kumar gave these samples? Who took

them? Where were they kept till they were sent for forensic examination? As stated, PW16 N.S. Rathore has at one stage, at the last paragraph of

his examination-in-chief, has stated that he recorded the statement of Maal Khaana Mohrrir about the entries of articles, but no such register has been

proved. Maal Khana Mohrrir has not been examined. There is no general diary entry, which could even show that the blood sample and other articles

taken in to custody by PW17 Dr. R.C. Arya, on 29.07.2018 were safely stored and taken to Maal Khaana for production before the court, so that it

may be transmitted to FSL. There is another angle to it. If blood sample of the appellant was taken on 29.07.2018, by PW15 Dr. R.C. Arya, why on

31.07.2018, blood sample was again taken, as stated by PW16 N.S. Rathore? In fact, he has proved few documents. Ex. A26, is an application for

taking blood sample of the appellant. Who took the blood sample on 31.07.2018 and where that blood sample was kept? Which blood sample was sent

for DNA examination? There is no evidence to this effect.

49. If PW15 Dr. R.C. Arya could not take the sample of semen of the appellant on 29.07.2018, how semen of the appellant was taken? There is no

evidence to that effect. Who took that sample? There is a letter of the court forwarding the samples to FSL, which is Ex. A21, according to it, the

blood sample and semen of the appellant was taken by the doctor at Doon Hospital, Dehradun. No such doctor has been examined.

50. According to PW4 Dr. Chirag Bahuguna, after post mortem, he sealed the clothes of the deceased and gave them to the police. In the post

mortem report, it is also stated that articles were handed over to Police, who brought the body. Their names have also been recorded they are Deepak

Chauhan, Constable and Sangeeta, a lady Constable. Where did these Constables keep those article on 29.07.2018? Who kept them? Whether they

were safely kept? There is no evidence to this effect. In view of the above, this Court is of the view that prosecution could not prove that biological

evidence or the articles recovered or found were safely kept or stored and properly transported to FSL.

51. As stated, even in the absence of DNA evidence, the prosecution has been able to prove that it is the appellant, who took the victim with him and

dead body was found in his hut. The victim was brutally sexually assaulted. All the circumstances unerringly and irresistibly concludes that it is the

appellant, who brutally sexually assaulted the victim and killed her and concealed her dead body so as to disappear the evidence of the victim.

52. In view of the foregoing discussion, this Court is of the view that prosecution has been able to prove the charges under Sections 302, 201, 376AB

and 377 IPC and Section 6 POCSO Act against the appellant Jai Prakash. Learned court below did not commit any error in convicting the appellant of

the charges. Accordingly, the appeal deserves to be dismissed.

53. The appellant has been awarded death penalty under Section 302 IPC. Reference under Section 366 of the Code is submitted for its confirmation.

54. On behalf of the appellant, it is argued that it is not a case of death penalty. In fact, once convicted, the sentence is one area, which requires a lot

of deliberations. When the choice is between death and imprisonment for life, it becomes more balancing act. In the case of Bachan Singh Vs. State

of Punjab, (1980) 2 SCC 684 ,HonÃ¢â‚¬â„¢ble Court laid down the test for imposing death penalty. It was, inter alia, held in the case that Ã¢â‚¬Å“A real and

abiding concern for the dignity of human life postulates resistance to taking a life through lawÃ¢â‚¬â„¢s instrumentality. That ought not to be done save in

the rarest of rare cases when the alternative option is unquestionably foreclosed.Ã¢â‚¬â€‹(Para 209)

55. In the case of Machhi Singh and others Vs. State of Punjab, (1983) 3 SCC 470, it has further been explained as to what proposition emerged from

the Bachan SinghÃ¢â‚¬â„¢s case. The court held as hereunder:

Ã¢â‚¬Å“38. In this background the guidelines indicated in Bachan Singh case Machhi Singh v. State of Punjab, (1983) 3SCC 470 : 1983 SCC (Cri) 681)

will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following

propositions emerge from Bachan Singh case:

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the Ã¢â‚¬Ëœoffender Ã¢â‚¬â„¢ also require to be taken into consideration along with the

circumstances of the Ã¢â‚¬Ëœcrime Ã¢â‚¬â„¢.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment

appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the

option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and

all the relevant circumstances.

(i) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded

full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.Ã¢â‚¬â€‹

56. Further in the case of Ram Naresh and others Vs. State of Chattisgarh, 2012 4 SCC 25,7 HonÃ¢â‚¬â„¢ble Supreme Court laid down the list of

aggravating and mitigating circumstances as hereunder:

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of

conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or

device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement

of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or

a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme

provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his

criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental

imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in that facts and circumstances

of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death

resulted in the course of commission of another crime and that there was a possibility of it being construed as consequence to the commission of the

primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.Ã¢â‚¬â€‹

57. Once aggravating and mitigating circumstances are weighed, the Court is always posed in such matters apply the Ã¢â‚¬Å“rarest of rare testÃ¢â‚¬. It also

depends upon the Ã¢â‚¬Å“perception of the societyÃ¢â‚¬ and not Judge Ã¢â‚¬" Centric; that is whether the society will approve the awarding of death sentence

to certain types of crime or not. (see Gurvail Singh @ Gala and another vs. State of Punjab, AIR 2013 SC 1177).

58. There has been another theory to consider the choice between the death and imprisonment for life. In the case of Ashok Debbarma alias Achak

Debbarma Vs. State of Tripura (2014) 4 SCC 747, the concept of Ã¢â‚¬Å“proof beyond reasonable doubtÃ¢â‚¬ and concept of Ã¢â‚¬Å“residual doubtÃ¢â‚¬ has been

considered. It was held in this case that Ã¢â‚¬Å“, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt,

but not with Ã¢â‚¬Å“absolute certaintyÃ¢â‚¬. But, in between Ã¢â‚¬Å“reasonable doubtÃ¢â‚¬ and Ã¢â‚¬Å“absolute certaintyÃ¢â‚¬, a decision makerÃ¢â‚¬â„¢s mind may wander

possibly, in a given case, he may go for Ã¢â‚¬Å“absolute certaintyÃ¢â‚¬ so as to award death sentence, short of that he may go for Ã¢â‚¬Å“beyond reasonable

doubtÃ¢â‚¬â€‹.

59. Learned court below took into consideration the principles of law in the matter of imposing death sentence and imposed death sentence. In the

instant case, the prosecution has been able to prove its case beyond reasonable doubt. It is, in fact, to the extent of Ã¢â‚¬Å“absolute certaintyÃ¢â‚¬. There is

no Ã¢â‚¬Å“lingering doubtÃ¢â‚¬ about the culpability of the appellant. It is absolutely certain that the appellant committed this heinous brutal crime upon a

defenceless and helpless girl. He lured the victim girl of most tender age under the pretext of giving her 10 rupees, so that she may purchase

something for herself. The victim followed her alongwith her two cousins PW11 and PW12. Those cousins were fortunate enough as they were let go

by the appellant. But, the victim had something most unfortunate waiting for her in the hut of the appellant. There have been tremendous injuries in the

vagina and anus of the victim. The victim was ruptured. She was penetrated from vagina as well as from her anus. There have been marks of injury

on her body, which suggests and establishes sexual assault having been committed upon her. It was most gruesome, diabolic act committed upon the

young girl. The accused did not stop here, he killed the deceased by manual throttling. PW4 Dr. Chirag Bahuguna has categorically stated about it.

This murder, which preceded with gruesome act upon the helpless girl shocks not only the conscience of the judiciary but of the entire society. Victim

girl was brutally sexually assaulted and killed thereafter. There is no mitigating circumstances, whatsoever in the case. This Court is of the view that

this case falls in the category of Ã¢â‚¬Å“rarest of the rareÃ¢â‚¬â€‹ cases, which calls for no punishment other than death.

60. Therefore, this Court is of the view that sentence of death imposed upon the appellant Jai Prakash under Section 302 IPC deserves to be

confirmed.

61. The appeal filed by the appellant is dismissed.

62. Sentence of death imposed upon the appellant under Section 302 IPC is confirmed.

63. Criminal Reference No. 02 of 2019 is answered, as above.

64. Let a copy of this judgment along with Lower Court Record be transmitted to the Court below for compliance.