

Shambhu Singh Vs State of Rajasthan

Court: RAJASTHAN HIGH COURT

Date of Decision: April 13, 2016

Acts Referred: Criminal Procedure Code, 1973 (CrPC) - Section 374(2)
Penal Code, 1860 (IPC) - Section 302, 376(2)(g)

Citation: (2016) 2 CriLR 1076 : (2016) 3 RLW 2353

Hon'ble Judges: Gopal Krishan Vyas and Goverdhan Bardhar, JJ.

Bench: Division Bench

Advocate: Doongar Singh, Advocate, for the Appellant; C.S. Ojha, Public Prosecutor, for the Respondent

Final Decision: Allowed

Judgement

Gopal Krishan Vyas, J.â€"This cr. appeal has been filed by the accused appellant Shambhu Singh under Section 374(2) of the Cr.P.C. to

challenge the judgment of conviction and sentence dated 8.1.2007 passed by the learned Addl. Sessions Judge (FT), Rajsamand in Sessions Case

No.44/2006 whereby the learned trial court convicted the accused appellant for the offences under Sections 302 and 376(2)(G) of the IPC and

passed the following sentences:

Life imprisonment and to pay

a fine of Rs. 2,000/- and in

Under Section 302 I.P.C. default of payment of fine to

further undergo six months

RI.

10 years RI and to pay a fine

Under Section 376(2) of Rs. 1,000/- and in default

(G)IPC of payment of fine to further

undergo 3 months RI.

2. Brief facts of the case are that initially missing report (Ex.P/1) was filed by PW-1 Kuwar Singh, father of the victim Usha Kanwar on 4.8.2006

at Police Station Rajnagar whereby it was informed by the complainant Kuwar Singh that my daughter Usha Kanwar aged about 14 years went

for grazing goats and buffalo in the Beed (agricultural field) but in the evening although animals come back but his daughter did not come back and

my wife and one Ganpat Singh made search of her but she is not trace out. After submitting aforesaid information at about 10.45 pm on 4.8.2006,

another written report (Ex.P/2) was filed by PW- 1 Kanwar Singh on 5.8.2006 at 8.30 am in the Police Station, Rajnagar stating therein that upon

search, body of my missing daughter is found in the grass of Beed near the wall in the half naked condition and there are so many injuries upon her

body. It was suspected by the complainant that unknown person has killed her daughter.

3. Upon aforesaid report (Ex.P/2) filed by the complainant, FIR no.468/2006 was registered on 5.8.2006 at Police Station Rajnagar. After

registration of the FIR, the police immediately went on spot and take body in possession while preparing Panchnama (Ex.P/3) in the presence of

five witnesses, namely, Keshar Singh, Shiv Singh, Khema Singh, Chain Singh and Sewa Singh. The body of the deceased was brought to the

hospital for post mortem and site plan (Ex.P/4) was prepared at 9.15 am on 5.8.2006. Blood stained mud and simple mud were taken from the

place of occurrence in the presence of two witnesses Keshar Singh and Shiv Singh. The blood stained cloths of deceased were also taken into

possession and kept in sealed bag vide Ex.P/7 and Ex.P/8. After post mortem, the body of deceased Usha Kanwar was handed over to Keshar

Singh and Shiv Singh vide Ex.P/12.

4. The police arrested accused appellant Shambhu Singh vide arrest memo Ex.P/14 at 8.00 pm on 5.8.2006 along with the co-accused Tej Singh

vide Ex.P/38 and upon information given by the accused appellant Shambhu Singh under Section 27 of the Evidence Act the pant and shirt of the

accused appellant which he was wearing at the time of occurrence was recovered vide Ex.P/35 and P/36 from the room of the residential house of

accused appellant. All the recovered articles were sent to the Superintendent of Police vide Ex.P/46 dated 21.8.2006 from where the articles were

sent to the FSL, Jaipur for examination vide communication (Ex.P/47) dated 21.8.2006. The FSL report (Ex.P/77) was received from FSL in

which it was reiterated that upon cloths and other articles recovered from the site and cloths recovered as per the information of accused appellant,

blood of "o" group was found. The investigating officer after completing investigation filed charge-sheet against the accused appellant Shambhu

Singh and Tej Singh under Section 302 and 376(2)(G) of the IPC in the court of Chief Judicial Magistrate, Rajsamand from where the case was

committed to the court of District & Sessions Judge, Rajsamand for trial. The learned District & Sessions Judge, Rajsamand transferred the case

for trial in the court of Addl. District & Sessions Judge (FT), Rajsamand.

5. On 5.10.2006 an application was filed on behalf of the accused Tej Singh while annexing his educational document in which it was prayed that

as per documents the date of birth of accused Tej Singh is 10.6.1989, therefore, on the date of alleged occurrence i.e., 4.8.2006 he was juvenile

because he was less than 18 years of age, therefore, his case may be transferred to the Juvenile Justice Board for trial.

6. The learned Addl. District & Sessions Judge (FT), Rajsamand passed an order dated 16.10.2006 whereby it was ordered that charge-sheet

against the co-accused Tej Singh may be filed against him before the Juvenile Justice Board for trial.

7. The Juvenile Justice Board after trial acquitted the accused Tej Singh from the charges levelled against him vide judgment dated 24.2.2009.

8. The trial of the accused appellant Shambhu Singh was commenced by the learned trial court while framing charge under Section 376 (2)(G) and

302 IPC or in the alternative under Section 302/34 IPC against him, thereafter, the learned trial court proceeded to record evidence of

prosecution. To prove the case against the accused appellant statement of 24 prosecution witnesses were recorded in the trial. Thereafter, the

statement of accused appellant Shambhu Singh were recorded under Section 313 Cr.P.C. in which he said that he has been falsely implicated in

this case. In defence no oral evidence was produced by the accused appellant.

9. After recording evidence of both the sides, the learned trial court finally heard the arguments and decided the case vide judgment dated

8.1.2007 whereby the learned trial court held the accused appellant guilty for offence under Section 302 and 376(2)(G) of the IPC and passed

sentence aforesaid.

10. In this appeal, the accused appellant Shambhu Singh is challenging the validity of the impugned judgment dated 8.1.2007.

11. Learned counsel for the appellant vehemently argued that in this case no direct evidence is on record against the accused appellant. The

charge-sheet was filed on the basis of circumstantial evidence but prosecution has miserably failed to prove its case beyond reasonable doubt.

12. Learned counsel for the appellant submits that the conviction for the aforesaid offences is based upon the testimony of sole evidence of Ganpat

Singh (PW-5) but the presence of PW-5 Ganpat Singh is seriously doubtful because right from the initial stage, PW-5 Ganpat Singh accompanied

the complainant Kunwar Singh, but did not disclose the fact that he saw accused appellant Shambhu Singh and Tej Singh running away from the

place of occurrence. For the first time, the aforesaid fact was disclosed by him in his statement recorded under Section 161 Cr.P.C. during

investigation.

13. Learned counsel for the appellant vehemently argued that non-disclosure of the fact of last seen right from initial stage of search of victim Usha

Kanwar by the victim's relatives and at the time of recovery of dead body of Usha Kanwar is not admission and the same is sufficient to discredit

the testimony of PW-5 Ganpat Singh but the learned trial court has erroneously relied upon the testimony of PW-5 Ganpat Singh to accept the fact

of last seen so as to convict the accused appellant, therefore the finding of conviction based upon the statement of PW-5 Ganpat Singh deserves to

be quashed and set aside.

14. With regard to finding to connect the accused appellant with the crime on the basis of so called recovery of blood stained shirt it is submitted

that although shirt and pant of accused appellant were recovered from the house and blood was found upon the shirt of the accused appellant was

reported to be of "O" group by the FSL but this recovery was effected on 8.8.2006. The only recovery of blood stained shirt cannot be a ground

to connect the accused appellant with the commission of crime because the blood group of the accused appellant was not determined. So also, the

recovery of blood stained cloths is a circumstantial evidence which is not sufficient to connect the accused with the offence. Therefore, the finding

of guilt arrived at by the learned trial court is not sustainable in law.

15. Learned counsel for the appellant further argued that the conduct of the PW-5 Ganpat Singh is seriously doubtful because he is the witness

who accompanied complainant before registration of missing report but till recording of his statement under Section 161 Cr.P.C. the fact of last

seen of two persons in the Beed was not disclosed by him, therefore, the conviction which is based upon circumstantial evidence of last seen of last

seen disclosed by the witness PW-5 Ganpat Singh cannot be accepted. The crux of the argument of the learned counsel for the appellant is that

there is no direct evidence against the accused appellant and conviction is completely based upon circumstantial evidence of last seen which is not

proved by the prosecution beyond doubt, so also, finding for conviction on the basis of so called recovery of blood stained shirt is also not

sufficient to connect the accused appellant with the crime. As per learned counsel for the appellant, the evidence of extra judicial confession cannot

be treated to be an evidence to hold the accused appellant guilty for alleged offence of murder and rape. Therefore, the judgment impugned may

kindly be quashed and set aside.

16. Learned counsel for the appellant inviting attention of the Court that serious allegations were levelled against co-accused Tej Singh but in the

trial by the Juvenile Justice Board Tej Singh has been acquitted from the charges levelled against him, therefore, the judgment impugned deserves

to be quashed because prosecution has failed to prove its case beyond reasonable doubt. In support of his argument, the learned counsel for the

appellant invited our attention towards the judgments of the Hon"ble Apex Court reported in (1980) 1 SCC 530 : Pohalya Motya Valvi v.

State of Maharashtra, AIR 1981 SC 765 : Shankar Lal Gyarsilal Dixit v. State of Maharashtra and (2003) 8 SCC 180 : State of

Rajasthan v. Raja Ram and submits that it is apparent from the evidence on record that prosecution has miserably failed to prove its case

beyond reasonable doubt, but the learned trial court erroneously held the accused appellant guilty without any trustworthy and reliable evidence,

therefore, the judgment impugned may kindly be quashed and set aside.

17. Per contra, learned Public Prosecutor submits that for the charge levelled against the accused appellant under Section 302 and 376(2)(G) of

the IPC, the prosecution has proved its case beyond doubt by leading trustworthy and reliable evidence. While inviting attention towards the

statement of PW-5 Ganpat Singh it is submitted that the witness Ganpat Singh specifically stated in his statement recorded under Section 161

Cr.P.C. during trial that on the date of occurrence he saw two persons running near the place of occurrence and he has reiterated the said

statement before the court during trial, therefore the evidence of last seen cannot be disbelieved. According to the learned Public Prosecutor in the

identification parade conducted before the Magistrate, the witness PW-5 Ganpat Singh identified both the accused, therefore, after identification it

is obvious that prosecution has proved presence of accused appellant at the place of occurrence on the date of incident. According to the learned

Public Prosecutor there is no question to disbelieve the testimony of PW-5 Ganpat Singh because he was present right from the initial stage when

missing report was registered upon the written complaint filed by the complainant PW-1 Kanwar Singh, father of the deceased Usha Kanwar.

18. While inviting attention towards the fact that blood was found upon the shirt recovered as per information of the accused appellant and blood

group of shirt and blood group of cloths which the deceased was wearing at the time of occurrence is of "o" group as per the FSL report,

therefore, this evidence is sufficient to hold accused appellant guilty for offence, therefore, there is no strength in the argument of the learned

counsel for the appellant that prosecution has failed to prove its case beyond reasonable doubt.

19. With regard to evidence of extra judicial confession it is argued that witness Bhanwar Singh PW-8 stated before the court that accused

appellant accepted before him that at about 3-4"O Clock on the date of occurrence, he drunk water from water pot of deceased Usha in her

Beed, therefore, it cannot be said that statement of PW-8 Bhanwar Singh have no trustworthy strength to prove the fact of extra judicial

confession. The learned trial court has categorically considered the entire evidence and while discussing the fact stated by the witness held that

prosecution has proved its case beyond reasonable doubt by leading circumstantial evidence of last seen, recovery of blood stained cloths and

extra judicial confession. Therefore, the instant appeal may kindly be dismissed.

20. After hearing the learned counsel for the parties, we have considered the arguments in the light of evidence and finding given by the learned trial

court. Upon consideration it emerges from the evidence that prosecution case is based upon the circumstantial evidence of last seen, recovery of

blood stained cloths and dying declaration. We have examined the finding of the learned trial court upon all the three grounds, which were taken

into consideration by the learned trial court so as to hold accused appellant guilty for the alleged offence of murder and rape of deceased Usha

Kanwar.

Ground of last seen:

21. The fact of last seen was not disclosed by the PW-5 Ganpat Singh when the missing report was made to the Police Station, Rajnagar (Ex.P/1)

on 4.8.2006 at 10.45 pm though he was with the complainant. In Ex.P/1 the father of the deceased Usha Kanwar PW-1 gave following missing

report:

Isok esa]

Jheku~ Fkkusnkj lk]

Fkkuk&jktuxj

fuosnu gS fd esjh cPph m""kk dqoj mez 14 lky (o""kZ) dh gS tks fd jkstkuk dh rjg cdfj;ka o HkSals ysdj fcMs esa xbZ Fkh

tkS vkt "kke dks okil ?kj ugha vkbZ ftdh esjh iRuh o x.kir flag oxSjk us ryk"k dh ugha ehyk tks xqe gks xbZ gS ryk"k djkBZ tkosA

gqfy;k fuEu izdkj gS%&

Cykmt ysxk iguk gqvK Fkk

dn yxHkx 4 QhV

jax lkaofy;k dyj

dqoj flag

A dqoajflag] i`Fohflag Mqykor B

22. On next date, the written information (Ex.P/2) was submitted by the complainant PW-1 Kanwar Singh before the SHO Police Station

Rajnagar. Upon perusal of Ex.P/2 the complaint submitted by the complainant although it was stated by him that at the time of search of victim

Usha Kanwar all the person Ganpat Singh, Vijay Singh, Kalyan Singh and Bhanwar Singh were with him but it is nowhere disclosed by the

complainant that any information was given by the witness Ganpat Singh (PW-5) that he saw two persons going on the place of occurrence on the

date of incident. Meaning thereby the fact of last seen was not disclosed by PW-5 Ganpat Singh either on 4.8.2006 nor on the date of filing FIR or

during the search. For the first time, in the statement recorded under Section 161 Cr.P.C. (Ex.D/1) the witness Ganpat Singh (PW-5) disclosed

the fact of last seen of two persons near the place of occurrence which reads as under:

dy Hkh lqcg 10&11 cts djhc cdjh;ka ysdj m""kk chM esa vkbZ Fkh tks cdjh;ka mlds [krs ukeh lqukj ogka ij pjg jgh Fkh djhc 4 cts lqukj og ukeh [ksr chM ls nks yM+dksa dks exjh dh rjQ rst&rst xfr ls tkrs ns[kk Fkka tks lqjrflag dh Hkkxy okys Hkaojflag oxsjk ds chMs dh rjQ tkrs ns[kk Fkka djhc 5 1@2 cts esjh iRuh us m""kk dks vkokt yxkbZ o esjs dks crk;k fd cdjh;ka vk xbZ m""kk ugha vkbZ gSA bl ij eSa o fltkjh fot;flag us chMs esa ryk" k dh exj ugha feyh ml oDr m""kk dh ekWa Hkh vk xbZ Fkh Qhj ge IHkh xkao esa x;s o dqaojflag dks QsDV~h ls cqyk;ka ,oa Fkkus ij tkdj m""kk ds xqe gksus dh fjiksVZ djkbZA

In the statement before the court PW-5 Ganpat Singh sole witness of last seen stated that :

dqoaj flag ds [ksr esjs [ksrksa ds ikl esa gh gSA muds [ksrksa esa mldh cPph m""kk viuh cdjh;ksa dks ysdj tkrh gSA pkj rkjh[k dh ckr gS ml fnu "kqdzokj Fkk] eghus dkSu lk Fkk ;g ;kn ughaA eSa esjh xk; dks ikuh fiykus x;k Fkk esjs [ksr ij x;k Fkka eSa xk; dks ikuh fiykdj okfil vk jgk Fkk rks ml le; nks vkneh Hkkxrs gq, utj vk;sa dqaojflag ds chMs ls Hkkx jgs FksA eSaus mudks Hkkxrs gq, ns[kk Fkka ml fnu ;g ckr pkj ikap cts dh ckr gSA fQj eSa viuh xk; dks ysdj vius [ksr ij pyk x;ka ml fnu "kqdzokj Fkk eSa le>k ogka ij ikl esa nsojk gS ogka ij "kqdzokj dks vkneh vkrs gS eSa le>k ;g nsojs ij tkus okys gksxsaA

m""kk chMs ls ges"kk pkj cts dh djhc ogka ls pyh vkrh FkhA fQj eSaus lkspk vkt cdjh;ka ;gka ij dSls vk;s eSaus lkspk m""kk ugha vk;h gS rks eSaus vkokt nsus ds fy, ckjg fudyk rks og cksyh ugha rks fQj esjh rch;r [kjc gksus ls esjs fltkjh fot; flag ge nksuksa <+wa<+us x;s rks mldh eka Hkh ogka ij vk x;h Fkh rks og ugha feyh fQj ge xkao esa x;s rks mlds firk

dqaojflag ds firk ds ckjs esa iwNk rks dqaojflag ml le; rd QSDV~h pyk x;k rks fQj eSaus eksVjlkBZfdy ysdj jke flag vkSj psu flag dks dqaojflag dks ysus Hkstka

23. It is worthwhile to observe that in the statement (Ex.D/1) recorded under Section 161 Cr.P.C. by the police in the investigation the witness

PW-5 Ganpat Singh first time disclosed that he saw two persons were going fast from Magri, but it is nowhere said by him that he has seen their

faces. It is also worthwhile to observe that as per his statement the deceased was not seen with them. The only disclosure is that two persons were

going in the Beed of agricultural field. Upon consideration of aforesaid evidence and facts narrated by witness PW-5 Ganpat Singh, we are of the

opinion that his statement cannot be treated as reliable evidence so as to accept the prosecution case upon such circumstantial evidence of last

seen because to establish circumstantial evidence of last seen it is necessary for the prosecution that witness should disclose the fact that deceased

was seen along with the accused last time, in this case, there is no such evidence on record to prove that deceased was last seen with the accused

appellant, but the learned trial court gave finding that accused appellant and Tej Singh were seen at the place of occurrence by the witness PW-5

Ganpat Singh on the date of incident, therefore he is liable to be held guilty. In our opinion, such finding creates serious doubt upon the prosecution

case because to convict a person for serious offence of murder and rape, the prosecution is required to prove its case beyond reasonable doubt, in

this case, the entire prosecution case is based upon circumstantial evidence of last seen and recovery of cloths on the basis of statement of PW-5

Ganpat Singh who was with the complainant right from the date of registration of the missing report but not disclosed the fact that he has seen the

accused appellant at the place of occurrence to the complainant or other persons till his statement were recorded under Section 161 Cr.P.C. by

the police. Even if, we accept his statement that two persons were going fast on the date of occurrence at the place of incident, then also, it is not

proper to rely upon the said evidence as evidence of last seen because to prove the fact of last seen, the prosecution is required to prove that the

deceased was last seen with the accused. In view of the above, the finding of the learned trial court to accept the evidence of PW-5 Ganpat Singh

upon his identification of the accused appellant before the Magistrate cannot be accepted to hold accused appellant guilty of offence. We have also

examined the credibility of the evidence of PW-5 Ganpat Singh from other angle. In the statement recorded under Section 161 Cr.P.C. it is

nowhere stated by him that he has seen the faces of those persons who were going fast near the place of occurrence. We cannot lose sight of the

fact that in the statement recorded in the court, the PW-5 Ganpat Singh stated that on the date of incident, I was coming from my agricultural field

along with cows after providing them drinking water, but in the statement recorded under Section 161 Cr.P.C. no such fact was disclosed by him.

Further, in the statement (Ex.D/1) it is stated by him that at about 5.30 pm my wife called Usha when goats come back, but in the statement

recorded in the court it is stated by PW-5 Ganpat Singh that in the evening when goats of Usha came back and Usha did not come then I called

her, when no response was given, my physical condition became bad then I and Vijay Singh went to search the deceased Usha.

24. It emerges from the evidence that there are major contradiction in the statement of PW-5 Ganpat Singh before the police and in the court, so

also, the facts of last seen of two persons on the date of occurrence was not disclosed by this witness to any one even though he was with the

complainant when missing report and FIR was filed by him. Upon aforesaid discussion it is obvious that prosecution has failed to prove the fact of

last seen with deceased by leading trustworthy evidence. The learned trial court relied upon the testimony of this sole witness so as to connect the

accused appellant with the crime. Therefore, it is not safe to rely upon the testimony of this witness without any corroboration for the purpose of

accepting the prosecution case on the basis of circumstantial evidence.

25. In the case of Sharad Birdhichand Sarda v. State of Maharashtra reported in AIR 1984 SC 1622 the following parameters/guidelines

are laid down by the Hon'ble Supreme Court, which reads as under:-

A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully

established:

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a

grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao

Bobade & Anr. v. State of Maharashtra where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance

between "may be" and "must be" is long and divides vague conjectures from sure conclusions.

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

on any other hypothesis except that the accused is guilty,

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

26. On the basis of evidence of circumstantial evidence of last seen coupled with the aforesaid adjudication, we are of the firmed opinion that the

finding of the learned trial court to accept the evidence of last seen is not sustainable in law.

Whether the prosecution has proved its case on the basis of recovery of articles to connect the accused appellant with the crime:

27. The accused appellant was arrested after recording statement of PW-5 Ganpat Singh on the basis of last seen vide Ex.P/40 at 8.00 pm on

5.8.2006. At the time of arrest, there is no mark of injury upon his body nor blood was found upon the cloths which he was wearing at the time of

arrest, but later on upon information with regard to recovery of shirt recorded by the SHO vide Ex.P/73 at 8.30 pm on 8.8.2006 and in pursuance

of the said information shirt and pent were recovered vide Ex.P/35 and P/36 in the presence of two persons namely, Hukum Singh and Udai Singh

at 4.15 pm and 4.45 pm in the evening. As per prosecution case all the articles were sent to the FSL for chemical examination. It is true that as per

the report of FSL (Ex.P/77) the blood of "o" group was found upon the shirt of the appellant and cloths of the deceased but we cannot lose sight

of the fact that there is no evidence on record with regard to blood group of the accused appellant himself and it is also very relevant to mention

here that the other accused Tej Singh who was tried by the Juvenile Justice Board, semen was found and blood was also found upon his cloths,

but while giving benefit of doubt, Juvenile Justice Board acquitted him from the charge levelled against him.

28. In case of Pohalya Motya Valvi (supra), the Hon"ble Supreme Court held that upon circumstantial evidence to prove the fact that appellant

was wearing blood stained dhoti at the time of his arrest, in absence of other circumstantial links would not unequivocally point to his guilt. The

blood stains on the Dhoti of an agriculturist is not an incriminating circumstances. The paras nos.18 and 21 of the said judgment is as follows:

18. The last circumstance relied upon by the High Court is that dhoti article 11 put on by the appellant when he was arrested was stained with

human blood. Evidence on this point is that there were some small stains of blood on the dhoti of the appellant. Blood-stains on the dhoti of an

agriculturist would hardly provide any incriminating evidence. Even if it is held proved that there were some small blood-stains on the dhoti of the

appellant that by itself would not provide evidence of a conclusive nature against the appellant.

21. What when remains against the appellant? The only thing said to have been established is that when the appellant was detained by the

investigating officer he had put on a dhoti which had some scattered stains of human blood. Discovery of a blood-stained spear alleged to have

been used in causing injuries to the deceased, on the information given by the appellant being found to be unconvincing, the only circumstance

proved is one of recovery of a blood-stained dhoti of the appellant. Applying the test of circumstantial evidence this is wholly insufficient to bring

home the charge.

29. In the case of Shanker Lal Gyarasilal Dixit (supra) the Hon"ble Supreme Court held that the discovery of blood stain of the B group measuring

0.5 cm in dia-meter on the appellant's pant and of a dried stained of semen on his under-pant are circumstances far too feeble to establish that the

appellant raped or murdered Sunita. Para no.28 of the said judgment is as follows:

28. The discovery of a blood stained of the B Group measuring 0.5 cm in dia-meter on the appellant's pant and of a dried stain of semen on his

under-pant are circumstances for too feeble to establish that the appellant raped or murdered Sunita. B" Group is not an uncommon group of

blood and no effort was made to exclude the possibility that the blood of the appellant belonged to the same group. As regards the dried stain of

semen on the appellant's under-pant, he was a grown up man of 30 years and no compelling inference can arise that the stain was caused during

the course of the sexual assault committed by him on the girl.

30. Similarly in the case of State of Rajasthan v. Raja Ram (supra) the Hon"ble Supreme Court in para no.21 of the judgment gave following

verdict:

21. Coming to the bloodstains on the cloths which were allegedly seized, on being pointed out by the accused, the forensic laboratory report

indicated that there were blots of human blood on the shirts and trousers of the accused. There was no effort to find out the blood group. In fact,

the High Court noted this position and observed that presence of PW-4 at the time of recovery is doubtful as he has been found to be an unreliable

witness. It was observed that even if it is accepted that there was existence of blood, this circumstance is not such from which it can be found that

the accused was the perpetrator of the crime. In the aforesaid report (Ext.61) it is clearly stated that the blood group of blood found on the

clothes could not be determined. Neither the blood group of the deceased nor that of the accused was determined. In that background, the High

Court held that the possibility of the blood being that of the accused cannot be ruled out. In view of the findings recorded by the High Court about

the non-acceptability of evidence relating to the alleged extra-judicial confession, the conclusions of the High Court cannot be said to be one which

are unsupportable. We decline to interfere in the appeals, and the same are dismissed.

31. Upon perusal of the above evidence and adjudication made by the Hon^{ble} Supreme Court, we are of the opinion that the finding given by the

learned trial court to hold the accused appellant guilty on the basis of recovery of blood stained pent is not sustainable in law because it is doubtful

upon the evidence. The other fact of last seen has not been proved by the prosecution by leading transparent evidence, therefore, obviously, the

conviction of the accused appellant on the basis of last seen and recovery of blood stained shirt is not based upon trustworthy evidence because

prosecution has not proved its case beyond reasonable doubt.

32. Therefore, the finding given by the learned trial court so as to hold accused appellant guilty for alleged offence under Section 302 and 376(2)

(G) of the IPC is not sustainable in law.

Extra judicial confession:

33. With regard to the ground of extra judicial confession the learned Public Prosecutor invited our attention towards the statement of PW-8

Bhanwar Lal before whom, the alleged extra judicial confession was made. The said witness stated before the court that the accused appellant

Shambhu stated him that :

mlds ckn rstflag ?kj dh rjQ x;k vkSj eSa Hkh okil "kaHkqflag ds ikl vk x;kA "kaHkq flag us crk;k fd eSa rhu vkSj pkj cts m""kk dh tks eVdh chMs esa Hkjh Fkh ml ij ikuh ihdj vk;k gwWaA mlus dgk fd m""kk ds ckjs esa eSa ugha tkurk rstflag tkurk gSA

34. Upon perusal of above statement it cannot be said that the above statement can be termed as extra judicial confession. It is nowhere stated by

him that he has committed rape or murder upon Usha, no other witness stated before the court that any extra judicial confession was made by the

accused appellant Shambhu Singh to connect him with the offence.

35. It is also important fact that evidence of extra judicial confession has been discredited by the Juvenile Justice Board while deciding the case of

co-accused Tej Singh. After perusing the statement of PW-8 Tej Singh we are of the opinion that any confession made by co-accused Tej Singh

cannot be read against accused appellant because prosecution has failed to prove the fact that deceased was last seen together with the accused

appellant.

36. In view of the above discussion it is a case in which the prosecution has miserably failed to prove its case on the basis of circumstantial

evidence, therefore, while following the aforesaid principles of law laid down by the Hon^{ble} Supreme Court, we hold that prosecution has failed

to prove its case beyond reasonable doubt against accused appellant Shambhu Singh.

37. Consequently, this cr. appeal is hereby allowed. The judgment of conviction and sentence passed against the accused appellant Shambhu

Singh dated 8.1.2007 by the learned Addl. District & Sessions Judge (FT), Rajsamand in Sessions Case No.44/2006 for the offences under

Section 302 and 376(2)(G) of the IPC is hereby quashed and set aside. The accused appellant Shambhu Singh is acquitted from the charges

levelled against him and he be released forthwith if not required in any other case.

38. Keeping in view, however, the provisions of Section 437A Cr.P.C. the accused appellant is directed to forthwith furnish a personal bond in the

sum of Rs. 20,000/- and a surety bond in the like amount each, before the learned trial court, which shall be effective for a period of six months to

the effect that in the event of filing of Special Leave Petition against the judgment or for grant of leave, the appellants, on receipt of notice thereof,

shall appear before Hon"ble the Supreme Court.