

**HIGH COURT OF MADHYA PRADESH
GWALIOR BENCH****DIVISION BENCH****G.S. AHLUWALIA****&****DEEPAK KUMAR AGARWAL J.J.****Cr.A. No. 525/2010****Girraj alias Batte****Vs.****State of M.P.**

None for the appellant.

Shri Rajiv Upadhyaya, Public Prosecutor for respondent/State.

Date of Hearing : 10/Jan/2022
Date of Judgment : 14th/Jan/2022
Approved for Reporting : Yes

Judgment**14th - January -2022****Per G.S. Ahluwalia J.**

This Criminal Appeal under Section 374 of Cr.P.C. has been filed against the judgment and sentence dated 18/5/2010 passed by First Additional Sessions Judge, Guna in ST No.63/2010, by which the appellant has been convicted under Sections 302, 376 read with Section 511 of IPC and under Section 25 (1-B) (b) of Arms Act and has been sentenced to undergo life imprisonment for offence under Section 302 of IPC and a fine of Rs.5,000/-, in default three years' rigorous imprisonment, Five years' rigorous imprisonment for offence

under Section 376 read with Section 511 of IPC and a fine of Rs.2,000/-, in default one year's rigorous imprisonment and One year rigorous imprisonment for offence under Section 25 (1-B) (b) of Arms Act and a fine of Rs.500/-, in default three months' rigorous imprisonment. All the sentences have been directed to run concurrently.

2. The necessary facts for disposal of the present appeal in short are that the complainant Gopaldas lodged a report on 30/11/2009 at 19:00, on the allegation that he is the resident of Jhagar. At 5:30 pm he was informed by Jitendra that the prosecutrix had returned from school at 12 pm after giving her examination and thereafter, went to answer the call of nature alongwith a *Lota* (a globular water container), however, she has not returned back. He has also tried to search her, but could not get any information about her whereabouts. Thereafter, the complainant sent his son Ramkrishna, Jitendra and Ramjidas to search for the prosecutrix, but after 30-45 minutes, they came back and informed that the prosecutrix is lying in the field of Mangilal Pathak. She has abrasions on her back. She is semi-naked and her *Chunni* is wrapped around her neck. Blood has come out from her nose. Face and hairs are stained with wet mud. Thereafter, he also went to see the prosecutrix and found that the prosecutrix was lying on the ground upside down and her back had abrasions and she was in a semi-naked condition and she was strangulated by her *Chunni* and her face and hairs are stained with wet mud and the blood

has come out of her nose. She is dead. Thereafter, it was alleged that somebody has killed her granddaughter after committing rape on her. On this information, the police registered the FIR in Crime No.283/2009 for offence under Sections 302, 376 of IPC.

3. The dead body of the prosecutrix was sent for postmortem. Vaginal slide was prepared. The cloths of the deceased were sealed. Sleeper and *Lota* were seized from the spot. The statements of the witnesses were recorded. The appellant was arrested and on the basis of his memorandum, one knife and his clothes were seized. They were sent for forensic examination. The police after completing the investigation, filed charge-sheet for offence under Sections 302, 376 of IPC and Section 25 (1-B) of Arms Act.

4. The Trial Court by order dated 1/4/2010 framed charges under Sections 376, 302 of IPC and under Section 25 (1-B) (b) of Arms Act.

5. The appellant abjured his guilt and pleaded not guilty.

6. The prosecution examined grandfather of the prosecutrix "A" (PW-1), Uncle of prosecutrix "B" (PW-2), Brother of the prosecutrix "C" (PW-3), Manoj (PW-4), Uncle of the prosecutrix "D" (PW-5), Aunty of the prosecutrix "E" (PW-6), Mother of the prosecutrix "F" (PW-7), Aunty of the prosecutrix "G" (PW-8), Anil Kumar Rai (PW-9), Badrilal (PW-10), Dr. Manish Jain (PW-11), S.P. Sharma (PW-12), R.B.S. Raghuvanshi (PW-13), Rajendra Sharma (PW-14), and Ashok Singh Tomar (PW-15).

7. The appellant did not examine any witness in his

defence.

8. The Trial Court by the impugned judgment has convicted and sentenced the appellant for the above-mentioned offences.

9. It is an unfortunate case where the counsel engaged by the appellant did not appear. Thereafter, this Court appointed an *amicus curiae*, but unfortunately he also failed to discharge his pious duty and did not appear. Under these circumstances, in the light of the judgment passed by the Supreme Court in the case of **Surya Baksh Singh Vs. State of U.P.** reported in **(2014) 14 SCC 222**, this Court went through the record of the Trial Court with the assistance of the Public Prosecutor.

10. Before advertng to the facts of the case, this Court thinks it apposite to find out as to whether the death of the prosecutrix was homicidal or not?

11. Dr. Manish Jain (PW-11) has conducted the postmortem of the dead body of the deceased and found following injuries:-

Ligature mark is present around the neck. Ligature mark is transverse. Knot present at anterior surface of neck. Blood stained present at suit, sweater, salwar, ...(not legible), on face, mud present, at mouth, oral cavity, mud present at face, mouth is half open and filled with mud, subconjunctival hemorrhage present over eye both.

Injuries present over external body:

- i- Abrasion at right forearm at flexer surface.
- ii- Lacerated wound at left forehead (illegible), size 2 X 1 cm just above eyebrow (illegible).
- iii- Abrasion at left gluteal region linear size 18 X .5 cm.
- iv- Abrasion at left sub-scapular (illegible) region, size 25 X 3 cm.

- v- Abrasion, right side of back, 25 X 3 cm.
- vi- Tip of nose is cut at both alar nostril, blood is coming through.

Old tear present at hymen, at 11 and 1 O Clock position. No swelling, no bleeding present at vulva or vagina. Uterus cavity is empty. No pubic hair after combing, only one finger can easily pass through hymen, normal size (in statement written as uterus normal size).

Mode of death of deceased is asphyxia and cause of death is strangulation. Time since death is within 24 hours.

The post-mortem report is Ex. P.24.

This witness was cross-examined and in cross-examination, he admitted that in his postmortem report, Ex. P/24, he has not given any specific opinion as to whether rape was committed or not, however, he on his own stated that there might have been an attempt to commit rape, but the rape was not committed. No question with regard to the injuries and the opinion of the autopsy surgeon with regard to the strangulation was asked.

12. Thus, it is clear that the death of the deceased prosecutrix was homicidal in nature due to strangulation. However, the question as to whether there was any attempt to commit rape or not will be considered and decided after appreciating the evidence.

13. The present case is based on circumstantial evidence, which can be summarized as under:-

- i- The prosecutrix returned back from her school at 12 PM and thereafter went to answer the call of nature alongwith one *Lota* and then, she did not return back.
- ii- When the relatives of the deceased were searching for her whereabouts, then they found that the dead body of the

prosecutrix was lying in a semi-naked condition and her *Chunni* was wrapped around her neck and in the post-mortem report, her death was due to strangulation.

iii- Uncle of Prosecutrix "B" (PW-2), Manoj (PW-4) and Aunty of the prosecutrix "G" (PW-8) had seen the appellant following the prosecutrix. Thus, the circumstance of last seen together.

iv- A sleeper and *Lota* was seized from the spot and finger print from the *Lota* was picked, which matched with the finger print of the appellant.

v- The *Lota* was identified by Manoj (P.W.4).

v- Human sperms and semen were found on the Salwar, underwear, vaginal slide of the prosecutrix as well as on the pant of the appellant. Sperms found on the *Salwar*, underwear of the prosecutrix and on the pant of the appellant were not found to be sufficient for further examination.

vi- The appellant made an attempt to commit rape on the prosecutrix.

vii- Blood was found on vaginal slide, *Salwar*, *Chunni* of the deceased, stone recovered from the spot as well as Pant, T-shirt and knife seized from the possession of the appellant. It was further found in the FSL report that blood stained earth, *Salwar*, Shirt, *Sameej* and sweater of the prosecutrix and T-shirt of the appellant were stained with human blood of A group, whereas pant and knife seized from the appellant were also found to be stained with human blood.

14. Before considering the above-mentioned circumstances, this Court would like to consider the law governing the field of circumstantial evidence.

15. The Supreme Court in the case of **Sharad Birdhichand Sarda v. State of Maharashtra**, reported in (1984) 4 SCC 116 has held as under :

153. 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 v. State of Maharashtra* where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“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.

16. The Supreme Court in the case of **Pudhu Raja v. State**, reported in (2012) 11 SCC 196 has held as under :

15. In a case of circumstantial evidence, the prosecution must establish each instance of incriminating circumstance by way of reliable and clinching evidence, and the circumstances so proved, must form a complete chain of events, on the basis of which, no conclusion other than one

of guilt of the accused can be reached. Undoubtedly, suspicion, however grave it may be, can never be treated as a substitute for proof. While dealing with a case of circumstantial evidence, the court must take utmost precaution whilst finding an accused guilty solely on the basis of the circumstances proved before it.

17. The Supreme Court in the case of **Ram Singh v. Sonia**, reported in **(2007) 3 SCC 1** has held as under :

39. The principle for basing a conviction on the basis of circumstantial evidence has been indicated in a number of decisions of this Court and the law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the court has to be watchful and avoid the danger of allowing the suspicion to make the place of legal proof, for sometimes unconsciously it may happen to be a short step between moral certainty and legal proof. It has been indicated by this Court that there is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions.

18. The Supreme Court in the case of **Inspector of Police Vs. John David** reported in **(2011) 5 SCC 509** has held as under :

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33. The principle for basing a conviction on the edifice of circumstantial evidence has also been indicated in a number of decisions of this Court and the law is well settled that

each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion that could be drawn is the guilt of the accused and that no other hypothesis against the guilt is possible.

34. This Court has clearly sounded a note of caution that in a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events have been established clearly and such completed chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. It has also been indicated that when the important link goes, the chain of circumstances gets snapped and the other circumstances cannot in any manner, establish the guilt of the accused beyond all reasonable doubts. It has been held that the court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof. It has been indicated by this Court that there is a long mental distance between “may be true” and “must be true” and the same divides conjectures from sure conclusions.

35. This Court in *State of U.P. v. Ram Balak* had dealt with the whole law relating to circumstantial evidence in the following terms: (SCC pp. 555-57, para 11)

“11. ‘9. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See *Hukam Singh v. State of Rajasthan*, *Eradu v. State of Hyderabad*, *Earabhadrapa v. State of Karnataka*, *State of U.P. v. Sukhbasi*, *Balwinder Singh v. State of Punjab* and *Ashok Kumar Chatterjee v. State of M.P.*) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In *Bhagat Ram v. State of Punjab* it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and [bring home the offences] beyond any reasonable doubt.

10. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.* wherein it has been observed thus: (SCC pp. 206-07, para 21)

“21. In a case based on circumstantial evidence, the 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 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.”

11. In *Padala Veera Reddy v. State of A.P.* it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

“(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;

(3) 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 none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

* * *

16. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra*. Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are: (SCC p. 185, para 153)

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned “must” or “should” and not “may be” established;

(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 aspects were highlighted in *State of Rajasthan v. Raja Ram*, at SCC pp. 187-90, paras 9-16 and *State of Haryana v. Jagbir Singh*."

19. Therefore, this Court would analyze the circumstantial evidence relied upon by the prosecution in the light of the law laid down by the Supreme Court, in order to find out as to whether the chain of circumstance is complete or not.

Circumstances Nos.1 and 2:

20. Grandfather of the prosecutrix "A" (PW-1), Uncle of the prosecutrix "B" (PW-2), Brother of the prosecutrix "C" (PW-3), Manoj (PW-4), Uncle of the prosecutrix "D" (PW-5), Aunty of the prosecutrix "E" (PW-6), Mother of the prosecutrix "F" (PW-7), Aunty of the prosecutrix "G" (PW-8) have stated that the prosecutrix had returned back from her school at 12 PM and thereafter, she went to answer the call of nature. When she did not return back till 6 PM, then the witnesses went in search of the prosecutrix and found that she was lying upside down and was dead. Her face was stained with mud. Further, as per the post-mortem report, Ex.P.24, the cause of

death was strangulation.

21. Thus, it is clear that the prosecution has succeeded in proving beyond reasonable doubt that the prosecutrix returned back from her school at 12 PM and thereafter went to answer the call of nature and did not return back and on search, her dead body was found in a semi-naked condition with her *Chunni* wrapped around her neck. Further her death was found to be homicidal in nature.

Circumstance No.3 : last seen together:

22. Uncle of Prosecutrix "B" (PW-2), Manoj (PW-4) and Aunty of Prosecutrix "G" (PW-8) were also the witnesses of last seen together, but they have not supported the prosecution case on the said aspect. Accordingly, the Trial Court has rightly held that the prosecution has failed to prove the circumstance of last seen together.

Circumstance No.4 :

a. Lota recovered from the spot and identified by Manoj (P.W.4)

b. Finger print of the appellant on the Lota :

23. Ashok Singh Tomar (PW-15) is the Investigating Officer. He has stated that on 30/11/2009 he was posted as SHO, Police Station Dharnavada, District Guna. Constable Ramesh brought an FIR from Police Outpost Jhagar, which was registered at zero and on the basis of which, Crime No.283/2009 for offence under Sections 302, 376 of IPC was registered. The FIR is Ex. P/57 and the acknowledgment of receipt of copy of FIR by the JMFC, Guna is Ex. P/58. Since it was already dark and, therefore, he went to the spot and secured the same

and sent an information to FSL Unit, Guna, Finger Print Unit Biaora and Senior Police Officers. On 1/12/2009, he alongwith Dr. Sharma of FSL Unit, Finger Print Expert of Biaora and Senior Police Officers went to the spot. Thereafter, he prepared *Safina Form* Ex. P/3. He saw that the dead body of the prosecutrix was lying upside down. Her head was towards western side and legs were towards eastern side. She was in a semi-naked condition. Blood was oozing out from nose and head. Her face and scalp hair were stained with wet mud. The deceased was wearing a Salwar suit of pink colour and sweater of black colour. Her neck was strangulated with the help of her *Chunni*. At a distance of about 100 ft from the dead body, one steel *Lota* was lying. One sleeper of the deceased was lying at a distance of 63 ft from the *Lota* and another sleeper was lying at a distance of 60 ft from the *Lota* and the distance between both sleepers was 23 ft and accordingly, *Lash Panchnama* Ex.P/4 was prepared. Thereafter, the spot map Ex. P/2 was prepared. The spot was jointly inspected by the FSL Unit as well as Finger Print Expert. The dead body of the deceased was sent for postmortem vide requisition Ex. P/59. After the inspection was carried out by the FSL Unit and Finger Print Unit, the blood stained earth, plain earth, blood stained stone, sleepers, steel *Lota*, wet mud and sleepers of the deceased were seized vide seizure memo Ex. P/6. Statements of the witnesses were recorded. On the suspicion expressed by the witnesses, the accused was arrested on 21/12/2009 vide arrest memo Ex. P/11. The appellant gave a

voluntary memorandum which is Ex. P/18 and on the basis of his disclosure, one pair of plastic sleepers, one Pant, T-shirt, one knife were seized vide seizure memo. Ex. P/9. The seized articles were sent to FSL, Gwalior vide draft Ex. P/60. The FSL report Ex. P/61 was received. The reports of the Finger Print Expert Ex. P/15 to P/21 were received. The FSL report with regard to the clothes, knife and clothes which were seized from the spot was also received which is Ex. P/63. The identification of the *Lota* was got done from Manoj Bairagi, who rightly identified the same vide Ex. P/27 and the photograph of the spot Ex. P/54 was received. Seized *Chappal* and *Lota* are article "A", knife is article "B", blood stained and plain earth which were received after the FSL are articles "C" & "D", stone is article "E" and clothes are articles "F", "G", "H", "I" and "J". From the evidence of this witness, it appears that on 1/12/2009 this witness went to the spot for the first time alongwith Dr. Sharma of FSL Unit, Finger Print Expert of Biaora and Senior Police Officer and only thereafter, he started investigation by preparing Safina form.

24. Whether the *Lota* allegedly seized from the spot was identified by Manoj (P.W.4).

25. Manoj (P.W.4) has stated that the prosecutrix was known to him and She has expired. The appellatant is known to him as he is the resident of same village. On 30-11-2009, the prosecutrix had come to his house and asked for water. Accordingly, he gave her water in steel *Lota*. The prosecutrix had demanded water for answering the

call of nature. The prosecutrix went towards *Gadi* along with water. At about 4:30 P.M., the mother of the prosecutrix informed that the prosecutrix is missing and he informed that She had taken water from him. Thereafter, he went to temple after washing his face. At 7-7:15 P.M., he came to know that the prosecutrix had gone towards the *Gadi* for answering the call of nature, where she is lying upside down. He expressed his ignorance as to who has killed her. He had given water to the prosecutrix and thereafter She went away. This witness was declared hostile. Nothing could be elicited from his evidence which may support the prosecution case. However, one thing is clear, this witness did not say anything about identification of *Lota* by this witness and no question was also asked to him in cross-examination.

26. Badrilal (P.W. 10) was Ex-Sarpanch of Gram Panchayat Jhagar. He admitted his signatures on Identification Memo, Ex. P.23. However, he denied that he had conducted any Identification Parade of *Lota*. He was called in Police Station, where his signatures were obtained, but he was not informed about the contents of the said document. This witness was declared hostile and he specifically denied that he had ever conducted identification parade of *Lota*.

27. The Trial Court has wrongly held in para 19 of its judgment, that it is undisputed that the *Lota* which was allegedly recovered from the spot was the same *Lota* which was taken by the deceased prosecutrix with her. **Thus, it is clear that the prosecution has**

failed to prove that the prosecutrix was carrying the *Lota* which was allegedly seized from the spot.

28. Now the moot question for consideration is that at what time, the *Lota* was seized and ;

Whether the finger prints were rightly picked up from the *Lota* which was allegedly lying on the spot or not?

29. Anil Kumar Rai (PW-9) is a Handwriting Expert. He has stated that on 1/12/2009 he received an information from Police Control Room, Guna and, therefore, he carried out the inspection of the spot. He picked up the finger print from the *Lota* and two chance prints were found, which were marked as "A" and "B". The said document is Ex. P/13. The finger prints were picked in the presence of Mahendra Sharma and Ashok Singh Tomar, Investigating Officer.

This witness was cross-examined on the issue of picking up of finger print from the *Lota*. In paragraph 7 of his cross-examination, this witness has stated that at about 7:30-8:00 AM, he received an information through telephone. The information so received is never maintained in any Rojnamchasanha, however, it is maintained in weekly diary. He admitted that he has not produced any such diary. In paragraph 8, this witness has stated that at about 7:45-8 AM he left Biaora for Guna by a bus and reached police outpost Ruthiyai at about 10:30-10:45 AM. Ashok Singh Tomar, SHO Police Station Dharnavada was waiting for him and, therefore, he left for the spot alongwith him in his vehicle. Ruthiyai is at a distance of about 15

km. from Jhagar. In paragraph 9 he stated that he stayed in Ruthiyai for about 5 minutes and left Ruthiyai police outpost for Jhagar outpost at 11 AM. He also stated that since he is not a local person, therefore, he cannot say that the distance of Jhagar from the toll tax barrier is 20 km. or not, however, he stated that he reached Jhagar about 35-40 minutes after starting from Ruthiyai. He further stated that he went directly to the spot in Jhagar and it was approximately 12 PM. He further stated that one *Lota* was lying in the bushes and it was lying in the same condition and was not touched and accordingly, he inspected the *Lota* on the spot itself. He further stated that the *Lota* was not found in sealed condition. He again admitted that after reaching the spot at 12 PM he inspected the *Lota* within 5 minutes. He further stated in paragraph 11 of his cross-examination that the information regarding *Lota* and not touching it was given by Ashok Singh Tomar, Investigating Officer and he inspected the spot in presence of Ashok Singh Tomar. He denied that the *Lota* was sealed by the police at 10:15 in the morning, but claimed that he had found the *Lota* on the spot. He further stated that only the Investigating Officer can explain the fact of sealing of *Lota*. He further stated that if the *Lota* is touched by more than one person, then multiple thumb impression may occur. However, he stated that he got the chance print of only two thumb impressions, out of which, one was that of the appellant and since the another was not clear, therefore, he cannot say that the said finger print was of which person. Thus, it is clear

that Anil Kumar Rai (PW-9) has specifically stated that he reached to the spot at 12 PM and inspected the *Lota* within 5 minutes, i.e. approximately about 12:05 PM.

30. At the cost of repetition, this Court would like to mention that Ashok Singh Tomar (PW-15) in paragraph 3 of his examination-in-chief itself had specifically stated that on 1/12/2009 he went to the spot alongwith Dr. Sharma of FSL Unit, Finger Print Expert of Biaora and Senior Police Officer and only after reaching on the spot, he started investigation by preparing *Safina form* Ex.P/3. According to Anil Kumar Rai (PW-9), he reached on the spot at 12 PM. *Safina Form* Ex.P/3 was prepared at 8:50 AM and the *Lash Panchnama* Ex.P/4 was prepared in between 9-10 AM, which is evident from the timing mentioned on the *Lash Panchnama* itself. The police vide seizure memo Ex.P/6 had seized the *Lota* from the spot at 10:15 AM and according to Ashok Singh Tomar (PW-15), the *Lota* was sealed on the spot itself. Further, the spot map Ex. P/2 was prepared at 8:30 AM. According to Ashok Singh Tomar (PW-15) everything was done in presence of Dr. Sharma of FSL Unit, Finger Print Expert from Biaora and Senior Police Officer.

31. From the above-mentioned documents, it is clear that the spot map Ex.P/2 was prepared at 8:30 AM, *Safina form* Ex. P/3 was prepared at 8:50 AM, *Lash Panchnama* Ex. P/4 was prepared in between 9-10 AM and the *Lota* was seized and sealed at 10:15 AM vide Ex.P/6. Whereas, according to Anil Kumar Rai (PW-9), he

reached on the spot at 12 PM and by that time, the *Lota* was lying in an open condition. Further, Ashok Singh Tomar (PW-15) has stated that he had gone to the spot alongwith FSL Unit, Finger Print Expert and senior police officer. The FSL Unit, Guna had also carried out the inspection and the Inspection Report is Ex. P/25. From this Inspection Report, it is clear that the inspection was carried out on 1/12/2009 from 8:30 AM to 10:30 AM, i.e. much prior to arrival of Anil Kumar Rai (PW-9). Ashok Singh Tomar (PW-15) has specifically stated in paragraph 4 of his examination-in-chief that the spot was inspected by him alongwith FSL Unit, Finger Print Expert and Senior Police Officer.

32. Thus, it is clear that the Finger Print Expert Anil Kumar Rai (PW-9) had not reached on the spot by the time the spot map Ex. P/2, *Safina form* Ex. P/3, *Lash Panchnama* Ex. P/4, seizure memo of *Lota* Ex. P/6 and the Inspection Report Ex. P/25 were prepared. Under these circumstances, if *Lota* was already sealed by the police at 10:15 AM, then Anil Kumar Rai (PW-9) had no occasion to lift thumb impression of the appellant from the *Lota* at 12:05 PM.

33. Further, Anil Kumar Rai (PW-9) had submitted his report Ex.P/20 to the SHO, Police Station Dharnavada, District Guna, but the said report does not contain the time at which the finger prints were lifted.

34. Although Anil Kumar Rai (PW-9) in his report has found that one of the finger print lifted from the *Lota* was that of the appellant,

but there is another important aspect of the matter. According to the prosecution case, the deceased had taken *Lota* with her when she went to answer the call of nature. Therefore, the thumb impression of the deceased should also have been found on the *Lota*. It is a matter of common knowledge that no one can hold a *Lota* with only one finger and if somebody holds the *Lota* with two fingers also, then there should have been at least two finger marks on the *Lota* apart from an finger mark of the accused. Admittedly, only two thumb impressions were found on the *Lota*. The prosecution has failed to prove as to where the thumb impressions of the deceased has gone? The prosecution also did not try to match the second thumb impression found on the *Lota* with that of the deceased. Even the thumb impression of the deceased was not lifted by Anil Kumar Rai (PW-9).

35. Further, according to Ashok Singh Tomar (P.W. 15) he had inspected the spot along with F.S.L. Unit and Finger Print Expert, Biaora. S.P. Sharma (P.W. 12) is a Senior Scientific Officer, Mobile F.S.L. He has not stated that at the time of inspection, the Finger Print Expert was also accompanying him. On the contrary, in the cross-examination, he has stated that at the time of inspection, S.D.O. (P) Raghugarh and S.H.O. Police Station Dharnavada were with him. The spot inspection was done in between 8:30 to 10:30 and during the inspection, he had directed the S.H.O. to seize *Lota*, sleepers of the deceased, blood stained earth, plain earth, stone as well as mud

mixed earth and he immediately started the proceedings for the same. Thus, it is clear that the so called *Lota* was already seized much prior to arrival of Anil Kumar Rai (P.W.9).

36. Under these circumstances, this Court is of the considered opinion that the prosecution has failed to prove that Anil Kumar Rai (PW-9) had lifted the thumb impression of the appellant from the *Lota* at 12:05 PM on 1/12/2009. Even otherwise, the prosecution has failed to prove that the prosecutrix had taken the so-called *Lota* with her.

37. Under these circumstances, where the prosecution has failed to prove that the *Lota* was lying in an open condition at 12:05 PM specifically when the *Lota* was already seized by the police at 10:15 AM coupled with the fact that all other documents of investigation done by Ashok Singh Tomar (PW-15) were prepared much prior to actual arrival of Anil Kumar Rai (PW-9). **This Court is of the considered opinion that merely because the thumb impression of the appellant was found on the *Lota* cannot be said to be an incriminating circumstance to prove the involvement of the appellant in the offence.**

Circumstance No. 5 & 6: Human Sperms and Semen in Vaginal Slide, Salwar, underwear of the prosecutrix and Pant of the appellant, and whether the appellant had made an attempt to commit rape on the prosecutrix.

38. Dr. Manish Jain (P.W. 11) had conducted the post-mortem of

the dead body of the prosecutrix and found the following internal injuries :

Old tear present at hymen at 11 and 10 clock position. No swelling, no bleeding at vulva and vagina. Uterus cavity is empty. No pubic hairs off combing. Only one finger can easily pass to hymen.

39. In cross-examination, this witness specifically denied that he has not mentioned specifically that rape has taken place. However, he on his own explained that no rape was committed but there could have been an attempt to commit rape.

40. The internal injuries found by Dr. Manish Jain (P.W.11) have already been reproduced. No injury whatsoever was found on genitals of the prosecutrix, however, old tear was found in hymen. Dr. Manish Jain (P.W.11) has specifically ruled out the possibility of Rape, however, stated that there might have been an attempt to commit rape. Dr. Manish Jain (P.W.11) has not given any reason for arriving at such a conclusion specifically when nothing was mentioned by him in the post-mortem report regarding that.

41. The interesting aspect of the matter is that in the vaginal slide, salwar and underwear of the prosecutrix, human semen and sperms were found. If no rape (by penetration) was committed with the prosecutrix, then from where the sperms and semen was found on Salwar, underwear and vaginal slide of the prosecutrix?

42. Under these circumstances, this Court is of the considered opinion, that D.N.A. Test should have been conducted to find out as

to whether the DNA profile of the appellant was found on the semen and sperms found on the Vaginal slide, Salwar and Underwear of the prosecutrix. Thus, it is held that mere presence of sperms and semen on Vaginal Slide, Salwar and Underwear of the prosecutrix is not sufficient to hold that the appellant had made an attempt to commit rape on the prosecutrix.

43. So far as the presence of semen and sperm on the pant of the appellant is concerned, the same is of no consequence.

Circumstance No. 7 : Blood of “A” group was found on the pant of the appellant.

44. According to the F.S.L. report, Ex. P.63, Human blood of “A” group was found on blood stained earth, blood stained stone seized from spot, Salwar, Kurta, Sameem and Sweater of the deceased prosecutrix as well as on T-Shirt of the appellant.

45. Presence of human blood of “A” group on the blood stained earth, blood stained stone and cloths of the deceased prosecutrix indicates that the blood group of the deceased prosecutrix was “A”. However, human blood of “A” group has also been found on the T-Shirt of the appellant. The incident took place on 30-11-2009 and the appellant was arrested after 21 days i.e., on 21-12-2009, vide arrest memo Ex. P.11 and cloths of the appellant apart from other articles were seized vide Seizure Memo Ex. P.9. It is not known that what was the blood group of the appellant. Incidentally, if the blood group of the appellant is also of “A” group, then the presence of blood of

“A” group would be of no consequence. However, in view of the F.S.L. Report, Ex. P.63, it is held that human blood of “A” group was found on the T-shirt of the appellant, which might be that of the deceased prosecutrix.

46. The next question for consideration is that whether the solitary circumstance of presence of human blood of “A” group on the T-Shirt of the appellant is sufficient to hold him guilty for committing murder of the deceased prosecutrix or not?

47. It is well established principle of law that suspicion howsoever may be grave, but it cannot take the place of Proof. It is well established principle of law that the circumstances should be of a conclusive nature and tendency and should exclude every possible hypothesis except the one to be proved, and 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.

48. So far as the question of recovery of knife from the possession of the appellant is concerned, the same is also doubtful. Uncle of the prosecutrix “D” (P.W.5) has stated that in the Police Station Jhagar, he came to know that the seizure proceedings, Ex. P.9 have been done in respect of T-shirt and Pant of the appellant. He further stated that the police had seized the knife from the *Thaila* (bag). In Cross-examination, this witness has stated that one day prior to arrest of the

appellant, the police had already informed that the accused has been arrested and accordingly, he went to police station on the next day. He further stated that it is true that the police had shown the knife and other articles to this witness in the Police Station. This witness has not stated that the knife was produced by the appellant. The prosecution has not examined another witness of seizure i.e., Dharmendra Bairagi. Thus, from the evidence of uncle of the prosecutrix "D" (P.W. 5), it cannot be said that the knife was seized by the police from the possession of the appellant. It is true that the seizure can be proved by the investigating officer also, but looking to the discrepancies committed by the investigating officer, specifically in view of the admission of the uncle of the prosecutrix "D" (P.W.5) that the appellant was already detained one day prior to the recovery of articles from his possession, it would not be proper to rely on the evidence of Ashok Singh Tomar (P.W. 15) without corroboration. Accordingly, it is held that the seizure of knife from the possession of the appellant has not been proved by the prosecution beyond reasonable doubt.

49. Under these circumstances, this Court is of the considered opinion, that the solitary circumstance of presence of human blood of "A" group is not sufficient to hold the appellant guilty of committing murder of the deceased prosecutrix. Accordingly, he is acquitted of all the charges.

50. *Ex-Consequenti*, the judgment and sentence dated 18/5/2010

passed by First Additional Sessions Judge, Guna in ST No.63/2010 is hereby **set aside**.

51. The appellant is in jail. He be released immediately, if not required in any other case.

52. Let a copy of the judgment be provided immediately to the appellant, free of cost.

53. The record of the Trial Court be sent back immediately, along with the copy of this judgment for necessary information and compliance.

54. The appeal succeeds and is hereby **Allowed**.

(G.S. Ahluwalia)
Judge

(Deepak Kumar Agarwal)
Judge

Arun*