

**Karandeep Sharma @ Razia @ Raju**

v.

**State of Uttarakhand**

(Criminal Appeal No(s). 630-631 of 2018)

04 March 2025

**[Vikram Nath, Sanjay Karol and  
Sandeep Mehta,\* JJ.]**

#### **Issue for Consideration**

In a case based on circumstantial evidence, whether the concurrent conviction of the appellant-accused for the kidnapping, rape/sexual assault and murder of a minor is sustainable.

#### **Headnotes<sup>†</sup>**

**Circumstantial evidence – Penal Code, 1860 – ss.376A, 302, 366, 363, 201 – Protection of Children from Sexual Offences Act, 2012 – ss.5, 6 – Kidnapping, rape/sexual assault and murder of minor – Case based on circumstantial evidence – Appellant was convicted, death sentence awarded – Sustainability:**

**Held:** Unsustainable – Prosecution relied totally on circumstantial evidence in the form of last seen theory, recoveries, DNA/FSL report and the confession of the appellant – The witnesses remained silent and did not disclose to the police regarding they having seen the appellant taking away the child-victim with himself, thus, the prosecution case regarding the theory of last seen is demolished – Further, non-examination of the scientific expert who carried out the DNA profiling is fatal – DNA report was merely exhibited in evidence by the IO (PW-14) who was not connected with the report in any manner – The procedure of collecting the samples was also tainted on account of non-sealing of the forensic material collected from the appellant – Thus, DNA/FSL reports cannot be read in evidence – Furthermore, the recoveries were planted as the appellant would not keep the clothes with him for almost two days after the incident so as to facilitate the police to recover the same at a later point of time – The confession was also extracted under duress and

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was not voluntary and as a matter of fact was not even relied upon by the Courts below – Trial was not conducted fairly and the appellant was not given a reasonable opportunity to defend himself – No evidence to connect the appellant with the crime – Impugned judgments set aside – Appellant acquitted. [Paras 12, 16, 35, 39, 40, 42, 46, 56-58]

**Circumstantial Evidence – Confession – Evidence Act, 1872 – ss.24, 25, 26 – PW-12 (Sub-Inspector) narrated the entire confession of the appellant-accused in his examination-in-chief – Lopsided trial:**

**Held:** The procedure adopted by the trial Court in permitting a police officer to verbatim narrate the confession made by an accused during investigation is grossly illegal and contrary to the mandate of ss.24, 25 and 26 – Trial Court also allowed the confessional statement of the appellant to be exhibited in the evidence of the witness, which further establishes that the trial was conducted in a totally distorted manner. [Paras 16, 47]

**Circumstantial Evidence – DNA Report – When inadmissible:**

**Held:** In order to make the DNA report acceptable, reliable and admissible, the prosecution would first be required to prove the sanctity and chain of custody of the samples/articles right from the time of their preparation/collection till the time they reached the FSL – For this purpose, the link evidence would have to be established by examining the concerned witness – However, in the present case, neither the documents/memorandums pertaining to the proceedings of sealing the samples/articles were exhibited in evidence nor did any of the prosecution witnesses gave evidence for proving the procedure – There is no evidence on record to show that the samples/articles collected from the dead body of the child-victim and those collected from the appellant-accused which were later forwarded to the FSL were properly sealed or that the same remained in a self-same condition right from the time of the seizure till they reached the FSL – No witness from the FSL was examined by the prosecution to prove that the samples/articles were received in a sealed condition – There is every possibility of the samples being tampered/manipulated by the police officers to achieve a favourable result from the FSL, thereby, inculpating the appellant in the crime – DNA/FSL reports cannot be read in evidence. [Paras 51, 54-56]

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### Case Law Cited

*Rahul v. State of Delhi, Ministry of Home Affairs & Anr.* [2022] 9 SCR 1129 : (2023) 1 SCC 83 – relied on.

### List of Acts

Penal Code, 1860; Protection of Children from Sexual Offences Act, 2012; Evidence Act, 1872; Code of Criminal Procedure, 1973.

### List of Keywords

Circumstantial evidence; Confession; Last seen theory; DNA/FSL report; DNA profiling; Recoveries; Forceable sexual assault; Child-victim; Confession extracted under duress; Confession not voluntary; Jagran function; Child victim went missing; Death sentence; Non-examination of the scientific expert; Forensic samples/articles; Post-mortem examination; Last seen circumstance; Undue haste; Just and fair manner; Denial of proper opportunity; Procedure of collection and forwarding of DNA samples to the FSL; Non-sealing of the forensic material; Examination-in-chief; Police officer verbatim narrated the confession made by accused; Contradiction in the evidence; Incriminating articles; Forensic examination; Chain of custody of the samples/articles; Lopsided trial; Trial not fair; Samples tampered/manipulated by the police officers.

### Case Arising From

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No(s). 630-631 of 2018

From the Judgment and Order dated 05.01.2018 of the High Court of Uttarakhand at Nainital in CRLA No. 156 and CRLR No. 1 of 2017

### Appearances for Parties

*Advs. for the Appellant:*

Nishant Sanjay Kumar Singh, Ashish Singh, Sadashiv.

*Advs. for the Respondent:*

Sumit Kumar, Shubham Arora, Manan Verma, Ms. Anubha Dhulia.

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1. Heard.
2. The accused-appellant<sup>1</sup> was tried by the Fast Track Court/Additional Sessions Judge/Special POCSO Judge, Rudrapur, Udhampur Singh Nagar<sup>2</sup> in Special Sessions Trial No. 159 of 2016 for the offences punishable under Sections 376A, 302, 366, 363 and 201 of the Indian Penal Code, 1860<sup>3</sup> and Sections 5/6 of the Protection of Children from Sexual Offences Act, 2012<sup>4</sup>. *Vide* judgment dated 5<sup>th</sup> April, 2017 and 6<sup>th</sup> April, 2017, he was convicted and sentenced in the terms below:

<b>Section</b>	<b>Sentence</b>
<b>376A IPC</b>	<b>Death Sentence</b>
<b>302 IPC</b>	<b>Death Sentence</b>
<b>366 IPC</b>	10 years Rigorous Imprisonment along with fine of Rs. 10,000/- and in default, to undergo Simple Imprisonment for 3 months.
<b>363 IPC</b>	3 years Rigorous Imprisonment along with fine of Rs. 10,000/- and in default, to undergo Simple Imprisonment for 3 months.
<b>201 IPC</b>	3 years Rigorous Imprisonment along with fine of Rs. 10,000/- and in default, to undergo Simple Imprisonment for 3 months.

1 Hereinafter. Referred to as the 'appellant'.

2 Hereinafter, referred to as the 'trial Court'.

3 Hereinafter, referred to as the 'IPC'.

4 Hereinafter, referred to as the 'POCSO Act'.

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3. The trial Court forwarded a reference<sup>5</sup> under Section 366 of the Code of Criminal Procedure, 1973<sup>6</sup> to the High Court of Uttarakhand at Nainital<sup>7</sup>, for confirmation of the death sentence. The appellant also preferred an appeal<sup>8</sup> assailing his conviction. The High Court *vide* judgment dated 5<sup>th</sup> January, 2018 dismissed the appeal preferred by the appellant and answered the reference in the affirmative thereby confirming the penalty of death sentence awarded to the appellant by the trial Court. The said judgment of the High Court is the subject matter of challenge in these appeals by special leave at the instance of the accused-appellant.
4. The case of the prosecution as unfurling from the record is that the child-victim, i.e., Ms. A<sup>9</sup> went missing from a *Jagran* function which was organized in the village Fasiyapura on the intervening night of 25<sup>th</sup>/26<sup>th</sup> June, 2016. The father of the victim(PW-1)<sup>10</sup> lodged an FIR<sup>11</sup> to the effect that his daughter had gone missing from the *Jagran* function and all their efforts to trace out the girl proved futile. While he was continuing the search operations, someone told him that the body of a girl child was lying in a nearby field. On this, the complainant(PW-1) along with his family members rushed to the location and identified the dead body to be that of his daughter (child-victim). The complainant(PW-1) suspected that the child-victim had been subjected to forcible sexual assault before being killed. On receiving the FIR, Om Prakash Sharma, Investigating Officer(PW-14) commenced investigation. Spot documents were prepared, and an inquest was carried out on the child-victim's dead body. Statements of witnesses were recorded. The body of the child-victim was sent for post-mortem examination. Dr. Madan Mohan, medical officer(PW-7) conducted autopsy upon the dead body and issued the post-mortem report<sup>12</sup>, taking note of multiple injuries on the private parts and the head of the child-victim. He opined that the

5 Criminal Reference No. 1 of 2017.

6 Hereinafter, referred to as the 'CrPC'.

7 Hereinafter, referred to as the 'High Court'.

8 Criminal Appeal No. 156 of 2017.

9 Hereinafter, referred to as the 'child-victim'.

10 Hereinafter, referred to as the 'complainant(PW-1)'.

11 FIR No. 236 of 2016 (Exhibit Ka-1).

12 Exhibit Ka-2.

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cause of death of the child-victim was asphyxia. Statements of the material witnesses were recorded. The appellant was apprehended on 28<sup>th</sup> June, 2016. It is alleged that the Investigating Officer(PW-14) got the confession<sup>13</sup> of the appellant recorded through the Magistrate concerned. After concluding the investigation, a charge-sheet<sup>14</sup> came to be filed against the appellant and he was subjected to trial. Upon completion of trial, the appellant was convicted and sentenced as mentioned above.

5. The appeal filed by the appellant against his conviction also stands rejected and the death sentence awarded to the appellant by the trial Court has been confirmed by the High Court *vide* judgment dated 5<sup>th</sup> January, 2018. Hence, the present appeals by special leave.
6. Learned counsel representing the appellant urged that the entire prosecution case is based on circumstantial evidence which is purely conjectural and untrustworthy. There is no tangible evidence on record to connect the appellant with the crime. The evidence of the witnesses of last seen circumstance, i.e., PW-2, PW-3, PW-5, PW-6, PW-8 and PW-11 is totally unreliable. Further, the DNA report cannot be read in evidence because the expert who conducted the DNA examination was not examined by the prosecution at the trial.
7. Learned counsel further submitted that the confession of the appellant was extracted under threat, duress and coercion and that is why neither the trial Court nor the High Court relied upon the same.
8. On these grounds, learned counsel for the appellant implored the Court to accept the appeals, set aside the conviction of the appellant, and acquit him of the charges levelled against him.
9. *Per contra*, learned standing counsel appearing for the respondent-State vehemently and fervently opposed the submissions advanced by the learned counsel for the appellant. He urged that the material prosecution witnesses, i.e., PW-2, PW-3, PW-5, PW-6, PW-8 and PW-11, have given unimpeachable testimony alleging that the child-victim was last seen in the company of the appellant on the night of the incident whereafter she was not seen alive.

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13 Exhibit Ka-11.

14 Exhibit Ka-17.

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10. Learned counsel further urged that the DNA expert's report (Exhibit Ka-8) conclusively established that the DNA obtained from the t-Shirt of the appellant matched with the DNA obtained from the blood sample of the child-victim. Likewise, the DNA obtained from the hair of the suspect, vaginal smear of the child-victim and her clothes were found to be matching with the DNA obtained from the blood sample of the child-victim and the blood sample of the appellant. Learned counsel thus, submitted that the evidence of the witnesses of the last seen circumstance coupled with the DNA/FSL report is sufficient to bring home the guilt of the appellant. On these grounds, learned counsel for the respondent-State sought dismissal of the appeals.
11. We have given our thoughtful consideration to the submissions advanced at the Bar and have gone through the impugned judgments and minutely reappraised the evidence available on record.
12. There is no dispute that the case of the prosecution rests totally on circumstantial evidence in the form of 'last seen', 'recoveries', 'confession of the appellant' and the 'DNA/FSL report'. We may note that the confession of the appellant was exhibited in prosecution evidence but the same was not relied upon by the trial Court or the High Court and thus, the same need to be taken into consideration while appreciating the evidence available on record. Otherwise also, we find that the confession seems to have been extracted under duress and cannot be termed voluntary. The prosecution is, thus, left with the testimony of the witnesses of the last seen theory and the DNA/FSL report in its endeavour to bring home the guilt of the appellant.
13. Before we proceed to discuss the evidence of the prosecution witnesses, we may note that the present case is yet another classic example of undue haste resulting in denial of proper opportunity to the accused to be tried in a just and fair manner.
14. The sequence of events narrated below is sufficient to draw this inference.
15. The incident took place on the intervening night of 25<sup>th</sup>/26<sup>th</sup> June, 2016. The charge-sheet came to be filed on 24<sup>th</sup> September, 2016 and the trial Court took cognizance of the same on the very same day. The matter was deferred to 26<sup>th</sup> September, 2016 for providing copies of the documents submitted under Section 173(2) CrPC

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to the appellant, as per the mandate of Section 207 CrPC. The matter was then deferred to 5<sup>th</sup> October, 2016 for the very same purpose. The order sheets of 5<sup>th</sup> October, 2016, 13<sup>th</sup> October, 2016, 17<sup>th</sup> October, 2016, 19<sup>th</sup> October, 2016 and 1<sup>st</sup> November, 2016, all indicate that the matter was deferred for providing the copies of the relied upon documents to the accused (appellant herein). It was only on 5<sup>th</sup> November, 2016 that the trial Court noted that the appellant had been presented from custody and the documents included in the chargesheet as relied upon by the prosecution were being provided to him. It must be emphasized that till this date the appellant was neither represented by a privately engaged defence counsel nor did the trial Court offer him the services of a legal aid counsel. On 5<sup>th</sup> November, 2016 itself, the trial Court proceeded to frame charges against the appellant even though he had been provided with the copies of the relied upon documents on that very day. Apparently thus, proper opportunity was not given to the appellant before framing charges against him and sending him for trial. Not only this, the trial Court extensively referred to the confession of the appellant recorded under Section 164 CrPC while framing charges against him. It is a different matter that the said confession was not relied upon either by the trial Court or the High Court, as a reliable piece of evidence against the appellant. On none of the dates fixed by the trial Court right up to the framing of charges and summoning of the witnesses did the Court make any endeavour to provide legal aid counsel to the appellant despite noting the fact that he remained unrepresented throughout the said proceedings.

16. Further, the Forensic Science Laboratory<sup>15</sup> report was presented by the Investigating Officer(PW-14) on 1<sup>st</sup> and 3<sup>rd</sup> December, 2016 and the trial Court took it on record. However, the order sheets of the trial Court are totally silent on the aspect of whether the copy of the said FSL report was ever provided to the appellant. For the first time on 11<sup>th</sup> January, 2017, on the request being made by the appellant, one Shri S.P. Singh, Advocate, was appointed as an *amicus curiae* to represent him in the trial. It is pertinent to note that the recording of the evidence of prosecution witnesses began on the very same day, i.e., 11<sup>th</sup> January, 2017, and the process was concluded within

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15 Hereinafter, referred to as the 'FSL'.

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27 days, i.e., on 6<sup>th</sup> February, 2017. During this short period, the *amicus curiae* appointed to defend the appellant was changed on 31<sup>st</sup> January, 2017. In view of the above sequence of events, there is no possibility that the defense counsel could have had a reasonable opportunity to prepare the matter and conduct the cross-examination from the witnesses. Thus, it is established beyond the pale of doubt that the trial was not conducted in a fair manner and that the appellant was not provided with a reasonable opportunity to defend himself.

17. Be that as it may, now we shall proceed to discuss the evidence of the prosecution witnesses who testified in the trial.
18. Brajpal Singh(PW-1), being the father of the child-victim gave evidence stating that his daughter (child-victim) went missing from a *Jagran* function. The dead body of the child-victim was recovered from a nearby field, whereby, he lodged the FIR<sup>16</sup> at the Police Station Kashipur. This report came to be filed around 10:00 AM on 26<sup>th</sup> June, 2016. However, what is most significant to note is that, although the witnesses of last seen circumstance claim in their depositions that they were present at the crime scene when the dead body of the child-victim was found, and police had arrived. Surprisingly, the FIR gives no indication whatsoever that anyone had seen the child-victim in the company of the appellant, who operated the sound and light at the *Jagran* function. The witnesses of the last seen theory claim to be present at the spot where the dead body was found but none of them divulged to the police officials who reached the spot that he/she had seen the child-victim and the accused-appellant moving together.
19. Jasweer Singh(PW-2) stated that he had come to the village Dhakiya Gulabo to meet his relatives. He also went to the *Jagran* function. The incident took place on the night of 25<sup>th</sup> June, 2016. In the morning of 26<sup>th</sup> June, 2016, at about 6:15 AM-6:30 AM, he came to know that the dead body of a girl child was lying in the nearby field. Out of curiosity, he also went there. He claimed that the dead body which he saw was of the same girl, whom he had seen in the night time accompanying a person who was doing the work of sound and light in the *Jagran* function and was being addressed by the name Rajiya @ Raju, by other people. The witness stated that he had seen the

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child-victim going with the said person in the middle of the night. In cross-examination, the witness admitted that he did not know the appellant prior to the date of the incident.

20. What is important to note here is that the witness(PW-2) was not made to identify the appellant in the dock as being the person with whom the child-victim was seen going away.
21. Anand Pal Singh(PW-3) also testified almost on the same lines as Jasweer Singh(PW-2). This witness too did not identify the appellant in the dock as being the suspect with whom the child-victim was seen going away. However, both Jasweer Singh(PW-2) and Anand Pal Singh(PW-3) stated that the appellant was wearing spectacles.
22. Sheespal(PW-4) was a formal witness who gave evidence regarding the inquest proceedings and preparation of the inquest memo.
23. Smt. Rashmi Devi(PW-5) also gave evidence of last seen circumstance. She alleged that in the night at about 3 o'clock, she saw the person who was doing the task of sound and light at the *Jagran* function, talking to the child-victim. Thereafter, both of them were seen going towards Dhakiya Gulabo road. This witness also was not made to identify the appellant in the dock as being the person who was seen going away with the victim. She admitted in her cross-examination that she had never seen the appellant before the incident and that she identified him with the help of a photograph which was published in the newspaper. The witness(PW-5) further admitted that her statement was recorded by the police on the same day on which she saw the photograph in the newspaper. The fact that the photograph of the appellant was published in a newspaper and that this witness of last seen theory got wise about the identity of the assailant thereafter, makes her testimony suspect.
24. Munesh Singh(PW-6) is another witness of last seen circumstance. The testimony of this witness is also on the same lines as that of PW-2, PW-3, and PW-5. This witness also was not made to identify the appellant in the dock as being the suspect with whom the child-victim was seen going away.
25. Dr. Madan Mohan, medical officer(PW-7) conducted the post-mortem examination on the body of the child-victim. He opined that the child-victim had been subjected to forcible sexual assault and that she may have died as a result of asphyxia because of pressure applied

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during the act of sexual assault. He also conducted the medical examination of the appellant and collected samples of the appellant for serological and DNA examination. The medical officer made a vague assertion in his evidence that all the samples which he had collected were handed over to the policeman who had brought the appellant to the hospital. However, he neither disclosed the name of the policeman to whom the samples were handed over nor did he state that the samples were sealed and were handed over to the policeman in a secure condition. The witness did not refer to any document or receipt under which the samples were handed over to the policeman.

26. Brajesh Kumar(PW-8) deposed that the *Jagran* function was being conducted by his group i.e., the *Ridhi-Sidhi Jagran Mandali* and that the appellant was taking care of the sound and light arrangements. The appellant had worked with his group, on earlier occasions as well. The witness further claimed that after completing his task, the appellant was sitting near the place where the artists were changing their clothes. Sometime later, the appellant brought two small girls to the artists and suggested that they should be dressed up as *Matas* (Deities) but the artists refused, on which the appellant went away with the girls. On the next morning, the parents of one of the girls approached the group and complained that their daughter had not reached home whereafter, the witness(PW-8) also participated in the search proceedings. In cross-examination, the witness candidly admitted that he did not see the appellant taking away the child-victim with himself.
27. Saroj Kamboj(PW-9) was posted as the Sub-Inspector, Mahila Helpline, Kashipur. She took formal steps pertaining to the investigation. She handed over the dead body of the child-victim to Constable Neelam Kanta(PW-10) and Constable Naveen Sharma for the post-mortem examination. The witness also moved an application to the medical officer(PW-7) for conducting post-mortem examination and preserving the forensic samples for analysis. However, the prosecution did not take the trouble of proving this application in the testimony of PW-9. Nothing turns on the testimony of this witness so far as the charges against the appellant are concerned.
28. Neelam Kanta(PW-10) was a Lady Constable posted at CCR Kashipur. She also gave formal evidence in respect of the inquest proceedings on the dead body of the child-victim, etc. In her evidence,

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there is nothing material which may connect the appellant with the crime.

29. Shiva Asthana(PW-11) claimed that he was the operator of the *Ridhi-Sidhi Jagran Mandali* and that the appellant used to do the work of sound and light for the group. The *Jagran Mandali* conducted a programme at the Fasiyapura T-Cross on 25<sup>th</sup> June, 2016. On that day, the appellant had accompanied them for doing the job of light and sound. After his work was finished, the appellant was sitting near the place where artists were changing their clothes. At about 2:30 AM in the night, two small girls were playing there whom the appellant took to the artists and suggested that they should be dressed up as *Matas* (Deities). The artists refused on which the appellant went away with the girls. When the witness was offered for cross-examination, the legal aid counsel provided to the appellant refused to continue with the case upon which another Advocate, namely Shri Neeraj Ranjan, was asked to represent the accused (appellant herein). The said counsel was not given any time to prepare the brief and was compelled to conduct the cross-examination on the same day. On a question being put to the witness(PW-11) in cross-examination, he answered that he did not see the appellant taking away the child-victim and that some persons who were doing the background decoration had given him this information. Clearly thus, the testimony of this witness on the aspect of identification of the accused-appellant is wavering and does not inspire confidence.
30. Prahlad Singh(PW-12) was posted as Sub-Inspector at Police Station Transit Camp. He accompanied the Investigating Officer(PW-14) to the crime scene on receiving information about the incident. He arrested the appellant who was seen standing near a Petrol Pump. The witness also stated that when the appellant was arrested, he observed numerous stains of blood and semen, etc. on his t-shirt. The clothes of the appellant were seized and sealed. However, the witness remained totally silent regarding the fate of these articles after the same were allegedly seized and sealed.
31. Anuj Tyagi(PW-13) was posted as a Constable at Police Station Kashipur. He gave evidence regarding the transmission of the forensic samples/articles related to the case in compliance of the directions given by the trial Court. The witness stated that he deposited the articles at the FSL on 29<sup>th</sup> June, 2016. However, he was totally silent

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regarding the mode and manner in which he received the sample packets. He also did not utter a word regarding the date of receipt and date of deposit of the samples.

32. Om Prakash Sharma, Inspector of Police(PW-14)<sup>17</sup> conducted the investigation of the case. He carried out the inquest proceedings; prepared the site inspection plan and collected the forensic samples/articles from the place of the incident. The witness stated that during the investigation, on 27<sup>th</sup> June, 2016, the secret informers told him that rumors were rife amongst the villagers that the crime had been perpetrated by the appellant, and he had been seen by several persons, taking away the child-victim. Evidence of this witness completely impeaches the credibility of the witnesses of the last seen theory and creates a grave doubt whether they had actually seen the appellant taking away the child-victim from the crime scene.
33. The incident took place on the intervening night of 25<sup>th</sup>/26<sup>th</sup> June, 2016. The witnesses of the last seen theory, i.e., Jasweer Singh (PW-2), Anand Pal Singh (PW-3), Smt. Rashmi Devi (PW-5), Munesh Singh (PW-6), Brajesh Kumar(PW-8) and Shiva Asthana(PW-11) categorically stated that they saw the appellant who was doing the job of sound and light in the *Jagran* function, taking away the child-victim with him. If at all, there was an *iota* of truth in this version of the witnesses of last seen theory, then there was no reason as to why they kept silent and failed to give this vital information to the police officers who arrived at the spot to investigate the matter in the early morning hours of 26<sup>th</sup> June, 2016. Manifestly, going by the evidence of the Investigating Officer(PW-14), no witness came forward with this theory till 27<sup>th</sup> June, 2016.
34. Furthermore, the witnesses of the last seen theory testified that they were already present at the site where the dead body of the child-victim was found, and police had also reached there in the early hours of 26<sup>th</sup> June, 2016. The FIR in respect of the incident came to be registered around 10:00 AM and the said FIR does not contain a whisper that anyone from the village had seen the child-victim in the company of the appellant, any time prior to her dead body being found.

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17 Hereinafter referred to as the "Investigating Officer(PW-14)".

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35. Hence, in our considered opinion, the conduct of these witnesses in remaining silent and not disclosing to the police regarding they having seen the appellant taking away the child-victim with himself, completely demolishes the prosecution case regarding the theory of last seen.
36. We may also observe that indisputably, the appellant was not known to PW-2, PW-3, PW-5, and PW-6 from before. However, no test identification parade proceedings were conducted by the Investigating Officer(PW-14), to ascertain the identity of the appellant as being the suspect, who took away the child-victim with himself.
37. Further doubt is created on the *bona fides* of the Investigating Officer(PW-14) who had tried to stick the case on to the appellant by getting his confessional statement recorded but neither the trial Court nor the High Court placed reliance on the said confessional statement and hence, we need not delve upon the same because these concurrent findings recorded by both the Courts remain unchallenged and have attained finality.
38. The circumstance of the 'last seen' having been disbelieved and 'confessional statement' having been discarded, the only other circumstance which remains in the hands of the prosecution to connect the appellant with the crime as relied upon by the trial Court and the High Court are the DNA/FSL reports. The DNA/FSL reports were proved by Om Prakash Sharma, Investigating Officer(PW-14). The conclusions drawn in the DNA report<sup>18</sup> are as follows: -
  - The DNA obtained from the Exhibit-15 (t-shirt of accused) is from a single female human source and matching with the DNA obtained from the Exhibit-1 (blood sample of the deceased).
  - The DNA obtained from the Exhibits-2, 3, 4 and 6 (hair of suspected, vaginal smear slide of deceased, paizami of deceased and underwear of deceased) are matching with the DNA obtained from the Exhibits-1 and 10 (blood sample of deceased and blood sample of accused).
39. The first flaw in the prosecution case on the aspect of DNA profiling is that the expert who conducted the DNA examination was not

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18 Exhibit Ka-19.

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examined in evidence and the DNA report was merely exhibited in evidence by the Investigating Officer(PW-14) who undeniably is not connected with the report in any manner. This Court in the case of **Rahul v. State of Delhi, Ministry of Home Affairs & Anr.**<sup>19</sup>, while dealing with the issue concerning evidentiary value of DNA report, has held that DNA profiling reports cannot be admitted in evidence *ipso facto* by virtue of Section 293 CrPC and it is necessary for the prosecution to prove that the techniques of DNA profiling were reliably applied by the expert. The relevant excerpts from the said judgment are reproduced hereinbelow for the sake of ready reference: -

“36. The learned Amicus Curiae has also assailed the forensic evidence i.e. the report regarding the DNA profiling dated 18-4-2012 (Ext. P-23/1), giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the appellant-accused. The Court finds substance in the said submissions made by the Amicus Curiae. **The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case.**

38. It is true that PW 23 Dr B.K. Mohapatra, Senior Scientific Officer (Biology) of CFSL, New Delhi had stepped into the witness box and his report regarding DNA profiling was exhibited as Ext. PW 23/A, **however mere exhibiting a document, would not prove its contents.** The record shows that all the samples relating to the accused and relating to the deceased were seized by the investigating officer on 14-2-2012 and 16-2-2012; and they were sent to CFSL for examination on 27-2-2012. **During this period, they remained in the malkhana of the police station. Under the circumstances, the possibility of tampering with the samples collected also could not be ruled out. Neither the trial court nor the High Court has**

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**examined the underlying basis of the findings in the DNA reports nor have they examined the fact whether the techniques were reliably applied by the expert. In the absence of such evidence on record, all the reports with regard to the DNA profiling become highly vulnerable, more particularly when the collection and sealing of the samples sent for examination were also not free from suspicion.”**

**(emphasis supplied)**

40. Thus, in the facts and circumstances of the present case, non-examination of the scientific expert who carried out the DNA profiling is fatal, and the DNA report cannot be admitted in evidence. That apart, we find that the very procedure of collection and forwarding of DNA samples to the FSL is full of lacunae and loopholes. The incident took place on the intervening night of 25<sup>th</sup>/26<sup>th</sup> June, 2016. The dead body of the child-victim was picked from the crime scene by the Investigating Officer(PW-14) on 26<sup>th</sup> June, 2016 at 06:16 AM and was forwarded to Dr. Madan Mohan, medical officer(PW-7) for carrying out the post-mortem examination. The medical officer, while deposing on oath, stated that he collected following samples and articles from the child-victim’s dead body for forensic examination. The relevant excerpt from his testimony is reproduced below: -

“The following tests were sent from the injuries of the deceased in her vagina.

No. 1: Extract was collected from the vagina and four slides were prepared for spectro majoa and smegma bacilli test and were sent to laboratory. 5 ml. blood was taken from the body of the deceased and sent for DNA test.

The hair stuck on the vagina of the deceased and blood accumulated outside the vagina were also sent for DNA test. The following clothes of the deceased were sent in a sealed bundle for semen and blood test.

**Clothing of the deceased:** no.1. readymade blue under wear stained with blood and mud. Printed Salwar of the deceased of white and green colour, stained with blood. One small towel with yellow linings, one bracelet, number 5<sup>th</sup>.- Mud-stained shirt of the deceased. The chip

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of the videography of all above samples of the deceased and of post mortem examination was sealed and handed over to the accompanied constables.”

41. The medical officer(PW-7) also testified that on 28<sup>th</sup> June, 2016 at about 12:44 PM, a Constable named Girish Kandpal brought the accused-appellant to the hospital for medical examination. The medical officer stated he collected the following samples from the appellant for forensic examination: -

“On 28.6.2016 at 12.44 PM in the noon, Constable Girish Kandpal, P.S. Kashipur brought the accused. In general examination the accused was found healthy. On examination of sexual organs of the accused, dense hair were found. Skin over the glans of the penis of the accused was being folded easily. The glans was neat and clean. There was no blood mark but there were light mark of abrasion around the glans in the circle. I have taken following samples:

- (1) Two slides were made from the swab of the glans for DNA test.
  - (2) Blood of the accused was taken for DNA test.
  - (3) Samples of hair from the stomach and outside of testicles were taken for DNA test.
  - (4) Two slides were made from the swab taken from the glans of accused for examination of spermatozoa and smegma vacilli.”
42. The medical officer(PW-7) also stated that the samples of the deceased as well as the appellant were handed over to the police officials who came to the hospital at contemporaneous points of time. However, there is not even a whisper in the statement of the medical officer(PW-7) that the samples collected from the appellant were sealed prior to being handed over to the police officials. Hence, at the very inception, the procedure of collecting the samples has been tainted on account of non-sealing of the forensic material collected from the accused-appellant.
43. Now, we shall discuss the evidence of the police officials who dealt with the samples/articles which were forwarded to the FSL/DNA laboratory.

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44. Saroj Kamboj(PW-9), Sub-Inspector, stated that she gave an application<sup>20</sup> to the medical officer(PW-7) at the L.D. Bhatt Government hospital for conducting the post-mortem examination on the dead body of the child-victim; to preserve the hair found on the reproductive organs of the deceased; to make slides of vaginal smear and to collect 5 ml blood for DNA test. However, Saroj Kamboj(PW-9) did not give any follow-up evidence regarding the fate of the samples, if any, prepared or collected from the hospital. Thus, her evidence is relevant only to the extent of submission of the aforesaid application. If we consider her evidence in the backdrop of the evidence of the medical officer(PW-7), we find that he did not utter a single word regarding any application having been submitted to him by any police official for collecting these samples/articles.
45. Neelam Kanta(PW-10), lady Constable, stated that she and Constable Naveen Sharma took the body of the child-victim to the hospital for the purpose of post-mortem examination. The Constable is completely silent regarding any samples having been handed over to her by the medical officer(PW-7). Rather, she gave a very surprising statement claiming that the Investigating Officer(PW-14) handed over the dead body to her and the male Constable for post-mortem examination, after duly sealing the same. We fail to understand as to why the dead body of the child-victim was sealed for the purpose of conducting the post-mortem examination. In sheer contrast, the medical officer(PW-7) did not utter a word in his deposition that when he received the dead body at the hospital, the same was sealed. Hence, there is a grave contradiction in the evidence of the prosecution witnesses on this vital aspect of the case.
46. Prahlad Singh(PW-12), Sub-Inspector, stated that he, along with the other members of the police team, launched a search for the appellant, who was arrested on 28<sup>th</sup> June, 2016 while standing near a petrol pump. After being arrested, the appellant confessed to the crime and also stated that the clothes which he was wearing at the time of commission of the offence were placed by him in a bag which he was carrying in his hand. The appellant had also stated that he was intending to throw the clothes but before he could do so, he was caught by the police. We feel that the theory put forward in the

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testimony of the said witness that the appellant was carrying the worthless incriminating articles, i.e., his clothes with him in a bag for almost two days after the incident, is totally unbelievable. It is clear as daylight that these recoveries have been planted because it is hard, if not impossible, to believe that the appellant who was a free bird and had an ample opportunity to destroy the clothes would keep the same with him for almost two days after the incident so as to facilitate the police to recover the same at a later point of time.

47. The lopsided manner in which trial was conducted is fortified from the evidence of Sub-Inspector Prahlad Singh(PW-12) who was allowed to narrate the entire confession of the appellant, in his examination-in-chief. This procedure adopted by the trial Court in permitting a police officer to verbatim narrate the confession made by an accused during investigation is grossly illegal and contrary to the mandate of Sections 24, 25 and 26 of the Indian Evidence Act, 1872. Not only this, the trial Court even allowed the confessional statement of the appellant, to be exhibited in the evidence of the witness, which further establishes that the trial was conducted in a totally distorted manner.
48. Anuj Tyagi(PW-13), who was posted as a Constable at Police Station Kashipur deposed that he went to the FSL to hand over the blood samples, hair samples and two slides for DNA test relating to the case at hand. The case property was deposited *vide* receipt No. 694/2016 dated 29<sup>th</sup> June, 2016. The said witness also stated that constable Vijay Pal went to the FSL carrying with him the case property related to the case under the order of ACJM, Kashipur and higher police officials. Anuj Tyagi(PW-13) proved the signatures of said Vijay Pal on the documents. Nonetheless, no explanation is forthcoming from the record as to why Constable Vijay Pal himself was not examined by the prosecution.
49. What is significant to note from the evidence of Anuj Tyagi (PW-13) is that he did not utter a single word as to who handed him the sample packets and what was the condition of the sample packets when he carried the same to the FSL.
50. Om Prakash Sharma, Investigating Officer(PW-14), also gave evidence to the effect that he seized the forensic samples from the crime scene where the body of the child-victim was lying. He stated that the clothes of the appellant were also seized upon his arrest,

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which were found stained with blood and bore marks of semen. Investigating Officer(PW-14) in his examination-in-chief, also made a detailed narration of the confessional statement made by the appellant and also proved the said confessional statement, which again reflects the total lackadaisical approach of the presiding officer who conducted the trial.

51. The Investigating Officer(PW-14) also deposed that the medical officer(PW-7) had handed over the samples/articles for forensic evaluation and DNA profiling which were duly sealed and were sent for scientific examination. However, the fact remains that neither the documents/memorandums pertaining to the proceedings of sealing the said samples/articles were exhibited in evidence nor did any of the prosecution witnesses gave evidence for proving this vital procedure.
52. A vague assertion was made by the Investigating Officer(PW-14) that on 26<sup>th</sup> June, 2016 and 28<sup>th</sup> June, 2016, the clothes of the appellant along with samples of his blood, hair and slides of vaginal smears and swabs of the child-victim were prepared and sent to the FSL for DNA profiling and forensic examination by the permission of the Court.
53. Nevertheless, the fact remains that the evidence of the Investigating Officer(PW-14) is totally silent regarding the deposit of these samples/articles in the *malkhana* of the police station or the mode and manner of transmission thereof from the police station to the FSL. No forwarding letter pertaining to the transmission of the samples was proved in the testimony of the Investigating Officer(PW-14) or any other police witness. The *malkhana-in-charge* of the police station was also not examined by the prosecution.
54. In order to make the DNA report acceptable, reliable and admissible, the prosecution would first be required to prove the sanctity and chain of custody of the samples/articles right from the time of their preparation/collection till the time they reached the FSL. For this purpose, the link evidence would have to be established by examining the concerned witness.
55. Evidently, there is not even a semblance of evidence on record to satisfy the Court that the samples/articles collected from the dead body of the child-victim and those collected from the appellant which were later forwarded to the FSL were properly sealed or that the same remained in a self-same condition right from the time of the

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seizure till they reached the FSL. No witness from the FSL was examined by the prosecution to prove that the samples/articles were received in a sealed condition. Hence, there is every possibility of the samples being tampered/manipulated by the police officers so as to achieve a favourable result from the FSL, thereby, inculpating the appellant in the crime.

56. Consequently, we feel that the DNA/FSL reports cannot be read in evidence. Once, these reports of the FSL are eschewed from consideration, there remains no evidence on the record of the case so as to connect the appellant with the crime.
57. Resultantly, the conviction of the appellant as recorded by the trial Court and affirmed by the High Court for the offences mentioned above cannot be sustained.
58. The impugned judgments dated 5<sup>th</sup> April, 2017 and 6<sup>th</sup> April, 2017 passed by the trial Court and dated 5<sup>th</sup> January, 2018 passed by the High Court, do not stand to scrutiny and are hereby quashed and set aside. The appellant is acquitted of the charges. He is in custody and shall be released from prison forthwith, if not wanted in any other case.
59. The appeals are allowed accordingly.
60. Pending application(s), if any, shall stand disposed of.

*Result of the case:* Appeals allowed.

<sup>†</sup>*Headnotes prepared by:* Divya Pandey