

AFR

Neutral Citation No. - 2025:AHC:125249-DB

Judgment Reserved on 28.05.2025

Judgment Delivered on 29. 07.2025.

Court No. - 46

Case :- CAPITAL CASE No. - 1 of 2021

With

Reference No. 01 of 2021

Appellant :- Bantu @ Shiv Shankar

Respondent :- State of U.P.

Counsel for Appellant :- Beena Mishra, From Jail, Pradeep Kumar Mishra, Vinay Saran (Senior Adv.)

Counsel for Respondent :- A.G.A.

Hon'ble Rajiv Gupta, J.

Hon'ble Ram Manohar Narayan Mishra, J.

Per : Ram Manohar Narayan Mishra, J

1. Heard Sri Vinay Saran, learned Senior Advocate and Amicus Curiae assisted by Sri Pradeep Kumar Mishra, Ms. Beena Mishra, learned Amicus Curiae for the appellant and Sri A. N. Mulla, learned A.G.A., Sri Arun Kumar Pandey, learned A.G.A. and Sri S.S. Tiwary, learned A.G.A. for the State.

2. Learned Additional Session Judge / Special Judge, POCSO Act, Firozabad has made a Reference to this Court on 01.12.2020 under section 366 of Cr.P.C., for confirmation of Capital punishment awarded to appellant, Bantu @ Shiv Shankar in PST No.1642 of 2019. The Reference has been registered as Reference No.01 of 2021. The Jail Appeal has also been filed by the convict as Capital Case No.0 1 of 2021). This reference and appeal have arisen out of judgment of trial court dated 01.12.2020 in PST No.1642 of 2019 (State of U.P. Vs. Bantu alias Shiv Shankar), whereby appellant has been convicted for charge under Sections 376 AB, 302 IPC arising out of Case Crime No. 137 of 2019, P.S. Sirsaganj, District Firozabad and sentenced

to death for both the charges and is directed to be hanged by the neck until he be dead. The above sentence is subject to confirmation by this Court. Both the sentences are directed to run concurrently. The Appeal and Reference have been framed together and are being disposed of by this common judgment.

3. The Reference and Appeal were admitted. The trial court's record is received and paper book is ready. The prosecution case in nutshell is that PW-1 Kancha Devi wife of Deepak Chandra lodged an FIR on the basis of written report dated 18.03.2019 at P.S. concerned stating that on 17.03.2019 her daughter aged about 8 years had gone to the house of Vimlesh at around 9:00 PM to watch DJ. The mother of the victim Smt. Kancha Devi visited the place of Vimlesh at about 09:30 PM, where Vimlesh and Mukesh who are her co-villagers disclosed that they had seen her daughter together with Bantu son of Atar Singh of their village. Whereupon she inquired about her daughter from Prabhu Dayal, who also stated that he had seen her daughter going with Bantu alias Shiv Shankar at around 09:15 PM. She visited the home of Bantu to inquire about her daughter, but she did not find her there. At around 01:00 AM in the night Bantu met her and stated that he had sent her daughter to bring Tobacco and gave Rs.10/- to her, she would come back. Thereafter she went in search of her daughter, but could not find her. In the next morning at around 06:30 AM co-villagers Vimal son of Ajay Pal told that underwear of her daughter was lying on the bank of drain of a tubewell on Mandhata Road. When she proceeded towards wheat field of Karu in search of her daughter, she found her lying dead. Blood was oozing out from lower part of her body, and her clothes were also smeared with blood. She stated in her FIR that Bantu had committed this incident to her daughter.

4. PW-8 Head Constable/Head Moharir Srichandra Verma registered an FIR on the basis of Ext. Ka-1 against accused, vide Case Crime No.137 of 2019, under section 302, 376, 201 IPC and Section 3 / 4 of POCSO Act, which is annexed as Ext. Ka-4. PW-8 also made an entry of this FIR, vide GD Entry No.18 time 09:15 AM dated 18.03.2018, the extracts of which are marked as Ext. Ka-5. The record reveals that after lodging of FIR, the police visited the

place where dead body was lying and inquest was carried out. SI, Ashesh Kumar, who was posted at P.S. Sirsaganj, District Firozabad, as Incharge O.P. Arav on 18.03.2019 prepared the inquest report marked as Ext.Ka-6. In the inquest report it is stated that the information of recovery of dead body was given by Prabhu Dayal (PW-2). The death occurred due to gagging of mouth by a cloth. A contusion was noticed on the face of the deceased and blood was oozing out from her private parts. She was wearing Salwar and Kurti. She had worn a string of white coral on her neck and a black band was fastened on her right leg. Family members were present there and waiting, the inquest was carried out between 9:45 to 10:55 hrs.

5. The age of the deceased was 8 years. The dead body was sent for postmortem to ascertain exact cause of death. Postmortem examination on the deceased was conducted by PW-7 Dr. Pradeep Kumar on 18.03.2019 at around 03:00 PM, who prepared postmortem report in his writing and signature, which is marked as Ext. Ka-3

6. In postmortem report following antemortem injuries were noted.

1. Multiple abrasion in an area 6 x 4 cm around the mouth.

2. Abrasion over the left side of forehead, area 1x 0.5 cm, bleeding from private part present.

3. Rigor mortis was present all over the body.

Dead body was produced by Constable Vikram Singh and Afzal Khan. On internal examination brain was congested, neck face were also congested.

Pleura and pericardium were congested.

Pasty food was found in stomach. Semi-digested food was found in small intestine, gases and faecal matter were found in large intestine.

Bleeding was present in genitals, vaginal smear and nail preserved for DNA testing and histopathology. Death was caused due to asphyxia as a result of ante mortem smothering.

7. The doctor who conducted postmortem examination, handed over the sealed bundle of cloth containing Frock, Payajami, Kala Dhaga, Mala to police constables, who had brought the dead body for postmortem examination.

8. The case was investigated by PW-6 S.I Rajesh Kumar who prepared site plan in his handwriting and signatures which is marked as Ext. Ka-2. He recorded statements of the Informant on 18.3.2019 and of three witnesses Vimlesh, Mukesh and Prabhu Dayal on 19.03.2019 drawn the case diary and tried to nab the accused. Thereafter investigation was taken over by PW-10 SHO Sunik Kumar Tomar on 20.03.2019, he altered the charge under Section 3/4 POCSO to charge under Section 5/6 of POCSO, Act, keeping in view the seriousness of offence on 21.03.2019. He arrested the accused Bantu on the road near under-constructed bridge at Saudhara crossing on 21.03.2019 at around 10:30 AM, and recorded his statement in which he confessed his guilt, recorded statements of public witness, Vimal Kumar on 26.03.2019 and also recorded statement of Dr. Pradeep Kumar on 27.03.2019. He sent the clothes of deceased at FSL, Agra for Forensic Examination on 07.04.2019 and recorded the statement of the informant in CD P-9 on 24.09.2019 and after concluding the investigation filed the chargesheet against the accused appellant for charge under Section 376, 302 IPC and under Section 5/6 of POCSO Act, which is marked as Ext. Ka-7. He stated that at the time of making arrest no visual injury was found on his person.

9. Learned trial court took cognizance of the offence and framed the following charge against the accused on 06.07.2019

मैं, इन्द्रीश कुमार प्रथम अपर सत्र न्यायाधीश, फिरोजाबाद, आप अभियुक्त बंदू के विरुद्ध निम्न आरोप लगाता हूँ-

प्रथम- यह कि दिनांक 17.03.2019 को समय व स्थान करू का गेहूं का खेत ग्राम चन्दपुरा बहद थाना सिरसागंज जिला फिरोजाबाद में आपने वादिनी मुकदमा श्रीमती कुन्या देवी की पुत्री O कुं शशी उम्र करीब 8 वर्ष को बिस्किट दिलाने की कहकर खेल में ले जाकर उसके साथ गलत काम करते हुए, मुंह दबाकर उसकी हत्या कर दी। इस प्रकार आपने ऐसा अपराध कारित किया है जो कि भा०द०सं० की धारा 302 के अन्तर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

द्वितीय- यह कि उपरोक्त दिनांक समय व स्थान पर आपने वादिनी मुकदमा श्रीमती कन्या देवी की पुत्री कु० शशी उम्र करीब 8 वर्ष की हत्या करने के बाद साक्ष्य छिपाने व नष्ट करने के आशय से लाश को पानी की नाली के बराबर में करू के गेहूँ के खेत में फेंक दिया। इस प्रकार आपके द्वारा धारा 201 भा०द०सं० के अन्तर्गत दण्डनीय अपराध कारित किया, जो इस न्यायालय के प्रसंज्ञान में है।

तृतीय- यह कि उक्त दिनांक समय व स्थान पर आपने वादिया मुकदमा वादिनी मुकदमा श्रीमती कन्या देवी की पुत्री कु० शशी उम्र करीब 8 वर्ष, को बिस्किट दिलाने की कहकर खेत में ले जाकर उसके साथ जबरदस्ती बलात्कार कारित किया। इस प्रकार आपने ऐसा अपराध कारित किया है जो कि भा०द०सं० की धारा 376 के अंतर्गत दण्डनीय है और इस न्यायालय के प्रसंज्ञान में है।

चतुर्थ - यह कि उपरोक्त दिनांक समय व स्थान पर आपने वादिया मुकदमा वादिनी मुकदमा श्रीमती कन्या देवी की पुत्री कु० शशी उम्र करीब 8 वर्ष, पर प्रवेशन लैंगिक हमला किया। इस प्रकार आपने धारा 3/4 पोक्सो अधिनियम के अन्तर्गत दण्डनीय अपराध कारित किया है जो कि इस न्यायालय के प्रसंज्ञान में है।

मैं एतद्वारा आपको आदेशित करता हूँ कि उपरोक्त आरोप के लिए आपका विचारण इस न्यायालय द्वारा किया जाये।

दिनांक: 06-07-2019

9.(a). On 09.11.2020 amended charge under Section 376 AB IPC and 5/6 of POCSO Act, was framed against the accused, which is being reproduced as under:-

यह कि दिनांक 17-03-2019 को समय 09.00 बजे रात्रि बस्थान करू का गेहूँ का खेत बहद थाना सिरसांगज, जिला फिरोजाबाद में आपने वादिया श्रीमती कंचा देवी की नाबालिग पुत्री राशि, उम्र करीब 08 वर्ष, जो कि 12 वर्ष से कम आयु की बालिका को बिस्कुट दिलाने की कहकर खेत में ले जाकर उसके साथ बलात्कार किया। इस प्रकार आपने धारा 376AB भा० न० सं० के अन्तर्गत दण्डनीय अपराध कारित किया जो इस के न्यायालय के प्रसंज्ञान में है।

द्वितीय- यह कि उपरोक्त दिनांक, समय व स्थान पर आपने वादिया श्रीमती कंचा देवी की नाबालिग पुत्री राशि, उम्र करीब 08 वर्ष, के साथ गुरुत्तर प्रवेशन लैंगिक हमला कारित किया। इस प्रकार आपने धारा 5/6 पोक्सो अधिनियम के अन्तर्गत दण्डनीय अपराध किया जो इस के न्यायालय के प्रसंज्ञान में है।

एतद द्वारा आपको निर्देश दिया जाता है कि उपरोक्त आरोप के लिए आपका विचारण इस न्यायालय द्वारा किया जायेगा।

The accused denied the charge and claimed to be trial.

10. On commencement of trial the prosecution examined PW-1 Smt. Kancha Devi, the informant mother of the deceased who proved the written report bearing her thumb impression, which is marked as Ext. Ka-1; PW2-Prabhu Dayal the witness of last seen; PW-3 Mukesh the witness of last seen; PW-4 Vimlesh, the witness of last seen and PW-5 Vimal on whose information dead body of the deceased was recovered; PW-6 SI Rajesh Kumar is initial Investigating Officer; PW-7 Dr. Pradeep Kumar is author of Postmortem report of deceased; PW-8 HC/HM Shrichandra Verma is author of Chik FIR and entries of GD regarding registration of case at P.S. concerned; PW-9 SI Ashesh Kumar, is author of Panchayatnama (inquest report); PW-10 SHO Sunil Kumar is IInd Investigating Officer who filed chargesheet against the accused; PW-11 Dr. Sadhana Rathore, is co-author of the postmortem report of the deceased. She also stated that on 18.03.2019 she prepared a slide of vaginal smear and preserved nails of the deceased for DNA test and Histopathology examination and handed over these things to police.

11. After conclusion of prosecution evidence, the trial court examined Bantu alias Shivshankar under Section 313 Cr.P.C., in which he stated that he is acquainted with the informant and witnesses as they are his co-villagers. The informant is his real aunt and deceased was his cousin sister, she was younger to him at the time of incident, she was daughter of the informant and Deepak Chand. He is acquainted with the owners of the field which was shown in the site plan on Ext. Ka-2, deceased was his real cousin. In the night of 17.03.2019, he was present at his village, he consumes tobacco product and khaini. He did not meet the deceased in fateful night around 09:00 PM. He had distributed Rs.10/- to many children as DJ was installed at the house of Vimlesh on the occasion of Chhatti Ceremony and he paid Rs.10/- to the deceased in usual manner and not for bringing tobacco.

12. It is wrong to say that he became restless in the night of the incident and he had met the mother of the deceased and admitted to have paid Rs.10/- to the deceased, thereafter, he went to the crossing road and slept there. It is

wrong to say that he took the deceased alongwith him in the fateful night at around 09:00 PM. He denied the incriminating evidence adduced by the witnesses against him. The accused has not adduced any evidence in defence, his defence is of denial.

13. The prosecution has proved following documents during course of trial as, Ext. Ka-1 written report authored by the informant; Ext. Ka-2 site plan of place of occurrence; Ext. Ka-3 Postmortem report; Ext. Ka-4 Chick FIR; Ext. Ka-5 extracts of GD of Case Registration; Ext. Ka-6 Inquest report; Ext. Ka-6A/5 report of RI, report CMO, Chalan Nash, Photo Nash, Sample seal, the papers sent regarding dead body and Ext. Ka-7 chargesheet.

14. The following materials were also proved during the trial. Ext.1 Pajami, Ext.2 Yellow Frock, Ext.3 Black Dhaga, Ext.4 Envelope, Ext. 5 Mala, Ext.6 Envelope, Ext.7 Sealed cloth, Ext.8 another sealed cloth, Ext.9 underwear.

15. In report of FSL, Agra dated 19.04.2019 blood was found on clothes and apparels of the deceased, but no blood was found on underwear allegedly belonging to the deceased. No sperm was detected on Exts. sent for testing before the FSL, human blood was found on Salwar and frock worn by the deceased, but it could not be classified on Kala Dhaga and Moti Mala. PW-1 Smt. Kancha Devi, who is mother of the deceased stated in his evidence that on 17.03.2019 her daughter aged around 08 years had gone to watch DJ in front of the house of Vimlesh at 09:30 PM, where she was told that they had seen her daughter going with Bantu alias Shivshankar son of Atar Singh, thereafter she was informed by Prabhu Dayal that he had seen her daughter going with Bantu around 09:15 PM. She visited the house of Bantu, but he was not found there, she met him at around 01:00 AM and he stated that he had paid Rs.10/- to her daughter for bringing tobacco, thereafter she went in search of her daughter, but could not find her.

16. On the next day at around 06:30 AM her co-villager Vimal told that underwear (Kachcha) of her daughter was lying on the bank of drain of

tubwell. She went forward to the wheat field of Karu where she found her daughter lying dead. Blood was oozing out from lower part of the body and her clothes were blood stained. She stated that Bantu committed rape and murder of her daughter. She got the written report scribed by Bhupendra Singh son of Shrichandra and produced the same at Police Station, which bears her thumb impression. The police conducted spot inspection on her pointing out. In cross examination, the witness stated that she had not attended Chhatti Ceremony of the daughter of Vimlesh, as she was not invited, but her deceased daughter visited the place to watch DJ party, which continued till morning. When she came to the house of Vimlesh 50 to 100 people had assembled there, then she went to the crossing, but did not find her daughter. She met the accused at his home, where he told that her daughter would come in the morning, his family members were also there, her daughter was bare-feet, she had worn Salwar and Frock Suit. She denied defence suggestion that she had framed the accused due to suspicion and to save the actual culprit.

17. PW-2 Prabhu Dayal has stated in his evidence that on 17.03.2019 at around 09:00 PM he saw Bantu, son of Atar Singh taking daughter of Deepak Chand aged about 8 years with him, thereafter the child was not found in the night, even after hectic search and in the morning at 06:30 AM it became known that dead body of the child was lying in wheat field of Karu. He went to the spot where dead body of the child was lying in wheat field of Karu. The deceased was raped and murdered and her dead body was concealed in the wheat field. In cross-examination it is stated that the informant is his daughter-in-law in relationship, he had not visited the place of Vimlesh in the night and was present in his house, as he was standing outside the house of Vimlesh to watch DJ, in which local people were dancing. Bantu fled away from dance party, he had seen Bantu taking the victim with him by holding her hand, she was around 8 years of age. He is not aware that there was any quarrel between family of the deceased and informant, smell of liquor was felt near the place of incident.

18. PW-3 Mukesh has also stated that in the night of 17.03.2019 at around 09:30 PM accused Bantu asked for tobacco from shop and he also took her alongwith him after cajoling her, and thereafter she was not found. Smt. Kancha Devi visited in the night and he told her that Bantu had taken away the victim. He came to know in the morning that dead body of the victim was lying in the wheat field. He also visited the spot and told this fact to police in detail. In cross-examination he stated that as soon as this fact spread in the DJ party that Bantu had taken away the victim he was not traceable and the DJ was stopped. He is brother of Vimlesh (PW-4).

19. PW-4 Vimlesh has also testified that he had seen the accused and victim in the fateful night around 09:50 PM together and told this fact to the informant. In cross-examination he stated that at around 09:15 PM he was serving meal to guests. The victim had also taken meal and performed dance. No foul smell was emanating from dead body when he visited the same.

20. PW-5 Vimal stated that on 18.03.2019 at around 06:30 AM he had gone to the fields to ease himself and he found underwear of the victim on the bank of drain of tubewell situated in his village, when he moved therefrom and made a search in wheat field, he found the victim lying dead there. The accused had taken the victim in front of the house of Vimlesh and he had seen this in the night of 17.03.2019.

21. PW-6 SI Rajesh Kumar has proved site plan as Ext. Ka-2 steps taken in and criminal investigation in his evidence.

22. PW-7 Pradeep Kumar has proved postmortem examination of the deceased in his evidence. He stated that time of death was $\frac{1}{2}$ to $\frac{3}{4}$ days prior to postmortem. The cause of death was Asphyxia due to smothering. He further stated that Dr. Sadhana Rathore had also accompanied her during postmortem examination. In cross-examination he stated that entire face of the victim was congested and abrasion and contusion marks were detected around mouth and nose, no mark of tooth bite was present there. He did not

do per-vaginal internal inspection of the victim, no mark of injury or swelling was found on outer part of vagina. He had not conducted any medical examination of the accused, in his knowledge a slide was prepared to detect semen in the vagina of victim. Postmortem report was prepared and signed by him.

23. From perusal of record it appears that a red colour underwear recovered near the place of incident is attributed to the deceased. In Forensic examination no blood was found thereon. The trade mark of Boomex MCHAH 90 CM was marked on said underwear.

24. Learned trial court on the basis of evidence laid in the matter has come to the conclusion that this is a horrifying incident in which a girl child 8 years of tender age was allured by the accused, who is her relative. He was 30 years of age, committed rape on her and subsequently smothered her to death by gagging her mouth. The offence is proved beyond reasonable doubt by the evidence of prosecution witnesses of facts. This fact is mentioned in FIR itself that informant was informed by witness, PW-2 Prabhu Dayal, PW-3 Mukesh, PW-4 Vimlesh, PW-5 Vimal that they had seen the accused taking away the victim alongwith him in the fateful night at around 09:50 PM in the night.

25. Learned trial court further observed that the chain of circumstantial evidence in the present case is duly proved. The victim was eight years of age, she had visited the place of Vimlesh (PW-4) to watch DJ and attend dancing. She had worn same apparel which were retrieved from the dead body by the doctor who conducted postmortem examination. The witnesses have stated that the accused gave Rs.10/- to the victim for bringing the tobacco, followed and accompanied her in the process, in the night of incident at around 09:00 PM. The victim never came back alive thereafter, and her dead body was recovered in a wheat field in next morning at around 06:30 AM. Every witness has testified before the court that they had seen the victim being taken away by the accused. The learned trial court has concluded that prosecution case is duly proved beyond reasonable doubt and gave a finding that this was

rarest of rare case where a girl child of 8 years was subjected to rape and murder and awarded extreme punishment of death to the accused for both the offences i.e. for charge under Section 376AB and 302 IPC.

26. Learned counsel for the appellant submitted that being a Capital Case, the prosecution case must be fool proof as for graver charges strong degree of proof is required. The investigation was faulty and tainted; the samples taken from dead body for DNA examination were never sent for Forensic Examination and thus scientific evidence could not be laid which would be able to exculpate or inculcate the accused in relation to said charge. No medical examination was done when the accused was arrested, no sample was taken from his person for DNA examination. Where as in the case of alleged rape and murder, the charge framed in the case is itself defective. This is not a case of prosecution that the accused had given Rs.10/- to the victim to bring biscuit, instead, the case of prosecution is that the accused had given Rs.10/- for bringing tobacco to the victim. It is not clear as to whose underwear was found lying in the vicinity of place of recovery of dead body and when and by whom it was taken into possession, no inventory has been made regarding this underwear. It is strange that PW-5 Vimal discerned at the first place that the underwear lying near the place of incident belonged to missing child, when this is a case of prosecution that she had worn a Frock and Pajami at the time of incident. How could he identify the underwear of victim. In FSL report no blood was found on said underwear, its number is shown as 90 cm which is worn by a grownup male. Therefore, there is nothing to connect the said underwear with the deceased. It appears to be planted only to create an evidence. The accused has duly explained the incriminating circumstances appearing against him in prosecution evidence during his examination under Section 313 Cr.P.C. No external or internal injury on private part is noted in postmortem examination report of the victim. He was cousin sister of the accused and there was no occasion that the accused would commit such kind of dastardly act against her. The investigating officer did not recover the clothes of the accused

27. The accused deserves to be acquitted due to flawed and shoddy investigation, as he has been greatly prejudiced by this. Only evidence appearing against the accused is that of last seen together with the victim which is not conclusive to convict an accused. All the incriminating circumstances were not put before the trial court when the accused was confronted with prosecution evidence during his examination under Section 313 Cr.P.C.

28. The accused appellant is languishing in jail since very inception of the case and only execution of Capital Sentence is stayed by orders of this Court.

29. Learned counsel for the appellant placed reliance on judgment of Hon'ble of Hon'ble Supreme Court in **Ramkirat Munilal Goud Vs. State of Maharashtra** 2025 (0) SC 841; **Gambhir Singh Vs. State of U.P.** reported in 2025 (0) SC 285 para 34; **Soundarajan Vs. State** represented by the Inspector of Police Vigilance Anti-corruptio Dindigul in 2023 Live Law (SC) 314; **Kalicharan and others Vs. State of U.P.** in 2022 Live Law (SC) 1027; **State of Haryana Vs. Bhagirath and others** AIR 1999 (5) SC 2005; **Padman Bibhar Vs. State of Odisha** SLP (Crl.) No.17440 of 2024 (SC) dated 21.05.2025; **R. Sreenivasa Vs. State of Karnataka** 2023(0) Supreme (SC) 836.

30. In **Padman Bibhar Vs. State of Odisha (supra)** the Hon'ble Supreme Court held as under:-

10. It is settled law that in a case based on circumstantial evidence, the prosecution is obliged to prove each circumstance, taken cumulatively to form a chain so complete that there is no escape from the conclusion that within all human probabilities, crime was committed by the accused and none else. Further, the facts so proved should unerringly point towards the guilt of the accused.

11. This Court in [Ramanand vs. State of Himachal Pradesh](#) has held that 'perfect proof is seldom to be had in this imperfect world and absolute certainty is a myth'.

12. This Court in a celebrated judgment in [Sharad Birdhichand Sarda vs. State of Maharashtra](#) 1984 (Supreme) SCC 116 has set down the golden rules in the cases basing circumstantial evidence which is to be proved by the prosecution.

(i.) That chain of evidence is complete;

(ii) Circumstances relied upon by prosecution should be conclusive in nature;

(iii) Fact established should be consistent only with the hypothesis of the guilt of accused;

(iv) Circumstances relied upon should only be consistent with the guilt of the accused;

(v) Circumstances relied upon should exclude every possible hypothesis except the one to be proved.

.....19. The present is a case where except for the evidence of ‘last seen together’ there is no other incriminating material against the appellant.

.....20. This Court in [Kanhaiya Lal vs. State of Rajasthan](#) (2014) 4 SCC 715 has held that evidence on ‘last seen together’ is a weak piece of evidence and conviction only on the basis of ‘last seen together’ without there being any other corroborative evidence against the accused, is not sufficient to convict the accused for an offence under [Section 302](#) IPC. The following passage from the judgment in paras 12 and 15 can be profitably referred:

“12. The circumstance of last seen together does not by itself and necessarily lead to the inference that it was the accused who committed the crime. There must be something more establishing connectivity between the accused and the crime. Mere non-explanation on the part of the appellant, in our considered opinion, by itself cannot lead to proof of guilt against the appellant.

15. The theory of last seen—the appellant having gone with the deceased in the manner noticed hereinbefore, is the singular piece of circumstantial evidence available against him. The conviction of

the appellant cannot be maintained merely on suspicion, however strong it may be, or on his conduct. These facts assume further importance on account of absence of proof of motive particularly when it is proved that there was cordial relationship between the accused and the deceased for a long time. The fact situation bears great similarity to that in [Madho Singh v. State of Rajasthan](#), (2010) 15 SCC 588”

.....21. Similarly, this Court in [Rambraksh @ Jalim vs. State of Chhattisgarh](#) (2016) 12 SCC 251 has reiterated above legal position in the following words in paras 12 and 13:

“12. It is trite law that a conviction cannot be recorded against the accused merely on the ground that the accused was last seen with the deceased. In other words, a conviction cannot be based on the only circumstance of last seen together. Normally, last seen theory comes into play where the time (2016) 12 SCC 251 gap, between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead, is so small that possibility of any person other than the accused being the perpetrator of the crime becomes impossible. To record a conviction, the last seen together itself would not be sufficient and the prosecution has to complete the chain of circumstances to bring home the guilt of the accused.

13. In a similar fact situation this Court in [Krishnan v. State of T.N.](#) (2014) 12 SCC 279 held as follows: (SCC pp. 284-85, paras 21-24)

“21. The conviction cannot be based only on circumstance of last seen together with the deceased. In [Arjun Marik v. State of Bihar](#) (1994) Supp (2) SCC 372 this Court held as follows: (SCC p. 385, para 31)

‘31. Thus the evidence that the appellant had gone to Sitaram in the evening of 19-7-1985 and had stayed in the night at the house of deceased Sitaram is very shaky and inconclusive. Even if it is accepted that they were there it would at best amount to be the evidence of the appellants having been seen last together with the deceased. But it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.’

22. This Court in Bodhraj v. State of J&K, (2002) 8 SCC 45 held that: (SCC p. 63, para 31)

‘31. The last seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.’ It will be hazardous to come to a conclusion of guilt in cases where there is no other positive evidence to conclude that the accused and the deceased were last seen together.

23. There is unexplained delay of six days in lodging the FIR. As per prosecution story the deceased Manikandan was last seen on 4-4-2004 at Vadakkumelur Village during Panguni Uthiram Festival at Mariyamman Temple. The body of the deceased was taken from the borewell by the fire service personnel after more than seven days. There is no other positive material on record to show that the deceased was last seen together with the accused and in the intervening period of seven days there was nobody in contact with the deceased.

24. In Jaswant Gir v. State of Punjab, (2005) 12 SCC 438, this Court held that in the absence of any other links in the chain of circumstantial evidence, the appellant cannot be convicted solely on the basis of “last seen together” even if version of the prosecution witness in this regard is believed.”

22. In the case at hand also the only evidence against the appellant is of 'last seen together'. The evidence of motive does not satisfy us to be an adverse circumstance against the appellant inasmuch as if the appellant has any doubt about his wife's chastity, he would have caused injury or harm to his wife rather than to wife's cousin with whom he had no animosity. Moreover, the so-called weapon of the offence i.e. the stone has not been recovered at his instance nor there is any memorandum statement of the appellant.

24. It is held by this Court in [Sujit Biswas vs. State of Assam](#) AIR 2013 SC 3817 suspicion, howsoever strong, cannot substitute the proof and conviction is not permissible only on the basis of the suspicion. It is held thus in para 6:

"6. Suspicion, however grave it may be, cannot take the place of proof, and there is a large difference between something that "may be" proved, and something that "will be proved". In a criminal trial, suspicion no matter how strong, cannot and must AIR 2013 SC 3817 not be permitted to take place of proof. This is for the reason that the mental distance between "may be" and "must be" is quite large and divides vague conjectures from sure conclusions. In a criminal case, the court has a duty to ensure that mere conjectures or suspicion do not take the place of legal proof. The large distance between "may be" true and "must be" true, must be covered by way of clear, cogent and unimpeachable evidence produced by the prosecution, before an accused is condemned as a convict, and the basic and golden rule must be applied. In such cases, while keeping in mind the distance between "may be" true and "must be" true, the court must maintain the vital distance between mere conjectures and sure conclusions to be arrived at, on the touchstone of dispassionate judicial scrutiny, based upon a complete and comprehensive appreciation of all features of the case, as well as the quality and credibility of the evidence brought on record. The court must ensure, that miscarriage of justice is avoided, and if the facts and circumstances of a case so demand, then the benefit of doubt must be given to the accused, keeping in mind that a reasonable doubt is not an imaginary, trivial or a merely probable doubt, but a fair doubt that is based upon reason and common sense. (Vide Hanumant Govind Nargundkar v. State of M.P.,(1952) 2 SCC 71, State v. Mahender Singh Dahiya (2011) 3 SCC 109 and Ramesh Harijan v. State of U.P. (2012) 5 SCC 777."

31. This is admitted fact that there is no eyewitness of the evidence and the case is based on circumstantial evidence.

32. In another judgment in **R. Sreenivasa Vs. state of Karnataka 2023 0 Supreme (SC) 836** Hon'ble Supreme Court in a murder appeal case based on last seen theory observed as under:-

“17. In the present case, given that there is no definitive evidence of last seen as also the fact that there is a long time-gap between the alleged last seen and the recovery of the body, and in the absence of other corroborative pieces of evidence, it cannot be said that the chain of circumstances is so complete that the only inference that could be drawn is the guilt of the appellant. In [Laxman Prasad v State of Madhya Pradesh](#), (2023) 6 SCC 399, we had, upon considering [Sharad Birdhichand Sarda v State of Maharashtra](#), (1984) 4 SCC 116 and [Shailendra Rajdev Pasvan v State of Gujarat](#), (2020) 14 SCC 750, held that ‘... In a case of circumstantial evidence, the chain has to be complete in all respects so as to indicate the guilt of the accused and also exclude any other theory of the crime.’ It would be unsafe to sustain the conviction of the appellant on such evidence, where the chain is clearly incomplete. That apart, the presumption of innocence is in favour of the accused and when doubts emanate, the benefit accrues to the accused, and not the prosecution. Reference can be made to [Suresh Thipmappa Shetty v State of Maharashtra](#), 2023 INSC 749 : 2023 SCC Online SC 1038.”

33. Hon'ble Supreme Court in another judgment **Gambhir Singh Vs. State of U.P. 2025 0 Supreme (SC) 285** also placed reliance on a leading case on circumstantial evidence **Sharadbirdi Chandra Sharda Vs. State of Maharashtra (1984) 4 SCC 116** wherein it is observed as under :

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: [SCC para 19, p. 807: SCC (Cri) p. 1047]

“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.

34. We have reappraised the evidence adduced in the case in the light of aforesaid judgments on circumstantial evidence, on which reliance has been placed on behalf of the appellant. The main thrust of the argument advanced on behalf of the appellant is that; the only evidence of last seen could not be conclusive to commit the accused, charge has been faulty in the case, as this is the case of the prosecution that the accused had offered Rs.10/- to the victim in the fateful night to bring tobacco for him and not biscuit and thereafter himself accompanied her.

35. It is stated in the charge that the accused allured the victim on the pretext of getting her biscuit and took her away in a field and committed rape

on her. Thus, the charge is defective and due to this defect the accused was misled to exact nature of prosecution case. In statement under Section 313 Cr.P.C. also a question has been put-forth to the accused that he on 17.03.2019 had offered some biscuit or some eatable to the victim in order to take her with him, which he denied. In question 19 it is stated that he had told the mother of the victim (PW-1) that he asked the victim to bring tobacco, but he had denied this fact and stated that in the fateful night he had distributed Rs.10/- to number of children including the victim and he had given Rs.10/- to the victim for bringing tobacco. The accused and children were present at 6th day ceremony of the child birth in the house of Vimlesh (PW-3). It is also contended on behalf of the appellant that there is no injury mark on private part of the body of the deceased who is said to be aged around 8 years only. Thus, commission of rape is not substantiated in the case, if a child victim of such tender age is sexually assaulted or subjected to rape, she must have suffered injuries on internal area of her private parts. It is only on account of the fact that doctor who conducted postmortem examination has noted that blood was oozing out from the private part of the victim, it cannot be assumed that she was subjected to rape.

36. In the present case, although prosecution witnesses have nowhere stated that victim girl child was real cousin of the accused, but the accused has stated in his statement under Section 313 Cr.P.C. that the victim was daughter of his uncle, he was present at the place from where the victim got missing, as this is a prosecution case that child birth ceremony was celebrated at the house of co-villager Vimlesh (PW-3) and the accused was present there when the victim had gone there to watch DJ. As the house of the victim and Vimlesh were adjacent, where witness had seen that accused had given Rs.10/- to the victim and asked her to bring tobacco. Thereafter he was “seen together” with the victim holding her hand and going away, thereafter victim was not seen in the night, even after much efforts made by her family members and witnesses and ultimately her dead body was explored on information given by witness PW-5 Vimal, who had seen the dead body of the

victim lying in the wheat field of Karu at the outskirts of the village and informed her mother, the informant. It is also stated in prosecution version that PW-5 Vimal firstly saw that an underwear was lying on the way to the place where dead body was found and then he presumed that it was the underwear of the victim.

37. Learned Senior Counsel appearing for the appellant further argued that vaginal bleed could have occurred on gagging and pressing the mouth and nostril, as the doctor has opined that cause of death was smothering. PW-11 Dr. Shadhana Rathore has categorically stated that no injury was found on the private parts of the victim.

38. Per contra, it is contended on behalf of the prosecution that as many as three witnesses PW-2 Prabhu Dayal, PW-3 Mukesh and PW-4 Vimlesh have given the evidence of last seen together against the accused and since the time victim got missing from the company of the accused, she was not noticed by any other person and subsequently, in the next morning her dead body was lying in a wheat field in the village. Therefore, as the victim was last seen together with accused, and this fact has been proved by evidence of three witnesses of facts; a heavy duty is cast upon the accused under Section 106 Evidence Act to explain what happened to victim thereafter when she was last seen along with him and when he parted company with her because there is no evidence in this regard and only accused would explain this fact and as he has failed to explain the fact which was exclusively in his personal knowledge it would be a vital additional circumstance against him and he would be treated as author of crime of rape and murder of the victim girl child as he failed to discharge this burden.

39. It is also contended on behalf of the prosecution that even if no sperm or blood mark was found on underwear near the place of the recovery of the dead body of the victim. No adverse inference can be drawn that the victim was not subjected to rape. Further more, no adverse inference can be drawn in respect of evidence of witnesses of fact, only due to the fact that the

underwear recovered in the case was found oversized which was usually worn by a grownup male person. Even if, this part of evidence of recovery of underwear which allegedly belonged to the victim is separated from prosecution evidence, the case is otherwise proved by evidence of witnesses of facts, as the accused failed to impute any motive against them, which would have prompted them to depose against them. He has stated in his statement under Section 313 Cr.P.C. that he had no enmity with the witnesses.

40. The FIR in the case was lodged on written report of Smt. Kancha Devi, the mother of the victim on 18.03.2019 at 09:15 AM, in which time of occurrence is shown as 09:30 PM on 17.03.2019 when the victim was got missing in front of the house of Vimlesh (PW-3), where some child birth ceremony was being celebrated. The informant has introduced all the relevant facts of the case in her written report itself, on the basis of which Chick FIR was drawn by PW-8 Head Moharir Shrichand Verma. She has stated in FIR that her daughter is aged about 8 years (victim) had gone in front of the house of the Vimlesh to watch DJ. At around 09:00 PM she went to take her daughter back at around 09:30 PM at the house of Vimlesh, but he told her that he had seen her daughter together with Bantu at around 09:15 PM. On this information she visited the home of Bantu, but he was not present there. He met her at around 01:00 AM in the night, when she asked him regarding whereabouts of his daughter, he told that he had sent her to take tobacco by giving Rs.10/-, thereafter she went in search of her daughter in the village and near by agricultural fields where he could not found her. At around 06:30 AM in the morning witness Vimlesh and some other villagers told him that dead body of her daughter was lying on the bank of drain of tubewell. On this information she visited the said place and found dead body of her daughter in the field of wheat, blood was oozing out from her private parts and her clothes were also smeared with blood. She stated in written report that it is Bantu who has committed rape and murdered her daughter. The Investigating Officer had recorded statement of the informant on the date of lodging of the FIR dated 18.02.2019 in which she has reiterated her FIR version. He also prepared site

plan of the place from where dead body was recovered, on pointing out of the informant, Smt. Kancha Devi. On 19.03.2019 he recorded statement of witnesses of last seen Vimlesh, Mukesh and Prabhudayal. He arrested the accused on 19.03.2019 and recorded confessional statement, on 26.03.2019 he recorded statement of witness Vimlesh Kumar, who is said to have seen the dead body of victim in the morning of 28.03.2019, when he had gone to ease himself. He stated that he had seen the underwear of the victim in the right side of the drain of tubewell and when he walked forward he found dead body of the victim in the wheat field of Karu. The victim was taken away by accused Bantu in the night of 17.03.2019 in front of the house of Vimlesh.

41. Thus, in the present case the name of the witnesses of last seen is shown in the FIR itself. The delay in lodging of FIR is self-explained as the informant has stated in her written report Ext. Ka-1 that she was in search of her missing daughter through out the whole night, and ultimately found her dead body in the next morning and thereafter she came to the police station to lodge the FIR. Thus, in the present case, the witnesses of last seen are not manufactured, but natural, they were examined by Investigating Officer on the next day of lodging of FIR. Thus, the statement of the witnesses of last seen cannot be treated as after thought. This is also noticeable that this case is based on last seen evidence of as many as four witnesses.

42. PW-1 has stated in her evidence before the court that she was told by her co-villager Vimlesh, Prabhu Dayal and Mukesh in the fateful night that they had seen the victim together with the accused at around 09:15 AM who was going with him. In the cross-examination PW-1 has stated that she was not invited at the place of Vimlesh and for that reason she has not visited the place of ceremony, but her daughter had gone alone to see DJ party at around 09:00 AM in night. She has also stated in cross-examination that she did not find her daughter at the place of Vimlesh and was told by witnesses that they had seen the victim together with Bantu. She visited his house, but she did not find him there. She again visited the house of Bantu at around 01:00 AM and he met her and told that her daughter would come back in the morning. She

went to police station by tempo, her daughter was wearing Todia on her legs, she had worn Salwar and Frock suit. She went to the house of Vimlesh twice, when she went in search of her daughters, the shops in the village were closed. The house of the accused and Vimlesh is near by her house. Thus, the description of wearing apparel of the victim given by her mother corresponds to those recovered from her person at postmortem report.

43. PW-2 Prabhu Dayal has given evidence of last seen and stated that he had seen the accused Bantu travelling with victim in the fateful night at around 09:15 PM, and thereafter she did not come back. He came to know in the next morning at 06:30 AM that her body was lying in the wheat field of Karu, in cross-examination he stated that the informant is wife of his brother. He had not participated in DJ party, he was standing near a pole, where DJ was being played and had seen the victim and accused together. Bantu fled away from the place of dance party, he was taking the victim by holding her hand. He followed him to some distance, but thereafter he did not meet him. The victim was 8 years of age, the victim was wearing chappal of her mother. He rushed to the place where dead body was lying on knowing this fact, the smell of liquor was emanating near the place of incident. This makes not much difference that in evidence of PW1 it is stated that the victim was bare feet and PW-2 has stated that she was wearing chappal, as evidence of a witness never becomes foolproof, therefore, the overall evidence of a witness is read to derive an inference regarding the incident. The incident occurred in the night and the witnesses have stated that they had seen the accused walking with the victim in darkness.

44. PW-3 Mukesh has also given evidence of last seen in her evidence, and in the fateful night victim was watching DJ at the place of Vimlesh, at that time Bantu brought tobacco from a shop, allured and took her away with him, and thereafter she was not found. Her mother came in search of her daughter and then he told her that he had seen the victim alongwith Bantu who had taken her away, he was also present in the DJ party.

45. As soon as this news spread that Bantu had taken the victim and she was not found thereafter the DJ was stopped and people went in search of the victim. The witness Vimlesh in whose house child birth ceremony was being celebrated in the night has also stated in his evidence that at around 09:15 PM, his co-villager Bantu had taken the victim alongwith him, thereafter her mother came in search of her and asked about her, then he told that Bantu had taken away her daughter. In next morning at 06:30 AM, it was learnt that dead body of the victim was lying in the wheat field of Karu. He had seen Bantu giving Rs.10/- to victim and thereafter he took her alongwith him, at that time he was serving meal to guests.

46. PW-5 Vimal has also stated in his evidence that he had seen the accused taking away the victim in the night of 17.03.2019 from the front of the house of Vimlesh and in the morning of 18.03.2019 at around 06:30 AM when he had gone towards field to ease himself he firstly noticed underwear of the victim near corner of drain of tube-well and subsequently, he found her dead body in wheat field. In cross-examination he stated that he was not having mobile phone at that time, he informed his uncle firstly about the incident, Smt. Kancha Devi is his Bhabi by relation, the underwear was of red colour. When he say dead body he assumed that underwear belonged to her. Thus, the theory of last seen in the present case has been proved by evidence of as many as four witnesses, PW-2 Prabhu Dayal, PW-3 Mukesh and PW-4 Vimlesh and also by PW-5 Vimal.

47. It is suggested on behalf of the defence that Atar Singh is step father of the accused and at his behest he was falsely named in the FIR to screen the real culprit. The accused has stated in his statement under Section 313 Cr.P.C. that the witnesses of facts have deposed falsely against him, but could not specify as to what prompted them to testify against him, no specific enmity with the witnesses has been averred on behalf of the accused.

48. In postmortem report of the deceased, the injuries were found on her mouth and forehead, cause of death is shown as asphyxia due to ante-mortem

smothering, as her mouth and nose were pressed prior to her death. Thus, in postmortem report the death is shown as homicidal.

49. PW-7 who is author of the postmortem report has also stated in his evidence that blood was oozing out from vagina of the victim, her internal examination was done by Dr. Shadhna Rathore (PW-11), who has prepared her vaginal slide) and nails were preserved for DNA examination. Estimated time of death is shown as 3-4 days which correspond to the time when the victim got missing in the night. The doctor has stated that the clothes of the victim were smeared with blood, two clothes were found on her body, no medical examination was done at the time of postmortem to ascertain her age, he had not conducted internal examination of her vagina, there was no injury on her private part. At the time of production of clothes and things worn by the victim in the evidence of PW-7, the clothes and things recovered from the dead body during postmortem were sealed in one bundle and the underwear allegedly recovered from the place of incident was sealed in another bundle, on which material Ext. Ka-9 was drawn.

50. PW-9 SI Ashesh Kumar who is author of inquest report of the body of victim, he has stated in his evidence that the victim was in semi naked position and was lying in supine position, she was wearing violet colour kurti, she was identified by her father Deep Chandra. He did not find any cloth in the mouth of victim.

51. PW-11 Dr. Shadhna Rathore had conducted internal examination on dead body of the victim and stated that blood was oozing out from vagina, therefore, probability of rape cannot be ruled out. She was in postmortem panel of doctors; she did internal examination of private parts, but did not find any mark of injury around it. She had prepared slide of vaginal smear for histo-pathology test and observed nails for DNA testing.

52. So far as, non-conducting of DNA examination of nail clippings of victim, it would not in itself fatal for prosecution case, if it would be otherwise proved by positive evidence.

53. Hon'ble Supreme Court in **Veerendra Vs. State of Madhya Pradesh (2022) 8 SCC 668** wherein it is observed in paragraph Nos. 48 to 53 as under:-

Presumption under the POCSO Act

33. *It is clearly established in evidence that the deceased was subjected to a brutal sexual assault. The injuries as evidenced in the postmortem report Exh.P.28 particularly injury no. 1 clearly indicate that the deceased was subjected to aggressive penetrative sexual assault. The injury on the prepuce of the penis of the accused along with the matching of the blood group coupled with other circumstantial evidence clearly constitute foundational facts for raising presumption under [Sections 29](#) and [30](#) of the POCSO Act.*

34. [Sections 29](#) and [30](#) of the POCSO Act reads as under:

“29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under [Sections 3, 5, 7](#) and [Section 9](#) of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

35. *It will be seen that presumption under [Section 29](#) is available where the foundational facts exist for commission of offence under [Section 5](#) of the POCSO Act. [Section 5](#) of the POCSO Act deals with aggravated penetrative sexual assault and [Section 6](#) speaks of punishment for aggravated penetrative sexual assault. [Section 3](#) of the POCSO Act defines what penetrative sexual assault is. The relevant Sections are extracted hereinbelow.*

“3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

5. Aggravated penetrative sexual assault.—(a)-(h)

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

6. Punishment for aggravated penetrative sexual assault.—

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

48. In the context of the contentions it is more appropriate to refer to the decision of this Court in [Sunil Vs. State of Madhya Pradesh](#). It was a case of rape and murder of a four (4) year old child. A three-Judge Bench held herein thus : SCC pp. 394-95, para 3-4)

“3. At the very outset, we deal with the arguments advanced on behalf of the appellant that in the present case the report of DNA testing of the samples of blood and spermatozoa under [Section 53-A](#) of the Code of Criminal Procedure, 1973 has not been proved by the prosecution. The prosecution has, therefore, failed to prove its case beyond reasonable doubt. Reliance in this regard has been placed on the decision of this Court in [Krishan Kumar Malik v. State of Haryana](#) .

4. From the provisions of Section 53-A of the Code and the decision of this Court in Krishan Kumar it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44), Section 53-A really “facilitates the prosecution to prove its case”. A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to.”

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

“Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain

alive after ejaculation cannot be precisely de- fined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods of 5 years. Non- motile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months.”

50. In paragraph 43 of Krishna Kumar Malik’s case, after extracting the above, it was further held : (SCC p.140)

“ 43. Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the appellant.”

51. This Court went on to hold thus in Paragraph 44 therein : (Krishan Kumar Malik case, SCC, p.140, para 44)

“44. Now, after the incorporation of Section 53-A in the [Criminal Procedure Code](#) w.e.f. 23.6.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused.”

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

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

54. As a matter of fact, the decision in *Rajendra Pralhadrao Wasnik's* case, would also fortify our view. The Bench was considering review petitions in Criminal Appeal Nos.145-146 of 2011. That was a case involving rape and murder of a three (3) year old girl where the case was held as proved on the basis of circumstantial evidence. So also, in that case DNA evidence was not produced before the Court, in spite of samples being taken. Obviously, taking note of the unerring nature of the circumstantial evidence pointing only to the guilt of the accused and the other circumstances the trial Court convicted and awarded him capital punishment. The High Court confirmed not only the conviction but also the award of capital sentence. Originally, this Court dismissed the appeals and thereafter, the dismissed review petitions were restored for consideration solely in view of a Constitution Bench decision of this Court in *Mohd. Arif Vs. Supreme Court of India*.

54. So far as, applicability of presumption under Section 29 and 30 of POCSO Act, is concerned, Hon'ble Supreme Court in recent judgment of **Sambhubhai Raisangbhai Padhiyar Vs. State of Gujarat** in 2025 (2) SCC 399 observed as under:-

Presumption under the POCSO Act

33. It is clearly established in evidence that the deceased was subjected to a brutal sexual assault. The injuries as evidenced in the postmortem report Exh.P.28 particularly injury no. 1 clearly indicate that the deceased was subjected to aggressive penetrative sexual assault. The injury on the prepuce of the penis of the accused along with the matching of the blood group coupled with other circumstantial evidence clearly constitute foundational facts for raising presumption under Sections 29 and 30 of the POCSO Act.

34. Sections 29 and 30 of the POCSO Act reads as under:

“29. Presumption as to certain offences.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

35. It will be seen that presumption under Section 29 is available where the foundational facts exist for commission of offence under Section 5 of the POCSO Act. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault and Section 6 speaks of punishment for aggravated penetrative sexual assault. Section 3 of the POCSO Act defines what penetrative sexual assault is. The relevant Sections are extracted hereinbelow.

“3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if-

(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

5. Aggravated penetrative sexual assault.—(a)-(h)

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

6. Punishment for aggravated penetrative sexual assault.—

(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.”

54-A. In the present case inspite of glaring defects in investigation on the part of the Investigating Officer, the prosecution has been successfully proved the foundational facts. This Court had observed on 25.10.2021, the glaring defects in investigation and summoned the Investigating Officer on 25.10.2021. This Court observed on that day as under:-

“ In a case of commission of offence under Sections 376-A and 376-B, 302, 201 I.P.C. and 5/6 of POCSO Act, the Investigating Officer mainly collected the statements to prove last seen of the deceased with the accused.

It is informed that blood stained clothes of the minor girl aged about 8 years were collected and as per the F.S.L. Report, blood was found on Salwar and Frock, black thread and "Motimala" and out of which human blood was found on Salwar and Frock while it remained inconclusive for the black thread and "Motimala". The Investigating Officer did not recover the clothes of the accused and even his medical report was not produced. The I.O. did not collect the evidence to get a DNA test. The nail of the

deceased minor at the age of 8 years were collected during the investigation but there is no F.S.L. report to find out whether the skin or a hair of the accused were found in it which may come while making resistance on the rape.”

55. It appears that the Investigating Officer submitted his explanation before the Superior Officer, which was not found correct and he was ultimately punished by the department. Had the investigating officer taken the DNA sample from person of the accused who was arrested within few days of the incident and sent the same alongwith DNA taken from person of the deceased alongwith her blood stained clothes, an irrefutable evidence with regard to commission of rape would have been available in this case in the form of scientific evidence. The DNA was taken from nail of the deceased and also the blood stains from her wearing apparel. However due to lapses of Investigating Officer, the evidence of prosecution witnesses, which is otherwise found trustworthy and reliable cannot be brushed-aside. Inasmuch as four witnesses have testified before the court, and has also stated the Investigating Officer earlier that they had seen the accused taking the victim with him in the fateful night at around 09:15 PM from the place of Vimlesh (PW-4) where child birth ceremony was organized. The accused could not specify any enmity with these witnesses of last seen together, namely Prabhu Dayal(PW-2), Mukesh(PW-3), Vimlesh(PW-4) and Vimal PW-5 prompted, by which they might have deposed against him. The accused has stated in his statement under Section 313 Cr.P.C. that victim was his real cousin sister. He did not dispute her alleged age, but feigned ignorance about her age.

56. He had made a general statement that witnesses have given false statement against him. A suggestion has been given on behalf of the accused to the witnesses that step father of the accused and Deepak Chandra father of the deceased were real brothers. The accused and his step father were not on cordial terms and for that reason at the behest of step father he was falsely implicated in the case. No reliance can be placed on such a bald suggestion which is not supported with any material. Much emphasis has been laid by learned Amicus Curiae appearing for the accused to the fact that no injury

marks were found on the person of the deceased in her postmortem report. Inasmuch as PW-11 Dr. Shadhana Rathore who is co-author of postmortem report has prepared Vaginal Swab of the victim and conducted her per-vaginal examination at the time of postmortem and had noted no internal and external injury on her private parts. Therefore, for want of any injury on the person of minor victim, no inference of rape can be drawn, and if the factum of rape is not proved, then the motive imputed to the accused which is an essential evidence of a case based on circumstantial evidence will be lacking, which is taken as a circumstance to exculpate the accused from alleged charges.

57. This is true that no internal or external injury on private part of the victim in her postmortem report and supplementary report prepared by Dr. Sadhana Rathore is recorded. Yet this fact cannot be lost sight that in inquest report of the victim as well as in her postmortem report it is stated that blood was oozing out from vagina of the deceased, her clothes were smeared with blood. In FSL examination of her clothes, human blood was found. Such a nature of profuse bleeding from private part of the victim who is stated to be 8 years of age cannot be attributed to any other cause, than that she was subject to sexual assault in the nature of rape. This appears to be a case of partial penetration, otherwise in the case of full penetration victim who was stated to be of 8 years of age, must have suffered some injury on her private part. It is settled law that rape is a legal term and not a clinical term; even partial penetration is sufficient to constitute offence of rape. Therefore, for want of injuries on private part of the victim it cannot be held that she was not subjected to rape.

58. Hon'ble Supreme Court in **Edakkandi Dineshan @ P. Dineshan & Ors. Vs. State of Kerala 2025 INSC 28** reiterated its earlier view that principle of "falsus in uno, falsus in omnibus" does not apply to the Indian criminal jurisprudence, only because there are some contradictions which in the opinion of this Court are not even that material, the entire story of the prosecution cannot be discarded as false. It is the duty of the Court to separate the grain from the chaff. Only due to the fact the underwear allegedly worn

by the deceased at the time of incident would not be connected with for want of scientific connective and link evidence, the entire prosecution version cannot be doubted.

59. Hon'ble Court in aforesaid case further observed that principle of law is crystal clear that on the account of defective investigation the benefit will not inure to the accused persons on that ground alone. It is well within the domain of the courts to consider the rest of the evidence which the prosecution has gathered such as statement of the eyewitnesses, medical report etc. It has been a consistent stand of this court that the accused cannot claim acquittal on the ground of faulty investigation done by the prosecuting agency.

60. The circumstances appearing against the accused in the present case were put to him, in his statement under Section 313 Cr.P.C., wherein he has denied the fact that he had given Rs.10/- to the victim for bringing tobacco, but he admitted that he had distributed the money to the victim as well as other children who were present on the place where DJ was being played.

61. The prosecution has proved following circumstances in the present case, which are proved against the accused appellant:-

i. The victim who was a girl child of 8 years of age and according to the accused was his cousin sister had gone to attend child birth ceremony at the place of her co-villager Vimlesh in the fateful night of 17.03.2019 at around 09:00 PM. She had worn Salwar, Frock, bits Mala in her neck and the black thread around her leg.

ii. Accused Bantu alias Shiv Shanker had admitted in his statement under Section 313 Cr.P.C. that he consumes tobacco and had given Rs.10/- note to the victim to bring tobacco and thereafter followed her and took her alongwith him to a secluded place. Next, just after the departure of the accused alongwith victim, when victim was not found in the vicinity, the witnesses who were present on the spot had told her mother that when she

came in search of her daughter that they had seen the victim being taken by Bantu (the accused).

iii. The victim visited the home of the accused, but he was not present there, she again went to his place to meet him and inquire from him about whereabouts of his daughter, he met her but gave her evading answer.

iv. Dead body of the deceased was found in a wheat field at the outskirts of the village, on pointing out of PW-5 Vimal. The informant, who is mother of the victim lodged an FIR without any further delay at P.S. concerned on 18.03.2019 at 09:15 hours, i.e. FIR was lodged within three hours of recovery of the dead body.

v. The motive of the commission of offence is introduced as commission of rape, and this fact is proved that when dead body was found in the wheat field, blood was oozing out from her private parts and this fact is recorded in inquest report as well as in postmortem report of the deceased.

vi. The name of the witnesses who had last seen the victim together with the accused is mentioned in FIR itself. Therefore, witnesses could be termed as natural and they are co-villagers of the accused and the informant.

Vii. It is proved by medical evidence that the death of the victim was homicidal.

No motive has been suggested against the witnesses to speak falsely against the accused, except the fact that some of them are related to the informant side. Once the factum of last seen was proved by evidence of witnesses of facts, the burden shifts to the accused to explain that when did he leave the company of the victim. Thus he failed to discharge his burden under Section 106 Evidence Act, as this was the fact within the special knowledge of the accused. Therefore, on reappraisal of evidence on record, we find no factual or legal error in findings of trial court, whereby accused has been convicted of charge under Section 376 AB and 302 IPC. He has also been

found guilty of charge under Section 5/6 of POCSO Act, by learned trial court and on facts of the case, the presumption under Section 29 of POCSO Act, can be drawn against the accused. The circumstances proved in the case unerringly point towards guilt of the accused and he has been rightly convicted for said offences.

62. Learned trial court has rightly observed that as major punishment has been provided for charge under Section 376 AB IPC, there is no need to award punishment against the accused under Section 5/6 of POCSO Act, in view of provisions of Section 42 of POCSO Act. Consequently, the conviction of the appellant for charge under Section 376 AB and 302 IPC which has been recorded by learned trial court is affirmed.

63. So far as sentence is concerned, the appellant has been awarded death sentence for both the charges, as the victim being a girl child of 8 years of age at the time of incident.

64. So far as the sentencing is concerned, the trial court has awarded death sentence to the accused for both the charges as stated above.

65. The Hon'ble Supreme Court in a recent judgment **Sundar @ Sundarrajan Vs. State by Inspector of Police, 2023 (2) SCC 353** in an appeal against conviction of appellant for charge under Section 364A, 302, 201 IPC in which death penalty was awarded, considered the scope of award of sentence to death at length. Hon'ble Court referred the Constitution Bench Judgment in **Mohd. Arif alias Ashfaq Vs. Registrar, Supreme Court of India 2014 (1) SCC 737**, wherein it is observed:-

*29. [...] death sentence cases are a distinct category of cases altogether. Quite apart from [Article 134](#) of the Constitution granting an automatic right of appeal to the Supreme Court in all death sentence cases, and apart from death sentence being granted only in the rarest of rare cases, two factors have impressed us. **The first is the irreversibility of a death penalty. And the second is the fact that different judicially trained minds can arrive at conclusions***

which, on the same facts, can be diametrically opposed to each other. Adverting first to the second factor mentioned above, it is well known that the basic principle behind returning the verdict of death sentence is that it has to be awarded in the rarest of rare cases. There may be aggravating as well as mitigating circumstances which are to be examined by the Court. At the same time, it is not possible to lay down the principles to determine as to which case would fall in the category of rarest of rare cases, justifying the death sentence. It is not even easy to mention precisely the parameters or aggravating/ mitigating circumstances which should be kept in mind while arriving at such a question. Though attempts are made by Judges in various cases to state such circumstances, they remain illustrative only.

*30. [...] A sentence is a compound of many factors, including the nature of the offence as well as the circumstances extenuating or aggravating the offence. A large number of aggravating circumstances and mitigating circumstances have been pointed out in **Bachan Singh v. State of Punjab, SCC at pp. 749-50, paras 202 & 206**, that a Judge should take into account when awarding the death sentence. Again, as pointed out above, apart from the fact that these lists are only illustrative, as clarified in **Bachan Singh** itself, different judicially trained minds can apply different aggravating and mitigating circumstances to ultimately arrive at a conclusion, on considering all relevant factors that the death penalty may or may not be awarded in any given case. Experience based on judicial decisions touching upon this aspect amply demonstrate such a divergent approach being taken. Though, it is not necessary to dwell upon this aspect elaborately, at the same time, it needs to be emphasised that when on the same set of facts, one judicial mind can come to the conclusion that the circumstances do not warrant the death penalty, whereas another may feel it to be a fit case fully justifying the death penalty, we feel that when a convict who has suffered the sentence of death and files a review petition, the necessity of oral hearing in such a review petition becomes an integral part of “reasonable procedure”.*

66. In the present case, learned counsel for the appellant submitted that the proceedings being based on circumstantial evidence, and the accused was at the time of incident he is young man of 30 years of age without any criminal antecedent and no brutality appears to be committed against the victim. The extreme penalty of death awarded to the appellant is not tenable in any manner. The Constitution Bench decision in ***Bachan Singh v.State of Punjab 1980 (2) SCC 684***; considered the scope of Section 354(3) and section 235 (2) Cr.P.C., 1973. The Apex Court held that Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on records material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The Court should not confine its consideration "principally" or merely to the circumstances connected with the particular crime, but also give due consideration to the circumstances of the criminal.

67. Hon'ble Court in **Sundar @ Sundarrajan (supra)** observed as under:-

68. The importance of a separate sentencing hearing being afforded to the accused after recording a conviction was reiterated in Anguswamy v State of Tamil Nadu, [Malkiat Singh State of Punjab](#) and [Dattaraya v State of Maharashtra](#).

69. On the other hand, there have also been judgments of this Court where it was held that while the court may adjourn for a separate hearing, same-day sentencing did not violate the provisions of [Section 235\(2\)](#) of the CrPC and did not in itself vitiate the sentence. This reasoning was adopted in the judgments of this Court in [Dagdu v State of Maharashtra](#), [Tarlok Singh v State of Punjab](#) and [Ramdeo Chauhan v State of Assam](#).

70. In Suo Motu W.P. (Crl.) No. 1/2022 titled In re: Framing Guidelines Regarding Potential Mitigating Circumstances to be Considered while Imposing Death Sentences, this Court took note of the difference in approach in the interpretation of [Section 235\(2\)](#) of CrPC and referred the question for consideration o [y f](#) a larger bench. While it took note of the conflict on what amounted to 'sufficient

time’ at the trial court stage to allow for a separate and effective sentencing hearing, it noted that all the decisions also had the following common ground:

27. The common thread that runs through all these decisions is the express acknowledgment that meaningful, real and effective hearing must be afforded to the accused, with the opportunity to adduce material relevant for the question of sentencing.

71. In the present case, the judgment of the Trial Court dealing with sentencing indicates that a meaningful, real and effective hearing was not afforded to the petitioner.

78. In [Rajendra Pralhadrao Wasnik v State of Maharashtra](#), a three judge bench of this Court took note of the line of cases of this Court which underline the importance of considering the probability of reform and rehabilitation of the convicted accused before sentencing him to death. The court observed:

43. At this stage, we must hark back to Bachan Singh and differentiate between possibility, probability and impossibility of reform and rehabilitation. Bachan Singh requires us to consider the probability of reform and rehabilitation and not its possibility or its impossibility.

[.....]

*45. The law [laid down by](#) various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the “special reasons” requirement of [Section 354\(3\)](#) CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. **To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed rehabilitated.** This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.*

46. If an inquiry of this nature is to be conducted, as is mandated by the decisions of this Court, it is quite obvious that the period between the date of conviction and the date of awarding sentence would be quite prolonged to enable the parties to gather and lead evidence which could assist the trial court in taking an informed decision on the sentence. But, there is no hurry in this regard, since in any case the convict will be in custody for a fairly long time serving out at least a life sentence.

47. **Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. Until Bachan Singh, the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. Bachan Singh 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 and in [Sangeet v. State of Haryana](#) where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in Sangeet “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.

82. In Mofil Khan, a three judge bench of this Court was also dealing with a review petition which was re-opened in view of the decision in [Mohd. Arif v Registrar](#), Supreme Court of India. While commuting the death sentence to life imprisonment, the Court reiterated the importance of looking at the possibility of reformation and rehabilitation. Notably, it pointed out that it was

the Court's duty to look into possible mitigating circumstances even if the accused was silent. The Court held that:

*9. It would be profitable to refer to a judgment of this Court in [Mohd. Mannan v. State of Bihar](#) in which it was held that before imposing the extreme penalty of death sentence, the Court should satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to the society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing material. **The hearing of sentence should be effective and even if the accused remains silent, the Court would be obliged and duty-bound to elicit relevant factors.***

10. It is well-settled law that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent. A scrutiny of the judgments of the trial court, the High Court and this Court would indicate that the sentence of death is imposed by taking into account the brutality of the crime.

There is no reference to the possibility of reformation of the Petitioners, nor has the State procured any evidence to prove that there is no such possibility with respect to the Petitioners. We have examined the socio-economic background of the Petitioners, the absence of any criminal antecedents, affidavits filed by their family and community members with whom they continue to share emotional ties and the certificate issued by the Jail Superintendent on their conduct during their long incarceration of 14 years. Considering all of the above, it cannot be said that there is no possibility of reformation of the Petitioners, foreclosing the alternative option of a lesser sentence and making the imposition of death sentence imperative.

83. The duty of the court to enquire into mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation before imposing the death penalty has been highlighted in multiple judgments of this Court. Despite this, in the present case, no such enquiry was conducted and the grievous nature of the crime

was the only factor that was considered while awarding the death penalty.

91. On the basis of these details, it cannot be said that there is no possibility of reformation even though the petitioner has committed a ghastly crime. We must consider several mitigating factors: the petitioner has no prior antecedents, was 23 years old when he committed the crime and has been in prison since 2009 where his conduct has been satisfactory, except for the attempt to escape prison in 2013. The petitioner is suffering from a case of systemic hypertension and has attempted to acquire some basic education in the form of a diploma in food catering. The acquisition of a vocation in jail has an important bearing on his ability to lead a gainful life.

92. Considering the above factors, we are of the view that even though the crime committed by the petitioner is unquestionably grave and unpardonable, it is not appropriate to affirm the death sentence that was awarded to him. As we have discussed, the 'rarest of rare' doctrine requires that the death sentence not be imposed only by taking into account the grave nature of crime but only if there is no possibility of reformation in a criminal.

93. However, we are also aware that a sentence of life imprisonment is subject to remission. In our opinion, this would not be adequate in view of the gruesome crime committed by the petitioner.

94. This court has been faced with similar situations earlier where it has noticed that the sentence of life imprisonment with remission may be inadequate in The matter may be inadequate in certain cases. For instance, in Swamy Sharddananda (2) @ Murali Manohr Mishra Vs. State of Karnataka the Court noted that:-

*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 year's imprisonment would amount to no punishment at all.

95. Accordingly, it is open to this Court to prescribe the length of imprisonment, especially in cases where the capital punishment is replaced by life imprisonment. Considering the facts of the instant case, we are of the considered view that the appellant must undergo life imprisonment for not less than twentyfive years without remission of sentence.

68. In the present case, if we strike a balance of mitigating and aggravating circumstances in respect of crime qua the appellant we find aggravating circumstance such as the tender age of the victim, her helpless situation, the relationship of the victim with the accused due to which she reposed trust in her, when he took her alongwith him the gruesome crime of child rape and subsequent murder of the victim by pressing her mouth by asphyxiating her by smothering and leaving the dead body on the place of incident. The mitigating circumstances are that, the accused was a young man of tender age, the offence is mainly based on circumstantial evidence of last seen together. The offence although being of heinous and diabolic nature, but even then on the facts of the case, it may not be said that brutality was committed against the victim for causing her death. The appellant is not a man of criminal antecedents and is a common villager, he is in jail custody since inception of the case, which took place in the year 2019. It cannot be said that appellant is incorrigible or he is a menace to society and he cannot be reformed or rehabilitated. In modern days, much emphasis laid down on reformatory theory of punishment, rather than retributory or deterrent. The golden thread

in the wave of criminal jurisprudence, still rules good that death sentence can only be awarded in rarest of rare cases.

69. In view of the above and foregoing discussion, we are of the considered opinion that this is not an appropriate case, in which award of death sentence to the appellant is liable to be affirmed.

70. Considering the facts of the instant case, we are of the considered view that the appellant must undergo life imprisonment for not less than 25 years without remission of sentence for charge under Section 302 IPC.

71. Consequently, we commute the death sentence awarded to the appellate for charge under Section 302 IPC to life imprisonment for not less than 25 years without reprieve or remission. We commute the death sentence awarded for charge under Section 376 AB IPC to 20 years rigorous imprisonment. A fine of Rs.10,000/- against the appellant for said charges, is also awarded, and in case of default he will have to undergo three months imprisonment in default for both the charges separately. All the sentences shall run concurrently. The whole of amount of fine (Rs.20,000/- in toto) shall be payable to the informant as compensation.

72. With the aforesaid modification the appeal qua conviction is dismissed. However, the appeal qua sentence is partly allowed and the sentence is modified to the aforesaid extent. The reference for confirmation of death sentence is hereby dismissed.

73. The accused appellant is in jail, he will undergo the remaining sentence in accordance with law. Trial court record and proceedings be sent back to the trial court forthwith for necessary compliance and onwards information to Superintendent of concerned jail about this modified sentence for necessary action.

74. While parting with the case, we deeply appreciate the valuable assistance of Senior Advocate Sri Vinay Saraan assisted by Smt. Beena

Mishra, learned Amicus Curiae and also Sri Pradeep Kumar Mishra, Advocate. We direct that an honorarium of Rs.25,000/- shall be paid to Sri Vinay Saran, Senior Advocate, and Rs.25,000/- to Smt. Beena Mishra, as both of them have been appointed as Amicus Curiae in the case by High Court, Legal Services Committee.

Order Date :- 29.07.2025

Ashish/-

(R.M. N Mishra, J) (Rajiv Gupta, J.)