(2000) 1 Supreme Court Cases 471

(BEFORE G.T. NANAVATI AND K.T. THOMAS, JJ.)

STATE OF MAHARASHTRA .. Appellant;

Versus

SURESH .. Respondent.

Criminal Appeals Nos. 1092-93 of 1998†, decided on December 10, 1999

A. **Penal Code, 1860 — Ss. 376 and 302 — Rape and murder of a four-year-old girl — Prosecution case based on circumstantial evidence — Circumstances of last seen together, recovery of dead body from the place pointed out by the accused, evidence of test identification parade, injuries found in the male organ of the accused and detection of stains of human blood and semen on underclothes of the accused at the time of his arrest — Held, on facts, circumstances sufficient to convict the accused respondent with the offence of rape and murder of the minor girl**

B. **Penal Code, 1860 — Ss. 302 and 376 — Sentence — Death sentence — Whether a rarest of the rare cases — Rape and murder of a four-year-old girl — Held, case perilously near the region of "rarest of the rare cases" — But since the accused respondent was acquitted by the High Court, the lesser option is not foreclosed and hence sentence of death awarded by trial court altered to sentence of life imprisonment — Sentences imposed by trial court on all other counts would remain unaltered (Para 29)**

Bachan Singh v. *State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580, *relied on*

Suggested Case Finder Search Text (*inter alia*) :

rape murder sentence

C. **Criminal Trial — Circumstantial evidence — Last seen together — Rape and murder of a minor girl aged 4 years — Three PWs seeing a little girl crying in the company of a man on the day of the incident — Both accused and victim were strangers to the PWs — Reason for the PWs remembering them was that next day when they heard about the murder of a little girl, they recollected seeing the man along with the little girl the previous day — PWs later identifying the accused in test identification parade — Held, recollection about the victim in the company of the accused was natural — Contention that there was inherent incredibility in the evidence of the PWs as normally accused would have taken precaution not to be seen by any other person on the way cannot be accepted — Penal Code, 1860, Ss. 376 & 302**

Held :

If a criminal court is to view the testimony of the three witnesses as unnatural it would be easy to brush it aside with the stereotyped reasoning that those persons had no cause to remember having seen the man with the girl accompanying him. Such a reasoning overlooks the broad aspect that a human mind, on hearing about any shocking incident, would have the tendency to recollect any previous event which could have had a connection with that

† From the Judgment and Order dated 5-5-1998 by the High Court of Mumbai, Bench at Nagpur in Confirmation Case No. 2 of 1997 with Criminal Appeal No. 348 of 1998

incident. If as a matter of fact those witnesses had occasion to see a crying girl of that age on the very day of the gruesome episode as happened in this case, there is nothing improbable in those witnesses remembering the person who was seen in the company of that girl. If they had immediately informed the police that they noticed a similarly-aged girl crying in the company of an utter stranger of that locality that cannot be brushed aside as a doubtful conduct. Either the three witnesses concocted the story falsely or what they said must be true. No reason was suggested for those three witnesses to bother themselves to concoct such a canard. (Para 17)

It is not possible to accept that there is "an inherent incredibility in the evidence" on the premise that a culprit kidnapping a minor girl with a sinister design would normally take the precaution not to be seen by any other person on the way, but in this case the culprit along with the girl had moved from place to place in the town. Such a reasoning as a proposition of human conduct cannot be accepted. The victim would certainly have been abducted by somebody (even assuming that it was not this respondent) and that person had taken the abducted girl from her house up to the place of occurrence (farm). Unless it is suggested that there was another alternative and a safer route for the culprit to take the girl unnoticed by any shopkeeper or even a pedestrian, there is no rationale in the reasoning that there is "inherent incredibility" in the version that the respondent would have taken the girl through this route. (Para 19)

Suggested Case Finder Search Text (*inter alia*) :

circumstantial evidence last seen together

D. **Evidence Act, 1872 — S. 9 — Test identification parade — Object and modalities of — Any relaxation in the modality to be followed in the parade should not impair the main object of the parade — On facts, held, modus adopted by the Magistrate in conducting the parade was reasonably foolproof**

In this case the criticism of the modus adopted in conducting the TI parade by the Executive Magistrate was based on the evidence of two witnesses who said that the accused were taken on foot from the police station to the place where the parade was conducted and that their faces were not covered during such transit. The minutes of the test identification parade conducted by the Magistrate who himself was examined as PW contained details of the steps adopted by him. Seven other persons were kept ready in the room and the witnesses were kept in another room from where they could not see the suspect. Thereupon the suspect was brought from the lock-up with the help of two respectable persons and all precautions were taken that the witnesses could not see the suspect during such transit. Then the suspect was permitted to stand anywhere among the 7 persons. It was thereafter that the witnesses were brought with the help of the same respectable persons and the witnesses were then asked to identify the person whom they saw on the crucial day. The Supreme Court

Held :

Identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities

that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held. The safeguards adopted in this case by the Executive Magistrate were quite sufficient for ensuring that the parade was conducted in a reasonably foolproof manner.
(Paras 22 and 23)

Budhsen v. *State of U.P.*, (1970) 2 SCC 128 : 1970 SCC (Cri) 343; *Ramanathan* v. *State of T.N.*, (1978) 3 SCC 86 : 1978 SCC (Cri) 341, *relied on*

Suggested Case Finder Search Text (*inter alia*) :

(test identification or ti) parade

E. **Evidence Act, 1872 — Ss. 27, 106 and 114 — Recovery of dead body from a place pointed out by the accused — Possibilities also exist that accused would have seen someone else concealing the dead body at that place or he would have been told by somebody else that the dead body was concealed there — But if the accused does not tell the court about the happening of any of the two possibilities, then the court can presume that the accused had himself concealed the dead body**

Held :

Three possibilities are there when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by him. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by him. Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.
(Para 26)

Suggested Case Finder Search Text (*inter alia*) :

evidence 27 recovery dead (body or bodies)

F. **Criminal Trial — Circumstantial evidence — Falsity of defence plea — Rape and murder of a minor girl — Doctor finding injuries on the male organ of the accused (para 11) — No explanation could be given by the accused and instead false answer given — Held, such injuries sustained by the accused is a formidable incriminating circumstance and the false answer given by accused can be counted as providing a missing link for completing the chain of circumstances**
(Para 27)

R-M/TZ/21911/CR

Suggested Case Finder Search Text (*inter alia*) :

circumstantial evidence (falsity or false) (plea or reason or explanation or statement)

Advocates who appeared in this case :
S.V. Deshpande, A.P. Mayee, S.S. Shinde, G. Sathe, Ms Promila and Ms Hemantika Wahi, Advocates, for the appearing parties.

Chronological list of cases cited ***on page(s)***

1. (1980) 2 SCC 684 : 1980 SCC (Cri) 580, *Bachan Singh* v. *State of Punjab* 480*e-f*
2. (1978) 3 SCC 86 : 1978 SCC (Cri) 341, *Ramanathan* v. *State of T.N.* 479*a*
3. (1970) 2 SCC 128 : 1970 SCC (Cri) 343, *Budhsen* v. *State of U.P.* 479*a*

The Judgment of the Court was delivered by

THOMAS, J.— A gory episode is narrated in this case the gravamen of which is a grisly perpetrated rape and murder of a four-year-old female child. The rapist had abducted the child from her house and decoyed her to a field at Arvi (in Wardha District of Maharashtra State). After the rape and murder the mangled body of the child was dumped in the field where pulses and cotton were cultivated. The man whom the police challaned as a culprit was convicted and condemned to death penalty by the Sessions Court but he now stands exonerated as a Division Bench of the High Court of Bombay proclaimed him not guilty. The State of Maharashtra is not prepared to reconcile with the clean chit granted to him by the High Court and hence this appeal by special leave has been filed by the State.

2. Sneha is the name of the little child who was subjected to the beastly sexual ravishment. She was endearingly called Gangu by her kith and kin. She had a brother younger to her and the children were living in the family house which is presumably a joint family house. The life of Gangu was snuffed out on 22-12-1995.

3. As per the prosecution version the accused (who is the respondent in this appeal) was already an accused in another case facing an allegation that he committed rape and murder of one eight-year-old female child by the name of Ujawala. While he was in jail in connection with that case he came into acquaintance with a prisoner (PW 6 Sanjay) who is the brother of Gangu's father (PW 5 Rameshwar). Both of them were later released from prison. (We are told that the respondent was acquitted in that case.)

4. After such release from jail the respondent visited Sanjay's house, and subsequently he paid frequent visits to the said house. During such visits he made himself familiar to Gangu. On 22-12-1995 the respondent went to that house and when he was told that Sanjay had gone out, he left the house. Sneha was then playing near the gate of her house. The respondent would have moved away by alluring the little child to go with him. The fact remains that after the respondent left the house in the afternoon no one in that house had seen Gangu alive.

5. The respondent took Gangu to the shop of PW 8 Mahadeo, and later to the shop of PW 14 Motiram, and thereafter to a farm whereon pulses and cotton were cultivated. He chose that venue for sexually ravishing that little child and smothering her to death.

6. As Gangu was not seen in the house or its precincts till nightfall the panic-stricken members of her family began to make hectic searches for her. As all such efforts failed her uncle Raju went to the police station and reported that Gangu was missing from that house. Next morning her father Rameshwar (PW 5) went to the police station and lodged Ext. 22 complaint in which he expressed strong suspicion against the respondent regarding the disappearance of his child.

7. The respondent was arrested in the evening of 23-12-1995. During interrogation the police came to know that the dead body of the child was concealed in a farm. Though a search was made in the night to find out the spot where the body was concealed it did not fructify due to darkness. Hence the police resumed the search operation on the next morning and the spot was pointed out by the respondent wherefrom the dead body of Gangu was traced out.

8. When autopsy was conducted on the body by two doctors of the local hospital a woeful picture of sexual molestation was etched by them. Ext. 68 (post-mortem report) contains the data, inter alia, that the vagina was torn down at the perineal region by 1" with irregular lacerations and a fleshy torn portion was found protruding out therefrom. Contusions and abrasions on the labia majora of both sides besides swelling were also noticed by the doctor. There were a number of contusions and abrasions on her face also. Dr Avinash S. Lawhale, Medical Superintendent and Dr Pathoda, Medical Officer of Rural Hospital, Arvi, District Wardha, after completing the jointly conducted autopsy reported that death of the child was due to asphyxia caused by rape and smothering.

9. There is not even a speck of doubt that Gangu was kidnapped from her house and she was raped and killed by somebody on the evening of 22-12-1995. In fact the Sessions Court and the High Court concurrently found the aforesaid point affirmatively. The whole endeavour was therefore confined to the question whether the crime was committed by the respondent.

10. The trial court and the High Court focussed on the circumstances which the prosecution presented through the evidence for proving that the culprit in the ghastly infanticide was the respondent himself and none else. The Sessions Judge found that all those circumstances were established and they formed themselves into a complete chain unerringly pointing to the guilt of the respondent. But the Division Bench of the High Court differed from the findings of the Sessions Court regarding some of the circumstances and that resulted in exoneration of the respondent.

11. The circumstances which the prosecution presented can be recast as follows:

(*1*) the respondent visited the house of Gangu at about 3.30 p.m. and after he left the house it was realised that Gangu also disappeared;

(*2*) PW 8 Mahadeo saw the accused and a female child together in his shop at about 4.30 p.m. on the same day;

(*3*) PW 14 Motiram saw them together in his shop at about 4.00 p.m.;

(*4*) a little later PW 3 Sayyad Niyamat saw them walking along the road;

(*5*) the respondent after his arrest disclosed to PW 26 (Police Inspector of Arvi Police Station) that the dead body of the child was concealed in the farm and he offered to hand it over. Pursuant thereto the spot was pointed out by the respondent wherefrom the dead body was recovered;

(*6*) PW 20 Dr Avinash S. Lawhale stated that the person who caused the injuries on the vagina of the deceased child would have sustained injuries on his male organ. When the respondent was medically examined on 25-12-1995 by PW 22 Dr Nand Kumar it was noticed that his glans penis was swollen with multiple tiny punctuated abrasions besides abrasions on the posterior aspect of both elbow joints. According to the doctor those injuries could have been caused 48 hours earlier than the time of his examination;

(*7*) stains of human blood and semen were detected on the underclothes of the accused when he was arrested.

12. The Division Bench of the High Court was not disposed to rely on the evidence of the three witnesses who claimed to have seen the respondent and the girl together though their evidence was found reliable by the trial court. Nor did the High Court concur with the Sessions Court's finding regarding recovery of the dead body as a sequel to the information supplied by the respondent. The High Court declined to take the injuries which the doctor noticed on the person of the respondent as an incriminating circumstance on the premise that it is not a conclusive circumstance. The Division Bench side-stepped the circumstance that semen and blood were detected on the underclothes of the accused on the premise that there was delay in seizing those wearing apparels.

13. The evidence of PW 3 Sayyad Niyamat, PW 8 Mahadeo and PW 14 Motiram needs scrutiny by us because acceptability of that evidence will have a decisive impact on the final conclusion of this case.

14. PW 8 Mahadeo claimed to have seen the respondent with a little girl at his grocery shop around 4 p.m. on 22-12-1995. He said that the man with the girl had purchased some peppermint from his shop presumably for appeasing the girl as she was then crying. His reason for remembering this purchase was that next day he heard about the murder of a little girl and he visited the house of the girl on 24-12-1995, and identified the dead body as that of the same girl. In a test identification parade conducted by PW 28 Magistrate he identified the respondent as the person who accompanied the child.

15. PW 3 Sayyad Niyamat gave evidence that when he was returning from his Friday namaz he saw a young man holding a crying girl around 4.00

p.m. He too gave almost the same reason for remembering it that when he heard next day about the murder of a little girl he had some doubt whether it was the same crying girl. He also identified the respondent in the test identification parade.

16. PW 14 Motiram has a betel shop in the locality. His evidence is that a young man wearing pant and shirt visited his shop at about 4.30 p.m. and bought some "*kharra*" from the shop. He remembered it as a little girl was with him who was found crying then. When he heard next day about the murder he felt suspicious because the young man whom he saw the previous day in his shop was a total stranger in the locality. So he informed the police about it. He too was called in the test identification parade wherein he identified the respondent as the person whom he saw with the girl.

17. If a criminal court is to view the testimony of the aforesaid three witnesses as unnatural it would be easy to brush it aside with the stereotyped reasoning that those persons had no cause to remember having seen the man with the girl accompanying him. Such a reasoning overlooks the broad aspect that a human mind, on hearing about any shocking incident, would have the tendency to recollect any previous event which could have had a connection with that incident. If as a matter of fact those witnesses had occasion to see a crying girl of that age on the very day of the gruesome episode as happened in this case, there is nothing improbable in those witnesses remembering the person who was seen in the company of that girl. If they had immediately informed the police that they noticed a similarly-aged girl crying in the company of an utter stranger of that locality that cannot be brushed aside as a doubtful conduct. Either the three witnesses concocted the story falsely or what they said must be true. Why should they concoct it falsely? We are not told of any reason whatsoever for those three witnesses to bother themselves to concoct such a canard.

18. It seems that a minor discrepancy in their evidence had affected their credibility before the High Court. They said that they went to the police station on 24-12-1995, whereas PW 26 Police Inspector said that they visited the police station only on 25-12-1995. We do not attach any significance to the aforesaid discrepancy as PW 26 should have been more correct because he was speaking with the help of investigation records while the witnesses would have spoken from their memory only. Another reason advanced by the Division Bench is that when PW 3 Sayyad Niyamat went to the bereaved house he did not inform anyone in that family as to what he saw earlier. But PW 3 himself gave an explanation for it that as members of that family were then in a shock he did not venture to tell them about it at that occasion. Here also the question is not whether PW 3 should have told them despite his hesitation but whether the witness had chosen to adopt such a reticence in a situation like that. It is not for the court to suggest that he should have divulged it to the members of the bereaved family despite his own thinking about it. At any rate we are not impressed by the aforesaid reasoning for rejecting the testimony of an important witness like PW 3.

19. The Division Bench then advanced a theory that there is "an inherent incredibility in the evidence" on the premise that a culprit kidnapping a minor girl with a sinister design would normally take the precaution not to be seen by any other person on the way, but in this case the culprit along with the girl had moved from place to place in the town. We are unable to appreciate such a reasoning as a proposition of human conduct. For considering that reasoning it must be remembered that Gangu would certainly have been abducted by somebody (even assuming that it was not this respondent) and that person had taken the abducted girl from her house up to the farm. Unless it is suggested that there was another alternative and safer route for the culprit to take the girl unnoticed by any shopkeeper or even a pedestrian there is no rationale in the reasoning that there is "inherent incredibility" in the version that the respondent would have taken the girl through this route.

20. The last reasoning of the Division Bench is based on a criticism of the modus adopted by the Executive Magistrate who held the test identification parade. The aforesaid criticism was based on the evidence of two witnesses who said that the accused were taken on foot from the police station to the place where the parade was conducted and that their faces were not covered during such transit.

21. Ext. 17 is the minutes of the test identification parade conducted by the Magistrate who himself was examined as PW 2. It contains the details of the steps adopted by him. Seven other persons were kept ready in the room and the witnesses were kept in another room from where they could not see the suspect. Thereupon the suspect was brought from the lock-up with the help of two respectable persons and all precautions were taken that the witnesses could not see the suspect during such transit. Then the suspect was permitted to stand anywhere among the 7 persons. It was thereafter that the witnesses were brought with the help of the same respectable persons and the witnesses were then asked to identify the person whom they saw on the crucial day.

22. If potholes were to be ferreted out from the proceedings of the Magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting a test identification parade is twofold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed

in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held (vide *Budhsen* v. *State of U.P.*[1]; *Ramanathan* v. *State of T.N.*[2].)

23. When we scan through Ex. 17 minutes of the test identification parade we feel that the safeguards adopted by PW 2 Executive Magistrate were quite sufficient for ensuring that the parade was conducted in a reasonably foolproof manner. We feel that the Division Bench niggled on unimportant details and came to the wrong conclusion that the test identification parade was irretrievably vitiated. The reasons by which the testimony of those three witnesses had been jettisoned by the Division Bench were fatuous and we cannot support them.

24. One of the formidably incriminating circumstances against the accused was that the dead body was recovered as pointed out by the respondent. The statement of the respondent which led to the recovery of the dead body has been incorporated in Ext. 79 and the admissible portion of it reads thus:

> "Her dead body is kept concealed in the field; I will take it out and produce the same; come with me."

25. But unfortunately the Division Bench of the High Court did not rely on the above circumstance on a very fragile reasoning. The first limb of that reasoning was based on a mistake committed by PW 3 Sayyad Niyamat in his evidence when he said that he saw the dead body of the child on 23-12-1995. Much strain is not required in holding that what PW 3 said should have been understood as 24-12-1995. The second limb of the reasoning is that two other possibilities could not have been ruled out, of which one is that the respondent would have seen someone else placing the dead body at that spot, and the second is that the respondent would have been told by somebody else that the dead body was placed there.

26. We too countenance three possibilities when an accused points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself.

1. (1970) 2 SCC 128 : 1970 SCC (Cri) 343
2. (1978) 3 SCC 86 : 1978 SCC (Cri) 341

Such an interpretation is not inconsistent with the principle embodied in Section 27 of the Evidence Act.

27. It is regrettable that the Division Bench had practically nullified the most formidable incriminating circumstance against the accused spoken to by PW 22 Dr Nand Kumar. We have pointed out earlier the injuries which the doctor had noted on the person of the accused when he was examined on 25-12-1995. The significant impact of the said incriminating circumstance is that the accused could not give any explanation whatsoever for those injuries and therefore he had chosen to say that he did not sustain any such injury at all. We have no reason to disbelieve the testimony of PW 22 Dr Nand Kumar. A false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculpating him. In a situation like this such a false answer can also be counted as providing "a missing link" for completing the chain.

28. It is disconcerting that a case like this in which the prosecution has presented such reliable and formidable circumstances forming into a complete chain and pointing unerringly to the irresistible conclusion that the little girl Gangu was raped and killed by none other than the respondent himself, ended in unmerited acquittal from the Division Bench of the High Court. Criminal justice unfortunately became a casualty in this case when the High Court side-stepped all such circumstances and exonerated the culprit of such a grotesque crime.

29. We, therefore, set aside the impugned judgment and restore the conviction passed by the trial court. Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime, but as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases" envisaged by the Constitution Bench in *Bachan Singh* v. *State of Punjab*[3]. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 IPC, to imprisonment for life. The sentences imposed by the trial court on all other counts would remain unaltered. The bail bond shall stand cancelled. We direct the respondent to surrender to bail. We also direct the Sessions Judge, Wardha to take immediate and necessary steps to put the accused in jail if he is not already in jail, for undergoing the sentence imposed on him.

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3 (1980) 2 SCC 684 : 1980 SCC (Cri) 580