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PAWAN

v.

STATE OF UTTARANCHAL

(Criminal Appeal No. 1000 of 2006)

FEBRUARY 26, 2009

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[S.B. SINHA, ASOK KUMAR GANGULY AND R.M. LODHA, JJ.]

Penal Code, 1860:

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ss. 302/201/34 and 376 – Rape and murder of a child of six years – Trial court relying on circumstantial evidence convicting the accused and sentencing each of them to death – Sentence commuted to life imprisonment by High Court – D *HELD: Courts below have rightly held the circumstances cumulatively completing the chain pointing towards guilt of the accused only – Sentence awarded by High Court calls for no interference – Circumstantial evidence.*

Juvenile Justice (Care and Protection of Children) Act, E *2000:*

s.7-A – Plea of juvenility – HELD: School leaving certificate produced only after conviction, and primary evidence like entries from birth register having not been F *produced and, as such, there being no satisfactory/adequate material, there is no reason to call for report about age of accused at the time of commission of offence – Penal Code, 1860 – ss. 302/201/34 and 376.*

FIR – It is not necessary that names of all the witnesses G *be mentioned in FIR.*

The accused-appellants faced criminal trial for offences punishable u/ss 302/34, 201/34, 376 and 377 IPC. The prosecution case was that on the morning of

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25.9.2003, the daughter of PW-4, a child of six years went out to answer the call of nature. When she did not return for quite some time, and efforts to search her out yielded no result, PW-4 lodged a report of her disappearance. In the night between 25.9.2003 and 26.9.2003 at about 1.30 A.M, when PW-4 with his fellow migrant labourers from Nepal (PWs-2,3 and 5), outside of his hutment, was waiting for his daughter, they saw four persons (the accused) throwing a dead body of a child from a gunny bag in the nearby vacant plot. PWs-2 to PW-5, raised an alarm and apprehended the accused. They found the dead body to be of the daughter of PW-4. The accused were handed over to the police which registered a case u/ss 302/201/34 IPC. Since after receiving the medical report, it was found that the child was raped by more than one person and carnal intercourse also indicated to have been committed on her, offences punishable u/ss 376 and 377 were also added. The trial court found the chain of circumstances complete pointing out towards the guilt of the accused and, accordingly convicted them u/ss 302/34, 201/34, 376 and 377 IPC and sentenced each of them to death. The High Court maintained the conviction u/ss 302/34, 201/34 and 376 IPC, but commuted the death sentence to imprisonment for life. The conviction and sentence u/s 377 IPC was, however, set aside.

In the appeal filed by the accused, it was contended for the appellants that there were inconsistencies in the evidence of PWs 2 to 5 and it was not probable for these witnesses to have seen in the midnight the dead body being thrown from the gunny bag. It was also pleaded that accused A-1 and A-2 were juvenile within the meaning of Juvenile Justice (Care and Protection of Children) Act, 2000 on the date of incident and the trial held under CrPC was illegal.

Dismissing the appeals, the Court

A **HELD:1.1. All the four witnesses (PW 2 to 5) are consistent in their version on material aspects. Merely because names of two witnesses were not mentioned in the F.I.R., their presence does not become doubtful. Omission of the names of two witnesses in the F.I.R. is** B **not material, particularly, because it is not necessary that names of all the witnesses be mentioned in the F.I.R. [Para 20] [481-D]**

1.2. The testimony of PW-3 and PW-5 in respect of light stands has been corroborated by the testimony of C **the Investigating Officer (PW-11) who has also deposed that there was light at the gate of the School and also near the hutment of PW-4. Significantly, none of the witnesses (PWs-2 to 5) has been cross-examined in this regard. [Para 21] [482-D]**

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1.3. It is true that the circumstances with regard to carnal intercourse were not held to have been proved, but on a careful consideration of the remaining circumstances, which have been sufficiently proved by E **prosecution, it is clear that the proved circumstances complete the chain cumulatively and there is no escape from the conclusion that within all human probabilities the crime was committed by the accused and none else, as the proved circumstances unerringly point towards the** F **guilt of the accused. [Para 30] [485-H; 486-, B]**

Hanuman Govind Nargundkar v. State of M.P. **AIR (1952) SC 343;** *State of U.P. v. Satish* **(2005)3 SCC 114;** *Shankarlal Gyarasilal Dixit vs. State of Maharashtra* **(1981) 2 SCC 35;** *Subhash Chand vs. State of Rajasthan* **(2002) 1** G **SCC 702 and** *Sadashiv Ramrao Hadbe vs. State of Maharashtra And Anr.*, **(2006) 10 SCC 92, referred to.**

1.4. The trial court and the High Court having carefully gone through the evidence of PWs 2 to 5, have rightly H **held the prosecution to have established the**

circumstances, namely: the four witnesses having seen the accused throwing the dead body of the child in the vacant plot; the accused having been apprehended by the four witnesses and handed over to the police; there being no enmity of the witnesses with the accused or any special relations of the witnesses with the police; no explanation by the accused as to how the dead body of the victim came in their possession and their act of disposing of the dead body in the midnight, and the fact that the victim was subjected to rape indicating the bend of mind of the accused and their motive to commit her murder and then attempt to dispose of the dead body surreptitiously. [Para 16,22 and 29] [482-E; 485-E-F; 479-E-H; 480-A] A B C

1.5. The view taken by the High Court is the only possible view on a proper appraisement of evidence and no other view is possible and it has not committed any error in upholding the conviction of the accused persons for the offences punishable u/ss. 302/34, 201/34 and 376 IPC. The sentence awarded to them by the High Court calls for no interference. [Para 39] [493-B-D] D E

2.1. If the plea of juvenility was not raised before the trial court or the High Court and is raised for the first time before this Court, the judicial conscience of the Court must be satisfied by placing adequate and satisfactory material that the accused had not attained age of eighteen years on the date of commission of offence; sans such material any further enquiry into juvenility would be unnecessary. [Para 37] [492-D-E] F

Gurpreet Singh v. State of Punjab (2005) 12 SCC 615 and *Murari Thakur and Another v. State of Bihar,* AIR 2007 S.C. 1129, referred to. G

2.2. In the instant case, the school leaving certificates of A-1 and A-2 were procured only after they had been H

convicted. Primary evidence like entry from the birth register has not been produced. There being no satisfactory and adequate material, there is no reason to call for report about the age of A-1 and A-2 on the date of commission of offence. [Para 38] [493-A-B]

Case Law Reference:

AIR (1952) SC 343	**referred to**	**para 14**
(2005)3 SCC 114	**referred to**	**para 14**
(1981) 2 SCC 35	**referred to**	**para 14**
(2002) 1 SCC 70	**referred to**	**para 23**
(2006) 10 SCC 92	**referred to**	**para 23**
(2005) 12 SCC 615	**referred to**	**para 35**
AIR 2007 S.C. 1129	**referred to**	**para 36**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1000 of 2006.

From the Judgment & Order dated 12.7.05 of the High Court of Uttranchal, at Nainital in Crl. Appeal No. 210/2004.

WITH

Crl. Appeal No. 364 of 2009 @ SLP (Crl) No. 5209/06.

Crl. Appeal No. 1036/06

Crl. Appeal No. 1743/07.

T.V. George, L.C. Goyal, Jyoti Bansi and Ranjana Narain for the Appellant.

S.S. Shamshery, Jatinder Bhatia and A.P. Sahay for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J.

Leave granted in S.L.P. (Crl.) No.5209/2006.

1. The appellants in these four appeals suffered death sentence for the offence punishable under Section 302/34 IPC, at the hands of Additional Distt. & Sessions Judge, First Fast Track Court, Nainital. The trial court also convicted the appellants for the offences punishable under Sections 376 and 377, IPC and sentenced them to life imprisonment. Each of the appellants was also convicted for the offence punishable under Section 201/34, IPC and sentenced to undergo seven years rigorous imprisonment and fine of Rs.2,000/- and in default in payment of fine, additional imprisonment of six months. Since death sentence was awarded, the trial court made a reference to the High Court for confirmation. The appellants challenged the judgment of the trial court in separate appeals before the High Court of Uttaranchal at Nainital. The death reference and appeals were heard together. Vide judgment dated July 12, 2005, the High Court maintained the conviction of the appellants under Sections 302/34, 376 and 201/34, IPC. The sentence of death awarded under Sections 302/34, IPC to each of the appellants was commuted to that of rigorous imprisonment for life. The sentence awarded by the trial court under Sections 376 and 201/34, IPC, was maintained. The High Court, however, acquitted the appellants of charge under Section 377, IPC and their conviction and sentence under this count was set aside. It is from the judgment dated July 12, 2005 that these four criminal appeals by special leave arise.

2. Amar Singh (PW-4) is a migrant labourer from Nepal. He and his minor daughter Sushma aged six years were residing in the locality known as Raj Mahal Hotel Compound Mallital, Nainital. On September 25, 2003 at about 8.00 A.M. Sushma left her home to ease herself. When she did not return for quite some time, she was looked for in the market, around the lake and near about by her father but of no avail. Despite

A frantic efforts when her whereabouts could not be known, PW-4 reported her disappearance (Ext.Ka-10) at around 4.00 P.M. at Police Station, Mallital. The night became horrendously eventful for PW-4; he and three migrant labourers from Nepal, namely, Veer Bahadur (PW-2), Puran (PW-3) and Mangal B (PW-5) were waiting for Sushma to return. At about 1.30 A.M., four persons came from the side of the road up to vacant plot of one Sardarji in that locality and were seen throwing the dead body of a girl from the gunny bag in that plot. The gunny bag was also thrown over there. PW-2, PW-3, PW-4 and PW-5 C raised alarm and caught hold of them; they were Babu (A-1), Aamir (A-2), Pawan (A-3) and Arjun (A-4) and the dead body was of Sushma (victim). A-1, A-2, A-3 and A-4 were taken to the Police Station, Mallital.

3. PW-4 lodged the written report at about 2.00 A.M. D (September 26, 2003) and a case under Sections 302/201/34 IPC was registered against A1, A-2, A-3 and A-4. Their formal arrest was made. In the morning of September 26, 2003 at about 6.30 A.M. seizure memo of the dead body was prepared by the investigating officer Bachhan Singh Rana (PW-11). Dr. E K.S. Dhami (PW-1) conducted post-mortem of dead body of Sushma at about 1.00 P.M. The accused persons were also sent for medical examination. On the basis of the disclosure statement A-1 and A-2, two feet long electric wire of yellow colour from the house of Ramesh Monga situate near Sanwal F School where the accused were then residing was recovered vide Memo (Ext. Ka-6-A)

4. On September 27, 2003, while A-1, A-2, A-3 and A-4 were in District Jail, Nainital, their underwears were seized and G sent for chemical examination to Forensic Science Laboratory, Agra. The Pyajama and other items of victim were also sent to Forensic Science Laboratory, Agra.

5. After receipt of the post-mortem report, the offences under Sections 376 and 377 IPC were also added.

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6. Aamir's statement under Section 164, Cr.P.C. was recorded by the Judicial Magistrate, Nainital on October 7, 2003.

7. The investigating officer on completion of investigation submitted charge sheet against A-1, A-2, A-3 and A-4 for the offences punishable under Sections 302/34, 376, 377 and 201/34 IPC. The Chief Judicial Magistrate, Nainital, took cognizance and committed the case to the Sessions Judge, Nainital which was transferred to the court of Additional Distt. & Sessions Judge, First Fast Track Court, Nainital.

8. The defence of the accused persons was one of simple denial. They stated that they have been falsely implicated in the case.

9. Dr. K.S. Dhami (PW-1) who conducted post mortem examination on the dead body of victim found following injuries.

> "Labiamajora are separated. Hymen ruptured. Reddish secretion inside the vagina. Rectum –laceration & abrasion around the external region on separation of gluteal fold large rectal canal is visible which is dilated. Spintsers are damaged. There is blood present in the anal canal. Mucosa is also damaged. Both rectal and vaginal smears are taken. There is well defined ligature mark on the upper part of neck slightly depressed and encircling the neck horizontally and completely. Colour is reddish & margins are ecchymosed. On dissection of ligature mark there is extra vassion of blood into the sub cutaneous tissue under the ligature mark as well as adjacent structures."

Dr.K.S. Dhami (PW-1) recorded cause of death being asphyxia as a result of strangulation. These injuries according to Dr. K.S. Dhami were sufficient in the ordinary course of nature to cause death.

A 10. On the basis of the medical evidence, no doubt is left that victim died of homicidal death and that she was raped before being murdered. The medical evidence shows that her hymen was ruptured; labiamajora separated and there was reddish secretion inside the vagina. These are indicative of
B having the sexual assault. Dr. K.S. Dhami further opined the rape on the deceased is possible to have occurred during the time of 8.00 A.M. on September 25, 2003 to the night (intervening night between September 25 and 26, 2003). The evidence of Dr. K.S. Dhami has gone unchallenged in so far
C as A-3 and A-4 are concerned and in his cross examination on behalf of A-1 and A-2, nothing has been elicited which may cast doubt with regard to his testimony.

11. There is no eye witness account and the case depends wholly upon circumstantial evidence.
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12. 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
E be of definite tendency unerringly pointing towards the guilt of the accused; (3) the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probabilities the crime was committed by the accused and none else; and (4) the
F circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.

G 13. 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.
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14. Legal principles with regard to the circumstantial evidence in criminal trial have been explained by this Court time and again; the first in long line of these cases being Hanuman *Govind Nargundkar v. State of M.P.* [AIR (1952) SC 343] and of late, *State of U.P. v. Satish* (2005)3 SCC 114. Reference to all these decisions is not necessary as we have already noticed these principles in preceding paragraphs. However, Mr.T.V. George, learned counsel appearing for A-3, referred to a decision of this Court in the case of *Shankarlal Gyarasilal Dixit vs. State of Maharashtra,* (1981) 2 SCC 35 which we may refer to. The learned counsel relied upon the following observations made therein:

> ".....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.
>
> The High Court, it must be said, has referred to the recent decisions of this Court in *Mahmood v. State of U.P.* (1976) 1 SCC 542 and *Chandmal v. State of Rajasthan* (1976) 1 SCC 621 in which the rule governing cases of circumstantial evidence is reiterated. But, while formulating its own view the High Court, with respect, fell into an error in stating the true legal position by saying that what the court has to consider is whether the cumulative effect of the circumstances establishes the guilt of the accused beyond the "shadow of doubt". In the first place, 'shadow of doubt', even in cases which depend on direct evidence is shadow of "reasonable" doubt. Secondly, in its practical application, the test which requires the exclusion of to her

A alternative hypotheses is far more rigorous than the test of proof beyond reasonable doubt."

15. It needs no emphasis that while evaluating circumstantial evidence, which of course has to be done carefully, the circumstances must be of such a nature as to be B 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.

C 16. The following circumstances were relied upon by the prosecution, and accepted by the trial court in order to establish the charges against A-1, A-2, A-3 and A-4:

(i) On September 25, 2003, at about 8.00 A.M., victim D left her home to ease herself.

(ii) Victim did not return to her house and all efforts on that day in search of her and her whereabouts did not yield any result.

E (iii) On that very day i.e. September 25, 2003, a missing report was lodged by Amar Singh (PW-4) at about 4.00 P.M. at Police Station, Mallital.

(iv) In the intervening night of September 25/26, 2003, F PW-4 and others were sitting outside their huts waiting for the victim, then about 1.30 A.M. in the night they saw accused coming towards the vacant plot of one Sardarji with a gunny bag and were seen throwing the dead body of victim.

G (v) PW-2, PW-3, PW-4 and PW-5 seeing the accused persons, raised an alarm and apprehended all of them at the spot.

(vi) A-1, A-2, A3 and A-4 made extra-judicial H confession of their guilt before PW-1, PW-2, PW-

3 and PW-4.

(vii) The accused persons were then taken to the Police Station, Mallital and in the intervening night of September 25/26, 2003, at about 2.00 A.M., First Information Report was lodged.

(viii) At the instance and on the disclosure statement of A-1 and A-2, piece of wire was recovered from the house of Ramesh Monga.

(ix) On September 27, 2003, the underwears of A-1, A-2, A-3 and A-4 were attached and sent for chemical examination. The chemical examination report confirmed that the underwears were stained with human semen and spermatozoa.

(x) A-2 made a confession of his guilt before the Judicial Magistrate on October 7, 2003.]

(xi) The medical evidence that victim was subjected to rape and carnal inter course.

(xii) The medical evidence also indicative of the fact that the offences of rape, carnal inter-course and murder were committed, in all probability, by more than one person.

(xiii) No enmity between PW-2, PW-3, PW-4 and PW-5 against A-1, A-2, A-3 and A-4 nor PW-1, PW-2, PW-3 and PW-4 had any special relations with the police.

(xiv) No explanation by A-1, A-2, A-3 and A-4 as to how the dead body of victim came into their possession and their act of disposing of the dead body in the midnight.

(xv) The fact that the victim was subjected to rape and

A carnal intercourse itself indicate the mental bend of mind of the accused and further the motive to commit her murder and then attempt to dispose of her dead body surreptitiously to screen themselves from legal punishment.

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(xvi) Confirmation and presence of semen and spermatozoa on the underwears of A-1, A-2, A-3 and A-4.

(xvii) Vaginal and anal/rectal smear of the victim and the C confirmation of human blood and human semen and spermatozoa.

17. The High Court discarded the circumstances mentioned at serial Nos. (vi), (viii) and (x) and the prosecution D case of carnal intercourse. Despite that, the High Court was convinced that all other circumstances have been cogently and firmly established.

18. In so far as circumstances (i) & (ii) are concerned, none of the accused persons disputed the said circumstances. The E circumstance (iii) is a matter of record and fully proved. As a matter of fact there was no serious challenge with regard to proof of circumstance (iii) by the counsel for the accused persons.

F 19. Mr. T.V. George, the learned counsel for A-3 highlighted inconsistencies in the ocular version of PW-2, PW-3, PW-4 and PW-5 to bolster up his contention that their evidence deserves rejection. He referred to variations in the first information report and the deposition of these witnesses. With G reference to the site plan (Ext.Ka-13), the learned counsel sought to contend that Hotel Rajmahal and its compound have not been shown and it was not probable for these witnesses to see in the midnight the dead body being thrown from the gunny bag. He argued that circumstances (iv), (v) and (xiv) H cannot be held to be established.

20. PW-4 is the father of victim. PW-2, PW-3 and PW-5 are migrant labourers from Nepal like PW-4. They all were residing in the same compound viz, Rajmahal Hotel Compound. If despite frantic search throughout the day, the girl could not be traced, there was nothing unusual if they were sitting outside the hut of PW-4 in the night with a hope that the girl may return or somebody may leave her. In the night at about 1.30 A.M., they saw four persons carrying one gunny bag and going towards plot of one Sardarji. They saw those persons throwing a dead body from the gunny bag in that plot. The dead body was of Sushma. They raised alarm and caught hold of the accused persons. They took the accused persons to the police station and handed them over to the police. PW-4 lodged F.I.R. and all of them came back to the place near the dead body. Sans insignificant and minor contradictions here and there, all these four witnesses are consistent in their version on material aspects as noticed above. Merely because the names of two witnesses were not mentioned in the F.I.R., their presence does not become doubtful. Omission of the names of two witnesses in the F.I.R. is not material particularly because it is not necessary that all the names of the witnesses be mentioned in the F.I.R.. It is true that in the site plan (Ext. Ka-13), Hotel Rajmahal and its compound have not been shown but the site map basically reflects the place from where dead body of the deceased was recovered and the place from where the accused persons are said to have been apprehended. Site map also reflects the place from where gunny bag containing hawai chappal of the deceased was recovered. However, the evidence of PW-2, PW-3, PW-4 and PW-5 leaves no manner of doubt that Hotel Rajmahal is situate in that vicinity and near the Hotel Sitakiran which is shown in the site plan. PW-2 is specific that Hotel Sitakiran is situate near Hotel Rajmahal. In the site plan drain has been shown in the east to Hotel Sitakiran. Sanwal School has also been shown in the site plan. PW-2 in his deposition has also stated that Sanwal School is in the east of the hotel. The testimony of PW-4 also shows that Sanwal

A School is situate at a short distance of his hutment. All these witnesses reside in that locality. Seen thus, merely because Hotel Rajmahal and its compound have not been shown in the site plan, it does not in any way affect the deposition of PW-2, PW-3, PW-4 and PW-5.

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21. The submission of the learned counsel that in the absence of any light at the place of occurrence, it was highly improbable that PW-2, PW-3, PW-4 and PW-5 saw the four accused persons carrying gunny bag and going to the vacant plot of Sardarji and throwing a dead body does not appear to C us to be of substance. The testimony of PW-3 and PW-5 in respect of light stands corroborated by the testimony of investigating officer (PW-11) who has also deposed that there was light at the gate of the Sanwal School and also near the hutment of PW-4. Significantly, none of these witnesses (PW-D 2, PW-3, PW-4 and PW-5) has been cross-examined in this regard.

22. Having carefully gone through the deposition of PW-2, PW-3, and PW-4 and PW-5, we find ourselves in agreement E with the view of the trial court as well as that of the High Court that circumstances (iv), (v) and (vii) are clearly proved.

23. That the underwears of the accused were seized on September 27, 2003 when they were in jail and these articles were sent for chemical examination is not in dispute. That the F evidence pertaining to chemical examination of underwears shows that those underwears were found stained with human semen and spermatozoa is also not in dispute. Mr. T.V. George, learned counsel, however, strenuously urged that merely because underwears were found stained with human G semen by itself cannot be used as an incriminating circumstance against the accused. Learned counsel in this regard placed reliance upon the following decisions: (1) *Shankarlal Gyarasilal Dixit vs. State of Maharashtra,* (1981) 2 SCC 35; (2) *Subhash Chand vs. State of Rajasthan* (2002) H 1 SCC 702 and *Sadashiv Ramrao Hadbe vs. State of*

Maharashtra And Anr., (2006) 10 SCC 92. A

24. Learned counsel heavily relied upon paragraph 28 of the report in the case of *Shankarlal Gyarasilal Dixit* which reads thus:

> "The discovery of a blood-stain of the 'B' Group measuring 0.5 cm in diameter on the appellant's pant and of dried stain of semen on his underpant are circumstances far too feeble to establish that the appellant raped or murdered Sunita. 'B' Group is not an uncommon group of blood and no effort was made to exclude the possibility that the blood of the appellant belonged to the same group. As regards the dried stain of semen on the appellant's underpant, he was a grown up man of 30 years and no compelling inference can arise that the stain was caused during the course of the sexual assault committed by him on the girl." B C D

In *Shankarlal Gyarasilal Dixit,* the presence of a dried stain of semen on the underpant of the accused, aged 30 years, was held too feeble a circumstance to establish the guilt. The aforesaid observation cannot be read to mean that in no case presence of dried stain of semen on the underpant/underwear of the accused can be considered as an incriminating circumstance against the accused. E

25. Paragraph 19 of the report in *Subhash Chand* relied upon by learned counsel reads thus: F

> "In the present case the age of the accused was about 21 years at the time of the incident. On his arrest he was subjected to medical examination and found to be a potent and capable person. Presence of semen stain on underwear, assuming that the underwear belonged to the accused, though there is no evidence adduced in this regard, is not by itself an incriminating piece of evidence connecting the accused with the crime in question. So also the discovery of Group B bloodstain on the underwear G H

A cannot be treated as an incriminating piece of evidence against the accused connecting him with the crime because there is no evidence that the underwear belonged to the accused and further the possibility of the underwear being stained with the blood of the person to whom it
B belonged, or the accused if he was wearing it has not been ruled out."

It would be seen that in the case of *Subhash Chand* there was no evidence that the underwear belonged to the accused and further the possibility of the underwear being stained with
C the blood of the person to whom it belonged or the accused if he was wearing was not ruled out.

26. In the case of *Sadashiv Ramrao Hadbe*, this Court made the following observations:

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"It is true that the petticoat and the underwear allegedly worn by the appellant had some semen but that by itself is not sufficient to treat that the appellant had sexual intercourse with the prosecutrix. That would only cause some suspicion on the conduct of the appellant but not sufficient to prove
E the case, as alleged by the prosecution."

The aforesaid observation has to be read in the light of the observation made in paragraph 6 of the report that the prosecution evidence was found to have many contradictions
F and the whole incident seemed to be highly improbable.

27. As a matter of fact there is no challenge with regard to proof of the circumstances (ix) and (xvi). The challenge is on relevance of these circumstances on the ground that the
G accused persons are labourers and they do not change their underwears daily and merely because their underwears were found to have semen stains, that by itself cannot be used as an incriminating circumstance. We find no merit in this contention. In our opinion, the circumstances (ix) and (xvi) do
H provide link in forming the chain together with other

circumstances against the accused persons and do not deserve to be ignored. Circumstances (ix) & (xvi) have rightly been held to be established by the trial court as well as High Court.

28. In so far as circumstances (xi), (xii) & (xvii) are concerned, the evidence of Dr. K.S. Dhami (PW-1) establishes that victim was subjected to rape and murder. Mr. T.V. George, learned counsel for A-3, however, sought to urge that the injuries and medical evidence make it highly improbable that four persons raped the minor girl. Firstly, no question or suggestion has been put to PW-1 in this regard. Secondly, and more importantly, semen stain with spermatozoa were found on the underwears of all the four accused. Thirdly, chemical examination of the vaginal smear of the victim has also confirmed presence of human blood, semen and spermatozoa. In view of this evidence, rape of victim by more than one culprit can be safely held to be established. The medical evidence proves beyond reasonable doubt that the victim died of homicidal death and that she was raped before being murdered. Circumstances (xi), (xii) and (xvii) to this extent are clearly proved.

29. Nothing has been brought on record that PW-2, PW-3, PW-4 and PW-5 had any enmity with A-1, A-2, A-3 and A-4 or had any special relations with the police. That A-1, A-2, A-3 and A-4 were seen throwing the dead body of the victim in the intervening night of September 25/26, 2003 is also established. The circumstances (xiii), (xiv) and (xv), thus, have rightly been held to be proved by the trial court as well as High Court.

30. Ms. Ranjana Narayan, amicus-curiae for A-4 submitted that circumstances (vi) , (viii) & (x) and part of circumstances (xi) & (xii) having not been held established by the High Court, there is break in the chain and the link having been snapped, it cannot be held that chain is complete. It is true that the circumstances (vi), (viii) & (x) and part of circumstances (xi) & (xii) with regard to carnal intercourse have not been held to be proved but on a careful consideration of the remaining

A circumstances which have been sufficiently proved by prosecution, we are of the considered view that the proved circumstances complete the chain cumulatively and there is no escape from the conclusion that within all human probabilities the crime was committed by the accused and none else as the B proved circumstances unerringly point towards the guilt of the accused. We are, therefore, unable to accept the submission of the amicus-curiae.

31. Mr. L.C. Goyal, learned counsel for A-1 and A-2 submitted that these accused were not given sufficient C opportunity to defend themselves and constitutional mandate was flouted and also they were denied their statutory right to be defended by a pleader as envisaged under Sections 303 and 304 Cr.P.C.

D 32. We deem it proper to refer to the consideration of this aspect by the High Court which is as follows:

"In regard to the submission that the trial stand vitiated for want of compliance of the constitutional mandate as well E as the legal provisions it need to be stated that the accused were committed to the Court of Sessions on 20.12.2003 by the C.J.M., Nainital and when the accused were brought before the court of Sessions in pursuance of the commitment of the case date for framing of the F charge was fixed by the Sessions Judge, Nainital. The date fixed for the purpose was 2.3.2004. Before this date the sessions trial was transferred to the court of Additional Sessions Judge/1 F.T.C., Nainital for disposal according to law and on receipt of the record this transferee court fixed 16.3.2004 for framing of the charge. The Additional G Sessions Judge took up the case for this purpose on 16.3.2004 and in the presence of all the four accused persons framed charges against them for the offences as mentioned above and for the commission of which the accused were later on convicted. The order sheet of the H said date does not reflect the presence of the defence

lawyer or even the public prosecutor before the learned Additional Sessions Judge and perhaps the charges were framed after perusal of the documents of the prosecution without referring that the Judge was of the opinion that there were grounds for presuming that the accused have committed offences which are exclusively triable by the court as envisaged by Section 228 of the 'Code'. Record also reveal that till that date neither the accused have engaged their own lawyer nor they were provided with a defence lawyer at the expense of the state as provided under Sections 303 and 304 of the 'Code'. The learned Additional Sessions Judge however after framing the charges and making an endorsement that the accused pleaded not guilty and claimed to be tried, fixed 24.3.2004 for recording of the evidence of the prosecution and directed the prosecution witnesses to be summoned. On 24.3.2004 A.D.G.C. (Criminal) moved an application for adjournment of the trial in view of the prosecution witnesses having not been served with summons and on his prayer the trial was adjourned to 7.4.2004 for recording of the evidence of the prosecution. However no lawyer was appointed on this date also as Amicus Curiae for the accused. On 7.4.2004, as is evident from the record and the order sheet of the said date, three prosecution witnesses, P.W.1, P.W.2 and P.W.3 were examined by the prosecution, and on the same day Sri M.A. Khan, Advocate was appointed Amicus Curiae. The Amicus Curiae cross-examined all these three witnesses on behalf of two accused Babu and Aamir only which indicate that only these two accused were provided the Amicus Curiae by the learned Additional Sessions Judge. The witnesses were cross-examined by a lawyer on behalf of other two accused Pawan and Arjun which indicate that they have engaged the lawyer of their choice after the charges against them have already been framed in the trial.

There can be no doubt that although the charges

were framed against the accused on 16.3.2004 without the accused being represented by their counsel and without recording of the satisfaction of the Judge that there are grounds for presuming that the accused have committed the offences with which they were being charged as envisaged by Section 228 of the 'Code', but we are of the considered view that there was enough evidence and material available on record at that time to form an opinion that there was sufficient ground for proceeding against the accused. The reason being that at the stage of framing of the charge the Judge is not required to enter into detailed scrutiny and consideration of the material and evidence which is available in the form of the record of the investigation or the documents submitted with the charge sheet and therefore as the allegations stand against the accused supported by the collected evidence even the above infraction in the compliance of the legal provision do not indicate any prejudice having been caused to the accused and in a situation like this the above aspect would not entail vitiation of the entire trial against the accused.

Amicus Curiae to the two accused in the case was provided on the day, that is, 7.4.2004 when three prosecution witnesses were examined in the trial. Sri M.A. Khan, Advocate was appointed Amicus Curiae for the two accused and he proceeded to cross-examine all the three witnesses on that date itself. Learned Senior Counsel Sri Panwar submitted that a duty is cast on Sessions Judge to see that raw and inexperienced juniors are not appointed to defend an accused in capital punishment cases and in support of the argument learned counsel pressed into service the reported decisions *Panchu Gopal Das vs. State;* A.I.R. 1968 Cal. 38, and *Mohd. Kunnumal vs. State of Kerala;* A.I.R. 1963 Ker. 54. The argument was advanced on the assumption that the Amicus Curiae appointed by the learned Additional Sessions Judge was an inexperienced Advocate, but we find nothing on record

to sustain the submission made in that behalf. It appears that Sri M.A. Khan, Advocate was practicing in criminal side in the Sessions Court at Nainital and judicial notice can be taken of the fact that he is at present a Brief Holder of the State of Uttaranchal in the High Court and is conducting criminal appeals in the High Court. This indicate that Sri Khan has long standing as a criminal lawyer and was rightly appointed as Amicus Curiae to defend the accused in capital punishment case. Further he was assigned the case to defend the two accused at the expense of the state on the day when the three prosecution witnesses were examined but the learned Amicus Curiae had not sought adjournment to avail some time to prepare the case. This indicate that the learned Amicus Curiae has not felt handicapped and must have prepared the case to his satisfaction so as to proceed with the cross-examination of the witnesses on that very day and looking at the cross-examination of the witnesses we do not find that for this reason any prejudice was caused to the two accused for whom he was appointed Amicus Curiae."

We agree with the view of the High Court.

33. Now, we deal with the contention of juvenility of Babu (A-1) and Aamir (A-2). The learned counsel submitted that A-1 and A-2 were 'juvenile' within the meaning of Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'the Act, 2000') on the date of incident and the trial held by Additional Sessions Judge, Nainital, under the Code of Criminal Procedure was illegal. With regard to the age of A-2, reliance is placed on his statement recorded under Section 313, Cr.P.C. wherein his age has been recorded as 17 years and a school leaving certificate indicating his date of birth as March 12, 1987. For A-1, his school leaving certificate which records his date of birth July 16, 1988 is being relied. The learned counsel would submit that juvenility can be claimed at any stage; even for the first time before this Court. He referred to Section

A 7A of the Act, 2000.

34. Section 7A came to be inserted in the Act, 2000 with effect from August 22, 2006. It reads thus:

B *"S.7A. Procedure to be followed when claim of juvenility is raised before any court.* – (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not C an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any D court and it shall be recognized at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement E of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate order, and the sentence if any, passed by a court shall be F deemed to have no effect."

35. Proviso to sub-section (1) does lay down that a claim of juvenility may be raised at any stage, even after final disposal of the case. In the case of *Gurpreet Singh v. State of Punjab,* G (2005) 12 SCC 615, the claim of juvenility under Juvenile Justice Act, 1986 was raised for the first time before this Court. It was held:

"It appears that this point was not raised either before the trial court or the High Court. But it is well settled that in such H

an eventuality, this Court should first consider the legality or otherwise of conviction of the accused and in case the conviction is upheld, a report should be called for from the trial court on the point as to whether the accused was juvenile on the date of occurrence and upon receipt of the report, if it is found that the accused was juvenile on such date and continues to be so, he shall be sent to juvenile home. But in case it finds that on the date of the occurrence, he was juvenile but on the date this Court is passing final order upon the report received from the trial court, he no longer continues to be juvenile, the sentence imposed against him would be liable to be set aside. Reference in this connection may be made to a decision of this Court in *Bhoop Ram v. State of U.P.*(1989) 3 SCC 1, in which case at the time of grant of special leave to appeal report was called for from the trial court as to whether the accused was juvenile or not which reported that the accused was not a juvenile on the date of the occurrence but this Court, differing with the report of the trial court, came to the conclusion that the accused was juvenile on the date the offence was committed and as he was no longer a juvenile on the day of judgment of this Court, sentence awarded against him was set aside, though the conviction was upheld."

36. A benefit of Act, 2000 was sought for the first time by claiming juvenility before this Court in the case of *Murari Thakur and Another v. State of Bihar,* AIR 2007 S.C. 1129 but negated. This Court said:

"Learned counsel for the appellant firstly submitted that the appellants are entitled to the benefit of the Juvenile Justice (Care and Protection of Children) Act, 2000 as amended by the amendment of 2006. We are of the opinion that this point cannot be raised at this stage because neither was it taken before the Trial Court nor before the High Court. Even otherwise we do not find any merit in the said

A contention. The question of age of the accused appellants is a question of fact on which evidence, cross-examination, etc. is required and, therefore, it cannot be allowed to be taken up at this late stage. Hence, we reject this submission of the learned counsel for the appellant."

B 37. The question is : should an enquiry be made or report be called for from the trial court invariably where juvenility is claimed for the first time before this Court. Where the materials placed before this Court by the accused, *prima facie,* suggest that the accused was 'juvenile' as defined in the Act, 2000 on C the date of incident, it may be necessary to call for the report or an enquiry be ordered to be made. However, in a case where plea of juvenility is found unscrupulous or the materials lack credibility or do not inspire confidence and even, *prima facie,* satisfaction of the court is not made out, we do not think D any further exercise in this regard is necessary. If the plea of juvenility was not raised before the trial court or the High Court and is raised for the first time before this court, the judicial conscience of the court must be satisfied by placing adequate and satisfactory material that the accused had not attained age E of eighteen years on the date of commission of offence; sans such material any further enquiry into juvenility would be unnecessary.

38. As regards A-2, two documents are relied upon to F show that he had not attained age of eighteen years on September 25/26, 2003. His age (17 years) mentioned by the trial court at the time of recording his statement under Section 313 Cr.P.C. is tentative observation based on physical appearance which is hardly determinative of age. The other G document is the school leaving certificate issued by Headmaster, Prem Shiksha Niketan, Bilaspur, Rampur which does not inspire any confidence as it seems to have been issued on October 16, 2006 after A-2 has already been convicted. Primary evidence like entry from the birth register has not been produced. We find it difficult to accept Annexure H

P-3 (school leaving certificate) relied upon by counsel. For A-1, the only document placed on record is a school leaving certificate which has been procured after his conviction. In his case also, entry from the birth register has not been produced. We are not impressed or satisfied with such material. There being no satisfactory and adequate material, prima facie, we are not persuaded to call for report about the age of A-1 and A-2 on the date of commission of offence.

39. In the light of our discussion aforenoted , we find that the view taken by the High Court is the only possible view on a proper appraisement of evidence and no other view is possible and it has not committed any error in upholding the conviction of the accused persons for the offences punishable under Sections 302/34; 376 and 201/34 IPC. The sentence awarded to them calls for no interference.

40. In the result, all the four appeals fail and are dismissed. Accused Babu is on bail. His bail bonds are cancelled. We direct the trial court to take immediate steps for putting him back in jail to serve out the remaining part of the sentence.

R.P. Appeals dismissed