Veerendra vs State Of Madhya Pradesh on 13 May, 2022

Author: Indira Banerjee

Bench: C.T. Ravikumar, Dinesh Maheshwari, A.M. Khanwilkar, Indira Banerjee

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REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL ORIGINAL JURISDICTION

CRIMINAL APPEAL NOS.5 & 6 OF 2018

VEERENDRA Appellant

VERSUS

STATE OF MADHYA PRADESH Respondent

J U D G M E N T

C.T.RAVIKUAMR, J.

1. The appellant, who was to avuncularise being the cousin brother of victim's mother, was found to have stripped, stuprated and strangled to cause her death. The incident took place on 19.9.2014 between 08:30 pm and 09:30 pm, inside the ruined bada (used in the sense 15:30:29 IST Reason: 'varanda') of Jagan Sindhi, which is a dilapidated, worthless building, situated at Thakur Das Baba Road, Dabra in the district of Gwalior in Madhya Pradesh. Hereafter in this judgment it will be referred to as "occurrence place" only, for brevity. The victim was aged 8 years. The appellant, who is a convict - awarded with capital sentence, calls in question the common judgment dated 14.7.2016 of the High Court of Madhya Pradesh at Gwalior in Criminal Reference Case No.101/2015 titled as "State of Madhya Pradesh vs. Veerendra" and in Criminal Appeal No.39/2015 titled as "Veerendra Vs. The State of Madhya Pradesh". Over the stated incident, Crime No.857/2014 was registered at Police Station, Dabra, soon after the noon of night, to be precise at 00:05 hrs on 20.09.2014. The appellant was arrested on 20.9.2014 at about 04:00 pm. Upon culmination of the trial for offences

punishable under Sections 364A, 376A, 376(2)(i), 302 and 201 of the Indian Penal Code (for short, "IPC") and Section 6 of the Protection of Children from Sexual Offence Act, 2012 (for short, "POCSO Act") in Session Trial No.642/2014 before the Court of IInd Additional Sessions Judge, Dabra, conviction was recorded against him for the offences punishable under Sections 302, 376A, 376(2)(i) IPC and Section 6 of POCSO Act. Consequently, he was awarded death sentence on first two counts, subject to confirmation by the High Court and life sentence under the 3rd and 4th counts besides sentence of fine of Rs.2,000/- each, on all counts. All the substantive sentences were ordered to run concurrently. As ordered under the said judgment, in respect of sentence of capital punishment, reference was made to the High Court of Madhya Pradesh as CRRFC.01/2015. The appellant herein filed Criminal Appeal No.39/2015 challenging his conviction for the stated offences and consequential sentences imposed therefor. As per the common judgment, the High Court partly allowed the appeal as well as the reference made to it as hereunder: -

> "In the result, the appeal filed by the appellant is hereby partly allowed. His conviction as well as sentence of offence under Section 376A of IPC is hereby set aside on technical ground whereas the conviction and sentences of offence under Sections 376(2)(i) and 302 IPC and Section 6 of the POCSO Act recorded by the trial court are confirmed. The reference sent by the trial court is partly accepted. Death sentence recorded for the offence under Section 302 IPC is hereby confirmed by us." Hence these appeals.

2. Briefly stated, the prosecution case is as follows:

Laxmibai Batham (PW-1) and Shri Ganesh are the parents of the deceased minor girl aged 8 years. Brij Lal (PW-2) and Janki (PW-3) are her maternal grand- parents. PW-1 is the cousin sister of the appellant-convict. In other words, the appellant-convict is an uncle (mama) of the deceased minor girl. The incident occurred between 08:30 pm and 09:30 pm on 19.9.2014. On that fateful day at about 08:30 pm, Raju Badam, who is the father of the appellant, sent her to purchase a bundle of bidi from a nearby shop. While proceeding to the shop she went past the house of Sri Patiram Basudev @ Pappu (PW-4). The appellant who was there, with PW-4 and one Rakesh, happened to see her. They gathered there for drinking. Upon seeing the victim, the appellant asked her whither she was going and then, he followed her after promising the retinue that he would return. Thereafter she was found missing. After a fervent, futile search till midnight at 00:05 hrs on 20.09.2014 PW-1 lodged Ext.P1-complaint about her missing. On 20.09.2014 itself, upon interrogation of the appellant and the aforesaid Rakesh and Patiram Basudev @ Pappu, the appellant was arrested. While in custody, the appellant made Ext.P5-disclosure Statement and thereafter, at his instance, the victim's corpse concealed underneath gunny bags, was recovered. A team of two doctors conducted autopsy on the body of the deceased and the post-mortem and the forensic science laboratory (FSL)reports revealed commission of rape in a diabolically and gruesome manner and causing of death by throttling. Subsequent to the filing of the final report and committal of the case, the trial Court initially framed charges against the appellant for offences punishable under Sections

364A, 376(2)(i), 302, 201 IPC and under Sections 3, 5 and 6 of the POCSO Act. After the commencement of the trial vide order dated 16.12.2014, charge for offence under Section 376A was also framed against the appellant.

3. Before the trial Court, for establishing the aforesaid charges against the appellant, the prosecution had examined PWs 1 to 19 and marked exhibits P-1 to P-26 documents besides identifying the material objects. In the examination under Section 313 of the Code of Criminal Procedure (for short 'Cr.P.C.') the appellant had failed to explain the incriminating circumstances against him. Though he was asked to enter on his defence he did not adduce any evidence. Upon analyzing the evidence on record, viz., the chain of events and circumstantial evidence thereof, the trial Court convicted and sentenced him as afore-stated. It is in reappreciation of the said chain of events and the circumstantial evidence that the High Court partly allowed the aforesaid appeal and also the Criminal Reference Case, in the stated manner.

4. In these appeals the appellant has candidly stated thus:-

"The Petitioner at the very outset and with great respect confines this petition with regard to the aspect of the sentencing awarded by the courts below." After having stated thus the appellant has, virtually, raised various contentions to challenge the very common judgment dated 14.07.2016 itself.

Still, it will not be inappropriate to refer to 'the questions of law' framed under "A" and "B" in the contextual situation. They read as hereunder: -

"A. Whether the conviction of the petitioner u/s 302 IPC is sustainable in view of the medical evidence on record which categorically suggested the fact that the deceased had died due to injuries sustained on her private part?

B. Whether any intention to murder a prosecutrix can be attributed, the death of which has occurred in the course of commission of alleged rape?"

5. In spite of the stated nature of the contentions, the circumstances and also what would be deducible therefrom we are inclined to consider the appeal, on all permissible grounds, taking note of the fact that the appellant herein has been handed down capital sentence for the conviction under 302 IPC, based on circumstantial evidence. However, we cannot be unmindful of the scope and delineated contours of an appeal by special leave under Article 136 of the Constitution of India. It is worthy to note that in such an appeal, unlike in a regular appeal, this Court would not undertake the exercise of an indepth consideration by way of re-appreciation of evidence.

Normally, in such an appeal only in rare and exceptional cases wherein manifest illegality appears to have infected the impugned judgment (going by the case of the appellant) concerned that this Court

will go beyond the stated scope of an appeal by special leave. In this case, the trial Court convicted the appellant based on circumstantial evidence and the High Court though partly allowed the appeal and the reference by setting aside the conviction under Section 376A IPC maintained the conviction and the sentences imposed for the other offences based on circumstantial evidence. That apart, the High Court disagreed with the findings of the trial Court as to the admissibility and evidentiary value of the underwear seized from the occurrence place (Art. F described as shaddy), upon treating it to be that of the appellant. In the circumstances thus obtained an exercise to reassure as to the existence of a complete chain of circumstances pointing to the guilt of the appellant alone, in exclusion of every hypothesis compatible with his innocence, is to be undertaken.

6. In the adjudicative pursuit the trial Court obviously considered the following circumstances: -

> a)Post Mortem report together with the expert opinion of PW-10, the Doctor who conducted autopsy on the body of the deceased and Ext.P24 -

FSL report revealing that the victim was raped and murdered;

b)The deceased was aged about 8 years and therefore, fell within the definition of 'child', under Section 3 of the POCSO Act;

c) The deceased was lastly seen with the accused at about 08:30 pm on 19.09.2014 and thereafter she was found raped and murdered;

d) After 09.00 pm on 19.09.2014 the accused was seen coming out of the Bada of the 'occurrence place';

e) Based on the disclosure statement of the accused (Ext.P5) and at his instance the nude dead body of the victim, concealed beneath gunny bags, was recovered from the 'occurrence place';

f) Finger nail scratches were found on the body of the accused;

g) Clothes of the deceased were recovered in consequent to the information given by the accused;

h) Semen was present in the vaginal swab as also on the clothes of the accused and the deceased;

i) Human blood was found on the gunny bags and also the clothes of both the accused and the deceased;

j) Additional link on account of the failure on the part of the accused to explain the incriminating circumstances put to him during the examination under Section 313, Cr.P.C.

7. As stated earlier, as per the impugned common judgment in the appeal as also in the reference made to the High Court for confirmation of the death sen- tence, the High Court set aside the conviction under Section 376A IPC. We may hasten to add that in spite of such interference no

appeal(s) has been filed by the prosecution. It is true that despite such inter- ference the High Court has concurred with the convic- tion for the offence punishable under Section 302 IPC and confirmed the capital sentence awarded by the trial Court. The High Court has also sustained the conviction for the other offences and also the sen- tences imposed therefor. What is noticeable is that even while concurring with the conviction and the sentences imposed as stated above, on certain conclu- sions such as the underwear found at the place of oc- currence as that of the appellant there is no con- comitancy among the trial Court and the High Court. The conviction under Section 376A IPC was actually interfered with on technical reasons. It is bearing in mind the aforesaid aspects and circumstances that the rival contentions are to be adverted to and ap- preciated.

8. Heard Ms. Sonia Mathur, learned Senior Counsel appearing as Amicus Curiae and Mr. Pashupatinath Raz- dan, learned Standing Counsel for the State of Madhya Pradesh. These appeals were heard together and this judgment will dispose both of them.

9. The learned Amicus Curiae appearing for the appellant submitted that the conviction of the appellant is founded on circumstantial evidences and a scanning of the materials on record and the circumstances relied on for his conviction, would reveal that the chain of circumstances was not complete. Furthermore, it is submitted that even a cursory glance of such evidence and the materials relied on would reveal that the appellant was entitled to get the benefit of doubt. Dilating the contentions it is submitted that there is no medical evidence pointing to the presence of the accused in the place of occurrence. Though blood and semen were found on the pants of the appellant recovered from his house on the next day of the occurrence, the FSL report is inconclusive and it did not connect the appellant to the blood and semen found on the clothes of the deceased. Following contentions were also raised on behalf of the appellant: -

> "that as per the report, in the matter of analyzation of the samples benzidine/ phenolphthalein and crystal tests were conducted and among them crystal test alone is a conclusive test. Ergo, in the absence of worksheet to demonstrate the nature of tests conducted on each of the items the report and the respective conclusions ought to have been discarded; that though in the list of articles seized from the house of the appellant and sent for examination, the pants seized from his house was described as the one worn by him at the time of the incident none of the witnesses had testified the fact that it was the same which he was wearing on the day of occurrence; that the MLC of the appellant was conducted in clear violation of Section 53A of the Cr.P.C.; that as relates nail scratches found on the face and neck of the appellant, allegedly caused by the victim, the evidence regarding the scratches is unreliable as despite the collection of nail samples of the deceased by PW-10 they were not sent to the laboratory for analysis."

10. It is the further contention on behalf of the ap- pellant that though, PW-14 testified that the finger nail injuries were seen on the right cheek of the ap- pellant, his MLC would indicate finger nail injuries only on the left side of the face and neck. At any rate, no reliance should have been given on that is- sue as the appellant was in the custody of the police even before his formal arrest, as spoken by PW-4. It was also contended that the date of birth of the vic- tim was not proved by

producing the school records. Furthermore, it was contended that the conclusion that the deceased was lastly seen in the company of the accused was arrived at relying on the oral testi- monies of PW-2 and PW-4 without proper appreciation of various relevant aspects. According to the appel- lant neither PW-2 nor PW-4 had informed about the same to the police at the first instance, i.e., at the time of lodging complaint regarding missing of the victim. The non-examination of one Rakesh who, according to the prosecution, joined PW-4 and the ap- pellant for drinking during that night and that of Sri Ganesh, the father of the deceased, who was an attesting witness to certain mahazars for the recov- eries and seizures, is fatal to the case of the pros- ecution. In regard to the testimony of PW-12 that he had seen the appellant coming out of the bada of Ja- gan Sindhi, in the night of 19.09.2014 at about 09:00 pm, it is submitted that it ought not to have been taken as a link in the chain of circumstances, as his statement under Section 161 Cr.P.C. was taken belat- edly. May be as an alternative contention it is con- tended that PW-12 is a chance witness and his testi- mony is not creditworthy.

11. As relates, another link in the chain of circum- stances viz., the recovery of the body and clothes of the deceased at the instance of the appellant it was contended that no independent witness was examined to prove the same. In that regard, it was further sub- mitted that the recoveries and seizure ought not to have been taken as proved by PW-2 as he is a related witness being the maternal grandfather of the de- ceased. It was contended that the clothes of the ap- pellant allegedly recovered from his house were not sealed and therefore, the failure of the appellant to explain the presence of human blood and semen on his clothes recovered from his house, could not have been relied on as a circumstance against him. In that re- gard, it was further contended that no DNA test was conducted to connect the appellant to the samples found on the body of the deceased and thereby Section 53A Cr.P.C., was violated. Based on the aforesaid contentions, the learned Amicus Curiae submitted that the conviction founded on circumstantial evidence is unsustainable on account of such glaring discrepan- cies, lacuna and the stated lapses on the part of the prosecution. At any rate, the circumstances relied on would not establish continuity in the links of the chain of circumstances to lead to an irresistible conclusion regarding the guilt of the appellant. The nub of the contentions is that appellant is entitled to get the benefit of doubt in view of such circum- stances and as such, the conviction and sentence awarded are liable to be set aside and he is entitled to be acquitted.

12. On the contrary, the learned counsel for the State sought to get sustained the judgment contending that the concurrent findings and the reasons assigned therefor, are nothing but outcome of proper analysis and appreciation/re-appreciation of evidence on record, by the trial Court and the High Court. The learned counsel urged that the contention based on failure to comply with Section 53A Cr.P.C. is abso- lutely bereft of any basis or merits as after rightly construing the position of law under Section 53A Cr.P.C., the High Court had properly appreciated the remaining evidence to arrive at the conclusion that the prosecution had succeeded in establishing a com- plete chain of circumstances pointing to the guilt of the appellant alone. It was contended that the tes- timonies of PWs 2, 4 and 12 are uncontroverted and credible and, therefore, rightly accepted and acted upon by the trial Court and the High Court. Though, PWs 2 and 4 were thoroughly cross-examined on behalf of the appellant, nothing could be elicited to dis- credit their version that they had seen the deceased lastly in the company of appellant, just under an hour before the commission of the gruesome acts of

rape and murder. Hence, the 'last seen theory' was rightly applied, it was submitted. PW-12 is a chance witness and his version that he had seen the appel- lant coming out of the bada of Jagan Sindhi abutting Thakur Das Baba Road around 09:00 pm on 19.09.2014, was rightly accepted as the appellant had neither succeeded in eliciting anything to discredit his ver- sion nor offered any alternative possible explanation for his presence at that time near the place of the incident. With respect to the appellant's contention of non-examination of independent witness to prove the recovery of the body and clothes of the deceased, at the instance of the appellant from the place of occurrence, the learned counsel submitted that their recovery was rightly taken as proved through PW-2 and his being the maternal grandfather of the deceased is no ground at all to discredit his evidence or to raise such a contention. The ocular evidence of PW-16 (Mr. Jitendra Nagaich) - a Police Officer who was party to the police team which conducted investiga- tion and present at the time of such recovery, of PW- 5 (Mr. Sonish Vashishtha)- who is a reputed journal- ist, of PW-14 (Akhilesh Bhargava) - the then Senior Scientific Officer, Gwalior, of PW-15 (Balakrishna) - the police photographer and of PW-11 (Mr. Deepak Shukla) who was the then Tehsildar and Executive Mag- istrate of the locality and present at the place of occurrence upon direction by the Sub-Divisional Mag- istrate concerned, lent support to the evidence of PW-2, on the said aspects, it was submitted. He drew our attention to the other circumstantial evidence, relied on to enter conviction by the trial Court and the High Court to contend that taken together all those circumstances would form a complete chain pointing to the fact that the appellant alone is the culprit and that they are incompatible with any hy- pothesis of his innocence. In short, it was submit- ted by the learned counsel appearing for the State that the contentions raised on behalf of the appel- lant do not merit any serious consideration and the appeal is liable to be dismissed.

13. In the light of the rival contentions, we have to examine whether the conviction of the appellant for the stated offences and the sentences imposed there- for warrant interference. In this case, the appel- lant has been awarded death sentence for the convic- tion under Section 300 IPC. The conviction is based on circumstantial evidence. Rarely, death penalty would be awarded if the conclusion on the connection of the accused with the offence(s) is fixed based on circumstantial evidence. It is true that even in such cases existence of exceptional circumstances/special circumstances would make death penalty awardable. This position was reiterated by this Court in the decision in Rajendra Pralhadrao Wasnik Vs. State of Maharashtra [(2019) 12 SCC 460]. We need to dilate on this issue only if the challenge of the appellant against the conviction for the of- fence punishable under Section 302 IPC is repelled.

14. Obviously, there is concurrent finding in favour of the prosecution as relates the first circumstance viz., the victim was raped and murdered. In order to establish the same, the prosecution mainly relied on the expert opinion of Dr. D.C. Arya (PW-10), who per- formed autopsy on the body of the deceased along with Dr. Asha Singh, and Ext.P17 post-mortem report proved by him wherein all the ante-mortem injuries are noted. PW-10 deposed that post-mortem was jointly performed by him and Dr. Asha Singh and Ext.P17 re- port was prepared by him in his handwriting. Hence, his competency as a witness is indisputable. While being examined, he deposed thus on the ante-mortem injuries found on the body of the deceased :-

1. Wound 3 inch x 2.5 cm., on inside direction of little finger;

2. Abrasion 3.5 inch x 2.5 cm. on left side of Labia Majora.

3. Contusion 4 cm. X 5 cm. on upper side of right thigh.

4. Contusion 4 cm. X 3 cm. on upper side of left thigh.

5. 3.5 inch x 2.5 cm. vaginal perennial tear of grade fourth extended up to anus.

6. Swelling and congestion were present on en-

tire vagina. Uterus was torn and coming out from vagina.

7. 8 cm x 2 cm. petechial hemorrhage was present underneath the sub cutaneous tis- sues of the neck extending from left side to right side of the neck.

15. As per Ext.P17 post-mortem report the cause of death is 'asphyxia due to throttling'. PW-10 - Dr. D.C. Arya had also deposed to that effect. However, the contention of the appellant is that when recalled and cross-examined, subsequent to the addition of charge under Section 376A IPC against the appellant, PW-10 would depose that the reason of death could possibly be a ruptured uterus with excessive bleed- ing. However, on scrutiny of his testimony, we did not find anything to suggest that PW-10 was prevari- cating. His version was to the effect that death would be possible going by the nature of injury Nos.7 and 8. 'It is incorrect to say that today I am wrongly stating the death to have occurred due to in- juries No. 7 & 8,' he deposed with reference to the following injuries :-

1. The vaginal perineal tear of 3.5 inch x 2.5 cm of grade fourth extended up to anus.

2. Swelling and congestion were present on entire vagina. Uterus was torn and com-

ing out from vagina.

Attempt on the part of the appellant is to depict and bring it as an incongruence in the opinion of PW-10 regarding the cause of death and ultimately to canvass the position that the case would not fall un- der Section 300 IPC punishable under Section 302 IPC.

16. In the context of the contentions it is only ap- posite to refer to the following aspects as also the probative value of the deposition of a doctor, depos- ing as an expert. Post-mortem certificate is a medico-legal certificate and it contains two parts. The first being the facts as found by the doctor who conducted the autopsy, such as the number of injuries (including ante-mortem), position of injuries and their extent etc., and the second part being his ex- pert opinion as to the cause of death. Though the opinion of the doctor given with the support of post- mortem report is entitled to get great weight, the court cannot abdicate its function as the ultimate opiner. Taking into account the ocular and medical evidence and upon their deeper analysis, the court has to form and record its opinion as to the cause of death for the purpose of finding out whether the death involved in a given case is accidental or sui- cidal or homicidal, in nature. In the decisions in Tahsildar Singh & Anr. Vs.

State of UP (AIR 1959 SC 1012) and Pudhu Raja & Anr. Vs. State [(2012) 11 SCC 196] this Court virtually held it as the duty of the Court to separate the chaff from the husk and to dredge the truth from the pandemonium of statements. 16.1 In the decision in State of Haryana Vs. Bha- girath [(1999) 5 SCC 96] this Court held :

> "The opinion given by a medical witness need not be the last word on the sub- ject. Such an opinion shall be tested by the Court." 16.2 In the decision in Mayur Panabhai Shah Vs. State of Gujarat [(1982) 2 SCC 396], while allowing an appeal by special leave filed against a judgment of Gujarat High Court summarily dismissing an appeal preferred against an order convicting the appellant for the offence under Section 376 IPC, this Court held :
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> "We think that this is not a case which should have been summarily rejected by the Learned Single Judge and moreover we do not think the Learned Judge was right in observing that, "our courts have al- ways been taken the doctors as witnesses of truth". Even where a doctor has de- posed in court, his evidence has to be appreciated like the evidence of any other witness and there is no irrebut- table presumption that a doctor is al- ways a witness of truth." 16.3 In the decision in State of WB Vs. Mir Mo-

hammed Omar and Ors. reported in (2000) 8 SCC 382 (referred to hereinafter to as 'Mir Mohammed Omar's case' only), this Court held thus :

> "21. The post-mortem report made by PW30 (Dr Debabrata Chaudhary) shows that the victim was murdered. He noticed as many as 45 injuries on the dead body which in-

cluded fracture of 5 ribs (2-6) on the left side towards sternal and, fracture of some of the fingers and extravasation of blood on the right side of occipital re- gion and also on the situs of the rib fractures. The remaining injuries included a few lacerated wounds, contusions and aberrations. There was just one minor in- cised wound on the left pinna. The right lung was congested the doctor opined that the death of the deceased had resulted from multiple injuries and injuries of vi- tal organs and it was homicidal in nature.

22. The trial court made a fallacious con- clusion regarding the death of the de-

ceased on the premise that the Public Prosecutor did not elicit from the doctor as to whether the injuries were sufficient in the ordinary course of nature to cause death. The Sessions Judge concluded that on the said issue:

> "There being no evidence on record to show that the injuries were suffi- cient in the ordinary course of na- ture to cause death, it cannot be said that the injuries noticed by the autopsy surgeon (PW30) were responsi- ble for causing the death of the de- ceased Mahesh."

23. No doubt it would have been of advan- tage to the court if the Public Prosecutor had put the said question to the doctor when he was examined. But mere omission to put that question is not enough for the court to reach wrong conclusion. Though not an expert as PW30, the Sessions Judge himself would have been an experienced ju- dicial officer looking at the injuries he himself could have deduced whether those injuries were sufficient in the ordinary course of nature to cause death. No sensi- ble man with some idea regarding the fea- tures of homicidal cases would come to a different conclusion from the injuries in- dicated above, the details of which have been stated by the doctor (PW30) in his evidence.

(Emphasis added) 16.4 Pithily stated, in the light of the decisions referred (supra) it can only be said that like any other evidence, the expert opinion also requires proper appreciation at the hands of the Court, though the opinion of the doctor given with the support of post-mortem report carries great weight, for arriving at the rightful conclusion as to question whether the death involved is homicidal or not.

17. Bearing in mind the position derived from the de- cisions referred (supra) we will consider the ques- tion whether the concurrent finding that the death of the victim was homicidal in nature calls for inter- ference. As noted earlier, in holding so, the oral testimony of PW-10 with Ext.P17 post mortem report was relied on by the Courts. Obviously, PW-10 who conducted the post mortem on the body of the de- ceased, with the support of Ext.P17 prepared by him, deposed that the deceased had sustained the stated ante-mortem injuries, as indicated specifically in Ext.P17 report. The presence of such ante-mortem in- juries on the body of the deceased is not in dispute. The alleged incongruence was only with reference to the opinion of PW-10 as to the cause of death. PW-10 opined 'Asphyxia due to throttling' as the cause of her death. He deposed about the presence of pe- techial hemorrhage of the size 8 cm. x 2 cm., under- neath the sub-cutaneous tissues of the neck extending from left side to right side. In fact, these aspects were specifically mentioned in Ext.P17, as well. Now, we will consider some aspects of asphyxia. When the respiratory functions of lungs stop as a result of lack of oxygen, it causes failure of heart due to oxygen deprivation and this mode of death is called Asphyxia. Asphyxia can occur due to external pres- sure like strangulation, to close air passages. Strangulation is a violent form of death which occurs from constriction of the neck by means of ligature or by other means without suspending the body and throt- tling is strangulation by constriction of neck pro- duced by fingers or palms. Post mortem appearance of death by Asphyxia includes numerous petechial hemor- rhages seen under the serous membranes of various or- gans due to rupture of capillaries caused as a result of increased pressure in them. PW-10 deposed about the presence of petechial hemorrhage underneath the subcutaneous tissues of the neck extending from left side to right side. Though, PW-10 was cross-examined nothing could be elicited from him to discredit his version. When that be the circumstances, the trial Court and the High Court were justified in giving weight to the oral testimony of PW-10 with Ext.P17 report, to form the opinion as to the cause of death as Asphyxia by throttling.

18. It is also worthy to take note of the injuries sustained by the deceased on her private parts in the context of the contentions and in view of the nature of the evidence tendered by PW-10. He would depose, with the support of Ext.P17, that the deceased had sustained perennial tear of grade fourth extending upto anus of the size 3.5 cms x 2.5 cms. He also de- posed that swelling and congestion

were present on entire vagina and that her uterus was torn and was coming out of the vagina. PW-10 deposed that all those injuries were ante-mortem. The above factual aspects contained in Ext.P17 report regarding the ante-mortem injuries and their positions proved through PW-10 were also taken into account by the trial Court. The injury referred above supporting the opinion of cause of death as Asphyxia due to throttling and the grave nature of the pudical in- juries referred above sustained by the deceased, evi- dently, made the trial Court and the High Court to form the opinion that the death of the deceased girl was homicidal in nature. Both the Courts, evidently concluded that Asphyxia by throttling is the cause of death and further that the grave injuries sustained by her on the private parts were also sufficient to cause death in the ordinary course of nature. The aforesaid contention of the appellant did not commend to us in the circumstances and also taking note of their combined effect. In short, we have no hesita- tion to hold that the concurrent finding that the death of the victim was homicidal in nature invites no interference.

19. We will consider the contentions of the appellant that conviction for the offence punishable under Sec- tion 302 IPC, consequent to the finding that the vic- tim was murdered, is unsustainable and that if at all he is guilty of causing her death the offence at- tracted would only be under Section 304 IPC, a little later.

20. In the light of the graveness of the injuries sustained on the private parts by the deceased, as detailed above in Ext.P17 post-mortem report proved by PW-10 and also taking note of Ext.P21 FSL report revealing the presence of blood and semen in the vaginal swab of the deceased, the trial Court held that the deceased was subjected to rape. The High Court also carefully considered the nature of the said injuries and the factum of presence of blood and semen in the vaginal swab taken from the deceased and sustained the finding that the deceased was subjected to rape. In the light of the nature of the evidence thus obtained and also the way in which they were an- alysed and appreciated, we find no illegality or per- versity at all with the concurrent finding that the deceased was subjected to rape.

21. Obviously, both the trial Court and the High Court answered the question as to who is the author of the crimes by relying on the circumstantial evi- dence. We have already taken note of the various circumstances relied on by the trial Court and subse- quently by the High Court, to fix culpability on the appellant. Though the Courts concurrently found him guilty of the offences of rape and murder there is lack of concomitancy in respect of conclusions/find- ings on certain aspects and circumstances, as noted above. Before adverting to the said issue, it is only proper to deal with a crucial contention of the appellant founded on Section 53A of the Code of Crim- inal Procedure, which was added to the Code by Cr.P.C. (Amendment) Act, 2005 (Act 25 of 2005). The relevant portion of Section 53A(1) reads thus :-

> "[53A. Examination of person accused of rape by medical practitioner.-(1) When a person is arrested on a charge of commit- ting an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practi- tioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of

> sixteen kilometers from the place where the offence has been committed by any other registered medical practi- tioner acting at the request of a police officer not below the rank of a sub-in- spector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the ar- rested person and to use such force as is reasonably necessary for that purpose."

22. The above extracted provision under Section 53A(1) Cr.P.C. would go to show that it provides for a detailed examination, (which term has been ex- plained under Explanation (a) to Section 53A Cr.P.C.), of a person accused of an offence of rape or attempt to commit rape, by a registered medical practitioner employed in a hospital run by the Gov- ernment or by a local authority and in the absence of such a practitioner within the radius of 16 kilome- ters from the place where the offence has been com- mitted, by any other registered medical practitioner. It is the said legal provision and the undisputed factual position of non-conduct of DNA profiling of the samples of the appellant that made him to take up the contention of violation of Section 53A Cr.P.C. In the said circumstances, he would further contend that there is absence of conclusive evidence to connect him with the samples taken from the body of the de- ceased. Certainly, non-conduct of DNA profiling in terms of the provisions under Section 53A Cr.P.C., is a flaw in the investigation. But then, the question emerged from the aforesaid indisputable position of not holding DNA profiling is whether the conviction of the appellant for the said offences, is liable to be set aside on that sole score.

23. There can be no doubt with respect to the posi- tion that a fair investigation is necessary for a fair trial. Hence, it is the duty of the investigat- ing agency to protect the rights of both the accused and the victim by adhering to the prescribed proce- dures in the matter of investigation and thereby to ensure a fair, competent and effective investigation. Even while holding so, we cannot be oblivious of the well-nigh settled position that solely on account of defects or shortcomings in investigation an accused is not entitled to get acquitted. In other words, it also cannot be the sole reason for interference with a judgment of conviction if rest of the evidence are cogent enough to sustain the same.

24. In the decision in Mir Mohammad Omar's case (supra), this Court held :-

> "In our perception it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in in- vestigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the vic- tim. Effort should be made by courts to see that criminal justice is salvaged de- spite such defects in investigation." (Emphasis added)

25. In the context of the contentions it is more ap- propriate to refer to the decision of this Court in Sunil Vs. State of Madhya Pradesh [(2017) 4 SCC 393]. It was a case of rape and murder of a four (4) year old child. A three-Judge Bench held herein thus :

> "3. At the very outset, we deal with the arguments advanced on behalf of the appellant that in the present case the report of DNA testing of the samples of blood and spermatozoa under Section 53-A of the Code of Criminal Procedure, 1973 has not been proved by the prosecution. The prosecu-
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> tion has, therefore, failed to prove its case beyond reasonable doubt. Reliance in this regard has been placed on the deci- sion of this Court in Krishan Kumar Malik v. State of Haryana [(2011) 7 SCC 130.
>
> 4. From the provisions of Section 53-A of the Code and the decision of this Court in Krishan Kumar it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44), Section 53-A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA pro-

filing had not been done in a given case, the weight of the other materials and evi- dence on record will still have to be con- sidered. It is to the other materials brought on record by the prosecution that we may now turn to."

26. Krishna Kumar Malik's case (referred supra) was rendered by a two-Judge Bench of this Court, wherein at paragraph 43 with respect to the matching of the semen, the following passage from Taylor's Principles and Practice of Medical Jurisprudence, 2nd Edn. (1965) was extracted thus :-

> "Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive af- ter ejaculation cannot be precisely de- fined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detec- tion of dead spermatozoa in stains may be made at long periods of 5 years. Non- motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months." In paragraph 43 of Krishna Kumar Malik's case, after extracting the above, it was further held :
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> "Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the ap- pellant." This Court went on to hold thus in Paragraph 44 therein :-
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> "Now, after the incorporation of Section 53-A in the Criminal Procedure Code w.e.f. 23.6.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecu-

tion to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused."

27. Evidently, the three Judge Bench in Sunil's case (supra) considered Krishna Kumar Malik's case carry- ing such observations and finding before coming to the conclusion that 'a positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e., favouring the accused or if DNA pro- filing had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered'.

28. In view of the nature of the provision under Section 53A Cr.P.C and the decisions referred (supra) we are also of the considered view that the lapse or omission (purposeful or otherwise) to carry out DNA profiling, by itself, cannot be permitted to decide the fate of a trial for the offence of rape espe- cially, when it is combined with the commission of the offence of murder as in case of acquittal only on account of such a flaw or defect in the investigation the cause of criminal justice would become the vic- tim. The upshot of this discussion is that even if such a flaw had occurred in the investigation in a given case, the Court has still a duty to consider whether the materials and evidence available on record before it, is enough and cogent to prove the case of the prosecution. In a case which rests on circumstantial evidence, the Court has to consider whether, despite such a lapse, the various links in the chain of circumstances forms a complete chain pointing to the guilt of the accused alone in exclu- sion of all hypothesis of innocence in his favour.

29. As a matter of fact, the decision in Rajendra Pralhadrao Wasnik's case (supra), would also fortify our view. The Bench was considering review petitions in Criminal Appeal Nos.145-146 of 2011. That was a case involving rape and murder of a three (3) year old girl where the case was held as proved on the ba- sis of circumstantial evidence. So also, in that case DNA evidence was not produced before the Court, in spite of samples being taken. Obviously, taking note of the unerring nature of the circumstantial ev- idence pointing only to the guilt of the accused and the other circumstances the trial Court convicted and awarded him capital punishment. The High Court con- firmed not only the conviction but also the award of capital sentence. Originally, this Court dismissed the appeals and thereafter, the dismissed review pe- titions were restored for consideration solely in view of a Constitution Bench decision of this Court in Mohd. Arif Vs. Supreme Court of India reported in (2014) 9 SCC 737. In paragraph 79, this Court in Ra- jendra Pralhadrao Wasnik's case held therein thus :-

> "Insofar as the present petition is con- cerned, we are of opinion that for the purposes of sentencing, the Sessions Judge, the High Court as well as this Court did not take into consideration the probability of reformation, rehabilitation and social re-integration of the appellant into society. Indeed, no material or evi- dence was placed before the courts to ar- rive at any conclusion in this regard one way or the other and for whatever it is worth on the facts of this case. The pros- ecution was remiss in not producing the available DNA evidence and the failure to produce material evidence must lead to an adverse presumption against the prosecu- tion and in favour of the R.P. (Crl.) Nos. 306-307 of 2013 in Crl. Appeal Nos.145-146 of 2011 Page 43 of 43 appellant for the purposes of sentencing. The Trial Court was also in

> error in taking into consider- ation, for the purposes of sentencing, the pendency of two similar cases against the appellant which it could not, in law, con- sider. However, we also cannot overlook subsequent developments with regard to the two (actually three) similar cases against the appellant."

30. In the light of the above referred decisions, the contentions of the appellant founded on the factum of non-holding of DNA profiling and the provision under Section 53A, is only to be repelled. As held in Sunil's case (supra), a positive result of DNA test would constitute clinching evidence against the ac- cused. But, a negative result of DNA test or DNA profiling having not been done would not and could not, for that sole reason, result in failure of pros- ecution case. So much so, even in such circum- stances, the Court has a duty to weigh the other ma- terials and evidence on record to come to the conclu- sion on guilt or otherwise of the appellant herein and that exactly what was done by the trial Court and then by the High Court, in the instant case.

31. Now, we will refer to other materials and evi- dence on record. PW-3, who is the maternal grand-mother of the deceased deposed that the deceased was aged 8 years and was wearing a frock and jeans pant on the day of occurrence. She would further depose that herself and the deceased were in the house of Raju who is none other than the father of the appel- lant. As already noted, they are all relatives. PW- 3 would depose that by about 08:30 pm Raju Badam sent the deceased for fetching a bundle of bidi from a nearby shop. Since then, she had not returned home alive.

32. The case unfolded by the prosecution through the witnesses to fix the culpability on the appellant constitute a chain of circumstances, including the "last seen theory". The deceased was lastly seen with the appellant by PW-2 and PW-4. 'Last seen the- ory' is certainly applicable in a crime like the one on hand which was carried out on sly and in secrecy during night, in the absence of availability of any eye-witnesses.

32.1 In the decision in Nizam and Anr. Vs. State of Rajasthan [(2016) 1 SCC 550] this Court held that it would not be prudent to base conviction solely on 'last seen theory'. This Court, obviously, sounded a caution that where time gap between 'last seen' and 'time of occurrence' is long it would be unsafe to base the conviction solely on the 'last seen theory' and held that in such circumstances, it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution.

32.2 In State of Rajasthan Vs. Kashi Ram reported in (2006) 12 SCC 254, at paragraph 23 this Court held :

> "23. It is not necessary to multiply with authorities. The principle is well set- tled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to

> offer an explanation on the basis of facts within his special knowl- edge, he fails to discharge the burden cast upon him by Section 106 of the Evi- dence Act. In a case resting on circum- stantial evidence if the accused fails to offer a reasonable explanation in dis- charge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compati- ble with his innocence, the court can con- sider his failure to adduce any explana- tion, as an additional link which com- pletes the chain. The principle has been succinctly stated in Naina Mohd., AIR 1960 Mad 218:1960 Crl LJ 620." 32.3 In Arabindra Mukherjee Vs. State of West Ben-

gal [(2011) 14 SCC 352], while dismissing the appeal by the convict who stood sentenced for offences pun- ishable under Section 302, 364, 120B and 201 of IPC, this Court held: "once the appellant was last seen with the deceased, the onus is upon him to show that either he was not involved in the occurrence at all or that he had left the deceased at her home or at any other reasonable place. To rebut the evidence of last seen and its consequence in law, the onus was upon the accused to lead evidence in order to prove his innocence." 32.4 In Pattu Rajan Vs. State of Tamil Nadu [(2019) 4 SCC 771] this Court held in paragraph 63 thus :-

> "It is needless to observe that it has been established through a catena of judg- ment of this court that the doctrine of last seen, if proved, shifts the burden of proof on to the accused, placing on him the onus to explain how the incident oc- curred and what happened to the victim who was last seen with him. Failure on the part of the accused to furnish any expla- nation in this regard, as in the case on hand, or furnishing false explanation would give rise to strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances." (Emphasis supplied) 32.5 The various aspects relating to the 'last seen theory', derived from the aforementioned deci-

sions, are well-settled and hence, we do not think it necessary to burden this judgment with further au- thorities on the subject.

33. A scanning of the circumstances and the evidence adduced in the case on hand would reveal that convic- tion by the trial Court was not solely based on "last seen theory". Naturally, the confirmation of the con- viction and sentence in the stated manner by the High Court is also not solely based on the "last seen the- ory". Obviously, to establish that the deceased was lastly seen with the appellant the prosecution had relied on the oral testimonies of PWs 2 and 4. Before adverting to their testimonies it is only worthwhile to refer to the oral evidence of PW-3, the maternal grandmother of the deceased. As noted earlier, she deposed that on the fateful day she was in the house of Raju along with the deceased and at about 08:30 pm Raju sent the deceased to purchase bidi and there- after she did not return home. PW-3 would also submit that the deceased was then wearing an embroidered broad frock and a blue-coloured jeans. Her evidence was not seriously challenged.

Now, we will refer to the evidence of PWs 4 and 2. It is enroute to the shop that the deceased girl went past the house of PW-4 viz., Pappu @ Patiram. Both PW-4 and the appel- lant are rickshaw pullers. PW-4 would depose that on 19.09.2014 himself, the appellant and one Mr. Rakesh were sitting in front of his house and were preparing to get intoxicated and he was making the pegs. He would depose that earlier the appellant had given him Rs.50 as drink-money and further that upon seeing the deceased, the appellant asked her where she was going and then followed her after promising them that he would return. Evidently, a feeble attempt was made to establish that PW-4 was entertaining animosity to- wards the appellant. Evidently, the suggestion was repudiated by him. Besides, putting the said sugges- tion nothing to shatter the credibility of PW-4 was brought out. Both the trial Court and the High Court found the testimony of PW-4 as uncontroverted and be- lievable. When the evidence is to the effect that in the evening of that fateful day the appellant, PW-4 and another had gathered at the residence of PW-4, that too for intoxication, it can only be said that the suggestion of animosity was righty repelled by both the Courts.

34. Now, we will refer to the testimony of PW-2. He is the maternal grandfather of the deceased. But, that by itself cannot be a reason to discredit or to eschew his oral testimony. Both the trial Court and the High Court had analysed and appreciated the evi- dence of PW-2 acknowledging the said position. Evi- dently, they found no reason to disbelieve PW-2. Upon scrutiny of his testimony, we also found that despite his thorough cross-examination on behalf of the ap- pellant, nothing to discredit his version was brought out. He deposed to the effect that he was sitting at the door of his house at Thakur Baba Road, Dabra and at about 8:00 to 8:30 in the night of the day of oc- currence he had seen the accused following the de- ceased. He would also depose to the effect that thereafter the deceased had not returned. There is not even a suggestion to the effect that his house is not near to the road and it was not possible to see someone passing from there. PW-2 further deposed that the appellant is his nephew and that the deceased was his grand-daughter. He was one of the attesting wit- nesses to several prosecution documents including Ex- t.P2 Safina Form, Ext.P3 dead body panchayatnama, Ex- t.P4 arrest memo, Ext.P5 that carries the disclosure statement of the appellant and Ext.P6 which is the dead body recovery memo and its identification memo and in Court, he had testified all of them. He de- posed to the effect that the body of the victim as also her dresses were recovered from the place of oc- currence viz., bada of Jagan Sindhi at the instance of the appellant. The contention of the appellant is that since PW-2 being the grandfather of the deceased the prosecution ought to have examined independent witness to the mahazhars of seizures and recoveries. As noticed earlier, despite thorough cross-examina- tion on behalf of the appellant nothing to discredit his evidence was elicited. There can be no two views that being related to the victim, by itself, is no reason at all to discredit the testimony of a wit- ness. This position has been made clear by this Court in various decisions.

35. In Dalip Singh and Ors. Vs. State of Punjab re- ported in AIR 1953 SC 364, wherein four persons ap- pealed against sentences of death imposed on them for conviction for a double murder, this Court held :-

> "A witness is normally to be consid- ered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely.

> Ordinarily, a close relative would be the last to screen the real cul- prit and falsely implicate and innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an in- nocent person against whom a witness has a grudge along with the guilty, but founda- tion must be laid for such a criticism and the mere fact of relationship far from be- ing a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our ob- servations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be lim- ited to and be governed by its own facts." 35.1. In Khurshid Ahmed Vs. State of Jammu & Kash-

mir [(2018) 7 SCC 429], this Court while setting aside the order of acquittal and convicting the accused (the respondent therein) for charges under Sec- tion 302, 341 IPC, held that there could be no prepo- sition in law that relatives ought to be treated as untruthful witnesses. On the contrary reason has to be shown when a plea of partiality is raised to show that the witness had reason to shield actual culprit and falsely implicate the accused, it was further held. In this case there is an added reason. PW-2 is also equi-related to the appellant-convict. The accused is his nephew. Therefore, the question is why should such a person who lost the granddaughter im- plicate his nephew in the case. The suggestion that he had a clash with the appellant was repudiated by him and still, no evidence to establish that sugges- tion was produced by the appellant. A suggestion to a witness when repudiated can have no relevance at all in the absence of any material produced, in accor- dance with law, to prove the factum suggested, cer- tainly, subject to admissibility. Hence, the said suggestion is impactless and inconsequential. Taking note of the nature of the contention raised against the testimony of PW-2, idest, that he is related to the deceased, it is apposite to refer to another as- pect. Noticeably, the appellant has taken up a con- tention in respect of the seizure/recoveries, in- volved in this case, that non-examination of Sri. Ganesh, the father of the deceased, is fatal to the prosecution as he being the other attesting witness to most of such documents. This would reveal the paradox and hollowness in the contentions of the ap- pellant inasmuch as, he would contend that PW-2 being a relative of the deceased another independent witness ought to have been examined to prove the seizures and recovery and in the same breath he would raise contention against the non-examination of the father of the deceased to prove the same. In this re- gard it is relevant to note the position of law that evidence is only to be weighed and not to be counted and that it is essentially, for the prosecution to decide as to how many witnesses are to be examined to establish its case on any particular point. In this case the version of PW-2 as relates the fact that the deceased was lastly seen with the appellant would get support from the oral testimony of PW-4 Pappu @ Pati- ram. The evidence of PW-4 and the fact that nothing was elicited from PW-2 to discredit his version that the appellant was following the deceased there was no reason to disbelieve PW-2 on that issue. In short, there is no reason to mistrust the said material wit- nesses on the point that the deceased was lastly seen with the appellant as concurrently held by the trial Court and the High Court.

36. The evidence of PW-12 was actually taken as res gestae under Section 6 of the Indian Evidence Act, 1872 by the High Court. In Sukhar Vs. State of UP [(1999) 9 SCC 507] this court explained the

said pro- vision. It was held therein that the statement sought to be admitted, as forming part of res gestae, must have been made contemporaneously with the acts. Thus, it is evident that the essence of the doctrine of res gestae is that a fact which, though not in is- sue, is so connected with the fact in issue "as to form part of the same transaction" that it becomes relevant by itself. A conduct of the accused after the incident may become admissible under Section 6 of the Evidence Act, though not in issue, if it is so connected with the fact in issue.

37. The statement of PW-12 is to the effect that af- ter finishing his work he was returning home during the night, at about 9 o'clock. He would depose that he saw the appellant then coming out of bada of Jagan Sindhi and dusting his clothes. It is true that a suggestion was put to him, while being cross-exam- ined, that he had not actually seen the appellant coming out of the bada and he was deposing otherwise due to animosity with the appellant. Though PW-12 had repudiated the said suggestion, the appellant had not adduced any further evidence to establish the same. A careful scanning of the evidence of PW-12 would re- veal that he had categorically stated that he knew the appellant-accused and on the fateful day he had seen him coming out of the bada of Jadan Sindhi. Ap- plying the doctrine the evidence of PW-12 that he had seen the appellant at about 9:00 pm on the fateful day, coming out of the bada of Jagan Sindhi and dust- ing his clothes, is admissible under Section 6 of the Evidence Act. It was treated as another incriminat- ing circumstance against the appellant. There can be no doubt with regard to the position that he is an independent witness though he was described as a 'chance witness'. In this context it is relevant to refer to the decision in Chanakya Dhibar Vs. State of West Bengal (2004 (1) Crimes 196) whereas this Court observed thus :-

> "In a murder trial by describing the inde- pendent witness as 'chance witness' it cannot be implied thereby that their evi- dence is suspicious and their presence at the scene doubtful. Murders are not com- mitted with previous notice to witnesses; soliciting their presence. If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passerby will be witnesses. Their evi- dence cannot be brushed aside or viewed with suspicion on the ground that they are mere 'chance witnesses'. The expression 'chance witness' is borrowed from coun- tries where every man's home is considered his castle and everyone must have an ex- planation for his presence elsewhere or in another man's castle. It is quite unsuit- able an expression in a country where peo- ple are less formal and more casual." We referred to the aforesaid decision to give em-
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> phasis on the aspect that description of a witness as 'chance witness' cannot and will not by itself denude the admissibility or relevance of the evidence of such a witness if nothing was brought out to make his version suspicious and thereby unacceptable. It is to be noted that despite cross-examining PW-12 on be-
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> half of the appellant nothing to make his version suspicious and untrustworthy was brought out. He de-

> posed that he knew the appellant and further that at about 9:00 pm he had seen him coming out of the bada in question and dusting his clothes.

38. The evidence of PW-6 (Jagdish @ Jagan) is to the effect that he is the son of Laxmibai, the owner of the bada which is the occurrence place. According to him, the said property was purchased by his mother and its eastern and western boundaries are respec- tively Thakurdas Baba Road and Dhan mill. He would further depose thus :-

> "On the aforesaid plot, four rooms were already constructed. Presently, the aforesaid rooms and the plot are not in use. Presently, the plot is in the shape of a Bada (verandah), whose boundary is broken.
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> The rooms are in dilapidated condition." According to him, at that place, miscellany (empty sacks) of the mills have been kept and the fallen clay wall of the Bada gives easy access to the Bada, and it is not worthy for use. The evidence of PW-6 on the aforesaid aspects remains unchallenged. It is to be noted that it is from such a place, which is in a dilapidated and unusable condition, that the appellant was seen coming out during the night by PW-12. Moreover, the corpse of the victim was recovered from there the very next day, based on Ext.P5 disclosure statement of the appellant and at his instance.

39. It was on 20.09.2014 at about 04:00 pm that the appellant was arrested. Ext.P4 is his arrest memo. While in custody he gave Ext.P5-disclosure statement regarding the concealment of the dead body of the de- ceased as also her dresses. The factum of the appel- lant having made such a disclosure statement as also their subsequent recovery is proved through PW-2. PW- 19 deposed that he had recorded Ext.P5 memo. PW-16 Jitendra Nagaich, the then Station House Officer, Po- lice Station, Dabra, deposed to the effect that along with the appellant they proceeded to the place of oc- currence, as shown by the appellant and from there the dead body of the victim, concealed beneath the gunny bags, was recovered at the instance of the ap- pellant. They would also depose that the body was seen in disrobed condition. The dresses of the de- ceased were recovered from the place of occurrence itself. The oral evidence of PW2 and PW16 that the corpse of the deceased girl and her dresses were re- covered from the said place of occurrence, at the in- stance of the appellant, gained corroboration from the oral testimonies of PW-5 Mr. Sonish Vasistha, a journalist and PW-11 Mr. Deepak Shukla, who was the then Tehsildar and Executive Magistrate of the local- ity.

40. In the decision in Govindaraju @ Govinda Vs. State [(2012) 4 SCC 722] this Court held that there would be nothing wrong in relying on the testimony of police officers if their evidence is reliable, trust- worthy, cogent and duly corroborated by other wit- nesses or admissible evidence. In the light of the fact that nothing was brought out to discredit the testimonies of PW-16 and PW-19 and their oral testi- monies gained corroboration from the testimonies from PWs 2, 5 and 11 it can only be held that the afore- said aspects were rightly appreciated by the Courts below and taken as circumstances against the appel- lant.

41. The recovery of the dead body, which was in a concealed condition from an unused and dilapidated building based on the disclosure statement of an ac- cused is a crucial incriminating circumstance. In the decision in Jaharlal Das Vs. State of Orissa [AIR 1991 SC 1388], this Court held therein that the dis- covery of the body at the instance of the accused is a crucial circumstance, in a case resting on circum- stantial evidence. This position was iterated in Mohd. Mannan @ Abdul Mannan Vs. State of Bihar [(2011) 5 SCC 317].

42. Now, we will advert to the other incriminating circumstances taken into consideration by the High Court to confirm the conviction of the appellant for the stated offences.

43. The impugned judgment would reveal that the High Court had interfered with the conviction of the ap- pellant under Section 376A IPC. Among other things, it also evident that on reappreciation of the evi- dence the High Court disagreed with and reversed the finding of the trial Court in regard to the admissi- bility and evidentiary value of the recovery of an underwear (Article F-described as shaddy) from the occurrence place and also its result on analysis. Nonetheless, the High Court went on to consider the question whether the rest of the circumstantial evi- dence and the supporting materials would unerringly point to the guilt of the appellant alone. The said approach cannot be said to be wrongful or illegal and in fact, it is the rightful approach in view of the fact that the conviction of the appellant was based on various circumstantial evidences, in the light of the decision of this court in State of West Bengal Vs. Dipak Haldar & Anr. [(2009) 7 SCC 288]. Evi- dently, the High Court had considered the cumulative effect of the rest of the circumstantial evidences and materials supporting them. In Dipak Haldar's case this court held thus:-

> "17. In a case based on circumstantial evidence, the court is required to consider whether the cumulative effect of all the circumstances leads to a conclusion that the same was a case of murder and the accused was responsible for such murder. A conviction can be based on circumstantial evidence if it is of such a character that the same is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. The incriminating circumstances that are being used against the accused must be such as to lead only to a hypothesis to reasonably exclude every possibility of his innocence.
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> 18. To put it differently, the court should find out whether the crime was committed by the accused and the circumstances proved formed themselves into a complete chain, which clearly points to the guilt of the accused. If on the other hand, the circumstances proved against the accused are consistent either with the innocence of the accused or raise a reasonable doubt about the way the prosecution has alleged the offence is committed, the accused would be entitled to the benefit of doubt." (Emphasis added) We are of the considered view that a different approach in re-appreciating the evidence would have defeated dispensation of justice, as in cases based on circumstantial evidence also it is not the quan-

tity of the evidence that counts, but it is its qual- ity. In other words, the question is only whether a complete chain of circumstantial evidence of such a character that the same is wholly inconsistent

with the innocence of the accused and is consistent only with his guilt, is available.

44. PW.16-Shri. Jitendra Nagaich proved Ext.P-8 Seizure memo by which a pants and a shirt were recovered from the residence of the Appellant. PW-2 also deposed to the same effect and he testified his thumb impression in Ext.P-8 Seizure memo. In Ext.P-21 FSL Report human blood was found on the said pants (article-C). True that the serological part of Ext.P- 21 report did not indicate the group of the blood stains found in the pants. This aspect was highlighted by the appellant before the High Court as also before us to contend that in view of the failure of the prosecution to establish that the blood stains found thereon belonged to the deceased it could not in anyway connect him with the crime and hence, could not have been taken as an incriminating circumstance against him. At the first blush this contention would appear to be attractive and acceptable. However, as per the impugned judgement the High Court had rightly repelled the said contention by relying on the decision of this court in Kansa Behera Vs. State of Orrisa (AIR 1987 SC 1507). In the said decision this Court exposited that when conviction is to be recorded solely on the basis of presence of blood stains in any article(s) seized from the accused concerned the prosecution has to prove beyond doubt that the blood found on that article(s) is that of the deceased and for that the group of the blood found on the seized article(s) should match with that of the deceased upon their grouping. At the same time, it was further held therein that when other circumstances are available non-detection of blood group by itself would not be fatal. The decision of this Court in R. Shaji Vs. State of Kerala [(2013) 14 SCC 266] also assumes relevance in this context. This court held thus :-

> "30. It has been argued by the learned counsel for the appellant that as the blood group of the blood stains found on the chopper could not be ascertained, the recovery of the said chopper cannot be re- lied upon.
>
> 31. A failure by the serologist to detect the origin of the blood due to disintegra-

tion of the serum does not mean that the blood stuck on the axe could not have been human blood at all. Sometimes it is possi- ble, either because the stain is insuffi- cient in itself, or due to haematological changes and plasmatic coagulation, that a serologist may fail to detect the origin of the blood in question. However, in such a case, unless the doubt is of a reason-

able dimension, which a judicially consci- entious mind may entertain with some ob- jectivity, no benefit can be claimed by the accused in this regard. Once the re- covery is made in pursuance of a disclo- sure statement made by the accused, the matching or non-matching of blood group(s) loses significance. (Vide Prabhu Babaji Navle v. State of Bombay, Raghav Prapanna Tripathi v. State of U.P., State of Ra-

jasthan v. Teja Ram, Gura Singh v. State of Rajasthan, John Pandian v. State and Sunil Clifford Daniel v. State of Punjab.)

32. In view of the above, the Court finds that it is not possible to accept the sub- mission that in the absence of a report regarding the origin of the blood, the ac- cused cannot be convicted, for it is only because of the lapse of time that the blood could not be classified success- fully. Therefore, no

advantage can be con- ferred upon the accused to enable him to claim any benefit, and the report of dis- integration of blood, etc. cannot be termed as a missing link, on the basis of which the chain of circumstances may be presumed to be broken." (Emphasis added) The evidence on record in the case on hand would reveal that conviction of the appellant herein was not based solely on a presumptive finding that the blood stains present in the pants (Article-C) seized from the residence of the appellant is that of the deceased. At the same time, it is a fact that it was taken as one of the incriminating circumstances. It is not the case of the appellant that the said pants was not the one recovered from his residence. In fact, under Ext.P8 it was recovered from his resi- dence and that fact was proved through PWs 2 and 16. Ext.P21 would reveal that upon analysis the blood stains stuck thereon were ascertained to be of human origin. In the light of Shaji's decision (supra) once the blood stains were ascertained as that of human origin the mere non-detection of blood group would be of no consequence. Despite the difference in factual situation the exposition of law that on account of mere non-detection of blood group no advantage could be conferred upon the accused to enable him to claim any benefit in such situation. Certainly, in such circumstances a case of missing link in the chain of circumstances could not be claimed on that sole score and at the same time, absence/failure of explanation from the appellant when the said incriminating cir- cumstance was put to him during his examination under Section 313 Cr.P.C. would work out against him.

In these circumstances, the Courts below cannot be found in fault in taking it as an incriminating circumstance against the appellant.

45. As noted earlier, another incriminating circum- stance considered against the appellant is the pres- ence of nail marks on his face and neck and also his failure to offer explanation therefor. In this regard the evidence of PW-17 (Dr. Harish Arya) with Ext.P24- MLC was relied on. PW-17 was the doctor who examined the appellant when he was produced for medical exami- nation after his arrest. He found the following four nail scratches on the body of the appellant: -

1. 1.5 cm x .02 mm on the left side neck near angle of left jaw.

2. 1 cm x 2 mm on left side of neck in front of injury no. 1.

3. 0.5 cm x 2 mm on left cheek.

4. 0.5 cm x 2 mm over angle of left jaw.

46. As per PW-17 those injuries were found on him on 21.09.2014 at about 1:00 pm and those injuries were caused within 48 hours before his examination. When this incriminating circumstance was put to the appel- lant during his examination under Section 313 Cr.P.C., he did not offer any explanation as to how such injuries were caused. Obviously, the trial Court found that the appellant sustained such injuries in the incident in question that occurred on 19.09.2014 at about 09:00 pm, after taking into account the evi- dence of PW-17 with Ext.P24 and in the absence of ex- planation from the appellant as to how those injuries have been caused. The High Court did not disturb the said conclusion. We find no illegality or infirmity on such conclusion and finding.

47. We have already observed that since the High Court had interfered with the conviction of the appellant under Section 376A IPC the question whether the rest of the incriminating circumstances formed a complete chain leading solely to the guilt of only appellant in exclusion of all hypothesis in favor of his innocence, as held by the High Court. We have already considered in detail all the incriminating circumstances and materials available to support them that weighed with the High Court. It is absolutely unnecessary to refer to each of them again. Suffice it to say that they would go to show that despite what are eschewed a continuous and complete chain of circumstances and materials supporting them, is available and they are wholly inconsistent with the innocence of the appellant and consistent only with his guilt. Above all, it is evident that an addi- tional link is available in this case owing to the failure on the part of the appellant to explain all the aforesaid incriminating circumstances. While be- ing examined under Section 318, Cr.P.C. in respect of all questions his answers were either 'it is false' or 'I do not know'. There is absolutely no case for the appellant that all the incriminating circum- stances were not put to him. In view of Pattu Rajan's case (supra) and other decisions such as, Trimukh Maroti Kirkan Vs. State of Maharashtra (2006 AIR SCW 5300) offering no explanation on incriminating cir- cumstances mentioned above would become an additional link in the chain of circumstances. The cumulative effect of all the aforesaid circumstances, referred to in detail hereinbefore, would definitely justify the finding of the High Court as to the guilt of the appellant.

48. The trial Court and also the High Court had con- currently concluded that the death of the victim is homicidal in nature. We have found, based on the evi- dence on record, that the Courts have rightly found that the victim was raped. The diabolic and gruesome manner in which the appellant had ravished the hap- less girl is evident from the grave injuries on her pudenda. There occurred perennial tear of grade fourth extending up to anus and that her uterus was torn and was coming out from the vagina. As noticed above, the vaginal swab on examination revealed the presence of blood and semen. Hence, the finding that the deceased was subjected to rape warrants no interference.

49. Though the appellant had disputed the age of the deceased before the trial Court, the impugned judg- ment would reveal that the said contention was given up at the appellate stage. When that be so, the ap- pellant could not now be permitted to dispute the age of the deceased at the time of occurrence in these appeals. Even otherwise, the evidence on record would reveal that PWs 1 to 3, who are respectively the mother, the maternal grandfather and the maternal grandmother of the victim, had deposed that the de- ceased was aged 7-8 years. PW-1 would further depose that the deceased was studying in Class-I in the Govt. School situated near Laddaram. PW-10 who along with the Dr. Asha Singh performed autopsy on the body of the victim and prepared Ext.P17 report noted therein that the deceased appeared to be of 8 years old and he had also deposed to that effect while be- ing examined before the Court. That apart, PW-9 who was the Headmistress-in-charge in Govt. Primary Boys School, Jawaharganj, brought and proved Ext.P14 - School Admission Application of the deceased, Ext.P15

- Admission Register and the copy of which was marked as Ext.P15C and also and also Ext.P16 which is her age verification Certificate issued from the school. They would disclose her Admission Number as 1937 and the date of birth as 10.09.2006. Her evidence was not seriously challenged by

the appellant during the cross-examination. At any rate, no contra-evidence was adduced in this regard by the appellant. Taking into account the nature of the commission of rape re- vealed from the evidence on record and discussed hereinbefore the concurrent finding of the courts be- low that the appellant has committed the offence of aggravated penetrative sexual assault punishable un- der Section 6 of the POCSO Act also invites no inter- ference.

50. The question, now to be considered is whether the homicidal death of the victim amounts to murder or whether it falls either under Section 304(1) or 304(2) as contended by the appellant. The impugned judgment would reveal that the High Court concurred with the finding of the trial Court that the homicidal death of the victim amounts to murder. The right approach in cases of culpable homicide is to first find out whether the offence falls under any of the four clauses viz., clauses firstly to fourthly under Section 300 IPC. If it is so found, then the Court has to see whether the case is covered by any one of the five exceptions to section 300 IPC, which would make a culpable homicide 'not amounting to murder'. The offence, if proved, to fall under one of the said exceptions would be punishable under Section 304, either under Part 1 or Part 2 as the case may be, or otherwise it would be murder punishable under Section 302 IPC. In the case on hand both the trial Court and the High Court, had analysed evidence on record and found that the appellant had pressed the neck of the victim so hard unmindful of the fact that she was aged only 8 years and caused internal hemorrhage. The cause of death was asphyxia due to throttling. The nature of the injuries found on the neck of the deceased would reveal the pressure exerted by the appellant on the neck. The fact that the victim was a hapless girl aged only 8 years has to be taken into account while considering the question. Intention is a subjective element and every sane person must be presumed to intend the result that his action normally produces. Hence, constriction of the neck of a girl child aged about 8 years by fingers or palm by a young man aged 25 years, with such force to cause the injuries mentioned hereinbefore cannot be said to be sans intention to take her life. If the said act was subsequent to commission of rape in the diabolic and gruesome manner revealed from the grave injuries sustained on her private parts, causing death alone can be inferred from the circumstances. If the act of constricting the neck with such force resulting in the stated injuries preceded the offence of rape, then, the manner by which she was ravished should be taken only as an act done knowingly that it is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death. Thus, viewing in any angle the homicidal death would fall either Clause 1 or Clause 4 of Section 300 IPC. A feeble attempt was made by the appellant to contend that the Courts had erred in finding the appellant guilty under Section 300 IPC, punishable under 302 IPC and that if at all he has to be convicted for causing death of the victim it ought to have been under Section 304 IPC. It is to be noted, once it is found that the act falls under any one of the 4 clauses under Section 300 IPC, to bring it out of its purview it must be proved that it falls under any one of the five exceptions to Section 300 IPC. There is nothing on record and no contention was also raised by the appellant, with support of material, to show that any one of the said five exceptions attracts in this case. In fact, the only contention urged and also taken in the written submission by the appellant is that the deceased had died due to an injury on her neck which had occurred quite naturally during the commission of the rape. We have no hesitation to hold that the said contention is palpably untenable and at any rate, not at all sufficient to bring the offence under any one of the five exceptions to Section 300 IPC. The long and short of the discussion is there is no reason to interfere with the finding of the Trial Court, which was confirmed by the High Court, that the appellant is

guilty of committing murder punishable under Section 302 IPC. Thus, on a careful examination of the matter in its entirety, we do not find any perversity or manifest illegality with respect to the concurrent finding of the trial Court and the High Court that the appellant herein had committed offences punishable under Section 302 IPC, 376(2)(i) IPC and Section 6 of the POCSO Act.

51. As noticed hereinbefore, upon conviction for each of the offence under Section 376(2)(i) IPC and under Section 6 POCSO Act, the appellant was sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.2000/- and in default of payment of fine to undergo imprisonment of one year. No extenuating circumstances warranting an interference with the sentence thus imposed by the trial Court, which was confirmed by the High Court, for the conviction for the stated offences were brought to our attention by the appellant.

52. The next question is whether death sentence awarded by the trial Court and confirmed by the High Court for the conviction of the offence of murder be maintained or substituted? This penalty is awardable to a culprit only the category of the case falls un- der 'rarest of rare cases', the culprit has become a threat to the society at large and beyond reformation and his elimination is the only way for eradication of the threat. For deciding the said question various aspects have to be considered. On a careful scanning of the consideration made by the trial Court as also the High Court for awarding the sentence for the con- viction under Section 300 IPC, punishable under sec- tion 302 IPC, we are of the view that the question regarding the correctness of the death sentence awarded to the appellant requires further considera- tion, taking into account the statutory requirements under Section 354(3) Cr.P.C. For awarding termination of natural life, a careful scrutiny is required. The statutory requirements under Section 354(3) Cr.P.C. are as under :

> "When the conviction for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such offence."

53. On the aforesaid subject this Court has already enunciated the principles. A careful survey of such decisions was made by this very three-Judge Bench in the decision in Pappu Vs. The State of Uttar Pradesh (Criminal Appeal Nos.1097-1098/2018, pronounced on 9.2.2022. Paragraph 49 of the decision in Shankar Kishanrao Khade Vs. State of Maharashtra reported in (2013) 5 SCC 546, highlighting the requirement of application of 'crime test', 'criminal test' and 'rarest of rate test' was referred therein. In the said paragraph, with reference to the previous decisions, the aggravating circumstances (crime test) and the mitigating circumstances (criminal test) were narrated as hereunder :

> "49. In Bachan Singh and Machhi Singh cases, this Court laid down various principles for awarding sentence:
>
> (Rajendra Pralhadrao case, SCC pp. 47-48, para 33) "'Aggravating circumstances — (Crime test) (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of

conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim. (7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, 90 murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances — (Criminal test) (1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct. (5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.'" This Court further said: -

> "52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."
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> 54. After taking into account the same and such other decisions specifically referred to therein, in Pappu's case (supra) it was held thus:-

> "41. It could readily be seen that while this Court has found it justified to have capital punishment on the statute to serve as deterrent as also in due response to the society's call for appropriate punishment in appropriate cases but at the same time, the principles of penology have evolved to balance the other obligations of the society, i.e., of preserving the human life, be it of accused, unless termination thereof is inevitable and is to serve the other societal causes and collective conscience of society. This has led to the evolution of 'rarest of rare test' and then, its appropriate operation with reference to 'crime test' and 'criminal test'. The delicate balance expected of the judicial process has also led to another mid-way approach, in curtailing the rights of remission or premature release while awarding imprisonment for life, particularly when dealing with crimes of heinous nature like the present one."
>
> 55. On going through the judgment of the trial Court and the High Court, we are of the considered view that in handing down capital sentence what had weighed with the Courts are the horrendous feature of commission of crime and the hapless state of the victim. The trial Court considered the question of sentence and awarded the same on the very same day on which the appellant was convicted. We shall not be understood to have held that this is absolutely illegal and impermissible. Ultimately, what is required is consideration of the aggravating and mitigating circumstances with application of mind.

They were not given the proper attention while considering the question of awarding the sentence for conviction under Section 302 IPC, in the case on hand. In the said circumstances, we will proceed to consider the question of sentence in the present case bearing in mind the principles enunciated by this Court in the matter of awarding the capital sentence. The trial Court as also the High Court arrived at the conclusion that the act of the appellant herein invited the extreme indignation of the community and therefore, it deserves a deterrent sentence so as to give a message to the society that such crimes should not be repeated by anyone. In short, we are of the considered view that the 'crime test' and the 'criminal test' require to be followed before awarding capital sentence, did not gather the required attention of the trial Court as also the High Court.

56. It is true that all murders are inhuman. For imposing capital sentence, the crime must be uncommon in nature where even after taking into account the mitigating circumstances the Court must be of the opinion that the sentence of imprisonment for life is inadequate and there is no alternative but to impose death sentence. The heinous and brutal nature of the commission of crime, viz., brutal rape and murder of an eight-year old girl child who is none other than the daughter of his own cousin, that too in a hapless situation, is definitely an aggravating circumstance. The nature of the injuries caused on the private parts of the victim as is evident from the evidence of PW10 with Ext.P17 report would definitely shock the conscience. At the same time, the principles enunciated by this Court in the matter of awarding of death sentence and in such circumstances, the undisputed and indisputable fact that the appellant had no criminal antecedents and he hails from a poor socio-economic background and also his unblemished conduct inside the jail cannot go unnoticed. So also, it is a fact that at the time of commission of the offence the appellant was aged 25 years. Hence, viewing the issue taking into account the aforesaid aspects, we do not find any reason to rule

out the possibility and the probability of the reformation and rehabilitation of the appellant. The long and short of the discussion is that the present case cannot be considered as one falling in the category of 'rarest of rare cases' in which there is no alternative but to impose death sentence.

57. In the aforesaid circumstances, the next question is what is the comeuppance for the conviction for offence of murder in this case. In the decision in Swamy Shraddananda Vs. State of Karnataka [(2008) 13 SCC 767], taking into account the tenets of penology and with a view to have a just, reasonable and proper course in a case where the Court is of the opinion that sentence for life is inadequate but imposition of death sentence is unwarranted this Court adopted the course of awarding life imprisonment without application of the provisions of premature release/remission before an actual imprisonment for a definite period of time. This position was iterated with agreement in the decision in Union of India Vs. Sriharan [(2016) 7 SCC 1], thus :

> "We hold that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative.

58. Thus, taking into account the fact that in the case on hand a hapless 8 year old girl child, who is none other than the daughter of appellant's cousin sister raped and murdered and that too, in an extremely brutal manner revealed from the evidence on record, we are of the considered view that course adopted in the decision in Swamy Shraddananda's case (supra) and reiterated in Sriharan's case (supra)has to be adopted in this case. In other words, even while commuting capital punishment, the appellant has to be awarded life imprisonment without application of the provisions of premature release/remission for a substantial length of period. On such consideration we are of the view that it would be just and proper to award punishment of imprisonment for life to the appellant for the offence punishable under Section 302 IPC, by providing for an actual imprisonment for a period of 30 (thirty) years without application of the provisions of premature release/remission.

59. In the circumstances, these appeals are partly allowed as hereunder:

> (i) The conviction of the appellant for the offences punishable under Section 302 and 376(2)(i), IPC and conviction for the offence punishable under Section 6 of POCSO Act is upheld and the sentences awarded to him for the conviction therefor, are confirmed, for the offence under Section 302 IPC;
>
> (ii) However, the death sentence awarded to the appellant for the offence under Section 300, IPC punishable under Section 302, IPC is commuted to that of imprisonment for life with the stipulation that he shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of thirty (30) years;

(iii) The other terms of sentences awarded to the appellant including fine amount and default stipulations also stand confirmed. All the substantive sentences awarded to the appellant shall run concurrently.

……J. (A.M. KHANWILKAR) ……J. (DINESH MAHESHWARI) .....J. (C.T. RAVIKUMAR) New Delhi;

May 13, 2022.