Pappu vs The State Of Uttar Pradesh on 9 February, 2022

Author: Dinesh Maheshwari

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

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1097-1098 OF 2018

PAPPU ……. .

VERSUS

THE STATE OF UTTAR PRADESH ……. R

JUDGMENT

Dinesh Maheshwari, J.

 Preliminary

1. These appeals by special leave are directed against the judgment and order dated 06.10.2017 in

Reference No. 13 of 2016 and Capital Case No. 6601 of 2016 whereby, the High Court of Judicature at Allahabad has affirmed the judgment and order dated 07/08.12.2016 in Sessions Case No. 414 of 2015, as passed by the Additional Sessions Judge, Court No. 2, Kushinagar; and, while upholding the conviction of the appellant of offences punishable under Sections 376, 302, 201 of the Indian Penal Code, 18601 and Section 5/6 of the Protection of Children from Sexual Offences Act, 20122, has confirmed the death sentence awarded to him for the offence under Section 302 IPC.

1.1. In addition to sentence of death for the offence under Section 302 IPC, the appellant has also been punished with fine of Rs. 20,000/- for the offence under Section 302 IPC. This apart, he has been awarded the punishments of rigorous imprisonment for a term of 10 years and fine of Rs. 10,000/- for the offence under Section 376 IPC; rigorous imprisonment for a term of 7 years and fine of Rs. 5,000/- for the offence under Section 201 IPC; and rigorous imprisonment for a term of 10 years 1 'IPC', for short.

2 'POCSO', for short.

and fine of Rs. 10,000/- for the offence under Section 5/6 POCSO. While providing for further imprisonment in case of non-payment of fine amount, it has also been directed that half of the fine amount shall be given to the mother of deceased girl as compensation.

2. In these appeals, the conviction of the appellant as also the punishment awarded to him, particularly the capital punishment, are under challenge. Before dealing with the matter in necessary details, we may draw a brief sketch to indicate the contours of the forthcoming discussion.

2.1. The appellant has been accused of enticing a seven-year-old girl to accompany him on the pretext of picking lychee fruits; having thereafter committed rape upon the child; having caused her death; and having dumped the dead body near a bridge on the riverbank, after having dragged the dead body over a distance of one and one-quarter kilometres.

2.2. The prosecution case rested on circumstantial evidence to the effect that the victim was lastly seen in the company of the appellant; that her dead body was recovered at the instance of the appellant; that the appellant had failed to satisfactorily explain his whereabouts and his knowledge of the location of dead body; and that the medical and other scientific evidence was consistent with the accusation. Per contra, the appellant alleged that he was falsely implicated due to enmity with the families of the deceased and other witnesses because of a land dispute. 2.3. The Trial Court, after analysing the material placed on record, came to the conclusion that the prosecution had been able to substantiate the charges by proving beyond doubt that the appellant had taken the deceased with himself by enticing her to pluck and eat lychee fruits, committed rape and then murdered her, and concealed the dead body in bushes near the riverbank. Thus, the appellant was convicted by the judgment dated 07.12.2016. Next day, the learned Additional Sessions Judge heard the accused and the prosecution on the question of sentence; and looking to the heinous crime committed by the appellant, found it unjustified to show any mercy in punishment and thus, awarded varying punishments, including that of death sentence for the offence under Section 302 IPC.

2.4. The sentence of death was submitted for confirmation to the High Court in terms of Section 366 of the Code of Criminal Procedure, 1973 3. On the other hand, the accused-appellant preferred an appeal against the judgment and order of the Trial Court. Both, the reference case for confirmation of death sentence and the appeal preferred by the appellant, were considered together, where the High Court found no reason to disbelieve the evidence led by the prosecution; and while rejecting the defence story of wrongful prosecution for enmity due to land dispute, affirmed the findings on conviction of the appellant. The High Court further dealt with the question of sentence and with reference to the nature of offence, in brutal rape and murder of a seven-year-old girl child, found the 3 'CrPC', for short.

present one to be 'rarest of rare case', where the sentence of death was considered 'eminently desirable'. The High Court, accordingly, dismissed the appeal filed by the appellant and confirmed the punishment awarded to him, including the sentence of death.

2.5. In the present appeals, conviction of the appellant has been questioned essentially with the contentions that the relevant factors are indicative of ante-dating of the FIR; that the prosecution has not been able to prove that the deceased was last seen with the appellant; that the story of discovery of dead body at the instance of the appellant was also not established; and that the medical and forensic evidence was not conclusive to connect the appellant with the crime. The sentence awarded to the appellant has also been put to question, essentially with the submissions that the Trial Court as also the High Court have not examined the mitigating circumstances existing in this matter, including that it is a case of weak chain of circumstances; and that the appellant is having no criminal antecedent and comes from a poor socio-economic background with family members, including wife and children, being dependent on him. Per contra, it is contended on behalf of the respondent that concurrent findings on the guilt of the appellant, based on proper appreciation of facts, call for no interference. It is also submitted that the abhorrent nature of the crime justifies the death sentence in the present case where the appellant, a grown-up person of about 35 years of age, enticed a seven-year-old girl child and committed brutal rape and murder. 2.6. Thus, two major points would arise for determination in these appeals: first, as to whether the conviction of the appellant calls for any interference; and second, if the conviction of the appellant is maintained, as to whether the sentence of death awarded to the appellant deserves to be maintained or deserves to be substituted by any other sentence?

3. With the aforesaid outline, we may take note of the relevant factual and background aspects in necessary details. Relevant factual and background aspects

4. The prosecution in the present case had its foundation in a complaint (Ex. Ka-1) submitted by PW-1 Nisha wife of Manoj Harijan, at Police Station Kasya, District Kushinagar on 14.05.2015 at about 12:35 p.m., with the allegations that the previous evening, at around 06:30 p.m., her seven-year-old daughter, when playing with other kids of neighbourhood, was taken by the appellant Pappu towards southern side of the house on the pretext of plucking lychee, while shooing away other children; and her sister PW-2 Anita and many neighbours had seen the appellant Pappu taking her daughter. The complainant further stated that after turning dark, she searched for her daughter who was not found anywhere and the appellant Pappu was also not found. The

complainant also stated her strong apprehension that the appellant had committed rape on her daughter, caused her death, and concealed the dead body. On the basis of this complaint, FIR No. 840 of 2015 (Ex. Ka-13) came to be registered for offences under Sections 376, 302, 201 IPC and Sections 3/4 POCSO. The complaint so made by PW-1 Nisha, on which the said FIR was registered, has its own relevance on the questions sought to be raised in this matter. Therefore, the translated version of the same is reproduced for ready reference as under4-5: -

> "To, The SHO, PS-Kasya Sir, It is requested that complainant Nisha w/o Shri Manoj, caste- Harijan is a r/o village- Sabaya Khas, PS- Kasya, District- Kushinagar. Yesterday evening i.e. on 13.05.2015 my daughter Am aged around 7 years was playing with neighbour Rajendra Dhobi's daughter Ashna, Mishri's daughter Rinku and other kids of neighbourhood near the home. At around 6:30 o'clock, native of my village and of my caste Pappu s/o Shri Ram Preet took my daughter Am with him towards the southern side of home on the pretext of plucking lychee. He gave toffee to other children of neighbourhood playing with her and shooed them off the spot. My younger sister Anita and many neighbours had seen Pappu taking away my daughter. After sometime when it turned dark, I started to search my daughter. Children who were playing with her, my sister Anita and neighbours told that Pappu had taken her in the orchard of lychee towards the south. I went to the house of Pappu where he could not be found. I kept searching my daughter but nothing could be known. I am damn sure that Pappu had taken my daughter Am with him on the pretext of plucking lychee and he committed rape on her, caused her death and concealed her corpse at some lonely place. It is requested that report be lodged and appropriate action be taken.
>
> Complainant Sd/- Nisha Name- Nisha w/o Manoj Harijan Village- Sabya Khas PS- Kasya District- Kushinagar Date- 14.05.2015" 4 It may be indicated that the relevant documents and depositions in the original record of this case are in Hindi language. The translated versions in English language, as placed before us, carry several obvious errors where the words and even sentences are rather incomprehensible.

We have scanned through the record with the assistance of learned counsel for the parties; and the extractions in this judgment are, as far as feasible, near to the correct translation and meaning of the text in original.

5 Having regard to the nature of case, the name of victim has been omitted in the extractions and at all other places in this judgment; and substituted by the expression 'Am'.

5. According to the prosecution, after registration of FIR, the investigation was taken over by the Station House Officer6 of Police Station Kasya, Gyanendra Nath Shukla (PW-8) 7; the statement of PW-1 Nisha was recorded; and a search was mounted for the appellant. The SHO obtained information on the whereabouts of the appellant and acting upon such information, found the appellant near the Community Health Centre. It has been the case of prosecution that on being questioned, the appellant disclosed the place of incident as also the location where body of the

daughter of the complainant had been dumped near the bridge on the banks of the river Hiranmati. On the basis of his disclosure, the corpse was recovered along with clothes of the deceased. The Investigating Officer prepared the necessary memos, plans and reports and sent the dead body for post-mortem examination. A few aspects related with preparation of such memos and reports have also been put to question in this matter on behalf of the appellant, which we shall examine hereafter later.

5.1. In the post-mortem conducted by PW-6 Dr. Himanshu Kumar, eleven injuries were found on the dead body and it was opined that death had occurred due to haemorrhage and shock, as a result of ante-mortem injuries.

6. After other processes of investigation, charge-sheet was filed against the appellant on 12.08.2015 and the case was committed to the 6 'SHO', for short.

7 Hereinafter also referred to as 'the Investigating Officer' or 'the IO'. Court of Sessions where the appellant was charged of the offences under Sections 376, 302, 201 IPC and Sections 3/4 POCSO (later on rectified to Sections 5/6 POCSO). The appellant pleaded not guilty and claimed trial. Prosecution Evidence

7. The case against the appellant was tried as Sessions Trial No. 414 of 2015 before the Additional Sessions Judge, Court No. 2, Kushinagar, Padrauna. The prosecution examined 8 witnesses, and produced 19 documents. In view of the contentions urged, we may take note of the salient features of the relevant evidence adduced by the prosecution.

7.1. PW-1 Nisha, mother of the deceased-child, deposed in her examination-in-chief as under: -

> "...Pappu Gautam had called and taken along my daughter namely Am aged 7 years at about 6:30/7:00. First of all he fed toffee then took her southwards in the village on the pretext of plucking litchi. My daughter was playing at the door along with other children. When (he) called and took along my daughter, my sister and other children who were playing with her and I had seen it. When the girl did not return home, we had searched for her throughout the night but in vain. When I did not find my daughter, I had given a complaint at Police Station Kasya the next day after getting it written on the basis of which the case was lodged. Pappu had sexually assaulted my daughter and thereafter had thrown her at the river bank on Deoria Road where cremation rites are performed.
>
> When I did not find my daughter, I enquired at Pappu's home then his wife said that she did not know where Pappu had gone after quarrelling. Pappu used to consume liquor. I know it. When police arrested Pappu and interrogated him, Pappu got the dead body recovered. My Jija (brother-in-law) and my uncle (bade papa) identified the dead body. When the case was lodged, the S.I. had recorded my statements. I had also shown the place to the S.I. from where the girl was taken along..." 7.1.1. The relevant part of her testimony in the cross-examination would read as under: -

"...I had got written the complaint by an educated boy. I was coming to the police station crying then this boy met me on the way. I asked him to write it, he wrote. I had gone to the police station at about 11-12 (during day time). Sister and I had gone to the police station and no one else had gone.....

Q: At what time and day your siter Anita had told you that your daughter is missing?

A: Pappu had taken along the girl at 6.30, thereafter we made a search for 1-1½ hours. Then (we) had gone to Pappu's house to inquire, his wife told that her husband is out of the hourse since evening after quarrelling.

Anita and I had seen Pappu carrying the girl.

Police/Chowkidar/Pradhan had not been informed first- firstly the girl was searched for. We had been searching for the girl throughout the night. My Jija (brother-in-law) and father had informed about the death of the girl. When police had arrested Pappu, only then I came to know that my daughter has died. I had not given the complaint at the police station on my Jija's advice. I did not have mobile at the time of the incident. I can't state as to from where the police had arrested Pappu. At the time when Pappu was arrested, I was at home. I had got the complaint written by a boy on dictation. He had written so much as I had dictated. I was satisfied with the thing that the same is written in my complaint what I had dictated. I had also told the same thing to the S.I. what I had got written in the complaint. We both (my sister and I) had seen Pappu taking along the girl. If darogaji had not written such point in my statement, I could not tell its reason. If darogaji had written this point that my sister had seen Pappu taking along my child, then it is correct. I had heard and seen at the door that Pappu is taking along the girl on the pretext of toffee and litchi. I had written in my complaint that I believe that it is Pappu who has taken along my daughter- this point is true because Pappu had taken along my daughter before me.
Q: When you saw Pappu taking along your daughter, despite it you gave complaint on the next day with delay. Can you tell its reason.

A: Firstly, I kept on searching for my daughter, when I did not find her, I gave the complaint on the next day.

I kept on searching for my daughter in the entire village throughout the night. I kept on searching door to door in the entire village. Whose name do I tell? I recognize the people of village. I kept on searching throughout the night. Names of how may persons do I tell? I can't tell the names of the persons of entire village. Pappu drinks liquor for many days. I don't know whether he falls inebriated condition at some place or not but he consumes liquor. Pappu drinks liquor daily. Prior to this incident, we had normal relation with Pappu's house. I went to see the dead body.

Firstly I had gone to the bridge itself and thereafter had gone to the Police Station. It was 5-6pm when Pappu was arrested. The dead body was recovered on the next day of the incident. When I saw the girl, one of her eyes had come out, vein was also coming out below the eye, leg was also fractured. The animals had not eaten the dead body. The neck of my daughter was also twisted. .....

It is wrong to state that I had falsely implicated Pappu due to village animosity." 7.2. PW-2 Anita (maternal aunt of the deceased) largely corroborated the testimony of PW-1. The relevant parts of her assertions in the examination-in-chief would read as under: -

"The incident is of 13.05.2015 at 6:30 pm. My sister's daughter namely Am aged 7 years was playing along with other children near Gokul Gupta's house beside my house. There came Pappu Gautam and gave a twenty rupee note to a girl called Aashna and asked her to bring toffees. He distributed toffees to the children and then made all the children go from there. Thereafter, he stopped my sister's daughter namely Am and took her along on his back on the pretext of plucking litchi. I had seen all this through my window. When my sister's daughter did not return home till night, we started search for her. But we could not find her in the night and my sister gave complaint at the Police Station on the next day.

Police arrested Pappu Gautam. Accompanying the police, Pappu had got recovered the dead body from the bush near the bridge. Pappu Gautam had concealed the dead body of my sister's daughter Am in the bush after committing rape upon her and killing her..." 7.2.1. In her cross-examination, this witness PW-2 Anita stated as under:-

"...The distance from my window to the place where children were playing is 4-5 steps...when I was watching the children playing... my sister was sitting at the place where I was standing...I had told my sister about the missing of the child after an hour. We had started to search for the girl child after one or one and half (1-1½) hour. Pappu Gautam had taken the child towards the south direction. We first went to the orchard of litchi and thereafter, went to Pappu's house. Pappu was not at home. We met Pappu's wife at home who told that she did not know where Pappu had gone after quarrelling...When we reached Pradhan's house at about 12- 1 at night, Pappu came home, his feet and clothes were laced with mud. When we asked, Pappu said that he had not taken the child.

When we were interrogating Pappu at about 12 at night, Pradhanji was not present there. We had met Pradhanji before Pappu came to Pradhanji's house then we proceeded to his house. Jamaluddin Ansari was the then Pradhan. By the time when we had gone to Pradhanji's house, Pappu's father had also arrived and we said that we are going to complain at police station then Pappu's father counselled and forbad us from going to police station by saying that if he would have gone somewhere, he would return. At that time my sister Nisha was not with me...After coming to know

that Pappu had come to his house, we didn't go to the police station because only girls were present at our house and there was no guardian so that we could leave for the police station. I don't remember the exact time but it was 10.00 to 10.30. Only Nisha and I had gone to the Police Station for giving the information. Pappu was not behind the bars when we reached the Police Station.

How much time after giving the information, the dead body was recovered we don't remember. Later, when the policeman apprehended Pappu and interrogated him then he told that the dead body of the child was there. The people of the entire village were shouting the dead body had been found there- when my brother-in-law lifted the dead body, it was the dead body of my sister's daughter..... No quarrel etc had taken place between my house and the house of Pappu before the incident....It is wrong to say that Pappu has been falsely implicated in this case due to factionalism."

7.3. PW-3 Aashna, said to be about 10 years of age at the time of her deposition, was found to be a competent witness. She deposed that the appellant gave her Rs. 20 to bring sweets and to distribute them amongst other children. She brought sweets worth Rs. 4, returned the remaining amount to the appellant, and distributed the toffees. While corroborating PW-1 and PW-2, this child-witness further stated that the appellant invited the deceased to accompany him to the farm to pluck lychee. When the other children attempted to follow, they were scolded by the appellant and shooed away. She further stated that in the morning, it came to be known that Am had been murdered and thrown; and she had stated this fact to Darogaji.

7.3.1. A few aspects emerging from the cross-examination of this child-witness PW-3 Aashna have been underscored during submissions on behalf of the appellant, particularly as regards the place where the children were playing and as regards the time of her having seen the dead body of the victim child. We may take note of the relevant facts stated by this witness in the cross-examination as under: -

> ".....was playing game at Rampravesh's door. Am's house falls behind one house after the house of Rampravesh and the middle one is Bablu's. Pappu's house is adjacent to Rampravesh's house. Pappu scolded us at 7 O'clock in the evening and thereafter we started playing at the door of Ram Parvesh and kept playing for almost 5 hours. Thereafter, we returned back home. At the time when we were playing, Am was there. Myself, daughter of my father's elder brother, my mama's daughter and my mausi's daughter were there; we all went back home. When met Pappu at my house, at that time my mother, father, brother and myself were present. My father did not talk to Pappu. (He) took away Am which was witnessed by my mother and father. Thereafter, I did not meet Am. After getting up in the morning, I got the information that Am had died. The information about death of Am was given by the sister and brother-in-law and when brother-in-law (jija) told the said fact then at that time, his sister Sunita was present. .....When Anita and Sunita told that Am has died then I along with them went to that place at about 10 O'clock where dead body of Am was lying. Many persons had gathered there and after that, I went to the police station. My brother-in-law (jija) took me there, but I cannot tell the name of brother-in-law(jija); he is husband of Neelam. I was interrogated at the police station on the same day and had stated to the sub-inspector that I have come after seeing the

dead body.....” 7.4. PW-4 Ambedkar is the uncle of the deceased child and residing at a place about 22 kms from the village of incident-Sabya. This witness asserted to have reached Sabya after getting information from PW-1 that her daughter was missing. He also stated that the appellant Pappu was interrogated by the IO before him whereupon the appellant agreed to show the place where he had thrown the child after committing rape and murder. The witness asserted that the dead body of victim and her clothing were recovered at the instance of the appellant before him. He also deposed regarding preparation of inquest report, the memos of arrest and recoveries, and identified his signatures on the memos Ex. Ka-

2 and Ex. Ka-3. In his cross-examination, this witness PW-4 Ambedkar pointed out that he reached Sabya by bus but was unable to state the time of his arrival. As regards the facts concerning arrest of the appellant and recoveries, this witness stated in the cross-examination, inter alia, as under: -

“...The police brought Pappu in afternoon. Perhaps, Pappu was arrested two hours prior to my arrival, he was arrested by police at Sabya-square. Thereafter, the sub-inspector brought Pappu from police station before me and obtained signature of arrest at the spot of arrest. I do not remember as to the signature of which persons were obtained there besides me. When I affixed my signature, there were no signatures of other persons. When signature was obtained, about 40-50 persons had gathered there. I had come to my relative’s place, therefore I cannot tell the names but I am acquainted with the relatives. Recovered panty and T- shirt are not before the court. Panty and T-shirt were sealed and stamped at the police station and after seal and stamp proceedings, signature was obtained. Panty was of black colour..... It is wrong to state that I did not see the place of occurrence and put the signature at the police station before the police.” 7.5. The post-mortem was conducted by PW-6 Dr. Himanshu Kumar on 15.05.2015, beginning at 3:05 p.m. and ending at 4:05 p.m. The relevant extracts of the post-mortem examination report (Ex. Ka-11) are as under: -

“External Examination-

Rigor mortis upper and lower limb present.

External General Appearance-

Tongue protruded mouth eye (L) closed, eye (R) protruded. External Injuries-

(1) Contusion 5 cm X 3 cm on the (R) side of eye.

(2) Contusion 10 cm X 3 cm on the (R) side face.

(3) Contusion 7 cm X 3 cm on the posterior aspect of (R) arm. (4) Contusion 12 cm X 5 cm on the front of chest.

(5) Lacerated wound 3 cm X 1 cm on the anus.

(6) Protruded trunk.

(7) Eye Protruded (R) side.

(8) Loss of hair (on the head).

(9) Germ found on the whole body.

(10) Contusion 5 cm X 3 cm on the (R) side parietal region. (11) Contusion 3 cm X 2 cm on the (L) side parietal region.

xxx xxx xxx Bones of Scalp and skull: Right and left Parietal region fractured xxx xxx xxx Genital Organs: Vagina found in tear position and clotting present.

Vaginal swab is taken and sealed and sent to lab." xxx xxx xxx Opinion:

1. Time since death: about 2 and 3 days.

(i) Cause and manner of death: Death is due to haemorrhage sand shock- result of Ante-Mortem Injury." 7.5.1. It was opined in the post-mortem report that possible time of death was about 2-3 days; and the cause of death was haemorrhage and shock as a result of ante-mortem injuries. A few factors relating to the probable time of death, as occurring in the statement of this witness PW-6 Dr. Himanshu Kumar, would read as under: -

"The probable time of her death would be within 2 to 3 days.... The time of 2-3 days means that the probable time of death could be between 48 hours and 72 hours before the post-mortem." 7.6. PW-8, Gyanendra Nath Shukla, the Investigating Officer, stated in his examination-in-chief that at the relevant time, he was posted as the SHO of Police Station Kaysa, when Case Crime No. 840 of 2015 was registered on the complaint submitted by PW-1. He immediately started investigation and attempted to locate the appellant. This witness further stated that he received a tip-off about the location of the appellant and acting on this information, he apprehended the appellant Pappu near the Community Health Centre. PW-8 stated that Pappu Gautam was then interrogated. The relevant part of his testimony as regards disclosures by the appellant Pappu and preparation of memos would read as under: -

"...And when asked about the dead body, he said, I could get the dead body recovered. On the pointing of the accused Pappu, the dead body of Am was recovered in the presence of witnesses, namely Siri s/o Jhagru, Ambedkar s/o Ram Nagine, Ishteyaq s/o Jamaluddin, which was identified by the above persons. Asked the lady constable

> Rinku Yadav and constable Om Prakash to bring the jild panchayatnama from the Police Station and instructed SI Rakesh Kumar Singh for the panchayatnama and inspected the spot of occurrence. During the inspection of the recovery spot, T- shirt and underwear of Am were recovered on the pointing of the accused Pappu. It was placed in a piece of cloth, sealed & stamped and recovery memo was prepared. ..." 7.6.1. It has rightly been pointed out on behalf of the appellant that a few parts of the testimony of this witness PW-8 in the cross-examination, as available in the original record, have not appeared in the English translation, particularly regarding the timing of his recording the statement of the complainant. As per that part of the statement, this witness stated that he commenced investigation at about 2 p.m. on 14.05.2015; he started from the Police Station about half an hour after commencing the investigation; and at that time, the person accompanying the complainant was not present. This witness deposed that he recorded the statement of complainant next day after entering into investigation but then, stated that he recorded the statement on the day of incident itself and then, further stated that he recorded the statement of the complainant at about 2 p.m.;

that it took about 20 minutes to record the statement; and that he reached the site about 2-2½ hours thereafter. This witness further deposed about the tip-off regarding the location of the appellant and stated as under: -

> "....Arrest of the accused took place at the road near CHC. I prepared the arrest memo at the spot. I did not write the arrest memo at the place where the accused Pappu was arrested. I, immediately after the accused was arrested and he confessed his crime, started preparing the arrest memo at the spot of arrest. I don't remember it well as to how long did it take to prepare the arrest memo. The memo was prepared after the proceeding was completed. Body of the deceased was recovered on being pointed out by the accused. Moreover, clothes of the deceased viz. Kachhi and T-shirt of the deceased were recovered from the place of occurrence. All these proceedings were recorded in the memo. It is right to say that at the time of arresting, the accused was apprised of the reason of his arrest. But the arrest memo was prepared after the recovery memo was written. The accused was not handed over the copy of the memo at the place where he was arrested because the memo was not prepared completely there. It is wrong to say that during the arrest, I did not abide by the rules of 50 CrPC, of the Human Right Commission and of the Hon'ble Supreme Court. The truth is that after arresting the accused, the arrest memo was prepared after the body of the deceased and her clothes were taken into custody. The accused was orally informed of the reason of his arrest before he was taken into police custody...." 7.6.2. This witness, the IO, further pointed out in his cross-examination about preparation of memos, inter alia, in the following terms: -

> "....Memo of arrest and the memo of recovery are same and one; they don't have different witnesses. Arrest memo of the accused, recovery memo of kachhi and T-shirt of deceased and recovery of Kachhi are mentioned in one. The witness again

> stated that recovery memo of dead body and arrest of dead body (sic) are in one and memo of recovery of kachhi of the deceased is one and recovery of kachhi of accused is in different memo which bear the signature of Siri and Ambedkar....” 8

8 This part of the statement of PW-8 carries obvious overlapping of expressions even in the original; and its translated version also carries several question marks (?) which have been omitted herein, to make it read, as close as possible, to the original version. 7.6.3. This witness, the IO, also admitted the fact that the report of Forensic Science Laboratory had not been received while filing the charge-sheet but according to him, the offence of rape was made out from a perusal of the post-mortem report.

7.7. It may be noticed at this juncture that as per the report dated 10.08.2016 (Ex. Ka-19) prepared by the Forensic Science Laboratory, U.P. Ramnagar, Varanasi, ‘spermatozoa and sperms were found’ on the underwear of the deceased.

7.8. There had been two more witnesses in this case namely, PW-5 SI Rakesh Kumar Singh and PW-7 HCP Nagendra Singh. PW-5 Rakesh Kumar Singh deposed in relation to the preparation of memos and reports. PW-7 Nagendra Singh stated that the complainant had arrived at the Police Station with her brother-in-law and with a hand-written complaint, which was duly entered as G.D. No. 30 at 12:35 p.m. and thereupon, FIR No. 840 of 2015 was registered. He indeed stated in the cross-examination that no other person had accompanied the complainant. He also stated that the SHO immediately left for investigation and had recorded the statement of the complainant at the Police Station; and that the statement of the brother-in-law of the complainant was also recorded at the Police Station. The relevant aspects of his testimony in the cross-examination would read as under: -

> “....Complainant of the case had come to the Police Station along with her Bahnoi (sister’s husband) namely Ambedkar. She had given me the complainant. Other than her Bahnoi, no other person was accompanying her. SHO was also present there. The case was registered when the SHO directed the same. Had not issued any order on the complaint and had asked it verbally. It was a serious matter, when I told him, he verbally asked to register the FIR. The SHO had said that he himself would investigate the case. Then his name was written as the IO of the case. The copy of the FIR was given to the SHO after registering the case. It would have taken 10 minutes in making the entry in the GD and FIR. The SHO immediately left for the investigation after the case was registered. SHO had recorded the statement of complainant at the police station. The statement of her bahnoi (sister’s husband) was also recorded at the police station....” Defence Version and Evidence

8. The appellant, in his examination under Section 313 CrPC stated, inter alia, that he had been falsely implicated in the case under a conspiracy; and that the investigation conducted by the IO was false, in pursuance whereof, a false charge-sheet had been filed. 8.1. One witness, DW-1 Shameem, was examined by the defence. DW-1 stated in his examination-in-chief that there was a commotion in the village on the 13th and again the next day, when it was said that a body was lying near the

bridge. The villagers reached the site and the body of the deceased was identified by the father of the child. This witness stated that only after that did the police arrive and took the dead body into custody. The witness further stated that there was some hubbub about enmity of Ram Preet (father of the appellant) and Rajendra Dhobi (father of PW-3) and Manoj (father of the deceased) as regards a piece of land sold by Ram Preet to one Gokul; and Pappu was falsely implicated. Trial Court found the appellant guilty and awarded death sentence

9. After conclusion of the trial and after having heard the parties, the Trial Court accepted the prosecution case; and while rejecting the contentions urged on behalf of the appellant, held that the chain of circumstances established by the prosecution was a complete and continuing one, bringing home the guilt of the appellant, who had not been able to rebut the presumption under Section 29 POCSO. The Trial Court, accordingly, convicted him of the aforementioned offences of rape and murder of the girl child and destroying evidence; and awarded varying punishments, including that of death.

9.1. By relying on the testimonies of PW-1, PW-2 and PW-3, it was held by the Trial Court that the deceased child was playing with the children of her village; the appellant gave money to PW-3 to buy toffees, who distributed toffees amongst other children; and the appellant then took the deceased child by enticing her on the pretence of picking lychee and shooed the other children away when they attempted to follow them. 9.2. The contentions regarding delay in lodging the FIR were rejected by the Trial Court, while holding that the delay was duly explained by PW- 1 and PW-2, since the father of the appellant had met and assured them that their daughter would be returned if she was taken by the appellant; and since PW-2 had stated that no guardian was available at home, so they could not go to the Police Station in the night. The Trial Court observed as under: -

> "...The reason for delay in lodging the FIR has been made apparent by PW-2, the sister of the complainant and it has been stated that 'the guardian was not present at home. It was assured by Pappu's father that he would come back, if he had taken (her) somewhere.' Because of it, as the deceased could not be found on the second day, the First Information Report was lodged..." 9.3. The defence sought to question the story of prosecution by submitting that due procedure had not been followed while arresting the appellant, since it was not mentioned in the arrest memo and recovery memo whether a copy thereof had been supplied to the appellant. This, the defence argued, weakened the assertion about the discovery of dead body and clothing of the deceased child at the instance of the appellant.

However, these submissions were rejected by the Trial Court after perusing the testimonies of PW-4 Ambedkar, PW-5 Rakesh Kumar, PW-7 Nagendra Singh and PW-8 Gyanendra Nath Shukla (IO); and while observing that since the IO was deposing after one and a half year and was reciting from memory, minor contradictions would not affect the case of the prosecution. The Trial Court rejected the contentions concerning the procedure followed by the Investigating Officer and held proved that the dead body as also clothing of the daughter of the complainant were recovered at the instance of the appellant. The relevant findings of the Trial Court could be usefully reproduced as under: -

"Thus it is clear from the above mentioned evidence that T shirt and panty belonging to deceased was recovered by the IO at the instance of accused after his arrest and arrest memo of accused as well as recovery memo were prepared at that very spot in the said order, copy of which is said to have been provided to accused and statement regarding absence of this fact in memo has been provided. Thus question raised by defence has been rebutted by PW-8 by the evidence provided by him in his examination due to which there is no weight in the defence argument. Thus it is amply proved from the above mentioned scrutiny that body, panty and T Shirt recovered at the instance of the accused belongs to the daughter of complainant only." 9.4. Further, with reference to the site plans Ex. Ka-14 and Ex. Ka-15, in addition to the post-mortem report Ex. Ka-11 and the testimony of PW-

6 Dr. Himanshu Kumar, the Trial Court held that the site plans and the medical evidence clearly proved that the deceased was dragged after being killed due to which, wheat stacks were trampled and a line was formed in the tilled field; and the deceased received numerous minor as well as major injuries. The Trial Court, inter alia, held as under: -

"...Spot marked as A 1 on the sketch map is the place where accused is shown to have committed rape of the deceased and murdered her, Spot marked as A 2 is the place from where panty of deceased was recovered, spot marked as A 3 is the place from where T Shirt belonging to deceased was recovered. Mark ---- exhibits the line made on accused dragging the body of deceased. Wheat stack was found trampled and a line due to dragging the body was present in the tilled field...Thus the sketch map... is corroborated by the evidence provided by medical witness PW-6 Dr. Himanshu Kumar...which clearly proves that deceased Am was dragged after being killed till the chak road due to which wheat stacks were trampled and a line was formed in the tilled field. Deceased received numerous minor as well as major contusion injuries on her head." 9.5. The Trial Court also examined the contention urged on behalf of the appellant that in the charge-sheet, he was charged of the offence under Section 376 IPC even though there was no eye-witness to the incident of rape and even before the IO had perused the report of the Forensic Science Laboratory. The Trial Court rejected this contention while holding that the nature of the injuries in the post-mortem report, the report of the Forensic Science Laboratory, the recovery of the underwear of the deceased child as also her T-Shirt at the instance of the appellant corroborated the fact that she had been subjected to rape.

9.6. Another contention urged on behalf of the appellant was that the complainant PW-1 mentioned in the written complaint about her apprehension that the appellant had raped and murdered her daughter and had concealed the dead body, though there was no reason for her to state such apprehensions while filing the complaint. It was argued that such assertions in the complaint demonstrated that the appellant had been falsely implicated. This contention was, however, negatived by the Trial Court while observing that PW-1 suspected from the beginning that the appellant had

raped and murdered her daughter and the suspicions were confirmed by the post-mortem report as also the report of the Forensic Science Laboratory.

9.7. The defence put forth by the appellant as regards enmity due to land dispute was also rejected by the Trial Court after examining the statement of DW-1 and with the observation that such a statement was of no assistance to the accused in the face of cogent evidence adduced by the prosecution.

9.8. Thus, in the ultimate analysis, Trial Court found proved the case of the prosecution beyond reasonable doubt and convicted the appellant accordingly by its judgment and order dated 07.12.2016.

9.9. Next day i.e., on 08.12.2016, the Trial Court heard the parties on the question of sentence where it was urged on behalf of the appellant that he had no criminal antecedents; he was in the young age of 35 years; and there was none else to look after his children and old parents.

On the other hand, the prosecution referred to the heinous nature of crime and urged that the present case was of 'rarest of rare' category where the accused-appellant ought to be punished with death sentence. The Trial Court observed that the appellant was around 33-34 years of age at the time of the incident and was sensible enough to understand the consequences of his actions, and yet committed such a heinous offence, for which no leniency was called for. Consequently, the Trial Court awarded the punishments as noticed at the outset, including the death sentence.

High Court confirmed the death sentence awarded to the appellant

10. As noticed, this case came up before the High Court of Judicature at Allahabad on two counts, i.e., the death sentence submitted for confirmation and the appeal against conviction and sentence preferred by the appellant. The High Court reappreciated the material placed on record, including the testimony of witnesses and, in its judgment and order dated 06.10.2017, upheld the decision of the Trial Court in convicting the appellant of the aforementioned offences and sentencing him to death for the offence under Section 302 IPC.

10.1. The counsel for the appellant attempted to highlight the inconsistencies in the testimonies of PW-1, PW-2, PW-3, PW-4 and PW-7 while arguing that the FIR was not filed immediately after it came to be noticed that the deceased girl had been taken away by the appellant; that it was a case of manipulated rediscovery because according to PW-3, she had seen the body of the deceased at around 10.00 a.m. but the FIR was lodged at about 12.35 p.m.; that PW-4 had incorrectly stated the colour of the recovered underwear to be black; that PW-1 had deposed that she came to the Police Station to file the FIR with PW-2 whereas it was deposed by PW-7 that PW-1 was accompanied by PW-4.

10.2. The High Court, however, held that the testimonies of PW-1, PW-2 PW-3 and PW-4 were trustworthy and were natural, being not a result of tutoring. Since the witnesses were deposing after

a year and were rustic villagers, minor inconsistencies in their testimonies would not be of any adverse impact on the case of the prosecution. Additionally, it was held by the High Court that merely because the witnesses were related to the deceased, they could not be characterised as interested witnesses once their testimonies were found to be natural.

10.3. The High Court reasoned that there was delay in lodging the FIR because the deceased child was being searched for in the village; and only when PW-1 and PW-2 failed in their search that they gave a written complaint the next day. Furthermore, it was held by the High Court that the delay would not be fatal to the case of the prosecution since the cases involving sexual offences had to be considered with a different yardstick, where the delay in lodging FIR was natural because it involved the prestige and reputation of the family.

10.4. On reappreciating the medical evidence, being the post-mortem report, the report of the Forensic Science Laboratory, and the testimony of PW-6, the High Court noted that vagina of the deceased was torn; there was presence of blood clots; the time of death was 2-3 days before post-mortem; and human sperm and spermatozoa were found on the underwear of the deceased. These corroborated the story of the prosecution and confirmed that rape had been committed upon the deceased child before her death.

10.5. The High Court also referred to the effect of discoveries made on the information furnished by the appellant in terms of Section 27 of the Evidence Act, 18729 and observed, inter alia, that the appellant himself having led the police to the place of recovery of the body, and having failed to offer any explanation as to how it came to be concealed there, the only inference would be that the appellant had murdered the deceased girl and concealed the body. The High Court observed and held thus: -

> "43. Learned trial Judge has legally and correctly interpreted the ocular testimony of the witnesses. Here the accused took police party and pointed out the place from where dead body of the deceased was recovered, in absence of explanation by accused as to how dead body was kept and concealed there, court can draw inference that it was accused who murdered deceased and concealed dead body and such interpretation is not inconsistent with principle embodied in Section 27 of Evidence Act.
>
> 44. In the present case, the declarant accused person was in the custody of the police and alleged information received from the accused person was made in consequence of his statement which resulted into the recovery of the dead body of the minor girl at the pointing out of the accused person.
>
> 45. Only this component or a portion which was immediate cause of the recovery of the corpse of minor girl would be legal evidence and not the rest. This may therefore pro tanto (to that extent) permits the derivative use of custodial statements in the ordinary course of events." 9 Hereafter referred to as 'The Evidence Act'.

10.6. The High Court found the prosecution evidence reliable and pointing towards guilt of the appellant while the appellant having failed to discharge the burden placed upon him under Section 29 POCSO. The High Court held the prosecution case established while observing as under: -

"54. Thus, the ocular testimony of P.W. 1 Smt. Nisha, P.W. 2 Km. Anita and P.W. 3 Km. Ashana is wholly reliable and trustworthy. We see no reason to disbelieve the testimony of P.W. 6 Dr. Himanshu Kumar. The oral evidence of P.W. 6 Dr. Himanshu Kumar fully supports prosecution version. The medical evidence of P.W. 6 Dr. Himanshu Kumar who conducted the autopsy found that the death of Km. Am aged about 7 years minor girl had taken place due to ante-mortem injuries and the time of death mentioned in the post-mortem report (Exhibit Ka-11) corresponds to the time mentioned in the F.I.R. (Exhibit Ka-1) as well as in the ocular testimony of P.W. 1 Smt. Nisha, P.W. 2 Km. Anita and P.W.3 Km. Ashana." 10.7. The High Court also rejected the defence story of false implication due to prior enmity while observing that no cogent documentary evidence was produced as regards the alleged sale of land by Rampreet to Gokul;

and it was also not shown as to how the appellant was concerned with the said land deal.

10.8. Having thus affirmed the conviction, High Court examined the question of sentence and, while holding that cases of such nature were crimes against humanity, upheld the death sentence awarded to the appellant while observing as under: -

"61. In this case, the accused person-appellant Pappu who belonged to the same caste, social strata and native place of the deceased minor girl Am; allured her to provide her Lychee apparently as a prelude to his sinister design which resulted in her kidnapping, brutal rape and gruesome murder-as the numerous ante-mortem injuries on her person testify; which culminated in concealing her dead body near the banks of the river beside the bushes and innocent helpless and hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position to win her trust. His culpability is of enormous proportion and arouses a sense of revulsion in the mind of the common man.

62. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a 'rarest of rare cases' where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crime.

63. Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain, we have searched for mitigating circumstances-but found aggravating circumstances aplenty." Rival Submissions

11. Learned counsel for the appellant has assailed the judgment and order aforesaid while raising questions against the findings leading to the conviction of the appellant as also against the sentence awarded to the appellant.

12. As regards conviction of the appellant, learned counsel has, in the first place, strenuously argued that probability of ante-timing of the FIR cannot be ruled out; and in this regard, has referred to the facts stated in the testimony of PW-3 that she, along with PW-2 and one Sunita, had visited the spot where the dead body was found at 10:00 a.m. on 14.05.2015. It is submitted that until that time, FIR had not been registered because the complaint was made only around 12:35 p.m. on 14.05.2015 and the dead body was allegedly recovered between 4:10- 5:15 p.m. Yet further, learned counsel has referred to the fact that according to PW-1, she came to know about the killing of her daughter only after the appellant was arrested but, in her complaint, she stated with confidence that the appellant had raped and murdered her daughter and concealed the dead body. According to the learned counsel, she could not have known the factum of alleged offences at the time of making the complaint. The learned counsel has also contended that the dead body having been found prior to the prosecution's claimed sequence of events is also probabilised by the fact that in the post-mortem conducted on 15.05.2015, the time of death was stated to be about 2-3 days and thus, the dead body was found in the afternoon of either 13.05.2015 or 12.05.2015. The contention has been that from the evidence on the record, it cannot be ruled out that the body was found before 10:00 a.m. on 14.05.2015 and the FIR was registered subsequently, while pinning the blame on the appellant due to prior enmity.

12.1. The inconsistencies in regard to the facts as to who was present at the Police Station at the time of registration of FIR as also the timing of recording of the informant's statement under Section 161 CrPC have also been highlighted. It has also been submitted that no particulars were mentioned in column 15 of the FIR as regards 'date and time of dispatch to the Court'. It is submitted that the inconsistencies, taken together with the doubts concerning circumstantial evidence would entitle the appellant to the benefit of doubt.

12.2. Learned counsel for the appellant has strongly assailed the findings relating to the circumstantial evidence, taken as proved by the Trial Court and the High Court. Taking up the circumstance that the deceased was lastly seen alive in the company of the appellant, the learned counsel has endeavoured to point out certain inconsistencies in the evidence which, according to him, falsify the prosecution case. 12.2.1. It has been contended that there are inconsistencies in testimonies of PW-1, PW-2 and PW-3 regarding the location where the children and the deceased were playing before the appellant allegedly enticed the deceased. This apart, the conduct of PW-1 and PW-2 has also been questioned, in that they allowed the deceased child to be taken away in the evening by a man they would describe as an alcoholic, without attempting to intervene. Various other features of inconsistencies in the prosecution case are referred to, where PW-3 Aashna stated that the children kept on playing for 5 hours and upon returning home, she found the appellant being there; and it is submitted that either the testimony may be seen as incoherent, or is required to be disregarded, or it casts strong doubts on the testimonies of PW-1 and PW-2. According to the learned counsel, the High Court has erroneously ignored the material contradictions and inconsistencies with reference to the so-called rustic background of witnesses, while ignoring that in

any case, benefit of doubt arising from such material contradictions should go to the appellant. 12.2.2. It has also been contended that PW-1 and PW-2 were not believable for they could not name a single villager whose house they visited in search of the deceased; and in fact, PW-2 stated about meeting the appellant at the house of village Pradhan between midnight and 1:00 a.m. on 14.05.2015 but such facts were not stated in the testimony of PW-1 or PW-8.

12.2.3. Learned counsel would contend that burden of explanation for the intervening period between the time of 'last seen' and 'recovery of the dead body' would not be shifted on the appellant because the circumstance of last seen itself is not satisfactorily proven with definiteness.

12.3. It has also been strongly argued that the prosecution has not been able to prove that the body of the deceased was recovered at the instance of the appellant, or that he had any knowledge of the location of the dead body.

12.3.1. The learned counsel would contend that the discovery of the dead body before registration of FIR is not ruled out and when the appellant was arrested later, there could not have been any so-called discovery pursuant to any statement made by the appellant. In this very sequence, it has also been submitted that the appellant cannot be said to have exclusive knowledge of the location of the dead body since such a knowledge to many persons beforehand is not ruled out. Therefore, the High Court has erred in drawing inference with reference to Section 27 of the Evidence Act.

12.3.2. It has also been argued that even the fact relating to the arrest of the appellant has itself not been proved in accordance with law and in this regard, inconsistencies in the statement of PW-4 have been indicated coupled with the fact that the arrest memo was not prepared at the spot of arrest and was finished few hours later after making of alleged recoveries. The learned counsel would contend that when the circumstance of arrest is doubtful, the subsequent disclosure statement and recovery cannot be taken as proved.

12.3.3. It has further been argued that the disclosure sought to be relied upon in this matter had been non-specific and the alleged recovery cannot be connected with the alleged disclosures. The submission is that no aspect of disclosure pointing out or leading to recovery has been proved and, in any case, such foisted recovery cannot be made the basis of conviction. It has also been contended that the Trial Court had erroneously taken into consideration the incriminating statements allegedly made by the appellant in police custody, including the factum of dragging of the deceased.

12.4. The learned counsel for the appellant has further contended that the medical and forensic evidence in this case are neither proved against the appellant nor are sufficient to connect the appellant to the crime. As regards the presence of human sperm on the underwear of the deceased, it is submitted that there has been no connecting evidence qua the appellant nor any sperm was found on the appellant's underwear. It is also submitted that the seizures were neither proved nor appeared scientifically proper. The clothes of the deceased were sealed at the Police Station and not at the spot. Even the storage and forwarding were also unscientific in as much as PW-8 admitted that there was no facility in the Police Station malkhana to store the seized clothes in a scientific manner. Further, the FSL report was delivered on 10.08.2016 and it was improbable that

spermatozoa could still be discovered on the cloth one year and three months after the incident; and no expert was examined to prove the scientific criteria and basis for the conclusion in the report. It has thus been submitted that the offence of rape is not established in the present case.

12.5. The learned counsel has also argued that the Courts below have seriously erred in relying on Section 29 POCSO while failing to consider that to shift the burden of proof on the appellant, foundational facts must have been established by the prosecution which, in the context of offences under POCSO, include 'proving the alleged offence beyond reasonable doubt'. According to the learned counsel for the appellant, the prosecution having failed to prove the alleged offences beyond reasonable doubt, no presumption with reference to Section 29 POCSO could have been drawn in the present case.

12.6. The learned counsel would also contend that the Courts below have erred in not drawing adverse inferences in terms of Section 114 illustration (g) of the Evidence Act on account of non-examination of material witnesses whose names had surfaced on the record; and in failing to consider that the rules of prudence and circumspection were required to be applied while appreciating the testimony of PW-1 to PW-4, who were to be personally benefitted by securing a conviction of the appellant because of prior enmity, thereby making them interested witnesses.

12.7. The learned counsel for the appellant has also referred to several decisions in support of his contentions, including those in Sudarshan and Anr. v. State of Maharashtra: (2014) 12 SCC 312, Sharad Birdhichand Sarda v. State of Maharashtra: (1984) 4 SCC 116, Anjan Kumar Sarma and Ors. v. State of Assam: (2017) 14 SCC 359, State (NCT of Delhi) v. Navjot Sandhu: (2005) 11 SCC 600, D.K. Basu v. State of W.B.: (1997) 1 SCC 416, Rammi Alias Rameshwar v. State of M.P.: (1999) 8 SCC 649, Raj Kumar Singh Alias Raju Alias Batya v. State of Rajasthan: (2013) 5 SCC 722, Aghnoo Nagesia v. State of Bihar: (1966) 1 SCR 134, Abdulwahab Abdulmajid Baloch v. State of Gujarat: (2009) 11 SCC 625, Ramesh Chandra Agrawal v. Regency Hospital Limited and Ors.: (2009) 9 SCC 709, Noor Aga v. State of Punjab and Anr.: (2008) 16 SCC 417 and Justin v. Union of India and Ors.: 2020 SCC OnLine Ker 4956.

13. In the second limb of submissions, learned counsel for the appellant has contended, without prejudice to his arguments against conviction, that the sentencing exercise by the Courts below has been in violation of settled law and in any case, the sentence of death deserves not to be confirmed.

13.1. With reference to the judgment of the Trial Court, the learned counsel would contend that it had only considered the circumstances of the crime but has failed to consider the elements relating to the probability of reform and rehabilitation of the appellant. The learned counsel would contend that the respondent-State did not adduce any evidence to show even a probability of the appellant committing criminal acts of violence, posing a threat to the society. The mitigating circumstances like no criminal antecedents, the family being dependent on the appellant and probability of reform were not considered by the Trial Court and no case law was discussed at all. The learned counsel would further submit that the High Court also repeated the same errors of sentencing while only discussing the seriousness of child rape offences and then recording a cursory finding that no mitigating circumstances were found. 13.2. The learned counsel has argued that the sentencing

exercise by the Courts below in the present case had not been in conformity with the ratio of this Court in various pronouncements including those in the Constitution Bench decision in Bachan Singh v. State of Punjab: (1980) 2 SCC 684, and a 3-Judge Bench decision in Mohd. Mannan Alias Abdul Mannan v. State of Bihar: (2019) 16 SCC 584.

13.3. The learned counsel for the appellant has emphasised on the elements relating to 'probability of reform' and has submitted that in taking a case in 'the rarest of rare' category, the principles are clear that the sentence of life imprisonment cannot be said to be 'unquestionably foreclosed' until there is scope or probability of reformation. The learned counsel has referred to the decision in Rajendra Pralhadrao Wasnik v. State of Maharashtra: (2019) 12 SCC 460 to submit that the said case also related to the rape and murder of a minor and therein, a 3-Judge Bench of this Court held that the probability that a convict could be reformed and rehabilitated in society must be 'seriously and earnestly considered' by the Courts before awarding the death sentence, and such an enquiry may require the period between date of conviction and sentencing to be prolonged so as to enable the parties to gather and lead evidence to assist the sentencing Court. The learned counsel would submit that in the present case, the Trial Court convicted the appellant on 07.12.2016 and, on the very next day, i.e., on 08.12.2016, sentenced him to death. Thus, the appellant was not given reasonable opportunity to bring on record material or evidence in relation to the relevant mitigating circumstances.

13.4. The learned counsel has further relied upon several factors which, according to him, are indeed the mitigating circumstances and for which, the sentence of death deserves not to be approved.

13.4.1. It has been argued that the first mitigating circumstance is of the good jail conduct of the appellant where he has also been assigned the cleaning work of the jail office and the fact that he has pursued a Certificate Course in Food and Nutrition, though he could not clear the examination. It is submitted that the appellant is using all available opportunities to reform himself.

13.4.2. According to the learned counsel, the second mitigating circumstance is that the appellant has no criminal antecedents and he had been a decent member of the society, which also shows strong possibility of reformation. The learned counsel has referred to the case of Gudda Alias Dwarikendra v. State of Madhya Pradesh: (2013) 16 SCC 596 and Kalu Khan v. State of Rajasthan: (2015) 16 SCC 492 to submit that therein, this Court has considered the absence of criminal antecedents and the age (35 years) as mitigating factors. 13.4.3. The third mitigating circumstance relied upon in this case is with reference to the family dependence and socio-economic background of the appellant. It is submitted with reference to the affidavit of the wife of the appellant that he had been a caring husband to her and a good father to the children; he continues to call his family and ask about their welfare; and even the people in the village are concerned about his well-being. It is also submitted that the appellant comes from an extremely poor dalit family, had been working as daily wage labourer and the family had hardly enough money to make both ends meet with no direct electricity or water connections. Further, the house they live in has been given to them as a part of the Pradhan Mantri Awas Yojana - Gramin in 2016. It has also been pointed out that after the appellant's arrest in the present case, his brother drowned in a river and his mother also passed away in the year 2018; that because of poverty, the eldest son of the appellant was required to be

sent to Gujarat to live with his maternal uncle; that his father Rampreet, despite old age, has to exert himself in order to feed the family and even the children are forced to work but still, the entire income of the family is only about Rs.3000/- per month; and that the appellant's wife is fragile and weak and the imposition of the death sentence on the appellant has caused her immense mental agony and stress. With reference to various decisions of this Court including that in M. A. Antony v. State of Kerala: 2018 SCC OnLine SC 2800, it is submitted that such factors are also of mitigating circumstance. It is also submitted that the appellant's continuing connection with his family and the local community; and the financial and emotional dependence of the family on him, are additional factors suggesting a probability of reformation. 13.4.4. As a fourth mitigating circumstance, the learned counsel for the appellant would submit that the present one being a case dependant on circumstantial evidence, awarding of extreme punishment is not warranted. The learned counsel has referred to various decisions of this Court including those in the cases of Mohd. Mannan and Kalu Khan (supra). The learned counsel would contend with reference to the decision in Shatrughna Baban Meshram v. State of Maharashtra:

> (2021) 1 SCC 596 that while considering the imposition of death penalty in a case of circumstantial evidence, the circumstantial evidence must be of 'unimpeachable character', or lead to an 'exceptional case', or be so strong as to convince the Court that the option of a sentence lesser than the death penalty is foreclosed. Further, it has been contended, with reference to the decision in Ravishankar Alias Baba Vishwakarma v.

State of Madhya Pradesh: (2019) 9 SCC 689, that therein a 3-Judge Bench of this Court has invoked 'residual doubt', which means that in spite of being convinced of the guilt of the accused beyond reasonable doubt, there might be lingering or residual doubts regarding such guilt and, therefore, the Court would not consider it safe to impose the death sentence. The learned counsel has submitted that, there are several inconsistencies and shortcomings in the prosecution case; and with reference to the contentions urged in assailing the conviction, the learned counsel would submit that the present one is clearly a case of lingering residual doubts, which should act as another mitigating factor in favour of the appellant.

13.4.5. The learned counsel has also placed before us a table of comparable decisions where this Court has commuted the death sentence into 'simple life imprisonment'. Further, the learned counsel has referred to the enunciations in the case of Union of India v. V. Sriharan Alias Murugan and Ors.: (2016) 7 SCC 1, where this Court has approved the special category of sentence in substitution of death sentence, (i.e., life sentence barring remission for specified term beyond 14 years, or life sentence barring remission for remainder of natural life). The learned counsel has also placed before us a table of comparable cases of rape and murder of minors, where remission has been excluded while commuting the death sentence into life imprisonment, either for a fixed term or for the remainder of life.

13.4.6. With reference to the aforesaid and while seeking to draw strength even from the decisions cited on behalf of the respondent, the learned counsel has argued that in the present case, the death sentence awarded to the appellant deserves to be disapproved.

14. Per contra, learned counsel for the respondent-State has duly supported the conviction and sentencing of the appellant with reference to the material on record and several decisions of this Court.

15. As regards the conviction of the appellant, learned counsel for the respondent-State has argued that the concurrent findings returned by the Trial Court and High Court after thorough appreciation of the evidence do not suffer from any infirmity and call for no interference. 15.1. The learned counsel has reiterated the chain of circumstances held proved against the appellant and has submitted that the inconsistencies sought to be referred on behalf of the appellant are of minor nature and do not prejudice the case of the prosecution. With reference to the decision of this Court in the case of Inspector of Police, Tamil Nadu v. John David: (2011) 5 SCC 509, the learned counsel has argued that minor loopholes and irregularities in the investigation process cannot form the crux of the case when strong circumstantial evidences are found in the investigation, which logically point towards the guilt of the accused.

15.2. The learned counsel has submitted that the entire chain of events, from disappearance of the deceased to arrest of the appellant occurred within 20 hours inasmuch as the victim disappeared at around 6:30 p.m. on 13.05.2015 and the appellant was arrested the next day at around 3:30 p.m.; and the prosecution has established the entire chain of significant circumstances which lead only to the conclusion of the guilt of the appellant.

15.3. The learned counsel has submitted, with reference to the depositions of PW-1, PW-2 and PW-3, that the victim was indeed lastly seen with the appellant when the appellant cunningly dissociated her from the company of her friends with whom she was playing, in a pre-planned manner after luring her on the pretext of picking lychees; and the guilt of the appellant could be deduced from the fact that he scolded the friends of the victim when they tried to follow him while he was taking the victim on his back. Thus, according to the learned counsel, the deliberate dissociation of victim from her friends itself proves that it was a premeditated, pre-planned, cold-blooded case of brutal rape and murder of a helpless child.

15.4. The learned counsel would further argue that since the deceased was last seen with the appellant, the burden was upon him to prove as to what happened thereafter, since those facts were within his special knowledge. According to the learned counsel, in the face of credible evidence to prove that the appellant took away the victim child and thereafter the child went missing and then, was only found inhumanely raped and murdered, heavy burden was on the appellant to explain as to where he was between 6:30 p.m. of the day when he took the child and 3:30 p.m. of the next day when he was arrested; as to why did he not take the responsibility of bringing back the minor girl since he was the one taking her away; as to when did he part company with the deceased if he did not commit the crime; and as to how he came to know about the location of the dead body of the deceased? Since the appellant has failed to provide any explanation to any of these pertinent questions, it could be concluded without an iota of doubt that the appellant has failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This, according to the learned counsel, provides a strong link in the chain of circumstances which prove his guilt beyond reasonable doubt. The learned counsel has referred to the decision of this Court in the case of State of Rajasthan v.

Kashi Ram: (2006) 12 SCC 254. The learned counsel has also emphasised on Section 29 POCSO.

15.5. The learned counsel for the respondent-State has also referred to the evidence regarding discovery of the dead body of victim child on the basis of the information of the appellant; and has submitted that when the information furnished by the appellant was proximate to the cause of discovery of material objects of the crime and there was no evidence to signify any involvement or interference of third party in the intervening period between the time when the victim was last seen alive in the company of the appellant and when her dead body was recovered, it provides another strong link in the chain of circumstances against the appellant. It has also been argued that the seizures made by the IO have neither been challenged nor their authenticity put in question during his cross-examination. The learned counsel has again referred to the decision in the case of John David (supra).

15.6. The learned counsel has also referred to the post-mortem report indicating a large number of gruesome injuries on the dead body of the victim child including those on her private parts and has submitted that those facts indicate heinous nature of inhuman crime committed by the appellant on the helpless victim, who was only 7 years of age. 15.7. The learned counsel for the respondent-State has also submitted that all the material facts in relation to the FIR have been duly proved in the statement of PW-1 and there had not been any contradiction in the cross-examination nor any question was put to her to discredit the information given to the police. It is also submitted that nothing has surfaced in the cross-examination to discredit the testimony of material witnesses of the prosecution nor the story of false implication due to enmity is established by the defence; rather the prosecution evidence disproves any such alleged enmity between the parties or their families for which, the appellant would be wrongly prosecuted by the family of the victim.

15.8. Thus, learned counsel for the respondent would submit that the prosecution case squarely falls within the principles relating to circumstantial evidence, as enunciated by this Court in the case of Sharad Birdhichand Sarda (supra) and the concurrent findings leading to the conviction of the appellant call for no interference.

16. Learned counsel for the respondent-State has also countered the submissions made on behalf of the appellant in relation to the question of sentence and has submitted that the present one is undoubtedly a ‘rarest of rare’ case where the sentence of death has rightly been awarded and deserves to be affirmed.

16.1. The learned counsel has referred to the enunciations of this Court in Bachan Singh (supra) and has submitted that within the norms laid down and the principles explained by this Court, the punishment of death is called for in the present case, where there are no mitigating circumstances and on the contrary, the facts of the case disclose only aggravating circumstances against the appellant. The learned counsel has contended that the victim, who was about 7 years of age, must have reposed complete confidence in the appellant since he was their next- door neighbour; and on account of such faith and belief, she accompanied him under the impression that she was being taken to pluck lychees, completely oblivious to the pre-planned evil designs of the appellant. The victim was a totally helpless child, and the appellant had the knowledge of the fact that there was no

one to protect her in the deserted area where he took her by misusing her confidence to fulfil his lust. The appellant also had full knowledge of the fact that there was no male member in the family and hence, he hatched the plan to commit the crime by resorting to diabolical methods and with that object, took the girl to a lonely place to execute his dastardly act. The learned counsel has also referred to the decision of this Court in the case of Shankar Kisanrao Khade v. State of Maharashtra: (2013) 5 SCC 546 and has submitted that the triple tests laid down therein, i.e., 'crime test', 'criminal test' and 'rarest of rare test' stand satisfied against the appellant for awarding capital punishment in this case.

16.2. In support of his submissions, learned counsel for the respondent- State has also referred to the observations of this Court in the cases of Machhi Singh and Ors. v. State of Punjab: (1983) 3 SCC 470, Dhananjoy Chatterjee Alias Dhana v. State of W.B.: (1994) 2 SCC 220, Laxman Naik v. State of Orissa: (1994) 3 SCC 381 and Kamta Tiwari v. State of M.P.: (1996) 6 SCC 250.

17. Learned counsel for the respondent-State has also submitted that though the guilt of the appellant and the beastly manner in which the crime was committed stand established beyond doubt but, if at all this case is not considered falling within the 'rarest of rare' paradigm, the appellant does not deserve to be released and even if his sentence is commuted into life imprisonment, the same is required to be without remission and for whole of the remainder of his natural life. The learned counsel would submit that looking into the nature of crime committed by the appellant, if he is released at any time in the future, the ends of justice would fail and his release would have an adverse impact on the society. The learned counsel has referred to such fixed term sentences awarded by this Court in cases of Swamy Shraddananda (2) v. State of Karnataka: (2008) 13 SCC 767, Mohd. Mannan and Rajendra Pralhadrao Wasnik (supra).

18. We have given anxious consideration to the rival submissions and have scanned through the material on record.

The scope and width of these appeals

19. As could be readily noticed, in the wide range of submissions made on behalf of the appellant, the concurrent findings leading to his conviction have been challenged as if it were a matter of regular appeal; and are practically to the effect that the entire evidence led in the matter be reappreciated on its contents as also its surrounding factors. However, while entering into the process of analysis, we cannot lose sight of the fact that the present one is a matter of concurrent findings of fact by the Trial Court and the High Court. Though the periphery of an appeal by special leave under Article 136 of the Constitution of India and the parameters of examining the matters in such appeals have been laid down repeatedly by this Court in several of the decisions but, having regard to the submissions made in this case, we feel rather impelled to recapitulate the nuanced principles, particularly on the subtle but relevant distinction in the scope of a regular appeal and an appeal by special leave.

19.1. Before adverting to the relevant decisions, it would be worthwhile to notice that the regular appellate jurisdiction of this Court in regard to the criminal matters is specified in Article 134 of the

Constitution of India. For the present purpose, Article 134 and Article 136 of the Constitution of India could be reproduced as under: -

> "134. Appellate jurisdiction of Supreme Court in regard to criminal matters. -
>
> An appeal shall lie to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India if the High Court –
>
> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to death; or
>
> (b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to death; or
>
> c) certifies under Article 134-A that the case is a fit one for appeal to the Supreme Court:
>
> Provided that an appeal under sub-clause (c) shall lie subject to such provisions as may be made in that behalf under clause (1) of Article 145 and to such conditions as the High Court may establish or require.
>
> Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India subject to such conditions and limitations as may be specified in such law." "136. Special leave to appeal by the Supreme Court. - (1) Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India. Nothing in clause (1) shall apply to any judgment, determination, sentence or order passed or made by any court or tribunal constituted by or under any law relating to the Armed Forces." 19.1.1. Further, the enlarged appellate jurisdiction of this Court in regard to the criminal matters is provided in Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 10 that reads as under: -
>
> "2. Enlarged appellate jurisdiction of Supreme Court in regard to criminal matters. – Without prejudice to the power conferred on the Supreme Court by clause (1) of Article 134 of the Constitution, an appeal shall lie to the Supreme Court from any judgment, final order of sentence in a criminal proceeding of a High Court in the territory of India if the High Court-
>
> (a) has on appeal reversed an order of acquittal of an accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten

years;

(b) has withdrawn for trial before itself any case from any court subordinate to its authority and has in such trial convicted the accused person and sentenced him to imprisonment for life or to imprisonment for a period of not less than ten years." 19.2. As back as on 05.05.1950, i.e., at the very early stage of the evolution of constitutional scheme and principles, this Court, in the case of Pritam Singh v. State: AIR 1950 SC 169, made it clear that even when leave is granted, the entire matter is not at large in such an appeal by special leave. This Court said: -

"5. In arguing the appeal, Mr Sethi proceeded on the assumption that once an appeal had been admitted by special leave, the entire case was at large and the appellant was free to contest all the findings of fact and raise every point which could be raised in the High Court or the trial court. This assumption is, in our opinion, entirely unwarranted. The misconception involved in the argument is not a new one and had to be dispelled by the Privy Council in England in Ibrahim v. Rex [(1914) Ac 615] in these words: "...the Board has repeatedly treated applications for leave to appeal and the hearing of criminal appeals as being upon the same footing: Riel Case; Ex-parte Deeming. The Board cannot give leave to appeal where the grounds suggested could not sustain the appeal itself; and, conversely, it cannot allow an appeal on grounds that would not have sufficed for the grant of permission to bring it." 10 'the Act of 1970', for short.

6. The rule laid down by the Privy Council is based on sound principle, and, in our opinion, only those points can be urged at the final hearing of the appeal which are fit to be urged at the preliminary stage when leave to appeal is asked for, and it would be illogical to adopt different standards at two different stages of the same case." (emphasis supplied) 19.3. The scope of Article 136 in relation to the findings of facts and appreciation of evidence came to be further exposited by a 3-Judge Bench of this Court in the case of Ramaniklal Gokaldas and Ors. v.

State of Gujarat: (1976) 1 SCC 6 in the following terms: -

"3. It is a wholesome rule evolved by this Court, which has been consistently followed, that in a criminal case, while hearing an appeal by special leave, this Court should not ordinarily embark upon a reappreciation of the evidence, when both the Sessions Court and the High Court have agreed in their appreciation of the evidence and arrived at concurrent findings of fact. It must be remembered that this Court is not a regular Court of appeal which an accused may approach as of right in criminal cases. It is an extraordinary jurisdiction which this Court exercises when it entertains an appeal by special leave and this jurisdiction, by its very nature, is exercisable only when this Court is satisfied that it is necessary to interfere in order to prevent grave or serious miscarriage of justice. Mere errors in appreciation of the evidence are not enough to attract this invigilatory jurisdiction. Or else, this Court would be converted

into a regular Court of appeal where every judgment of the High Court in a criminal case would be liable to be scrutinised for its correctness. That is not the function of this Court." (emphasis supplied) 19.4. A few days after the aforesaid decision, a 2-Judge Bench of this Court in the case of Mst. Dalbir Kaur and Ors. v. State of Punjab:

(1976) 4 SCC 158, with reference to several decided cases, summarised the principles in the lead judgment as follows: -

"8. Thus the principles governing interference by this Court in a criminal appeal by special leave may be summarised as follows:

"(1) that this Court would not interfere with the concurrent finding of fact based on pure appreciation of evidence even if it were to take a different view on the evidence;

(2) that the Court will not normally enter into a reappraisement or review of the evidence, unless the assessment of the High Court is vitiated by an error of law or procedure or is based on error of record, misreading of evidence or is inconsistent with the evidence, for instance, where the ocular evidence is totally inconsistent with the medical evidence and so on;

(3) that the Court would not enter into credibility of the evidence with a view to substitute its own opinion for that of the High Court;

(4) that the Court would interfere where the High Court has arrived at a finding of fact in disregard of a judicial process, principles of natural justice or a fair hearing or has acted in violation of a mandatory provision of law or procedure resulting in serious prejudice or injustice to the accused;

(5) this Court might also interfere where on the proved facts wrong inferences of law have been drawn or where the conclusions of the High Court are manifestly perverse and based on no evidence." It is very difficult to lay down a rule of universal application, but the principles mentioned above and those adumbrated in the authorities of this Court cited supra provide sufficient guidelines for this Court to decide criminal appeals by special leave. Thus in a criminal appeal by special leave, this Court at the hearing examines the evidence and the judgment of the High Court with the limited purpose of determining whether or not the High Court has followed the principles enunciated above. Where the Court finds that the High Court has committed no violation of the various principles laid down by this Court and has made a correct approach and has not ignored or overlooked striking features in the evidence which demolish the prosecution case, the findings of fact arrived at by the High Court on an appreciation of the evidence in the circumstances of the case would not be disturbed." (emphasis supplied) The aforesaid parameters were redefined in the concurring opinion in the following terms: -

"30. The decisions of this Court referred to in the judgment of my learned brother lay down that this Court does not interfere with the findings of fact unless it is shown that "substantial and grave injustice has been done". But whether such injustice has been done in a given case depends on the circumstances of the case, and I do not think one could catalogue exhaustively all possible circumstances in which it can be said that there has been grave and substantial injustice done in any case. In the appeals before us the findings recorded by the trial court and affirmed by the High Court do not disclose any such exceptional and special circumstances as would justify the claim made on behalf of the appellants whose appeals we propose to dismiss that there has been a failure of justice in these cases." 19.5. We need not multiply the case law on the point but may usefully refer to one of the recent decisions of a 3-Judge Bench of this Court in the case of Hari & Anr. v. The State of Uttar Pradesh: Criminal Appeal No. 186 of 2018 decided on 26.11.2021. Therein, after referring to the aforesaid enunciations in Mst. Dalbir Kaur (supra), this Court has said: -

"19. In the said judgment, this Court observed that the evidence and the judgment of the High Court is examined for the limited purpose for determining whether or not the High Court has followed the aforementioned principles. If the High Court has committed no error or violation of the said principles and has not ignored or overlooked striking features of the evidence which demolish the prosecution case, the findings of fact arrived at by the High Court on an appreciation of the evidence in the circumstances of the case would not be disturbed. Article 136 of the Constitution of India is an extraordinary jurisdiction which this Court exercises when it entertains an appeal by special leave and this jurisdiction, by its very nature, is exercisable only when this Court is satisfied that it is necessary to interfere in order to prevent grave or serious miscarriage of justice. Mere errors in appreciation of the evidence are not enough to attract this invigilatory jurisdiction. It is not the practice of this Court to reappreciate the evidence for the purpose of examining whether the finding of fact concurrently arrived at by the High Court and the subordinate courts is correct or not. It is only in rare and exceptional cases where there is some manifest illegality or grave and serious miscarriage of justice that this Court would interfere with such finding of fact.

20. Regarding the argument on behalf of the accused persons with respect the contradictions and inconsistencies in the evidence of the eye-witnesses, the High Court found that the contradictions and inconsistencies indicated in the statements of the four eye- witnesses were trivial in nature. Following the law laid down by this Court in State of MP v. Ramesh [(2011) 4 SCC 786], the High Court ignored the contradictions and inconsistencies....." (emphasis supplied)

20. In summation of what has been noticed hereinabove, it is but clear that as against any judgment/final order or sentence in a criminal proceeding of the High Court, regular appeals to this Court are envisaged in relation to the eventualities specified in Article 134 of the Constitution of India and Section 2 of the Act of 1970. The present one is not a matter covered thereunder and the present appeals are by special leave in terms of Article 136 of the Constitution of India. In such an

appeal by special leave, where the Trial Court and the High Court have concurrently returned the findings of fact after appreciation of evidence, each and every finding of fact cannot be contested nor such an appeal could be dealt with as if another forum for reappreciation of evidence. Of course, if the assessment by the Trial Court and the High Court could be said to be vitiated by any error of law or procedure or misreading of evidence or in disregard to the norms of judicial process leading to serious prejudice or injustice, this Court may, and in appropriate cases would, interfere in order to prevent grave or serious miscarriage of justice but, such a course is adopted only in rare and exceptional cases of manifest illegality. Tersely put, it is not a matter of regular appeal. This Court would not interfere with the concurrent findings of fact based on pure appreciation of evidence nor it is the scope of these appeals that this Court would enter into reappreciation of evidence so as to take a view different than that taken by the Trial Court and approved by the High Court.

Concurrent findings of fact: whether requiring interference in these appeals

21. As noticed, the Trial Court and the High Court have concurrently recorded the findings that the prosecution has been able to successfully establish the chain of circumstances leading to unmistakable conclusion that the appellant is guilty of the offences of rape and murder of the victim child as also of concealing her dead body. The fundamental fact, as held proved against the appellant is that the deceased was lastly seen in the company of the appellant when he took the deceased along with himself while shooing away other children. The other significant fact, as held proved, is that the dead body of the victim child was recovered at a faraway place near the riverbank at the instance of the appellant. Coupled with the said two aspects is the factor that the appellant had failed to satisfactorily explain his whereabouts since he was last seen in the company of the deceased as also his knowledge of the location of the dead body. These facts and factors, taken together with the medical and other scientific evidence, are said to be of a complete chain of circumstances, leading to the conclusion on the guilt of the appellant.

22. The concurrent findings returned by the Trial Court and the High Court on conviction of the appellant have been questioned in these appeals with a wide range of submissions directed towards the matters of appreciation of evidence. As noticed, this Court would not be embarking upon wholesome reappreciation of evidence but, of course, the matter may be examined from the point of view that there ought not be any misreading of evidence or disregard of any principle of law or procedure, i.e., the findings ought not be suffering from manifest illegality. While taking up this exercise, we may summarise the principles in the cited decisions, so far relevant for the present purpose.

22.1. The principles explained and enunciated in the case of Sharad Birdhichand Sarda (supra), referred to and relied upon by learned counsel for both the parties, remain a guiding-light for the Courts in regard to the proof of a case based upon circumstantial evidence. Therein, this Court referred to the locus classicus of Hanumant v. State of Madhya Pradesh: AIR 1952 SC 343, deduced five golden principles, and named them panchsheel of proving a case based upon circumstantial evidence. This Court exposited as follows: -

> “152. ...It may be useful to extract what Mahajan, J. has laid down in Hanumant case:

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."
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> 153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793] where the observations were made :

> "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.

155. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in King v. Horry [1952 NZLR 111] thus:

> "Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and

> compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

156. Lord Goddard slightly modified the expression "morally certain" by "such circumstances as render the commission of the crime certain".

157. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction..." 22.1.1. Learned counsel for the appellant has particularly relied upon paragraphs 159 to 161 of the said decision in Sharad Birdhichand Sarda. In that part of the judgment, this Court dealt with a contention urged by the Additional Solicitor General that if the defence case is false, it would constitute an additional link so as to fortify the prosecution case. While not accepting such a contention, this Court said as follows: -

> "159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as additional link, the following essential conditions must be satisfied:
>
> (1) various links in the chain of evidence led by the prosecution have been satisfactorily proved, (2) the said circumstance points to the guilt of the accused with reasonable definiteness, and (3) the circumstance is in proximity to the time and situation.

160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. On the facts and circumstances of the present case, this does not appear to be such a case. This aspect of the matter was examined in Shankarlal case [(1981) 2 SCC 35, 39] where this Court observed thus: [SCC para 30, p. 43] "Besides, falsity of defence cannot take the place of proof of facts which the prosecution has to establish in order to succeed. A false plea can at best be considered as an additional circumstances, if other circumstances point unfailingly to the guilt of the accused."

161. This Court, therefore, has in no way departed from the five conditions laid down in Hanumant case [AIR 1952 SC 343]. Unfortunately, however, the High Court also seems to have misconstrued this decision and used the so-called false defence put up by the appellant as one of the additional circumstances connected with the chain. There is a vital difference between an incomplete chain of circumstances and a circumstance which, after the chain is complete, is added to it merely to reinforce the conclusion of the court. Where the prosecution is unable to prove any of the essential principles laid down in Hanumant case [AIR 1952 SC 343], the High Court cannot supply the weakness or the lacuna by taking aid of or recourse to a false defence or a false plea. We are, therefore, unable to accept the argument of the Additional Solicitor-General." 22.2. In the case of Sudarshan (supra), this Court noted the unusual behaviour on the part of complainant and his friends who, after the incident of killing of two persons, approached a lawyer living 15 kms away,

instead of registering an FIR straightaway. Then, the FIR was not lodged in the jurisdictional Police Station and there was no date and time marked on it. It was also not shown as to who took, and how, the FIR to the Magistrate. In the given set of facts, this Court found the FIR ante- timed.

22.3. The case of Anjan Kumar Sarma (supra) has been cited on behalf of the appellant in support of the contention that when other circumstances are not proved, solely the circumstances of last seen cannot form the basis of conviction. In the said case, the prosecution relied upon nine circumstances to prove the guilt of the accused but this Court found that seven of them were to be disregarded as not proved. This Court, thereafter, examined the two circumstances, that the deceased was last seen with the accused and they had failed to offer the necessary explanation and found that only those circumstances were not completing the chain to prove the guilt of the accused, while observing as under: -

> "23. It is clear from the above that in a case where the other links have been satisfactorily made out and the circumstances point to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain. In the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction...." 22.4. The case of Navjot Sandhu (supra) has been cited in support of the argument that a fact already known cannot be discovered pursuant to the statement made by an accused in police custody. The relevant part in the relied upon paragraph shows that Section 27 of the Evidence Act was not found applicable in relation to a particular packet of silver powder which carried the name of the shop and thus, it was found that the name and address of the shop were already known to the police. Even then, this Court said that the conduct of the accused in pointing out the shop and its proprietor would be relevant under Section 8 of the Evidence Act.
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> 22.5. The decision in D.K. Basu (supra) has been referred in support of the submission that arrest memo is required to be prepared at the time of arrest. In the case of Rammi Alias Rameshwar (supra), after finding that there was material discrepancy as to the time of arrest of the accused, this Court declined to place reliance on the evidence of the IO as to the recovery of weapon on the information furnished by the accused in police custody. In the said case, the conviction was maintained with reference to the reliable testimony of eye-witnesses.
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> 22.6. In the case of Raj Kumar Singh (supra), the requirement of putting relevant circumstances to the accused have been reaffirmed while also holding that the circumstances which are not put to the accused in his examination under Section 313 CrPC, cannot be used against him and have to be excluded from consideration.
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> 22.7. The case of Aghnoo Nagesia (supra) has been cited to submit that the incriminating portions of custodial disclosure are inadmissible and therefore, the appellant's alleged admission of dragging the dead body would not be admissible.

22.8. The decision in Abdulwahab Abdulmajid Baloch (supra) has been cited in support of the contention that sole circumstance of recovery cannot be the basis of conviction. In the said case, this Court held thus: -

"38. The learned trial Judge himself opined that the recovery having been made after nine months, the weapon might have changed in many hands. In absence of any other evidence connecting the accused with commission of crime of murder of the deceased, in our opinion, it is not possible to hold that the appellant on the basis of such slander evidence could have been found guilty for commission of offence punishable under Section 302 of the Penal Code." 22.9. The case of Ramesh Chandra Agrawal (supra) related to the compensation claim for medical negligence and therein, the issues involved had been concerning the relevance of the expert evidence where it was alleged that the appellant was impaired because of the faults in treatment by the respondent. As regards the principle concerning expert evidence in terms of Section 45 of the Evidence Act, this Court said: -

"20. An expert is not a witness of fact and his evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of these criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions....." 22.10. The principle relating to reverse burden of proof in special enactments came up for consideration in the case of Noor Aga (supra) wherein this Court dealt with the provisions of Sections 35 and 54 of the Narcotic Drugs and Psychotropic Substances Act, 1985. This Court, inter alia, observed as follows: -

"58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place the burden of proof in this behalf on the accused; but a bare perusal of the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of the accused on the prosecution is "beyond all reasonable doubt" but it is "preponderance of probability" on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established." 22.11. In the case of Justin (supra), the Kerala High Court, while rejecting the challenge to the validity of Sections 29 and 30 of POCSO, has

underscored the requirement that the duty to rebut the presumption arises only after the prosecution has established the foundational facts of the offence alleged against the accused.

22.12. In the case of John David (supra) relied upon by the learned counsel for the respondent, this Court has reiterated the principle that when there is a recovery of an object of crime on the basis of information given by the accused which provides a link in the chain of circumstances, such information leading to discovery is admissible. It has also been held that minor loopholes and irregularities in investigating process cannot form the crux of the case on which the accused can rely upon to prove his innocence, when there is strong circumstantial evidence deduced from the investigation which logically and rationally point towards the guilt of the accused. This Court, inter alia, said as under: -

"72. It is well-settled proposition of law that the recovery of crime objects on the basis of information given by the accused provides a link in the chain of circumstances. Also failure to explain one of the circumstances would not be fatal to the prosecution case and cumulative effect of all the circumstances is to be seen in such cases. At this juncture we feel it is apposite to mention that in State of Karnataka v. K. Yarappa Reddy [(1999) 8 SCC 715] this Court has held that: (SCC p. 720, para 19) "19. ... The court must have predominance and pre-eminence in criminal trials over the action taken by [the] investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it...."

73. Hence, minor loopholes and irregularities in the investigation process cannot form the crux of the case on which the respondent can rely upon to prove his innocence when there are strong circumstantial evidences deduced from the said investigation which logically and rationally point towards the guilt of the accused."
22.13. As regards the last seen theory and operation of Section 106 of the Evidence Act, in the case of Kashi Ram (supra) this Court has explained and laid down as follows: -

"23. It is not necessary to multiply with authorities. The principle is well settled. 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 knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable

> explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule 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 compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., Re. [AIR 1960 Mad 218]
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> 24. There is considerable force in the argument of counsel for the State that in the facts of this case as well it should be held that the respondent having been seen last with the deceased, the burden was upon him to prove what happened thereafter, since those facts were within his special knowledge. Since, the respondent failed to do so, it must be held that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides the missing link in the chain of circumstances which prove his guilt beyond reasonable doubt."

23. Keeping the aforesaid principles in view, we may examine the contentions urged in this matter as regards conviction of the appellant.

24. Learned counsel for the appellant, while seeking to challenge the conviction, has put at the forefront the contentions that the probability of ante-timing of FIR cannot be ruled out. In this regard, three major factors have been highlighted: first, that according to the witness PW-3, she had seen the dead body at 10:00 a.m. on 14.05.2015 though until that time, FIR had not been registered; second, that in the FIR itself, mother of the victim child stated with confidence that the deceased was raped and murdered and the dead body was concealed by the appellant though there was no reason for her to make such assertions at the time of lodging the FIR; and third, that there had been inconsistencies as regards the presence of people at the time of lodging the FIR and as regards the timing of recording the statement of mother of the victim child under Section 161 CrPC as also that there had been opaqueness as regards compliance of Section 157 CrPC in dispatching the FIR to the Court. 24.1. We are unable to persuade ourselves with this line of submissions; rather, we are clearly of the view that these factors, whether taken individually or taken collectively, cannot be decisive of the questions calling for determination in this case. It is the overall view of the evidence as regards the chain of circumstances that alone is decisive of the matter. We may, however, indicate that the contentions urged with reference to the factors aforesaid carry their own shortcomings. 24.2. It is true that the child-witness PW-3 Aashna stated as if she had gone to the site and looked at the dead body at 10:00 a.m. in the morning but then, the said child-witness was about 10 years of age at the time of her deposition and was coming from a rural background. Her comprehension of timings had obviously been crude or amateurish, which is borne out of the fact that in the other part of statement, she stated that after 7 p.m., she and other children kept on playing for 5 hours. Such a narrative about the timing by her had obviously been lacking in the requisite maturity and comprehension. In the process of appreciation of evidence, the Trial Court and High Court have looked at the crux of the matter emerging from her testimony that she was indeed a witness to the fact that the deceased child was last seen in the company of the appellant when he took her along

towards lychee farm.

24.3. Similarly, the overt assertion made in the complaint by PW-1 Nisha, mother of the victim child, that as per her belief, the child was raped and murdered and the dead body was concealed by the appellant, is also required to be visualised with reference to the backdrop that she had the knowledge about the appellant having taken her daughter in the evening and had been searching for her daughter for the whole night. This is coupled with the fact that she was undoubtedly a rustic villager and even got the complaint scribed from someone else. Again, in the process of appreciation of evidence, the Trial Court and High Court have looked at the substance and core of the matter emerging from her testimony while consciously taking note of her background. 24.4. Yet further, as to who accompanied PW-1 Nisha to Police Station is not a factor for which, the FIR could be taken as ante-timed. PW-1 Nisha and PW-2 Anita had been consistent that both of them had gone to the Police Station before the noon hours of 14.05.2015. It has, of course, appeared in the statements of PW-7 Nagendra Singh that PW-4 Amebdkar had accompanied PW-1 Nisha to Police Station but, such a minor discrepancy occurring in the statement of the said police officer posted at the Police Station concerned cannot override the entire evidence on record. Moreover, he had been the person who registered the FIR and there had not been any specific suggestion to this witness that dead body had been seen by anyone before lodging of FIR. Similarly, PW-8, the IO initially stated in the cross-examination that he took the statement of the complainant next day after taking over investigation but thereafter, corrected himself to say that he took her statement at about 2.00 p.m. after registration of the case. This aspect has also been duly taken note of by the Trial Court and the contentions urged on behalf of the appellant have been rejected with reference to the fact that the IO had deposed from memory after one and a half year of the investigation; and PW-7 has clarified that the statement of the complainant was taken by the SHO at the date of registration of FIR and thereafter, he proceeded to investigate. Further, even if the particulars regarding date and time of dispatch of FIR to the Court were not stated in the form, that could only be regarded as a procedural fault on the part of the staff of the Police Station and that cannot nullify all other material on record. In the case of Sudarshan (supra), the FIR was not lodged immediately and not even in the jurisdictional Police Station. In the given set of facts, this Court found that the FIR was recorded after due deliberation and was ante-timed to give it a colour of promptly lodged FIR. The said decision is hardly of any assistance to the appellant in the present case. Even otherwise, every irregularity in maintaining the record pertaining to the investigation cannot take away the crux and substance of the matter, if there are strong substantial evidences deduced from the investigation, which logically and rationally point towards the guilt of the accused, as held by this Court in John David (supra).

24.5. It has been repeatedly argued in this matter that a fact already known cannot be said to have been discovered pursuant to the statement made by the accused-appellant in police custody. As noticed above, this line of argument has been developed with reference to minor and irrelevant inconsistencies in the deposition of witnesses, particularly the child witness PW-3 Aashna. Further, strength is sought to be taken with reference to certain irregularities in maintaining the investigation record. This line of submission is required to be rejected because minor inconsistencies or irregularities cannot take away the substance of the matter and the crucial facts proved in evidence. The decisions, like that in the case of Navjot Sandhu (supra), about the facts

already known to the police, have no application to the facts of the present case. There is no such material discrepancy as regards the time when the police took the appellant into custody, as it has been consistently deposed by the witnesses and found established by the Courts that the IO started from the Police Station at about 2:00 p.m. on 14.05.2015 and apprehended the appellant near the Community Health Centre in the afternoon hours. Then, he started preparing the arrest memo and at the same time, also took the appellant to the site after the appellant agreed to lead to the location where he had dumped the dead body. Thus, the principles in D.K. Basu and Rammi Alias Rameshwar (supra) also do not enure to the benefit of the appellant.

25. For what has been discussed hereinabove, it is but clear that a few discrepancies here or there do not establish that the FIR was ante- timed or that the dead body had already been seen by anyone before lodging of FIR. As noticed, while recording the findings against the appellant, the so-called discrepancies/inconsistencies have also been duly taken note of by the Trial Court and the High Court before finding them either of trivial nature or duly explained. We find no infirmity in such appreciation of evidence by the Trial Court and the High Court.

26. Apart from above, learned counsel for the appellant has made all endeavours to point out some more inconsistencies or shortcomings in the prosecution case. For example, it is submitted that there has been inconsistency as regards the location where other children and the deceased were playing before the appellant allegedly enticed the deceased; that the witness PW-2 had stated about meeting the appellant between midnight and 1:00 a.m. on 14.05.2015 but such facts were not stated by PW-1 or PW-8. These and other such minor factors cannot be said to be of any relevant inconsistency so as to create a reasonable doubt on the prosecution case; rather, such minor variations are more of natural presentation of their versions by the witnesses. The learned counsel would further submit that PW-1 and PW-2 could not name a single villager whose house they visited in search of the deceased. We are unable to find even a logic in such an argument. It is too far-stretched to suggest that even the factum of search of the missing child by her mother and aunt is required to be corroborated by any other evidence. The learned counsel has expanded on his submissions even to the extent that adverse inference ought to be drawn for the prosecution not examining the persons whose names had surfaced on the record. Such a contention remains bereft of logic. All the necessary witnesses to prove the relevant facts have been examined by the prosecution. The principles of drawing adverse inference for non- production of a material evidence available with the prosecution do not even remotely come into operation in this case. To put it in a nutshell, the so-called inconsistencies do not take away the substance of the matter where the prosecution has established fundamental facts leading to the chain of circumstances pointing towards the guilt of the appellant. In an overall view of the evidence, the statements of PW-1, PW-2 and PW-3 appear to be genuine and the discrepancies or inconsistencies therein appear to be rather of natural character as are likely to arise from the persons of their background. It gets, perforce, reiterated that in the present appeal against concurrent findings of fact, the whole of the evidence on record is not to be reappreciated as if it were a matter of regular appeal.

27. Having examined the matter in its totality, we find no infirmity in the Trial Court and the High Court concurrently finding the prosecution case proved that on 13.05.2015, at around half past six in the evening, while the deceased was playing with PW-3 Aashna and other children of the village

Sabaya Khas, Kushinagar, appellant gave Rs. 20 to PW-3, for buying sweets for the children. After distributing these sweets amongst them, the deceased was lured by appellant by suggesting that they go together and pluck lychees from the farm. When the other children sought to follow them, he sent them away by scolding them, picked and placed the deceased on his back, and set off towards the farm. The testimony of child witness PW-3 Aashna is categorical in regard to these facts and there appears no reason to disbelieve her testimony, even if her comprehension of time and hours appears to be wanting in maturity. It would be rather unrealistic to expect such maturity from a ten-year-old child coming from a rustic background. PW-2 Anita, the maternal aunt of the deceased, has also corroborated PW-3 in regard to these crucial facts, establishing that the deceased was last seen with the appellant. In fact, the evidence has been categorical that it was the appellant alone who enticed the deceased to go along with him and rather carried the deceased child on his back. PW-2 Anita has also testified to the fact that she saw the appellant taking the deceased child from the window of the house while standing and PW-1 Nisha, mother of the deceased child was sitting. This explains even the statement of PW-1 Nisha that she had also seen the appellant taking the deceased child. The submission that why these women allowed the child to taken in the evening by a man they described as alcoholic is, again, only an attempt at hair-splitting exercise in the matter of appreciation of evidence. In the rural background, where the appellant was a neighbour and a person of the same community, there could not have been any reason for the ladies to suspect the intent of the appellant towards the child. The assertion that the ladies searched for the child for the whole night cannot be a cooked-up story because, if the seven-year-old girl child did not return home until late hours, they were, obviously, expected to look for the child. The fact that while searching, they indeed reached the house of the appellant, where his wife stated about his having gone out after quarrelling, has also been consistently stated by PW-1 and PW-2. Of course, PW-2 stated about herself having met the appellant past midnight but, also made it clear that PW-1 was not with her at that time. It is also given out that the ladies could not take steps for approaching the police because at the relevant point of time i.e., during the night intervening 13.05.2015 and 14.05.2015, they were not having any person of support with them.

27.1. The sum and substance of the matter is that we find no infirmity in the finding that the deceased was lastly seen in the company of the appellant. This finding remains a cogent finding based on proper appreciation of evidence and calls for no interference.

28. So far as the factum of discovery of the dead body of the victim child at the information of appellant is concerned, as indicated hereinabove, the same stands proved by the evidence of relevant witnesses including PW-4 Ambedkar and PW-8 IO. As noticed, the IO of this case seems to have not meticulously prepared the papers of investigation and even the memorandum of discovery of dead body and arrest of the appellant was prepared as one document (Ex. Ka-2). However, a perusal of the said document Ex. Ka-2, duly proved by the relevant witnesses including PW-4 Ambedkar and PW-8 IO, makes it clear that the relevant facts stand established therefrom and cannot be ignored. As already observed, mere irregularity in preparation of memos by the IO would not falsify the factum of information by the accused- appellant leading to the discovery of the dead body.

29. The submission that the incriminating part in the statement of the appellant made to the police while in custody, like that of 'dragging the dead body', has been relied upon by the Trial Court is also not correct. The Trial Court essentially relied upon the site plan (Ex. Ka-15), where it was indicated that a line over the tiled field with trampling of wheat stack was clearly visible at the site (vide paragraph 9.4. hereinabove). Thus, the decision in Aghnoo Nagesia (supra) is of no relevance to the present case.

30. The principles in the case of Anjan Kumar Sarma (supra) that solely the circumstance of last seen cannot form the basis of conviction as also in Abdulwahab Abdulmajid Baloch (supra) that the sole circumstance of recovery cannot be basis of conviction have no relevance to the present case where both the circumstances of 'last seen' as also 'recovery pursuant to disclosure by appellant', forming strong links in the chain of circumstances, have been duly established on record.

31. It is hardly a matter of doubt or debate that when 'last seen' evidence is cogent and trustworthy which establishes that the deceased was lastly seen alive in the company of the accused; and is coupled with the evidence of discovery of the dead body of deceased at a far away and lonely place on the information furnished by the accused, the burden is on the accused to explain his whereabouts after he was last seen with the deceased and to show if, and when, the deceased parted with his company as also the reason for his knowledge about the location of the dead body. The appellant has undoubtedly failed to discharge this burden. Applying the principles enunciated in the case of Kashi Ram (supra), we have no hesitation in endorsing the view of the High Court that the appellant having been seen last with the deceased, the burden was upon him to prove as to what happened thereafter, since those facts were within his special knowledge. For the appellant having failed to do so, it is inevitable to hold that he failed to discharge the burden cast upon him by Section 106 of the Evidence Act. This circumstance, therefore, provides another strong link in the chain of circumstances against the appellant.

32. For what has been discussed hereinabove, it is also but clear that the foundational facts of the offences alleged against the appellant have been established. In the given set of circumstances, it could safely be said that the presumption contemplated by Section 29 POCSO came into operation and the burden came staying with the appellant; and it was for him to rebut the presumption and to prove that he had not committed the offence. The appellant has failed to discharge this burden. Viewed from this angle too, the decisions in Noor Agha and Justin (supra) do not come to the rescue of the appellant; rather on the principles stated therein and in terms of Section 29 POSCO, the presumption would only lead to the finding of guilt against the appellant.

33. It has unnecessarily been argued with reference to the case of Raj Kumar Singh (supra) that the circumstances not put to accused in his examination under Section 313 CrPC cannot be used against him. The said decision has no application to the present case, particularly when we find that all the material and incriminating circumstances have indeed been put to the appellant.

34. It has also unnecessarily been argued that even if the defence case is taken to be false, it would not constitute an additional link to the chain of circumstances. It is not of taking any additional link to the chain of circumstances but, from the failed attempt of defence to suggest enmity due to the

land dispute, it is clear that there was not even a remote reason for the mother of the victim to direct the imputations against the appellant while allowing the real culprit, if there was any other but the appellant, to escape. In fact, the haphazard suggestions in relation to the alleged enmity had also been of strange nature where it was suggested to PW-1 that the appellant was implicated for 'village animosity' whereas the suggestion to PW-2 was of 'factionalism'. The Trial Court and the High Court have also rightly indicated that nothing of concrete evidence towards the alleged land dispute was available on record. Even the basic fact is also not clear as to how the appellant or his family were concerned with any sale made to one Gokul? 34.1. Having examined the baseless defence plea of enmity due to land dispute and its consideration by the Trial Court and the High Court, we are satisfied that this failed defence plea has not been used as an additional link to the chain of circumstances required to be proved by the prosecution. It has only been referred to as an additional assuring circumstance, after finding that all other circumstances unfailingly point towards the guilt of the appellant. The principles stated in paragraphs 159 to 161 of the decision in Sharad Birdhichand Sarda (supra), as relied upon by the learned counsel for the appellant, do not make out a case for interference in the present appeals.

35. Yet another distended line of arguments, with reference to the decision in Ramesh Chandra Agrawal (supra), is also of no assistance to the appellant. The Forensic Science Laboratory had reported that traces of 'spermatozoa and sperms' were found on the underwear of the deceased. Even if the said report was drawn on 10.08.2016, its veracity cannot be doubted and there is no reason to consider the said report with suspicion. The relevant articles were indeed sealed as proved in evidence and did reach the laboratory in the same sealed condition. The alleged want of upgraded and sophisticated facilities for sealing of the articles at the Police Station cannot override and nullify the proceedings otherwise lawfully conducted by the Police Station and the Investigating Officer. In any case, it is also far-stretched to argue that the offence under Section 376 IPC could not have been imputed in the charge-sheet before receiving such report. The said report was only corroborative scientific evidence but the other facts directly available on record, more particularly as per the conditions of the dead body of the seven-year-old girl child, as seen at the site and then the relevant aspects of gruesome injuries, including those on private parts, as reported in the post-mortem report, could not have been ignored. The decision in Ramesh Chandra Agrawal (supra) is of no support to the contentions urged in this matter on behalf of the appellant.

36. A rather strange line of submission in this case has been that as per post-mortem report, the death had occurred 2-3 days before examination and that opinion would take the time of death even much before the evidence of last seen or that the dead body might have been seen by other persons much before its recovery at the instance of the appellant. The approximate time of death before examination, as indicated in the post-mortem report, cannot be applied as something of mathematical precision. The post-mortem examination was conducted in the afternoon of 15.05.2015; and approximation of two days before such examination matches the proven time when the deceased was last seen with the appellant i.e., around 6:30 p.m. on 13.05.2015. In fact, the indications in the post-mortem report are only to the effect that the appellant did not provide any time to the child and rather carried out his misdeeds immediately after taking her along.

37. Thus, even after examining the principal contentions urged on behalf of the appellant against the concurrent findings returned by the Trial Court and the High Court, we do not find any case of perversity or manifest illegality for which any interference in such concurrent findings would be called for. In an overall view of the matter, it is proved beyond doubt in this case that the hapless child, seven-year-old daughter of the complainant, met with her gruesome end after having been treated inhumanely and having been subjected to sexual assaults; that the victim was lastly seen in the company of the appellant when he enticed and took her along to pluck and eat lychee fruits while shooing away the other children playing with her; that the dead body of the victim child was recovered at the instance of the appellant; and that the appellant failed to satisfactorily explain his whereabouts and his knowledge of the location of dead body. The medical and other scientific evidence has been consistent with the prosecution case and then, the defence version of enmity due to land dispute turns out to be false. That being the position, we have no hesitation in holding that the present case of circumstantial evidence answers the panchsheel principles of Sharad Birdhichand Sarda (supra). The appellant was rightly convicted by the Trial Court and his conviction has rightly been maintained by the High Court. This part of the submissions on behalf of the appellant stand rejected. Whether death sentence be maintained or substituted by any other sentence

38. Even when we find no reason to consider interference in the concurrent findings of fact leading to conviction, the question still remains about correctness of the death sentence awarded to the appellant. The sentence, when being of termination of a natural life, obviously requires closer scrutiny with reference to the statutory requirements of Section 354(3) CrPC as also the principles enunciated by this Court.

39. The requirements of Section 354(3) CrPC are as under: -

> "(3) When the conviction is 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 sentence."

40. We need not elongate this discussion with dilation on all the cited decisions but, having regard to the issues raised and the circumstances of the present case, we may usefully summarise the evolution of legal position and norms for dealing with the question of sentencing in such matters and the connotations of 'special reasons' for awarding death sentence.

40.1. In Bachan Singh (supra), this Court examined two broad questions: One, as to whether death penalty provided for the offence of murder under Section 302 IPC was unconstitutional; and if not, as to whether the sentencing procedure in Section 354(3) CrPC was unconstitutional on the ground that it invested the Court with unguided and untrammelled discretion, which allowed death sentence to be arbitrarily imposed in relation to the offences punishable with death or life imprisonment.

40.1.1. A variety of features and factors including those pertaining to Articles 19(1) and 21 of the Constitution of India were examined by this Court while answering the first question in the negative, which are not of bearing in the present case. The relevant part of enunciations in Bachan Singh had been in relation to the second question, where, while upholding the constitutionality of Section 354(3) CrPC, this Court noted that the legislature had explicitly prioritised life imprisonment as the normal punishment and death penalty as being of exception. For operation and application of this legislative policy, this Court also examined several of the past decisions, particularly the case of Jagmohan Singh v. State of U.P.: (1973) 1 SCC 20 and modulated the propositions as follows: -

> "164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv)(a) and (v)(b) in Jagmohan [(1973) 1 SCC 20] shall have to be recast and may be stated as below:
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> "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
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> (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence." (emphasis supplied) 40.1.2. This Court also said that special reasons in the context of Section 354(3) CrPC would obviously mean exceptional reasons, meaning thereby, that the extreme penalty should be imposed only in extreme cases. This Court said: -
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> "161. ....The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only in extreme cases." (emphasis supplied) 40.1.3. This Court further made it clear that standardisation of sentencing would not be possible because no two criminal cases were identical and standardisation would leave no room for judicial discretion and additionally, standardisation of sentencing discretion was a policy matter belonging to the sphere of legislation. This Court, of course, referred to the suggested aggravating circumstances as also mitigating factors, but reiterated that the Court would not fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other 11. Having said so, this Court ultimately laid down the 'rarest of rare case' doctrine in the following terms:-

"209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines 11 vide paragraphs 169-175, 202 and 206 of the decision in Bachan Singh (supra) indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed." (emphasis supplied) 40.2. In Machhi Singh (supra), a 3-Judge Bench of this Court was considering as to whether the case fell within the 'rarest of rare' category where the appellant was convicted of orchestrating a conspiracy and then carrying it out, which resulted in the murder of 17 people due to a family feud. This Court explained the philosophy pertaining to the death sentence while observing, inter alia, as under: -

"32. ...Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime...." 40.2.1. This Court also explained the propositions of Bachan Singh (supra) and the pertinent queries for applying those propositions in the following passages: -

"38. In this background the guidelines indicated in Bachan Singh case [(1980) 2 SCC 684] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge

from Bachan Singh case [(1980) 2 SCC 684] :

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so." (emphasis supplied) 40.3. The decision in Swamy Shraddananda (2) (supra) was rendered by a 3-Judge Bench of this Court in the backdrop that though the 2-Judge Bench of this Court upheld the conviction of the appellant of offences under Sections 302 and 201 IPC but, one of the learned Judges felt that in the facts and circumstances of the case, punishment of imprisonment till the end of the natural life of the convict would serve the ends of justice, whereas the other learned Judge took the view that the appellant deserved nothing but death penalty. In keeping with the ever-progressing tenets of penology and the anxiety to evolve a just, reasonable and proper course, the 3-Judge Bench adopted the course of not awarding death penalty, but conditioning the life imprisonment sentence with the rider of not releasing the convict from the prison for the rest of his life. The Court explained the logic of such sentencing, which overrides the availability of remission, in the following terms: -

> "92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.
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> 93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh besides being in accord with the modern trends in penology." (emphasis supplied) 40.4. In Rameshbhai Chandubhai Rathod v. State of Gujarat : (2009) 5 SCC 740, the Court was dealing with the case of rape and murder of a young child by a young man. Herein too, the learned Judges of a 2-Judge Bench of this Court differed on the question of sentence. One learned Judge held that death sentence could also be awarded in cases of circumstantial evidence, if those circumstances were of unimpeachable character and it would have nothing to do with the question of sentencing.

If the circumstantial nature of evidence was considered to be a mitigating circumstance, it would amount to consideration of an irrelevant aspect, since the same material was found cogent enough to convict the accused. It was reiterated that what was to be considered for sentencing was the balance-sheet of aggravating and mitigating circumstances. The other learned Judge, however, observed that the Trial Court had not provided the accused an opportunity to demonstrate that he could be reformed; and opined that the Court must not be oblivious of the right of an accused to a fair sentencing policy. Consequently, this matter was also placed before a 3-Judge Bench leading to the decision in Rameshbhai Chandubhai Rathod (2) v. State of Gujarat :(2011) 2 SCC 764. The 3-Judge Bench agreed with the view that the Trial Court was obligated to render a finding on whether the accused could be reformed and rehabilitated; and that the young age of the accused (being only 27 years old), was a mitigating factor operating in his favour. However, it was also observed that the

gravity of offence, the behaviour of accused, and the fear and concern such incidents generate in society, were also the factors which could not be ignored. In result, the 3-Judge Bench, following the course adopted in a couple of other decisions, commuted the death sentence into that of life imprisonment for the remainder of the natural life of the appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reasons. 40.5. Such propositions, whereby this Court had provided for special category sentencing by way of life sentence sans remission in substitution of death sentence gave rise to yet further debate in this Court and led to the reference to the Constitutional Bench that came to be answered in V. Sriharan (supra). There had been several questions referred to the Constitutional Bench as regards the powers of remission, but all those aspects need not be dilated herein. The relevant part of the matter is concerning the first question, as stated in paragraph 52.1 of the referral order. A majority of three Judges approved the ratio in Swamy Shraddananda (2) (supra) providing for special category of life sentence without remission. Though the minority opinion concurred on the point that imprisonment for life in terms of Section 52 read with Section 45 IPC only meant imprisonment for the rest of the life of the convict, where the right to claim remission, commutation etc. as provided under Article 72 or 161 of the Constitution of India would always be available but, did not concur with the other part of the majority opinion approving the aforesaid special category sentence with the reasoning that such a course of providing mandatory period of actual imprisonment would be inconsistent with Section 433-A CrPC. The majority view, being the declaration of law by this Court, reads as under: -

> "Question 52.1: Whether imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?
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> Answer
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> 177. Imprisonment for life in terms of Section 53 read with Section 45 of the Penal Code only means imprisonment for the rest of the life of the convict. The right to claim remission, commutation, reprieve, etc. as provided under Article 72 or Article 161 of the Constitution will always be available being constitutional remedies untouchable by the Court.
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> 178. We hold that the ratio laid down in Swamy Shraddananda (2) 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." (emphasis supplied) 40.6. In Ravishankar (supra), a 3-Judge Bench of this Court re-affirmed the conviction of the appellant of the offences of kidnapping,

> rape, and resultant death of a 13-year-old girl and destruction of evidence. The case had been that of circumstantial evidence and on the question of sentence, this Court examined as to whether death sentence was justified. Though this Court made it clear that even in the case where conviction is based on circumstantial evidence, capital punishment could indeed be awarded but then, proceeded to observe that this Court had been increasingly applying the theory of 'residual doubt', which effectively create a higher standard of proof over and above the "beyond reasonable doubt" standard used at the stage of conviction, as a safeguard against routine capital sentencing, keeping in mind the irreversibility of death. Applying this theory and indicating certain 'residual doubts', it was held that the said case fell short of 'rarest of rare' case. In that case too, the Court commuted the death sentence into one of life for the remainder of the natural life.

40.7. In Shatrughna Baban Meshram (supra), another 3-Judge Bench of this Court considered an appeal against conviction and award of death sentence for rape and murder of a 2½ year old girl by her maternal uncle. On the question of sentencing, a table of 67 cases decided by the Supreme Court over the past 40 years was perused and it was observed that when the offences were of Sections 376 and 302 IPC, and the age of the victim was under 16 years, death sentence was confirmed in 15, but in 3, was later on commuted to life in review. Hence, in only 12 of the 67 cases was the death sentence confirmed. As regards the guiding factors in sentencing, it was held that death penalty was not entirely impermissible to be awarded in circumstantial evidence cases but the circumstantial evidence ought to be of unimpeachable character with option of lesser sentence foreclosed. The Court also examined the theory of 'residual doubt'; and after a survey of the decisions of this Court and those of the U.S. Supreme Court, observed as under: -

> "75.4. These features are only illustrative to say that the theory of "residual doubt" that got developed was a result of peculiarity in the process adopted. Even then, what is material to note is that the theory has consistently been rejected by the US Supreme Court and as stated by O'Connor, J.: "Nothing in our cases mandated the imposition of this heightened burden of proof at capital sentencing." Thereafter, this Court also referred to some of the decisions of this Court where the said theory of 'residual doubt' was referred to, including that in Ashok Debbarma Alias Achak Debbarma v. State of Tripura:
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> (2014) 4 SCC 747, and it was pointed out that those matters were considered from the standpoint of individual fact situation where, going by the higher or stricter standard for imposition of death penalty, alternative to death sentence was found to be appropriate.

40.8. In the case of Rajendra Pralhadrao Wasnik (supra), the appellant was convicted of offences under Section 376(2)(f), 377 and 302 IPC for rape and murder of three-year-old girl on the basis of circumstantial evidence and was sentenced to death. Though his appeal to this Court was dismissed and review petition was also dismissed but, his review petition was later on reopened and heard by a 3-Judge Bench. This Court held that there was no hard and fast rule that death sentence could not

be awarded if conviction was based on circumstantial evidence, but proceeded to commute death sentence into life after finding that the Trial Court and the High Court did not consider various factors including the probability of the petitioner to be reformed. This Court, inter alia, held as under: -

> "47. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. Until Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in Bariyar [Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] and in Sangeet v. State of Haryana [Sangeet v. State of Haryana, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in Sangeet [Sangeet v. State of Haryana, (2013) 2 SCC 452 :
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> (2013) 2 SCC (Cri) 611] "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible." 40.9. In the case of Kalu Khan (supra), while examining various factors concerning the crime and the criminal and the abhorrent circumstances reflected through the nature of crime, this Court also took into consideration that there was no criminal antecedent of accused-appellant and the circumstantial evidence included extra-judicial confession. In the given set of facts, this Court commuted the sentence of death into that of imprisonment for life.

40.10. In the case of M.A. Antony (supra), this Court underscored that the socio-economic factors relating to a convict should also be taken into consideration for the purpose of deciding whether to award life sentence or death sentence.

40.11. In Mohd. Mannan (supra), this Court summarised the proposition of law to be applied in the process of sentencing in such cases in the following terms: -

"72. The proposition of law which emerges from the judgments referred to above is itself death sentence cannot be imposed except in the rarest of rare cases, for which special reasons have to be recorded, as mandated in Section 354(3) of the Criminal Procedure Code. In deciding whether a case falls within the category of the rarest of rare, the brutality, and/or the gruesome and/or heinous nature of the crime is not the sole criterion. It is not just the crime which the Court is to take into consideration, but also the criminal, the state of his mind, his socio-economic background, etc. Awarding death sentence is an exception, and life imprisonment is the rule." 40.12. In Shankar Kisanrao Khade (supra), after survey of a wide variety of cases and pointing out the requirement of applying 'crime test', 'criminal test' and 'rarest of rare test', this Court recounted, with reference to previous decisions, the aggravating circumstances (crime test) and the mitigating circumstances (criminal test) as follows: -

"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, 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." 40.13. The case of Dhananjoy Chatterjee (supra), decided on 11.01.1994, had been that of rape and murder of a young girl about 18 years of age; and this Court found it justified to confirm the death sentence for a cold-blooded and pre-planned murder after committing rape. Therein, this Court essentially referred to the atrocity of the crime on the defenceless and unprotected state of the victim; and observed that imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. This Court, inter alia, observed as under: -

"15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment." 40.14. The case of Laxman Naik (supra), decided on 22.02.1994, was that of offence of rape and murder of a 7-year-old girl by her own uncle.

This Court analysed the fact situation and said as under: -

"27. The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the preplanned unholy designs of the appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfil his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act." 40.15.

> Kamta Tiwari (supra), decided on 04.09.1996, was again a case of rape followed by murder of a 7-year-old girl by a person who was close to the family of the deceased and the deceased used to call him "Tiwari uncle". The girl was kidnapped by the accused and was subjected to rape and then was strangulated to death and later, the dead body was thrown into the well. The enormity of crime coupled with the misuse of trust seem to have weighed with this Court in confirming the death sentence.
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> 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.

41.1. We may proceed to deal with the question of sentence in the present case while keeping in view the principles so evolved and applied by this Court.

42. It could at once be noticed that both the Trial Court as also the High Court have taken the abhorrent nature of crime alone to be the decisive factor for awarding death sentence in the present case. As noticed, the Trial Court convicted the appellant on 07.12.2016 and on the next day, proceeded to award the sentence. The impugned sentencing order of the Trial Court does not indicate if the appellant was extended reasonable opportunity to make out a case of mitigating circumstances by bringing relevant material on record. The sentencing order also fails to satisfy if the Trial Court consciously pondered over the mitigating factors before finding it to be a 'rarest of rare' case. The approach of the Trial Court had been that the accused-appellant was about 33-34 years of age at the time of occurrence and was supposed to be sensible. The Trial Court would observe that 'if such heinous crime is committed by him, it is not justifiable to show any sort of mercy in the punishment.' The High Court though has made rather intense comments on the menace of rape and brutal murder of children as also on the society's abhorrence of such crime12 but has, thereafter, proceeded to confirm the death sentence with a cursory observation that there were no substantial mitigating factors and the aggravating circumstances were aplenty.

42.1. In other words, the impugned orders awarding and confirming death sentence could only be said to be of assumptive conclusions, where it has been assumed that death sentence has to be awarded because of the ghastly crime and its abhorrent nature. The tests and the norms laid down in the relevant decisions commencing from those in 12 In the words of the High Court, 'beastly act of the accused person- appellant Pappu shakes the confidence of society and tears to shreds the warp and woof of the social fabric' Bachan Singh (supra) seem not to have acquired the requisite attention of the Trial Court and the High Court. It would have been immensely useful and pertinent if the

High Court, while taking up the question of confirmation of death sentence and making several comments in regard to the abhorrent nature of crime and its repulsive impact on society, would have also given due consideration to the equally relevant aspect pertaining to mitigating factors before arriving at a conclusion that option of any other punishment than the capital one was foreclosed. The approach of the Trial Court and the High Court in this matter while awarding sentence could only be disapproved; and we do so in no uncertain terms.

43. What has been observed and held hereinabove leaves us with the question as to whether in the present case, capital punishment is called for or it should be substituted by any other sentence. 43.1. The heinous nature of crime like that of present one, in brutal rape and murder of a seven-year-old girl child, definitely discloses aggravating circumstances, particularly when the manner of its commission shows depravity and shocks the conscience. But, at the same time, it is noticeable that the appellant has no criminal antecedents, comes from a very poor socio-economic background, has a family comprising of wife, children and aged father, and has unblemished jail conduct. When all these factors are added together and it is also visualised that there is nothing on record to rule out the probability of reformation and rehabilitation of the appellant, in our view, it would be unsafe to treat this case as falling in 'rarest of rare' category. Putting it differently, when the appellant is not shown to be a person having criminal antecedents and is not a hardened criminal, it cannot be said that there is no probability of him being reformed and rehabilitated. His unblemished jail conduct and having a family of wife, children and aged father would also indicate towards the probability of his reformation.

43.2. Having said so, we may observe that so far as the other arguments on behalf of the appellant, with reference to the theory of 'residual doubt', are concerned, in the later 3-Judge Bench decision of this Court in Shatrughna Baban Meshram (supra), it was observed that the said theory, developed as a result of peculiarity in the process adopted in U.S. jurisdictions, has not found favour even by the U.S. Supreme Court. We need not dilate on this aspect any further in the present case for the simple reason that the strong mitigating factor of probability of reformation and rehabilitation, particularly with reference to the antecedents and background of the appellant coupled with his satisfactory jail conduct, make out a case for communing death sentence into that of imprisonment for life. 44. However, and even when the present case is taken to be not falling in the category of 'rarest of rare' so as to require termination of the life of the appellant yet, the impact of the offences in question on the conscience of the society as a whole cannot be ignored. Thus, it appears just and proper to apply the course adopted in various cases involving the crimes of similar nature where, even while commuting capital punishment, this Court has provided for life imprisonment without application of the provisions of premature release/remission before mandatory actual imprisonment for a substantial length of time.

45. The appellant was about 33-34 years of age at the time of commission of crime in the year 2015. Looking to the overall facts and circumstances, in our view, it would be just and proper to award the punishment of imprisonment for life to the appellant for the offence under Section 302 IPC while providing for actual imprisonment for a minimum period of 30 years. Having regard to the circumstances of this case and other punishments awarded to the appellant, it is also just and proper to provide that all the substantive sentences shall run concurrently. Conclusion

46. Accordingly, these appeals are partly allowed in the following manner: -

(i) The conviction of the appellant of offences under Sections 376, 302, 201 IPC and Section 5/6 POCSO is upheld and the sentences awarded to him are confirmed except the death sentence for the offence under Section 302 IPC.

(ii) The death sentence awarded to the appellant for the offence under Section 302 IPC is commuted into that of imprisonment for life, with the stipulation that the appellant shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of 30 (thirty) years.

(iii) The other terms of sentences awarded to the appellant, including the amount of fine and default stipulations, are also confirmed. The direction for payment of half of the amount of fine to the mother of the deceased girl is also confirmed.

(iv) All the substantive sentences awarded to the appellant shall run concurrently.

47. These appeals and the pending applications stand disposed of accordingly.

.....J. (A.M. KHANWILKAR)1 .....J. (DINESH MAHESHWARI) .....J. (C.T. RAVIKUMAR) New Delhi;

February 09, 2022