

Anil Surendrasingh Yadav vs State Of Gujarat on 27 December, 2019

Equivalent citations: AIRONLINE 2019 GUJ 853

Author: Bela M. Trivedi

Bench: Bela M. Trivedi, A.C. Rao

R/CR.A/1973/2019

CAV JUDGMENT

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL APPEAL NO. 1973 of 2019

With

R/CRIMINAL CONFIRMATION CASE NO. 2 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE BELA M. TRIVEDI

Sd/-

and

HONOURABLE MR.JUSTICE A.C. RAO

Sd/-

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- | | | |
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| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ? | YES |
| 2 | To be referred to the Reporter or not ? | YES |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ? | NO |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO |

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ANIL SURENDRASINGH YADAV

Versus

STATE OF GUJARAT

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Appearance:

MR. RADHESH Y VYAS(7060) for the Appellant(s) No. 1

MR HIMANSHU K. PATEL, APP for the Opponent(s)/Respondent(s) No. 1

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CORAM: HONOURABLE MS.JUSTICE BELA M. TRIVEDI
and
HONOURABLE MR.JUSTICE A.C. RAO

Date : 27/12/2019

CAV JUDGMENT

(PER : HONOURABLE MS.JUSTICE BELA M. TRIVEDI)

1. Both the proceedings arise out of the self-same judgement and order dated 31.7.2019 passed by the Additional Sessions Judge and Special Judge (POCSO), Surat (hereinafter referred to as "the Special Court") in Special POCSO Case No.223 of 2018, whereby the Special Court has convicted the appellant - accused for the offence under Sections 302, 363, 366, 376AB, 377 and 201 of IPC and under Sections 3(a), 4, 5(a), 5(r) and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "the POCSO Act"), and has sentenced him to death penalty for the offence under Sections 302, 376AB of IPC and has awarded different punishments of different durations and directed to make payment of fine for the said offences. The Special Court has acquitted the accused for the offences under the Atrocities Act. The Special Court has not imposed separate punishment for the offence under Sections 3, 4, 5(a), 5(r) and 6 in view of Section 42 of POCSO Act. The appellant - accused has preferred the appeal under Section 374 of Cr.P.C., against the said judgement and order of the conviction and sentence, which has been registered as Criminal Appeal No.1973 of 2019, whereas the Special Court has submitted the proceedings to the High Court for confirmation of sentence of death penalty imposed by it in view of Section 366 and Section 368 of Cr.P.C., which has been registered as Confirmation Case No.2 of 2019. Case of Prosecution:

2. The case as unfolded by the prosecution before the Special Court was that the appellant/accused was residing in a room situated on the ground floor of the house owned by one Shyam Narayan Pandey, situated on the plot No.44 at Someshwar Park Society, Surat, and the complainant was staying along with his family on the 1st floor of the said house as the tenant. The appellant on 14.10.2018 between 20.00 to 20.30 hours kidnapped the minor daughter (hereinafter referred to as "the victim") aged about 3 years 6 months of the complainant Narayan Uttam Umale, who belonged to the scheduled caste. The appellant thereafter took the victim to his room and committed rape on her and killed her by throttling. The appellant thereafter with the intention to destroy the evidence put the body of the victim in a gunny bag in his room. He thereafter locked his room from outside and fled away. The complainant fervently searched his daughter in the society, but she was not found and therefore, he lodged a complaint at Limbayat Police Station, Surat on 15.10.2018 at about 1.15 hours, which was registered as CR-I No.209 of 2018 at the said police station. The Investigating Officer thereafter made inquiry and search at the said society. Since the room of the accused was found locked, he broke open the lock of the said room in presence of the panch witnesses, from where the corpse of the victim was found in a gunny bag in a decayed and decomposed condition. The complaint thereafter was registered for the offences under Sections 302, 363, 366, 376AB, 377, and 201 of IPC and under Sections 3(A), 4, 5(a), 5(r) and 6 of the POCSO Act and under Section

3(2)(5), Section 3(2)(5-A) of the Scheduled Caste and Scheduled Tribes (Prevention of Atrocity) Act (hereinafter referred to as "the Atrocity Act"). The case was investigated by the Investigating Officers at Surat as well as at the native place of the accused at Bihar. After collecting sufficient evidence against the accused, the charge-sheet was filed by the ACP Mr. Parmar before the Special Court, which was registered as Special POCSO Case No.223 of 2018.

3. The Special Court framed charge against the accused for the alleged offences, however, the accused denied the said charge and claimed to be witnesses and relied upon about 60 documentary evidence in order to prove the charges levelled against the accused.

Sr.	PW	Name of the witness	Exhibit No.	Other Particulars
1	PW-1	Dr. Piyush Chunilal Vasava	14	He had examined the accused at 4.20 p.m., on 22.10.2018.
2	PW-2	Dr. Vijaykumar Darogi Kaushik	21	He had carried out the postmortem of the deceased between 10.45 a.m. to 12.15 p.m., on 16.10.2018.
3	PW-3	Shalulal Shankarlal Mevada	28	He had a grocery shop with CCTV Camera at Someshwar Park Society.
4	PW-4	Sheikh Abdul Safiq	30	Video/photographer,
		Abdul Kher		who had taken the video/ photographs of the scene of offence.
5	PW-5	Jitendra Sitaram Kumbhar	33	Panch witness in whose presence the lock put on the room of the accused was broken open, from where the corpse was found on 15.10.2018.
6	PW-6	Pratigna Adharbhai Baviskar	35	Panch witness in whose presence the inquest panchnama (Exh. 36) was carried out and articles were seized.

7	PW-7 Narayan Uttam Umale	38	Father of the victim and the complainant.
8	PW-8 Mahopal Saidane Bhimrao	43	Panch witness in whose presence the panchnama of scene of offence (Exh.49) was carried out.
9	PW-9 Sahdev Saluke Bhanbhubhai	48	Panch witness in whose presence the articles were seized for investigation at the police station as per the panchnama Exh.49.
10	PW-10 Rakesh Patil Rajendra	50	Panch witness in whose presence the accused was arrested and the search of his person was carried out as per the panchnama (Ex.51).
11	PW-11 Chandraprakash Premraj Jain	52	Panch witness in whose presence the discovery of clothes of the accused at the instance of the accused was carried out as per the panchnama (Exh.53)
12	PW-12 Subhash Gupteshwar Prasad Sharma	56	Panch witness in whose presence the clothes of the accused were seized as produced by Geetadevi, sister of the accused at Village Dhansoi, District Baksar, Bihar as per the panchnama (Exh.57)
13	PW-13 Vijay Bihari Pasavan	59	Panch witness of the NIL Panchnama (Exh.60)
14	PW-14 Adhikar Balkrushna	61	Tahsildar, who had

Pendharkar

produced the extract of register with regard to the caste certificate of Vijay

15	PW-15	Rajaram Barku Sangle	63	Parbhat Umale Gram Sevak at Village Vaar, Dhule, Maharashtra, who had produced the extract of the birth register of the victim, etc. at Exh.64 to 66.
16	PW-16	Mangal Shankar Khandekar	67	Panch witness in whose presence the accused had demonstrated as to how he had fled away after the incident as per the panchnama (Exh.68)
17	PW-17	Bhimrao Bhila Saidane	69	Panch witness in whose presence the DVD produced by Salulal Mevada, owner of the grocery store was recovered as per the panchnama (Exh.70)
18	PW-18	Shyamnarayan Suryanarayan Pandey	71	Owner of the house situated at Plot No.44 at Someshwar Park Society, Limbayat, Surat
19	PW-19	Vijaykumar Bhagvatbhai Patel	73	FSL Officer, who had visited the scene of offence on 15.10.2018 and submitted the preliminary report (Exh.77)
20	PW-20	Sujita Pravinbhai Baisane	79	Neighbour of the complainant
21	PW-21	Arunbhai Santoshbhai Sapkale	81	Neighbour of the complainant
22	PW-22	Pawan Ramkrupal Jaiswal	86	Neighbour of the complainant
23	PW-23	Sanjeev Omprakash Pandey	87	RPF Officer at Ankleshwar, who had given CCTV Footage of the date 15.10.2018 to the PSI, Limbayat Police Station, along with the certificate Exh.88.
24	PW-24	Hitesh Ramgopal Acharya	90	Technician working at the Telecom Department, Western

			Railway, Ankleshwar, who had given the footage of CCTV Camera in Pen-drive to PW-23 Mr.Pandey.
25	PW-25	Rajeshkumar Jagabhai Patel	92 The Circle Officer at Udna, who had prepared the map (Exh.94) of the scene of offence.
26	PW-26	Arun Irappabhai Argidi	95 PSO at Limbayat Police Station, who had taken down the complaint of the complainant Narayan Uttam Umale on 15.10.2018.
27	PW-27	Gaurav Anil Pandit	100 Nodal Officer of Vodafone Idea Limited, Ahmedabad, who had given the call details at Exh.102 along with the certificate Exh.103 in respect of the mobile No.9978529830.
28	PW-28	Shamalbhai Ishwarbhai Desai	104 PSI at Limbayat Police Station, who had carried out initial investigation in the case and handed over further investigation to Shri C. R. Jadav on 15.10.2018.
29	PW-29	Ashok Navshibhai Chaudhry	105 PSI, Limbayat Police Station, who was entrusted with the investigation of the case on 24.10.2018 and had gone to the Ankleshwar Railway Station as per the panchnama (Exh.68).
30	PW-30	Nikunj Kumar Prahladbhai Mandli	107 PSI, Limbayat Police Station, who had gone to the District Baksar at Bihar as per the instruction of the

					Deputy Commissioner, Zone-I, Surat and carried out the proceedings of panchnama at Exh.60 on 27.10.2018 and panchnama at Exh.57 on 28.10.2018.	
31	PW-31 Prabhatsinh Mayurbhai Bariya			117	PSI at Kabortara Police Station, who	
					was deployed at the scene of offence from 16.10.2018 to 24.10.2018 by way of security.	
32	PW-32 Vijaykumar Valand	Hiralal		118	PSI At Udna Police Station, who was deployed at the scene of offence from 16.10.2018 to 24.10.2018 for security.	
33	PW-33 Chetankumar Jadav	Ratilal		119	PI, Limbayat Police Station, who had taken over the investigation of the case from PSI, Mr. S. I. Desai at 5.15 p.m., on 15.10.2018.	
34	PW-34 Geetadevi Laxman	Vibhuti		122	Sister of the accused staying at the Village Dansoi, District Baksar, Bihar.	
35	PW-35 Anjudevi Brahmadevsingh Yadav			123	Sister of the accused staying at the Village Hakinpur, Bihar.	
36	PW-36 Vinay Shukla	Harishbhai		124	ACP, Surat City, had taken over investigation	who the on
37	PW-37 Ashwin Gamit	Anilbhai		128	Scientific Officer at FSL, who had submitted DNA Profile, reports	

38 PW-38 Abhijeetsinh
Madhavsinh Parmar

133 at Exh.129 to 131.
ACP, B-Division,
Surat, who had taken
over the investigation
on 18.10.2018 and had
filed charge-sheet in
the Court against the
accused.

4. The Special Court, after appreciating the

evidence on record, convicted and sentenced the appellant/accused as per the impugned judgement and order, which is under challenge before this Court at the instance of the appellant/accused and the same is submitted by the Special Court for confirmation of death sentence as stated herein above.

Submissions by Learned Advocates for the parties:

5. Learned Advocate Mr.Ridhesh Vyas for the appellant accused made following submissions:-

(i) The entire case of the prosecution is rested on circumstantial evidence and the prosecution has miserably failed to prove each circumstance forming the chain of circumstances by producing cogent and reliable evidence.

(ii) Taking the Court to the evidence of the witnesses, it was submitted that the alleged confession made by the accused before the PW-1 Dr. Piyush Vasava on 19.10.2018 could not have been relied upon and could not be read in evidence, the same having been made by the accused when he was in police custody.

(iii) The CCTV Footages produced by the PW-3 Shalulal Mevada did not cover the entire area of the society and could not be said to be reliable piece of evidence. The investigation carried out by different police officers at the Railway Station, Ankleshwar and at different places at Bihar were without any authority, and that any evidence collected by the said officers could not be said to be authentic piece of evidence. The PW-34 and 35, the sisters of the accused had not supported the case of the prosecution so far as the alleged recovery of the clothes of the accused was concerned.

(iv) Relying upon the cross-examination of the PW-11 panch witness Chandraprakash Jain, he submitted that there was a shutter in the room of the accused and the possibility of somebody having kept the dead body in the room of the accused through the said shutter could not be ruled out.

(v) Placing heavy reliance upon the guidelines laid down by the Supreme Court in case of Bachan Singh v. State of Punjab, reported in (1980) 2 SCC 684 and in the case of Machhi Singh and Ors. v. State of Punjab, reported in (1983) 3 SCC 470, he submitted that the Special Court had committed gross error in not considering the mitigating circumstances before awarding capital punishment.

According to him, there was no evidence on record that there was no possibility of improvement of the accused, who was coming from a very poor strata of the society.

(vi) He has also relied upon several other decisions, including the latest decisions in case of Vijay Raikar vs. State of M.P., reported in (2019) 4 SCC 210, as also in case of Viran Gyanlal Rajput v. State of Maharashtra, reported in (2019) 2 SCC 311, to submit that the instant case can not fall within the category of 'rarest of rare' case.

6. The learned APP Mr.Himanshu Patel made following submissions:-

(i) Though the case was based on circumstantial evidence, the prosecution had proved each and every circumstance beyond reasonable doubt, conclusively proving the guilt of the accused and excluding any possibility or hypothesis of the innocence of the accused.

(ii) At the first instance, the conduct of the accused was relevant after committing the alleged crime, on the date of the incident in question, when the father of the victim and others were trying to search the victim and the accused, who was staying on the ground floor of the same house in which the complainant was residing, and had not permitted the complainant and others to enter his room and had immediately shut the door telling them that he was feeling sleepy, and thereafter he had eloped and gone to Ankleshwar from where he caught the train and went to his native place at Bihar.

(iii) The Investigating Officer had found the dead body of the victim from the house of the accused, and the description made in the inquest panchnama as also from the DVD prepared on the spot clearly revealed that the victim was raped in a diabolical manner and brutally murdered by strangulation and then her dead body kept in a gunny bag to decay and decompose.

(iv) The CCTV Footage at the Ankleshwar Railway Station also showed the presence of the accused on 15.10.2018. He thereafter went to village Palej and caught the train for going to Delhi. He was arrested from the village at Bihar.

(v) From the DNA profile and other scientific investigations carried out at the FSL also the involvement of the accused in the alleged crime was duly established.

(vi)	After	the	arrest	of	the
accused,	he	was	taken	for	the
examination	before	the	PW-1	Dr.	Piyush

Vasava and the accused had confessed about he having committed the alleged crime. In this regard he has relied upon the decision of the Supreme Court in case of B. A. Umesh Vs. Registrar General, High Court of Karnataka, reported in (2011) 3 SCC 85 to submit that the extra-judicial confession made to the doctor could be relied upon, more particularly when there was nothing to show that the police personnel were present when such statement was made.

(vii) Pressing into service the provisions contained in Sections 29 and 30 of the POCSO Act, he submitted that the presumption about the commission of crime and about the culpable mental state of the accused could be raised by the Court unless the same is rebutted by the accused by leading evidence, which the accused had failed to lead before the Special Court.

(viii) Lastly, he submitted that considering the brutal and socially abhorrent nature of crime committed on the minor girl of hardly about 3½ years, no leniency or mercy be shown to the accused by the Court. The Special Court after, taking into consideration the mitigating and aggravating circumstances as laid down by the Supreme Court in case of Bachan Singh v. State of Punjab (supra) and in case of Machhi Singh and Ors. v. State of Punjab (supra) and other judgements, has awarded the sentence of death penalty, be confirmed. Death of the victim whether homicidal ?

7. At the outset, it may be stated that to establish that the death of the victim was homicidal, the prosecution had examined the PW-2 Dr. V. D. Kaushik, who had carried out the postmortem at Smimer Hospital, Surat on 16.10.2018. He had opined that the cause of death of the victim was Asphyxia due to pressure over the neck associated with head injury. He had stated that all the injuries were ante- mortem in nature and the death had occurred 12 to 36 hours prior to carrying out the postmortem. The PM Lividity was present due to decay of the dead body. He had narrated all the external as well as internal injuries found on the body of the deceased in his PM Report at Exh.23 and had reiterated the same in his substantive evidence before the Court. It was stated by him that the death of the victim was homicidal death after the sexual assault. On the local genital examination, it was found that the hymen of the victim was torn at posterior aspect at 6 O'clock with redness and that the injuries found on head and neck stated in Column No.19 of the report were sufficient to cause the death in ordinary course of nature. He had also stated that he had taken the blood samples for DNA and the vaginal swab, anal swab and finger nail, saliva swab, etc., for further instigation, and handed over the same in sealed condition to the police officer for sending the same for examination to the FSL. In the cross-examination he had categorically denied that the injuries found on the private part of the body were possible, if she had itched the said part or had hurt herself by falling from a tree. He had also denied that the injuries found on the neck were possible if a child while playing, went inside the gunny bag and thereafter could not come out.

8. Having regard to the said evidence of the PW-2 and the PM Report (Exh.23) prepared by him, there remains no shadow of doubt that the victim aged about 3½ years was subjected to the sexual assault and had died due to Asphyxia due to pressure over neck, associated with head injury. Thus, her death was a homicidal death and not the death in ordinary course of nature. Whether the confessional statement of the accused before the medical officer admissible in evidence ?

9. It may be stated that the accused after the arrest, was taken to the PW-1 Dr.Piyush Vasava for examination on 22.10.2019, before whom he had allegedly made the confession as recorded by the doctor in the case papers (Exh.19). According to the said witness, the accused had stated before him that on 14.10.2018 at about 9 p.m., he had taken the victim girl to his house at Someshwar Park, and had throttled her and murdered her, and that he had committed rape on her, and then had kept her body in one gunny bag, and kept the same on the shelf of the cupboard, and thereafter he had fled away to Bihar. According to the Doctor witness, the said history was taken down by him as narrated by the accused.

10. Though much reliance is placed by the learned APP Mr.Patel on the said extra-judicial confession allegedly made by the accused before the doctor, the Court cannot be oblivious to the fact that the alleged confession by the accused before the doctor was made when he was in police custody. As transpiring from the evidence of the PW-1, the accused was brought to him for examination, accompanied by the police personnel, after his arrest. It cannot be gainsaid that any confession made by the accused, while in the custody of police, can not be proved as against him, unless it was made in the immediate presence of a Magistrate, as per Section 26 of the Evidence Act.

11. The Supreme Court, while dealing with the law of confession in the light of Sections 24 to 30 of the Evidence Act, observed in case of Aghnoo Nagesia Vs. State of Bihar, reported in AIR 1966 SC 119 as under:-

"9. Section 25 of the Evidence Act is one of the provisions of law dealing with confessions made by an accused. The law relating to confessions is to be found generally in ss. 24 to 30 of the Evidence Act and ss. 162 and 164 of the Code of Criminal Procedure, 1898. Sections 17 to 31 of the Evidence Act are to be found under the heading "Admissions". Confession is a species of admission, and is dealt with in ss. 24 to 30. A confession or an admission is evidence against the maker of it, unless its admissibility is excluded by some provision of law. Section 24 excludes confessions caused by certain inducements, threats and promises. Section 25 provides :

"No confession made to a police officer, shall be proved as against a person accused of an offence." The terms of s. 25 are imperative. A confession made to a police officer under any circumstances is not admissible in evidence against the accused. It covers a confession made when he was free and not in police custody, as also a confession made before any investigation has begun. The expression "accused of any offence" covers a person accused of an offence at the trial whether or not he was accused of the offence when he made the confession. Section 26 prohibits proof against any person of a confession made by him in the custody of a police officer, unless it is made in the immediate presence of a Magistrate. The partial ban imposed by s. 26 relates to a confession made to a person other than a police officer. Section 26 does not qualify the absolute ban imposed by s. 25 on a confession made to a police officer. Section 27 is in the form of a proviso, and partially lifts the ban imposed by ss. 24, 25 and 26. It provides that when any fact is proved to be discovered in consequence of

information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. Section 162 of the Code of Criminal Procedure forbids the use of any statement made by any person to a police officer in the course of an investigation for any purpose at any enquiry or trial in respect of the offence under investigation, save as mentioned in the proviso and in cases falling under sub-sec (2), and it specifically provides that nothing in it shall be deemed to affect the provisions of S.27 of the Evidence Act. The words of s. 162 are wide enough to include a confession made to a police officer in the course of an investigation. A statement or confession made in the course of an investigation may be recorded by a Magistrate under s. 164 of the Code of Criminal Procedure subject to the safeguards imposed by the section. Thus, except as provided by s. 27 of the Evidence Act, a confession by an accused to a police officer is absolutely protected under s. 25 of the Evidence Act, and if it is made in the course of an investigation, it is also protected by s. 162 of the Code of Criminal Procedure, and a confession to any other person made by him while in the custody of a police officer is protected by S. 26, unless it is made in the immediate presence of a Magistrate. These provisions seem to proceed upon the view that confessions made by an accused to a police officer or made by him while he is in the custody of a police officer are not to be trusted, and should not be used in evidence against him. They are based upon grounds of public policy, and the fullest effect should be given to them."

12. So far as the facts of the present case are concerned, the extra-judicial confession made by the accused before the doctor, while he was in police custody, would therefore be hit by Section 26 of the Evidence Act and could not be read in evidence. It is also required to be noted that in response to the suggestion put by the learned Advocate for the accused in the cross-examination, the PW-1 Dr.Piyush Chunilal Vasava had admitted the presence of the police officer when the accused was being examined by him. Of course, he had denied that the accused had not given any such history as recorded in the case paper. It is also true that the Medical Officer being an independent witness, he had no reason to falsely implicate the accused by recording such history in the case paper, nonetheless, even if it is presumed that the said history was given by the accused, the same having been given by him while in police custody and in the presence of the police officer, such admission or confession made by him would be inadmissible in evidence by virtue of Section 26 of the Evidence Act.

Other Evidence led by the Prosecution:-

13. On the exclusion of the said extra-judicial confession from the set of evidence, the case of prosecution would rest on the circumstantial evidence only. As per the chain of events alleged by the prosecution, the victim was found missing on 14.10.2018 at about 20.00 hours by the complainant, and on search being made at the nearby houses of the society where the complainant was residing, the appellant/accused who was residing on the ground floor of the same house, where the complainant was residing on the first floor, had tried to avoid the complainant and other neighbours to enter his room, when the inquiry was made at his residence. The accused had eloped next day

early morning. As per the further case of the prosecution, on the complaint having been lodged by the father of the deceased, a search was made by the investigating officer on 15.10.2018 and when the lock put on the room of the accused was broken open, the dead body of the victim was found in a gunny bag, at the chowkdi (utility area) of the said room. On 16.10.2018, the postmortem was carried out by the PW-2 Dr. Vijayakumar Kaushik, and the injuries as stated in the P.M. Report were found on the body of the victim. It was opined by the said doctor that there was a sexual assault on her and the cause of death of the victim was "Asphyxia due to pressure over the neck associated with head injury". In the meantime, the ACP Mr.A. M. Parmar having authorized the PSI Mr.Nikunj Kumar Mandli to go for investigation at Bihar to find out the accused, the said PSI Mr.Mandli had gone to the native place of the accused at Baksar and arrested the accused with the help of the local police on 19.10.2018. Thereafter the accused by virtue of the transit remand granted by the Court of Judicial Magistrate, Baksar vide the order 20.10.2018, was brought to the DCB Police Station, Surat on 22.10.2018. Thereafter further investigation was carried out and the scientific reports were also called for.

14. So far as the oral evidence led by the prosecution to prove the chain of circumstances is concerned, the prosecution had examined PW-3 Shalulal Shankarlal Mevada, who had a grocery shop in the society, where the accused and the complainant were staying. He had installed CCTV Camera in his shop. He had stated inter alia that on 15.10.2018 early in the morning at One O'clock the police officer from Limbayat Police Station had come to his house and inquired about the footages of CCTV camera installed at his shop. He, therefore, had gone to his shop along with the police officers to check the CCTV Camera, and transferred the footages from the CCTV Camera to the pen-drive through his computer for the dates 14.10.2018 and 15.10.2018. He had stated that from the CCTV footage it was found that the victim had not gone out of the gate of their society on 14.10.2018. He had subsequently come to know that the dead body of the victim was found from the room of the accused Anil Yadav. The pen- drive, which was kept in the sealed envelope was played in the Court, and he had stated that the said CCTV footages recorded in his CCTV Camera, were given by him to the police officer. In the cross-examination he had stated that the CCTV Camera installed in his shop covered the area of 100 feet and the recording of the said camera would remain for 15 days. He had denied that he did not have any knowledge of computer. The panch witness Bhimrao Bhila Saidane in whose presence the said DVD was recovered, was examined as PW-17 at Exh.69. He had also supported the contents of panchnama Exh.70 in respect of the seizure of the said DVD by the Investigating Officer.

15. The PW-4 Sheikh Abdul Safiq Abdul Kher was the photographer. He, in presence of the team of police officers and scientific officers, had shot the videography on 15.10.2018 at the residence of the accused, situated on the ground floor of Plot No.44 of Someshwar Park Society. He had described in his evidence as to how the dead body of the victim was found in the gunny bag kept in the said room of the accused. The certificate given by him under Section 65B was produced on record at Exh.31 along with the DVD prepared by him at the scene of offence.

16. The prosecution had also examined PW-5 Jitendra Sitaram Kumbhar, the panch witness in whose presence the panchnama of scene of offence (Exh.34) was drawn. He had stated inter alia that the PI Jadav had broken open the lock of the room situated on the ground floor of Plot No.44 and on

making search of the said room, one dead body of a child kept in a gunny bag was found at the chowkdi i.e. utility area of the said room. He had admitted the contents of the said panchnama at Exh.34 and supported the case of prosecution. Nothing material adverse to the case of prosecution was extracted from his cross-examination.

17. The PW-6 Pratigna Adharbhai Baviskar was the panch witness in respect of the Inquest panchnama (Exh.36). While admitting the contents of the said panchnama, she had stated that in her presence the dead body of a young girl was taken out from a gunny bag. She had described the decomposed state of the dead body, and stated that the FSL Officers and videographer were also present at that time. She had further stated that one small hair and some sticky material was found to be present on the private part of the said child and the same was taken by the FSL Officer for examination. On examination, it was opined that the said sticky material was the semen. She had further stated that the dead body was stinking as it was decomposed. In short, she had supported the case of the prosecution as regards the panchnama (Exh.36). Nothing material turns out from her cross- examination.

18. The PW-7 Narayan Uttam Umale was the father of the deceased. He had stated inter alia that on 14.10.2018 he had returned home from his job at about 7.30 p.m., and thereafter his wife having asked him to go to make the payment of the loan instalment, his daughter i.e. the victim had insisted to come with him, and therefore, he gave her Rs.5 and left the house. When he returned home at about 8.30 p.m., his wife informed him that their daughter had gone to buy Anand (some chocolate) from the money he had given to her, but she had not returned home. Thereafter, they made search in the society but their daughter was not found, and therefore, he had gone to the Limbayat Police Station to lodge the complaint. The said complaint was produced on record at Exh.39. He had further stated that after the lodging of the complaint, on 15.10.2018 early in the morning, the police had come to his house and they had gone to the grocery shop of Shalulal Shankarlal Mevada where the CCTV camera was installed, and it was found that his daughter had not gone out of the society on that day. Thereafter he along with the police team had gone to each house of the society, and had found that the room of the accused situated on the ground floor on Plot No.44 was locked. They, therefore, called Shyamnarayan Suryanarayan Pandey, the owner of the house. The said Shyamnarayan Suryanarayan Pandey had informed them that his nephew Sunny and one Anil Yadav were staying in the said room, however, the said Sunny had left the room a few days ago and thereafter Anil Yadav (i.e. the accused) alone was staying in the room. The police thereafter had broken open the lock of the said room and saw that there was one gunny bag at the utility area of the room. On opening the said gunny bag, the dead body of his daughter was found. He had further stated that the dead body of his daughter was examined by the two ladies in presence of the police officers and other persons, and one hair and some sticky material was found on the private parts of the victim. The complainant had identified the accused sitting in the Court. He had also stated that he belonged to "Mad" Caste, which was scheduled caste in Maharashtra, as per the certificate at Exh.41.

19. In the cross-examination, the PW-7 the complainant had admitted that while coming back from the work at 6.30 p.m., he along with one Praveen and Anil Yadav had gone to have liquor, however, Anil Yadav had not drunk the liquor and all the three had come home in a rickshaw. He had further

admitted that he was staying on the first floor of the house situated at Plot 44 and in other rooms other tenants were staying. He had stated that he did not know as to at what time Anil Yadav had gone home on that day, however, had volunteered to state that when he returned after making payment of instalment, Anil was present in the house. He had admitted that he personally did not know as to whether the room where the alleged incident had taken place, was taken on rent by Anil Yadav or not, however, he had volunteered to state that he had come to know from Shyamnarayan Suryanarayan Pandey that Anil Yadav had taken the room on rent. He had also admitted that on the day when his daughter was found missing, he did not have any suspicion against Anil Yadav, however, he had denied that somebody might have kept the dead body in the room of Anil Yadav when Anil Yadav had gone out keeping his room open. He had also denied that somebody might have kept the dead body in the room by opening the shutter situated on the backside of the room. He had also denied that he had falsely implicated the accused only because the dead body was found from his room.

20. The Prosecution had examined the the owner Shyamnarayan Suryanarayan Pandey of the house in which the complainant and the accused were residing, at Exh.71. He had stated inter alia that the Plot No.44 on which the house in question was situated was in the name of his wife Geetaben and the accused Anil Yadav was initially staying with his relative Sunny Kumar on the ground floor, however, the said Sunny Kumar had already left the room since 15 days before the alleged incident and thereafter Anil Yadav alone was staying in the said room. The complainant Naranyan Uttam Umale with his family was staying on the first floor of the same house as tenant. As regards the incident he had stated that on 14.10.2018 at about 10 p.m., many persons had gathered in the society as the daughter of Narayan Uttam Umale was found missing, and when they were searching in the society, the room of the accused was found shut. On knocking the door, the accused had half-opened the door and told them that he was feeling sleepy and then closed the door. He had further stated that on the next date at about 11 O'clock in the morning he was asked by the police to give the key of the lock put on the room of the accused, but he did not have the key, and therefore the police had broken open the lock, and found that the dead body of the victim was kept in a gunny bag in the said room. In the cross-examination he had admitted that he had not executed any rent note in favour of the accused Anil Yadav. He had also admitted that he had not seen the accused taking away the victim along with him.

21. The prosecution had also examined PW-20 Sujita Pravinbhai Baisane, PW-21 Arunbhai Santoshbhai Sapkale, and PW22 Pawan Ramkrupal Jaiswal, who were the residents of the society. They had supported the case of the prosecution that when they tried to search the victim on 14.10.2018, the accused had reluctantly opened the door of his room and stated that he was feeling sleepy, and that thereafter on the next day the lock of the room was broken open and the dead body of he victim was found kept in a gunny bag in his room.

22. PW-8 Mahopal Bhimrao Saidane, PW-9 Sahdev Bhanbhubhai Saluke, PW-10 Rakesh Rajendra Patil, PW-11 Chandraprakash Premraj Jain, PW-12 Subhash Gupteshwar Prasad Sharma, and PW-13 Vijay Bihari Pasavan were the panch witnesses examined by the prosecution to prove the contents of the respective panchnamas, which according to them were drawn in their presence by the Investigating Officer. All the said panch witnesses had fully supported the case of the

prosecution by stating inter alia that the proceedings of the panchnamas in which they are shown as panch witnesses were carried out in their presence. They had also identified their respective signatures thereon.

23. PW-16 Mangal Shankar Khandekar was the panch witness in respect of the discovery panchnama (Exh.68), drawn on 24.10.2018 with regard to the places visited by them as shown by the accused, where he had gone after the alleged incident. The said panch witness had stated that he, along with the accused and the police personnel, had gone to the places as shown by the accused on 24.10.2018. First of all the accused had taken them to the Someshwar Park Society from where the accused had eloped after the alleged incident, and thereafter he had taken them to the Ankleshwar Railway Station. The witness had further stated that on checking the CCTV footages of the platform Nos.1 and 4 of the said railway station, the presence of the accused was found. Thereafter he had shown the Narmada River where he had thrown away the key of his room and the sim card of his phone. Thereafter the accused had taken them to the Palaj Railway Station from where he had taken the ticket of Firozpur Janta Express for going to Delhi. In the cross-examination he had adhered to his version stated in the examination-in-chief and denied that he had not gone to any of such places as stated by him.

24. The RPF Officer at Ankleshwar Railway Station Mr.Sanjeev Omprakash Pandey was examined as PW-23 at Exh.87. He had stated that the CCTV footages of the date 15.10.2018 from the CCTV Camera installed at Ankleshwar Railway Station, transferred in the pen-drive prepared by the technician Hitesh Acharya, was handed over to the PSI Limbayat Police Station on 24.10.2018. He had produced the certificate under Section 65B of the Evidence Act at Exh.88. The said technician Hitesh Acharya was also examined as PW-24 at Exh.90 and he had stated that he had given the CCTV footages of 15.10.2018 in the pen-drive to the PSI of Limbayat Police Station on 24.10.2018, in which the presence of the accused, was seen in the camera No.1 (PRS Hall) and the camera No.8 (UTS - East Booking).

25. PW-27 Gaurav Anil Pandit was the Nodal Officer, Vodafone Idea, who was examined to furnish the call details of the Mobile No.9978529830. He had stated that as per the form filled up by the customer the sim card of the said number was of Anil Yadav and as per the call details, the said phone was not used after 19.58 hours since 14.10.2018. He had produced the EKYC Form at Exh.101 and the call details along with the certificate under Section 65B of the Evidence Act at Exh.102 and Exh.103 respectively.

26. So far as the scientific evidence is concerned, the prosecution had examined PW-19 Vijaykumar Bhagvatbhai Patel, who was the Scientific Officer at FSL, Surat. He had stated that on 15.10.2018 he had gone to the scene of offence at Someshwar Park Society along with his team and had carried out the proceedings as stated in the preliminary report (Exh.75). He had further stated that one dead body of a young girl was found kept in the gunny bag at the scene of offence and on the close examination of her body, one hair and some sticky material was found at the private parts of her body, which were seized for further examination and other articles were also seized from the said place for examination as recorded in the preliminary report (Exh.75). He had further stated that thereafter on 24.10.2018, he was again called by the Instigating Officer at the scene of offence and at

that time, the accused had taken out one towel (Gamacha) from the shelf of the said room and also an underwear, which were seized for further examination as stated in the report (Exh.77).

27. The PW-37 Ashwin Anilbhai Gamit was also the Scientific Officer at FSL, Surat. He had stated inter alia that the muddamal articles in sealed condition sent by the Investigating Officer were received at the FSL Office on 25.10.2018 and he had examined and analyzed the said articles in his DNA Department and given the DNA Examination Reports at Exh.129, Exh.130 and Exh.131. The PW- 37 Ashwin Anilbhai Gamit, Scientific Officer, after the examination and analysis, had recorded his conclusions in his reports as under:-

- Anil Surendrasingh Yadav (Source of Ex. J, case No.18/DNA/454) is the donor of semen fraction found on the Ex.D/1 mark 1 (Leggings/Blood mixed semen), Ex.D/1 mark 2 (Leggings/Semen), Ex.G/4 (Vaginal Swab/Blood mixed semen) - Case No.18/B/1073 collected from victim Divya Narayan Umale.
- Blood stains of Divya Narayan Umale (Source of Ex.F, Blood, Case No.18/B/1073) were found on Ex.A (Minyu, Case No.18/B/1073) collected from scene of crime.
- Blood stains of victim Divya Narayan Umale herself (Source of Ex.F, Blood, Case No.18/B/1073) were found on Ex.D/2(T-Shirt/Blood), Ex.G/1 (Anal Swab/Blood), Ex.G/2(Oral Saliva Swab/Blood), Ex.G/3 (Cheek Swab/Blood) - Case No.18/B/1073, collected from her."

28. The sisters of the accused Geetadevi Vibhuti Laxman and Anjudevi Brahmadevsingh Yadav were examined at Exh.122 and Exh.123. However, both had turned hostile and not supported the case of the prosecution that the accused had come to their residences at Bihar after the alleged incident.

29. The prosecution had examined the police officers who had carried out the investigation at different stages. The PW-28 was the PSI Shamalbhai Ishwarbhai Desai, who had recorded the statement of Deepikaben, the mother of the victim and the brother of the complainant and the other witnesses, and thereafter had handed over further investigation to P.I. Chetankumar Ratilal Jadav (PW-33) on 15.10.2018. PW-29 Ashok Navshibhai Chaudhry, PSI at Limbayat Police Station was handed over the investigation on 24.10.2018 as per the order passed by the ACP and he had gone to various places at Ankleshwar, Bharuch, Palaj as shown by the accused and collected DVD from the RPF Officer, Ankleshwar. In the cross-examination he had denied that he had not recovered any DVD of CCTV footages. The PW-30 Nikunj Kumar Prahladbhai Mandli was the PSI at Limbayat Police Station, who had gone to the village Baksar, Bihar as per the order passed by the ACP. He had stated about the proceedings were carried out by him as per his Report Exh.114 submitted to the ACP Mr.Parmar. The PW- 31 Prabhasinh Mayurbhai Bariya and the PW-32 Vijaykumar Hiralal Valand were the security personnel deployed at the scene of offence during the period 16.10.2018 to 24.10.2018. PW- 33 was the PI Chetankumar Ratilal Jadav, who had stated about the investigation carried out by him. PW-36 was the ACP Vinay Harishbhai Shukla had proved the contradictions appearing in the evidence of the witnesses Geetadevi and Anjudevi the sisters of the accused, whose police statements were recorded by the PSI Nikunj Kumar Prahladbhai Mandli and submitted to him. Lastly PW-38 the ACP Abhijeetsinh Madhavsingh Parmar, who had taken over the investigation

from 18.10.2018 was examined at Exh.133. He had submitted the charge-sheet in the Court after collecting the evidence in the case. He had identified the accused sitting in the Court. In the cross-examination he had admitted that he had not obtained any certificate to show that the accused did not belong to scheduled caste or scheduled tribe. He had also denied that false case was concocted against the accused. INCRIMINATING CIRCUMSTANCES:-

30. From the afore-discussed evidence adduced before the Special Court, following incriminating circumstances have emerged as proved by the prosecution:-

(i) It was proved by examining the complainant - PW-7 Narayan Uttam Umale, the father of the deceased, the PW-18 Shyamnarayan Suryanarayan Pandey, the PW-20 Sujita Pravinbhai Baisane, the PW-21 Arunbhai Santoshbhai Sapkale, and the PW-22 Pawan Ramkrupal Jaiswal, the residents of the Someshwar Park society that at the time of alleged incident, the accused Anil Yadav was residing in the room situated on the ground floor of the house at Plot No.44, Someshwar Park Society (i.e. the scene of offence), and the complainant with his family was residing on the first floor of the said house.

(ii) The daughter of the complainant i.e. the victim aged about three and half years old, was found missing since 8.30 p.m., on 14.10.2018 in respect of which the complaint lodged by the complainant at Limbayat Police Station was registered on 15.10.2018 at about 1.15 hours.

(iii) From the evidence of PW-4 Sheikh Abdul Safiq Abdul Kher, Photo/Videographer, PW-5 Jitendra Sitaram Kumbhar, panch witness, in respect of panchnama (Exh.34), PW-6 Pratigna Adharbhai Baviskar, in respect of the Inquest Panchnama (Exh.36), PW-7 Narayan Uttam Umale, father of the deceased, PW-19 Vijaykumar Bhagvatbhai Patel, Scientific Officer, FSL, Surat and PW-33 Police Inspector Jadav, it was duly proved that on 15.10.2018 the dead body of the victim in decomposed condition was found in a gunny bag kept at the utility area (chowkdy) of the room occupied by the accused on the ground floor of the house at Plot No.44, Someshwar Park Society.

(iv) From the evidence of PW-2 Dr. Vijaykumar Kaushik (Exh.21) and the PM Report at Exh.23, it was duly proved that the dead body of the victim was decomposed and her death was homicidal after the sexual assault. She had the external injuries on neck and internal injuries in the brain and in the genital organs. Her hymen was found torn at posterior 6 O'clock with redness. Her cause of death was Asphyxia due to pressure over neck associated with head injury.

(v) The accused Anil Yadav had eloped since early morning of 15.10.2018 and was arrested by the PW-30 Nikunj Kumar Prahladbhai Mandli from the house of his relative Vinod Rai from the village Maniya, Baksar, Bihar on 19.10.2018, with the help of the local police. He was produced before the DCB Police Station, Surat by Mr. Mandli on 22.10.2018, as per the Report Exh.114, after obtaining transirt remand from the Chief Judicial Magistrate, Baksar as per the order dated 20.10.2018 (Exh.112).

(vi) From the evidence of PW-16 Mangal Shankar Khandekar, panch witness in respect of discovery panchnama (Exh.68), PW-29 PSI Ashok Chaudhry, PW-23 RPF Officer Sanjeev Omprakash Pandey at Ankleshwar Police Station and from the CCTV footages obtained from the said PW-23 and PW-24, it was proved that the accused was present at the Ankleshwar Railway Station on 15.10.2018 and was making some inquiry. From the evidence of PW-30 PSI Mandli, and from the said discovery panchnama (Exh.68), it was duly proved that the accused had gone to the Village Palej from Ankleshwar and had travelled from Palej to Delhi on 15.10.2018 by purchasing the ticket (Exh.115).

(vii) From the evidence of PW-27 Gaurav Anil Pandit, Nodal Officer of Vodafone, it was proved that the Mobile No.9978529830 of the accused was not used since 19.38 hours of the date 14.10.2018.

(viii) From the evidence of PW-36 Vinay Harishbhai Shukla, the ACP and PW-37 Ashwin Anilbhai Gamit, Scientific Officer, FSL, Surat that the muddamal articles seized during the course of investigation were sent to FSL in a sealed condition and was received by the FSL in sealed cover on 17.10.2018 as per the FSL Receipt (Exh.127).

(ix) From the evidence of PW-37 Ashwin Anilbhai Gamit, Scientific Officer, FSL, Surat it was proved that he had examined and analyzed the muddamal articles for deciding the DNA profile and had submitted the reports at Exh.129, Exh.130 and Exh.131. He had arrived at the conclusion that the semen of the accused was found present in the leggings of the victim and on the vaginal swab - blood mixed semen collected from the vagina of the victim; that the blood stains of the victim were found on the gunny bag collected from the scene of offence and also on her T-Shirt, anal swab and oral saliva swab blood, as also cheek swab-blood collected at the time of postmortem.

31. So far as the relevant provisions of the POCSO Act are concerned, Section 3 describes as to what is penetrative sexual assault and Section 4 prescribes the punishment for the penetrative sexual assault. Section 5 describes as to what is aggravated penetrative sexual assault, and Section 6 thereof prescribes the punishment for aggravated penetrative sexual assault. As per clause (r) of Section 5, whoever commits penetrative sexual assault on a child and attempts to murder the child, is said to commit aggravated penetrative sexual assault. So far as the provisions of IPC are concerned, Section 376AB thereof prescribes the punishment for the rape on a woman under twelve years, and Section 302 prescribes punishment for committing murder. Both the said provisions prescribe punishment of imprisonment for life or of death penalty and for fine.

32. At this juncture, it may be noted that as per Section 29 of the POCSO Act, where the person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7, and Section 9 of the Act, the Court shall presume that such person had committed or abetted or attempted to commit the offence as the case may be, unless the contrary is proved. The presumption of culpable mental state of the accused is also envisaged in Section 30 of the said Act. In the instant case, the accused had failed to rebut the said statutory presumptions contained in the Act either by bringing on record the facts during the course of cross-examination of witnesses or during the further statement recorded under Section 313 of Cr.P.C..

33. It is axiomatic that the object of recording the further statement of the accused under Section 313 is to bring to the notice of the accused the incriminating evidence and to give him an opportunity to explain the same, if he chooses to do so. The essential features of Section 313 and the principles of law enunciated in various judgements have been succinctly summarized in case of Ashokkumar Vs. State of Haryana, reported in (2010) 12 SCC 350. The paragraphs 29 to 31 thereof reads as under:-

"29. Now we may proceed to discuss the evidence led by the prosecution in the present case. In order to bring the issues raised within a narrow compass we may refer to the statement of the accused made under Section 313, Cr.P.C. It is a settled principle of law that dual purpose is sought to be achieved when the Courts comply with the mandatory requirement of recording the statement of an accused under this provision. Firstly, every material piece of evidence which the prosecution proposes to use against the accused should be put to him in clear terms and secondly, the accused should have a fair chance to give his explanation in relation to that evidence as well as his own versions with regard to alleged involvement in the crime. This dual purpose has to be achieved in the interest of the proper administration of criminal justice and in accordance with the provisions of the Cr.P.C.. Furthermore, the statement under Section 313 of the Cr.P.C. can be used by the Court in so far as it corroborates the case of the prosecution. Of course, conviction per se cannot be based upon the statement under Section 313 of the Cr.P.C.

30. Let us examine the essential features of this section and the principles of law as enunciated by judgments of this Court, which are the guiding factor for proper application and consequences which shall flow from the provisions of Section 313 of the Cr.P.C. As already noticed, the object of recording the statement of the accused under Section 313 of the Cr.P.C. is to put all incriminating evidence to the accused so as to provide him an opportunity to explain such incriminating circumstances appearing against him in the evidence of the prosecution. At the same time, also permit him to put forward his own version or reasons, if he so chooses, in relation to his involvement or otherwise in the crime.

31. The Court has been empowered to examine the accused but only after the prosecution evidence has been concluded. It is a mandatory obligation upon the Court and besides ensuring the compliance thereof, the Court has to keep in mind that the accused gets a fair chance to explain his conduct. The option lies with the accused to maintain silence coupled with simplicitor denial or, in the alternative, to explain his version and reasons, for his alleged involvement in the commission of crime. This is the statement which the accused makes without fear or right of the other party to cross-examine him. However, if the statements made are false, the Court is entitled to draw adverse inferences and pass consequential orders, as may be called for, in accordance with law. The primary purpose is to establish a direct dialogue between the Court and the accused and to put every important incriminating piece of evidence to the accused and grant him an opportunity to

answer and explain. Once such a statement is recorded, the next question that has to be considered by the Court is to what extent and consequences such statement can be used during the enquiry and the trial. Over the period of time, the Courts have explained this concept and now it has attained, more or less, certainty in the field of criminal jurisprudence."

34. In the instant case, though the incriminating evidence was brought to the notice of the appellant/accused while recording his further statement, the accused had failed to explain the same. The accused was given the opportunity to answer the incriminating circumstance which had come on record, however, except the denial, he had not made any attempt to explain the same, nor had expressed any regret or repentance.

35. Having regard to the afore-stated chain of incriminating circumstances proved by the prosecution, and to the legal provisions contained in the POCSO Act and in the IPC, the Court is of the opinion that it was duly established by the prosecution that on 14.10.2018 at about 8.00 p.m., when the victim left her house to buy Anand (chocolate), the accused had kidnapped her and taken her to his residence i.e. the room situated on the ground floor of the house at Plot No.44, Someshwar Park Society. It was also duly established that thereafter the accused had throttled her by causing injuries on her neck and head, and committed penetrative sexual assault as described in Section 3 of the POCSO Act and committed rape as described in Section 375 of the IPC. The appellant - accused thus had committed the offences punishable under Section 4 of POCSO Act and under Section 376 of the IPC. Since the victim was under 12 years of age, it was also duly proved that the accused had committed the offence punishable under Section 376AB of the IPC. The accused by committing the murder of the victim after the penetrative sexual assault had also committed "aggravated penetrative sexual assault" as per Section 5(r) punishable under Section 6 of the POCSO Act, and the murder punishable under Section 302 of the IPC. The Court, therefore, has no hesitation in holding that the prosecution by leading cogent, trustworthy and credible evidence had conclusively proved the guilt of the appellant/accused, excluding any possibility of his innocence. The chain of circumstances duly proved by the prosecution, taken cumulatively formed a chain so complete that it unerringly pointed to the guilt of the accused so far as the charges levelled against him were concerned. Award of sentence:

36. As regards the sentence of death penalty awarded by the Special Court, the learned Advocate Mr.Ridhesh Vyas for the appellant/accused relying upon number of judgements of the Supreme Court submitted that life-imprisonment is the rule and death penalty is the exception and that the death penalty should be imposed only when the alternative of life-imprisonment is totally inadequate, and therefore, unquestionably foreclosed. According to Mr.Vyas, the Special Court had committed gross error in not following the guidelines issued by the Supreme Court in case of Bachan Singh v. State of Punjab and in the case of Machhi Singh and Ors. v. State of Punjab (supra) by not comparing the mitigating circumstances with the aggravating circumstances. He also submitted that the Special Court ought to have considered the age of the accused and the probability that the accused can be reformed and rehabilitated.

According to him, in catena of decisions the Supreme Court in similar cases has substituted the death penalty by life-imprisonment.

37. As against that, the learned APP Mr.Himanshu Patel vehemently submitted that this is one of the rarest of rare cases even as per the decisions of *Bachan Singh v. State of Punjab* (supra) and in the case of *Machhi Singh and Ors. v. State of Punjab* (supra) where the 3½ year old helpless child was sexually assaulted and brutally murdered and then was kept in a gunny bag in his room in utter defiance of the human dignity. Mr.Patel also submitted that the accused did not have any repentance and he eloped after committing the heinous crime. Mr.Patel also relied upon catena of decisions of Supreme Court to submit that in similar cases where the innocent, helpless girl was subjected to barbaric treatment by the accused, the death penalty was awarded, which according to Mr.Patel is not only desirable to deter others from committing such atrocious crime, but also to give emphatic expression to the society's abhorrence of such crime.

38. Whether the case falls within the rarest of rare case so as to impose death penalty or not is always a matter of great concern for every Court. Though the Supreme Court in various decisions dealing with various situations has laid down certain guidelines as to which case should be treated as the rarest of rare case, there is no straight-jacket formula and yardstick set to decide the vexed issue. Let us have a glance through some of the cases involving similar facts, dealt with by the Supreme Court so as to decide whether the case on hand should be treated as the rarest of rare case or not.

39. In the celebrated case of *Bachan Singh v. State of Punjab* (supra) the Supreme Court had laid down elaborate guidelines as to what are the mitigating circumstances and aggravating circumstances which should be taken into consideration before awarding the extreme penalty of death. Thereafter in *Machhi Singh and Ors. v. State of Punjab* (supra), the Supreme Court culled out the guidelines indicated in *Bachan Singh v. State of Punjab* (supra) as under:-

"38. In this background the guidelines indicated in *Bachan Singh's* case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from *Bachan Singh's* case:

(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 alongwith 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 has 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."

40. Thereafter in case of *Dhananjay Chatterjee alias Dhana v. State of West Bengal*, reported in (1994) 2 SCC 220, the Supreme Court upheld the death penalty when the young girl was raped and murdered by the accused, who was the security guard. Taking note of the rising crime rate and considering the observations made in *Bachan Singh v. State of Punjab* (supra), the Supreme Court had found that the offence was not only inhuman and barbaric but it was a totally ruthless crime of rape followed by cold-blooded murder and an affront to the human dignity of the society, and observed as under:-

"14. In recent years, the rising crime rate□particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over□all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

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."

41. In case of *Laxman Naik v. State of Orissa*, reported in (1994) 3 SCC 381, the Supreme Court again referring the guidelines issued in *Bachan Singh v. State of Punjab* (supra) confirmed the death penalty awarded to the accused, who was found guilty of committing rape on the girl of tender age of 7 years and then committing her murder. In the said case, the Supreme Court noticing that there were no mitigating circumstances and the case disclosed only aggravating circumstances against the

accused observed as under:-

"28. The evidence of Dr Pushp Lata, PW 12, who conducted the postmortem over the dead body of the victim goes to show that she had several external and internal injuries on her person including a serious injury in her private parts showing the brutality which she was subjected to while committing rape on her. The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code. As regards the punishment under Section 376, neither the learned trial Judge nor the High Court have awarded any separate and additional substantive sentence and in view of the fact that the sentence of death awarded to the appellant has been confirmed we also do not deem it necessary to impose any sentence on the appellant under Section 376."

42. In case of Kamta Tiwari v. State of M. P., reported in (1996) 6 SCC 250, the Supreme Court was again dealing with the case of rape and murder of 7 year old girl and while confirming the death sentence, the Court observed as under:-

"8. ... When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. 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."

43. In case of State of U.P. v. Satish, reported in (2005) 3 SCC 114, the victim who was studying in the school was found dead in the sugarcane field and the accused, who was found to be last seen together with the victim was awarded death sentence by the trial Court, however, in the appeal, the High Court set aside the judgement of conviction and acquitted the accused. The Supreme Court set aside the judgement of acquittal passed by the High Court and restored the death penalty awarded by the trial Court by observing as under:-

"27. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the judge that leads to determination of the lis."

44. In case of Bantu v. State of U.P., reported in 2008 11 SCC 113, the Sessions Court and High Court had awarded death penalty to the accused who was found to be guilty of committing rape on six year old girl and then committing her murder. The Supreme Court confirming the death penalty, referred the earlier judgements and also quoted Lord Denning in paragraph 23 as under:-

"23. Lord Justice Denning, Master of the Rolls of the Court of Appeals in England said to the Royal Commission on Capital Punishment in 1950:

"Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformatory or preventive and nothing else... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not."

In J.J. Rousseau's The Social Contract written in 1762, he says the following:

Again, every rogue who criminally attacks social rights becomes, by his wrong, a rebel and a traitor to his fatherland. By contravening its laws, he ceases to be one of its citizens: he even wages war against it. In such circumstances, the State and he cannot both be saved: one or the other must perish. In killing the criminal, we destroy not so much a citizen as an enemy. The trial and judgments are proofs that he broken the Social Contract, and so is no longer a member of the State."

45. The Supreme Court in case of Shivaji @ Dadya Shankar Alhat v. State of maharashtra, reported in AIR 2009 Sc 56, while dealing with the case based on circumstantial evidence, held that case of rape committed on the victim aged about nine years coupled with her murder, was the rarest of rare case. It was held that in the balance sheet of mitigating and aggravating circumstances, the fact that the case rests on circumstantial evidence has no role to play. It was observed in paragraph 40 as under:-

"40. The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death sentence are awarded for rape and murder and the like, there is practically no scope for having an eye witness. They are not committed in the public view. But very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect. The plea of learned Amicus Curiae that the conviction is based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable."

46. Again in case of *Rajendra Pralhadrao Wasnik v. State of Maharashtra*, reported in (2012) 4 SCC 37, the Supreme Court upheld the death penalty awarded by the Sessions Court and High Court when the accused was found guilty of committing rape on and murder of 3 year old child, leaving her without clothes in a badly injured condition in an open field. It was observed in paragraph 37 and 38 as under:-

"37. When the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.

38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of 'trust and belief' and 'confidence', in which capacity he took the child from the house of PW2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self."

47. In *Mohd. Mannan alias Abdul Mannan v. State of Bihar*, reported in (2011) 5 SCC 317, while confirming the death penalty awarded to the appellant - accused guilty of committing rape on his 8 year old niece and then murdering her, held that his act had invited extreme indignation of the community and shocked the collective conscience of society and that the appellant was the menace to the society and shall continue to be so, and he cannot be reformed.

48. Of course, in case of Viran Gyanlal Rajput v. State of Maharashtra (supra) relied upon by the learned Advocate Mr. Vyas for the appellant, the Supreme Court had converted death sentence of the accused to life imprisonment. In the said case, the accused was found guilty of kidnapping, raping and murdering 13 year old girl. Similarly, in case of Raju Jagdish Paswan, reported in AIR 2019 SC 897, the Supreme Court did not find the case of the appellant-accused found guilty of committing rape on the victim aged about nine years and thereafter throwing her in a well, as the rarest of rare case.

49. However, in the latest unreported judgement of the Supreme Court in case of Ravi v. State of Maharashtra, (Rohinton Fali Nariman, R. Subhash Reddy, & Surya Kant, JJ), decided on 3.10.2019 in Criminal Appeal Nos.1188-1489 of 2018, the Supreme Court, while confirming the death penalty awarded to the accused guilty of committing rape on 2 year old girl and of murdering her, considered various earlier decisions, whereby the death penalty was confirmed and distinguished decisions, whereby the death sentence was converted into life- imprisonment, and observed as under:-

"52. The Sentencing Policy, therefore, needs to strike a balance between the two sides and count upon the twin test of

(i) deterrent effect, or (ii) complete reformation for integration of the offender in civil society. Where the Court is satisfied that there is no possibility of reforming the offender, the punishments before all things, must be befitting the nature of crime and deterrent with an explicit aim to make an example out of the evil doer and a warning to those who are still innocent. There is no gainsaying that the punishment is a reflection of societal morals. The subsistence of capital punishment proves that there are certain acts which the society so essentially abhors that they justify the taking of most crucial of the rights - the right to life."

50. The Supreme Court in the afore-stated case also took note of the statement of objects and reasons of the recent amendment in Section 6 with regard to the punishment in aggravated penetrative sexual assaults, and observed as under:-

"59. The minimum sentence for an aggravated penetrative sexual assault has been thus increased from 10 years to 20 years and imprisonment for life has now been expressly stated to be imprisonment for natural life of the person. Significantly, 'death sentence' has also been introduced as a penalty for the offence of aggravated penetrative sexual assault on a child below 12 years.

60. The Legislature has impliedly distanced itself from the propounders of "No Death Sentence" in "No Circumstances" theory and has re-stated the will of the people that in the cases of brutal rape of minor children below the age of 12 years without murder of the victim, 'death penalty' can also be imposed. In the Statement of Objects and Reasons of amendment, Parliament has shown its concern of the fact that "in recent past incidents of child sexual abuse cases administering the inhuman

mindset of the accused, who have been barbaric in their approach to young victim, is rising in the country." If the Parliament, armed with adequate facts and figures, has decided to introduce capital punishment for the offence of sexual abuse of a child, the Court hitherto will bear in mind the latest Legislative Policy even though it has no applicability in a case where the offence was committed prior thereto. The judicial precedents rendered before the recent amendment came into force, therefore, ought to be viewed with a purposive approach so that the legislative and judicial approaches are well harmonised."

51. In the instant case, if the Court has to draw a balance-sheet of the aggravating circumstances and mitigating circumstances to strike a just balance as propounded by the Supreme Court, the Court is of the opinion that the scale of justice tilts against the appellant/accused. The aggravating circumstances proved beyond reasonable doubt like the acts of the accused in kidnapping a young girl of 3½ years, committing rape on her in her absolutely helpless and unprotected condition, and then murdering her in a brutal manner by strangulating her and then putting her in a gunny bag, fleeing away to his native place at Bihar, leaving the dead body in the locked house to decay and decompose, with no repentance or remorse after the commission of crime overweigh the mitigating circumstances like no criminal antecedents of the accused or no evidence to suggest that he cannot be reformed. The plea that the case being based on circumstantial evidence be treated as a mitigating circumstance is also unsustainable, when the Court has found that the prosecution by its unimpeachable, trustworthy, cogent and credible evidence has proved the guilt of the accused beyond reasonable doubt.

52. The abhorrent and atrocious nature of crime committed by the appellant/accused in diabolical manner, on the defenseless unprotected girl of 3½ years, without any remorse, has left the Court with no option but to consider the case as the "rarest of rare case" for awarding the punishment of death penalty. Such crimes do not only reflect the abusive facet of human conduct but also shock collective conscience of the society. The latest legislative wisdom shown by the legislature by amending Section 6 of the POCSO Act and by incorporating the punishment of death penalty for the offence of "aggravated penetrative sexual assault" on the child below 12 years reinforces the desirability of the capital punishment for the heinous crimes. Of course, the said amendment has been carried out recently and could not be made applicable to the present case, as the offence was committed prior to the amendment. Nonetheless, considering the rising crime rate particularly of the heinous nature of crimes against the young girls, and in response to the society's cry for justice against the criminals and to have deterrence in the society, the culpability of the appellant/accused deserves to be awarded extreme penalty. The Court, therefore, is of the opinion that the death penalty awarded to the accused by the Special Court deserves to be confirmed.

53. In that view of the matter the judgement and order dated 31.7.2019 passed by the Additional Sessions Judge and Special Judge (POCSO), Surat in Special POCSO Case No.223 of 2018 of conviction for the offence under Section 363, 376AB, 377, 302 and 201 of IPC and under Section 3(a), 4, 5(r) and 6 of the POCSO Act, and of the sentence of death penalty for the offence under Section 302 and 376AB of IPC is confirmed. The other punishments imposed by the Special Court for the other offences are also confirmed. The appeal being Criminal Appeal No.1973 of 2019 stands

dismissed. The Confirmation Case No.2 of 2019 stands disposed of accordingly.

54. The office is directed to do the needful to send a copy of the order to the Special Court as per Section 371 of Cr.P.C.. R & P of the case along with muddamal articles called for as per the order dated 20.11.2019 be sent back forthwith to the Special Court.

Sd/-

(BELA M. TRIVEDI, J) Sd/-

(A. C. RAO, J) V.V.P. PODUVAL