
(2010) 12 BOM CK 0129

In the Bombay High Court

Case No : Criminal Confirmation Case No. 1 of 2009 in Sessions Case No. 73 of 2008 and Criminal Appeal No. 78 of 2010

The State of Maharashtra

APPELLANT

Vs

Babu alias Ravindra Suresh Kamble
 Babu alias
Ravindra Suresh Kamble (Kolhapur Central Jail) Vs The State
of Maharashtra

RESPONDENT

Date of Decision : 10-12-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174, 313
Evidence Act, 1872 — Section 106, 27
Penal Code, 1860 (IPC) — Section 201, 302, 307, 363, 364

Citation : (2011) 113 BOMLR 196

Hon'ble Judges : V.K. Tahilramani, J;Ranjana Desai, J

Bench : Division Bench

Advocate : Mankunwar Deshmukh, APP in Cri. Confirmation Case No. 1 of 2009 in Sessions Case No. 73 of 2008 and Abhaykumar Apte, in Criminal Appeal No. 78 of 2010, for the Appellant; Abhaykumar Apte in Cri. Confirmation Case No. 1 of 2009 in Sessions Case No. 73 of 2008 and Mankunwar Deshmukh, APP in Criminal Appeal No. 78 of 2010, for the Respondent

Judgement

V.K. Tahilramani, J.—By judgment and order dated 5.3.2009 in Sessions Case No. 73 of 2008, the learned Additional Sessions Judge, Kolhapur convicted the accused for the offence punishable u/s 302 of IPC and sentenced him to capital punishment of death. By the very same judgment and order the accused was also convicted under Sections 363, 376(2)(f) and 201 of IPC. For the offence u/s 363 of IPC the accused was sentenced to RI for three years and fine of Rs. 1000/- in default RI for one month. For the offence u/s 376(2)(f) he was sentenced to suffer RI for ten years and to pay a fine of Rs. 1000/- in default RI for one month and for the offence punishable u/s 201 of IPC, the accused was sentenced to RI for three months and to pay a fine of Rs. 1000/- in default RI for one month. The learned Sessions Judge directed that all the substantive sentences shall run concurrently. As sentence of death was imposed on the accused, the learned

Sessions Judge made a reference to this Court for confirmation of death sentence. The Appellant-original accused being aggrieved by the very same judgment and order, preferred Criminal Appeal No. 781 of 2010. As both the confirmation case and the appeal were directed against the very same judgment and order, hence, both these matters were heard together.

2. The prosecution case briefly stated is as under:

PW 9 Ashok and PW 4 Sangita are the parents of victim girl Chakuli. They resided in village Nerli, District Kolhapur. They had three children i.e. daughter Aparna, son Ajit and daughter Chakuli aged 5 years. The mother of Ashok also resided in the same village but in a separate house. The grand mother of the accused and the mother of PW 9 Ashok were acquainted with each other, hence, the accused used to visit the house of Sangita and Ashok.

On 24.10.2007 at about 7.30 p.m. the accused came to the house of Sangita to tell her that she should come for work on the next day. At that time, Chakuli and Ajit were playing outside the house. At about 8.15 p.m. Ajit came inside the house. Sangita enquired with Ajit about the whereabouts of Chakuli whereupon, he said that he did not know as he had gone to view TV programme. Hence, they made announcement on the loudspeaker in the village that Chakuli was missing. Thereafter, Ashok and Sangita searched for Chakuli in the village but they were not able to trace Chakuli. On the next day also they searched for Chakuli but she could not be found. Thereafter, Ashok lodged missing report in Karveer police station. Accordingly, entry No. 6 of 2007 was made in the register maintained for missing persons.

On 29.10.2007 at about 9.00 a.m. one PW 6 Ravindra Patil was ploughing the field of Anil Patil near the Nerli-Kagal road, where sugarcane crop was standing in some part of the field. At that time, he noticed that a dog had dragged some object upto the embankment of the field and dirty smell emanated from the object. Hence, he went to the spot and he noticed a naked dead body of a girl with bangles on the left hand. He also saw a frock, underwear, plastic bangles, underwear and banyan of a male, one empty liquor bottle and lid lying scattered in the 5CONF12009nearby area. He recollected the announcement made on 24.10.2007 about Chakuli being missing, hence, he went to the house of Ashok. At that time, only Sangita was present in the house. Ravindra Patil disclosed the incident to her. Thereafter, all family members of Ashok and others went to the spot and they identified the dead body of Chakuli on the basis of bangles, frock etc. Thereafter police patil of Nerli village informed this incident to the police at about 11.15 a.m. A.D. Case No. 222 of 2007 u/s 174 of Code of Criminal Procedure came to be registered at Karveer Police Station. PW 3 ASI Chigare along with constable proceeded to the spot. By that time, other police personnel also reached the spot. ASI Chigare prepared inquest panchnama and spot panchnama in the presence of panchas. He seized 11 articles found in the nearby area. He sought help of dog squad. The dog squad arrived at about 2.00 p.m. When the dog was given smell of banyan and knicker, the dog led the police to

the house of Chakuli and then to the house of accused. On enquiry with Ashok father of Chakuli, ASI Chigare came to know that the accused had come to their house on 24.10.2007 and since then Chakuli was missing. Hence, ASI Chigare inferred that the accused might have raped Chakuli and committed her murder, hence, he lodged complaint on behalf of the State against the accused. Accordingly, CR No. 253 of 2007 was registered for the offence under Sections 363, 376, 302 and 201 of IPC. The dead body of Chakuli was sent for postmortem. Dr. Reshma Patil who conducted post mortem noticed that there was tear of hymen with injury to perineum. In the opinion of P.W. 23 Doctor Reshma Patil the cause of death was due to throttling with multiple fractures of ribs. It transpired during the investigation that the accused had kidnapped the minor girl Chakuli, committed rape on her and then committed her murder. After completion of investigation, the charge sheet came to be filed against the accused.

3. Charge under Sections 302, 376(2)(f), 363 and 201 of IPC came to be framed against the accused. The accused pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted and sentenced the accused as stated in para 1 above.

4. We have heard the learned Counsel Mr. Abhaykumar Apte for the accused and Mrs. Deshmukh, the learned APP for the State of Maharashtra. We have perused the judgment and order passed by the learned Sessions Judge. We have also perused the evidence on record. After carefully considering the matter, for the reasons stated herein below, we are of the opinion that the judgment and order of conviction passed by the learned Sessions Judge does not call for any interference.

5. There is no eye witness in the present case and the case depends only upon circumstantial evidence. In order to prove its case, the prosecution has relied on the following incriminating circumstances, which according to the prosecution conclusively prove the guilt of the accused:

- (a) Chakuli was missing from about 8 p.m. of 24.10.2007 (PW 9);
- (b) Deceased was last seen in the company of the accused on 24.10.2007 between 8 p.m. to 8.30 p.m. ; (P Ws 11, 12, 13 and 16).
- (c) Previous conduct of the accused and preparation on his part i.e. purchasing bottle of liquor and purchasing chocolate to give the same to Chakuli and thus lure her away; (PW 7, PW 14 and PW 15)
- (d) Subsequent conduct of the accused i.e. he was seen sweating and in a frightened condition by witnesses (PW 5 and 8).
- (e) Finding of wrapper of chocolate pursuant to memorandum statement given by the accused; (PW 10)

(f) The evidence of PW 18 Dr. Patil who has stated that accused had a 4 to 7 days old scar on his private part;

6. As far as the first circumstance as stated above is concerned, it is not disputed by the defence that from 24.10.2007 Chakuli was missing. However, Mr. Apte submitted that the accused had nothing to do with the disappearance or murder of Chakuli.

7. On the aspect of last seen, the prosecution has examined four witnesses i.e. PW 11 Vandana, PW 12 Gangubai, PW 13 Dipali and PW 16 Suresh. They are all residents of Village Nerli. The house of PW 11 and 13 is situated near the house of Chakuli. PW 11 Vandana is the first witness on the aspect of last seen. She is the neighbour of Chakuli. Vandana has stated that she knew the accused as well as Chakuli. On 24.10.2007 at about 8 p.m. while she was sitting in the doorway of her house, in the light of electric bulb outside her house as well as in the moon light, she saw that her son and Chakuli were playing in front of her house. At that time, accused came from Bhairoba temple side and he called Chakuli towards him saying that he will give her sweetmeat. When Chakuli reached near the accused, accused gave her a chocolate. Thereafter, accused and Chakuli went towards Shirol Nala side.

8. PW 12 Gangubai is the next witness on the aspect of last seen. She has stated that on 24.10.2007 at about 8 p.m. to 8.30 p.m. she was answering the call of nature. At that time, she saw one man coming towards that side with a girl. One motorcycle passed by that side and in that light, she saw that the man was the accused and the girl was Chakuli. This witness has stated that the accused was telling Chakuli to walk fast.

9. The next witness on the aspect of last seen is PW 13 Dipali. Her house was near the house of Chakuli. She has stated that on 24.10.2007 at about 8.15 p.m. when she was standing on the road in front of her house, the accused came towards her. Accused enquired with Dipali whether she would accompany him to his house. She did not give any reply. At that time, Chakuli was nearby. Dipali saw the accused proceeding ahead and Chakuli following him. Thereafter, she went to sleep.

10. PW 16 Suresh is a resident of village Nerli. He has stated that on 24.10.2007 at about 8.30 p.m. he was returning back to Nerli on his motor cycle. When he reached near the boundary of his village, he saw accused taking Chakuli with him towards Kagal road. He saw them in the light of his motor cycle. He also saw two ladies who were attending the call of nature by the side of the road. PW 12 Gangubai has stated that when she went to attend call of nature, in the light of a motorcycle which was passing by, she saw the accused and Chakuli coming towards their side. The evidence of PW 16 Suresh thus stands corroborated by the evidence of Gangubai who has stated that when she was answering call of nature, a motorcycle passed by and in the light of the motorcycle she saw the accused and Chakuli. PW 16 Suresh has also stated that when he reached

boundary of the village, he saw the accused and Chakuli and at that time, two ladies were answering the call of nature by the side of the road. All these witnesses are residents of village Nerli and being residents of village Nerli, all these witnesses knew the accused as well as Chakuli. Nothing has been elicited in the cross-examination of any of these witnesses so as to disbelieve their testimony that on 24.10.2007 between 8.00 p.m. to 8.30 p.m. they saw the accused and Chakuli together.

11. Mr. Apte stated that as per the prosecution Chakuli was missing from the night of 24.10.2007. He drew our attention to the evidence of Ashok who is the father of Chakuli wherein he stated that an announcement was made that very night in the village from the speaker at Bhairavnath temple about Chakuli being missing. Mr. Apte submitted that in such case, all these four witnesses would have informed Ashok or Sangita that they had seen accused and Chakuli together. The very fact that they did not inform Ashok or Sangita that they had seen accused and Chakuli together on 24.10.2007 means that none of these witnesses had actually seen the accused and Chakuli together on 24.10.2007 and only in order to support the prosecution, they have been set up by the prosecution and their statements were recorded later on. He also pointed out that the statements of these witnesses were recorded belatedly, therefore, they cannot be relied upon.

12. As far as PW 11 Vandana is concerned, she has stated that she did not hear any announcement on the speaker about Chakuli being missing as she had gone to sleep by that time. She has stated that parents of Chakuli had not made any enquiry with her about Chakuli. On the next day, she had gone for Yatra and came back only after four days. Then she learnt that the accused had raped and committed murder of Chakuli. Obviously, as this witness was not available in the village, her statement could be recorded only when she came back to the village. As she had gone for yatra the very next day. She did not know Chakuli was missing till she came back and hence, there was no question of her telling anything to parents of Chakuli.

13. PW 12 Gangubai has also stated that she had not heard announcement on the speaker on the night of 24.10.2007. As far as Suresh PW 16 is concerned, he has stated that he had not heard announcement on the speaker in the night about Chakuli being missing as he was viewing TV programme. On the next day, he had gone to Pune. He came back to the village from Pune on 1.11.2007 only in the night, hence, he did not know Chakuli was missing. It is observed that these witnesses themselves have explained as to why their statements were recorded late by the police. Evidence of PW 13 Dipali does not show that she had heard any announcement. It is also to be noted that none of these witnesses or the Investigating Officer were asked any question categorically on the point of delay in recording their statements. On the point of delay in recording statements, we may make useful reference to a decision of the Supreme Court in State of U.P. Vs. Satish, , wherein it is observed as under:

As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage there from. It cannot be laid down as a rule of universal application that if there is any delay in examination of particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the Court accepts the same as plausible there is no reason to interfere with the conclusion.

We may also refer to the case of *Raju Raghunath v. State of Maharashtra* reported in 2008 All MR 2160 wherein it is observed that "merely because witness had not come forward to give his statement on the very same day that would not be a sufficient ground to discredit his testimony." Thus, as none of these witnesses has heard about the announcement therefore, there was no question of them informing Ashok or Sangita that they had seen the accused and Chakuli together on 24.10.2007.

14. In any event, accused and his family were well known to Chakuli and her family. This is clear from the evidence of PW 9 Ashok father of Chakuli. Ashok has stated that his mother and grand mother of accused were acquainted with each other and accused used to visit their house frequently. As the family of accused and Chakuli were well known to each other, hence, no one suspected that there was anything amiss when they saw the accused and Chakuli together. They would not find anything strange nor would they suspect anything when they saw the accused and Chakuli together. It was only if they had seen something which according to them, was unusual then they would have gone and informed the parents of Chakuli. For all these witnesses seeing Chakuli with the accused was not an unusual occurrence, hence, they did not find anything strange so as to inform the parents of Chakuli.

15. Mr. Apte contended that a conviction cannot be based on the point of "last seen" and circumstance of "last seen" cannot be said to be an incriminating circumstance. To support this contention, he has placed reliance on the decision in the case of *Seth Pal v. State of Himachal Pradesh* (2003) 12 S.C.C. 169. We have carefully perused the decision. The Supreme Court observed that the conviction of Appellant (brother of deceased) was based on circumstances that (i) before recovery of dead body, deceased, Appellant and G (brother in law of Appellant) were seen together at a tea stall by PW 1 and (ii) Appellant was thereafter not seen in the locality. In the said case, as both deceased and accused were closely related, the first circumstance of "last seen" was, held not an incriminating one and second circumstance in the facts of the case did not amount to abscondence, hence, Appellant was acquitted. It is observed that in the peculiar facts of that case, the observations were made that "last seen" is not an incriminating circumstance. The Supreme Court in the said decision did not lay down by way of universal application that circumstance of last seen is not

an incriminating circumstance.

16. On the aspect of last seen, Mr. Apte also placed reliance upon the decisions in the following cases:

- (1) Eradu and Others Vs. State of Hyderabad, .
- (2) Gambhir Vs. State of Maharashtra, ;
- (3) K. Sukumaran v. State of Kerala, (2000) 10 SCC 365 ;
- (4) Dinesh Borthakur Vs. State of Assam, ;
- (5) State of U.P. Vs. Ram Balak and Another, ;

In the decision in Eradu (supra) it was observed that "where the accused enticed away the deceased on the evening of the day of murder and the deceased was found hanging in the backyard of his house, these circumstances by themselves, are not enough, without anything more, to connect the accused with the crime."

In the decision of Gambhir (supra), it was observed that "on scrutiny the only thing established is that the accused and other persons used to visit the house of Laxmi during the absence of her husband and that he was again seen in the company of Laxmi on February 26, in the night till before dinner time. This single circumstance by itself is too feeble to connect the accused with the murder of Laxmi and her children". In both these decisions, it appears that the only circumstance is that of "last seen" hence, these observations were made. However, in the present case, "last seen" is not the only circumstance against the accused hence, both these decisions would not be applicable.

17. In the decision of K. Sukumaran (supra), it was observed that though circumstance of last seen together was proved, but as a most vital circumstance that is the alleged clothes of the accused on which blood of the same group as of the deceased was found actually belonged to the accused was not established, on facts, it was held that the charge of murder against the accused-Appellant could not be proved beyond reasonable doubt, hence, the accused was entitled to acquittal. From the above observations it becomes at once clear that the only circumstance against the accused therein was "last seen" and in the facts of the said case, it was not found to be sufficient. It is reiterated that in the present case, there are many other circumstances besides the circumstance of "last seen".

18. Reliance was also placed by Mr. Apte on the observations in the decision in Dinesh Borthakur (supra). On going through the said decision, we found that the circumstance of last seen was not relied upon as in that case no proper evidence was brought on record and there was improper and ineffective investigation and prosecution hence, it was held, no suspicion can be raised that the Appellant had committed the crime." This case is entirely distinguishable on facts. As the facts in the case relied upon and the present case are entirely different, this decision would not be applicable to the present case.

19. In the decision in Ram Balak (supra), it was held that "merely because the accused were seen near the place of incident, that cannot be a ground to show their involvement. There was no evidence to show that accused were last seen in the company of the deceased." In the present case, the evidence of P Ws 11, 12, 13 and 16 clearly shows that the accused was "last seen" in the company of the deceased. The accused has made no attempt to explain where the deceased went thereafter i.e. when and where he and the deceased parted company. Thus, in the facts of this case, the circumstance of "last seen" is a strong circumstance against the accused.

20. On the aspect of last seen, the learned APP placed reliance on a decision in the case of Barku Bhaskar v. State of Maharashtra reported in 2006(1) Bom. C.R. 353. She has placed reliance on para 10 wherein it is observed as under:

Time gap between last seen and discovery of dead body is immaterial. By larger time gap between last seen and death also the evidence of witnesses need not be discarded in the light of the illustration quoted herein above and the evidence of last seen together can be worthless, only if, defence creates a probability of somebody having seen the victim alive, after the point of time about which the witnesses speak of last seen together. In the matter at hands, there is no such possibility created by the defence. In the circumstances, the evidence of Ranjana and Rajendra, at least, rolls the ball into the Court of the accused and it was necessary for him to explain as to when did he part the company of the victim. On reference to answers to question Nos. 7, 8 and 13 during the statement u/s 313 of the Code of Criminal Procedure , the accused does not seem to have utilized the opportunity for offering any plausible explanation. We are, therefore, not inclined to accept the submission of the learned Advocate for the Appellant that evidence of Ranjana and Rajendra, on the point of last seen together is worthless any utility.

21. Learned APP also brought to our notice that in the present case, there is no suggestion to any witness that the victim was seen alive by anybody after having parted company with the accused. On the point of "last seen" the learned APP has also placed reliance on the decision in the case of Joseph s/o. Kooveli Poulo v. State of Kerala reported in AIR 2000 SC 1608 wherein the Supreme Court observed that the formidable incriminating circumstances against the Appellant, as far as could be seen are that the deceased was taken away from the Convent by the Appellant under a false pretext and she was last seen alive only in his company and that it is on the information furnished by the Appellant in the course of investigation that the jewels of the deceased were seized. She pointed out that it was only on the basis of these two circumstances that the charge under Sections 302 and 392 came to be upheld.

22. The learned APP pointed out another circumstance against the accused. She stated that prior to the incident between 7.30 p.m. to 8 p.m. accused purchased liquor as well as coffee bite chocolates. She submitted that bottle of liquor was purchased by the accused to give a boost to his courage to commit the offence.

The purchase of chocolates by the accused shows that the offence was preplanned as the accused purchased chocolates with the intention that he would offer it to Chakuli and Chakuli being 5 to 6 years old, would accept the chocolate and would do his bidding. The evidence of PW 14 Dagadu shows that on 24.10.2007 at about 8 p.m. the accused came to his shop and purchased quarter size Santra liquor. It is pertinent to note that quarter size santra liquor bottle (Article 3) and cap (Article 4) were found near the dead body which is evident from the evidence of Pancha witness PW 2 Dipak Kamble and the panchnama (Exh.14).

23. PW 7 Baliram Patil is the grocery shop owner in village Nerli. He has stated that on 24.10.2007 at about 7.30 p.m. the accused came to his shop and purchased Chocolates. Witness has identified the wrapper of chocolate (Article 15) of coffee bite as similar to the one sold by him to the accused. This wrapper of coffee bite chocolate was found near the scene of incident.

24. This conduct of the accused prior to the incident shows that he had prepared the plan in his mind to lure Chakuli so that he could commit rape on her and pursuant to this, he went to shop of PW 7 Baliram and purchased chocolates. PW 11 Vandana has stated that at about 8 p.m. the accused called Chakuli and gave her chocolate and then took her towards Shirol Nala side. Thus, the accused purchased chocolate from PW 7 Baliram which chocolate he gave to Chakuli which was witnessed by PW 11 Vandana and wrapper of coffee bite chocolate was found near scene of incident. This circumstance also connects the accused with the crime.

25. The learned APP drew our attention to the subsequent conduct of the accused which has been deposed to by PW 5 Vaishali and PW 8 Pujari. PW 5 Vaishali has stated that on 24.10.2007 at about 8.30 p.m. to 9.30 p.m. she heard announcement on the loudspeaker of the temple in their village about Chakuli being missing. At about 9.30 p.m. when she was proceeding towards temple, the accused met her on the way. She enquired with the accused whether he had seen Chakuli who was reported to be missing, on that, the accused got frightened and replied in the negative. This witness has specifically stated that when the accused met her he was terrified and he was sweating.

26. PW 8 Tamma Pujari is also a resident of village Nerli. He has stated that on 24.10.2007 at about 9.15 p.m. he saw the accused coming from Kagal road side towards the village. He noticed that accused was in a hurry and he was frightened and was sweating. Thus, both these witnesses i.e. PW 5 Vaishali and PW 8 Pujari have seen the accused at about 9.15 p.m. to 9.30 p.m. on 24.10.2007 and both of them have categorically stated that the accused was in a frightened condition and he was sweating. Thus, the subsequent conduct on the part of the accused lends further assurance to the prosecution case that at about 8.30 p.m. the accused took away Chakuli and committed rape on her and murdered her.

27. Thereafter, the prosecution has relied on the evidence of PW 10 Nivrutti who is panch witness to the panchnama (Exh.26) wherein the accused stated that he will show the place where he gave chocolate to Chakuli. Pursuant to the said statement made by the accused, the accused led the police and panchas towards the spot near village Nerli. The accused went near a thorny bush and took out a wrapper of a chocolate from the said bush. The wrapper of chocolate (Article 15) came to be seized and sealed. PW 7 Baliram has identified the wrapper (Exh. 15) as being similar to that of the chocolate purchased by the accused from him at about 7.30 p.m on 24.10.2007.

Mr. Apte submitted that this cannot be held to be a recovery u/s 27 of the Evidence Act because the accused had not stated that he would show the wrapper to the police but he had only stated to the police that he would show the place where he gave the chocolate to Chakuli.

28. According to the learned APP, fact discovered embraces the place from where the object is produced and the knowledge of the accused as to this. She relied on the decision of the Supreme Court in the case of Inspector of Police, Tamil Nadu Vs. Balaprasanna, . In the said decision, in relation to Section 27 of the Evidence Act, it is observed as under:

The scope and ambit of Section 27 of the Evidence Act had been stated and restated in several decisions of this Court. However, in almost all such decisions reference is made to the observation of the Privy Council in Pulukuri Kotayya v. Emperor (AIR 1947 PC 67). It is worthwhile to extract such quoted observation:

It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to his discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of the knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant....

It was further observed:

At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in Pulukuri Kottaya's case (supra).

From the above decision, it is clear that fact discovered also covers the place

from which it is produced and the knowledge of the accused as to this. The accused knew where he gave the chocolate to Chakuli. The finding of a chocolate wrapper at the spot further corroborates the prosecution case. The finding of chocolate wrapper at the spot was in consequence of the information received from the accused which coupled with the evidence of PW 11 Vandana and PW 7 Baliram is another circumstance against the accused.

29. On this point, learned advocate for the accused vehemently argued that wrapper of chocolate was found at an open place and such seizure is of no consequence. As far as the aspect of recovery of incriminating article i.e. chocolate wrapper from the place which is open and accessible to others is concerned, the learned A.P.P. cited the case of State of Maharashtra Vs. Bharat Fakira Dhiwar, , wherein the case of State of Himachal Pradesh Vs. Jeet Singh, is referred to and it is observed as under:

There is nothing in Section 27 of the Evidence Act, which tenders the statement of the accused inadmissible if the recovery of the articles was made from any place which is "open or accessible to others" it is a fallacious notion that when recovery of any incriminating articles was made from a place which is open or accessible to others, it would vitiate the evidence u/s 27 of the Evidence Act, any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is whether it was ordinarily visible to others. If is not, then it is immaterial that the concealed place is accessible to others.

In the case in hand also the wrapper was found in thorny bushes away from the main road and it was found only after the place was pointed out by the accused. So in our view, the prosecution has proved seizure of the wrapper of chocolate Article No. 15 under panchnama Exh. 26. This is an additional circumstance against the accused. It might be a fact that similar wrapper of chocolate is a common article. But the fact that such wrapper was found consequent to the disclosure statement made by the accused is of great significance.

30. Learned APP further submitted that in case of seizure of wrapper, not only the evidence of panch witness PW 10 Nivrutti can be relied upon but the evidence of police officer on the said aspect can also be relied upon to support the seizure. She has placed reliance on a decision of the Supreme Court in the case of Akmal Ahmad Vs. State of Delhi, wherein it was held that the evidence of police officer relating to seizure can be safely relied upon. In the said case, the Supreme Court relied on the factum of seizure of revolver only on the basis of evidence of PW 8 who was a Sub-Inspector of Police whose evidence was not supported by any other witness other than police personnel.

She also placed reliance on a decision in the case of Lopchand Naruji Jat and Another Vs. State of Gujarat, wherein the Supreme Court observed that when the investigating officer was found to be trustful and in spite of incisive cross-examination, nothing material has been brought to discredit his evidence, the trial court was justified in recording conviction on his evidence alone.

31. Mr. Apte submitted that when the body of Chakuli was found on 29.10.2007 at that time, the body was in a highly decomposed state. He submitted that fleshy part of face was decomposed, thus, it was not possible for anyone to identify the body. He has placed reliance on a decision in Ravinder Parkash and Another Vs. State of Haryana, . In the said case, it was observed that body was found in highly decomposed state and looking to the state of decomposition, identification was not acceptable. In such case, the link in the chain of circumstances was broken. However, on careful perusal of the said decision, it is noticed that in the said case there was a material discrepancy between the height of the dead body stated by the Doctor and height of the person mentioned in the complaint to be missing. Hence, the Supreme Court observed that in such case, it was incumbent on the part of the witness identifying the dead body to state how he recognized the dead body and as PW 3 and PW 4 have not stated so, hence, the identification of the dead body which was in highly decomposed state, was found to be unreliable.

32. In reply, the learned APP submitted that even though the body was decomposed, PW 9 Ashok and PW 4 Sangita who were parents of Chakuli, have identified the dead body to be that of Chakuli. She stated that they being the parents of the deceased girl, they would be in a position to identify that dead body was that of their daughter Chakuli. PW 9 Ashok has stated that he had identified the dead body on the basis of bangles (Article 6 and 12) in the left hand, frock (Article 10), knicker (Article 5) which were lying near the dead body. Looking to the evidence in this case, the decision in the case of Ravindra Prakash (supra) is distinguishable on facts.

33. The learned APP placed reliance on a decision reported in the case of State of H.P. v. Vilas Maruti Sutar reported in 1998 S.C.C. 354 wherein the Apex Court has accepted the identification of dead body by relatives of deceased on the basis of clothes on the dead body. In the said case, mother of the deceased identified those clothes which were on the person of the deceased. The Apex Court held that identification of the dead body on the basis of clothes could not be doubted. The learned APP also relied on the case of Atmaram Shende v. State of Maharashtra reported in 2001(5) Bom. C.R. 334 wherein this Court observed that identification of the dead body by the witnesses on the basis of clothes cannot be doubted. She submitted that the parents of Chakuli identified the dead body from the clothes and bangles, which identification can be safely relied upon.

34. Reliance was also placed by the learned APP on a decision of the Supreme Court in the case of Gokaraju Venkatanarasa Raju Vs. State of A.P., . In the said case, the learned Counsel had contended that the identity of the dead body was

highly doubtful because the dead body was found in a highly decomposed state and that the identity of the deceased was beyond recognition. It was contended that simply because some wearing apparels could be recognized by the relations lying near the dead body, it cannot be held beyond all reasonable doubt that the dead body of the deceased was recognized. In the said case, the Supreme Court did not accept the submissions made by the learned Counsel for the accused that the factum of murder could not be established beyond reasonable doubt because the body exhumed was highly decomposed and could not be properly identified. The Supreme Court observed that the father and near relations had identified the body and it appears that despite decomposition, it was possible to be identified by near and dear ones.

35. Mr. Apte submitted that PW 9 Ashok has not identified the body from the features of the face but from the bangles found in the hands of the dead body and clothes found at the spot. Mr Apte drew our attention to the missing report (Exh.24) lodged by PW 9 Ashok wherein, it is stated that Chakuli was wearing a chocolate colour T-shirt and knicker of black colour whereas on the spot, what was found was a green and red colour dress and underwear which was not black in colour. He submitted that clothes found at the spot did not tally with the description of the clothes given in the missing complaint, in such case, it cannot be said that the dead body was that of Chakuli.

36. It is to be noted that it is nobody's case that any other girl than Chakuli was missing from the village so that it is possible that the dead body might be of some other girl. It cannot be said that the body was of some other girl from any neighbouring village and it was brought to Nerli village by some one. So there is no force in the contention that the dead body was not that of Chakuli.

It can be seen from the evidence on record that PW 9 Ashok Kamble, who lodged missing report had come back home from his place of work in another village at about 7.30 to 8.00 p.m. and casually saw that Chakuli was playing outside the house. At that time, it would be dark. He gave a cursory look towards her during such night hours. Thus, it is possible that he may not have noticed what was the exact dress on the person of Chakuli when she was playing outside the house. That is why he might have stated in the missing report "T" shirt in place of frock and might have stated about the colour which he recollected having seen during that night. In our view, it is not a material contradiction. That apart, it is natural that the mother will have more knowledge and information about the dress on the person of her daughter than the father. Moreover, PW 4 Sangita (mother) PW 9 Ashok (father) categorically stated that on the basis of the frock, nicker, bangles i.e. article Nos. 10, 5 and 6 to 12 they identified the dead body as that of Chakuli. It is most pertinent to note that during the cross examination of these witnesses, it is nowhere suggested that the dead body was not that of Chakuli. Thus, looking to the evidence on record, we have no manner of doubt that the dead body was that of Chakuli.

37. Mr. Apte submitted that no semen was found on the clothes of the accused or

the deceased. So also no semen was found in the vaginal smear, swab and the nail clippings of Chakuli. Thus, the prosecution case that rape was committed on Chakuli is totally false. As far as offence of rape is concerned, it is not necessary that there should be presence of any semen. Even partial penetration amounts to an offence of rape. In a decision in *State of U.P. Vs. Babul Nath*, it is held that "ingredients which are essential for proving a charge of rape are the accomplishment of the act with force and resistance. To constitute the offence of rape neither Section 375 of IPC nor the Explanation attached thereto require that there should necessarily be complete penetration of the penis into the private part of the victim/prosecutrix. In other words to constitute the offence of rape it is not at all necessary that there should be complete penetration of the male organ with emission of semen and rupture of hymen. Even partial or slightest penetration of the male organ within the labia majora or the vulva or pudenda with or without any emission of semen or even an attempt at penetration into the private part of the victim would be quite enough for the purpose of Sections 375 and 376". So also in *State of Himachal Pradesh Vs. Raghubir Singh*, the Supreme Court observed in para 6 that the absence of spermatozoa could not be at all said to be a circumstance in favour of the accused.

38. As far as the offence of rape is concerned, the evidence of PW 23 Dr. Reshma Patil who carried out post mortem examination on the dead body of Chakuli shows that Chakuli was raped. Dr. Patil stated that on external examination she noticed perineum tear at middle about 1 cm. And infiltration of blood in subcutaneous tissue around injury. The injury noticed by this witness was ante mortem. This witness further stated that on internal examination, she noticed tear of hymen with injury to perineum. The post mortem report is at Exh.63. The medical evidence thus totally supports that Chakuli was subjected to rape.

39. The prosecution has examined PW 18 Dr. Mrunalini Patil who has examined the accused and issued the report Exh.44 wherein she has opined that the accused is capable of sexual intercourse, she has further observed that she noticed one old scar admeasuring 0.3 x 0.1 over penis of accused and which might be 4 to 7 days old. It may be noted that Chakuli was missing since the night of 24.10.2007 and the accused was medically examined after his arrest on 29.10.2007. The accused is a man of 24 years whereas Chakuli was a small girl of about 5 years. In such case, if rape is committed by him on Chakuli, there is every possibility of injury to his private part. Though Dr. Patil has not given any specific opinion whether that scar was the result of the rape, but a 4 to 7 day old scar in the light of the other evidence on record suggests that the accused must have committed rape on Chakuli on 24.10.2007. This injury on the private part of the accused is another corroborative piece of evidence against the accused.

40. From the evidence of PW 23 Dr. Reshma Patil & the injuries on the body of Chakuli, it can safely be concluded that Chakuli met a homicidal death. In the opinion of PW 23 Dr. Reshma Patil, the cause of death is throttling with multiple fracture of ribs. The said opinion is at Exh. 64. The defence has not disputed that

the death was homicidal in nature.

41. Learned APP stated that when the dead body was found, some clothes of a girl and banyan of a male was found at the spot, hence, a dog squad was called on the spot. She pointed out that after taking initial sniff of banyan and knicker found on the spot, the dog led upto the house of the accused and to the house of deceased which is an incriminating circumstance against the accused.

It is a matter of record that when PW 6 Ravindra noticed the dead body, he informed PW 4 Sangita and PW 9 Ashok, who identified the dead body as that of Chakuli. The police were called and accordingly, PW 3 ASI Chigari arrived at the spot who prepared inquest panchnama Exh. 13 in presence of panch witness PW 2 Dipak. ASI Chigari also requested for dog squad and accordingly, PW 19 ASI Ramesh reached the spot. He is the head of tracking dog handler. He categorically stated as to how he reached the spot at about 2 p.m. along with dog "Chetak" and how after giving smell of one banyan and knicker lying near the dead body, the dog set off and tracked upto the house of the deceased. Smell of banyan was again given to the dog whereupon the dog tracked to the house of the accused. The dog was again taken 500 meters away and then smell of banyan was again given to the dog and the dog again tracked to the house of the accused. Accordingly, this witness prepared the report Exh. 46. It may be noted here that though PW 2 Dipak was panch for the inquest and spot panchnama, he was also cross-examined on the point of dog tracking. He has also stated how the dog after taking smell of banyan tracked upto the house of the deceased and then to the house of the accused. The evidence of PW 19 ASI Ramesh is also corroborated by the evidence of PW 3 ASI Chigari and PW 9 Ashok Kamble. On that basis, after making inquiry with PW 9 Ashok Kamble and PW 4 Sangita, ASI Chigari then lodged the complaint against the accused. On the point of evidence of tracker dog, the learned APP referred to the case of Pandian Kanappan Nadar Vs. State of Maharashtra, wherein in relation to the evidentiary value of dog tracking evidence, it is observed as under:

Judicial notice must be taken of the fact that the training skills and the special qualities that are found in the police and the special qualities that are found in the police Dogs are now recognized as being of such a high caliber that in case such as detection of explosives, drugs etc. they are found superior and more effective than the most sophisticated instruments. In this background, one needs to take cognizance of the fact that for the purpose of tracking down a criminal, that special faculties, qualities and skills of the dog are aspects of which serious note must be taken. Where the police rely on such evidence, Courts would be more than fully justified in accepting it provided that it passes the test of complete scrutiny.

42. She also placed reliance on a decision of this Court in the case of Babu Magbul Shaikh Vs. State of Maharashtra, wherein it is observed as under:

It is scientifically accepted that dogs are rated as extremely intelligent animals

and that some of their sensibilities are very highly developed and are extremely reliable. It is also to be noted that there are some breeds of dogs and some strains which are specifically utilized for hunting and tracking because of their abnormally high talents. If the dog belongs to one of these categories and if it is shown to the Court that it has been specially trained for purposes of detection, not only would the dog tracking evidence be admissible, but it will have to be relied upon as being evidence of a very high caliber.

43. Mr. Apte pointed out that panch witness PW 2 Dipak has stated that police collected all the articles found on the spot inclusive of banyan of a male person and a knicker separately in plastic bags, then the articles were sealed, after that the articles were not opened in his presence. After the panchnama the police and other persons dispersed from the spot. Pointing out this statement, Mr. Apte vehemently argued that then there is no question of tracker dog coming to the spot and taking smell of these two articles i.e. banyan and knicker as by then the banyan and knicker had already been sealed. However, it is noted that, in his further cross-examination itself PW 2 Dipak has stated that, the police had already brought dog squad at the spot and the dog sniffed clothes and thereafter the dog led to the house of Chakuli and then to the house of the accused. Thus, we do not find any contradiction in the evidence. It may be noted here that though PW 2 Dipak was panch for the inquest and spot panchnama, he was cross-examined on the point of dog tracking also. He has also stated how the dog after taking smell of banyan tracked upto the house of the deceased and then to the house of the accused. In view of the evidence of this witness, it cannot be said that as the articles were already packed and sealed, it was not possible for the dog to smell the clothes and lead the police to the house of the accused.

44. Mr. Apte submitted that according to the prosecution, the sniffer dog came to the spot at about 2 p.m. He submitted that this case of the prosecution cannot be believed as the spot panchnama which was carried out from 1.10 p.m. to 2.15 p.m. does not mention the presence of tracker dog. As far as this submission is concerned, it is observed that spot panchnama is prepared in relation to what was seen on the spot of the incident and hence, only those details would be mentioned in the panchnama. Moreover, dog squad came at about 2 p.m. as this has nothing to do with the spot panchnama it would not find mention in the spot panchnama. Thus, we find no merit in this submission.

45. Mr. Apte submitted that there is no evidence to show that banyan found at the spot belonged to the accused as no witness has identified the said banyan belonged to the accused. No doubt, no witness has identified that banyan belonged to the accused but the dog when given smell of the banyan, tracked upto the house of the accused. In his statement u/s 313 of Code of Criminal Procedure accused has nowhere stated that the banyan found on the spot did not belong to him.

46. Mr. Apte, learned Counsel for the accused thereafter submitted that the Dog tracking evidence is necessarily evidence of a weak character and that the Court

should not place any reliance on it. He has submitted that there are various possibilities whereby this evidence could go wrong. Mr. Apte has submitted that in the present case the theory of dog tracking, cannot be relied upon as it would be difficult to believe such tracking. To support this submission, he has placed reliance on the decision in Abdul Rajak Murtaja Dafedar Vs. State of Maharashtra, wherein it was held that "the tracker dogs" evidence cannot be likened to the type of evidence accepted from scientific experts describing chemical reactions, blood tests and the actions of bacilli, because the behaviour of chemicals, blood corpuscles and bacilli contains no element of conscious volition or deliberate choice. Dogs are intelligent animals with many thought processes similar to the thought processes of human beings and wherever there are thought processes there is always the risk of error, deception and even self-deception. In the present state of scientific knowledge evidence of dog tracking, even if admissible, is not ordinarily of much weight."

It is pertinent to note that these observations were by way of obiter. Their Lordships however, did not express any concluded opinion or lay down any general rule with regard to tracker dog evidence or its significance or its admissibility as against the accused. Thus, this decision will be of no help to the accused.

It is also observed in the aforesaid decision in Abdul Razak (supra) that "a survey of the cases however, reveals that most Courts in which the question of the admissibility of evidence of trailing by bloodhounds has been presented take the position that upon a proper foundation being laid by proof that the dogs were qualified to trail human beings, and that the circumstances surrounding the trailer were such as to make it probable that the person trailed was the guilty party, such evidence is admissible and may be permitted to go to the jury for what it is worth as one of the circumstances which may tend to connect the Defendant with the Crime."

Thus, it is noticed that it is observed that as far as dog tracking evidence is concerned, it can be one of the circumstances, which may tend to connect the accused with the crime.

47. Mr. Apte has further placed reliance on a decision in Surinder Pal Jain Vs. Delhi Administration, , wherein it was held that "the possibility that the entire case was built up after the dogs of the dog squad pointed towards the Appellant cannot be ruled out. Since, the Appellant had slept in the verandah near the cot where the dead body of his wife was found, had locked the collapsible door with the recovered lock before going to sleep and had himself been close to the dead body before the police came, the picking up of smell by the dogs and pointing towards the accused could not be said to be a circumstance which could exclude the possibility of guilt of any person other than that of the Appellant or be compatible only with hypothesis of guilt of the Appellant. The pointing out by the dogs could as well lead to a misguided suspicion that the Appellant had committed the crime. The explanation of the Appellant regarding the injuries on

his person as having been caused by the police is also quite plausible". However, as the facts in the case relied upon are entirely different from the present case, this decision can have no application to the present case.

48. Thereafter, Mr. Apte placed reliance on a decision in *Gade Lakshmi Mangraju @ Ramesh Vs. State of Andhra Pradesh*, wherein the Supreme Court observed that the evidence based on sniffer dogs has inherent frailties. The possibility of error on the part of the dog or its master is the first among them. The possibility of misunderstanding between the dog and its master is close to its heels. The possibility of a misrepresentation or a wrong inference from the behaviour of the dog could not be ruled out. The last, but not the least, is the fact that from a scientific point of view, there is little knowledge and much uncertainty as to the precise faculties which enable police dogs to track and identify criminals. Police dogs engaged in these actions by virtue of instincts and also by the training imparted to them. Criminal Courts need not bother much about the evidence based on sniffer dogs although we cannot disapprove the investigating agency employing such sniffer dogs for helping the investigation to track down criminals. Thus, it is seen that the Apex Court has observed that sniffer dogs can be employed for investigation purpose.

49. In *Gade Lakshmi*, the Supreme Court observed that as per the dog handler, PW 14 after the dog smelt the dead body and materials at the scene of offence, it led them to the house of the accused No. 1 and scratched the ground and barked. Thereafter, it went to the house of the accused No. 2 and stopped near the door of the house and scratched. This evidence was found not sufficient to show that there was any positive identification of the criminal by the police dog. It was observed that as the house of the accused No. 1 is next to the house of deceased, possibility of the dog stopping in front of the house of the accused No. 1 cannot be ruled out. In their view, in the absence of incriminating materials like dog actually catching hold of the accused, this material was insufficient to hold that the dog had pointed out the accused as culprits. The Supreme Court further observed that what is surprising is the admission of the Investigating Officer and the mahazar witnesses that no article belonging to the accused was found lying near the dead body; if that is so, it is rather improbable for the sniffer dog to catch the smell of the accused and track them down. Hence, in the peculiar facts of that case the Supreme Court observed that this evidence of the prosecution relating to identification of the accused by the dog was very weak.

50. It is worthwhile to note that in *Gade Lakshmi*, it is also observed that "there are basically three kinds of police dogs-the tracker dogs, the patrol dogs and sniffer dogs, Recent trends show that hounds belonging to certain special breeds sheltered in specialized kennels and imparted with special training are capable of leading investigating agency to very useful clue in crime detection and thereby help detectives to make a breakthrough in investigation. English Courts have already started treating such evidence as admissible. In Canada and in Scotland such evidence has become, of late, admissible though in United States the

position is not uniform in different States". Thus, on going through this decision, it cannot be said that use of sniffer or tracking dogs is a worthless or futile exercise.

51. Mr. Apte has also placed reliance on a decision in *Sridhara @ Sripathi and Another Vs. State of Karnataka*, wherein the evidence of dog tracking was not relied upon. The tracker dog's evidence was not relied upon as the dog after smelling dead body stopped near accused persons house situated nearby and the dog did not actually catch the accused persons. Moreover, the Court observed that "no articles belonging to accused were found near dead body, hence, it is improbable for sniffer dog to track smell of accused, hence, the dog tracking evidence was not relied upon." However, in the present case, banyan of a male was found near the dead body, after giving smell of the banyan to the dog, it led to the house of the accused. In the case relied upon, no article of the accused was found at the spot. Moreover, in the present case the accused was not in the house, hence, there was no question of the dog catching the accused. Thus, this decision being distinguishable on facts, would not apply to the present case.

52. Judicial thinking worldwide, even in the U.K. has undergone a complete change and later judicial decisions from all over indicate that the courts have taken cognizance of certain other factors the first of them being that as far as the tracker dog is concerned, it happens to be an animal of a particular pedigree which is selected on its special qualities such as skill, alertness and intelligence. It is not that any and every dog is picked up by the police for these purposes. There are special rules which prescribe the manner in which the dog is required to be selected. In this context, we may refer to the Maharashtra State Police Dog Squad Manual, a perusal of this indicates that not only is the dog very carefully selected but that it goes through a rigorous process of training at the hands of experts. Its training takes place over a period of time where the dog is made absolutely proficient in the finer points of detection by experts in the field on the basis of well settled principles of training. Even after the skills are communicated to the dog, it is put through a rigorous process of exercise in order to satisfy the police authorities that the dog has not only learnt but is able to carry out these skills with a high degree of precision, and that it does not go wrong, under any circumstances. In the course of daily training the dog is put through regular exercises in order to eliminate any possibility of an error. We need to also observe that judicial notice must be taken of the fact that the training skills and special qualities that are found in the Police Dogs are now universally being recognized as being of such a high caliber that in cases such as detection of explosive drugs etc., they are found superior and more effective than the most sophisticated instruments. In this background, one needs to take cognizance of the fact that for the purpose of tracking down a criminal, special faculties, qualities and skills of the dog are aspects of which note must be taken. One needs to take cognizance of this factor. It would be extremely difficult under these circumstances and on this ground to brush aside this evidence. We need to record in this context that we are not placing complete and implicit reliance with

regard to the identification of accused only on the dog tracking evidence. We have accepted this last head of evidence in addition to the earlier evidence in so far as it completely supports the same.

53. To support his contention that evidence of sniffer dog cannot be relied upon, Mr. Apte also placed reliance on the observations in the case of Dinesh Borthakur Vs. State of Assam, wherein it was observed that "conviction of the accused on the major ground of sniffer dog going near the Appellant was held improper".

54. In the present case, the conviction is most certainly not based only or mainly on the dog tracking evidence. There are various other circumstances which have been proved against the Appellant, which we have discussed in detail above. Hence, we do not feel it necessary to rely on the evidence of dog tracking except to feel that it leads further assurance to the circumstances already proved.

55. Where the entire case hinges on circumstantial evidence, great care must be taken in evaluating circumstantial evidence to ensure that the circumstances on which the prosecution relies are wholly consistent with the sole hypothesis of the guilt of the accused. When a case rests on circumstantial evidence, such evidence must satisfy oft quoted tests viz: (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should unerringly point towards the guilt of the accused; (3) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probabilities the crime was committed by the accused and none else; (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence.

56. Legal principles with regard to circumstantial evidence in criminal trial have been explained by the Supreme Court time and again. A recent case in a long line of cases being Pawan and Ors. v. State of Uttaranchal, 2009(3) Bom.C.R. 194 which has more or less reiterated the principles in an earlier decision of the Supreme Court in the case of Shankarlal Gyarasilal Dixit Vs. State of Maharashtra, . In the said case, the Supreme Court observed as under:

... It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis.

It needs to be emphasized that while evaluating circumstantial evidence, which of course has to be done carefully, the circumstances must be of such a nature

as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged and the circumstances so shown by the prosecution are compatible with no other reasonable hypothesis. Keeping these principles in mind, we have evaluated the evidence.

57. In addition to the six circumstances mentioned in para 5 above, which have been relied upon by the prosecution, we find that the accused has not made any attempt at all to explain in any manner, the incriminating circumstances against him, which were brought to his notice. Most of these circumstances are such that they could have been explained only by the accused and none else. However, he has failed to give any explanation or clarification. In this connection we may refer to the evidence of PW 11 Vandana who has categorically stated that at about 8.00 p.m. the accused called Chakuli towards him and gave her a chocolate. Thereafter the accused and Chakuli went towards Shirol Nala side. The accused has not given any explanation as to where Chakuli went thereafter or where he left Chakuli thereafter. Throughout to all the questions asked to the accused u/s 313 of Code of Criminal Procedure he has replied either in the negative or he has stated that he did not know anything. In *Amit @ Ammu Vs. State of Maharashtra*, the accused was convicted of rape and murder. The circumstantial evidence was that accused was seen together with the victim a young school girl of about 11 to 12 years, by two witnesses. The Supreme Court observed that close proximity of place and time between the event of the accused having been last seen with the victim girl and factum of death, in such circumstances, the burden was on the accused to explain how and in what circumstances, the girl suffered death. No explanation was offered by the accused in statement u/s 313 of Code of Criminal Procedure In such case, the conviction for rape and murder came to be upheld.

58. Learned APP drew our attention to the fact that the accused in his statement u/s 313 of Code of Criminal Procedure has not provided any explanation but he has only answered, "I do not know" or "It is false". She submitted that this fact provides a link in the chain of incriminating circumstances against the accused. She placed reliance on a decision of the Supreme Court in case of *Joseph Poulou Vs. State of Kerala*, wherein it is observed as under:

During the time of questioning u/s 313 Cr. P.C., the Appellant instead of making at least an attempt to explain or clarify the incriminating circumstances inculcating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the Appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed.

That missing link to connect the accused-Appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy.

59. Similar view has been taken by the Supreme Court in *Damodar Vs. State of Karnataka*, and in the case of *State of Maharashtra Vs. Suresh*, .

On this point we may also refer to the decision in the case of *Deonandan Mishra Vs. The State of Bihar*, wherein it is observed that "such absence of explanation or false explanation would itself be an additional link which completes the chain. We find that these decisions are all perfectly applicable to the present case.

60. In the present case, since the prosecution has established last seen together theory, a burden is cast upon the accused to prove that in what circumstances and when he parted company with deceased. He has to explain as to how and when parted company as required u/s 106 of the Evidence Act. Unfortunately, he has not given any explanation. If we have a look to his statement u/s 313 of Code of Criminal Procedure the accused has nowhere explained this aspect. In such circumstances, it can safely be said that he has not discharged the burden cast upon him. When the said fact was within the special knowledge of the accused, he was under obligation to explain to show his innocence, but unfortunately, he has not discharged this onus. We may advantageously quote a ruling reported in case of *Ranjyotsingh Gurudayalsingh Vs. The State of Maharashtra* (at the instance of Senior Inspector of Police), . In that matter, it was argued that circumstance that the accused was last seen together with deceased at the International Air Port at Delhi on 12.2.2001, is not sufficient to bring home the charge of murder because over 60 hours had elapsed thereafter until his body was found at Mumbai on 15.2.2001. It has been urged that the prosecution has not been able establish as to what transpired in the interregnum, etc. we would like to refer hereto paragraph 25 of this citation, which reads as under:

Section 106 of the Evidence Act provides that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. In several recent decisions, the Supreme Court has held that the principles which underlies Section 106 of the Evidence Act can be applied in the context of the last seen theory when certain facts are especially within the knowledge of a person. In the *State of Rajasthan Vs. Kashi Ram*, , the Supreme Court held as follows:

Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast

upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain.

In the above case, the Supreme Court followed its earlier decisions in Joseph Poullo Vs. State of Kerala, and Sahadevan @ Sagadevan Vs. State rep. by Inspector of Police, . We have in the preceding paras reproduced the observations in Joseph Poullo.

In Sahadevan" s case, the Supreme Court held thus:

Therefore, it has become obligatory on the Appellants to satisfy the Court as to how, where and in what manner Vadivelu parted company with them. This is on the principle that a person who is last found in the company of another, if later found missing, then the person with whom he was last found, has to explain the circumstances in which they parted company. In the instant case, the Appellants have failed to discharge this onus. In their statements u/s 313 of Code of Criminal Procedure they have not taken any specific stand whatsoever.

The principle of law which has been laid down in the citations quoted above squarely applies on all fours to this case. It is obvious from the evidence in this case, which we have discussed above, that the accused was seen in the company of the deceased by Pws 11, 12, 13 and 16 on 24.10.2007 at about 8 to 8.30 p.m. It needs to be noted that this factual aspect has not even been denied by the defence. We may state at the risk of repetition that when the accused parted company of the deceased, where the accused and/or deceased went thereafter has remained unexplained. In fact, it was his duty to explain all these facts in detail, as required u/s 106 of Evidence Act. So also, as stated earlier, the facts and principles of citation (supra) squarely applies to this case. We would like to reproduce few lines and the observations from paragraph 26 in the case of Ranjyotsingh Gurudayalsingh v. State of Maharashtra, which are as under:

There is absolutely no reason or justification to discard the testimony of PW 8. The defence of Appellant in his statement u/s 313 is one of a blunt and complete denial. What happened after the evening of 12.2.2001, particularly when if at all the Appellant parted with company with the deceased, were facts within the special knowledge of the Appellant. It was for the Appellant to explain those facts, but he chose instead a complete denial in his statement u/s 313 of Code of Criminal Procedure 1973. The additional link that connects the Appellant with the crime and completes the chain is provided by his blunt and outright denial of every one of the incriminating circumstances. It was for the Appellant who was

last seen in the company of the deceased to explain the circumstances in which they parted company. The failure of the Appellant to do so must weigh in the balance as a failure to explain facts which were within his special knowledge.

61. As against all these incriminating circumstances, there is no probable or plausible explanation given by the accused as to why all these witnesses are deposing falsely against him. The accused in his statement u/s 313 of Code of Criminal Procedure has tried to make out a case that he had some dispute with one Appaso Dhangar in relation to work done for him by the accused. Appaso is the brother of landlord of PW 9 Ashok, therefore, he is falsely implicated in this case. It is pertinent to note that it is nowhere suggested to any witness except PW 12 Gangubai that they are relatives of Appasaheb or that they are deposing falsely at his instance. It is the case of the accused that he had dispute with one Appasaheb Dhangar and he lodged N.C. Case against Appasaheb. The accused has produced on record in defence at Exh. 71 the extract of N.C. Case register of Karveer Police Station at Sr. No. 985 relating to an entry dated 12.12.2006 wherein the accused is the complainant and one Appa Pujari is shown as accused. The incident is dated 12.12.2006 and the details given are that some amount was due from Appasaheb to accused on account of work of excavation of pit and when accused demanded that amount Appasaheb abused him and threatened to assault him. According to the accused, Appasaheb is the brother of Narayan and Narayan is the landlord of PW 9 Ashok Kamble. It is difficult to believe that on the basis of such dispute Appasaheb would falsely implicate the accused in this crime with the help of all these witnesses. Moreover, the incident relating to Appaso was a trivial dispute over some small amount of money, which incident had taken place on 12.12.2006 i.e. more than 10 months prior to the incident which took place on 24.10.2007. It cannot be believed that the whole village will go against the accused on account of such flimsy dispute at the instance of Appasaheb. So such explanation on the face of it is unacceptable and clearly appears to be an after thought. In view of the incriminating facts and circumstances as discussed above, it can safely be concluded that they are incompatible with innocence of the accused or guilt of any other person.

62. Keeping in mind the legal principles in relation to circumstantial evidence, we are of the opinion that the circumstances taken cumulatively form a chain which is so complete that it leads to the conclusion that within all human probabilities, the crime was committed by the accused and none else. On going through the evidence adduced by the prosecution, we find that there is sufficient evidence to sustain a conviction under Sections 302, 376(2)(f), 363 and 201 of IPC which leaves for our consideration that all important question that is, whether the death sentence should be confirmed.

63. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by

convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e the Judge that leads to determination of the sentence.

64. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

65. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentence are determined largely by other considerations. Sometimes, it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes, the desirability of keeping him out of circulation.

66. Learned APP submitted that looking to the facts of this case, it is a fit case to confirm the death sentence. She submitted that looking to the fact that the accused has committed rape on a young defenseless girl and thereafter murdered her, it calls only for the death penalty. She placed reliance on a decision of the Supreme Court in the case of *Dhananjay Chatterjee alias Dhana Vs. State of W.B.*, wherein it is observed as under:

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime, the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the societys"cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

Learned APP pointed out that in the said case, the accused who was a security guard had committed rape on a school going girl and thereafter, murdered her.

The Supreme Court observed that a cold blooded preplanned brutal murder, without any provocation, after committing rape on an innocent and defenceless young girl by the security guard certainly makes this case a "rarest of rare case" which calls for capital punishment. In that case, the accused was a security guard of the building in which the deceased resided, hence, he was duty bound to protect her. The accused in the present case is not similarly situated, hence, this case is distinguishable on facts.

67. On the point of death sentence, the learned APP placed reliance on a decision of the Supreme Court in the case of State of U.P. Vs. Satish, . She pointed out that in the said case, the accused had committed rape on a minor girl of about six years of age and thereafter, committed murder of the girl. While confirming the death sentence, the Supreme Court observed that the case falls in the rarest of rare category and death sentence awarded by trial court was appropriate.

68. The learned A.P.P. also placed reliance on another decision of the Supreme Court in the case of Shivaji @ Dadya Shankar Alhat Vs. The State of Maharashtra, wherein the accused had committed rape and murdered a young girl of 9 years of age. After referring to Bachan Singh Vs. State of Punjab, and Machhi Singh and Others Vs. State of Punjab, , the Supreme Court held that the case at hands falls in the rarest of the rare category and calls only for death sentence.

69. Learned A.P.P. submitted that the victim in the present case is an innocent child and as the accused was known to her, he was like an uncle to her and hence, the accused was in a dominating position. She submitted that in such case, when the victim was an innocent child, death sentence is called for. She placed reliance on the decision in the case of Sushil Murmu Vs. State of Jharkhand, .

70. Lastly, on the point of death sentence, reliance was placed by learned A.P.P. on a decision of the Supreme Court in the case of Sevaka Perumal, etc. Vs. State of Tamil Nadu, wherein it is observed as under:

Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc.

However, this decision is entirely dissimilar to the facts in the present case. As in the case of Sevaka Perumal, murder of four young innocent boys was committed by the accused persons. The crime of murder was committed by the accused for gain as a means of living. Such are not the facts in the present case, hence this decision would be of no help to the learned A.P.P.

71. In reply, Mr. Apte submitted that this cannot be said to be a case which

would fall under rarest of rare category wherein the sentence of death can be awarded or confirmed. He placed reliance on five decisions of the Supreme Court wherein in similar cases, the Supreme Court commuted the death sentence to life imprisonment. The said decisions are:

1. Mohammed Chaman v. State (N.C.T. Of Delhi); (2007) 2 S.C.C. 28;
2. Amit @ Ammu Vs. State of Maharashtra, ;
3. S Surendra Pal Shivbalak pal Vs. State of Gujarat, ;
4. The State of Maharashtra v. Mansingh;(2005) 3 S.C.C. 131;
5. Rahul alias Raosaheb v. State of Maharashtra; (2005) 10 S.C.C. 323;

Mr. Apte brought to our notice that in all the above cases, the accused were convicted for committing rape on a minor girl and murdering her. Thus, they were similarly situated as the accused in the present case.

72. So far as decision in Mohd. Chaman (supra) is concerned, the accused had committed offence u/s 376 and 302 of IPC and he was sentenced to death for the offence u/s 302 of IPC. In the said case, the accused-Appellant had committed rape on a child aged about one and half year. In the process of committing rape, injuries were inflicted on the liver which resulted in death of the child. The Supreme Court held that the case did not fall within the rarest of rare category. Mr. Apte pointed out that in Mohd. Chaman (supra) though a one and half year old child was raped by the Appellant who was 66CONF12009about 30 years of age and he caused death of the child, yet the Supreme Court did not feel that this was a case which fell within the rarest of rare category and commuted the death sentence to life imprisonment.

73. In Amit alias Ammu, the accused was convicted of rape and murder of a minor girl of about 11-12 years of age. The conviction was based only on circumstance of "last seen" and recovery of articles such as match box used for burning the school bag and other articles. Mr. Apte drew our attention to the fact that though in the case of Amit (supra), the accused had committed rape on a girl who was about 11 to 12 years and thereafter, committed her murder, the Supreme Court reduced the death sentence to life imprisonment.

74. In Surinder Pal Jain (supra), the accused had raped a minor girl and committed her murder. In the said case, the accused committed rape on a minor girl and thereafter, threw her body into a pond. The Supreme Court reduced the death sentence to life imprisonment. The Supreme Court observed that "the Appellant who was accused therein was impecunious and a migrant labourer and there being no evidence that he was involved in any other case previously and held that it could not be said that he would be a menace to society as no material has been placed on record to draw such a conclusion. In view of these facts, the Supreme Court held that this was not a case of rarest of rare and death penalty was not warranted, hence the sentence of death was commuted to

life imprisonment.

75. Reliance was placed by Mr. Apte on a decision in *State of Maharashtra v. Mansingh* reported in (2005) 3 SCC 131. This was also a case of rape and murder. The Supreme Court felt that it was not a fit case to award death penalty. It was observed therein as under:

Now the question which arises is as to whether the present case would come within the ambit of rarest of the rare cases. In the facts and circumstances of the case, we are of the view that the trial court was not justified in imposing extreme penalty of death against the Respondent and ends of justice would be met in case the sentence of life imprisonment is awarded against the Respondent.

76. In *Rahul alias Raosaheb (supra)*, the accused raped a girl aged about 4-1/2 years and caused her death by inflicting cut injuries on her neck. Mr. Apte pointed out that in the case of *Rahul (supra)*, the accused enticed a girl aged about four and half years and took her to a deserted place. He then committed rape on her and later caused her death. After causing death, he kept the body in a gunny sack and put it in a pit. In the said case, the Supreme Court observed that it is true that Appellant committed a serious crime in ghastly manner but the accused was aged 24 years at the time of the crime, hence, considering the age of the Appellant and other circumstances i.e. he had no previous criminal record, death sentence was commuted to life imprisonment. Mr. Apte submitted that the facts in the case of *Rahul* and the facts in the present case are absolutely similar. Here also the accused is aged 23 years. The age of the victim girl is also similar and other facts are also similar. In identical circumstances, the Supreme Court thought it fit to commute the sentence of death to life imprisonment. He also pointed out that the accused has no previous criminal record. Mr. Apte reiterated that the facts of the present case are identical to the case of *Rahul (supra)*, hence, he submitted that this is a fit case to reduce the sentence of death to life imprisonment.

77. The crime committed is undoubtedly serious and heinous and the conduct of the Appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Testing the case on the touchstone of the above decisions and balancing the aggravating and mitigating circumstances, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weight age to the mitigating circumstances.

78. We do not think that this is a "rarest of rare case" in which death penalty should be imposed on the Appellant. We say so because the case of the Appellant and *Rahul (supra)* is identical. The Appellant was aged 23 years at the time of

the occurrence and there is no evidence that the Appellant had been involved in any other criminal case previously. The Appellant is a poor labourer and living in impecunious circumstances which can be seen from the fact that as he could not afford a lawyer, he was provided one at State expense from the legal aid panel. No material is placed before us to draw a conclusion that he would be a menace to society in future. Hence, we do not think that the death penalty is warranted in this case. We confirm conviction of the Appellant on all the counts, but the sentence of death penalty imposed on him for the offence u/s 302 IPC is commuted to life imprisonment.

79. Though we are not inclined to confirm the sentence of death and are instead inclined to commute it to life imprisonment, however, we are inclined to make the sentences of imprisonment under Sections 302 and 376 consecutive. While taking this view, we may refer to a decision of the Supreme Court in case of *Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka*, . In the said case also the accused had been sentenced to death. The Supreme Court felt that it was not a fit case to award a death sentence but the Supreme Court observed that a sentence of life imprisonment which, subject to remission, normally works out to a term of 14 years would be grossly disproportionate and inadequate. The Supreme Court further observed that in such case, the court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, in which case the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court, i.e., the vast hiatus between 14 years" imprisonment and death. The Court, therefore, can substitute a death sentence by life imprisonment for rest of life of convict or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual terms as specified in the order, as the case may be. Observing thus, the Supreme Court substituted the death sentence by imprisonment for life and directed the accused shall not be released from prison till the rest of his life.

80. We may also make useful reference to two decisions of the Supreme court i.e *Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra*, and *Ravindra Trimbak Chouthmal Vs. State of Maharashtra*, . In the case of *Ronny (Supra)*, the accused persons had committed gang rape on a lady and murder during the course of the same incident. In this case, the Supreme Court felt it appropriate that the sentence u/s 376(2)(g) of I.P.C. for gang rape shall run consecutively after serving the sentence for offence of murder i.e the Supreme Court directed that the sentence of imprisonment u/s 376(2)(g) of 10 years RI shall be served after the sentence of life imprisonment is over. So also, in the case of *Ravindra Chouthmal (Supra)*, the Supreme Court directed that the sentence of seven years RI for the offence u/s 201 of the I.P.C. be directed to run consecutively after the sentence of life imprisonment had run its course. In the case of

Ravindra Chouthmal, the accused had murdered his wife and thereafter to cause the evidence of the crime to disappear, he had cut the body and thrown it in the creek.

81. In decision dated 7.9.2010 in Confirmation Case No. 4 of 2009 (The State of Maharashtra v. Kamlakar Tanaji Shinde), the Division Bench of this Court directed that sentence of imprisonment u/s 364 of IPC shall be served after serving sentence of imprisonment u/s 302 of IPC. Similar view was taken by this Court in its judgment dated 23rd April, 2010 in Criminal Appeal No. 760 of 2003, Sunil Anandrao. Sawant v. Government of Maharashtra [Coram: Smt. Ranjana Desai & Smt. V.K. Tahilramani, JJ] wherein this Court directed the sentence of three years RI under Sections 307 shall run consecutively after serving the sentence for the offence of murder.

82. There can be no doubt that the offence committed by the Appellant deserves severe condemnation and is a heinous crime, but on looking to the cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases. Hence, we are not inclined to confirm the sentence of death and instead for the offence u/s 302, we are inclined to sentence the accused to life imprisonment and direct that the sentence of imprisonment u/s 376(2)(f) shall run consecutively after the sentence of life imprisonment u/s 302 has run its course. Having regard to the totality of the circumstances, we pass the following order:

ORDER

1. The conviction of the accused under Sections 302, 376(2)(f), 363 and 201 of IPC is maintained.
2. The sentence of imprisonment and fine and in default sentence u/s 376(2)(f), 363 and 201 is maintained.
3. The sentence of death is commuted to life imprisonment, in addition thereto, fine of Rs. 1000/-in default simple imprisonment for two months.
4. The sentence of imprisonment u/s 376(2)(f) of IPC shall run after serving the life sentence u/s 302 of IPC.
5. The sentence of imprisonment under Sections 363 and 201 of IPC shall run concurrently with above sentences of imprisonment.
6. Thus, the reference is answered accordingly and appeal is partly allowed.