

(2004) 12 UK CK 0018

In the Uttarakhand High Court

Case No : Criminal Appeal No. 36 of 2004 and Criminal Reference No. 1 of 2004

Aftab Ahmad Ansari and Another

APPELLANT

Vs

State of Uttaranchal

RESPONDENT

Date of Decision : 17-12-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 366

Evidence Act, 1872 — Section 134, 27

Penal Code, 1860 (IPC) — Section 201, 302, 376

Citation : (2005) 2 UC 789

Hon'ble Judges : V.S. Sirpurkar, C.J.; Irshad Hussain, J

Bench : Division Bench

Advocate : Jagdish Singh Sainger, assisted by, Pushpa Joshi, for the Appellant;
U.P.S. Negi, A.A.G., for the Respondent

Judgement

Irshad Hussain, J.—This is an appeal against the Judgment, dated 7-1-2004, whereby both the Appellants were convicted and death sentence was passed against them u/s 302 I.P.C. They were also convicted and sentenced to undergo imprisonment for life and fine of Rs. 10,000/- each u/s 376 I.P.C. and in default to further undergo imprisonment for one year each. They were further convicted and sentenced to undergo R.I. for seven years and fine of Rs. 5000/- each and in default to further undergo imprisonment of one year each u/s 201 I.P.C.

2. Criminal Reference u/s 366 of the Code of Criminal Procedure is submitted by Sri G.K. Sharma, Additional Sessions Judge, Nainital in view of the death sentence passed against these Appellants per aforesaid judgment in Sessions Trial No. 252 of 1998, arising out of case crime No. 112 of 1998, P.S. Bajpur, District U.S. Nagar.

3. Both the Appellants at the time of the occurrence of the case were in their early twenties. Appellant Aftab is resident of village Patianagla, P.S. Bhagatpur, Tehsil Thakurdwara, District Moradabad. His sister Smt. Bilkis (D.W.1) was married to Kabir Ahmad of village Bajpur, within the circle of the Police Station of

the same name of District Udham Singh Nagar. The Appellant Aftab used to visit and even reside in his sister's house. Appellant Mumtaz is resident of adjoining village Mundia Pistor of P.S. Bajpur. Km. Yasmeen aged about five - six years, victim of the case, was the daughter of Nairn Ahmad (P.W.I) of this village Bajpur.

4. The prosecution version in nut-shell is that Km. Yasmeen went missing from the evening of 5-2-1998 while playing near her house and could not be traced in and around the vicinity and the houses of the relatives. Next day at 10.00 a.m. informant Nairn Ahmad gave a missing report (Ext. Ka.1) at the Police Station and the information was entered in the General Diary vide report No. 16 dated 6-2-1998 (Ext. Ka.6). On 8-2-1998 at about 6.00 a.m. the dead body of Km. Yasmeen with injuries was found in front of the house of Haji Khurseed, a neighbor of the informant and also the sister of Appellant Aftab. Written report (Ext. Ka.2) was given by informant's brother Shamim Ahmad (P.W.2) at the Police Station. On its basis case u/s 302/201 I.P.C. was registered vide G.D. Report No. 12 of 7.30 a.m. dated 8-2-1998 (Ext. Ka.7) and the investigation of the case was taken up by S.H.O. Sri Parveen Kumar Tyagi (P.W.7). The Investigating Officer reached there. He held inquest on the dead body and prepared inquest report (Ext. Ka.4) and connected documents and sent the dead body in a packed and sealed bundle for post mortem. Dr. Y.S. Rawat (P.W.6) of Government Hospital Kashipur performed post mortem on the dead body of Km. Yasmeen at 2.15 p.m. on 8-2-1998 and prepared the post mortem report (Ext. Ka. 5). Following ante-mortem injuries were detected on her person:

(1) Contusion regular around the neck size 20cm x 2cm below the thyroid cartilage in whole circumference (abraded wounds at places).

(2) Perineal tear right side from vagina to rectum of size 6cm x 4cm Anal canal filled with faecal matter. Anal wall seem teared and vagina was having blood.

(3) Abrasion over buttock right side of size 2cm x 0.5cm.

In the opinion of the Medical Officer death occurred about 48-72 hours before due to strangulation and ante mortem injury around neck. He also testified that probably before causing the death the victim was subjected to rape.

5. It is the prosecution's case that both the Appellants were arrested at about 2.00 p.m. on 9-2-1998 from the house of Appellant Mumtaz on the clue provided by a police informer. They confessed their guilt before the Investigating Officer and agreed to discover the underwear and frock which Km. Yasmeen was wearing and a sheet which according to them was spread on the fodder-straw to commit rape by them on the said victim. The Appellants accordingly took the police party to the house of the sister of Appellant Aftab from where they took out these items from inside the inner Kotari, situate in the west of the house, vide memo of recovery and disclosure statement, Ext. Ka.3. All these items were blood-stained and sent to Forensic Lab for expert report along with the underwear of the two Appellants, which they were wearing at the time of the arrest and were attached as they appear to be stained with blood and semen.

Expert report, Ext. Ka.16 was tendered in the evidence in the trial.

6. The recovery on the disclosure statement was effected in the presence of police personnel and public witnesses Rais Ahmad, P.W.4 and Lakhvinder Singh, examined in defence as D.W.2, as this witness was not produced from the side of the prosecution.

7. During the course of the investigation, statement of Naseeb Ahmad (P.W.3) was recorded as it revealed that on 8-2-1998 at about 4.30 a.m. the two Appellants were seen in front of the door of the house of Haji Khurseed and they at once ran inside the adjacent house of Kabir Ahmad. This witness was then accompanied by one Zakir while both of them were going towards jungle side to ease themselves. They came to return at about 5.30 a.m. and by then the dead body of the victim was found lying by the side of the house of Haji Khurseed.

8. In the course of the investigation, statement of witness Anand Swaroop (P.W.5) was recorded as he disclosed that on 23-2-1998 Appellant Aftab made extra-judicial confession to him in regard to the crime committed.

9. The Investigating Officer completed other formalities of the investigation and finally submitted charge sheet (Ext. Ka.17) against the Appellants on 27-2-1998.

10. Before the Sessions Court the Appellants did not admit the accusations of the prosecution and urged that they have been falsely implicated in the case. They denied their arrest in the manner as alleged by the prosecution. Appellant Aftab also claimed that the police took away the clothes of his niece (sister's daughter).

11. In order to prove its case, the prosecution examined above named seven witnesses and relied upon the documents referred above, besides Forensic Science Lab Report, Ext. Ka.16. In defence also two witnesses as referred above were examined with a view to dispute the claim about the arrest of the Appellants in the manner as alleged and also the recovery of the clothes and sheet from the house of the sister of the Appellant Aftab.

12. As is evident there is no direct evidence in the case and the prosecution case rests entirely on circumstantial evidence. The main circumstances relied upon by the prosecution and held proved by the trial Court are:

(i) Both the Appellants were seen by P.W.3, Naseeb Ahmad and another at about 4.30 a.m. on 8-2-1998, fleeing away from near the place where the dead body of Km. Yasmeen was after some time found.

(ii) Recovery of frock and underwear of the deceased and bed-sheet, all of these stained with blood, on disclosure statement of the Appellants.

(iii) Under-wears of both the Appellants were attached and these were found stained with human blood and semen.

(iv) Extra-judicial confession of Appellant Aftab made to P.W.5, Anand Swaroop.

13. At the out-set it need to be stated that in a case based on circumstantial

evidence inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with innocence of the accused or the guilt of any other person. The thrust of the submission of the Learned Counsel for the Appellants was that the Learned Court committed manifest error in concluding that the circumstances formed a complete chain and rule out reasonable likelihood of innocence of the Appellants. According to them it was highly improbable that P.W.3, Naseeb Ahmad and his companion Zakir could have come out to move towards jungle side to ease themselves in the dark hours at 4.30 a.m. on a winter day of 8-2-1998 so as to be able to saw the Appellants running away from near the house of Haji Khurseed and further that the witness at that time would not see the dead body lying near the house of Haji Khurseed and he would only come to know of it later in the morning at about 5.30 a.m. on return from the jungle side. Therefore, the evidence of P.W.3 was claimed to be highly doubtful and incapable of reliance being placed thereon for proving of the first mentioned circumstance in the case.

14. In regard to the second circumstance it was submitted that the claim regarding the arrest of the Appellants being highly doubtful in view of the evidence of the prosecution witnesses and at any rate prosecution has failed to prove that Km. Yasmeen had blood group "A" which has been the case in regard to the blood group on the articles said to have been recovered at the instance of the Appellants and further that absence of human semen on the bed sheet further run counter to the claim of the prosecution regarding the recoveries. The claim that the under-wears of the Appellants were attached was also adversely commented upon by the Learned Counsel and it was argued that it would be a very doubtful proposition that the Appellants would be wearing the same under-wears for about four or five days knowing fully well that these have human blood and semen stains. Therefore, it was canvassed that the third circumstance was also highly doubtful and should not have been held to be proved. The statement of P.W.5, Anand Swaroop was also termed as wholly unreliable because it was highly improbable that the Appellant Aftab while already in police custody without any rhyme or reason would take the witness in confidence and made extra-judicial confession and that too when the witness was not a close acquaintant and man of confidence of the Appellant. Learned Counsel therefore submitted that the extra-judicial confession could not have also been taken as a circumstance to complete the chain pointing to the guilt of the Appellants. It was therefore argued that in the totality of the circumstances of the case no implicit reliance could have been placed on the evidence of the prosecution in regard to these incriminating circumstances and the judgment of the trial court can not legally be sustained.

15. On the other hand Learned Additional Advocate General, on behalf of the State, made submissions-supporting the impugned judgment and contended that the infirmities and defects pointed out by the Learned Counsel for the Appellants would not entail the rejection of the prosecution case, particularly when the circumstances and other factors have rightly been relied upon by the Learned

trial court for coming to the conclusion that the two Appellants had committed the crime.

16. We have carefully considered the submissions made by the Learned Counsel for the parties. There can be no doubt that Km. Yasmeen was subjected to rape and she died a homicidal death. Dr. Y.S. Rawat (P.W.6) beside proving that the death was homicidal, gave out, in view of the ante-mortem injuries on the private part of Km. Yasmeen, that the victim was subjected to rape and the death was caused after she was ravished. He also opined that the death occurred about 48-72 hours before the post mortem which was performed at 2.15 p.m. on 8.2.1998. Not a single question was put to him in cross-examination. The positive evidence therefore also prove beyond doubt that the claim of the prosecution and evidence of the informant, Nairn Ahmad (P.W.I) that his daughter Km. Yasmeen went missing from the evening of 5-2-1998 is reliable. The evidence on record further indicate that few hours thereafter Km. Yasmeen was ravished and was made to suffer death by strangulation. The question, however, is whether the Appellants or any of them can be said to be responsible for the crime perpetrated on the minor girl and the trial court was justified in awarding also the death sentence in the case.

17. The dead body of Km. Yasmeen was found at about 6.00 a.m. on 8.2.1998 out side the house of Haji Khurseed. Informant Nairn Ahmad (P.W.I) and his brother Shamim Ahmad (P.W.2) are the witnesses of this fact and none of them had even been put a single question in cross-examination. Therefore, the defence has not disputed the said fact of recovery of the dead body. The inquest on the dead body was held at that place by the Investigating Officer Parveen Kumar Tyagi (P.W.7) and the site plan, Ext. Ka.12 was also prepared by him. It shows that the house of the informant Nairn Ahmad is situate just adjacent in the south of the house of Haji Khurseed and the house of Kabir Ahmad, the brother in law of Appellant Aftab, is situate just adjacent in the north of the house of Haji Khurseed. The village path-way runs west of these houses leading to the main village passage in the north. These houses are situate in the thick of the village Abadi as other houses are also shown in the site plan. Witness Naseeb Ahmad (P.W.3) testified that on 8-2-1998 at about 4.30 a.m. he was going towards jungle side along with Zakir alias Kuloo for natural call and at that time he saw both the Appellants hurriedly moving away from near the outer door of the house of Haji Khurseed and then entering in the adjoining house of Kabir, the brother in law of Appellant Aftab. The witness was not cross-examined to show that the witness was not in the habit of moving out to ease himself in the early hours of the morning. Therefore, there was nothing to raise any doubt in his claim that he went out at that time to ease himself along with one another. It is prosecution's case that during those days Appellant Aftab although resident of Tehsil Thakurdwara, District Moradabad, was staying in the house of his brother-in-law Kabir Ahmad and Appellant's own sister Smt. Bilkis (D.W.I) gave out that during the period when the victim of the case went missing and victim's dead body was found, her brother Aftab had been staying in her house. The Appellant

Aftab also has not made any contrary claim in his statement u/s 313 of the Code of Criminal Procedure, and therefore, it was proved beyond doubt that the Appellant Aftab during those days was residing in the house of his brother in law.

18. Km. Yasmeen was only aged about five-six years and naturally she had not attained much height on account of her age. This witness was not able to see the dead body of Km. Yaseen lying there in front of the door of the house of Haji Khurseed at that time and only on his return from the jungle side at about 5.30 a.m. that day he came to know that the dead body was recovered from that place. When the witness was going towards jungle side it was dark hours of the early morning and the dead body of a minor girl of small height lying in front of the door of a house could not have been noticed by the witness and his companion and whereas the Appellants being adult and standing there and known to the witness were conveniently recognized while they were hurriedly getting into the adjoining house of Kabir Ahmad. Therefore, there was nothing unusual that the witness was not able to notice and see the dead body near the house of Haji Khurseed while going towards the jungle side at about 4.30 a.m. that day. The submission made in that regard by the Learned Counsel to assail the reliability of the witness do not carry any weight and we are inclined to believe the evidence of the witness that he went towards jungle side that morning and on return came to know that the dead body of Km. Yasmeen was found in front of the house of Haji Khurseed from where the Appellants were moving away to enter into the adjoining house. However we find that this witness has not named initially the Appellant Mumtaz also as the person entering into the house of Kabir Ahmad along with Appellant Aftab when the witness was interrogated by the Investigating Officer. This fact has been affirmed by P.W.7, the Investigating Officer, who gave out that witness Naseeb Ahmad had not initially named Appellant Mumtaz as the another person accompanying Appellant Aftab that early morning of 8-2-1998 and entering the house of Kabir Ahmad. The Learned trial court has not attached importance to this aspect of the matter and went on to believe the evidence of the witness that both the Appellants Aftab and Mumtaz were there and were seen entering into the house of Kabir Ahmad. Considering the fact that in the first instance the name of Appellant Mumtaz was not disclosed by the witness, we are of the view that the evidence of the witness could only safely be accepted that only Appellant Aftab was there, who has also reason to be at that place in view of his staying in the adjoining house of his brother-in-law Kabir Ahmad.

19. In the face of the facts of the case it was also argued on behalf of the Appellants that P.W.3, being admittedly a relation of the informant, was an interested witness and in the absence of any corroboration his evidence was not worth placing reliance upon. It is well settled that a close relative, who is a natural witness, can not be regarded as an interested witness. Even the evidence of an interested witness can be relied upon in proof of the prosecution claim if on scrutiny the evidence of the witness repose confidence and it warrants acceptance. The cross-examination of the witness failed to bring anything

incriminating as may indicate that the witness is wholly unreliable. The witness had been straightforward in not claiming to have seen the dead body lying there in front of the house of Haji Khurseed while going towards the jungle side. He had deposed about what actually had been seen in that early morning hours of 8-2-1998 and had not tried to be over-zealous even in claiming to have seen the dead body there at that time. This factor can be taken to classify the witness into a category of a wholly reliable witness whose evidence can safely be acted upon without corroboration from the evidence of any other witness. Therefore, even if Zakir, who accompanied this witness that day, was not examined in evidence, it makes little difference and on that account also the evidence of the witness can not be said to be infirm and unacceptable. In a recent decision in the matter of State of Madhya Pradesh v. Dharkole alias Govind Singh and Ors. 2004 AIR S.C.W. 6241, the Apex Court did not attach any importance to the argument in regard to non-examination of a witness of a particular fact and it was held that, "it is not necessary for prosecution to examine somebody as a witness even though the witness was not likely to support the prosecution version. Non-examination of some persons per se does not corrode vitality of prosecution version, particularly when the witnesses examined have withstood incisive cross-examination and pointed to the Respondents as the perpetrators of the crime." Considering this aspect we need not search for further explanation regarding non-examination of Zakir by the prosecution. This apart, it is well settled in view of Section 134 of the Evidence Act, that evidence has to be weighed and not counted and that no particular number of witnesses shall in any case be required for the proof of any fact. The evidence of the witness Naseeb Ahmad on being carefully scrutinized is reliable to prove the circumstance that he had seen the Appellant Aftab speeding away to enter the house of his brother-in-law from the place where the dead body of Km. Yasmeen was found in the early morning hours of 8-2-1998. As stated above, the witness has in fact seen only Appellant Aftab, but somehow also named Appellant Mumtaz also as the other person entering in the house, but since the name of the Appellant Mumtaz was not in the first instance told to the Investigating Officer, we are of the view that the Learned trial court made an error in coming to the conclusion that both the Appellants were seen fleeing away from that place at that time. The circumstance in fact stand established only against the Appellant Aftab, who was seen and has reason to be there to enter in to the house of his brother in law from that place where later on the dead body of Km. Yasmeen was found on that day. Considering the reliability of the evidence of the witness non-mentioning of the name of the witness in the information, Ext. Ka.2, given by P.W.2, Shamim Ahmad about the dead body lying in front of the house of Haji Khurseed can not be a ground to doubt his evidence. Even if the witness had told the informant and others regarding the presence of the Appellant at the place in the early hours of the morning of 8-2-1998, the non-mentioning of the same fact and the name of the witness in the above written information, Ext. Ka.2 can not have any effect on the reliability of the evidence of the witness. There can be no gain saying that the Appellant Aftab was seen there at that place in the manner as

stated to by the witness and the circumstance is a strong link in the chain of circumstances pointing to his guilt.

20. In regard to the recovery of frock and underwear of the deceased and bed-sheet with blood-stains at the pointing of the Appellants, it was argued that the evidence of the fact discovered is not reliable. The recovery was made in the presence of the police party headed by the Investigating Officer P.W.7, Parveen Kumar Tyagi and public witnesses P.W.4, Rais Ahmad and D.W.2, Lakhvinder Singh, after the arrest of the Appellants was effected same day, that is, 9-2-1998 at 2.00 p.m. from the house of Appellant Mumtaz. In the first instance the claim in regard to the arrest was challenged on behalf of the Appellants by referring to the evidence of the witnesses that by the lead provided by sniffer dog pressed in to service by the police the arrest had already been made on 8-2-1998 and that thereafter the theory in regard to the recovery was concocted. We see no substance in this argument because it is not the case of the prosecution that sniffer dog was pressed into service during the investigation. There is categorical statement of Investigating Officer P.W.7, who stated that he had not requisitioned sniffer dog at the place of the occurrence. If the witnesses P.W.3, Naseeb Ahmad and P.W.4, Rais Ahmad talk of presence of sniffer dog on 8-2-1998 and Investigating Officer does not admit the use of sniffer dog, it may at any rate be only a case of irregularity in the investigation, which should not be treated as a ground to reject the prosecution case as a whole. The Apex Court in the matter of Lila Ram (D) through Dulichand v. State of Haryana and Anr. AIR 1999 S.C. 3117 has held that any irregularity or even an illegality during the investigation should not be treated as a ground to reject the prosecution case. Earlier decision of the Court with similar observation in the matter of State of Rajasthan Vs. Kishore, was followed. Lately the Apex Court in Allarakha K. Mansoori v. State of Gujarat 2002 AIR SCW 781 laid stress on the proposition that in murder case defective investigation by itself can not be made a ground for acquitting accused. The Learned trial court on the controversy pointed out in the case, also repelled the submission on behalf of the defence and did not attach importance to the irregularity in the investigation by adverting to a decision of Apex Court in the matter of Karnel Singh Vs. State of M.P., . We are of the firm view that the approach of the Learned trial court was fully justified and we are convinced that even if for argument sake it is taken that sniffer dog was used and its effect was not taken note of in the proceedings of the investigation the irregularity or the illegality do not tell upon adversely on the prosecution case.

21. In view of above we are now concerned with the evaluation of the evidence about the recovery on the disclosure statement relied upon by the prosecution. Perusal of the memo of recovery, Ext. Ka.3 clearly reveal that the disclosure statement was made by Appellant Aftab and that Appellant Mumtaz merely verified the statement of Appellant Aftab and thereafter both of them went on to lead the witnesses and to effect the recovery of the articles from the western Kotari of the house of Kabir Ahmad as also shown in the site plan, Ext. Ka.14. The memo further reveal that the frock and the underwear of the deceased and a

bed sheet, all of which were stained with blood, were taken out from the hidden place in the house by Appellant Aftab. The evidence of Investigating Officer, P.W.7 and P.W.4 Rais Ahmad also indicate that Appellant Aftab took out these items from the hidden place in the house of Kabir Ahmad although they claimed that both the Appellants went there together to effect the recovery. In the case of Ramkishan Mithanlal Sharma Vs. The State of Bombay, the recovery on the basis of the statements of the two accused was not found admissible u/s 27 of the Evidence Act for the reason that the disclosure statements of the two accused were not precisely recorded in their respective words immediately one after the other before the discovery of the fact was made. As stated above, in the instance case also the separate statement of Appellant Mumtaz, as precisely as possible attributing the respective words, was not recorded but it was stated that this Appellant verified the version given by the other Appellant Aftab. Even the precise statements in regard to the fact discovered attributing to the Appellant Mumtaz were not recorded in memo, Ext. Ka.3, as also were not proved in the evidence of the two witnesses examined by the prosecution and therefore the Learned trial court was not justified in holding that the recovery of the above items was at the instance of both the Appellants. Considering the import of Section 27 of the Evidence Act statement distinctly leading to discovery of a fact is admissible in evidence and since the evidence on record is attributing distinct statement of discovery of fact to Appellant Aftab the recovery could only be held to be on the basis of his disclosure statement and not that of Appellant Mumtaz.

22. The circumstance in regard to the recovery of these items was also adversely commented upon by pointing out that none of the prosecution witnesses was made to prove that the frock and underwear belong to Km. Yasmeen and she was wearing these items while she went missing on 5-2-1998 and further that the expert's report indicating that these two items and bed sheet were found to be stained with human blood of "A" group could be of no consequence when there was no evidence that the blood group of Km. Yasmeen was "A" and that in such a situation the circumstance could not have been taken to make out a link in the chain of the circumstances pointing to the guilt of any of the Appellant. We see no substance in the argument of the Learned Counsel for the Appellants because even if the items recovered were not got exhibited by referring to the evidence of the informant and his brother P.W.I and P.W.2, it is of significance that in the missing report, Ext. Ka.1 it was specifically mentioned that Km. Yasmeen went missing while wearing a frock and underwear and this piece of evidence can safely be taken to connect the frock and underwear marked as Articles 2 and 3 in the expert's report, Ext. Ka.16 as belonging to Km. Yasmeen. The bed sheet shown as item No. 1 was also recovered on the disclosure statement of Appellant Aftab and since it was also stained with blood of the same group as that of frock and underwear there was nothing wrong in accepting the claim of the prosecution that the bed sheet was utilized when the victim was ravished leading to blood discharge spoiling the bed sheet also.

23. Here the reference may also be made to the evidence of D.W.1, Smt. Bilkis, the sister of Appellant Aftab, who belatedly claimed that police took away the frock and underwear of her daughter from her house at the time of the arrest of her brother Appellant Aftab. If it was so it does not stand to reason why this witness kept quiet for such a long time till she was produced as a defence witness on 30-9-2003 and did not agitate the matter before the higher authorities. She being the real sister of the Appellant appear to have merely made such a false statement with a view to come to the rescue of her brother and to save him from the clutches of lawful proceedings.

24. So far as the non-confirmation of the blood group of Km. Yasmeen is concerned, it is well settled that find of human blood can be a material circumstance even in absence of determination of blood group. The frock, the underwear and the bed-sheet were all recovered on the disclosure statement of the Appellant Aftab and no explanation for the presence of human blood on these items was given by him, in response to question No. 4 of the statement u/s 313 of the Code of Criminal Procedure. Mere assertion that the clothes belong to his niece was of no consequence because the clothes having been found stained with blood a reasonable explanation was required to be put forward by him. Since it is not so the absence of determination of blood group of Km. Yasmeen can not have any telling effect on the veracity of recovery and the incriminating circumstance established from it against Appellant Aftab. We may also refer to a decision of the Apex Court in the matter of Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, wherein the incriminating circumstance of find of human blood on weapon and clothes of the accused even in absence of determination of blood group and in the absence of an explanation for the presence of human blood by the accused was taken to be of consequence pointing to the guilt of the accused.

25. In the written information, Ext. Ka.2, P.W.2 Shamim Ahmad did not mention that the dead body of Km. Yasmeen with injuries has been found lying in front of the door of the house of Haji Khurseed and referring to this, it was argued that in all probability the deceased had her clothes on and therefore there was no occasion even for the Appellant Aftab to have effected the recovery of frock and underwear on his disclosure statement. Mere omission to mention that the dead body was naked could not tell upon the credibility of the evidence of the prosecution in regard to the recovery at the instance of the Appellant Aftab which was witnessed also by public witnesses, one of which Rais Ahmad (P.W.4) amply corroborated the evidence of Investigating Officer, P.W.7, Parveen Kumar Tyagi. Here it need to be stated that the other public witness of the recovery Lakhvinder Singh was produced as D.W.2 in defence. A scrutiny of the evidence of this witness also infact support the prosecution claim. He admitted his signatures on the memo of recovery, Ext. Ka.3, but claimed that his signatures were obtained at the police station. He has, however, while referring to the claim of the prosecution about the recovery of the above items stated that at the scene of the occurrence a big crowd had assembled and on account of commotion and heated

atmosphere the recovered clothes were sealed at the police station and formalities were completed there. This is how he was also there at the police station and signed the recovery memo, Ext. Ka.3. In the face of the facts of the case such a situation was not unusual in view of the serious nature of the crime perpetrated on a minor girl of 5-6 years of age and recovery of her clothes and since large number of people have assembled there and if to avoid any untoward incident recovered clothes were taken to the police station and sealed there and formalities were also completed at that time the genuineness of the entire proceeding and the veracity of the evidence of the prosecution can not be seriously doubted. The evidence of this public witness produced in defence also in fact amply support the prosecution claim in regard to the recovery at the instance of the Appellant Aftab.

26. For the reasons aforesaid we have no hesitation in coming to the conclusion that as a result of the disclosure statement of Appellant Aftab alone the frock and underwear and a bed sheet stained with human blood of group "A" were recovered and the trial court merely made an error in attributing the recovery also to Appellant Mumtaz who has had no concern with it and made no disclosure statement in that regard. The incriminating circumstance on account of these recoveries is proved as against Appellant Aftab and this also a link in the chain of the circumstances pointing to the guilt of the said Appellant.

27. The third circumstance pertain to the attachment of the under-wears of both the Appellants at the time of their arrest and which were found stained with human blood and semen. The criticism of the evidence of the prosecution made by the Learned Counsel for the Appellants is based on cogent and weighty reasons. The medical evidence in the case is to the effect that death was caused about 48-72 hours before the post mortem and after the victim Km. Yasmeen was ravished. She went missing from the evening of 5-2-1998 and the post mortem was performed at 2.15 on 8-2-1998. In view of the probability as regards the time of the death the victim most probably had been ravished either in the later hours of 5-2-1998 or in the early hours of 6-2-1998. The arrest of the Appellants was made on 9-2-1998 at 2 p.m. and in view of intervening period of four days, it appear highly improbable that the Appellants would still be wearing the same under-wears stained with blood and semen. This also is opposed to the normal human conduct and behavior and therefore we are not inclined to believe that the under-wears of the Appellants were so attached as stated to by the Investigating Officer. Learned Counsel for the Appellants also pressed into service the decision of the Apex Court in the matter of Khalil Khan v. State of M.P. 2004 SCC (Cri.) 1052 wherein it had been observed that accused involved in a serious crime like murder would still be wearing blood-stained clothes even four days after the murder is opposed to normal human conduct and hence extremely difficult to believe. This reasoning also holds good for the instant case and we are not inclined to place implicit reliance on the claim of the prosecution in regard to the said circumstance. In our view the Learned trial Court was not justified to believe that it so happened and taking this

incriminating circumstance as a link in the chain of the circumstances against the Appellants.

28. It takes us to the fourth circumstance which pertain to the extrajudicial confession of Appellant Aftab made to P.W.5, Anand Swaroop on 23.2.1998. It need to be stated at the out set that the extra-judicial confession made by Appellant Aftab inculpatory to him would legally be admissible and no part of it can be acted upon as against other Appellant Mumtaz who according to Anand Swaroop made no extra-judicial confession before him. Learned Counsel for the Appellants argued that there was no occasion even for the Appellant Aftab to have made extra-judicial confession to save his skin while he had already been under the clutches of the police since 9-2-1998 and the matter was being duly investigated by the police. According to P.W.5, Appellant Aftab made the extrajudicial confession on 23-2-1998 while the said Appellant was in judicial custody and was there in the court premises on that day where the witness has also visited for some of his own work. This witness is resident of same village Bajpur and is erstwhile village Pradhan. By virtue of his holding the office of village Pradhan in the past he was naturally a man of status and influence and if the Appellant Aftab has put himself in such a frame of mind that even while in judicial custody he could be helped out by a man of influence there was nothing unusual if he went out to make an extra-judicial confession so that the witness may help in his cause and he may be saved from being prosecuted in the crime. Till 23-2-1998 the charge sheet had not been submitted and the investigation of the case was on. The perusal of the remand-sheet available in the file reveal that both the Appellants were brought to the court on 23-2-1998 for seeking further judicial remand from the Magistrate concerned and if on that day Appellant Aftab has had opportunity to make extra-judicial confession to the said witness, there appear to be nothing unusual in it as by then the charge sheet has not been filed against him.

29. Attention was also drawn to the cross-examination of the witness, which is to the effect that the Appellant Aftab was not very well known to him and they were not having visiting terms to support the argument that the Appellant was not expected to make extra-judicial confession to a person who was not his confidant and that this aspect of the matter shows that the evidence in regard to the same is not reliable. As stated above, the witness being an ex-gram pradhan his status in the society and an old resident of the village were the factors which influenced the Appellant Aftab to make up his mind to take the witness in confidence with the hope that he will be getting help from him and might be saved from the legal punishment. Therefore, we do not find any substance in the argument that the Appellant Aftab has had no reason to make extra-judicial confession to the witness even though in judicial custody, however, as late as on 23-2-1998.

30. It was then submitted that the extra-judicial confession being a weak type of evidence the same in the face of the facts of the case can not safely be acted upon. It need to be stated that the Apex Court in the case of Narayan Singh and

Others Vs. State of M.P., cautioned that it is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witness who speak about such a confession. As stated earlier, by the time the extra-judicial confession was made the charge sheet had not been filed against Appellant Aftab and therefore even if the Appellant was under detention it was still the proper time for him to make up the mind to make extra-judicial confession and that too to a man of status and influence such as P.W.5, Anand Swaroop to help him out in the matter. Considering the circumstances under which the extra-judicial confession was made we do not think that it can be taken to be a weak type of evidence worth not placing reliance upon by the court.

31. In the case of State of Rajasthan v. Raja Ram 2003 AIR SCW 4097 their Lordships of the Apex Court have observed that "an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to the confession, like other evidence depends upon the veracity of the witness to whom it had been made." It was further observed that "if the evidence relating to extra-judicial confession is credible after being tested on the touch-stone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration is matter of prudence and not an invariable rule of law." Here we find and are of the firm view that the extra-judicial confession by the Appellant Aftab was voluntary and true and also that it was made in a fit state of mind. The cross-examination of the witness P.W.5, Anand Swaroop to whom the extra-judicial confession was made also reveal that nothing incriminating as may assail the credibility and truthfulness of the witness could be brought on record and therefore the evidence relating to the extra-judicial confession can safely be said to be credible and it can even solely form the basis of the conviction of Appellant Aftab who made the extrajudicial confession that Km. Yasmeen was ravished and thereafter murdered by him. In short the legal position as exists in regard to the extra-judicial confession thus also stand on the side of the prosecution and the Learned trial court was justified in holding the extra-judicial confession made by Appellant Aftab as voluntary and true. There can be no gain saying that this strong circumstance is also a link in the chain of the circumstances referred above which cumulatively point to the guilt of the Appellant Aftab alone and establish beyond reasonable doubt that he committed rape on Km. Yasmeen, caused her death by strangulation and later on threw her dead body out side the house of Haji Khurseed with intention to screen himself from legal punishment.

32. The Learned trial court has taken into consideration other factors also which were peripheral to the above proved circumstances which make out a complete chain of circumstances leading to the only conclusion of guilt of Appellant Aftab and therefore there appear to be no need to dilate upon those factors referred to by the trial court in its judgment under appeal and criminal reference. In short

the chain of circumstances in the case prove that the Appellant Aftab alone is responsible for the crime perpetrated on the minor girl and the other Appellant Mumtaz could not have been saddled with the responsibility for the same. Therefore, Appellant Mumtaz deserve to be acquitted of the charges leveled against him.

33. In regard to the last submission as to the propriety of the death sentence awarded, we find that the Appellant Aftab is aged about 26 years at present and he has no previous criminal history. Before the Apex Court in the matter of *Amit alias Ammu v. State of Maharashtra* 2003 AIR SCW 3980 the culprit was arraigned for committing rape and murder of a minor school girl. He was awarded death penalty which the Apex Court converted in to life imprisonment considering the age of the culprit who was 20 years old and had no previous history of any heinous crime. There was also no evidence that the culprit will be a danger to the society if the capital punishment was not upheld. We find that the Appellant Aftab before us also had no previous criminal history and there is nothing to indicate that if the death penalty is not maintained he will be a potential mischief-monger and danger for the society at large. Considering these aspects and the age of the Appellant Aftab, we are of the view that the Appellant Aftab deserve to be given similar approach as has been made by the Apex Court in the reported case. Therefore, the death sentence awarded to the Appellant Aftab by the Learned trial court need to be modified into life imprisonment, for an offence u/s 302 I.P.C. The sentences under other counts however need to be maintained as such.

34. For the reasons aforesaid the appeal partly succeeds. The Appellant Mumtaz is held not guilty. His conviction and sentences under Sections 302/376/201 I.P.C. are set-aside. He is in jail. He shall be released forthwith, if not wanted, in connection with any other case.

35. The conviction of the Appellant Aftab under Sections 302/376/201 I.P.C. is maintained. The sentences as awarded under Sections 376/201 I.P.C. against Appellant Aftab are also maintained. However, the death penalty awarded u/s 302 I.P.C. is modified and we award life imprisonment to him for the said offence. The sentences shall run concurrently. Appellant Aftab is in jail and he shall serve out the sentences awarded against him.

36. The criminal reference made by the Learned Additional Sessions Judge, is hereby rejected.

37. Let the record of the case be sent to the court concerned for compliance to be reported to the Court within a period of one month.