## **HEADING OF JUDGMENT IN SPECIAL CASE**

## **IN THE COURT OF SPECIAL JUDGE BILASIPARA**

Present:- Smti S. Bhuyan, AJS

Special Judge, Bilasipara

Special (POCSO) Case No- 04 of 2018

## u/s 376-AB/302/201 of IPC r. w section 6 of POCSO Act

#### **STATE**

#### **Versus**

#### Gauri Shankar Nath @ Banka

S/O Sri Budheswar Nath @ Buduru, R/O Vill- Puran (Old) Lawpara PS- Sapatgram, Dist- Dhubri, Assam

#### **Accused person**

(Corresponding to GR case No- 582/18 u/s 376-AB/302/201 IPC r.w section 6 of POCSO Act)

#### Advocate appeared:-

For the state:- Mr. T. Kr. Bhattacharya, Ld. Special P.P.

For the accused:- Mr. Hekmat Ali Sk., Advocate.

Date of institution of the case :- 30-04-18

Date of Framing charge :- 15-09-18

Date of prosecution evidence :- 27-09-18,28-09-18,29-09-18,01-10-18

03-10-18,04-10-18,05-10-18, 06-10-18,

31-10-18,28-11-18,04-01-19

Statement of accused recorded on :- 22-01-19

Date of Argument :- 27-02-19 & 13-03-19

Judgment delivered :- 25-03-19

Hearing on Sentence :- 29-03-19

Sentence Pronounced :- 29-03-19

#### **JUDGMENT**

#### **Prosecution Case**

1. The incident of this case was took place on 29-04-18. On the day of incident 7 years old daughter of the informant Pradip Kr Nath was missing from the Puran Lawpara school field where victim girl went to play from the marriage house, where one of the ceremonies of marriage of the daughter of accused's jethu (paternal uncle) P.W-14 was going on. The girl was seen with accused at village road by PW-6, PW-3 and PW-4. When news of the missing of the 7 years old girl was spread in the village, parents of the child with some of the villager of Puran Lawpara village made search for the girl and father of the girl asked Gauri Shankar Nath, about his daughter as he got information that his victim daughter was seen with him but father of the child did not get proper answer from the accused Gauri Shankar Nath and when father of the victim girl got message from one co-villager Dharmendra that accused Gauri Shankar Nath, is about to flee from the village, Pw-1 with the help of his covillager, Dharmendra and PW-6 (Pradip) made search for accused and they managed to apprehend him at Holong Bazar, brought him to school filed thereafter villager grilled him and before village people Gauri Shankar made statement of taking victim with him, committing rape on victim girl and then kill her and by this time someone informed the police about the missing of the girl and police from Raniganj outpost arrived at the Puran Lawpara village and received further information from the villager that accused Gauri Shankar after taking the victim committed rape on victim and killed the victim girl Miss X(named change). Thereafter police reached school filed, villager hand over accused Gauri Shankar Nath, to police, police took him to police station and on early next morning of the incident, accused Gauri Shankar Nath took police to the ditch near the Besimari Lutapara graveyard where he threw the girl and dead body of the girl was recovered.

2. In connection with this case Prodip Kr. Nath, father of the deceased victim child lodged one written ejahar (Ext-1) before i/c Raniganj Out Post on 30-04-18 wherein he made allegation that on 29-04-18 at about 06.30 pm, accused Gauri Shankar enticed his minor daughter Miss X (name changed hereinafter read as Miss X) aged about 7 years old to go with him from Puran Lawpara LP School field and after taking Miss X at Lutapara Samsan ghat committed murder of Miss X by strangulating her and thrown her to one ditch situated at Besimari. He along with his wife while searching for their daughter Miss X, they suspected on accused Gauri Shankar Nath and immediately they informed the matter to police and handed over accused Gauri Shankar Nath to police. Thereafter during interrogation by police, dead body of Miss X was recovered from a ditch as lead and shown by accused Gauri Shankar Nath.

## **Investigation of the case**

3. On receipt of ejahar from informant Pradip Kr. Nath, i/c Raniganj police out post forwarded the same to O/C Sapatgram P.S. for registration of the case and Officer-in-charge of Sapatgram P.S registered a police case vide Sapatgram Police Case No. 40/18 u/s 302 IPC and SI Emdadul Hussain was entrusted to conduct the investigation of the case and during investigation of the case on the prayer of the IO section 376-AB IPC r/w section 6 of POCSO Act were added. I/O visited place of occurrence that is Puran Lawpara schoolfield, took custody of accused Gauri Shankar Nath, interrogated accused Gauri Shankar Nath at police station and finally recovered the dead body of deceased victim child in a ditch situated at Lutapara (Besimari) Samsan ghat as per statement of the accused when accused lead police to the ditch present near the Besimari Graveyard and shown the dead body to police and PWs who were accompanied the police with the accused Gauri Shankar Nath. Thereafter IO called executive magistrate for inquest on the dead body and inquest on the dead body was done by one executive magistrate at the place of recovery of the dead body of the deceased victim child, IO drawn the site map of the place of recovery of the dead body, seized wearing apparels of deceased victim child along with the dead body at the place of recovery and jeans pant of the accused from the physical possession of the accused and after inquest of the dead body sent dead body for post mortem examination, sent seized articles for examination at FSL, Kahilipara Guwahati, seized bicycle which was used by the accused to carry deceased girl from the village school playground to the place of occurrence, recorded statement of the witnesses and produced witnesses before the Ld. Magistrate to record their statement u/s 164 Cr.P.C. and after collecting PM report submitted charge sheet against the accused Gauri Shankar Nath u/s 302/376-AB/201 IPC r/w section 6 of POCSO Act. IO of the case submitted FSL report before the court. IO of the case submitted charge sheet in section 6 of the POCSO Act, therefore, special case under POCSO Act has been registered to commence trial. The then Ld. SDJM(M) Bilasipara after adding section 6 of the POSCO Act forwarded the record to the Special Court.

#### **Charge**

4. This case is under POCSO Act together with penal section and therefore, after perusal of the case diary, case record, documents present with the record and submitted by the IO of the case, finding sufficient prima facie material to proceed with the case against the charge sheeted accused Gauri Shankar Nath u/s 302/376-AB/201 I.P.C, r. w section 6 of the POCSO Act, cognizance has been taken and after furnishing necessary copies to accused person and hearing learned counsel for both sides and perusal of material on record charge u/s 376-AB/302/201 of IPC and section 6 of POCSO Act has been framed against the accused Gauri Shankar Nath @ Banka and when charges are read over and explained to the accused person, he pleaded not quilty and claimed to be tried.

#### **Trial**

5. In order to prove the prosecution charges against the accused person, prosecution adduce evidence of all together 17 number of witnesses and exhibited 22 nos. of documents. PW-1 Prodip Kr. Nath, PW-2 Pranita Devi, PW-3 Chandra Bala Devi, PW-4 Anjali Devi, PW-5 Gajen Ch. Nath, PW-6 Pradip Kr. Nath S/O Lt. Tipin Ch. Nath, PW-7 Samendra Narayan Barman, PW-8 Dayal Nath, PW-9 Anil Ch. Nath, PW-10 Abdul Latif, PW-11 Dr. Sk. Md. Azahar (M.O), PW-12 Nabajit Pathak, PW-13 Chandra Prava Devi, PW-14 Lalit Kr. Nath, PW-15 Lumanta Kr. Nath, PW-16 SI Imdadul Hussain (I.O) and PW-17 Dr. Monalisha Choudhury (Scientific Officer). Ext-1 Ejahar, Ext-2 inquest report, Ext-3 Statement of PW-3 recorded u/s 164 Cr.P.C, Ext-4 Statement of PW-4 recorded u/s 164 Cr.P.C, Ext-5 Seizure list, Ext-6 statement of PW-6 recorded u/s 164 Cr.P.C, Ext-7 Seizure list, Ext-8 Seizure list, Ext-9 statement of PW-7

recorded u/s 164 Cr.P.C, Ext-10 Statement of PW-9 recorded u/s 164 Cr.P.C, Ext-11 Post Mortem Report, Ext-12 Statement of PW-15 recorded u/s 164 Cr.P.C, Ext-13 informant general diary entry no. 376 dated 29-04-18 of Raniganj out post, Ext-14 general diary entry no. 381 dated 30-04-2018 of Raniganj out post, Ext-15 general diary entry no. 382 dated 30-04-18, Ext-16 requisition sent to Dhubri Civil Hospital to conduct post mortem examination on dead body of victim child, Ext-17 Dead body challan, Ext-18 Command Certificate, Ext-19 Seizure list, Ext-20 Sketch map of the place of occurrence where accused took victim, Ext-21 Sketch map of the place of occurrence where dead body of victim recovered and Ext-22 Charge sheet, Ext-23 DNA test report, Ext-24 Serological report and Ext-25 forwarding letter of the Director cum Chemical Examiner to the Govt. of Assam. After closure of the prosecution evidence, statement of the accused person recorded u/s 313 Cr.P.C. Accused plea is denial, however declined to adduced evidence in support of the plea of denial.

## 6. **POINTS FOR DETERMINATION:-**

- i) Whether accused on 29-04-18 at about 06.30 pm at Luthapara under Sapatgram PS, committed rape on informant's daughter Miss X (aged about 7 years old) under the age of 12 years?
- ii) Whether accused on 29-04-18 at about 06.30 pm at Luthapara under Sapatgram PS, committed murder intentionally causing the death of informant's minor daughter Miss X?
- iii) Whether accused on 29-04-18 at about 06.30 pm at Luthapara under Sapatgram PS, knowing or having reason to believe that rape of Miss X has been committed, thrown Miss X into a pond ditch and did cause certain evidence of said offence disappear, to wit or knowingly gave false information, to wit with the intention of screening the offender from legal punishment?
- iv) Whether accused on 29-04-18 at about 06.30 pm at Luthapara under Sapatgram PS, committed aggravated penetrative sexual assault on informant's daughter Miss X aged about 7 years old?

#### **ARGUMENT**

7. Ld. Special. P.P contended that the offence committed by the accused in the present case is not only heinous crime, but it is rarest of rare crime and shock and shivered the society as a whole and the offence committed by the accused pointed females are not safe in the presence of accused. Ld. Special. P.P further submitted incident was took place on 29-04-18 when one function in respect of marriage ceremonies of the paternal uncle of accused who is the neighbour of PW-1, the informant and accused was going on and in the said marriage house deceased victim child, her parents, other villagers of the village attend as guest and PW-1 was the cook of the function. He contended when victim child went to play in the playground of school present near her and marriage function house, accused took benefit of presence of villager in the marriage house, took away the victim child to an isolated place and taking of Miss X by the accused from the school filed was seen by PW-4 from the marriage house where she came as guest. Ld. Special PP contended after taking the child accused committed rape on victim girl (deceased) and to eliminate evidence he threw her in the ditch causing head injury on her with intent and knowledge that if he threw the injured child in the water body with her head face neck (upside down position) submerged under water she would definitely die. Thereafter, accused to give colour of innocence returned to his house with his nephew whom he took along with the victim girl and accused returning was noticed by PW-1, the informant and father of the deceased victim child. Ld. Special P.P submitted when accused was asked about the child, he did not give satisfactory answer and tried to mislead the villager and thereafter accused tried to escape from the village but same was spotted by one villager. Accordingly villager alerted father (PW-1) of the deceased victim child and PW-1 with the help of other villagers able to capture him when he was trying to leave the village and he was brought back to village where he made confession before the villagers that he took away the deceased victim child, rape her and threw her body. Ld. Special. P.P further submitted though accused at very first instance did not disclosed the place where he threw the dead body but finally it is accused statement that disclosed the presence of dead body of the deceased victim child and accused in the early morning of 30-04-18 at about 04.00 am took police to the Besimari pond near Samsan ghat and showed the dead body and dead body was recovered in presence of witness (PWs), informant, police as lead, disclosed and shown by the accused Gauri Shankar Nath. Ld. Special. P.P further submitted post mortem report clearly, pointed commission of rape on the deceased child and FSL report on the seized pant of accused and panty of deceased that deceased was wearing at the time of incident and accused was wearing on the date of incident gave positive result for presence of semen. Ld. Special. P.P submitted accused trying to abscond immediately after the incident pointed his guilty and he tried to abscond only to evade his prosecution. Ld. Special. P.P submitted there is complete chain of circumstance that goes against the accused and only proved his quilty and no inference of his innocence came to play and there is no delink, no interruption no snag present in the chain of circumstances and prosecution beyond all reasonable doubt established prosecution charges of section 376-AB/302/201 IPC r.w. section 6 of the POCSO Act against the accused Gauri Shankar Nath and prays for stringent punishment for accused Gauri Shankar Nath arguing that this is a case of rarest of rare one and first of its kind in the Bilasipara Sub-Division and in the Dhubri district and shock the whole community. Ld. Special. P.P prays for exemplary punishment so to send a message to the society that nobody will looked into woman with bad eye and to curb the menace, crime that is frequently took place in the State and to have faith of the public upon the judiciary.

8. Countering the same, ld. defence counsel contended that there is no eye witness to the incident and prosecution case is based on hearsay evidence that is not admissible under the Evidence Act. Ld. Counsel further contended whole prosecution case is based on only one clue that deceased victim child was seen with accused on his bicycle with accused on the date of incident and that drawn up suspicion and conclusion against the accused that it was accused who had committed the murder of the deceased child. Ld. Defence counsel further contended bicycle was seized from the house of other person, not from the accused person. So, accused hand in the rape with murder of deceased child not established against the accused beyond all reasonable doubt. It has been further contended by ld. defence counsel that public torture accused and handed over to the police and accused though took police to ditch and dead body of the deceased child was recovered on next day of incident but that does not established that dead body was recovered as per statement of accused as because he was tortured by villager. He further submitted police to safe their skin compelled accused to identify the dead body. Ld. counsel further made stretch on the point that whole prosecution case is based only on one assumption that victim was last seen with the accused and that is not sufficient to hold accused guilty of prosecution charge and prosecution totally failed to connect accused link to the heinous crime of rape and murder of the victim child that shock the whole community and accused Gauri Shankar Nath is an innocent person and prosecution failed to establish the prosecution charges against the accused Gauri Shankar Nath beyond all reasonable doubt.

#### **PROSECUTION EVIDENCE**

9. PW-1 Prodip Kumar Nath is the informant of the case. His evidence is that deceased victim child was his daughter and she was aged about 7 years old at the time of incident and accused Gauri Shankar Nath is his neighbour. He deposed incident was took place on 29-04-18 and on that day there was marriage ceremony in the house of his neighbour who is paternal uncle of accused Gauri Shankar Nath. On the day of incident he also visited the marriage party which was held in the house of paternal uncle of accused as invited to cook for the marriage party and at about 05.30- 06.00 pm his deceased victim daughter was playing in the Lawpara Prathamik Vidyalaya school field and accused Gauri Shankar was present at the time in the field while his deceased victim daughter was playing in the field. His deceased daughter went to play in the field telling him that she was going to play in the Lawpara Prathamik Vidyalaya school field. When time was dusk, his wife Pranita Devi came to him and asked him to bring their deceased daughter and they used to call their deceased daughter by nick name. Accordingly he went to bring his deceased daughter from the Lawpara Prathamik Vidyalaya School filed but he did not find his daughter there. Immediately he made search for their daughter and inquired about his daughter to other persons. To that one of his neighbours Anjali Devi told him that she had seen accused Gauri Shankar taking away his deceased daughter on his bicycle. Hearing the same, he made search for accused Gauri Shankar and also inform the matter to his friend Pradip. After one hour he had noticed accused Gauri Shankar Nath returning from north side towards his home on bicycle with his nephew aged about 3 years old. Seeing accused Gauri Shankar, he stopped him and asked about his deceased daughter and at that time his wife was also present with him. On being asked, accused Gauri Shankar told him that he (accused) had already dropped his deceased daughter at their (PW-1 informant) house. He told to accused Gauri Shankar that his deceased daughter is not found at home to that accused Gauri Shankar told him (informant) that he (accused) too will search his deceased daughter and accused Gauri Shankar shown him that he (accused) went to search his deceased daughter. He followed accused Gauri Shankar along with one Dharmendra and his mita Pradip and they saw accused Gauri Shankar entering into the house of Naba Nath but accused Gauri Shankar did not returned back from the house of Naba Nath. Thereafter he went to the house of Naba Nath to ask him about the accused Gauri Shankar Nath. To that wife of Naba Nath replied to him that accused Gauri Shankar Nath did not visit their house. Getting this reply from the wife of Naba Nath he suspected of accused will run out from village to abscond. Immediately he along with Shankar, Dharmendra and Mita Prodip made search for Gauri Shankar Nath on Motor Cycle and they noticed and apprehend accused at Halong bazar near their village. Thereafter they bring accused Gauri Shankar Nath to their village on motor cycle and interrogated accused. Accused was not giving answer to their questions properly. Some of the villagers manhandle accused and police was also informed about the incident. Thereafter police arrived at their village and along with police he, accused Gauri Shankar Nath, his Mita Prodip, Somen, Dayal, Rumanta Nath, Sadhu (nickname) and others made search for his deceased daughter and finally accused Gauri Shankar Nath took them to Lutapara Samsan Ghat at about 04:30 a.m in the next morning and shown the dead body of his deceased daughter in a ditch and dead body was recovered as shown and lead by the accused Gauri Shankar Nath. Seeing dead body of his deceased daughter he fainted, fell down on earth. After few minutes, he regained his senses and look into the dead body of his daughter. He noticed the head of the dead body was submerged under the ditch water and half of the body is on the side of the ditch. Her panty was removed and there was blood stain on the forehead and back of the head of his deceased daughter. He deposed police took photographs of dead body at the time of recovery of dead body and inquest was done on the dead body by the Magistrate. Thereafter in connection with this incident he has lodged ejahar vide Ext-1 and he put his signature on ejahar vide Ext- 1(1). He also put his signature on Ext-2 inquest report vide Ext 2 (1). He deposed the photographs shown to him by Ld. Special. P.P before the court are the photographs of his deceased daughter. **In**  cross he stated he works in the steel furniture making company at Guwahati and he came to his native house during Bihu in the month of April. He stated accused Gauri Shankar Nath is his adjacent neighbour and they are having common courtyard. He stated he visited in the house of jetha of accused Gauri Shankar where marriage occasion was held and same is present next to the house of accused Gauri Shankar and in the said marriage ceremony he worked as cook for the marriage party. He stated he had seen accused Gauri Shankar Nath sitting in the school field while his deceased daughter was playing in the school field but he did not see accused Gauri Shankar Nath taking his daughter on his bicycle. He stated he cannot say the exact time when his daughter was playing in the field but probably the time was 04:30 p.m to 05:30 p.m and he made search for his daughter from 06:00 p.m. He stated he saw accused Gauri Shankar Nath was coming to his house on his bicycle with his nephew while he was searching for his deceased daughter and he met accused near the school field and accused was coming from the north side. He stated while accused Gauri Shankar Nath was asked, accused told him that he had dropped his deceased daughter at his house. He further stated when he asked Bhagin of accused, where about of his deceased daughter, Bhagin of accused told him that accused Gauri Shankar Nath taken him (Bhagin) and deceased victim child along with him and accused had threw deceased victim child. After disclosing the fact that accused Gauri Shankar Nath threw his daughter Deceased victim child in the water body by the Bhagin of accused to him, accused Gauri Shankar told him that he too will made search for his daughter and proceeded on the other direction and run out. He stated at the time of incident Bhagin of accused was little boy and could not speak properly therefore they did not took Bhagin of accused along with them for the search of his deceased daughter considering the tender age of Bhagin of accused Gauri Shankar. He stated when accused Gauri Shankar fled away, they apprehend accused and brought accused to the village and at that time other villagers assaulted accused Gauri Shankar Nath. Accused Gauri Shankar Nath was surrounded by villager for about 11/2 hour till arrival of the police and police was informed about the incident. Later on police arrived and took custody of accused Gaur Shankar and on the next day of taking custody of Gauri Shankar by the police, he went to the police station. When Police took custody of accused Gauri Shankar Nath, he was still searching for his deceased daughter with other co-villager and in the early morning at about 04:00am/04:30am police came to their village with accused Gauri Shankar Nath and at that time accused Gauri Shankar Nath took police and them to the Lutapara Samsan Ghat and shown dead body of his deceased daughter in a ditch and at that time he was behind the police following the police to the site of recovery of his deceased daughter. He stated he did not witness the murder incident of his deceased daughter. He denied defence suggestion that he deposed falsely before the court that he heard from Anjali Devi that accused Gauri Shankar Nath taken away his deceased daughter on his bicycle; accused Gauri Shankar Nath did not committed murder of his deceased daughter. He further stated one Chandra also told him that she too noticed accused Gauri Shankar taking away his deceased daughter.

10. PW-2 Pranita Devi deposed informant Prodip Kr. Nath is her husband and deceased was her daughter and her deceased daughter was 7 years old at the time of incident. She deposed she knows accused Gauri Shankar Nath and he is her co villager. She deposed native house of her husband is at Puroni Lawpara and generally they stayed at Guwahati but in the month of April during Bohag Bihu, she along with her husband and deceased daughter came to their native house at Puroni Lawpara. She deposed incident was took place in the Assamese Bohaq month of the year 2018 and the date is 29th. There was marriage ceremony of Tanu at her house on the day of incident. Tanu is their neighbour. She deposed her deceased daughter was playing with others in the marriage house and her husband Prodip Kr. Nath was working in the said marriage party. She deposed while she told her husband Prodip Kr. Nath to bring their deceased daughter at house, her husband made search for their deceased daughter but did not find their deceased daughter. Thereafter she and her mother in law too made search for her deceased daughter but did not find. From the people present in the marriage house, she came to know that accused Gauri Shankar Nath took her deceased daughter somewhere. After sometime she saw accused Gauri Shankar coming along with his nephew, seeing accused she asked about her deceased daughter to accused and accused replied to her that he did not take her deceased daughter along with him. When their deceased daughter was not found, she became unwell and later on she heard that accused Gauri Shankar Nath @ Banku killed her deceased daughter after committing rape on her. She further deposed her husband Prodip Kr. Nath told her that the Bhagin of accused Gauri Shankar Nath told him that accused Gauri Shankar Nath @ Banku killed their deceased daughter. Her husband further told her that accused Gauri Shankar had killed her deceased daughter after committing rape on her. She deposed she was informed about the recovery of dead body of her deceased daughter by her husband but she was not present when dead body of her deceased daughter was recovered. She deposed she saw dead body of her deceased daughter when dead body of her deceased daughter was brought to their house. She saw injury mark on the forehead of her deceased daughter and her deceased daughter was in naked condition. She further deposed dead body of her daughter was recovered in the early morning at about 04:00 am - 04:30 am and she got to know that after inquest, dead body was sent for post mortem. In cross she stated the marriage of Tanu was held on the date on incident and she went to the marriage house as invited but she returned back home and her deceased daughter remained in the marriage house and her deceased daughter told her that she wanted to play with her friends and stayed. She stated several other children were playing in the marriage house and her daughter joined them and play with them in the marriage house. She stated at about 06.00 p.m she asked her husband to bring their daughter and at that time, she did not go to find out her daughter. She made search for her daughter later on. She stated the people present in the marriage house told her that accused Gauri Shankar Nath @Banku had taken away her deceased daughter on his bicycle. She stated she does not know from where and who had recovered the dead body of her deceased daughter. She stated she do not know who had killed her deceased daughter and what was done with her deceased daughter.

11. PW-3 Chandra Bala Devi deposed she knows informant, deceased daughter of informant and accused Gauri Shankar Nath and house of accused Gauri Shankar is adjacent to the house of informant Prodip Kr. Nath. She deposed incident was took place in the year 2018 in the month of Assamese Bohag. On the date of incident at about 06:30 p.m while she was returning home from Lawpara Puroni Bazar, she saw accused Gauri Shankar Nath with deceased victim child and his one nephew together on the bicycle of accused Gauri Shankar Nath at a little distance from one field. Later on, father of the deceased came to her house and asked her if she had seen deceased victim

child. To that, she replied to informant Prodip Kr. Nath that she had seen deceased victim child with accused Gauri Shankar Nath and his nephew on the bicycle of accused Gauri Shankar Nath. She deposed on the day of incident she heard about missing of deceased victim child and on the next morning at about 04.30 am she heard that dead body of deceased victim child was recover. Accordingly she went to see the dead body and saw the dead body was lying naked and deceased was rape and murdered. She deposed she did not see accused Gauri Shankar in the house of Prodip Kr. Nath when she went to see the dead body of Deceased victim child after recovery but she saw large gathering of people and police there. She stated police produced her before the Magistrate and she made statement before the Magistrate vide Ext-3 and Ext-3 (1) is her signature. **In cross** she stated incident was took place in the month of Assamese Bohag in English year 2018 but she can't say the date. She stated her house is on the south direction from the house of informant and accused and she has to cross the house of accused and informant to reach her house from the Lawpara Puroni Bazar. She stated the Lawpara Puroni Bazar where she visited on the day of incident is on the east direction from her house. She stated while she was returning from the Lawpara Puroni bazar, she met accused Gauri Shankar Nath along with deceased victim child and his nephew and they were proceeding towards east direction of her house. She stated she does not know who had rape, murdered deceased victim child and from where dead body of deceased victim child was recovered. She denied defence suggestion that she did not made statement before the police that she had seen accused Gauri Shankar Nath taking deceased victim child along with his nephew on his bicycle.

12. Evidence of PW-4 Anjali Devi is that she knows informant Prodip Kr. Nath, deceased victim child and accused Gauri Shankar Nath. She deposed her house is very close to the house of informant and accused Gauri Shankar Nath. She deposed on the day of incident, she was present in the house of Lalit Nath, the jethu of accused Gauri Shankar Nath for the marriage ceremony and from the house of Lalit Nath, she saw accused Gauri Shankar Nath taking away deceased victim child and his nephew Tilak Nath on his bicycle. On the next morning dead body of deceased victim child was recovered and she saw undressed naked body with injuries on the forehead of deceased victim child and blood was oozing out from the nose. She deposed when she went to see

the dead body, she heard from the gathering present in the house of informant that dead body of deceased victim child was recovered from a ditch and she also heard that accused Gauri Shankar Nath committed murder of deceased victim child after committing rape on her. She deposed police recorded her statement, produced her before the Magistrate and she had made statement before the Magistrate vide Ext-4 and Ext-4 (1) is her signature. She further deposed she had stated same statement before the Police and before the Magistrate whatever statement she made before the court today. **In cross** she stated her house is on the south side of the house of informant and accused Gauri Shankar Nath. She was invited to the marriage party and she performed some duties (work) in the marriage house. She stated when accused Gauri Shankar Nath took deceased victim child and his nephew in his bicycle she had notice the same from the marriage house and accused taken deceased victim child from the school field present near the marriage house. She stated from gathering present in the house of informant, she heard that accused Gauri Shankar Nath committed murder of deceased victim child after committing rape on deceased victim child but she can't say the name of those persons from whom she came to know the same. She stated she does not know the place from where dead body was recovered. She stated she does not know how deceased victim child was murdered.

13. PW-5 Gajen Ch. Nath deposed informant Prodip Kr. Nath is his neighbour and he knows deceased victim child and accused Gauri Shankar Nath. He deposed on the day of incident, accused Gauri Shankar Nath took deceased victim child on his bicycle for riding and he came to know about the missing of deceased victim child about 07-00 pm - 07-30 pm when hue and cry took place in their village with regard to the missing of deceased victim child. He heard that before missing, deceased victim was taken by accused Gauri Shankar Nath on his bicycle for riding. He further heard that accused Gauri Shankar Nath fled away and youth of their village search accused on Motor Cycle and finally accused was apprehended by village youths and was brought back to their village. He deposed when father of deceased victim interrogated accused Gauri Shankar Nath about his missing daughter, accused Gauri Shankar Nath confessed that he had taken deceased victim child on his bicycle for riding and when village people and father of the deceased victim, the informant Prodip Kr. Nath asked accused Gauri Shankar Nath about the child,

accused Gauri Shankar Nath took them to several places and at that time police was also informed by the villagers. Special. S.P., Dhubri and other police personnel arrived to their village and one section of the police deputed in their village and one section of the police took custody of the accused Gauri Shankar Nath and took him to the police station. After 12 O'clock night other villagers went to their respective home, but he along with Prodip Nath, S/o. Tipin Ch. Nath, Somen Ch. Barman, S/o. Dipendra Barman, Dayal Ch. Nath, S/o. Letha Ram Nath, Piya Ram Nath, Lumanta Kr. Nath, S/o. Lt. Narendra Ch. Nath stayed in the 1533 Lawpara L. P. School campus and at that time accused Gauri Shankar Nath stated presence of deceased victim child at different places and at that time they were informed by the police ASI Kapil of Raniganj Out Post to verify and to look out the fact but on searching in different places as stated by accused Gauri Shankar Nath they did not find the deceased victim Thereafter at about 04:05 a.m, accused Gauri Shankar Nath was brought to their village by the police accompanied by Special. S.P., Dhubri and accused Gauri Shankar Nath took them and police to the Lutapara Samsan Ghat situated near the river Kachua and accused Gauri Shankar in presence of him and other villagers and in presence of police shown the place where dead body of deceased victim was kept by him. He deposed dead body of deceased victim child was recovered from a ditch present near the river Kachua as shown and lead by accused Gauri Shankar in presence of him and presence of villagers and police. He saw the head of the body of deceased child was submerged under the water and inner was removed and her frock was above her chest. He also saw injury mark on the forehead of the deceased victim child and blood was oozing out from the nostril and there was mark of violence and injury present in her private parts which pointed that deceased child was rape and then murdered. Thereafter he lifted the dead body of deceased child on being directed by police and covered the dead body of deceased child with his gamosa. Thereafter Magistrate arrived at the place of recovery of dead body, Magistrate thoroughly look into the dead body and did inquest on the dead body in his presence. He deposed he put his signature on the Ext-2 inquest report vide Ext 2(2). Police also took his signature on Ext-5 seizure list at the time of seizure of wearing dress of deceased. He further deposed M-Ext.1 is the Photograph of the accused taken by the police at the place of recovery of the deceased in his presence. M-Ext.2 and M-Ext.3 are the photographs of the deceased. M-Ext.3 is the photograph of the deceased taken at the exact place of recovery where deceased was threw by the accused and found in the ditch upside down. **In cross** he stated the Photograph, material M-Ext.1, M-Ext.2, M-Ext.3 were not seen at the place of recovery but police had taken photograph of the deceased and accused at the place of recovery. He stated he did not seen accused Gauri Shankar Nath taking deceased victim child on his bicycle for riding. He stated the murder of deceased victim child was not seen by him but her dead body was recovered from the ditch as shown and lead by accused Gauri Shankar Nath. He stated the place of recovery of dead body is about 11/2 km away from the house of Informant Prodip kr. Nath and there is no human inhabitant near the place of recovery of dead body. He denied defence suggestions he deposed falsely before the court that accused Gauri Shankar Nath confessed before them that he had taken deceased victim child on his Bicycle, rape her and murdered; when accused refused to confessed, they handed over him to police; accused Gauri Shankar Nath is not involved in the rape and murder of deceased victim child.

14. PW-6 Pradip Kr. Nath S/O Lt. Tipin Ch. Nath deposed informant Prodip Kr. Nath is his Mita as well as neighbour and deceased victim child was aged about 7 years old at the time of incident. He deposed on the day of incident on 30-04-18 he was coming to his house at Raniganj and at that time in the Bridge present in their village, he saw accused Gauri Shankar Nath with deceased victim child and nephew of accused on the bicycle of accused Gauri Shankar Nath. After reaching his house, while he was at his home after taking meal, his Mita informant Pradip Kr. Nath called him over mobile and informed him that his daughter was missing. Thereafter informant called him to his house. When he reached the house of his Mita Prodip Kr. Nath, one boy of their village namely Dharmendra Nath told them that accused Gauri Shankar Nath was going towards Bilasipara town. Thereafter he along with his Mita informant Prodip Kr. Nath and Dharmendra proceeded on a bike and at Halong bazar, they met accused Gauri Shankar Nath. They called and stopped accused Gauri Shankar Nath, and took accused Gauri Shankar Nath along with them in their village and informed the police of Raniganj. On being asked about deceased victim child, accused Gauri Shankar stated different stories of deceased victim child's presence at different places. At that time, police arrived at their village and police also interrogated accused Gauri Shankar Nath and police took custody of accused and took him to the police station. At that time one section of the police deployed in the village and one section of police present at police station interrogated accused Gauri Shankar Nath at the police station and at that time accused stated different stories of the presence of deceased victim child before the police and as informed to them by the police from the police station, they along with section of police deployed in the village went to those places that were stated by accused Gauri Shankar Nath but they did not find any clue of deceased victim child. Thereafter at about 04.00 a.m to 04.30 a.m in the early morning Special. S.P., S.D.P.O., Bilasipara and other police personnel brought accused Gauri Shankar Nath and at that time accused Gauri Shankar Nath lead the police to the Kachua beel and shown the dead body of deceased victim child. He deposed Kachua beel is present at about 11/2 km away from his house and when accused shown the dead body, they saw dead body was lying half submerged under the water, her head was submerged under the water and her panty was removed and dress was lifted to the upper parts of her body. He deposed one Gajen Nath lifted the dead body in presence of police and villagers and at that time he had seen injury on the head of the deceased and the place where dead body was lying is also blood mixed with the water. He deposed accused Gauri Shankar Nath confessed before them that he after committing rape, killed the girl. Dead body of deceased victim child was brought to police station from the place of recovery of dead body of deceased victim child and dead body was sent to Dhubri Civil Hospital for post mortem. He deposed he was produced before the Magistrate by the police and he made statement before the Magistrate. Ext-6 is his statement recorded u/s 164 Cr.P.C and Ext 6(1) is his signature. He deposed police seized one bicycle belonging to accused Gauri Shankar Nath vide Ext-7, police also seized one panty, frock and red blouses of deceased victim child vide Ext-8. He deposed dead body of deceased victim child was wearing green colour panty, red colour blouse and white colour frock. M.Ext.1 is the photograph of accused Gauri Shankar Nath. M.Ext.2 is the photograph of deceased victim child and M. Ext.3 is the photograph of deceased victim child which was taken when dead body was recovered in the Kachua beel. In cross he stated M.Ext-1, M. Ext-2 and M. Ext-3 photographs are taken by the police and he had seen police taking photographs vide M.Ext-1, M.Ext-2 and M. Ext-3. He stated when they interrogated accused Gauri Shankar Nath, accused took them to different places telling them about the presence of deceased victim child and accused Gauri Shankar Nath tried to abscond. He stated he did not see the murder scene of deceased victim child. 'He denied they did not held up accused at the Halong bazar; he had beaten accused Gauri Shankar Nath along with co-villagers; they forced accused Gauri Shankar Nath to confess and beaten them to confess the guilty; accused Gauri Shankar Nath is an innocent and they falsely implicated him.'

15. PW-7 Samendra Narayan Barman @ Samen Barman deposed informant Prodip Kr. Nath is his neighbour and deceased victim child was daughter of informant and she was about 7 years old at the time of incident. He further deposed accused Gauri Shankar Nath hails from his village and house of accused Gauri Shankar Nath and informant is adjacent to each other. He deposed on the day of incident on 29-04-18 at about 09.00 pm he heard that informant's deceased daughter was missing, deceased daughter of informant was taken by the accused Gauri Shankar Nath, public apprehended accused Gauri Shankar Nath, brought accused to their LP school field and accused was interrogated by the village people. Hearing the same, he went to the LP School field, noticed accused Gauri Shankar Nath being questioned by village people about deceased victim child and at that time accused Gauri Shankar Nath given different replies to the villagers where about of the deceased victim child. Police was informed about the incident, police arrived at the place and took custody of accused Gauri Shankar Nath and took him to the police station leaving one section of the police in the L P. School field. Thereafter police at the police station interrogated accused Gauri Shankar Nath about deceased victim child and at that time accused gave different stories of deceased victim child of her presence and accordingly police of Raniganj O.P. informed the police who were deployed at the L. P. School field and villager with the help of police deployed in the L. P. School field made searches of deceased victim child in those places stated by the accused Gauri Shankar Nath but she was not found. Thereafter in the morning hour, at about 04:30 a.m. accused Gauri Shankar Nath was brought back to the village from the police station by Special. S.P., Dhubri, S.D.O. (Civil), Bilasipara and police of Raniganj O.P. and accused Gauri Shankar Nath took police to the Kachua beel present near the Samsan Ghat and accused Gauri Shankar Nath shown the dead body of Deceased victim child in the Kachua beel. He too went to the Kachua beel where accused took police personnel to the Kachua beel and he has seen the dead body of deceased victim girl was recovered from the Kachua beel as shown and lead by accused Gauri Shankar Nath. He noticed there was no dress of the lower part of the deceased. He deposed as commanded by the police, one Gajen Nath lifted the dead body of deceased victim child after recovery of dead body of deceased victim child as shown and lead by accused Gauri Shankar and he had seen head injury on the dead body of deceased victim child. He deposed police produced him before the Magistrate and he made statement before the Magistrate vide Ext-9 and Ext-9 (1) is his signature. He deposed at the time of taking custody of the dead body with her dress police took his signature in Ext.5. M.Ext.1 is the photograph of accused Gauri Shankar Nath. M.Ext.2 and M.Ext.3 are the photographs of deceased victim child, which was taken at the place of recovery of dead body. In cross he stated he does not know where accused Gauri Shankar Nath took deceased victim child riding on his bicycle. He does not know who had killed deceased victim girl and in what manner. He stated he had stated before Ld. Magistrate that accused Gauri Shankar Nath disclosed before them that after committing rape on deceased victim child, he had murdered her and accused stated these statements before them. He stated he did not made statement before police that accused Gauri Shankar Nath disclosed before them that he had killed deceased child after committing rape on her. He stated when police took accused Gauri Shankar Nath to the Police station leaving one section of Police at L. P. school field, he spent whole night with the police till the period of recovery of dead body of deceased victim child. He denied he and other villagers assaulted accused Gauri Shankar Nath on the night of the incident; accused Gauri Shankar Nath is not involved in the rape and murder of deceased victim child.

16. PW-8 Dayal Nath deposed informant Prodip Kr. Nath is his neighbour and deceased victim child was daughter of informant Prodip Kr. Nath. He deposed deceased victim child was 7 years old at the time of incident and incident was took place on 29-04-18. He deposed on the day of incident at night hour, while he arrived at his home from his work, he came to know that deceased victim child was missing. Hearing the same he went to the house of informant Prodip Kr. Nath and found accused Gauri Shankar Nath was held by the villagers. Police was also arrived at the place and police after taking

custody of the accused, taken accused to the police station and one section of police left in the village. He along with villagers and one section of police made search for deceased victim child but did not find her and in the next morning at about 04:00 a.m to 04.30 am, police came to their village with accused Gauri Shankar Nath and at that time accused Gauri Shankar Nath took police at Kachua (besimari) beel near Samsan ghat and shown the dead body of deceased victim child at Kachua (besimari) beel, and accordingly dead body of deceased victim child was recovered as lead and shown by accused Gauri Shankar Nath and at the time of recovery of dead body of deceased victim child he was also present. He saw dead body and found undergarment of dead body was pulled down up to knee and her frock was present above her chest and he also saw one head injury on the dead body of deceased victim child. He deposed one Gajen Nath of their village had lifted the dead body of deceased child after recovery of the dead body as shown by the accused Gauri Shankar and after recovery of dead body, police took dead body for post mortem. He deposed M.Ext.1 is the photograph of accused Gauri Shankar Nath. M.Ext.2 and M.Ext.3 are the photographs of deceased victim child which was taken at the place of recovery of dead body. **In cross** he stated hearing the missing incident of deceased victim child from his wife, he went to the house of informant Prodip Kr. Nath and found accused Gauri Shankar Nath held up by the village people. Thereafter when police questioned accused Gauri Shankar Nath about deceased victim child, he replied his ignorance about deceased victim child. He stated he does not know who had killed deceased victim child and where. 'He denied he deposed falsely that police brought accused Gauri Shankar Nath in the morning about 04:00 a.m - 04:30 a.m in their village; he deposed falsely that accused Gauri Shankar Nath shown the dead body of deceased victim child in his presence and in presence of villager at Kachua (besimari) beel near Samsan ghat'.

17. PW-9 Anil Ch. Nath deposed informant Prodip Kr. Nath is his neighbour and deceased victim child was daughter of informant and she was 7 years old at the time of incident. He also knows accused Gauri Shankar Nath and he is his co villager. He deposed he is VDP Secretary of the village Puran Lawpara. He deposed incident was took place in the year 2018 in the month of April and Assamese Bohag on 29<sup>th</sup> April and on that day, one marriage party was going on in the house of Lalit Nath. On that day at about 06:00 p.m - 06:30 p.m

accused Gauri Shankar Nath took deceased victim child on his bicycle for bicycle riding and at that time Tilok Nath, nephew of accused Gauri Shankar Nath was also with them and he heard these facts from their villagers and from the person who were present in the marriage house. He deposed while accused Gauri Shankar Nath was returned, he was questioned by the village people and to that Tilok Nath, nephew of accused Gauri Shankar Nath who was present with accused Gauri Shankar Nath at that time told that deceased victim girl was thrown in a ditch. He deposed accused tried to run away from the village and villagers held the accused. On being informed, police arrived at the place, took custody of the accused Gauri Shankar and one section of the police left in the village to search deceased victim child and accused Gauri Shankar Nath told different stories of presence of deceased victim child to them and police and accordingly he along with others made searches to the place stated by accused Gauri Shankar Nath but till late night accused did not disclosed the true story where deceased victim child was thrown. In the next morning at about 04.30 am, police came to their village along with accused Gauri Shankar Nath and at that time, accused Gauri Shankar Nath took police to Besimari beel near Samsan Ghat and shown the dead body of deceased victim child at besimari beel, and dead body of deceased victim child was recovered as shown by accused Gauri Shankar Nath from the Besimari beel. He deposed he was informed about the recovery of dead body of deceased victim child as shown by accused Gauri Shankar Nath from the other villagers who went to the place of recovery along with police and accused Gauri Shankar Nath. He deposed he had seen the dead body after recovery and he saw panty of deceased victim child removed and it was pulled down below the knee, frock of dead body was lifted above chest, injury on the head of deceased victim child. Police took dead body of deceased victim child and accused Gauri Shankar Nath to the police station again. He deposed one Gajen Nath, one of his co-villagers lifted the dead body from the besimari beel. He further deposed police produced him before the Ld. Magistrate and he had made statement before the Ld. Magistrate vide Ext-10 and Ext-10(1) is his signature. Ext-8 is the seizure list and Ext-8(2) is his signature. He deposed M.Ext-1 is the photograph of accused Gauri Shankar Nath. M.Ext.2 and M.Ext.3 are the photographs of deceased victim child which was taken at the place of recovery of dead body and M.Ext-3 is the photograph of the place where from the dead body of deceased victim child was recovered. In cross he stated his house is about 150 cubit away from the house of informant and presently he can't say the name of exact person from whom he had heard about the missing of deceased victim child. He stated all the villagers were making hue and cry about the missing of deceased victim child. He stated accused Gauri Shankar Nath read either upto Class-V or Class-VI in 1533 No. Lawpara L. P. School and Tilok Nath, the nephew of accused Gauri Shankar Nath did not stated before him that accused Gauri Shankar Nath thrown out deceased victim child in a ditch but Tilak Nath stated before other villagers when accused Gauri Shankar Nath was asked about deceased victim child. He stated he was not present when police asking accused Gauri Shankar Nath about deceased victim child. He was present on the next day when police brought accused Gauri Shankar Nath and interrogated him about the deceased victim child. He stated he was not present at the time of lifting of the dead body and how dead body was lifted from the ditch is not seen by him. He stated police seized one panty, one red blouse and one frock of deceased victim child vide Ext-8 and he put his signature on Ext-8 seizure list. He stated he has not seen the incident of murder of deceased victim child but it is true that deceased victim child was murdered after committing rape on her. He denied he did not made statement before the police when villager asked accused Gauri Shankar Nath about the deceased victim child, accused's nephew Tilok Nath told that accused Gauri Shankar Nath thrown deceased victim child in a ditch; he denied that accused Gauri Shankar Nath did not killed deceased victim child after committing rape on her; he deposed falsely that accused Gauri Shankar Nath tried to run away from the village.

18. Evidence of PW-10 Abdul Latif is that he does not know informant, deceased victim child and accused Gauri Shankar Nath. He heard from the villagers of Lawpara and Kachua that one seven years old girl of village Lawpara was murdered after committing rape on her and her dead body was thrown into the ditch present in the land of him situated near the Kachuagaon Samsan ghat (graveyard) and at that place the dead body of the deceased victim girl was recovered. He deposed incident was took place in the month of Assamese Bohag but he did not visit the place of recovery of dead body. **In cross** he stated whole plot of land is measuring 5 bigha and there is ditch

meant for fishery in one corner of land. He stated he does not know who when and who lifted the dead body from the ditch belonging to him.

- PW-11 Dr. Sheikh Md. Azahar is M.O. His evidence is that on 30-04-18 he had conducted post mortem examination on the dead body of Miss X (deceased victim child) D/O Pradip Kr. Nath under reference Raniganj Out Post GDE no. 376 dated 29-04-18 and found- External Appearance -An average built female child dead body was examined, frothing from mouth and nostril noted, rigor mortis present in all 4 limbs; Wounds - position and character - i. Abrasion of (1 x 0.5 cm) on Right eye lid and abrasion of (0.5 x 0.5 cm) on Left eye lid, ii. Laceration on Mid-scalp (2 x 0.5 cm); Bruise - position size and nature -i. Bruise of around (1 x 0.5 cm) noted around lateral part of vaginal introitus, ii. 0.5 cm of hymen tear noted on posterior part, iii. (0.5 x 0.5 cm) of anal mucosal tear on posterior part noted; Cranium and Spinal canal - Scalp, skull, vertebrae - As described; Membrane - Healthy; Brain and spinal cord -Healthy; Walis, ribs and cartilage - healthy; Pleurae - Edematous; Laryax and trachere - White frothing noted in trachea and larynx; Right lung - Voluminous, water-logged lungs; Left lung - Voluminous, water-logged; Pericardium -Healthy; Heart - pale and healthy; Vessels - Collapsed; Abdomen -Walls -Healthy; Peritoneum – Healthy; Mouth, pharynx, oesophagus – Healthy; Stomach and its contents - Healthy and water; Small intestine and its contents - healthy and semi digested food particles; Large intestine and its contents -Healthy and fecal content; Liver - Healthy; Spleen - healthy; Kidneys - Pale; Bladder – Empty; Organs of generation, extema, and internal - As described; More detailed description of injury or disease – i. Injuries described are antemortem in nature, ii. Injuries around vagina and anal region is due to forceful insertion of hard object, probably erect penis, iii. Vaginal and anal swab is preserved and sent for smear examination. According to his opinion cause of death is due to airway asphyxia sustained due to ante-mortem drowning. In **cross** he stated he had conducted the post mortem examination on 30-04-18 vide Raniganj Out Post GDE No. 376 dated 29-04-18. According to his opinion death is due to ante-mortem drowning.
- 20. Evidence of PW-12 Nabajit Pathak, ACS is that on 30-04-2018 he was posted as Circle Officer, Chapar Revenue Circle and he was also performing duties of In-charge S.D.O.(Civil), Bilasipara. On that day Circle Officer, Bilasipara informed him over phone that one dead body is recovered at

Besimari, Lutapara under Sapatgram P.S. accordingly he made contact with the SDPO, Bilasipara and went to the Besimari, Lutapara, where dead body was recovered and conducted inquest on the dead body of Miss X (deceased victim child) and he saw dead body in the side of ditch and by this time dead body was lifted from the ditch. During inquest he found - Frothy substance coming out from the nose, seen injury marks above the eye in between both eye lids and eyebrow, one injury mark below the lower lips, backside of the head and clot blood seen in the anal area of the Miss X (deceased victim child). Red kurta, red inner, red leggings and green panty were spotted with the dead body and he had conducted the inquest on dead body of Miss X (deceased victim child) in presence of the witness and police personnel and according to the witnesses the deceased was murdered after committing rape on her and dead body was sent to Dhubri Civil Hospital to ascertain the exact cause of death. In cross he stated he left to place of occurrence from Bilasipara at 04.30 am and reach the place of recovery of dead body before 05.00 am. He stated he was not present when dead body of deceased victim child was lifted from the ditch. By the time he reached the place of recovery of dead body, dead body was already pulled up from the ditch and was kept in the side of the ditch. He denied he did not see any blood clot in the anal area of deceased victim child at the time of inquest.

21. PW-13 Chandra Prava Devi deposed informant Prodip Kr. Nath is her neighbour and deceased was daughter of informant and deceased was aged about 7-8 years old. She deposed incident was took place in the year 2018 on 15th day in the month of Assamese Bohag. On the date of incident one occasion of her daughter was going on at her house and her house is present near the Lawpara L. P. School and Lawpara M E School and house of accused Gauri Shankar Nath is present next to her house and house of informant Prodip Kr. Nath is next to the house of accused Gauri Shankar Nath. She deposed in the evening grand-mother (abu) of deceased came to her house and enquired about deceased victim child and at that time she heard about missing of deceased victim child and everyone were searching for deceased and deceased victim child was untraced. She deposed while Abu (grandmother) of deceased victim child asking her about deceased victim child, she heard that deceased victim child was taken by accused Gauri Shankar Nath on his bicycle. She deposed she does not know where accused Gauri Shankar Nath taken deceased victim child. On the next day she heard that dead body of deceased victim child was recovered from a ditch (Bagdoba) present in between the village of Lutapara, Kachua and Lawpara. Police arrived in their village in the morning. Police also came to her house and took her signature when police seized the bicycle and one mobile and she produce the bicycle to the police which accused Gauri Shankar Nath took. She deposed she had seen the dead body of deceased victim child at her house when her dead body was brought at her house. **In cross** he stated she did not noticed when accused Gauri Shankar Nath taken the bicycle. She did not see when accused Gauri Shankar Nath was riding the bicycle. She further stated she did not give mobile handset to the police and police did not seize mobile in her presence.

- 22. PW-14 Lalit Kr. Nath deposed he knows informant Prodip Kr. Nath, deceased victim child and accused Gauri Shankar Nath. He deposed informant is his next door neighbour and accused Gauri Shankar Nath is his nephew. He deposed on the date of incident one function of marriage of his daughter was going on and deceased victim child was murdered on the day when Pithakhowa function (one of the ceremonies of the marriage) of his daughter was going on in his house. He deposed incident of murder of deceased victim girl was took place on 15<sup>th</sup> day of Boisakh month in the year 2018 and on the next day he heard that deceased victim child was murdered by accused Gauri Shankar Nath. He deposed dead body of deceased victim girl was recovered from a ditch of besimari and on the day of incident accused Gauri Shankar Nath took his bicycle which was seized by police at his house and police took his thumb impression on the seizure list Ext-7. He further deposed when dead body of deceased victim child was brought to her house, he did not go to see her dead body. In cross he stated he did not notice when accused Gauri Shankar Nath taken away the bicycle. He did not heard that accused Gauri Shankar Nath was moving around with the seized bicycle on the previous date of the seizure of the bicycle. He stated police came to his house, directed him to hand over the bicycle and accordingly he had handed over the bicycle to the police. He stated he does not know who had killed deceased victim child and where she was killed.
- 23. PW-15 Lumanta Kr. Nath deposed informant Prodip Kr. Nath is his neighbour and deceased victim girl was daughter of informant and was aged about 7 years old. He also knows accused Gauri Shankar Nath as Gauri

Shankar Nath is co villager and his neighbour. He deposed incident was took place on 29-04-18 at about 06.00 pm. On the day of incident at about 06.00 pm while he was present at his shop house situated at Puran Lawpara village, he saw informant Prodip Kr. Nath's gloom face. Seeing this when he asked him, what happened to him. Informant Prodip Kr. Nath replied his daughter was missing and accused Gauri Shankar took his daughter with him along with accused's nephew and Gauri Shankar returned to his home with his nephew but his daughter (deceased victim) did not return home and when informant Prodip Kr. Nath asked Gauri Shankar about his daughter, accused Gauri Shankar replied to Prodip Kr. Nath that she is present somewhere but did not disclose the name of the place where she was present. At the time when informant Prodip Kr. Nath was narrating the incident to him, he saw accused Gauri Shankar leaving his home and noticing the same, informant Prodip Kr. Nath told him that see, accused Gauri Shankar is trying to abscond. At that time he asked informant Prodip Kr. Nath to follow accused Gauri Shankar and at that time accused Gauri Shankar was moving towards east direction which is on way to Bangalipara and immediately informant Prodip Kr. Nath along with one of his neighbour Pradip Nath followed Gauri Shankar and at about 07.00 pm, informant Prodip Kr. Nath, Pradip Nath and some others brought back accused Gauri Shankar to the village. He deposed seeing large gathering in the school field which is near to the house of accused Gauri Shankar and informant Prodip Kr. Nath, he too visited the school field and asked accused Gauri Shankar where about of deceased victim girl. To that accused Gauri Shankar replied deceased victim girl is present in some places but accused did not disclose the name of the place where deceased victim girl was present and accused Gauri Shankar also told him in presence of gathering that he took deceased victim girl with his nephew in the evening and all of them returned and deceased victim girl is present somewhere. He deposed on being informed, police of Raniganj Out Post and army arrived in the school field and when police arrived, police personnel were divided in two groups. One section of police took custody of accused Gauri Shankar and taken accused to the Raniganj police out post and another section of the police with army personnel remained present in the field and after taking accused Gauri Shankar to the Raniganj police out post, police on interrogating accused, send message to the police force who were present in the school field with them that accused Gauri

Shankar disclose before the police regarding presence of deceased victim child behind the bamboo bushes of school field. Accordingly they made search with the police personnel but did not find and not finding they informed the same to the Raniganj police over phone. Again Raniganj police, as per information disclosed by the Gauri Shankar, asked them and to the police personnel present in the school field to made search of the deceased victim child at Dong, Khundo and Kachua Nadi. They made search in all the places but did not find deceased victim child. He deposed the Kachua Nadi is large area and at the time of searching of deceased victim child it was raining. On the next morning, at about 04.00 am Raniganj Police, accompanying by Special. S.P. Dhubri came and also asked them to come to Kachua Nadi. Accordingly the police party and villagers who were present in the school field also proceeded to the Kachua Nadi. The police of Raniganj police out post accompanying by Special. S.P Dhubri came along with accused Gauri Shankar Nath and on way to Kachua Nadi after crossing ½ km asked accused Gauri Shankar to show the place where deceased victim child was hidden. Accused Gauri Shankar replied deceased victim child was kept in the Kachua Nadi (Besimari) near graveyard and after crossing another ½ km when Special. S.P asked accused Gauri Shankar to show the place, accused Gauri Shankar stated before the police and them that they were approaching to the site where deceased victim child was present in a ditch. Thereafter, when they reached the ditch (khal), they found two ditch. Accused Gauri Shankar first shown the first ditch but in the first ditch they did not find deceased victim child and then Special. S.P Dhubri again ask accused Gauri Shankar to show the exact position where he had kept deceased victim child. At that time accused Gauri Shankar shown the next ditch and told that he had kept the dead body of deceased victim child there and when they went to the second ditch situated near to the graveyard, near the Kachua river (Besimari), they saw the dead body of deceased victim child. He deposed he saw the panty of deceased victim child removed and was below the knee, deceased was wearing Multi colour printed Frock and same was above the chest, head of deceased was submerged under the water, injury mark on the head and blood was oozing out from injury. He deposed police had taken photographs of the dead body of deceased when it was recovered on being pointed and shown by accused Gauri Shankar. Thereafter as per direction of the police, he along with Gajen Nath get down into the ditch and Gajen Nath lifted the dead body of deceased victim child and placed it on the vehicle. He deposed the dead body of deceased victim child clearly shown that she was rape and murdered. After recovery of the dead body Executive Magistrate conducted inquest on the dead body and police seized the wearing dresses of the deceased and sent dead body to Dhubri Civil Hospital for post mortem. He deposed when accused Gauri Shankar was interrogated by the village people, Gauri Shankar confessed that after raping deceased victim child, he had murdered her. He further deposed during investigation police produced him before the Id. Magistrate and he made statement before the Ld. Magistrate vide Ext-12 and Ext 12(1) is his signature. He further deposed Ext 5 (4) is his signature in Ext-5 seizure list. **In cross** he stated he did not see accused Gauri Shankar taking deceased victim child on his bicycle but he had heard about the said fact. He stated accused Gauri Shankar during interrogation by the village people stated before the villagers that he committed rape on victim child and murdered victim child (deceased). He had made statement before the police that during interrogation by the village people, accused Gauri Shankar stated that deceased victim child was present here and there and accused Gauri Shankar took them to various places telling them that deceased victim child is present there and once accused took them to his moha's (uncle's) house telling them that deceased was present there in the evening time. He stated he did not witness the exact scene of murder of deceased victim child but in the next early morning accused Gauri Shankar shown them the dead body of deceased victim child in the ditch near Kachua Nadi (Besimari. He stated accused Gauri Shankar confessed before them that he had committed rape and murder of deceased victim child and accused Gauri Shankar lead and shown the dead body of deceased victim child to them and police in the ditch where dead body of deceased victim child was recovered from a ditch. He denied defence suggestion that he did not made statement before the police that accused Gauri Shankar Nath stated before them that he had killed deceased victim child; only to harass accused Gauri Shankar he made statement before the Ld. Magistrate and court that accused Gauri Shankar stated before them that he had committed rape on deceased victim child and killed her; he and villagers assaulted Gauri Shankar when he was brought in the school field; accused Gauri Shankar, in the school field at the time of interrogation by the village people did not disclose the incident of murder and rape of deceased victim child; Gojen Nath did not lift the dead body from the ditch and he did not get down in the water with Gajen Nath to lift the dead body; accused Gauri Shankar is not involved in the incident of rape and murder of deceased victim child.

24. PW-16 Imdadul Hussain is the I.O of the case. He deposed on 29-04-2018, he was posted as In-charge at Raniganj Out Post under Sapatgram P.S. On that day at about 08:30 PM one Kanoj Nath S/o. Balendra Nath of vill -Puran Lawpara came to PS and verbally informed that daughter of Pradip Kr. Nath missing from the evening 06:30 pm. near her house from the house of Lalit Kumar Nath where function of the marriage of the daughter of Lalit Kumar Nath was going on. Getting the information he went to Puran Lawpara the place of occurrence village with staff and interrogated the village people and from the village people, he came to know that village people seen victim girl with accused Gauri Shankar Nath during evening time. At the time of making inquiry, he got information from some other villager that accused Gauri Shankar Nath try to run away from the place and at that time villager apprehended him and when he was at the place of occurrence village Puran Lawpara, some villager namely Pradip Kr. Nath S/o. Lt. Tipin Kr. Nath and few others brought accused Gauri Shankar Nath before him and handed over to him. On interrogation of the accused Gauri Shankar Nath, accused stated before him in presence of his staff, villager Prodip Kr. Nath and others that he had taken deceased victim girl to the house of his maha Chaitanya Nath at village - Lutapara. Hearing the same they immediately went to the house of Chaitanya Nath with accused Gauri Shankar Nath and others and found wife of Chaitanya Nath and on being ask, wife of Chaitanya Nath told them that accused Gauri Shankar Nath did not come to her house as stated by him. Thereafter, again they interrogated him and on repeated questioning, accused Gauri Shankar Nath disclosed that he had thrown out deceased victim child in the Lutapara Samsan ghat, Besimari where J.C.B. (excavator) used for digging the earth. They immediately proceeded to the place along with accused Gauri Shankar Nath and as pointed by accused Gauri Shankar Nath, they made search in the Lutapara Samsan, Besimari but did not found the victim. Thereafter he had informed the incident to higher police official, SDPO Bilasipara, Special. S.P. Dhubri, S.P. Dhubri and they had taken accused Gauri Shankar Nath to the Raniganj Out Post. In the meantime S.P. Dhubri, Special.

S.P. Dhubri arrived at the Raniganj Out Post and thereafter accused Gauri Shankar Nath was again questioned and on vigorous interrogation accused Gauri Shankar Nath at about 03:40 a.m dated 30-04-2018 disclosed that he had killed deceased victim child and thrown her dead body in the pond near Lutapara Samsan ghat, Besimari. Accordingly they rushed to the place of occurrence with accused Gauri Shankar Nath along with him, S.P. Dhubri, Special. S.P., SDPO Bilasipara, O/C Sapatgram PS accompanied and villagers of Puran Lawpara also rushed to the spot and as lead and shown by the accused Gauri Shankar Nath, the dead body of deceased victim child recovered from a pond near Lutapara Samsan, Besimari. He deposed the head of the dead body was submerged under the water, and the inner (panty) of the victim girl was removed up to the knee position and also found one injury on the back side of the head of the deceased victim girl. Thereafter, as per their direction, Prodip kr. Nath (father of victim), Gajen Chandra Nath and Prodip Kr. Nath S/o. Tipin Kr. Nath, Somen Kr. Nath helped them in lifting and bringing the dead body from the pond. Executive Magistrate was also informed and Executive Magistrate came to the place of recovery of dead body and did inquest on the dead body at the place of occurrence. He deposed he had taken photograph of deceased victim child before and after lifting her from the pond. After inquest dead body was sent to Dhubri Civil Hospital for post mortem and the wearing apparel of victim and pant of accused was seized, the seized long pant of accused and seized panty of the victim sent to FSL for examination. He further deposed during investigation, he had seized one mobile handset of accused Gauri Shankar Nath and the bicycle in which accused Gauri Shankar Nath carried and moved deceased victim child and accused Gauri Shankar Nath took this bicycle from the house of Lalit Chandra Nath, the uncle of accused Gauri Shankar Nath. He deposed during interrogation accused Gauri Shankar Nath confessed that he had committed murder of deceased victim child after committing rape on her and thereafter thrown the dead body in the pond. Thereafter on finding sufficient material against the accused Gauri Shankar Nath, he arrested accused Gauri Shankar Nath and produced him before the Ld. Magistrate and took accused for 3 days in police custody, in connection with this incident Prodip Kr. Nath, the father of the victim child lodged written ejahar, during investigation he had drawn sketch map of the place of occurrence, also drawn sketch map of place of recovery of the dead body,

produced witnesses Anil Chandra Nath, Lumanta Kr., Nath, Gajen Chandra Nath, Prodip Kr. Nath, Somen Kr. Barman and Karindra Nath before the Ld. Magistrate to record their statement u/s 164 Cr.P.C. and thereafter prays before the Ld. SDJM (M), Bilasipara to add Section 376(AB)/201 I.P.C. R/W Section 6 of the POCSO Act and after collecting Post mortem report submitted charge sheet against the accused Gauri Shankar Nath to face trial u/s 302/201/376(AB) I.P.C. and R/W Section 6 of the POCSO Act vide Ext-22. He deposed during investigation he had also collected the FSL report and submitted before the court. He deposed Ext-13 is the Informant General Diary Entry No. 376 dated 29-04-2018 of Raniganj Out Post; Ext-14 is the General Diary Entry No. 381 dated 30-04-2018 with regard to accused Gauri Shankar Nath taking them to the Lutapara Samsan, Besimari; Ext-15 is the General Diary Entry No. 382 dated 30-04-2018 with regard to the recovery of the dead body of deceased victim child as shown and lead by accused Gauri Shankar Nath and then return to Police Station with accused; Ext-16 is the requisition sent to Dhubri Civil Hospital to conduct post mortem examination on the dead body of victim Deceased victim child Nath; Ext-17 is the dead body challan; Ext-18 is the command certificate; Ext-19 is the seizure list of the seizure of long pant belonging to accused Gauri Shankar Nath; Ext-20 is the sketch map of the place of occurrence (1st) where from accused Gauri Shankar Nath took away victim child; Ext-21 is the sketch map of the place of recovery of the dead body (2<sup>nd</sup> place of occurrence); M. Ext-(1) is the photograph of accused Gauri Shankar Nath taken during investigation at the police station; M.Ext-2 and M.Ext-3 are the photograph of deceased victim child taken at the place of recovery of dead body. **In cross** he stated when they reached the village Puran Lawpara, they did not find accused Gauri Shankar Nath and when they were in the place of occurrence village Puran Lawpara, they were informed by the villager that villager apprehended accused Gauri Shankar Nath when he tried to run away from the village. He stated he had interrogated accused Gauri Shankar Nath in presence of the villager and accused Gauri Shankar Nath stated that he had taken deceased victim girl to Lutapara in the house of his Maha. He stated witnesses Chandra Bala Debya, Pradip Kr. Nath and Gajen Chandra Nath stated before him that accused Gauri Shankar Nath had taken and carried deceased victim child on his bicycle on the date of incident and he did not recorded statement of nephew of accused Gauri Shankar as he was toddler at that time. He stated he had noted down the age of the victim as 7 (seven) years as per statement of the parents of deceased victim. As per certificate of the accused collected by him, during investigation from the Bholanath M.E. School where accused studies, he was 18 years old and his date of birth is 20/09/1999 as per school certificate. He stated as per Case diary, accused was slightly manhandled by the villager. He stated accused Gauri Shankar Nath only to save him, he mislead the police and taken to different places and finally accused took them to actual place where he had thrown the dead body of deceased victim child. He stated the first place of occurrence is school field where deceased victim child was playing with accused Gauri Shankar Nath and second place of occurrence is the place where the dead body of deceased victim child was recovered, and second place of occurrence is an isolated place, where there is no human habited. The second place of occurrence which is the place of recovery of dead body is  $1\frac{1}{2}$  km away from the first place of occurrence. He denied defence suggestions Gauri Shankar Nath did not stated before him in presence of villager that he had taken victim girl at Lutapara in the house of his Maha; accused Gauri Shankar Nath did not stated before him and in presence of villager the presence of dead body of deceased victim child at Lutapara Samsan, Besimari and took them to the Lutapara Samsan, Besimari and shown dead body and dead body was recovered at his instance; accused Gauri Shankar Nath did not confessed commission of rape and murder of deceased victim child before him and in presence of witnesses; accused Gauri Shankar Nath did not lead police to the place where dead body of deceased victim child was thrown.

25. PW-17 Dr. Monalisha Choudhury is Forensic Expert. She deposed on 04-05-18 she was working as Scientific Officer at Directorate of Forensic Science Assam, Kahilipara. On that day she had received one parcel through Director, FSL, Kahilipara in connection with Sapatgram PS case no. 40/18 u/s 302 I.P.C vide Memo no. SDPO/BLP/2018/107 dated 03-05-18. The parcel one consists of four exhibits in a sealed cloth cover carton box with the impression seal corresponding with the sealed impression forwarded. Description of articles: i. One blue colour jeans long pant. The exhibit was found packed in polythyne packet. Marked as DNA/1647/18; ii. One Green colour underwear. The exhibit was found packed in polythyne packet and in wet condition. Marked as DNA/1648/18; iii. one red colour top. The Exhibit was found packed

in polythyne packet and in wet condition. Marked as DNA/1649/18; iv. one Multi colour frock. The Exhibit was found packed in polythyne packet and in wet condition. Marked as DNA/1650/18. Result of DNA finger printing **Analysis-** i. The Exhibit no. DNA 1647/18, DNA 1648/18, DNA 1649/18 and DNA 1650/18 were subjected for DNA isolation but DNA yield from the exhibits were fragmented and could not be amplified. Therefore its comparison with each other does not arise; ii. the report of Serology Division of their laboratory in original is attached here with. As per Serology report- One blue colored jeans long pant contains stain of suspected semen marked As Sero-4024/A; One green colour underwear contains stain of suspected blood and semen marked as Sero 4024/B; One red colour top contains stains of suspected blood and semen marked as Sero 4024/C and one multi colour frock contains stain of suspected blood and semen marked as Sero- 4024/D and Result of examination is i. Exhibit No. Sero- 4024/A and Sero- 4024/B gave positive test for human semen; ii. Exhibit No. Sero-4024/C and Sero-4024/D gave positive test for human blood and negative test for semen. Prosecution marked report of DNA test as Ext-23 and serological test report at Ext-24. Ext-23 (1) is her signature and Ext-24(1) is the signature of Mr. Shankar Rabha which she knows and in Ext-25 forwarding report, Ext-25(1) is the signature of G.N. Deka, Director cum Chemical Examiner to the Government of Assam, which she knows. In cross she stated Director cum Chemical Examiner to the Government of Assam endorsed her to conduct the DNA test and all the exhibited articles are seal packed at the time of chemical examination. She denied defence suggestions she deposed falsely that exhibited articles are sealed packed; chemical examination was not done properly.

# DISCUSSION, DECISION & REASON THERE OF: AGE OF THE ACCUSED

26. During the trial of the case accused took plea of juvenility and in course of enquiry conducted as per the section 9(2) of the Juvenile Justice care and protection Act 2015 it has been found that admission register of 1533 no. LP School is manipulated, fabricated and made out and therefore same has not been accepted and accused was found working for more than last two years in a steel factory at Bongaigaon and accused plea of juvenility being not proved same is rejected. During trial at the time of cross examination of the IO by the defence, IO stated to proof the age of the accused that he was major at the

time of incident, he collect school certificate of accused Gauri Shankar Nath from the Bholanath ME School where accused studies. Accused in his 313 Cr.P.C statement in answer to question no. 14 he stated he had studied at Bholanath ME School and as per school certificate available in the case diary accused's date of birth is 20-09-1999 and accordingly he was more than 18 years old and was a major on the date of incident.

27. **Prosecution evidence** in nutshell is that on 29-04-18 from the evening victim child (deceased) was missing and prior to missing she was playing in the school field present near her and accused house and before she gone missing she was seen with accused on his bicycle along with accused's nephew but accused returned back with his nephew on the same bicycle and victim child was untraced. On questioning accused gives different version of story and pretending to search the victim child, tried to run away from the village but accused was seen by village youth and they informed father of the deceased victim child, thereafter father of the deceased victim child with the help of others made search for accused and managed to apprehend him at Halong bazar way to Bangalipara (Bilasipara), bring him to school filed, in the meantime some villagers informed police of Raniganj outpost about missing of the victim child and victim child was seen with accused for the last time before her disappearance from the village and apprehension of the accused and police arrived at village, took custody of the accused. When accused was brought to village school field, PWs and other villagers question accused where about of the victim child and before them he made confession that he took the victim child on his bicycle had committed rape on victim child and killed her and when police took his custody question him, at the time of interrogation it was discovered that accused threw the child in the ditch and accused took the police to the place where he threw the victim child after committing rape on her to let her die and her body was discovered as shown by accused. Dress of accused and deceased victim child seized by the police after recovery of the dead body of the missing child and same were send to FSL for examination and FSL report gave positive test of semen and human blood and autopsy report pointed deceased victim child was rape and died due to airway asphyxia on account of ante-mortem drowning. Dead body of the victim child was found drowning in ditch with upside down half body, face submerged in the water of the ditch. According to the testimony of the PWs, autopsy and expert report this is a case of rape with murder.

28. Now let me discuss the evidence on record in step by step to arrive at the just decision of the case and to find out whether accused is guilty of commission of the prosecution charge levelled against him.

## Whether deceased victim was under the age of 12 years on the date of incident?

29. Informant is the father of the victim child and he is examined as PW-1. PW-2 is the mother of the deceased victim child. According to them deceased victim was 7 years old at the time of incident. PW-3 to PW-9 and PW-13, PW-15 are independent witnesses and co-villagers of informant and accused. PW-11 is the MO of the case. PW-12 is the inquest officer and PW-16 is the IO of the case. PW-10 is resident of Kachuagaon. PW-3 to PW-9 and PW-15 stated deceased victim child was 7 years old at the time of incident. PW-12 inquest officer stated age of the deceased child was 7 years. PW-11 MO of the case deposed deceased child was 7 years old. PW-14 stated deceased child was 10 years old. Accused in his 313 Cr.P.C statement stated deceased victim child 'Miss X' was 9-10 years old on the date of incident. Thus, conjoint reading of the statement of all the prosecution witnesses and statement of the accused recorded under section 313 Cr.P.C goes to show that deceased victim child 'Miss X' was below 12 years old on the day of incident. Section 313 Cr.P.C statement of the accused pointed accused admitted deceased victim child was below 12 years old at the time of incident. Section 56 of the Evidence Act says "Fact once admitted need no proof'. Therefore, it has been proved beyond all reasonable doubt that deceased child was below 12 years old on the date of incident.

## Marriage Function

30. The statement of PW-1 to PW-9, PW-15 is that on the date of incident, celebration of one of the marriage ceremony of the daughter of paternal uncle of accused was going on in the house of Lalit Nath. Further testimonies of PWs are that on the date of incident PW-1, his victim daughter and other villagers came to the house of accused's paternal uncle (who is resident of same village) where marriage function was going on. PW-13 and PW-14 is the paternal aunt and uncle of accused and they stated on the day of incident one of the marriage function of their daughter was going on at their house on the date of

incident. Accused in his 313 Cr.P.C statement admitted arrival of PW-1 and his deceased victim child in the house of marriage party wherefrom deceased victim child went to school playground to play. Accused in his 313 Cr.P.C statement pointed deceased victim child was playing in the school field prior to the incident. This is an undisputed and an admitted fact that incident was took place on 29-04-18 and on that day some marriage function was going on in the house of paternal uncle of accused where deceased victim child came and her father attended the function and prepared food for the guest of marriage party as cook and village people and parents of the victim child were busy in the house and inmates of the house were also busy with the marriage function. The starting point of the case is from the house of marriage party where accused, victim, her parents, other villagers, PWs came to marriage house and from this house victim child went to play in the school field which is present near the marriage house where form she was untraced.

## **Missing of victim child**

31. PW-1 is the informant and father of the deceased victim child and he stated his daughter went to play in the school field present near the house of marriage party and his house. PW-1 further deposed when it was husk time, his wife came and asked him to bring their daughter from the school filed as time was about to dark. PW-2, the mother of the deceased victim child deposed when it was husk time she came to marriage house and asked her husband to bring their child to home. PW-2 substantiate the statement of PW-1. Thereafter PW-1 went to school field to bring the child but he did not found his daughter "Miss X' (deceased victim) in the field and he reported this matter to his wife, his friend and other villagers. Deceased victim was missing from the school field on the evening of 29-04-18 that is on the date of marriage function of the daughter of PW-13 and PW-14. According to the PW-1 and other PWs of the case except official witnesses of the case and PW-10, who is the resident of the place of recovery village, is that victim came to marriage function, wherefrom she went to school filed (Lawpara LP School field) to play and deceased victim was last seen with accused Gauri Shankar Nath in the school field and on road on his bicycle. PW-14 stated on the day of incident, accused took one bicycle from his house and said cycle was seized by the police after the incident during investigation from his house. Deceased victim gone missing after she was seen with the accused. PW-1 stated he saw accused in the school field when his daughter was playing in the school filed and defence failed to falsified his statement and his unshaken testimony remain stand at high footing. PW-1 told missing of his daughter from school field to PW-6 and PW-6 corroborated the same. PW-2 to PW-9, PW-15 all heard about missing of the victim girl from school field. PW-4 noticed accused taking away the victim child Miss X from the school field. The testimonies of PW-1 to PW-9, PW-15 only pointed one thing and that is victim child was missing from the school field, where she was playing. Statement of PWs remains unassailable and defence failed to shake their piece of evidence during cross examination, as such un shaken, trustworthy evidence of PWs only pointed Miss X was playing in the school field were from she was missing and PW-4 seen accused taking away the child Miss X from the school field.

## Last seen theory-

32. PW-1, father of the deceased victim child stated when he did not find his daughter "Miss X" he asked other villagers if they saw his daughter. To that Anjali Devi told him, she saw his daughter "Miss X" (deceased victim) with accused Gauri Shankar Nath and accused took his daughter on his bicycle. Anjali Devi is examined as PW-4. She deposed on the day of incident she was present in the house of Lalit Kr. Nath, jethu of accused where marriage function was going on and she saw accused Gauri Shankar Nath taking away deceased child with his nephew Tilak on his bicycle. The statement of PW-1 is corroborated by PW-4 that she had seen accused taking away deceased victim child with him. PW-3 is another witness and her evidence revealed she saw accused Gauri Shankar Nath taking deceased victim child with his nephew on his bicycle and she had disclosed this fact to PW-1 when PW-1 came to her house to enquiry about his daughter and PW-1 in his evidence before the court deposed Chandra told him that she had seen his daughter Miss X with accused Gauri Shankar Nath. PW-5's evidence pointed he heard victim child was seen with accused Gauri Shankar Nath before she gone missing. PW-6 evidence is that while he was on way to home from Raniganj, he saw Victim child with accused on his bicycle on the bridge of their village and accused's nephew was also present. PW-9 deposed accused Gauri Shankar Nath took deceased victim child along with his nephew Tilak Nath for bicycle riding on the date of incident just prior to her missing and incident of rape and murder. PW-7 and PW-8 deposed they heard from villagers just before victim child gone missing, she

was seen with accused and accused took victim child on his bicycle. PW-13 deposed she heard from villagers that victim child was last seen with accused and accused Gauri Shankar had taken her on his bicycle and thereafter she gone missing. PW-15 stated he heard from PW-1, father of the victim child about taking away of deceased child by accused on his bicycle. The careful reading of the statement of PWs, more particularly from the statement of PW-3, PW-4, PW-6 it is transpiring visibly that they have seen deceased victim child with accused Gauri Shankar Nath on accused's bicycle along with his nephew just before she was not found in the village that is just prior to the incident. Defence though cross examined witnesses on this point but failed to distract and shake them from their stand and they remain intact on their stand and strongly stated they had seen deceased victim child with accused on his bicycle just prior to the incident on the day of incident. It is the further testimony of the PWs that accused return to his home on his bicycle but victim child was not with him so accused was questioned by the father and other villager of the child about the victim child, after that accused left his house and made attempt to go out from the village. PW-1, the father of the deceased victim heard the fact of his daughter (deceased victim child) was last seen with accused from PW-3 and PW-4 and each of them substantiated, corroborated each other respective statement and there remains nothing to disbelief, disregard their unshaken, unrebutted piece of testimonies and the testimonies of PWs being cogent, convincing carries weight. PW-7, PW-8, PW-9 and PW-13 heard the fact of deceased victim was last seen with accused from other villagers. PW-3, PW-4, PW-6 are the co-villagers of PW-7, PW-8 and PW-13 and all of them made one single consistent statement that victim child (deceased) was last seen with accused on his bicycle and their unshaken, unassailable piece of evidence carries weight and defence failed to overrule and falsified their piece of evidence.

33. Section 60 of the Evidence Act says- Oral evidence must be direct. – Oral evidence must, in all cases whatever, be direct; that is to say-

If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

If it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds.

After careful reading of the statement of the PW-7, PW-8, PW-9 and 34. PW-13 along with the statutory provision of law, I find PW-7, PW-8, PW-9 and PW-13 stated before the court which they heard from other co-villagers. Informant who is also their co-villagers heard from PW-3 and PW-4, that his daughter was last seen with accused. PW-1 stated when he asked PW-3 and PW-4 about his daughter, they told him that they had seen his daughter with accused on his bicycle and other PWs stated before the court what they had heard about victim with accused from other villager. PW-3, PW-4, and PW-6 are co-villager and when each one of them stated what they have seen with their own eye the victim with accused and PW-7, PW-8, PW-9 and PW-13 stated they heard from their fellow villager that victim was last seen with accused and when they corroborated each other statement, their piece of evidence is primary evidence and the unshaken, unassailable corroborated statement of PW-3, PW-4, PW-5, PW-6, PW-1, PW-7, PW-8, PW-9 and PW-13 is reliable, believable acceptable and admitted piece of evidence. The evidence on record when read carefully and minutely goes to show only one aspect that deceased victim child was last seen with accused Gauri Shankar Nath just before the incident. The statement of PWs pointed only one thing on the date of incident 'Miss X' was playing in this school field where accused was present with his nephew. Accused in his statement u/s 313 Cr.P.C in question no. 12 admitted his nephew Tilak was present with him on the day of incident. PW-3, PW-4, PW-6, PW-7, PW-9 and PW-15 in their 164 Cr.P.C statement in ext-3, ext-4, ext-6, ext-9, ext-10 and ext-12 made similar consistent statement what they have stated before the court while adducing evidence. Therefore, their consistent statement is trust worthy and is fairly reliable and acceptable piece of evidence. Now, from the evidence on record, it is an unequivocally establish and admitted fact that deceased victim child was missing from the school playground where accused was present and seen by PW-1 and PW-4. It is equally established that before she gone missing she was last seen with accused that is just prior to the incident on the day of incident deceased victim child was seen with accused person and this fact of last seen is established against the accused beyond all reasonable doubt.

#### **Seizure**

35. PW-14 is the paternal uncle of accused and he stated on the day of incident pitha khowa (one of the marriage related) ceremony of his daughter was going on at his house and accused Gauri Shankar Nath took bicycle from his house on that day and police seized said bicycle from his house. Seizure of this bicycle by the IO of the case vide Ext-7 is admitted by the accused Gauri Shankar Nath in his statement recorded u/s 313 Cr.P.C in question no. 17. In this bicycle accused took the victim girl before the incident on the day of incident that was seen by PW-3, PW-4, PW-6 which is remains unassailable. Thus, the statement of the PWs together with the statement of the accused made in 313 Cr.P.C, it is now abundantly clear that on the date of incident accused took one bicycle from his jethu's (PW-14) house and on the said bicycle he took victim and said bicycle was seized by the IO during investigation of the case and he was last seen with the deceased victim child just before the incident. PW-16, the IO of the case seized jeans long pant wear by the accused on the date of incident; panty, frock and top of the deceased and IO sent to FSL for examination. Accused in his 313 Cr.P.C statement admits that police seized his long pant that was wear by him on the date of incident and panty, top, frock of deceased found with her dead body.

#### Absconding theory.

36. Prosecution's next plea is absconding theory. It is the statement of witnesses that accused made attempt to run away from the place of occurrence village just after the incident when every villager came to know about the missing of the victim child and she was last seen with accused. When villagers noticed accused left his home and proceeded to leave the village, villager alerted father of the victim child and father of the victim child with the help of villager managed to apprehend him. PW-1 informant of the case and father of the deceased victim child deposed not finding his daughter in the Lawpara school filed where his daughter (deceased victim) went to play and hearing news that she was last seen with accused Gauri Shankar Nath, he asked Gauri Shankar where about of his daughter when accused was coming home with his nephew Tilak on the bicycle but PW-1 did not get positive reply

from the accused and noticing accused suspicious look and contradictory answer given to him, he charted accused with his friend Pradip (his Mita) and Dharmendra. His evidence pointed accused Gauri Shankar entered into the compound of Naba Nath sensing their presence but accused did not come out from the compound of Naba Nath and therefore he along with Pradip and Dharmendra entered into Naba Nath compound and made enquiry into Naba Nath's house and came to know from the wife of Naba Nath that accused Gauri Shankar Nath did not came to her house.

37. Here accused by entering into the compound of Naba Nath tried to give impression to PW-1 and his friend Pradip and Dharmendra that he came to the house of Naba Nath in search of deceased victim which is not the true picture and is the tricks played by the accused sensing they were following him so thus to dupe PW-1 and his friend accused entered into the compound of Naba Nath. The attempt of the accused to run away from the village is clearly coming out just after the incident from the statement of PW-1. PW-1, his mita Pradip and Dharmendra sensing foul play of accused entered into the house of Naba Nath and made enquiry and cats comes out from the pocket that accused Gauri Shankar Nath did not went to the house of Naba Nath and in reality he tried to abscond. Further testimonies of PW-1, pointed he along with his mita Pradip, Shankar Nath and Dharmendra made search for accused Gauri Shankar and they spotted him at Halong bazar near their village and apprehended accused and took him with them in their village. Statement of PW-15 pointed time when informant narrated incident of missing of his daughter to PW-15, both of them noticed accused Gauri Shankar Nath leaving his house and Prodip Kr. Nath, informant told this fact to him and to follow him and nab him. Accordingly PW-15 with his friend PW-6 Pradip followed accused and managed to apprehend accused. At that time accused Gauri Shankar Nath was moving towards east direction which is on way to Bangalipara. PW-6 evidence revealed, after getting news of missing of deceased victim child from her father, he went there and at that time Dharmendra of their village informed them that accused was going towards Bilasipara town (Bangalipara is at Bilasipara town) and hearing this he, PW-1 and Dharmendra proceeded on a bike and at Halong Bazar they noticed accused, called him, stopped him, hold him and bring him to their village. PW-9 deposed when village people grilled accused and questioned him about deceased victim child, he try to run away from the village. Testimonies of PW-5, PW-7 goes to show that accused after the incident tried to leave the village and villagers apprehended him and bring back to the village. Accused in his statement recorded u/s 313 Cr.P.C stated he was held by PW-1, PW-6, PW-15 at Halong Bazar and brought at Lawpara LP school field.

38. Scrutiny of entire evidence on record goes to show that when accused was grilled by the parents of the child 'Miss X' when she was untraced, accused gave different reply and told father of the child that he too will made search for the child thereafter accused pretending to made search for the victim child, is about to leave the village and made attempt to run away from the village but same was noticed by the villager Dharmendra and Dharmendra informed PW-1 the father of the victim child 'Miss X' and PW-1, with his friend mita PW-6 and Dharmendra in right time jump for his search, noticed him and managed to apprehend him at Holong Bazar and brought back to village from Halong Bazar. The statement of the PWs clearly goes to show that when news of missing of deceased victim child was spread in the village and that she was last seen with accused before she gone missing (at that time the only thing comes to the knowledge is missing of the girl) that is just prior to the incident, accused made attempt to flee from the village. Accused was last seen with victim girl (deceased) and with him his nephew Tilak was present but accused returned home with his nephew riding on his bicycle, on which bicycle he carried deceased victim with him along with his nephew and seeing him without the victim girl when parents and other villagers questioned him where about of deceased victim child, daughter of PW-1, he tried to run away from the village and this is an important point coming in favour of the prosecution. The accused attempt to run away from the village just after the incident when all are making search of the girl draws only presumption against him of his involvement with the incident. But in the case in hand on account of timely receiving information by PW-1, PW-6 from Dharmendra about his planning to leave the village, they went to the direction used by accused and apprehend accused. Accused Gauri Shankar after the incident made attempt to abscond is disclosed by the PWs in a clear unambiguous way however, accused attempt to run away from the village is not materialized and PW-1, PW-6 and Dharmendra pour water on his plan of absconding and he was apprehended by PW-1, PW-6 and Dharmendra and brought back to school field of Lawpara LP School where he was question about the victim child. Attempt of the accused to leave suddenly from the village just after the incident and then apprehension of the accused by the PW-1 with other witnesses and villagers of the deceased victim's village is another vital factor produced and adduced by the prosecution to prove the prosecution charge against the accused. Prosecution able to bring home the plea of absconding against the accused just after the incident without any doubt.

#### Extra judicial confession of the accused.

- 39. **Interrogation of the accused by the villagers:-** Statement of PW-1, informant pointed he questioned accused more than one occasions. First when he was searching his daughter and did not found her and learnt from other that his daughter 'Miss X' (deceased victim child) was last seen with accused Gauri Shankar Nath, PW-1 asked accused where about of his daughter when accused was coming to his house. Evidence of other PWs also pointed accused after taking his nephew and deceased child on his bicycle returned to his house with his nephew but deceased was not with him and then after dropping his nephew at home, he tried to run away from the village when villagers came to know about victim child (deceased) was missing and she was last seen with accused just before she gone missing.
- 40. PW-1 with his friend Mita Pradip (PW-6) with Dharmendra apprehended accused from Halong Bazar and bring him to their village and at that time accused was questioned by villagers and someone of their village informed police about the missing of the daughter of PW-1. Cross examination of the PW-1 revealed when PW-1 first noticed accused Gauri Shankar Nath, he asked accused and accused on being asked by PW-1 replied that he (accused) dropped his daughter at his (PW-1's) house. PW-1 in chief stated when he questioned accused about his daughter, accused told him that he dropped her at house and to that PW-1 replied to accused if he had dropped her at home why she is not found at home. Cross examination of PW-1 further pointed when PW-1 questioning accused when he was coming with his nephew, with whom villagers had earlier seen deceased victim last time with accused along with his bhagin, accused bhagin stated that accused threw his daughter (deceased victim child) in a ditch. It is the evidence of all the PWs, at the time of interrogation of the accused by the villager when accused was coming home with his nephew, his nephew told, accused threw the victim in a ditch. Nephew

of the accused was a small (toddler) boy of aged hardly about 3 years old so he was not taken while search of deceased victim was made.

- 41. Testimonies of PW-5 bring on record that when accused was bring to village, villagers questioned him about deceased victim and he was present at that time of questioning of accused and accused confessed before them that he had taken deceased child on his bicycle for riding and accused took them (villagers) in different places. Cross examination of PW-5 bring that accused made statement before PW-5 and other villager that he had taken deceased victim girl with him, rape her and murder her. By the time, when villager were questioning where about of the child, police arrived at their village and police questioned accused about deceased child and then took him to police station for further investigation keeping one section of police at village and as disclosed by the accused at the police station and transmission of the message to the rest section of police present at 1533 Lawpara LP School campus, police with the help of PW-5, PW-6 Prodip, PW-1, PW-15, Dayal and others made search of the deceased victim.
- 42. Testimonies of PW-6 and PW-7 pointed accused during question by the villager stated in their presence that he had killed the victim girl after committing rape. During cross examination by the defence PW-6 and PW-7 firmly stated during interrogation by them, accused Gauri Shankar made statement before them that he had committed rape on deceased child and then murdered her and accused made this statement in their presence and in presence of other villagers at the time of interrogation. It is also coming out from the cross examination of PW-6 that accused made attempt to abscond and he with PW-1 and another managed to apprehend him at Halong Bazar just after the incident. PW-7 in cross stated that before Ld. Magistrate he made statement that accused confessed before them that accused Gauri Shankar committed rape on victim child 'Miss X' and then he murder her.
- 43. PW-9 in his in chief and in his cross stated accused was questioned by the villagers about deceased victim child and he cropped up different stories and in cross he stated accused confessed before them that he had rape and killed deceased victim and denied defence suggestion that he did not made statement before the police that accused confessed before them that he had killed deceased after committing rape on her. PW-9 was present when accused was being questioned by them and in his presence accused made confession

that he rape her and kill her. PW-15 in his chief and cross stated during questioning of accused by the villagers where PW-15 was present and also questioned accused Gauri Shankar about victim child and acc made different stories of her presence to fool them at first and then confessed before him and other villagers that accused Gauri Shankar Nath committed rape on deceased victim child and killed her. PW-6, PW-7 deposed they interrogated accused in presence of other villagers and police and accused Gauri Shankar made different stories of presence of dead body of the deceased victim at different places and on next morning at about 4 a.m. accused finally took police and villagers to the Samsan ghat where from dead body of deceased victim child was recovered. Accused in his 313 Cr.P.C statement stated that he was questioned by villagers at Lawpara L.P. School and he stated different stories about Miss X and search of the child as per his statement.

44. Scanning of the testimonies of PWs pointed when villager grilled accused Gauri Shankar Nath, he confessed before them that he had taken deceased on his bicycle and committed rape and killed her. PW-16, IO of the case corroborated the same while adducing his evidence. Cross examination of the witnesses by the defence failed to shake their testimony and statement of PWs more particularly the statement of PW-5, PW-6, PW-7, PW-9 and PW-15 who were independent witness and co-villagers of informant as well as accused and were present at the time of questioning of accused till making of the statement by the accused before them strongly, firmly made statement that accused made statement before them in presence of villagers when questioned about the victim child that he (accused) had taken victim child on his bicycle, committed rape on her, threw her and killed her. PW-5, PW-6, PW-7, PW-9 and PW-15 before the police and before the Ld. magistrate u/s 164 Cr.P.C made similar statement that accused made statement before them that he had taken the victim child on his bicycle, then committed rape and finally murder her and threw her in the ditch. All of them made similar consistent statement in all the stages and during cross examination too they made same statement. Accused Gauri Shankar Nath admits his guilty before the independent person who are his co-villager and all of them were neutral, un-biased person and there is no enmity between accused and PW-5, PW-6, PW-7, PW-9 and Pw-15. There is no force, promise present to extract the confessional statement of the accused by PWs and accused during question by the villager where PW-5, PW-6, PW-7,

admissible piece of evidence.

PW-9 and PW-15 were also present and in their presence he made confession that he took 'Miss X' with him on his bicycle, rape her, threw her and killed her. The PWs made further statement that accused during interrogation by the villagers, made different stories of presence of dead body of the deceased victim. Accused made different stories of presence of the victim child in different places only to misled and divert the direction of search and to delay the search for the child so that victim child must die in the ditch and there should not be any chance of her surviving. All the PWs made statement before the court what was actually taken place in the school field after missing of the girl and when they were making search for the girl and how accused fooling the villager in finding out the victim girl. On the next morning accused led villager and police to the place where he threw the victim girl to die after having sexual intercourse with her. I further find that different statement made by the accused Gauri Shankar @ Banka with regard to the presence of the deceased child in different place before the villager is only to create confusion in the mind of villager so to make him innocent and to divert the path of search of the girl and his different story of presence of the victim girl is coming out after his statement that he took victim girl on his bicycle, rape her and kill her and this has no adverse impact on his extra judicial confessional statement and this is only because he tried to delay the search of the girl only to eliminate the girl from this world so that there is no hope of her survive and wanted to screen himself from the legal punishment, to wipe out the evidence of the case by eliminating victim from disclosing the incident. The unshaken, unassailable and consistent statement of PW-5, PW-6, PW-7, PW-9 and PW-15 only goes to show that accused made statement before them that he took the victim girl on his bicycle from the school field and he rape her and then kill her and there is no room to disbelief the testimonies of PWs with regard to the confession of the accused made before them which is voluntary, with free consent and without any force, promise, pressure, undue influence and I believe the unshaken testimonies of PW-5, PW-6, PW-7, PW-9 and PW-15 and I have acted upon the same against the accused person as because their unbiased testimonies carries weight and same is cogent, convincing, trustworthy and

#### **Leading to Discovery**

## (Prosecution next plea hinged on leading to discovery)

- 46. PWs made statement that dead body of deceased victim child was recovered as shown by the accused Gauri Shankar Nath. The statement of PWs further pointed during interrogation accused Gauri Shankar Nath made statement of committing rape on victim and killing her and accused cropped up different stories to mislead villagers and police to recover the dead body of the victim child at the beginning but finally on next morning in between 4 to 4.15 AM, accused open up his mouth, led police and villagers to the place where he had threw deceased victim child after committing rape on her to kill her. It is the statement of PW-1, PW-5, PW-6, PW-7, PW-8, PW-9 and PW-15 that bhagin of the accused at the initial time of questioning of accused about the victim child, told that accused threw the victim child in ditch. Said child was about 3 years old at the time of incident so none have taken him seriously while searching the girl. Accused in his statement recorded under section 313 Cr.P.C admitted that he was grilled by the villagers and villagers handed over him to the police on the date of incident on 29-04-98 and police grilled him. He admitted on 30-04-18 early morning at about 04 .00 to 04.30 am dead body of deceased victim was recovered from a ditch near Samsan ghat of Besimari (Lutapara village) and at that time he was in police custody.
- 47. PW-1 informant and father of the deceased victim child deposed after apprehension of accused by him with the aid of his Mita Pradip PW-6 and Dharmendra they brought accused to their village, questioned accused about his daughter (deceased) and some one of their village informed police, police arrived and took custody of the accused and taken him to police station (Raniganj police out post) and during interrogation of the accused by the police, at the beginning accused stated name of different places' about the presence of the dead body of the victim child accordingly when the message was sent to them by the police from the police station to the police who were present in the school field with them then they with police force present in the school field made search for the dead body of the deceased victim child for whole night but could not trace out the dead body of the victim child. This fact is corroborated by PW-16, the IO of the case. It is the further testimonies of PW-1, PW-5, PW-6, PW-7, PW-8, PW-9 and PW-15 and PW-16 the IO of the case that on next day early morning at about 4 AM to 4.15 AM PW-16 the IO of

the case with higher police officer of Dhubri District brought accused to their village and again interrogated accused in their presence and at this time accused disclosed that he threw the girl in the ditch present near the graveyard of Besimari Lutapara village graveyard (samsan ghat) present near the river Kachua which is about 11/2 KM distance from the Puran Lawpara village from where incident was started and accused took all of them and led police and village people to Besimari Samsan ghat. PW-1 went there with police and other villager and at that time PW-5, PW-6, PW-7, PW-8, PW-9 and PW15 were also proceeded and reach the Besimari Samsan ghat. At Besimari Samsan ghat, accused shown the ditch which is near the samsan ghat where victim child was thrown by the accused and at this place dead body of PW-1's deceased victim daughter 'Miss X' was recovered as shown by the accused. This piece of statement of PW-1 is supported, corroborated by PW-5, PW-6, PW-7, PW-8, PW-9, PW-15 and PW-16, the IO of the case and PW-1, PW-5, PW-6, PW-7, PW-8, PW-9, PW-15 headed by PW-16, the IO of the case with other higher police official were present at the place of recovery when accused lead them and shown the dead body of the 7 years old deceased victim child 'Miss X' in the ditch. The dead body of the child was discovered as per statement of the accused Gauri Shankar Nath during investigation of the case and this is one of the most vital facts of the case. PW-1 was present at the place of recovery of the dead body of his deceased daughter Miss X and he along with other villagers went to place of recovery when accused while in police custody took police to the place of recovery and as pointed and shown by accused Gauri Shankar, dead body of the deceased victim child was recovered in the early morning of next day of incident. PW-2 is the mother of the victim child and she deposed she got the news of recovery of the dead body of her minor daughter Miss X from her husband PW-1. The recovery of the dead body of the victim child was took place as per statement of accused and same is witness by PW-5 to PW-9 and PW-15 in presence of the IO of the case with other senior police official.

- 48. PW-3 and PW-4 are lady and they got to know on the next day of incident that is on the date of recovery of the dead body of the child that dead body of victim child was recovered from a ditch.
- 49. PW-5, PW-6, PW-7, PW-8, PW-9 and PW-15 are present at the place of recovery and they went to Kachua Beel (Besimari Samsan Ghat) when accused

led police to the samsan ghat place and in a ditch near Samsan ghat accused shown dead body of the deceased victim child. PW-5 deposed at about 04.05 am police bring accused Gauri Shankar Nath at their village and this time accused took police party to the Lutapara Samsan ghat near the river Kachua and accused in his presence, in presence of villagers and police show the dead body of deceased victim child and dead body of the deceased victim child was recovered as stated and shown by accused which he disclosed during interrogation by the police in his/their presence. Till this time nobody was aware that dead body of the deceased victim was present there. Whole night villagers made search of deceased victim girl but she was untraced living or dead and her dead body was recovered only when accused disclosed the place of keeping the dead body. Statement of PW-5, PW-6, PW-7, PW-8, PW-9, PW-15 and PW-1 further pointed when accused shown dead body of the deceased, police took photograph of the deceased and dead body was recovered in the position of half submerged up-side down in ditch and another photograph of the deceased was taken after lifting of the dead body from the ditch. M. Ext-2 and M. Ext-3 are the photograph of the deceased victim child taken by the police at the place of recovery. Accused in his 313 Cr.P.C statement admitted that police took photograph of deceased victim when her body was first discovered in the ditch and was recovered and her dead body was recovered from ditch near Lutapara Samsan ghat which is  $1\frac{1}{2}$  km away from his village. All the facts are admitted fact.

50. PW-16 is the IO of the case and his evidence is that dead body of the deceased victim child was recovered on the statement made by the accused and it was accused who during investigation took police to the place Lutapara (Besimari) Samsan Ghat (Kachua Beel) and show the dead body of the victim child and dead body of the deceased victim child was recovered as per statement disclosed by the accused during interrogation when he was in police custody. Pw-16, the IO of the case corroborated the statement of rest PWs with regard to recovery of the dead body as led by accused. PW-5, PW-6, PW-7, PW-8, PW-9, PW-15 were villagers and they were independent witness. They have no personal enmity with accused. There is nothing comes out against them to disbelief their piece of statement. PW-5, PW-6, PW-7, PW-8, PW-9, PW-15 and PW-1 the informant of the case went to the place of recovery when accused took police to the Samsan ghat and all of them present

with police when accused disclosed, pointed and shown the dead body of deceased victim child in the ditch present near Lutapra Samsan ghat in their presence. PW-10 is the person in whose land ditch was present and he too stated dead body of one child was recovered from the ditch present on his land and said deceased child hail from village Lawpara and this ditch is present near the Kachua beel Samsan ghat. PW-13 and PW-14 are relative of accused and they stated dead body of the deceased child recovered on the next day morning of the incident from ditch and said ditch is present near Lutapara Kachua beel.

- 51. The conjoint reading of the statement of PW-1, PW-5 to PW-9, PW-15 and PW-16, the IO of the case bring only one thing and that is on the next day of incident early morning at about 04.00 to 04.30 am police bring accused Gauri Shankar Nath to the village school field wherefrom police took his custody, again questioned him and accused Gauri Shankar Nath took police to the Samsan ghat and PW-1, PW-5 to PW-9, PW-15 and some other villagers followed them and reached the place where accused took police and accused pointed the ditch which is present near the Samsan ghat about 1 ½ km away from the Puran Lawpara village and dead body of the deceased victim was recovered. It was lifted from the ditch by PW-5 and he was helped by other villagers. PW-12 the inquest officer deposed he had conducted inquest on the dead body at the place of recovery of the dead body which was lying by the side of ditch.
- 52. Accused Gauri Shankar Nath in his statement recorded u/s 313 Cr.P.C admitted on the date of incident he was apprehended (held up) by the village people for the incident and on same day he was handed over to police, dead body of the victim was recovered from ditch near Samsan ghat (Lutapara Besimari) on early next morning and police taken photograph of the deceased victim at the place of recovery. Accused in his 313 Cr.P.C. statement admitted Gajen Nath Lifted the dead body of the deceased victim girl as directed by the police present at place of recovery of the deceased girl, inquest was done at place of recovery, police seized dead body with the dress of the deceased victim at place of recovery. Only point he denied is he did not took police to the place of recovery. Here pausing for a while, let me reverse back to whole picture of discovery of deceased victim child. Victim girl was missing from the school field, she was last seen with accused, accused was questioned about

the girl, he give different reply, try to flee way from the village he was apprehended by the villager and handed over to police on the day of incident and accused was in police custody when dead body of the victim child was recovered, accused know the place of recovery of the dead body of the deceased victim girl, position of the dead body in the ditch upside down, taking up of the photograph of the deceased at the place of recovery, Gajen lifted the dead body of the deceased victim girl from the ditch, place of recovery ditch is near samshan ghat (graveyard), inquest of the child at the place of recovery, accused known seizure of dead body with the dress of the deceased victim child at place of recovery at about 04.00 to 04.30 am, the time stated by all the PWs pointed only one thing that it is accused who led the police to the place of recovery of the deceased victim child, and dead body was recovered as per disclosure made by the accused. All the aforesaid fact were only known to accused as because it was he who led for the discovery of the dead body of the child and his only denial that he did not took police to the place of recovery is nothing but lame excuse and it is accused false statement before the court.

53. Thus, from the entire scanning of the evidence on the record together with the statement of the accused recorded u/s 313 Cr.P.C, I have come to my considered judicious decision that prosecution beyond all reasonable doubt establish that during investigation at the time of interrogation of the accused Gauri Shankar Nath, his statement led discovery of the dead body of the child which is the vital clue of the case. Where about of the dead body of the victim child was not known to any person prior to recovery of the dead body of the child and it was possible only when accused took police and villager to the place of recovery and show the ditch where he threw the victim girl and dead body of the child was recovered at his instance. Victim child was last seen with accused Gauri Shankar Nath. Accused returned to home but victim girl gone missing. Whole night villager made search for the deceased victim girl but could not trace out and her dead body was recovered only when accused took police and villagers to the ditch near Samsan ghat (Lutapara Besimari village) where he threw the child and this fact is only known to him and dead body of victim child was discovered and recovered at his instance. Prosecution fairly able to establish the theory of leading to discovery against the accused Gauri Shankar Nath @ Banka.

#### **Medical Evidence**

# <u>Analysis of Post Mortem report and oral evidence on the injury found</u> <u>on the dead body of deceased victim child.</u>

54. As per Ext-11 PM report, on 30-04-18 PW-11 Dr. Sheikh Md. Azahar (M.O) had conducted post mortem examination on the dead body of 'Miss X' and found- External Appearance -An average built female child dead body was examined, frothing from mouth and nostril noted, rigor mortis present in all 4 limbs; Wounds - position and character - i. Abrasion of (1 x 0.5 cm) on Right eye lid and abrasion of (0.5 x 0.5 cm) on Left eye lid, ii. Laceration on Midscalp (2 x 0.5 cm); Bruise - position size and nature -i. Bruise of around (1 x 0.5 cm) noted around lateral part of vaginal introitus, ii. 0.5 cm of hymen tear noted on posterior part, iii. (0.5 x 0.5 cm) of anal mucosal tear on posterior part noted; Cranium and Spinal canal - Scalp, skull, vertebrae - As described; Membrane – Healthy; Brain and spinal cord – Healthy; Walis, ribs and cartilage healthy; Pleurae – Edematous; Laryax and trachere - White frothing noted in trachea and larynx; Right lung - Voluminous, water-logged lungs; Left lung -Voluminous, water-logged; Pericardium – Healthy; Heart - pale and healthy; Vessels – Collapsed; Abdomen -Walls – Healthy; Peritoneum – Healthy; Mouth, pharynx, oesophagus - Healthy; Stomach and its contents - Healthy and water; Small intestine and its contents - healthy and semi digested food particles; Large intestine and its contents - Healthy and fecal content; Liver -Healthy; Spleen - healthy; Kidneys - Pale; Bladder - Empty; Organs of generation, extema, and internal - As described; More detailed description of injury or disease – i. Injuries described are ante-mortem in nature, ii. Injuries around vagina and anal region is due to forceful insertion of hard object, probably erect penis, iii. Vaginal and anal swab is preserved and sent for smear examination. According to opinion of PW-11 the M.O, cause of death is due to airway asphyxia sustained due to ante-mortem drowning

55. PW-1 is the informant and father of the victim child and he was present at the place of recovery of the dead body of the deceased victim child. His evidence is that he noticed head of the dead body submerged under water upside down and panty was removed. He deposed he had seen blood stain on the forehead and back of the head of his daughter. PW-2 is the mother of deceased victim child and her evidence is that she saw injury mark on the forehead of her deceased daughter and she was naked when brought at home.

PW-3, PW-4 deposed they visited informant house when dead body of the victim child brought at home and they saw injury on her head and naked body of the deceased. PW-9 stated he went to the place of recovery and seen the dead body and there was an injury on her head (deceased child), panty of the deceased was removed and pulled down below the knee and frock was lifted above chest when he saw the dead body the moment it was recovered. PW-5 to PW-8 deposed as pointed by the accused dead body of the deceased victim child was recovered from ditch near Kachua beel of Lutapara (Besimari) Samsan ghat. Their further evidence is that head of the deceased was submerged under the water and inner (panty) of the victim girl was removed and pulled down up to knee and frock was above her chest. M.Ext-2 and M.Ext-3 are the photograph of the deceased victim child taken up by the police at the time of recovery of the dead body of the victim child at the place of recovery. M. Ext-3 shown the position in which dead body of the victim child was noticed and recovered. M.Ext-3 clearly show that head of the victim child was submerged under the water of the ditch with panty pulled down up to knee and M Ext-2 more clearly show that panty of deceased victim child was pulled down below knee, there was presence of injury mark in forehead.

- 56. PW-5 deposed he noticed injury on the forehead of the deceased child, blood oozing out from the nostril, mark of injury present in her private part. It is the PW-5 who pulled out the dead body from the ditch and he gave his gamosha to cover the child's dead body. So he noticed each and every inch of the injury present on the dead body of the deceased child from a very close proximity. PW-6 deposed he too seen injury on the head of the deceased. PW-7 noticed head injury on the dead body of the victim child. PW-8 seen head injury. PW-1 stated after the recovery of the dead body, Ld. Magistrate conducted inquest and dead body sent to Dhubri Civil Hospital for post mortem. Rest PWs made statement to the line of PW-1 that after recovery of the dead body of the victim child at the instance of accused Gauri Shankar Nath, Ld. Magistrate conducted inquest and police sent dead body to Dhubri Civil Hospital for post mortem. PW-15 deposed he saw injury mark on the head, blood was oozing out from injury and may be due to rain, blood stain was washed out by rain water.
- 57. PW-12 is the inquest officer. At that time he was working as Circle Officer, Chapar Revenue Circle. His evidence reveal he had conducted inquest

at the place of recovery i.e near the ditch present near the Besimari Lutapara graveyard and dead body was kept by the side of the ditch where from dead body was recovered. His evidence further pointed frothy substance coming out from the nose, seen injury mark below the lower lips, eye in between both eye lid, eyebrow, one injury mark below lower lips, injury mark back side of the head and blood clot seen in the anal area of the deceased.

- 58. As per post mortem report, during post mortem examination on the dead body of deceased child, PW-11 Dr. Sheikh Md. Azahar found injuries- i. Abrasion of  $(1 \times 0.5 \text{ cm})$  on Right eye lid and abrasion of  $(0.5 \times 0.5 \text{ cm})$  on Left eye lid, ii. Laceration on Mid-scalp  $(2 \times 0.5 \text{ cm})$ ; iii. Bruise of around  $(1 \times 0.5 \text{ cm})$  noted around lateral part of vaginal introitus, iv. 0.5 cm of hymen tear noted on posterior part, vi.  $(0.5 \times 0.5 \text{ cm})$  of anal mucosal tear on posterior part noted.
- 59. PW-1, PW-5 to PW-9 and PW-15 testimony pointed when they saw dead body of the victim child immediately after discovery on being pointed and shown by the accused, they noticed body of the victim child was half submerged under the water, frock lifted above chest, panty removed and pulled down below the knee, injury mark on head. Testimonies of PW-5 pointed he noticed injury mark on the private parts of the deceased girl. Inquest report and PM report shown injury on the head, private parts of the deceased victim child. PW-1 to PW-9, PW-15 deposed accused made statement before them in presence of police that accused Gauri Shankar Nath committed rape and committed murder of the child and it is accused who show the dead body in the ditch. PW-16, the IO of the case stated accused before him and superior police officer of the Dhubri district in presence of village people made statement that he had committed rape and murder of the deceased victim child.
- 60. The oral testimony together with the post mortem report goes to show that deceased child was rape before her death and hymen tear injury around vagina and anal region is due to forceful insertion of hard object, probably erect penis. The autopsy report together with the inquest report of the deceased child corroborated the oral testimonies of the PWs on the injury present on the dead body of the deceased victim child and it is evident from the autopsy report that deceased was rape before her murder.

## **Analysis of FSL report.**

- 61. PW-17 is the FSL expert. PW-16 is the I/O of the case. PW-16 IO of the case stated during investigation he had seized panty of the deceased girl and long pant of the accused and sent to FSL for examination. Accused in his 313 Cr.P.C statement stated police seized his jeans long pant that was wear by him on the date of incident and panty and frock (wearing dress) of the deceased victim girl. M. Ext-5 one panty of deceased and long pant of the accused seized by PW-16. By Ext-19, PW-16 seized long pant of the accused from accused possession. PW-16 deposed he had collected FSL report and submit before the court.
- 62. PW-17 stated on 04-05-18 she was working as Scientific Officer at Directorate of Forensic Science Assam, Kahilipara and on that day she received one parcel through Director FSL, Kahilipara in connection with Sapatgram PS Case No. 40/18 u/s 302 IPC and parcel contain one blue colour jeans long pant, one green colour under wear, and red colour top, one multi colour frock. During examination they marked blue coloured jeans long pant as Sero 4024/A contains stain of suspected blood and semen and green colour panty marked as Sero 4024/B and Exhibit no. Sero 4024/A and Sero 4024/B gave positive test for human semen. Ext 4024/A is the jeans pant of accused and Ext Sero 4024/B is the green colour undergarment (panty) of the victim child. Frock and top gave positive test for human blood as per serological test. Ext-24 is the serological test report. Her testimonies pointed DNA yield from the exhibit that is green colour panty, blue colour jeans, one red colour top and one multi colour frock were fragmented and could not be amplified, therefore, comparison of each other does not arise but serological test report gave positive test of semen in panty and jeans pant. Ext-23 is DNA report.
- 63. Exhibit No. Sero 4024/C and Sero 4024/D, red colour top and multi colour frock gave positive test for human blood. M Ext-2 and M. EXT-3 photo of the deceased girl shown top and frock was lifted above chest so it gave negative test of semen but panty that was wear by the deceased victim child on the date of incident which was found with the dead body and the jeans long pant that was wear by the accused on the date of incident and seized from his possession gave positive test of human semen. PW-1, PW-5 to PW-9, PW-15, PW-16, PW-12 stated they found blood stain/clot present on the frock of the deceased girl and blood of frock and top gave positive test for human blood.

Witnesses further deposed blood was oozing out from the injury of the deceased victim child.

- 64. Accused was wearing seized jeans long pant blue colour on the date of incident. M. Ext-1 is the coloured photograph of the accused. M. Ext-1 coloured photograph of the accused shown he was wearing blue colour jeans on the date of incident. Accused admitted in his 313 Cr.P.C statement that police seized his blue colour jeans long pant from his possession which he was wearing on the date of incident. PW-16 IO stated after seizure of the long pant of the accused and panty, frock and top of the deceased girl, he sent all seizure dress to FSL Kahilipara for chemical examination and panty of the deceased victim child and long pant of the accused gave positive test of semen. There is no explanation from the defence side.
- 65. Taking together testimonies of PW-1, PW-5 to PW-9, PW-15, PW-11, PW-12, PW-16 and PW-17 goes to show only one point that deceased victim child was rape on the date of incident and then murdered. Their testimonies together with the testimonies of PW-17 expert bring only one point that it is accused Gauri Shankar Nath who on the day of incident after taking victim child on his bicycle took her to the isolated place of samsan ghat and committed rape on her and threw her in the ditch to eliminate her to wipe out the evidence of crime committed by him. Deceased Victim child was 7 years old. Post mortem report revealed forceful insertion of erect penis in the vagina and anus of the victim child and post mortem report further pointed injury on vagina and anus and injury run from vagina to anus of the victim child and blood oozing out from vagina and anus, hymen torn, presence of semen in the panty of deceased and jeans of accused, autopsy report establish commission of rape on victim and all these point clearly bring on record the ingredients of section 5(m) of the POCSO Act and section 376-AB IPC.
- 66. It is clearly coming out from ocular as well as medical and expert evidence of serological test report that deceased victim child was a victim of aggravated penetrative sexual assault and this is covered by the definition of rape defined in section 375 I.P.C. and the deceased victim was 7 years old girl at the time of incident and I find prosecution beyond all reasonable doubt established that victim child was rape before committing murder of her. Presence of semen in the seized jeans long pant of the accused together with his extra judicial confession made before the witnesses more particularly

before the PW-5 to PW-9 and PW-15 that he had sexual intercourse with the child victim who was aged about 7 years old at the time of incident proved the prosecution charge of section 376-AB and section 6 of the POCSO Act against the accused beyond all reasonable doubt.

- 67. Ext-11 is the PM report. PW-11 MO of the case stated in his opinion death is due to airway asphyxia sustained due to ante mortem drowning. Autopsy report pointed probable cause of death of the victim child due to airway asphyxia sustained due to ante mortem drowning.
- 68. PW-1, PW-5 to PW-9 and PW-15 and PW-16 IO of the case deposed deceased victim child was found in the ditch in upside down position. Her head was submerged under water. It is already coming to light that dead body of the deceased victim child was recovered as led and shown by accused. It was accused who had threw the child in the ditch. From the cross examination of the PW-1 by defence it is coming out when PW-1 was asking accused about his daughter, Bhagin of accused Gauri Shankar who was with accused Gauri Shankar, told him that accused Gauri Shankar Nath threw his daughter in the water. Allegation against accused is that when victim child was not found and she was untraced, PW-1, PW-6, PW-15, PW-2 and other asked accused where about of victim child (deceased child) and at that time nephew of accused who was a toddler at that time told them that accused threw victim child in the water. PW-9 deposed when villagers questioned accused, accused Bhagin stated accused threw deceased in the water. Dead body of the deceased victim was recovered from ditch which is water body. Her head submerged under water with leg up. That it was accused threw the child in the water is crystal clear from the evidence on record. It is also revealed from the testimonies of the PWs accused threw the victim child in the ditch after committing rape (penetrative sexual assault) on her. Accused threw the victim child in the ditch with knowledge and intention that if he threw the 7 years old child in the water after committing rape on her with injury on her head and other parts of the body she will definitely die and there will be no chance and hope of her survival and accused with intention and knowing fully that injured child will not survive if he threw her in the water bodies, threw her in the ditch to cause her death. Ditch is present at an isolated place where none visit except to perform the last rites of deceased and therefore at this place if 7 years old injured child is threw in the water, nobody will noticed and there is possibility of her death

and no chance of survival and for that reason accused threw the child in the ditch to let her died and the 7 years old child die as a result of airway asphyxia sustained due to ante-mortem drowning.

69. Throwing of the child in the ditch with head submerged under the water means and included it was done with intention to cause the death of the child and to cause death of the child accused threw her in the water. The evidence on record oral as well as medical report bring only one fact that this is a case of culpable homicide amounting to murder and all the ingredients of section 300 I.P.C is fairly established against the accused person beyond all reasonable doubt. There is nothing to doubt, disbelief the testimonies of the PWs and the unshaken, incontrovertible, unquestionable, absolute testimonies of the PWs relied and same is acted upon. It is further revealed from the evidence on record that accused threw the child in the ditch to eliminate her from disclosing the incident of rape committed by accused on her and he did act of wiping out the evidence of crime committed by him only to screen himself from getting legal punishment. The intention of the accused to wipe out the evidence is clearly visible from his conduct that were noticed and come up immediately after the incident of rape and prosecution fairly able to bring home the charge of section 201 I.P.C against the accused beyond all reasonable doubt.

#### **Discussion on Law points**

70. Ext-1 is the ejahar. PW-1 is the informant of the case and he lodged formal written ejahar on 30-04-18. Incident was took place on 29-04-18. PW-1 with the villager apprehended accused on 29-04-18 and handed over to police on the same day. PW-16 is the IO of the case. He corroborated all these facts. PW-1, PW-5 to PW-9 and PW-15 stated someone of their village informed police about the incident of missing of Miss X. PW-16, IO of the case deposed on 29-04-18 at about 8.30 PM one person named Kanoj Nath s/o Balendra Nath of village Puran Lawpara verbally informed at Raniganj police outpost that daughter of PW-1, Pradip Kumar Nath, Miss X is missing from their village from 6.30 PM near her house from the house of Lalit Kr Nath where marriage function of daughter of Lalit Kr Nath was going on. PW-16 is the in-charge of Raniganj Outpost and he after receiving this information entered same in the general diary and proceeded to village Puran Lawpara. This is the information about missing of the daughter of PW-1 and this is not the first information

report as per section 154 Cr.P.C. and this information was given to police to alert the police to find out the missing girl. It is revealed from the statement of PW-16 that when he reached Puran Lawpara village, he got information about apprehension of the accused Gauri Shankar and that accused was last seen with the victim girl. The statement of PWs more specifically from the statement of PW-1, PW-5 to PW-9, PW-15 and PW-16 the IO of the case it is revealed that after apprehension of the accused, villager question accused about Miss X and accused made statement that he took Miss X on his bicycle and committed rape and then kill her and thereafter whole night of 29-04-18 all of them made search for the dead body of Miss X but no clue was found. On next day of incident early morning at about 4 to 4.05 AM accused disclosed that he threw the Miss X in the ditch present near the Besimari Lutapara Samsan ghat and accused took the police and PWs to the place where he threw the victim child and her dead body was recovered. After recovery of the dead body, inquest of the deceased was done at place of recovery, thereafter dead body was sent to post mortem and thereafter after handing over the dead body to her parents, her last rites was performed and all along the PW-1 the informant and father of 'Miss X' was present. The statement of PW-2, the mother of the deceased victim child clearly pointed she was unstable mentally and physically after the missing of her daughter. The evidence on record clearly and beautifully explained the delay in filing the ejahar and in the instant case considering the facts and circumstances of the case delay in filing the ejahar is not fatal for the prosecution case. The evidence on records pointed father of the deceased child with his village people were making search for the child in whole night and thereafter father of the deceased child PW-1 was busy with the legal formalities in view of the case and then he had to perform the last journey of the departed child and this alone is the sufficient and reasonable cause for delay in filing the ejahar considering the nature of the case.

71. The second point that I have taken up for discussion is whether verbal information that PW-16 received from Kanoj Nath is the first information report and to that my answer is in negative because it is just an information to the police about the missing of the girl so that police set in motion to find out the missing girl. The information does not give the foundation of the case and said information is only to alert the police to avert any untoward incident and to trace out the girl. When Kanoj informed the Raniganj police out post, nobody

was aware of the incident of rape and murder of the girl and it was just taken as missing incident and missing report was lodged by one of the villager and no detail of the incident against the accused was made. Therefore, the ext-1 is the formal first information report and ext-1 does not hit section 162 Cr.P.C. and GD entry dated 29-04-18 about missing report is not the first information report u/s 154 Cr.P.C

- 72. In Sidhartha Vashisht @ Manu Sharma vs State (Nct Of Delhi) (Jessica Lal murder case) decided on 19 April, 2010 in para no. 37 Hon'ble Apex Court held that "Insofar as the decision in Bhagwant Kishore (supra), it was noted in para 8 at page 224 that the information received by the officer was not vague, but contained precise particulars of the acts of misappropriation committed by the accused and, therefore, the said information could be treated as FIR. On the contrary, it is evident from the facts established on record in the present case that none of the three telephonic messages received by police furnished any detail about the offence or the accused. The judgment in Khwaja Nazir Ahmad (supra) is also distinguishable as the law laid down in the said case does not concern the issue involved in the present case. Cryptic telephonic messages could not be treated as FIR as their object only is to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from a bare reading of Section 154 of the Criminal Procedure Code which states that the information, if given orally, should be reduced in writing, read over to the informant, signed by the informant and a copy of the same be given free of cost to the informant."
- 73. In Yanob Sheikh alias Gagu vs. State of West Bengal, reported in (2012) 6 SCC 428, It was observed by Hon'ble Apex court that a First Information Report normally should give the basic essential in relation to the commission of a cognizable offence upon which the Investigation Officer can immediately start his investigation in accordance with the provisions of Section 154 CrPC. It was further observed that cryptic telephonic message cannot be treated as FIR as their objective is only to get the police to the scene of offence and not to register the FIR. Information which gives no details would not constitute First Information Report as contemplated under Section 154 of the CrPC but there is an obligation on the part of the police officer to register the information received by him in respect of commission of a cognizable offence.

- 74. After going through the aforesaid decision of the Hon'ble Apex Court and taking into account the facts and circumstances of the case it goes to show that information that was received by PW-16 on 29-04-18 at about 8.30 PM is only to alert the police about the missing of the girl and said information was not detail. The information does not stated who had entice the girl. That information was only cryptic information. When police took custody of the accused and he opened the mouth on next day that led to the discovery of the dead body of Miss X and accordingly PW-1 lodged ejahar against the accused on 30-04-18 that give the gist of the incident. Therefore, ext-1 full fill the principle of section 154 Cr.P.C. and ext-1 is the First Information Report.
- 75. Extra Judicial confession: It is now well established principle of law that extra judicial confession is admissible if it inspired confidence and made voluntarily. PW-5 to PW-9 and PW-15 are co-villager of the PW-1 the informant of the case and accused and their testimonies is that accused Gauri Shankar before them confessed that he took victim girl on his bicycle and then in their presence and before police confessed his guilty of committing rape and murder of the victim child after taking victim on his bicycle.
- 76. In Gura Singh Vs State of Rajasthan 2001 2 SCC 205 Hon'ble Apex Court in para 6 at SCC P 212 observed "It is settled position of law that extrajudicial confession, if true and voluntary, it can be relied upon by the court to convict the accused for the commission of the crime alleged. Despite inherent weakness of extra judicial confession as an item of evidence, it cannot be ignored when shown that such confession was made before a person who has no reason to state falsely and to whom it is made in the circumstances which tend to support the statement".
- 77. In the Gura Singh case, Hon'ble Apex Court discussed Maghar Singh Vs State of Punjab AIR 1975 SC 1320 wherein held that the evidence in the form of extra judicial confession made by the accused to witnesses cannot be always termed to be tainted evidence. Corroboration of such evidence is required only by way of abundant caution. If the court believe the witness before whom the confession is made and is satisfied that the confession was true and voluntary made, then the conviction can be founded on such evidence alone. Again in the case of Narayan Singh Vs. State of M.P AIR 1985 SC 1678 Hon'ble Apex Court made observation that "this Court cautioned that it is not open to the court trying the criminal case to start with presumption that extra judicial

confession is always a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession is made and the credibility of the witnesses who speak for such a confession. The retraction of extrajudicial confession which is a usual phenomenon in criminal cases would by itself not weaken the case of the prosecution based upon such a confession."

- 78. Hon'ble Apex Court in Ram Lal Vs. State of Himachal Pradesh in Criminal Appeal No. 576 of 2010 in para 13 held "Extra-judicial confession is a weak piece of evidence and the court must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In order to accept extra-judicial confession, it must be voluntary and must inspire confidence. If the court is satisfied that the extra-judicial confession is voluntary, it can be acted upon to base the conviction." Hon'ble Apex Court in para 14 and 15 again held "14. It is well settled that conviction can be based on a voluntarily confession but the rule of prudence requires that wherever possible it should be corroborated by independent evidence. Extra-judicial confession of accused need not in all cases be corroborated." "15......, if the court is satisfied that if the confession is voluntary, the conviction can be based upon the same. Rule of Prudence does not require that each and every circumstance mentioned in the confession with regard to the participation of the accused must be separately and independently corroborated.
- 79. In Gagan Kanojia & another vs State of Punjab, criminal appeal 561-62 of 2005 decided on 24-11-06 Hon'ble Apex Court held "Extra-judicial confession, as is well-known, can form the basis of a conviction. By way of abundant caution, however, the court may look for some corroboration. Extra-judicial confession cannot ipso facto be termed to be tainted. An extra-judicial confession, if made voluntarily and proved can be relied upon by the courts. [See Sukhwant Singh @ Balwinder Singh v. State through CBI AIR 2003 SC 3362].
- 80. Hon'ble Apex Court in Sahadevan & Anr Vs. State of T. Nadu, Cri. Appeal No. 1405/2008 held, " 17. While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of State of Rajasthan v. Raja Ram [(2003) 8 SCC 180] stated the principle that an extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as

to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made. The Court, further expressed the view that such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused." "19. Accepting the admissibility of the extra-judicial confession, the Court in the case of Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604] held that :-"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41: AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B.] 30. In the present case, the extra-judicial confession by Balwan has been referred to in the judgments of the learned Magistrate and the Special Judge, and it has been corroborated by the other material on record. We are satisfied that the confession was voluntary and was not the result of inducement, threat or promise as contemplated by Section 24 of the Evidence Act, 1872."

81. Again in para 21 and 22 of the Sahadevan & Anr Vs State of T.Nadu case Hon'ble Apex Court held, "21 Extra judicial confession must be established to be true and made voluntarily and in a fit state of mind. The words of the witnesses must be clear, unambiguous and should clearly convey that the accused is the perpetrator of the crime. The extra judicial confession can be accepted and can be the basis of conviction, if passes the test of credibility." "22.Upon a proper analysis of the above-referred judgments of this Court, it will be appropriate to state the principles which would make an extra-judicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extra-judicial confession alleged to have been made by the accused.

The Principles

- i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
- ii) It should be made voluntarily and should be truthful.
- iii) It should inspire confidence.
- iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
- vi) Such statement essentially has to be proved like any other fact and in accordance with law."
- 82. It is further held in para 31 of this judgment (Sahadevan case) "31. With the development of law, the theory of last seen has become a definite tool in the hands of the prosecution to establish the guilt of the accused. This concept is also accepted in various judgments of this Court. The Court has taken the consistent view that where the only circumstantial evidence taken resort to by the prosecution is that the accused and deceased were last seen together, it may raise suspicion but it is not independently sufficient to lead to a finding of guilt.
- 83. In the instant case, prosecution fairly able to bring on record several circumstances against the accused of his involvement in the rape and murder of the victim child. Last seen theory, extra judicial confessional statement of the accused, medical repot, seizure of the dress of the accused and victim and report of the FSL, accused admission in his 313 Cr.P.C all goes to show and drawn only inference of his guilty and no fact of innocence is appearing. The unequivocal circumstances only drawn the guilty of the accused.
- 84. Coupled with the aforesaid decision on the extra judicial confession it is evident that settled position of law to rely upon the extra judicial confession is that it must satisfied that it is voluntary and is not the result of inducement, threat, or promise envisaged under section 24 of Evidence Act or was brought about in suspicious circumstances to circumvent section 25 and section 26 of the Evidence Act. Extra Judicial Confession if found not made under promise, threat, inducement, and voluntary it can be acted upon without corroboration

and corroboration is only required for safe application of the same to avoid any conflict.

85. Upon scrutiny of the entire evidence on record, more particularly from the testimonies of PW-5 to PW-9 and PW-15, who are neutral and independent witnesses having no dispute with the accused or his family stated only one aspect specifically, categorically, firmly in a lucid manner without any biasness and honestly stated that during questioning of accused by them, PW-1 and other villager, accused made statement before them that he had took victim girl with him on his bicycle committed rape on her and killed her. During vigorous lengthy cross examination of PW-1, PW-5 to PW-9, PW-15 there is no trace of use of coercion, force, threat, inducement, promise made to accused to extract confession from the accused by the villager. It is quite natural that when one 7 year old child of the village was untraced and she was seen with accused by the villager and accused return back to his home but child was not with him, parents and villagers will indisputably questioned him about the girl and on such question by the villagers accused Gauri Shankar Nath confessed before them about taking of victim child with him, committed rape on her and killed her and this confessional statement of the accused made before the villager of the accused is without any threat, promise, force, coercion and it is accused free and voluntary statement made before the villager. More so, cross examination of the PWs exposed that accused made statement before them that he took away victim child on his bicycle, committed rape on her and then murder her and PWs made this very statement before the Ld. magistrate when learned magistrate recorded their statement u/s 164 Cr.P.C. There is nothing comes out against the PW-1, PW-5 to PW-9 and PW-15 as to why they would falsely implicate the accused in such a heinous gruesome brutal crime. PW-5 to PW-9 and PW-15 are co-villagers of accused too. Under such circumstances when they stated accused confessed his guilty before them, that too, without any force, threat, promise, inducement, coercion the same pass the test of section 24 of the Evidence Act and therefore the extra judicial confession of the accused is reliable and this extra judicial confession of the accused made before PW-5 to PW-9, PW-15 is admissible piece of evidence under the settled position of law and can be acted upon safely. Accordingly coupled with the aforesaid decision of the Hon'ble Apex Court, I find that in the case in hand extra judicial confession of accused can be safely acted upon accordingly same is relied and acted upon and used against the accused.

- 86. Section 27 of the Evidence Act says- "27. How much of information received from accused may be proved –Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."
- 87. In Vasanta Sampat Dupane vs State of Maharastra (2015) 1 SCC 253 it was held that recovery of the dead body of the deceased at the instance of the accused would be a fact within the special knowledge of the accused, and therefore, the said recovery including the recovery of cloth in said cap, were admissible and are relevant evidence as per section 27 of Evidence Act.
- 88. Here in this case extra judicial confessional statement of the accused led the discovery of the dead body of the victim child from ditch and same satisfy the essential ingredients of section 27 of the Evidence Act. Thus, it is applicable.
- 89. In Anil @ Raju Namdev Patil vs Administration Of Daman & Diu and anr (2006) 13 SCC 36, Hon'ble Apex Court held "23. The information disclosed by the evidences leading to the discovery of a fact which is based on mental state of affair of the accused is, thus, admissible in evidence."
- 90. In Himachal Pradesh Vs. Jeet Singh (1999) 4 SCC 370 opined that when an object is discovered from an isolated place pointed out by the accused, the same would be admissible in evidence.
- 91. In Prakash chand Vs State (Delhi Administration) (1979) 3 SCC, Hon'ble Apex court refer decision of HP Admn Vs Omprakash (1972) 1 SCC, 249 and held "There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible u/s 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a police officer in the course of an investigation which is hit by sec 162 Cr.P.C. what is excluded by sec 162 Cr.P.C is the statement made to a police officer in course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a police officer during the course of an investigation. For example, the evidence of the circumstances, simplicitier, that

an accused person led a police officer and pointed out the place where stolen articles or weapon which might have been used in the commission of the offence were found hidden, would be admissible as conduct u/s 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of section 27 of Evidence Act". Decision of the Privy council in 'Pulukuri Kottaya & ors Vs Emperor, AIR 1947 PC 67 is the most authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced the knowledge of the accused to it, but the information given must relate distinctly to that effect. But if a relevant fact is discovered in consequences of such information, it furnishes assurance regarding the truth of such information'. In Umesh Karmakar & ANR Vs State of Assam, 2005 (1) GLT, 358, "Accused person led police to the bamboo groove for discovery and seizure of the weapon of assault and discovery of fact u/s 27 of Evidence Act."

92. In the case in hand the statement of the accused led discovery of the dead body of the victim child and this fact was within the special knowledge of the accused Gauri Shankar Nath and except he no other villager has knowledge of the same. The villager made search of the girl from the evening till whole night but no clue found and her dead body was recovered when accused took police and villager to the place where he threw the girl and only then the dead body of the victim girl was recovered from the ditch near Samsan ghat and presence of the dead body of the girl in the ditch near the graveyard are within the knowledge of the accused and except accused it was not known to any other person and only denial of the accused that he did not took police to the place of recovery has no relevancy and same does not offer any explanation. Accused statement in his 313 Cr.P.C made it copiously, clearly that dead body of the victim girl was recovered as per his statement and this is the most vital and important fact in issue of the case in hand that prosecution fairly able to prove against the accused. Therefore the last seen theory, together with the extra judicial confession of the accused with the leading to discovery of the dead body and accused admission in his sec 313 Cr.P.C about the position of the dead body of the deceased at the time of recovery of the dead body, recovery of the dead body in the ditch near graveyard of Besimari village (Lutapara), pulling out the body by PW-5 Gajen, accused knowledge of dress of the deceased girl at the time of recovery, inquest of the dead body of the deceased at place of recovery, taking of the photograph of the deceased girl in the position when body was recovered in the ditch and then taking of another photograph when dead body was place on ground after pulling out from the ditch show the conduct of the accused which are relevant fact in issue of the case and accused conduct clearly pointed that it was accused Gauri Shankar Nath who after committing rape threw the girl in the ditch to kill her and there is complete uninterrupted chain of circumstances appearing against the accused that draws only inference of accused guilty and no innocence.

- 93. It has been stated by all the PWs that dead body of deceased victim child was recovered from a ditch near Samsan ghat. Accused Gauri Shankar Nath in his 313 Cr.P.C statement admitted that dead body of deceased victim was recovered from a ditch near Samsan ghat and her dead body was flowing in the ditch upside down (face, head submerged under water). Statement of PWs unquestionably establish that dead body of deceased victim recovered as shown by accused from ditch near the Samsan ghat. The theory of leading to discovery is fairly coming out against the accused beyond all reasonable doubt and it has connected all the chain of circumstances from the last seen to missing to recovery of the dead body of the child and circumstances of the case coming out against the accused form one complete chain of circumstances.
- 94. Hon'ble Apex court in the Navaneetthakrishnan Vs. State of Inspector of Police Criminal Appeal No. 1134/13 in para 23 made observation that "The law is well settled that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about the guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. In a case depending largely upon circumstantial evidence, there is always a danger that conjecture or suspicion may take the place of legal proof. The court must satisfy itself that various circumstances in the chain of events must be such as to rule out a reasonable likelihood of the innocence of the accused. When the important link goes, the chain of circumstances gets snapped and the other circumstances cannot, in any manner, establish the guilt of the accused beyond all reasonable doubt. The court has to be watchful and avoid the danger of allowing the suspicion to take the place of legal proof

for sometimes, unconsciously it may happen to be a short step between moral certainty and legal proof. There is a long mental distance between "may be true" and "must be true" and the same divides conjectures from sure conclusions. The Court in mindful of caution by the settled principles of law and the decisions rendered by this Court that in a given case like this, where the prosecution rests on the circumstantial evidence, the prosecution must place and prove all the necessary circumstances, which would constitute a complete chain without a snap and pointing to the hypothesis that except the accused, no one had committed the offence".

- 95. In Sucha Singh Vs. State of Punjab (2001) 4 SCC 375 held "in para 19 we pointed out that section 100 of Evidence Act is not intended to relieve the prosecution of its burden to prove the guilty of the accused beyond all reasonable doubt, but the section would apply to cases where the prosecution has succeeded in proving facts for which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of special knowledge regarding such facts failed to offer any explanation which might drive the court to draw a different inferences."
- 96. Hon'ble Apex Court in Satpal Vs. State of Haryana in Cri. Appeal No. 1892 of 2017 in para no. 6 held that "..... There is no eye witness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal Jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain

of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine.

In Gagan Kanojia & Anr Vs. State of Punjab, Criminal Appeal no. 561-62 97. of 2005 Hon'ble Apex Court held "The prosecution case is based on circumstantial evidence. Indisputably, charges can be proved on the basis of the circumstantial evidence, when direct evidence is not available. It is wellsettled that in a case based on a circumstantial evidence, the prosecution must prove that within all human probabilities, the act must have been done by the accused. It is, however, necessary for the courts to remember that there is a long gap between 'may be true' and 'must be true'. Prosecution case is required to be covered by leading cogent, believable and credible evidence. Whereas the court must raise a presumption that the accused is innocent and in the event two views are possible, one indicating to his guilt of the accused and the other to his innocence, the defence available to the accused should be accepted, but at the same time, the court must not reject the evidence of the prosecution, proceeding on the basis that they are false, not trustworthy, unreliable and made on flimsy grounds or only on the basis of surmises and conjectures. The prosecution case, thus, must be judged in its entirety having regard to the totality of the circumstances. The approach of the court should be an integrated one and not truncated or isolated. The court should use the yardstick of probability and appreciate the intrinsic value of the evidence brought on records and analyze and assess the same objectively.

We would proceed on the well-known principles in regard to appreciation of the circumstantial evidence which were noticed by the High Court in the following terms :

- "1) There must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.
- 2) Circumstantial evidence can be reasonably made the basis of an accused person's conviction if it is of such character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt.

- 3) There should be no missing links but it is not that every one of the links must appear on the surface of the evidence, since some of these links may only be inferred from the proven facts.
- 4) On the availability of two inferences, the one in favour of the accused must be accepted.
- 5) It cannot be said that prosecution must meet any and every hypothesis put forwarded by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise."
- 98. In Bodh Raj @ Bohda & ors Vs State of Jammu & Kashmir, (2002) 8 SCC it is held that circumstantial evidence can be a sole basis for conviction provided the condition as stated below satisfied. Conditions are:-
  - (1) The circumstances from which guilt is established must be fully proved;
  - (2) That all the facts must be consistent with the hypothesis of the guilt of the accused;
  - (3) That all the circumstances must be of a conclusive nature and tendency;
  - (4) That the circumstances should, to a moral certainly, actual excludes every hypothesis except one proposed to be proved.
- 99. It was again observed in Bodh Raj @ Bohda & ors Vs State of Jammu & Kashmir, (2002) 8 SCC "It has been consistently laid down by this court that where a case rests squarely on circumstantial evidence, the intervene of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person". "The circumstances from which an intervene as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be informed from those circumstances".
- 100. In Krishnan Vs State (2008) 15 SCC 430 Hon'ble Apex court observe;

'The circumstances from which an inference of guilty is sought to be drawn must be cogently and firmly established;

Those circumstances should be of definite tendency unerringly pointing towards guilt of the accused;

The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that with all human probability the crime was committed by the accused and none else; and The circumstantial evidence in order to sustain conviction must be complete and in capable of explanation of any other hypothesis then that of the guilty of the accused and such evidence should not only be consistent with the guilty of the accused but should be inconsistent with his innocence."

- 101. Going through the aforesaid decision of the Hon'ble Apex Court it is now crystal clear that when prosecution case is hinged on circumstantial evidence prosecution must prove every link of the chain of circumstance and it must be one complete chain of circumstances and circumstances must bring on record only guilty of the accused and no inference of his innocence and the circumstances only connect it to a conclusion of fact which proves only guilty of the accused and there must be a complete chain of circumstances and there should not be any dent, snapping, dislocation of the chain of circumstances.
- Coupled with the aforesaid decision and upon meticulous scrutiny of the 102. evidence on record it is appearing that that there is no dent in the prosecution case. All the PWs before the police, before learned magistrate and before court make one single consistent statement that accused made statement before them that he had taken the victim child with him and he rape her and threw her in the ditch and it was his statement that led the discovery of the dead body of the victim child from the ditch. The victim child was playing in the field and she was last seen by her parents at the school field. Accused was present in the said school field and this fact was noticed by the father of the deceased child. Victim child was taken by accused on his bicycle and this was noticed by the PWs. Accused returned but victim was not found. Accused made attempt to flee away from the place of occurrence. He was apprehended by the villager and before police he confessed that he had committed rape and killed the victim. It was accused who led police and villager to the Besimari samsan ghat and show the ditch where he threw the child and dead body of the child was recovered. Autopsy report and inquest report revealed commission of rape on the victim and injury found on her anus and vagina shown commission of rape (sexual assault) on her. The jeans pant of the accused and dress last wore by the deceased child found with deceased was seized by the IO of the case and

sent to FSL for chemical examination and jeans pant of accused, panty of the deceased child gave positive test of presence of human semen. Cycle that was seized by the police pointed that this cycle was taken and ride by accused on the day of incident as per statement of the PW14, the uncle of the accused. All the facts that were brought by the prosecution against the accused were established by the prosecution against the accused and all the circumstances that prosecution bring form one complete chain of circumstances and there is no inference of innocence of the accused and only guilty of the accused is coming and prosecution fairly able to bring home the guilty of the accused.

103. Hon'ble Apex Court in Nagesh Vs. State of Karnataka in Criminal Appeal No. 671 of 2005 in para 13 held, "It is neither possible nor prudent to state a straight-jacket formula or principle which would apply to all cases without variance. Every case has to be appreciated on its own facts and in light of the evidence led by the parties. It is for the Court to examine the cumulative effect of the evidence in order to determine whether the prosecution has been able to establish its case beyond reasonable doubt or that the accused is entitled to the benefit of doubt."

104. Thus, the circumstances appearing from the evidence on record against the accused are that: - PW-1, informant is that accused was seen at the Lawpara school field where victim child was playing; PW-3, PW-4 and PW-6 seen victim girl with the accused on the bicycle of accused and accused's nephew was also present; Accused return with his nephew on the same bicycle; On questioning of accused by PW-1, accused gave answer that he drop her at her home; thereafter accused tried to fled away from his village; PW-1, PW-6 with Dharmendra apprehend the accused; accused made statement before the PWs and villager that he had committed rape on victim and threw her in ditch; accused on early next morning when in police custody took police to the samsan ghat and show the ditch where he threw the child and dead body of the child was recovered as per statement of accused at accused instance; police seized jeans pant of the accused that was dressed by accused on the day of incident and panty and other dress of the deceased child found with the dead body; inquest report pointed commission of rape of the child; Autopsy report of the deceased child confirm the inquest report of the deceased child; FSL report revealed and gave positive test of presence of semen in the jeans pant of accused and panty of the deceased child and

presence of human blood in the frock of the deceased child; death of the child is due to asphyxia as a result of drowning. The IO of the case seized dress of accused and deceased after recovery of the dead body of the child and sent to FSL for chemical examination. All the facts when read together give only one point that accused Gauri Shankar Nath after taking the child on his bicycle from the school filed took her to isolated place of Besimari Samsan ghat and committed forceful sexual intercourse with the 7 years victim child and then threw her in the ditch to die her to eliminate her from disclosing the incident of crime committed by accused and return to his village with his nephew to give impression as if nothing is happened but when he was spotted by the villager without the victim child villager questioned him not finding the victim girl, he gave inappropriate reply and then tried to run away from the villager to hide out to screen himself from getting legal punishment but he was apprehended, handed over to police and during questioning from his disclosure statement dead body of the victim child was recovered. Thus, from the point of last seen to missing of the girl with the recovery of the dead body on the statement of accused draws only hypothesis of accused guilty and no inference of his innocence and there is complete chain of circumstances coming out against the accused Gauri Shankar Nath that proves his only guilty and nothing comes in his favour.

105. Protection of Children from Sexual Offences Act 2012 in short section 3 of the POCSO Act define what is penetrative sexual assault.

Section 3 of POCSO Act is quoted herein below.

#### "3.Penetrative sexual assault.-

A person is said to commit "penetrative sexual assault" if-

- he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person."

- 106. Section 5 of the POCSO Act says the condition when penetrative sexual assault on child is aggravated and section 5(m) defines who ever commits penetrative sexual assault on a child below (12) years is said to commit an offence punishable u/s 6 of POCSO Act. Section 375 IPC defines rape and section 376 IPC is the penal provision of rape and after recent amendment in 2018 section 376-AB inserted. Section 376-AB is the penal provision to an offender committing rape on a child below 12 years. The amended criminal Act comes into force from the month of April 2018 and instant incident was took place on 29-04-18.
- 107. Section 375 IPC. Offence of rape is defined in section 375 I.P.C. An accused is said to be committed rape if accused committed one or more of the following acts:
  - Penetrates his penis, to any extent, into vagina, mouth, urethra
    or anus of a woman or makes her to do so with him or any
    other person; or
  - ii. Inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or
  - iii. Manipulates any part of the body of woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or
  - iv. Applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

Accused did the said act falling under any of the following seven descriptions

**Firstly -** Against her will.

**Secondly** -Without her consent.

**Thirdly -** With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

**Fourthly-** With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

**Fifthly -** With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

**Sixthly -** With or without her consent, when she is under sixteen years of age.

**Seventhly-** when she is unable to communicate consent.

Therefore prosecution must bring the essential ingredient as defined in section 375 I.P.C. to attract penal provision of section 376 I.P.C.

- 108. Cumulative reading of the ingredients of section 3 and 5 of POCSO Act and section 375 and 376-AB I.P.C gives one and same meaning and that is sexual assault, sexual intercourse (rape) by a man on a girl below 12 years of age is punishable u/s 6 and 376-AB I.P.C.
- 109. The evidence on record revealed deceased victim child was only 7 years old at the time of incident and she is below 12 years of age and 'Miss X' was below 12 years of age at the time of incident is an admitted fact. The scanning of the entire evidence on record brings only one fact and that is, it is the accused who took 7 years old daughter of the PW-1 on his bicycle with only intention to commit the offence in a cold blooded manner his sinister conduct bring only his guilty and nothing else coming in his favour.
- 110. Section 29 of POCSO Act says "Presumption as to certain offences.-where a person is prosecuted for committing or abetting or attempting to commit any offence under sections 3, 5, 7 and section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved" Section 29 of the POSCO Act draws presumption that if sexual assault is alleged by a minor unless it is rebutted by the accused it is presumed that accused had committed sexual assault on the minor as alleged. When allegation of sexual assault on a minor is alleged, accused has to prove his innocence and this is the special legislation where accused has to prove his innocence. In the case in hand evidence on record clearly pointed that accused

Gauri Shankar Nath committed aggravated penetrative sexual assault (rape) on 7 years child (deceased victim) after taking her in an isolated area and after committing the offence of rape he threw her in the ditch to eliminate her from disclosing the crime committed by him. The unimpeached, unshaken evidence of PWs more specifically evidence of PW-1, PW5 to PW-9, PW-15 and PW11, inquest officer, PW-12 MO and PW-16 the IO of the case only drawn the inference of accused guilty of commission of rape/ aggravated penetrative sexual assault and murder of the 7 years old deceased child Miss X.

## **Conclusion**

- 111. On scanning of the entire evidence on record, both oral as well as documentary evidence and upon perusal of the statement of the accused recorded u/s 313 Cr.P.C and material on record produces following scenario of the case in hand;
  - I. Incident was took place on 29-04-18 during evening time;
  - II. On the date of incident there was marriage function in the house of paternal uncle of accused Gauri Shankar Nath i.e daughter of PW-13 and PW-14;
  - III. Accused is the adjacent neighbour of informant and co-villager of PW-3 to PW-9 and PW-15;
  - IV. Lawpara LP school is present near the house of accused, informant and PW-13 and PW-14 and school having one play ground;
  - V. PW-1 his wife PW-2, their victim daughter (deceased), accused and other villagers came to the marriage house and PW-1 worked as cook in the marriage house;
  - VI. From the marriage house deceased victim child went to play in the Lawpara LP school;
  - VII. When victim child was playing in the Lawpara LP school field accused was present in the field;
  - VIII. On the date of incident accused took bicycle belonging to PW-14 from their house, that was subsequently seized by police from the house of PW-14 on being produced by PW-13 paternal aunt (jethai) of accused Gauri Shankar Nath;
    - IX. Victim child was missing (untraceable) from the school field from evening of 29-04-18;

- X. PW-3, PW-4, PW-6 when coming to their respective house from their visiting place, they have seen deceased victim child with accused on accused's bicycle with accused nephew and PW-4 seen accused Gauri Shankar Nath taking away deceased victim child on his cycle from the house of PW-14 Lalit Nath where one of the marriage function was going on;
- XI. PW-2, PW-5, PW-7, PW-9, PW-15 heard from the visitors of marriage house and villagers where PW-4 was also present that accused Gauri Shankar taken away deceased victim child, daughter of PW-1 and PW-2 on his bicycle with accused's toddler nephew;
- XII. Accused Gauri Shankar Nath returned to his village on his said bicycle with his nephew and spotted by PW-1, PW-2 and other villagers but daughter of PW-1 and PW-2 (deceased victim) was not with accused;
- XIII. All the PWs including PW-13 stated about missing of deceased victim child from the evening of 29-04-18;
- XIV. On being spotted accused with his nephew on the bicycle ( later on seized by police), accused was questioned about victim child and gave contradictory reply- he dropped victim child at her home, did not take her, and he will too find out her;
- XV. At the time of questioning of accused about victim child( deceased) when he was returning home with his nephew, his nephew told accused threw victim child in the water;
- XVI. After dropping nephew of accused at his home by accused, accused try to leave the village and proceeded towards Bilasipara town from his village Lawpara;
- XVII. PW-1, PW-6 got information from another villager Dharmendra ( nickname) that accused is about to leave the village;
- XVIII. PW-1, PW-6, Dharmendra immediately made search for accused, noticed him and at that time accused seeing them entered into the compound of one Naba Nath but did not come out and on enquiry by PW-1, from the wife of Naba Nath, it is learn that accused did not enter into her house;
  - XIX. Accused made attempt to flee away from the village seeing PW-1, PW-6 are following him;

- XX. PW-1, PW-6 and Dharmendra on their motorcycle chased accused Gauri Shankar Nath and intercepted him at Halong Bazar and held him and bring back to village Lawpara;
- XXI. Accused was interrogated by village people, PW-1, PW-5 to PW-9, PW-15;
- XXII. During grilling by PW-1, PW-5 to PW-9, PW-15 and other villagers, accused made statement before them he took away victim child, rape her and killed her and this is more particularly revealed from the cross examination of PWs;
- XXIII. Police was informed by some villager about the missing of the 7 years old victim child when accused was brought to village and questioned by village people and accused made statement that he killed victim child after committing rape on her;
- XXIV. Police arrived at village Lawpara and villagers handed over accused to police;
- XXV. Accused was taken in custody of police and Sapatgram police station deployed one section of police at village to conduct search and for tracing out victim child;
- XXVI. During interrogation by the police, accused made statement before the police where about of the dead body of the deceased victim child;
- XXVII. From the disclosure statement made by the accused in the early morning at about 04.00 to 04.30 am of 30-04-18, led by accused, dead body of the victim child was recovered from one ditch present near Lutapara Besimari Samsan ghat which is near Kachua river in presence of PW-1, PW-5 to PW-9, PW-15, PW-16 IO of the case and other superior police official and villagers of Lawpara village;
- XXVIII. Dead body was found upside down (head submerged) under water, frock of the deceased lifted above her chest, panty was pulled down below her knee, forehead injury, blood spot on private parts and anal region. Blood spot on her dress (frock and top) presence of sperm in her panty;
  - XXIX. Police taken photograph of the dead body of the deceased victim child at the time of spotting on showing by accused and after she was bring on ground by PW-5 on being commanded by police;

- XXX. PW-12 conducted inquest on the dead body, found injury mark on the private part of the deceased victim child;
- XXXI. Ext-11 autopsy report pointed injury on vaginal introitus, hymen tear, anal mucosal tear on posterior part with abrasion on left eye lid, laceration mid scalp and private parts injury around vagina and anal region is due to forceful insertion of hard object, probably erect penis;
- XXXII. I/O of the case seized frock, top and panty of the deceased victim child and blue jeans pant of the accused and sent to FSL for chemical examination;
- XXXIII. Accused admitted seizure of his blue colour jeans long pant that was worn by him on the date of incident;
- XXXIV. Accused admitted seizure of panty, frock top of the deceased girl and seizure of the dead body at the place of recovery;
- XXXV. IO of the case send seized dress of the accused and wearing apparel of the deceased to FSL for examination;
- XXXVI. Chemical examination report and serological report revealed and gave positive test of presence of semen in the blue coloured jean pant and green coloured panty and positive test of presence of human blood on the frock and top;
- XXXVII. Green colour panty was wear by deceased victim child on the day of incident at the time of incident and police seized it from the dead body after recovery in presence of witnesses and sent to FSL for examination as spotted with suspected semen. Blue colour jeans pant was seized from accused by PW-16 I/O of the case that was worn by accused on the date of incident at the time of incident in presence of witnesses and I/O sent the same to FSL for examination;
- XXXVIII. Accused recovery of the dead body in a ditch near Lutapara Besimari village graveyard which is about 1 ½ Km away from his village and pulling up of the dead body from the ditch by PW-5 Gajen after recovery as commanded by police and dead body was found in upside down position;
  - XXXIX. Accused admitted he read upto class VII at Bholanath ME School, Puran Lawpara;

- XL. Accused stated at the time of incident deceased victim child was about 09-10 years which means below 12 years;
- XLI. Accused admitted presence of injuries on the dead body of deceased victim child;
- XLII. Accused admitted Magistrate conducting inquest on the dead body of the deceased child at the place of recovery of the dead body of the child;
- XLIII. Accused admitted taking of photograph of deceased victim child at the place of recovery (M. Ext-2 and M. Ext-3) when shown to him at the place of recovery of the dead body from the ditch;
- XLIV. Accused admitted that PW-1, PW-6 called him, stopped at Halong Bazar and bring back him to the village Lawpara and at that time he was proceeding to Bilasipara town and they grilled him;
- 112. Upon scrutiny of the entire evidence on record and when the settled principle of circumstantial evidence is applied and after going through the provision of section 375 I.P.C, 376-ABIPC, 300 I.P.C, section 3 and 5(m) of the POCSO Act I find that prosecution without any snaps, dent bring book all the incriminating circumstances against the accused Gauri Shankar Nath and that from only one complete chain of circumstances that draws only inference that accused Gauri Shankar Nath after committing rape of 7 years victim girl threw her body in the ditch to eliminate her from disclosing the incident and cause her death intentionally and it is he had committed rape with murder of the 7 years old daughter of the PW-1 on 29-04-18 and I hold him guilty u/s 376-AB/302/201 r.w section 6 of the POCSO Act and accordingly accused Gauri Shankar Nath is convicted u/s 376-AB/302/201 of I.P.C and section 6 of the POCSO Act.
- 113. The series of offence committed by the accused and the heinous nature of the offence and manner of commission of the offence does not entitle the benefit of section 360 Cr.P.C and benefit of Probation of Offender Act in accused favour. Accordingly I have heard accused and his learned counsel and Ld. Special PP for the state on the point of sentence.

## **Hearing on Sentence**

- 114. I have heard accused and his counsel and Ld. Special P.P on the point of sentence. Accused pleaded mercy and his sentence is written in a separate sheet enclosed with the case record.
- 115. Ld. Special P.P submitted deceased victim child was 7 years old, there was no provocation, victim child was defenseless, victim was unarmed and she did not get chance to safe her, this is a cold blooded murder, accused to eliminate the victim murder the defenseless child, accused to full fill his carnal lust committed rape on the girl in presence of another toddler of less than three years of age and this is the first of its nature case took place at Bilasipara subdivision and is the rarest of rare case and prays for highest punishment of the accused.
- 116. Learned defence counsel submitted accused is young and no past history of crime brought against the accused hence, prays for leniency.
- 117. I have taken into consideration the respective submission of both the learned counsel and after through scrutiny of the record I find following aggravating and mitigating facts that are placed by the learned counsel for both sides and coming out from the evidence and material on record.
- 118. Now, let me scanned both the facts to find out which side is heavier in terms of the principle of law settled by Hon'ble Apex court in Bachan Singh vs State of Punjab, (citation AIR 1980 SC 898) and Machhi singh vs state of Rajasthan (1983 (3) SCC 470, AIR 1983 SC 957). In the constitution bench of the Hon'ble Apex Court in Bachan singh case held that the sentence of death ought to be given only in the 'rarest of rare cases' and death sentence be given only when the option of awarding the sentence of life imprisonment is 'unquestionably foreclosed'. In Machhi Singh Case Hon'ble Apex Court settled guidelines while determining the 'rarest of rare cases'.
- 119. Life imprisonment is the rule and death sentence is exception. It was held by the Hon'ble Apex court in a catena of decision that death sentence be imposed only when life imprisonment appear to be an altogether inadequate punishment having regard to the relevant circumstances of the crime and when the sentence of imprisonment for life cannot be conscientiously exercised having regard to all relevant circumstances.

### 120. Hon'ble Supreme Court Guidelines in Bachan Singh

- The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- ii. Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime';
- iii. Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and only provided, the option to of imprisonment sentence for life impose cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

121. Hon'ble Supreme Court Guidelines in Machhi Singh case (supra) – Factors to be considered while determining the "rarest of rare" case

#### I Manner of Commission of murder

- 33. When the murder is committed in an extremely brutal, grotesque, diabolical. revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
  - (i) When the house of the victim is set aflame with the end in view to roast him alive in the house.
  - (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
  - (iii)When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

## II Motive for commission of murder

34. When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of

a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.

# III Anti-social or socially abhorrent nature of the crime

- (a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.
- (b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

# **IV Magnitude of crime**

35. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

## **V** Personality of victim or murder

36. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

"It is further observed that 'in this background the guidelines indicated in Bachan Singh case (supra) will have to be culled out and applied to the facts of each individual case where question of imposing of death sentences arises'. 'In order to apply these guidelines inter alia the following questions may be asked and answered: a) Is there something uncommon about the crime such which renders sentence of imprisonment for life inadequate and calls for a death

sentence? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender' 'If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the posed here in above, the circumstances of the case are such that death sentences is warranted, the court would proceed to do so".

122. In Machhi Singh (supra), a three-Judge Bench has explained the concept of 'rarest of the rare cases' by observing thus:

"The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection"

123. Hon'ble Apex court in Dhananjay Chatterjee Alias Dhana Vs State of W.B (1994) 2 SCC 220 in para 14 and 15 held, "14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation,

impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration."

- 124. "15. 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 defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to 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."
- 125. In State Of M.P vs Bablu Natt Hon'ble Apex Court stated "13. The principle governing imposition of punishment would depend upon the facts and circumstances of each case. An offence which affects the morale of the society should be severely dealt with. (14 moreover) in Alister Anthony Pareira vs State Of Maharashtra Hon'ble Apex Court held "Sentencing is an important task in the matters of crime. One of the prime objectives of the criminal law is imposition of appropriate, adequate, just and proportionate sentence commensurate with the nature and gravity of crime and the manner in which the crime is done. There is no straitjacket formula for sentencing an accused on proof of crime. The courts have evolved certain principles: twin objective of the sentencing policy is deterrence and correction. What sentence would meet the ends of justice depends on the facts and circumstances of each case and the court must keep in mind the gravity of the crime, motive for the crime, nature of the offence and all other attendant circumstances."
- 126. In CRIMINAL APPEAL NOS. 607-608 OF 2017 with criminal appeal no. 609-610 of 2017 (arising out of S.L.P. (Criminal) Nos. 3119-3120 of 2014) Mukesh & Anr. Versus State for NCT of Delhi & Ors (Mukesh & ano vs state for NCT Delhi & ors (2017)6SCC 356 it has been observed by Hon'ble Apex court "It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons, again in para 356 .... It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the powered and the attitude of

perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome beastility of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy "tsunami" of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety." 357. "When we cautiously, consciously and anxiously weigh the aggravating circumstances and the mitigating factors, we are compelled to arrive at the singular conclusion that the aggravating circumstances outweigh the mitigating circumstances now brought on record. Therefore, we conclude and hold that the High Court has correctly confirmed the death penalty and we see no reason to differ with the sameI."

127. In Mukesh & ano vs state for NCT Delhi & ors (2017)6SCC Justice Bhanumati made observation in this case in para 2, 116, 126 and 217 which is quoted herein

"2.Honesty, pride, and self-esteem are crucial to the personal freedom of a woman. Social progress depends on the progress of everyone. Again in para 11 held "Duty of court in appreciation of evidence while dealing with cases of rape: Crime against women is an unlawful intrusion of her right to privacy, which offends her self-esteem and dignity. Expressing concern over the increasing crime against women, in State of Punjab v. Gurmit Singh and Others (1996) 2 SCC 384, this Court held as under":

"21. Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating woman's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault — it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the broader probabilities of a case and not get swayed by minor contradictions or

insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case......" [Emphasis supplied]"

"116. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large." "126. As dealing with sentencing, courts have thus applied the "Crime Test", "Criminal Test" and the "Rarest of the Rare Test", the tests examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. Courts have further held that where the victims are helpless women, children or old persons and the accused displayed depraved mentality, committing crime in a diabolic manner, the accused should be shown no remorse and death penalty should be awarded."

"127.Even the young age of the accused is not a mitigating circumstance for commutation to life, as has been held in the case of Bhagwan Swarup v. State of U.P. (1971) 3 SCC 759 (para 5), Deepak Rai v. State of Bihar (2013) 10 SCC 421 (para 91-100) and Shabhnam v. State of Uttar Pradesh (2015) 6 SCC 632 (para 36)"

128. In State of U.P. Vs. Satish (2005) 3 SCC 114 the victim was a six year old girl who lost her life on account of the bestial acts of the respondent who raped and murdered her. The body was found in a sugarcane field and blood was oozing from her private parts and there were marks of pressing on her neck (suggesting death by strangulation). It was held that this diabolic, iniquitous, flagitious act reached the lowest level of humanity when the rape was followed by brutal murder. Hence death sentence was justified.

- 129. Now, let me analyze the whole facts and circumstances of the case, manner of commission of the offence and the aggravating and mitigating facts of the case in terms of settled principle of law to arrive at just decision on the point of sentence whether the present case is fall in the category of 'rarest or rare cases' and aggravating factor outweigh the mitigating factor or not?
- **Aggravating facts of the case:** Deceased victim was 7 years old 130. child; deceased was victim of aggravated penetrative sexual assault and rape at the tender age of 7 years when her age is to play and move like a butterfly, after the rape of 7 years child she was threw in the ditch with injury on her head, private parts, and other parts of body on a rainy storm season to die during the month of April (rainy storm season started in the month of April in the state of Assam); incident night was rainy night and girl was threw to die in the cold rainy day with injury suffering in pain with no one to save her; deceased child was immediate neighbor of the accused and she was not save at her own village; at the age of 7 years when child has not developed any sexual character fall in the carnal pray of the accused who is closely known to the victim, helpless and defenseless child, no provocation, injury on the child, cold blooded, pre planed, calculated murder, conduct of the accused and manner of commission of the offence by the accused upon a 7 years old girl who bestowed her faith on accused being her villager and next door brother. Cross examination of the PWs does not pointed that accused committed the offence under moral or emotion disturbance under intoxication, under pressure or under domination of another person. Rather evidence on record bring, accused committed the crime is most barbaric, savage, pre-planned, calculated way to fulfil his carnal lust and his conduct pointed adult female and ladies in general of the village is not safe in presence of the accused in the society.
- 131. Mitigating facts: young age of the accused; no past criminal record brought by prosecution.
- 132. The offence committed by the convicted accused Gauri Shankar Nath is heinous gravest one. It is shocking incident to society as a whole. The accused is next door neighbor of the deceased victim girl, there is no feud with the family member of deceased. Accused is the village elder brother of the deceased victim girl and next door neighbor having same compound and accused being village elder brother of the deceased girl and adjacent neighbor of the 7 years old victim girl it is his utmost moral duty to protect the life of the

girl being his sister who believe him and so thus went with him for joyous cycle riding but accused instead of protecting the girl from all odds, taking advantage of marriage function of his cousin sister, took away the innocent unguarded girl to lonely place of samshan ghat, rape her who has no defence except crying in pain and agony and accused with fit mental condition after committing rape on her causing injury on her body head, face, private parts, he threw her in the ditch on a rainy day to die her in the water that is most vulgar, barbaric, inhuman, brutal, cold blooded, calculated, per planned sordid nature crime.

133. When the incident was took place society cry for justice to the girl and there was storm and cay of the society as a whole after the incident in the society for stringent punishment to eliminate this type of crime from the society. The incident of rape of a 7 years old child shock the societies and judicious consciousness and society cry for justice of the departed soul of the rape victim child. The conduct of the accused the manner of committing the offence by the accused clearly bring on record that he had committed the crime after planning it and therefore he choose the date to commit the crime on the date of his cousin sister marriage function, where father of the victim girl was called to cook the fest meal, and other villager come to the house for the occasion. So taking advantage of all these circumstances he materialize the crime and he took away the poor girl and also took his toddler nephew to give impression to other if any one see him they will not suspect him and he could easily escape from the legal punishment of the crime committed by him. Accused first win the confidence of the little girl to take with her on his bicycle pretending to be bicycle riding that child of that age like most and then he made her victim of his salvage lust and to fulfil his carnal lust he caused injury on the mid-scalp, abrasion on both eye lid, bruise on lateral part of vaginal introtius of 1 x 0.5 cm, 0.5 cm of hymen tear on posterior part, 0.5x0.5 cm of anal mucosal tear on posterior part and injury caused to the victim alone pointed the torture he did with the little girl to full fill his barbaric carnal lust and this is not only condemnable but it must be eliminate from the society for safe living of the children of the society in particular and woman folk in general. The most barbaric conduct of the accused of committing rape on the child of 7 years causing injury on her body and then throwing her in the water in the rainy storm season of Boghag Month (Assamese Boghag Month English April month) to die of suffocation under water in pain does not deserve any leniency and society call for stringent punishment to eliminate this type of criminal from the society to make safe place for the woman in particular and citizen in general.

One neighboring girl of 7 years of age who called accused as brother 134. and known to the family member of the deceased girl and when there is no provocation, no enmity, no dispute, accused can commit rape on 7 years old girl of his next door neighbor who was helpless, innocent, defence less child of only 7 years having no knowledge what is sex, falls prey of accused carnal lust, then it is easily sensible for adult woman of the society that they will not safe in the society in accused presence. The court duty is to see the safety and security of the larger section of the society not to consider the plight of one person who has committed rape which alone is most barbaric heinous crime that kill the very spirit of the woman and destroy the life of rape victim and in the case in hand accused after committing rape on the 7 year old child did not take breadth and kill her in most ghastly barbaric way by throwing the girl in ditch in face downward to die her in suffocation having no one to help the girl for her rescue and the conduct of the accused manner of committing the offence by the accused person does not entitle any treatment of leniency and this case is falls within the rarest of rare one in view of the principle set in Bachan Singh and Machhi Singh case. The offence committed by the accused person and manner of committing the offence is most un-savaged, most barbaric one and the horror story of committing rape on 7 years old child and murder of the child by immersing child face downward ( submerged) is the water to die in suffocation and pain shaken and shock the consciousness of the society and court and out weight the mitigating facts and aggravating facts is much high above the mitigating facts and in the case in hand woman of the society when not save in presence of the accused in the society, the death sentence is only option left to punish the accused.

135. Ld. Special P.P submitted that instant case, the offence committed by the accused is first of its kind in the subdivision of the Bilasipara and the conduct of the accused and nature and manner of committing the crime by the accused give shivering to the society and woman are not safe in presence of the accused in the society and therefore accused does not deserve any

leniency and aggravating circumstances of the case out weight mitigating fact of young age of the accused.

When mitigating factor and aggravating factor is weighted, it is found weight of aggravating factor is more and the conduct of the accused clearly pointed this is a cold blooded murder after committing aggravated penetrative sexual assault on the deceased child. Accused who is the adjacent neighbor of the deceased child, took the innocent child on his bicycle and said child was under impression of the joyful riding of cycle, committed aggravated sexual assault (rape) upon her that too in presence of another toddler of less than 3 years who just could able to say one or two words and then after fulfilling his carnal lust he threw the girl in the ditch to let her die. His conduct is most cruel, barbaric and savage. He had mother at his home, having his sister but he did not think of the plight of the woman and he gone to the extreme point to commit rape on 7 years old child who do not understood anything and then threw her in the ditch after causing injury on her lips, eye, head and other parts of the body and let her die under pain. Accused only for his carnal lust made the 7 years innocent girl to his prey and to wipe out the evidence he committed murder of an innocent girl child without any provocation and the crime committed by the accused and manner of commission of the offence shocked and shivered the society and society cay for end of the savage crime committed by the accused.

137. Testimonies of PW-1, PW-5, PW-6, PW-7, PW-8, PW-9, PW-15 and PW-16, the IO of the case revealed that whole night accused mislead the search operation and on next morning at about 04.00 to 04.30 am, when police bring accused to the village school field where incident was started first and from this place police took custody of the accused on the day of incident and again interrogated accused in their presence. This time accused Gauri Shankar Nath took police to the Lutapara Besimari village Samsan ghat (Kachua beel) and showed dead body in ditch and PW-5 Gajen lifted the body as directed by the police. The conduct of the accused in misleading the direction of search operation clearly pointed that he was only waiting for the death of the girl. It is accused who know where he threw the victim girl Miss X, the 7 years old child and accused only to eliminate her from this world in cold blooded committed series of crime in one incident which is most barbaric savage, brutal and threat to the society and society is not safe in his presence. When this incident of

rape with murder of 7 years old girl was took place by the close next door brother of the deceased victim girl, it gave shock to the consciousness of the society and society feels and wanted stringent punishment to curb this menace from the society for the safety of woman folk.

- 138. Again coming to the facts and circumstances of the case in hand, it pointed that accused Gauri Shankar Nath taking advantage of marriage function in the village took the girl with him in an isolated place after winning her confidence showing joyous bicycle riding to full fill his ghastly act of barbaric carnal lust and then to eliminate her threw in the ditch in the isolated place to let her die with no one to help her and then returning home on the same bicycle to home to show if nothing was happened and then when he was asked about the girl, he tried to flee away from the village telling father of the deceased that he too is going to search Miss X. The most cold blooded murder of the 7 years old girl after rape by the accused when compared with the facts of his young it falls far away and aggravating facts were on high level.
- 139. After going through the aforesaid principles of law set forth by the highest court and when applied in the present case to balance the aggravated and mitigating fact I find the mitigating fact has no force, weight in comparison to the aggravated facts and young age of the accused in this case not out weight the aggravating factor of the helpless, defenseless 7 years old girl child who was rape and murdered. When one 7 years old girl is not safe in the society in presence of the accused, the other adult woman of the society is not at all safe in the society in presence of the accused in the society and collective conscience of society and consciousness of the court is shocked and shivered by the crime committed by the accused and keeping in view the settled principle of law set by Hon'ble Apex Court in Bachan Singh vs State of Punjab and Machhi Singh & ors I find that this is the case falling in the category of 'rarest of rare cases' so to award the death penalty u/s 302 I.P.C as imprisonment for life is foreclosed in the case and death penalty is only option for safer society.

## **Punishment**

- 140. Section 42 of the POCSO Act says: "42. Alternative punishment.-Where an act or omission constitute an offence punishable under this Act and also under section 166A, 354-A, 354-B, 354-C, 354-D, 370, 370-A, 375, 376, [376-A, 376-B, 376-C, 376-D, 376-AB, 376-DA, 376-DB] 376-E, or section 509 of the Indian Penal Code then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under such law or this Act as provides for punishment which is greater in degree."
- 141. Maximum punishment prescribed u/s 6 of POCSO Act is imprisonment for life but which shall not be less than 10 years and shall be liable to fine.
- 142. Coming to section 42 of the POCSO Act. I find that act of accused constitute an offence which is punishable u/s 376-AB IPC and punishment prescribed in section 376-AB of IPC is greater in degree. Therefore, I am of the considered opinion, if accused is sentenced u/s 376-AB IPC it will also serve the purpose of section 6 of the POCSO Act. Accordingly for the offence committed by the accused u/s 6 of POCSO Act which is equivalent to the offence u/s 376-AB IPC, I deem it fit to sentence the accused u/s 376-AB of the Indian Penal Code and same will do the justice.
- 143. In view of my aforesaid discussion, I award the following punishment to the convict Gauri Sankar Nath @ Banka
- 144. I sentence convict Gauri Shankar Nath @ Banka to death for the offence punishable under section 302 IPC. Accordingly convict Gauri Shankar Nath @ Banka to be hanged by neck till he is dead. I also imposed fine of ₹ 5000/-and in default of payment of fine convict Gauri Shankar is sentenced to undergo SI of 6 month u/s 302 IPC
- 145. For the offence under section 376-AB IPC, I award the punishment of rigorous imprisonment for life which means imprisonment for the remainder of the natural life of the convict accused Gauri Shankar Nath and also imposed fine of ₹ 15,000/- in default payment of fine to undergo S.I of 1 year u/s 376-AB I.P.C. The punishment u/s 376-AB I.P.C will do the justice for offence u/s 6 of the POCSO Act

- 146. For the offence under section 201 IPC, I award the punishment of 3 years rigorous imprisonment and also imposed fine of ₹ 2000/- in default to pay fine to undergo another S.I of 3 month u/s 201 I.P.C.
- 147. The sentence u/s 376-AB IPC/201 I.P.C will run concurrently. Benefit u/s 428 Cr.P.C be given wherever applicable.
- 148. Case record of this proceeding be submitted to the Hon'ble High Court for the confirmation of the death penalty u/s 366 Cr.P.C along with the case diary and all relevant materials. The file be prepared and be sent to Hon'ble High Court as per rules.
- 149. The sentence of death imposed on the convict shall not be executed unless confirmed by the Hon'ble High Court.
- 150. The convict Gauri Shankar Nath be commuted to jail custody under warrant.
- 151. Let furnish free certified copy of judgment and order of sentence to Convict Gauri Shankar Nath @ Banka.
- 152. The convicted accused is told that he has right to appeal against the judgment and order of this court before Hon'ble High court through the jail authority or independently of his own. Convicted accused is further informed that he is entitled free legal aid to prefer appeal before the Hon'ble High court.
- 153. Seized one bicycle and one mobile handset vide Ext-7 be disposed of in auction sale and sale proceed be deposited in the State Exchequer; Seized jeans long pant of convict Gauri Shankar Nath @ Banka vide Ext-19 be destroyed in due course of time in accordance with law; Seized wearing apparels of deceased victim child be handed over to the parents of deceased victim child in due course of time. The exhibit and seized items be preserved till the confirmation of death sentence by the Hon'ble High Court.
- 154. Send copy of judgment and order to District Magistrate Dhubri u/s 365 Cr.P.C
- 155. DLSA Dhubri will make necessary enquiry to provide the compensation to the next kin of the deceased under the Victim Compensation Scheme as envisage u/s 357-A Cr.P.C as state failed to protect the life of the deceased.
- 156. Send copy of the judgment and order and relevant document to the learned Secretary DLSA Dhubri for determination of the compensation to be payable to the next kin of the deceased 'Miss X'

157. Given under hand and seal of this Court on this 29<sup>th</sup> day of March, 2019 at Bilasipara, Dist- Dhubri.

Special Judge, Bilasipara

Dictated and Corrected by me,

(Smti S. Bhuyan) Special Judge, Bilasipara

Typed by, Swmkhwr Brahma, Stenographer Gr. III.

## **APPENDIX**

### PROSECUTION WITNESS:-

PW-1 Prodip Kr. Nath,

PW-2 Pranita Devi,

PW-3 Chandra Bala Devi,

PW-4 Anjali Devi,

PW-5 Gajen Ch. Nath,

PW-6 Pradip Kr. Nath S/O Lt. Tipin Ch. Nath,

PW-7 Samendra Narayan Barman,

PW-8 Dayal Nath,

PW-9 Anil Ch. Nath,

PW-10 Abdul Latif,

PW-11 Dr. Sk. Md. Azahar (M.O),

PW-12 Nabajit Pathak,

PW-13 Chandra Prava Devi,

PW-14 Lalit Kr. Nath,

PW-15 Lumanta Kr. Nath,

PW-16 SI Imdadul Hussain (I.O) and

PW-17 Dr. Monalisha Choudhury (Scientific Officer).

## PROSECUTION EXHIBIT:-

Ext-1 Ejahar,

Ext-2 inquest report,

Ext-3 Statement of PW-3 recorded u/s 164 Cr.P.C,

Ext-4 Statement of PW-4 recorded u/s 164 Cr.P.C,

Ext-5 Seizure list,

Ext-6 statement of PW-6 recorded u/s 164 Cr.P.C,

Ext-7 Seizure list,

Ext-8 Seizure list,

Ext-9 statement of PW-7 recorded u/s 164 Cr.P.C,

Ext-10 Statement of PW-9 recorded u/s 164 Cr.P.C,

Ext-11 Post Mortem Report,

Ext-12 Statement of PW-15 recorded u/s 164 Cr.P.C,

Ext-13 informant general diary entry no. 376 dated 29-04-18 of

Raniganj out post,

Ext-14 general diary entry no. 381 dated 30-04-2018 of Raniganj out post,

Ext-15 general diary entry no. 382 dated 30-04-18,

Ext-16 requisition sent to Dhubri Civil Hospital to conduct post mortem examination on dead body of victim child,

Ext-17 Dead body challan,

Ext-18 Command Certificate,

Ext-19 Seizure list,

Ext-20 Sketch map of the place of occurrence where accused took victim,

Ext-21 Sketch map of the place of occurrence where dead body of victim recovered,

Ext-22 Charge sheet,

Ext-23 DNA test report,

Ext-24 Serological report and

Ext-25 forwarding letter of the Director cum Chemical Examiner to the Govt. of Assam

DEFENCE WITNESS :- NIL

DEFENCE EXHIBITS :- NIL

COURT EXHIBITS :- NIL

COURT WITNESS :- NIL

(Smti S. Bhuyan)

Special Judge, Bilasipara