Chotkau vs The State Of Uttar Pradesh on 28 September, 2022

Author: V. Ramasubramanian

Bench: V. Ramasubramanian, A.S. Bopanna, S. Abdul Nazeer

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOs.361-362 OF 2018

CHOTKAU …APPELLANT(S)

VERSUS

STATE OF UTTAR PRADESH ...RESPONDENT(S)

JUDGMENT

V. RAMASUBRAMANIAN, J.

1. Convicted for the offences punishable under Sections 302 and 376 of the Indian Penal Code, 1860 (for short "IPC") and sentenced to death by the Sessions Court, which was also confirmed by the High Court on a reference and an appeal, the sole accused has come up with the above appeals.

2. We have heard Shri S. Nagamuthu, learned senior counsel for the appellant and Shri Ardhendumauli Kumar Prasad, learned Additional Advocate General for the State of Uttar Pradesh.

3. The case of the prosecution was that on 08.03.2012 at about 20:10 hrs., one Kishun Bahadur, resident of Village Semgarha, P.S Ikauna, District Shravasti lodged a complaint at Police Station Ikauna alleging that at about 4:00 p.m on the same day, the appellant herein took his niece aged about 6 years under the pretext of showing dance and song performances on the occasion of the Holi Festival. When the girl did not return home, a search was conducted. It was found that the appellant was not found in his house, but the dead body of the girl was found in the sugarcane field located on the southern side of the village. Another villager by name Fatehpur Bahadur, who was part of the team that searched for the missing girl, claimed to have seen the appellant leaving the sugarcane field after about half□an□hour. Therefore, invoking the last seen theory and on the basis of circumstantial evidence, the appellant was charged for the commission of the offences of raping the minor girl and murdering her.

4. The prosecution examined six witnesses, namely, (i) Kishun Bahadur, the first informant and the uncle of the victim, as PW-1;

(ii) Shri Raj Karan, a localite who claimed to have seen the appellant carrying the victim towards the sugarcane field and who was cited as a witness to the inquest, as PW-2; (iii) one Fatehpur Bahadur, who was part of the search party and who claimed to have seen the appellant leaving the sugarcane field after about half an hour, as PW-3; (iv) the Head Constable Balram Tripathi, the scribe of the First Information Report who registered the FIR, as PW-4; (v) Dr. Mukesh Kumar who conducted the post-mortem, as PW-5; and (vi) the Investigation Officer Shri Rambali Roy as PW-6.

5. During questioning under Section 313 of the Code of Criminal Procedure (hereinafter referred to as the "Code"), the appellant denied the charges and claimed that he had been falsely implicated in the case, at the behest of one Mr. Zalim Khan, with a view to grab the property of his mother, who was none other than Zalim Khan's brother's daughter. To substantiate this claim, the appellant also examined his mother as DW-1.

6. Holding that the guilt of the appellant stood established beyond reasonable doubt by circumstantial evidence and also holding that it is one of the rarest of rare cases where a six year old girl had been raped and murdered, the Sessions Court convicted the appellant for the offences punishable under Sections 302 and 376 of the IPC and awarded death penalty.

7. The proceedings were then submitted to the High Court under Section 366(1) of the Code for confirmation. The appellant also filed an appeal. The capital punishment reference as well as the appeal filed by the appellant were taken up together by the Division Bench of the High Court and the High Court confirmed the conviction and sentence. The High Court came to the said conclusion on the basis that the evidence of PWs 1 to 3 were trustworthy and that the chain of circumstances pointing to the guilt of the appellant stood established unbroken, by their evidence. The discrepancies in the testimonies of PWs 1 to 3 pointed out by the appellant were rejected as minor and insignificant. The theory of animosity and false implication put forth by the appellant and sought to be established through the evidence of DW-1 were rejected by the High Court. The High Court found fault with the appellant for not coming up with any explanation as to what happened to the girl, especially in the light of the burden cast upon him under Section 106 of the Evidence Act.

8. The arguments of the appellant regarding the delay in sending the FIR to the Court and the faulty manner in which the questioning under Section 313 of the Code was done, were rejected by the High Court and the High Court finally agreed with the Sessions Court that it is one of the rarest of rare cases where the appellant has exhibited a deviant behaviour and abnormal sexual urge, thereby forfeiting his right to life. Accordingly, the High Court confirmed the death penalty. Under these circumstances, the accused is on appeal before us.

9. Obviously and admittedly, the prosecution of the appellant is based on circumstantial evidence and hence we may have to see whether the chain of circumstances is complete and unbroken. As held by this Court in Sharad Birdhichand Sarda vs. State of Maharashtra 1, the Court must keep in mind five golden principles or the panchsheel, lucidly brought out in para 153 of the decision, as

follows:□"153. ... ...

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

1 (1984) 4 SCC 116

... .

(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."

10. In this case, the prosecution sought to establish the guilt of the appellant, only through the evidence of PWs 1 to 3. PWs 1 and 2 had seen the victim being taken towards the sugarcane field. PW□3 had seen the appellant taking the victim from the house and also leaving the sugarcane field half□an□hour later. When the search was conducted for the missing girl, her dead body was found in the sugarcane field and the appellant was absconding. On a cumulative consideration of these circumstances and applying the last seen theory and invoking the burden of proof cast under Section 106 of the Evidence Act, the Sessions Court and the High Court came to the conclusion that the appellant was guilty.

11. Assailing the concurrent judgments of the Sessions Court and the High Court, it was contended by Shri S. Nagamuthu, learned senior counsel for the appellant that the evidence of PWs 1 to 3 is untrustworthy; that there was an unexplained delay of five days in forwarding the FIR to the jurisdictional Court; that there were serious contradictions regarding the place where the body of the victim was kept and the place where the inquest was conducted; that the evidence to support the last seen theory was insufficient to convict the appellant; that there was complete failure on the part of the prosecution to examine material witnesses; that in a shocking abdication of duties, the I.O. failed to produce forensic/medical evidence; and that the mandatory requirement of Section 313 of the Code was not fulfilled.

12. However, it was contended by Shri Ardhendumauli Kumar Prasad, learned AAG for the State that there are no reasons for PWs 1 to 3 to implicate the appellant; that their evidence was found to be cogent and trustworthy by two Courts; that the delay in forwarding the FIR to the court did not vitiate the trial and did not prejudice the appellant; that any defect in the questioning under Section 313 of the Code, may not ipso facto vitiate the findings, unless prejudice is shown; and that the forensic/medical evidence is not always mandatory.

13. We have carefully considered the rival contentions. In our view, the questions that crop up for our consideration revolve around – (i) the trustworthiness of the testimonies of PWs 1 to 3, in the light of certain contradictions; (ii) the consequences of the delay on the part of the Police in forwarding the FIR to the Court; (iii) the failure of the prosecution to produce forensic/medical evidence and its effect and (iv) the manner in which the questioning under Section 313 of the Code was undertaken and its effect upon the findings recorded.

I. Trustworthiness of the testimonies of PWs 1 to 3

14. As we have indicated earlier, the guilt of the appellant is sought to be established by the prosecution, by (i) relying upon the testimonies of PWs 1 to 3 for invoking the last seen theory; and

(ii) invoking Section 106 of the Evidence Act.

15. It is needless to point out that for the prosecution to successfully invoke Section 106 of the Evidence Act, they must first establish that there was "any fact especially within the knowledge of the" appellant. This can be done by the prosecution only by proving that the victim was last seen in the company of the appellant. To establish this last seen theory, the prosecution relies upon the evidence of PWs 1 to 3. PWs 1 and 2 claim to have seen the appellant taking away the girl at 04:00 p.m on 08.03.2012. PW-3 claims to have seen the appellant leaving the sugarcane field after about half-an-hour. Therefore, according to the prosecution, the burden of showing what happened to the girl was heavily upon the appellant/accused.

16. Hence we have to see whether the evidence of PWs 1 to 3 was trustworthy and same proved the last seen theory. Both the Sessions Court as well as the High Court have found the evidence of PWs 1 to 3 to be cogent and trustworthy. The contradictions pointed out by the defence were held by both the Courts to be minor and insignificant. Therefore, being the third Court exercising jurisdiction under Article 136 of the Constitution, we have to tread a very careful path while considering the question of trustworthiness of these witnesses.

17. Unlike other cases, the appellant in this case has taken a defence right from the beginning that he was implicated falsely at the behest of a locally powerful person whose wife is the Pradhan of the village. The case projected by the appellant was (i) that his maternal grandfather was one Lazim Khan; (ii) that Lazim Khan's brother was one Zalim Khan; (iii) that after the death of Lazim Khan, his property devolved upon the appellant's mother Jannatul Nisha; (iv) that Zalim Khan wanted to grab the properties from the appellant's mother but the appellant and his mother were not willing to let the land be taken away by Zalim Khan; and (v) that since Zalim Khan is a very powerful person in the village and his wife is also the Pradhan of the village, he managed to implicate the appellant falsely in this case.

18. To demonstrate the veracity of the above claim, the appellant did 3 things. First he confronted PWs 1 to 3 with pertinent questions in cross-examination. Then the appellant articulated this theory in the questioning under Section 313. Third, the appellant also examined his mother as DW-1.

19. Let us now take note of the answers elicited by the defence from PW-1 during cross-examination. The relevant portion of the testimony of PW-1 in cross-examination reads as follows" "The mother of accused-Jannatul Nisha, was earlier living at Semgarha; now she lives' at Ikauna. At Ikauna, the mother of accused has kinship in the family of Jumai Pathan. The mother of accused do not have agriculture land in Ikauna. I do not know as to whether she works there as a labourer. At Semgarha, the mother of accused has 28-30 bighas of agriculture land which she had got from the maternal grandfather of the accused. The maternal grandfather of the accused had no son, that's why the land of accused's maternal grandfather had transferred in the name of the mother of accused. The name of the maternal grandfather of the accused is Lazim Khan who was resident of Semgarha village only. Lazim Khan is pattidar (relative) of the present Gram-pradhan Zalim Khan. Zalim Khan is very prosperous man. He has 200 bighas of land, 2 tractors, two motorcycles and 4 sons. Zalim Khan has high influence in my village. He has prominence there.

... ...

Zalim Khan had come at the spot. Zalim Khan had told to get lodged the F.I.R.

... ...

Zalim Khan cultivates the land of accused Chotkau.

Zalim Khan has won the court case related with the land. The suit regarding the land is pending before the higher courts. The mother of Chotkau lives at Ikauna after this incident."

20. After having said what is extracted above during cross-examination, PW-1 denied certain suggestions made in this regard. The portion of his testimony where he denied the suggestions is as follows:

> "It is correct to say that no witness has seen Chotkau committing the rape and murder of Uma Devi. It is wrong to say that I had lodged the F.I.R. against Chotkau on being said by Zalim Khan Pradhan. It is wrong to say that we are men of Zalim Khan Pradhan. It is wrong that Zalim Khan Pradhan owes enmity with the mother of Chotkau regarding the land, that's why Zalim Khan had got lodged the F.I.R. against Chotkau. It is wrong to say that Chotkau had neither committed rape nor the murder of Uma Devi. It is wrong to say that I am submitting false testimony."

21. Even PW-2 was confronted with specific questions relating to the alleged role of Zalim Khan in implicating the appellant. The relevant portion of the cross-examination of PW-2 reads as follows:

> "I know the mother of accused Chotkau. Her maternal house is at village Semgarha only and she is daughter of Lazim Khan. Lazim Khan has died. Lazim Khan had no son. After the death of Lazim Khan, Zalim Khan-the present Pradhan, got his land and he only cultivates the land. The mother of accused had not got the land of her father. Lazim Khan and Zalim Khan are real brothers. The land would be about 18-

> 20 bighas.
>
> Zalim Khan cultivates the entire land. The mother of Chotkau had fled away from here and living at Ikauna. Chotkau has three brothers including him. All the three of them do not have any land. All the three of them are engaged in the occupation of labourers."

22. After having said what is extracted above, PW-2 denied the suggestion that it was Zalim Khan who got the appellant implicated in the case.

23. Even the Investigation Officer examined as PW-6 admitted in cross-examination: "I had detected that a land dispute was proceeding between accused Chotkau and Zalim Khan."

24. In answer to the last question (Question No.13) during the questioning under Section 313 of the Code, as to whether he wished to say anything else, the appellant stated as follows:

> "After death of Lazim Khan, his real brother Zalim Khan had usurped all the property of Lazim Khan and expelled the accused. The accused was not leaving possession of the land of his maternal grandfather therefore Zalim Khan implicated him false in this case."

25. The appellant's mother examined as DW-1 not only elaborated the theory that the appellant was falsely implicated at the instance of Zalim Khan but also came up with a story as to what could have happened to the victim. The relevant portion of the evidence of DW-1 reads as follows:

> "After the death of father, finding me helpless, Zalim Khan gobbled all my property. We have intense enmity with Zalim Khan for the same reason. My son Chotkau and I opposed Zalim Khan in the election of Pradhan and other matters, that is why Zalim Khan implicated my son in this false case. Zalim Khan has falsely implicated my son by making Kishun Bahadur and Rajkaran the complainant and the witness in the said case who are the servants of Zalim Khan. The truth is that the daughter of brother of the complainant of case Kishun Bahadur had gone in the sugar-cane field for defecation, there itself a Markaha (aggressive) Neelgai threw her by its horns, due to which she had died. But giving this matter a different color due to enmity, Zalim Khan got my son implicated as the acused by putting pressure on the local police. We got to know the fact of Uma Devi being killed by the Neelgai when the son of Behna had gone for defecation in the same field and Neelgai had hit him too with its horn due to which his scrotum had ruptured."
>
> 26. Keeping in mind the defence so put up by the appellant, let us now come to the other portions of the evidence of PWs 1 to 3.

The Mode of Lodging of the FIR

27. On the question as to how the complaint was lodged and as to what happened immediately thereafter, PW-1 stated in Chief-examination as follows:

> "I went to the police station to inform about the incident, got the application written by a man there, got read over the application, marked my signature and handed over the same to the police station. On the same Tehrir my case had been registered."
> .....

> "After I handed over the Tehrir, the police went to the spot, performed the documentation regarding the corpse and sent the corpse for post-mortem. The Investigating Officer had taken my statement and went to the spot. He had prepared the site map on pointing out by me."

28. During cross-examination, PW-1 said:

> "I myself had gone to the police station to lodge the FIR. I had got written the complaint by a person who was resident of Sitkahna.
>
> The police station officials themselves provided the paper. The Inspector had asked me to get the FIR written by any person of my side".

29. But during further cross-examination PW-1 stated thus:

> "I had got written the Tehrir of FIR by another person inside the police station itself. The Inspector had dictated it and got it written. I had marked my signature on that."

30. After some time, PW-1 admitted during further cross-examination the following:

> "Zalim Khan had come at the spot. Zalim Khan had told to get lodged the FIR against Chotkau."

31. In contra-distinction to what PW-1 said, PW-3 stated that the "information had been given to police station over telephone, then police man had come". During cross-examination also PW-3 stated that police reached the spot upon getting a phone call and that he did not know who made the call.

32. PW-4, the Head Constable said in Chief Examination:

> "On 08.03.2012, I was posted as H.C. at Police Station-Ikauna, District-Shrawasti. On that day a written Hindi Tahrir had been submitted by complainant of the case Shri Kishun Bahadur s/o Chintaram, resident of Semgarha, Police Station-Ikauna, District Shrawasti." During cross-examination PW-4 reiterated: "The complainant of the case had given me a written application. The complainant of the case had given the Tehrir on 08.03.2012 at 20:10 hrs..".

33. Thus even on the question as to how the first information was given to the police, there are different versions. According to one version, "PW-1 went to the police station, got the Tehrir written by a man there, got read over the complaint, marked his signature and handed over the same to the police station". According to the second version, again by PW-1, "the Inspector dictated it and got it written". According to a third version "Zalim Khan had told to get the FIR registered against the appellant". According to the fourth version, which was by PW-3, "the information was given to the police through phone call".

34. Thus there were different versions, (i) as to how the first information was given to the police; and (ii) by whom the complaint was written.

The place where the dead body was seen by the police, persons took the body from the place of occurrence and where it was taken to.

35. There were several contradictions regarding, (i) the place where the dead body was first seen by the Police; (ii) the person who took the dead body; and (iii) the place to which the dead body was taken. PW-1 stated in chief-examination as follows:

> "After I handed over the Tehrir, the police went to the spot, performed the documentation regarding the corpse and sent the corpse for post-mortem."

36. In cross-examination PW-1 stated "Despite getting the dead body, we did not bring the dead body to the home. When police personnel had come, they got carried the dead body." During further cross-examination PW-1 stated: "the dead body was not lying there for whole night. I will not be able to tell at what time the Inspector had taken away the dead body. The Inspector had come at half past seven. He had come in his vehicle. The Inspector had taken away the dead body in his vehicle....." "After consulting from every one the Inspector had taken the dead body to the police station. He had brought a cloth from the police station and took away the dead body wrapping it in the same cloth. Later on we had gone with the dead body."

37. But a little while later, PW-1 stated in cross-examination:

> "when this first information application had been written, the dead body of the girl was kept inside the police station itself.
>
> That time several persons there. The police personnel had carried the dead body by a Magic (brand of vehicle) to Bahraich for post-mortem".

38. PW-3 stated during cross-examination:

> "the dead-body of the girl had been sent for post-mortem from the occurrence spot itself."

39. PW-4 the Head Constable who registered the FIR said in cross-examination: "the dead body had not been brought to the police station."

40. But interestingly PW-6, the Investigation Officer stated the following during cross-examination:- "……After lodging of case, I had visited the occurrence spot same day at 09.00-09.30 o' clock of the night. It had become dense night when I had reached the spot. The family members were wailing. There was no arrangement of light therefore I stayed there itself in the night with a Daroga and two-three constables. When I had reached the village, upto that time the villagers had already brought the dead body to home from the occurrence spot. Therefore, due to aforesaid reasons I did not go to the occurrence spot in that night. Although I have not referred this fact in my case diary but it is the correct fact. The dead body was kept in front of the door of house of first informant and the family members were wailing there itself…"

41. When confronted with the statements of PWs 1 to 3 to the effect that the dead body had been taken away to the police station, PW-6 denied the same as wrong. His answer to this question in cross-examination was as follows: "If the complainant of the case would have said that the police man had taken away the dead body of Uma to the police station in the night itself and conducted the inquest proceeding there, then this fact is wrong."

42. Thus, there are different versions (i) regarding the place where the dead body was first seen by the police; and (ii) as to who carried the dead body and where. The first version of PW-1 was that "he and other villagers who accompanied him did not bring the dead body to the house and that when police personnel came, they carried the dead body". The second version of PW-1 was the "Inspector took away dead body in his vehicle to the police station". His third version was that "when the first information application had been written, the dead body of the girl was kept inside the police station itself". His fourth version was that "the police personnel had carried the dead body by a Magic (brand of vehicle) for post mortem". A new version was put forth by PW-3 to the effect that the dead body of the girl was sent for post-mortem from the occurrence spot itself, meaning thereby that the body was never taken to the police station. PW-4, the Head Constable said that the dead body had not been brought to the police station. PW-6, the Investigating Officer categorically stated that the police did not take away the dead body to the police station and that he saw the dead body near the front door of the house of the first informant.

43. There was yet another contradiction which is crucial. It was claimed by PW-1 and confirmed by the others that the police came to the occurrence spot only after the FIR was lodged. But at one place of the cross-examination, PW-1 claimed that when the first information application was written, the dead body of the girl was kept inside the police station itself. Therefore, it remains a mystery as to whether the dead body was ever taken to the police station and if so, how, when and why.

Different versions regarding the Place, Date and Time of conduct of the inquest.

44. There were many discrepancies regarding the place where inquest was conducted and the date and time at which inquest was conducted. In his chief-examination PW-2 stated as follows :

> "...Then searching the girl, family members of Chheddan went towards the sugarcane field and began searching, then they found that the dead body of Uma was lying in the sugarcane field. Blood was coming out of her urinal track, her clothes had torn up and she had died. I also went to the spot. The family members of Chheddan had informed the Police Station, on which the police team of Police Station Ikauna had arrived. They had carried out the inquest proceedings at the spot itself and obtained my signature on the Memo of Inquest. When the Memo of Inquest had been shown and read over to the witness, he said that it was the same Memo of Inquest which had been prepared in my presence and I had market my signature on that which I verify..."

45. Interestingly, PW-2 stated in cross-examination, the opposite of what he stated in chief-examination. What PW-2 stated in cross-examination was that "the inquest proceedings on the dead body of the girl were not performed before me".

46. PW-6, the Investigation Officer stated in chief-examination as follows:

> "....The inquest proceedings could not be performed due to being night time. On 09.03.12 the inquest proceedings had been completed and the dead body had been sent to District-Bahraich for postmortem after sealing-stamping the same. Same day I recorded the statement of the complainant on the spot, inspected the spot and recorded the statements of witnesses..."

47. In cross-examination PW-6 reiterated that the inquest proceedings were not conducted on the same night, but were started at 8 o' clock in the morning on 09.03.2012. PW-6 claimed that Raj Karan, Vikram, Pesh Ram, Rameshwar Prasad and Raksha Ram were deputed as panch for the inquest. Out of these five panch witnesses, Raj Karan alone was examined as PW-2, but according to Raj Karan, examined as PW-2, the police arrived at the spot upon being informed by the family members of Chheddan and conducted inquest proceedings at the spot itself. He also claimed that the I.O recorded his statement on the night of the incident at 7 o' clock.

48. Out of the five panch witnesses mentioned by the I.O to have been present at the time of inquest, the names of three persons were mentioned by PW-1 also, but according to PW-1, the I.O came to the spot at half past 7'o clock in his vehicle and noted down the names of four or five persons including that of PW-2, obtained their signatures and went away.

49. Therefore, there were two versions, regarding the date of conduct of inquest. According to one version, it was conducted on the date of the incident namely, 08.03.2012, but according to I.O., it was conducted on 09.03.2012. Interestingly the I.O added one more dimension to the contradiction at one stage of the cross-examination. He claimed that after registering the case he visited the occurrence spot same day at 9:00-9:30 at night. But subsequently he claimed as follows: "First I completed the inquest proceedings and inspected the occurrence spot subsequently, after two hours of the inquest proceedings on 09.03.2012 itself".

50. Moreover the inquest ought to have been conducted at the place where the dead body was found. PW-1 claimed that he did not bring the dead body to the house and that the police personnel who had come to the spot, took away the body. But according to PW-6, the relatives had taken the dead body to the house and that he saw the dead body only in the house. If that is so, the inquest proceedings should have been conducted there and not elsewhere. It is quite strange that PW-6 claimed during cross-examination to have first completed the inquest and thereafter inspected the occurrence spot.

Clothes on the body of the victim, recovered by the police.

51. According to PW-1 "the victim was clad in frock, brief, salwar and vest. The frock was red coloured. The brief was green. The sandow vest was green coloured. The salwar was red coloured as well."

52. PW-1 also claimed that "at the place of occurrence, the brief was torn and lying apart from her limbs". He also stated that salwar was lying away from her and that there was blood stain in the salwar and brief. PW-1 claimed that he had taken the salwar.

53. PW-3 claimed that the police recovered and took away the salwar of the victim. Interestingly, PW-3 asserted that he went to the occurrence spot and he found that the victim was wearing a red colour frock and black colour spotted salwar.

54. The Investigation Officer stated during cross-examination that the deceased was wearing a brick colour sandow vest and a violet colour frock on the upper portion of her body. He confirmed that he recovered the salwar from the occurrence spot and that it was a green colour salwar. He further stated that though there was blood on the occurrence spot, no blood was stuck on the green colour salwar. Thus, there were 3 different versions, regarding the colour of the salwar, one by PW-1 that it was red, the second by PW-3 that it was black color spotted and the third by PW-6 that it was green colored. Similarly, there were two different versions regarding the presence of blood on the salwar, one by PW-1 and another by PW-6.

55. A letter dated 27.03.2012 purportedly sent by the Deputy Superintendent of Police to the Forensic Sciences Laboratory, which formed part of the documents submitted by the police, presumably along with the final report, but which was not marked as Exhibit indicates that the salwar worn by the deceased, with stains of semen on it, was one of the few items sent for forensic examination. But there was no report of the Forensic Sciences Laboratory.

56. Strangely, the aforesaid letter dated 27.03.2012 addressed to the Forensic Sciences Laboratory, was not sent by the Investigation Officer but by the Deputy Superintendent of Police.

57. Thus there were very serious contradictions, both mutual and otherwise, in the evidence tendered by PWs 1 to 3, on crucial aspects such as, (i) the mode of Lodging of the FIR; (ii) the place where the dead body was first seen by the police, persons took the body from the place of occurrence and where it was taken to; (iii) the Place, Date and Time of conduct of the inquest; and (iv) the

clothes on the body of the victim, recovered by the police. These contradictions make the evidence of PWs 1 to 3 completely untrustworthy. Unfortunately, the Sessions Court as well as the High Court have trivialized these major contradictions to hold that the chain of circumstances have been established unbroken.

II. Delay in transmitting the FIR to court

58. According to the prosecution, the FIR was lodged at 20:10 hrs. on 08.03.2012. The Court of the CJM, Shravasti, received the copy of the FIR on 13.03.2012. Therefore, a cloud is sought to be cast on the genuineness of the FIR.

59. On the importance of promptitude, both in the registration of the FIR and in the transmission of the same to the Court, reliance is placed by Shri Nagamuthu, learned senior counsel on the following passage in Meharaj Singh (L/Nk.) vs. State of U.P2 2 (1994) 5 SCC 188 "12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eye witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an after thought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR, was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr. P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante timed and had not been recorded till the inquest proceedings were over at the spot by PW8."

60. While reiterating the above principles, a note of caution was also added by this Court in Bhajan Singh alias Harbhajan Singh and Others vs. State of Haryana 3. Paragraphs 28 to 30 of the said decision read as follows:□"28. Thus, from the above it is evident that the Criminal Procedure Code provides for internal and external checks: one of them being the receipt of a copy of the FIR by the Magistrate concerned. It serves the purpose that the FIR be not anti□timed or anti□dated. The

Magistrate must be immediately informed of every serious offence so that he may be in a position to act under Section159 Cr.P.C., if so required. Section 159 Cr.P.C. empowers the Magistrate to hold the investigation or preliminary enquiry of the offence either himself or through the Magistrate subordinate to him. This is designed to keep the Magistrate informed of the investigation so as to enable him to control investigation and, if necessary, to give appropriate direction.

29. It is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the FIR has not been lodged at the time stated or has been anti□timed or anti□ dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression “forthwith” mentioned therein does not mean that the prosecution is required to explain delay of every hour in sending the FIR to the Magistrate. In a given case, if number of dead and injured persons is very high, delay in dispatching the report is natural. Of course, the same is to be sent within reasonable time in the prevalent circumstances.

30. However, unexplained inordinate delay in sending the copy of FIR to the Magistrate may affect the prosecution case adversely. An adverse inference 3 (2011) 7 SCC 421 may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the FIR by falsely roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the FIR, as it affords sufficient time to the prosecution to introduce improvements and embellishments. Thus, a delay in dispatch of the FIR by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when the prosecution furnishes a cogent explanation for the delay in dispatch of the report or prosecution case itself is proved by leading unimpeachable evidence.”

61. It is clear from the aforesaid decisions that the delay in forwarding the FIR may certainly indicate the failure of one of the external checks to determine whether the FIR was manipulated later or whether it was registered either to fix someone other than the real culprit or to allow the real culprit to escape. While every delay in forwarding the FIR may not necessarily be fatal to the case of the prosecution, Courts may be duty bound to see the effect of such delay on the investigation and even the creditworthiness of the investigation.

62. Section 157(1) of the Code requires the officer□in□charge of the police station to send the FIR, “forthwith”. The legal consequences of the delay on the part of the police in forwarding the FIR to the court was considered by this Court in Brahm Swaroop and Another vs. State of Uttar Pradesh4. Incidentally Brahm Swaroop (supra) is also a case where there was a delay of five days in sending the report to the Magistrate (as in the present case). After taking note of several earlier decisions of this Court, this Court held in Brahm Swaroop in para 21 as follows:

> “21. In the instant case, the defence did not put any question in this regard to the investigating officer, Raj Guru (PW.10), thus, no explanation was required to be furnished by him on this issue. Thus, the prosecution had not been asked to explain the delay in sending the special report. More so, the submission made by Shri Tulsi that the FIR was ante□timed cannot be accepted in view of the evidence available on record which goes to show that the FIR had been lodged promptly within 20 minutes

of the incident as the Police Station was only 1 k.m. away from the place of occurrence and names of all the accused had been mentioned in the FIR."

63. To come to the above conclusion, reliance was placed upon a decision of a three member Bench in Balram Singh and Another vs. State of Punjab5. In Balram Singh (supra), a three member Bench of this Court rejected the contention with regard to the delay in transmitting the FIR to the Magistrate, on the ground that "while considering the complaint in regard to the delay in the FIR reaching the Jurisdictional Magistrate, we will have to also bear in mind the 4 (2011) 6 SCC 288 5 (2003) 11 SCC 286 creditworthiness of the ocular evidence adduced by the prosecution and if we find that such ocular evidence is worthy of acceptance, the element of delay in registering a complaint or sending the same to the Jurisdictional Magistrate by itself would not weaken the prosecution case".

64. In State of Rajasthan vs. Daud Khan6, this Court referred to Brahm Swaroop and interpreted the word "forthwith" appearing in Section 157 (1) of the Code, as follows:

"26. ... ... The purpose of the "forthwith" communication of a copy of the FIR to the Magistrate is to check the possibility of its manipulation. Therefore, a delay in transmitting the special report to the Magistrate is linked to the lodging of the FIR. If there is no delay in lodging an FIR, then any delay in communicating the special report to the Magistrate would really be of little consequence, since manipulation of the FIR would then get ruled out. Nevertheless, the prosecution should explain the delay in transmitting the special report to the Magistrate. However, if no question is put to the investigating officer concerning the delay, the prosecution is under no obligation to give an explanation. There is no universal rule that whenever there is some delay in sending the FIR to the Magistrate, the prosecution version becomes unreliable. In other words, the facts and circumstances of a case are important for a decision in this regard."

65. Therefore, the learned Additional Advocate General for the State may be right, in theory, that a delay in transmission of the 6 (2016) 2 SCC 607 FIR to the court, may not, per se, be fatal, without anything more. But in the case on hand, the delay was not small. The FIR said to have been registered on 08.03.2012 was received by the Court of the Chief Judicial Magistrate on 13.03.2012. It is true that no question was put in cross-examination to the Investigation Officer about this delay.

66. But we have found that the evidence of P.Ws. 1 to 3 is untrustworthy, particularly on the question of the origin and genesis of the first information report. Therefore the inordinate delay in the FIR reaching the jurisdictional court assumes significance. We agree that the word "forthwith' in Section 157(1) of the Code is to be understood in the context of the given facts and circumstances of each case and a straight-jacket formula cannot be applied in all cases. But where ocular evidence is found to be unreliable and thus unacceptable, a long delay has to be taken note of by the Court. The mandate of Section 157(1) of the Code being clear, the prosecution is expected to place on record the basic foundational facts, such as, the Officer who took the first information report to the jurisdictional court, the authority which directed such a course of action and the mode by which it was complied. Explaining the delay is a different aspect than placing the material in compliance of the Code.

67. In the present case, it is not even known as to who took the first information report from P.W.6 or P.W.4 and submitted before the jurisdictional court. Neither PW-4 nor PW-6 spoke about the person who took the FIR to the court. They did not say that they took it to the court. It is not a case of mere delay in sending the first information report, but one involving the contradictory evidence by the prosecution witnesses on the manner in which the first information report is written.

68. On the question of compliance of Section 157(1) along with logical reasoning for doing so, the following passage from the decision in Jafarudheen and Ors. vs. State of Kerala 7 may be usefully quoted as under:

> "26. The jurisdictional Magistrate plays a pivotal role during the investigation process. It is meant to make the investigation just and fair. The Investigating Officer is to 7 2022 SCC Online SC 495 keep the Magistrate in the loop of his ongoing investigation.

The object is to avoid a possible foul play. The Magistrate has a role to play under Section 159 of Cr.PC.

27. The first information report in a criminal case starts the process of investigation by letting the criminal law into motion. It is certainly a vital and valuable aspect of evidence to corroborate the oral evidence. Therefore, it is imperative that such an information is expected to reach the jurisdictional Magistrate at the earliest point of time to avoid any possible ante-dating or ante-timing leading to the insertion of materials meant to convict the accused contrary to the truth and on account of such a delay may also not only gets bereft of the advantage of spontaneity, there is also a danger creeping in by the introduction of a coloured version, exaggerated account or concocted story as a result of deliberation and consultation. However, a mere delay by itself cannot be a sole factor in rejecting the prosecution's case arrived at after due investigation. Ultimately, it is for the Court concerned to take a call. Such a view is expected to be taken after considering the relevant materials."

Therefore, we hold that the delay of 5 days in transmitting the FIR to the jurisdictional court, especially in the facts and circumstances of this case was fatal.

III. Failure to conduct medical examination

69. Despite the fact that it was a shocking case of rape and murder of a six year old girl, the prosecution did not care to subject the accused (appellant herein) to examination by a medical practitioner. There were two documents which formed part of the records submitted along with the final report, but which were not exhibited. One of them appears to be a Memo signed by PW-5, the Doctor who conducted the post-mortem. This Memo is dated 09.03.2012 addressed to the Senior Pathologist, District Hospital, Bahraich. The Memo reads as follows:

> "Vaginal smear prepared in two slides from the body of Km. Uma D/o Chhedam Lal, R/o Semgadha, PS Ikauna, Dist: Shravasti."

70. The second is a Report dated 10.03.2012. It reads as follows:□"Report□In microscopic examination of supplied specimen, no spermatozoa seem alive or dead. No (unclear) seen.

71. Despite the fact that the author of the Memo dated 09.03.2012 was examined as PW□5, he never spoke about this. The Report of the Forensic Sciences Laboratory, to whom the salwar was forwarded, was also not obtained by the Investigating Officer.

72. Section 53(1) of the Code enables a police officer not below the rank of Sub□ Inspector to request a registered medical practitioner, to make such an examination of the person arrested, as is reasonably necessary to ascertain the facts which may afford such evidence, whenever a person is arrested on a charge of committing an offence of such a nature that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence. Section 53(1) reads as follows:

"53. Examination of accused by medical practitioner at the request of police officer.□ (1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a police officer not below the rank of sub□ inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose."

73. By Act 25 of 2005, a new Explanation was substituted under Section 53, in the place of the original Explanation. The Explanation so substituted under Section 53, by Act 25 of 2005 reads as follows:

"Explanation.□In this section and in sections 53A and 54,□

(a) "examination" shall include the examination of blood, blood stains, semen, swabs in case of sexual offences, sputum and sweat, hair samples and finger nail clippings by the use of modern and scientific techniques including DNA profiling and such other tests which the registered medical practitioner thinks necessary in a particular case;

(b) "registered medical practitioner" means a medical practitioner who possess any medical qualification as defined in clause (h) of section 2 of the Indian Medical Council Act, 1956 (102 of 1956) and whose name has been entered in a State Medical Register."

74. Simultaneously with the substitution of a new Explanation under Section 53, Act 25 of 2005 also inserted a new provision in Section 53A. Section 53A reads as follows:

"53A. Examination of person accused of rape by medical practitioner, □(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub□inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

"(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail. (3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report. (5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in Clause (a) of sub□section (5) of that section."

75. Even in a case where the victim of rape was alive and testified before the Court and the accused was also examined by a doctor, this Court found in Krishan Kumar Malik vs. State of Haryana8 that the failure to obtain the report of the Forensic Sciences Laboratory was fatal. Paragraph 40 of the said decision reads as follows:

"40. The appellant was also examined by the doctor, who had found him capable of performing sexual intercourse. In the undergarments of the prosecutrix, male semen were found but these were not sent for analysis in the forensic laboratories which could have conclusively proved, beyond any shadow of doubt with regard to the

> commission of offence by the appellant. This lacuna on the part of the prosecution proves to be fatal and goes in favour of the appellant."

76. On the scope of the newly inserted Section 53A, this Court said in Krishan Kumar Malik (supra) as follows:

> "44. Now, after the incorporation of Section 53A in the Criminal Procedure Code, w.e.f. 23.6.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, 8 (2011) 7 SCC 130 facilitating the prosecution to prove its case against the accused. Prior to 2006, even without the aforesaid specific provision in CrPC the prosecution could have still resorted to this procedure of getting the DNA test or analysis and matching of semen of the Appellant with that found on the undergarments of the prosecutrix to make it a fool proof case, but they did not do so, thus they must face the consequences."

77. It is true that a three member Bench of this Court indicated in Rajendra Pralhadrao Wasnik vs. State of Maharashtra9 that Section 53A is not mandatory. It was held in paragraphs 49 and 50 of the said decision as follows:□"49. While Section 53□A CrPC. is not mandatory, it certainly requires a positive decision to be taken. There must be reasonable grounds for believing that the examination of a person will afford evidence as to the commission of an offence of rape or an attempt to commit rape. If reasonable grounds exist, then a medical examination as postulated by Section 53□A(2) CrPC must be conducted and that includes examination of the accused and description of material taken from the person of the accused for DNA profiling. Looked at from another point of view, if there are reasonable grounds for believing that an examination of the accused will not afford evidence as to the commission of an offence as mentioned above, it is quite unlikely that a charge□ sheet would even be filed against the accused for committing an offence of rape or attempt to rape.

50. Similarly, Section 164□A CrPC requires, wherever possible, for the medical examination of a victim of rape. Of course, the consent of the victim is necessary and the person conducting the examination must be competent to medically examine the victim. Again, one of the requirements of the medical 9 (2019) 12 SCC 460 examination is an examination of the victim and description of material taken from the person of the woman for DNA profiling."

78. After saying that Section 53A is not mandatory, this Court found in paragraph 54 of the said decision that the failure of the prosecution to produce DNA evidence, warranted an adverse inference to be drawn. Paragraph 54 reads as follows:□"54. For the prosecution to decline to produce DNA evidence would be a little unfortunate particularly when the facility of DNA profiling is available in the country. The prosecution would be well advised to take advantage of this, particularly in view of the provisions of Section 53□A and Section 164□A CrPC. We are not going to the extent of suggesting that if there is no DNA profiling, the prosecution case cannot be proved but we are certainly of the view that where DNA profiling has not been done or it is held back from the trial court, an adverse consequence would follow for the prosecution."

79. It is necessary at this stage to note that by the very same Amendment Act 25 of 2005, by which Section 53A was inserted, Section 164A was also inserted in the Code. While Section 53A enables the medical examination of the person accused of rape, Section 164A enables medical examination of the victim of rape. Both these provisions are somewhat similar and can be said approximately to be a mirror image of each other. But there are three distinguishing features. They are:□

(i) Section 164A requires the prior consent of the women who is the victim of rape. Alternatively, the consent of a person competent to give such consent on her behalf should have been obtained before subjecting the victim to medical examination. Section 53A does not speak about any such consent;

(ii) Section 164A requires the report of the medical practitioner to contain among other things, the general mental condition of the women. This is absent in Section 53A;

(iii) Under Section 164A(1), the medical examination by a registered medical practitioner is mandatory when, "it is proposed to get the person of the women examined by a medical expert" during the course of investigation. This is borne out by the use of the words, "such examination shall be conducted". In contrast, Section 53A(1) merely makes it lawful for a registered medical practitioner to make an examination of the arrested person if "there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence".

80. In cases where the victim of rape is alive and is in a position to testify in court, it may be possible for the prosecution to take a chance by not medically examining the accused. But in cases where the victim is dead and the offence is sought to be established only by circumstantial evidence, medical evidence assumes great importance. The failure of the prosecution to produce such evidence, despite there being no obstacle from the accused or anyone, will certainly create a gaping hole in the case of the prosecution and give rise to a serious doubt on the case of the prosecution. We do not wish to go into the question whether Section 53A is mandatory or not. Section 53A enables the prosecution to obtain a significant piece of evidence to prove the charge. The failure of the prosecution in this case to subject the appellant to medical examination is certainly fatal to the prosecution case especially when the ocular evidence is found to be not trustworthy.

81. Their failure to obtain the report of the Forensic Sciences Laboratory on the blood/semen stain on the salwar worn by the victim, compounds the failure of the prosecution. IV. Argument revolving around section 313 of the Code

82. Though arguments were advanced even on (i) the manner in which the statement of the accused was recorded under Section 313 of the Code; (ii) the failure of the Court to comply with the mandate of Section 313(1)(b) of the Code in letter and spirit; and

(iii) the consequences of such failure, we do not think it necessary to go into the said question. This is for the reason that we have found in Part□I of this order that the evidence of P.Ws 1 to 3 are not trustworthy and in Part□II of this order that the failure of the prosecution to subject the appellant to medical examination was fatal. These findings are sufficient to overturn the verdict of conviction

and penalty.

Reasoning of the Sessions court and the High Court

83. Before wrapping up, it is necessary to say something about the approach adopted by the Sessions Court and the High Court. In cases of this nature the court is obliged to assess the evidence on the test of probability. Though wide discretion is given to the Court to consider the "matters before it", such an evidence has to be sifted carefully before recording satisfaction. It is not the quantum, but what matters is the quality. Both the Courts below found the evidence of P.Ws. 1 to 3 acceptable. The seriously inherent contradictions in the statements made by them have not been duly taken note of by both the courts. When the offence is heinous, the Court is required to put the material evidence under a higher scrutiny. On a careful consideration of the reasoning of the Trial Court, as confirmed by the High Court, we find that sufficient care has not been taken in the assessment of the statements made by P.Ws. 1 to 3. No one spoke as to who sent the FIR to the court and when it was sent. Strangely even the copy of the post□mortem report was admittedly received by SHO on the 13.03.2012 though the post mortem was conducted on the 09.03.2012,. It was the same date on which the FIR reached the Court. These factors certainly create a strong suspicion on the story as projected by the prosecution, but both the Courts have overlooked the same completely. This erroneous approach on the part of the Sessions Court and the High Court has led to the appellant being ordained to be dispatched to the gallows.

Conclusion

84. We cannot shy away from the fact that it is a ghastly case of rape and murder of a 6 year old child. By not conducting the investigation properly, the prosecution has done injustice to the family of the victim. By fixing culpability upon the appellant without any shred of evidence which will stand the scrutiny, the prosecution has done injustice to the appellant. Court cannot make someone, a victim of injustice, to compensate for the injustice to the victim of a crime.

85. In fact this is a case where the appellant is so poor that he could not afford to engage a lawyer even in the Sessions Court. After his repeated requests to the Court of District and Sessions Judge, the service of an advocate was provided as amicus. In cases of such nature, the responsibility of the Court becomes more onerous. When we analyse the evidence with such a sense of responsibility, we are not convinced that the guilt of the appellant stood established beyond reasonable doubt. Therefore, the appeals are allowed and the conviction and penalty are set aside. The appellant shall be released forthwith if not wanted in connection with any other case.

……J. (S. Abdul Nazeer) ……J. (A.S. Bopanna) .....J. (V. Ramasubramanian) NEW DELHI SEPTEMBER 28, 2022