REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1488-1489 OF 2018

Ravi S/o Ashok Ghumare ..... Appellants(s)

VERSUS

The State of Maharashtra .....Respondents(s)

JUDGMENT

SURYA KANT, J.

These appeals assail the judgment dated 20th January, 2016 passed by the High Court of Judicature at Bombay, Bench at Aurangabad, confirming the death reference in the Sessions Case No. 127 of 2012 decided by the Additional Sessions Judge, Jalna, in which the appellant having been found guilty of committing offences punishable under Sections 302, 363, 376 and 377 of the Indian Penal Code (for short, "the IPC"), has been awarded the sentence of death under Section 302, IPC along with the sentence of rigorous imprisonment(s) of different durations with fine for the rest of offences. The Trial Court as well as the High Court have

concurrently held that the case falls within the exceptional category of `rarest of the rare' cases where all other alternative options but to award death sentence, are foreclosed.

2. The facts leading to the aforestated conclusion are to the following effect:-

3. The informant Iliyas Mohinuddin (P.W.9) had been a fruit-seller based in Jalna. On 06.03.2012 at about 5.00 p.m. while he was as usual busy in selling fruits, his wife informed him that their daughter (in short, `the victim child') who was 2 years old, was missing. He along with his relatives started looking for the child. During their search, the informant came to know from Azbar (P.W.2) that the appellant had been spotted drunk and was distributing chocolates to small children in the lane near the Maroti Temple. The appellant was also a resident of the same lane. The informant went to the appellant's house which was found locked. As the whereabouts of the missing child were still not known, the informant lodged a formal missing report to the police. He also passed on the information to the police as received from Azbar (P.W.2) regarding the distribution of chocolates amongst small children by the appellant. The police, therefore, came to

the appellant's house which had two doors. One was found locked from outside while the other was locked from inside. Police broke open the door and entered the house along with the informant, his brother and a few other persons. They found the appellant in the house; deceased-victim was lying under the bed in a naked and unconscious condition. Blood was oozing out from her private parts and had multiple injuries on her body. She was covered in a blanket and taken to the hospital where the doctor declared her brought dead. Inquest panchnama was prepared and the body was sent for post mortem. A panel of doctors, including Dr. B.L. Survase and Dr. Bedarkar (P.W. 7 and P.W.8 respectively) performed the post mortem and found multiple injuries on the person of the victim. They opined that the death was caused due to throttling. The informant – father of the victim lodged the report at 12.30 a.m. on 07.03.2012 on the basis of which Crime No. 56 of 2012 was registered. The appellant was arrested at about 1.00 a.m. on the same day by the Investigating Officer Rajinder Singh Gaur (P.W.12). The clothes worn by the appellant were seized and the seizure panchnama was drawn in the presence of panchnama witnesses – Sheikh Arshad and Sheikh Nayeem.

4. Iliyas (P.W.9), the father of the deceased-victim also produced the clothes worn by her which too were duly seized in the presence of Syed Muzeeb (P.W.1) and Mohd. Akbar Khan. The scene of crime panchnama was drawn and articles found on the spot were also seized. The appellant was referred for medical examination to Ghati Hospital, Aurangabad. The appellant's blood samples were taken on 11.3.2012 and sent to Mumbai for DNA examination along with the seized muddemal. The blood samples of the appellant were taken again on 13.03.2012 and were sent for the DNA test.

5. On filing of the chargesheet, charges under Sections 363, 376 and 302, IPC were framed to which the appellant did not plead guilty and claimed trial. Thereafter, prosecution moved an application for framing an additional charge under Section 377, IPC. The said application was allowed and charge under Section 377 was framed to which also the appellant did not plead guilty. His defence was of total denial and that he was falsely implicated.

6. The prosecution examined 12 witnesses in all. The following points thus arose for consideration of the Trial Court:-

"1. Whether the prosecution proves that accused on

6.3.2012 at about 16.00 Hrs. in the vicinity of Indira Nagar, old Jalna, Taluka and District : Jalna, kidnapped xxx.. d/o Iliyas Pathan a minor girl under 16 years of age from her lawful guardianship & without his consent, and thereby committed an offence punishable u/s 363 of I.P.C.?

2. Whether the prosecution further proves that accused on above date, time and place of offence, committed rape on xxx.. and thereby committed an offence punishable u/s 376 of IPC?

3. Whether the prosecution further proves that accused on above date, time and place of offence, committed carnal intercourse against the order of nature with minor girl xxx.. and thereby committed an offence punishable u/s 377 of IPC?

4. Whether the prosecution further proves that accused on above date, time and place of offence, committed murder intentionally or knowingly causing death of xxx.., and thereby committed an offence punishable u/s 302 of IPC?"

7. The Trial Court discussed the evidence at length in the context of each point and answered them in the affirmative. It held the appellant guilty of the offences referred to above. The Trial Court thereafter compared the `aggravating circumstances' vis-a-vis the `mitigating circumstances' and having found that the crime was committed in a most brutal, diabolical and revolting manner which shook the collective conscience of the society, it found that the R.R. Test (rarest of the rare cases) is fully attracted, hence capital punishment was imposed on the appellant under Section 302, IPC.

8. The High Court considered the death reference as well as the appeal preferred by the appellant against the trial Court judgment and after scrutinising the prosecution evidence, reached the following factual issues:-

> "A. Accused was found with victim girl in a house one door of which was locked from outside and another door closed from inside,
>
> B. Multiple injuries found on the person of victim,
>
> C. Medical evidence showing that the girl was forcibly raped and done to death,
>
> D. Recovery of blood stained jeans pant and full bush shirt (torn) from the accused,
>
> E. Motive,
>
> F. Failure of accused to offer plausible explanation to the incriminating circumstances against him."

9. The High Court held that the circumstances conclusively prove that all the pieces of the puzzle fit so perfectly that they leave no reasonable ground for a conclusion consistent with the hypothesis of the innocence of the appellant, rather the same leads to the irrefutable conclusion that it is the appellant who took away the victim child to his house, sexually assaulted her, committed unnatural intercourse and throttled her to death. Consequently, the conviction of the appellant under Sections 302, 376, 377 and 363 of the IPC. was upheld.

10. The High Court thereafter engaged itself on the question of quantum of sentence and as to whether the R.R. Test was attracted to the facts and circumstances of this case. The High Court drew up the balance sheet of the `aggravating' and `mitigating' circumstances and after their comparative analysis, it concurred with the extreme penalty awarded by the trial Court and confirmed the death sentence.

11. We have heard Ms. Nitya Ramkrishnan, Learned Counsel for the appellant and Mr. Nishant R. Katneshwarkar, Learned Counsel for the State of Maharashtra on merits as well as on the contentious issue re: quantum of sentence and have minutely perused the relevant record.

12. Learned Counsel for the appellant argued that there are chinks in the culpability calculus that have a direct bearing on the quantum of sentence as well. She urged that according to Azbar (P.W.2), the appellant was distributing chocolates to children near Maroti Temple around 3.30 to 4.00 p.m. and that the mother of the victim called her husband Iliyas (P.W.9) around 5.00 p.m. to inform that the deceased-victim had been missing since 4.00 p.m. There is no evidence that she was one amongst the children to whom the appellant was distributing chocolates; where had the victim been until 4.00

p.m. and where and when was she last seen and in whose company? The argument is that the victim was not lastly seen in the company of the appellant. It was then urged that the appellant's house is four houses away from that of the victim; there are other houses next and opposite to that of the appellant, therefore, it is unbelievable that nobody saw the victim child being taken away by the appellant. She pointed out that five policemen entered the house of the appellant and the informant (P.W.9) also statedly accompanied them but the police officials in their depositions have not made any such reference.

13. According to Learned Counsel for the appellant, Azbar (P.W.2) also went to the house of the appellant only after learning that the victim had been traced in the house of the appellant, yet he claims to have seen the appellant under the cot while the victim was on the cot inside the house. It was unbelievable that even after the police had entered the 10x10 room and had hunted him out, the appellant would still remain under the cot until P.W.2 reached the spot. Similarly, Aslam (P.W.5) who is the maternal uncle of the victim, also went to the appellant's house only after the victim had been found there. Yet, he too found the appellant under the cot.

According to the Learned Counsel, all these witnesses, namely, P.W.2, P.W.3, P.W.4, P.W.5 and P.W.9 have been set out after learning that the child had been found purportedly to describe a scene immediately upon entering the house, which naturally cannot be the case. It was strongly urged that most of these persons did not witness the crime or scene of the crime as they have deposed that the child and the appellant were found in a state of undress, only Dilip Pralhadrao Tejan (P.W.3), who is a police official, says that the appellant was found outraging the modesty of the child. It thus suggests that the testimony of all these witnesses is not accurate and at best it leads to an inference that the child was found in the same house as was the appellant. It was pointed out that the testimony of P.W.3, P.W.4 and P.W.9 varies at the point as to what they saw on entering the house. However, P.W.3's statement claiming that the appellant was found outraging the modesty of the child under the bed, is different from the version of others who found a cloth around the bed and could see the appellant and the victim only when the cloth was removed. P.W.9 (father of the victim child) does not state the same facts as have been described by P.W.3 or P.W.4 and thus there is inconsistent version on what was seen inside the appellant's house upon

entering.

14. It was then urged that the houses in the area were in a close cluster and it would have been difficult for the appellant to take the child away without being noticed by anyone. Further, prosecution has failed to establish two crucial facts, namely, the place where the victim child was last seen and the estimated time of her death. In the absence of surety of these two facts as to when was the victim child last seen alive and her approximate time of death, the recovery of her dead body between 9.30-10.00 p.m. in the house of the appellant *per se* is insufficient to establish the charge beyond reasonable doubt.

15. It was contended that even as per P.W.9 (the informant) the appellant along with his family had been residing in that very house since the past 7-10 years, but the prosecution has failed to explain as to where had the other members of the family been during those six hours, between 4.00 p.m. to 10.00 p.m. on that fateful day. This assumes significance in view of the DNA report which merely indicates that they are from the same paternal progeny.

16. Learned Counsel lastly urged that since the basis for the match in DNA report is the comparison with the blood sample

of the appellant, it was imperative upon the prosecution to establish that the sample indeed was that of the appellant only. The person, who drew the blood sample has not been examined as a witness nor the contemporary record of the procedure for taking blood sample has been explained. There is only a bald statement of the Investigating Officer that the appellant was referred to Ghati hospital, Aurangabad. There is no memo or material to show as to who collected the blood sample of the appellant, when was the sample collected and where and how was it preserved. As against it, the medical examination reports and sample collection reports of the appellant (Exbts. 21, 21A and 22) indicate that no blood sample was taken which shows the incorrectness of the Investigating Officer's testimony. The chemical lab at Mumbai also does not mention any receipt of a blood sample of the appellant. She argued that the prosecution has strongly relied on the D.N.A. evidence despite the fact that the method of analysis used, i.e., Y-Chromosome Short Tandem Repeat Polymorphism (Y-STR) has certain inherent limitations due to which accurate identification of the accused cannot be established beyond a reasonable doubt. Unlike other processes like autosomal STR analysis, Y-STR analysis does not

allow for individual identification in the same male lineage. It was thus contended that the prosecution has failed to bring the guilty at home, hence the appellant deserves the benefit of doubt.

17. Learned State Counsel, however, refuted all the appellant's contentions and took us through the ocular and medical evidence, especially the eye-witness's account to urge that there is no error or lapse worth whispering committed by the prosecution in establishing the appellant's guilt. He extensively referred to the relevant parts of the impugned judgments to explain as to how the `aggravating' and `mitigating' circumstances have been drawn up and weighed before awarding or confirming the death sentence.

18. Before entering the hassled arena of sentencing, it is apropos to recapitulate the facts and evidence on record to find out whether the prosecution has been able to prove the charges against the appellant beyond any reasonable doubt.

19. The victim was not even 2-year old when she died an unnatural death. The post mortem was conducted on 07.03.2012 by a panel of doctors, which included Dr. B.L. Survesh (P.W.7) and Dr. Bedarkar (P.W.8). According to Dr. B.L. Survesh, the external injuries corresponded to the internal

injuries and were sufficient in the ordinary course of nature to cause death. All the injuries were ante-mortem and the cause of death was throttling. The Medical Board found following injuries on external examination on the body of the deceased-victim:-

1. Linear abrasion on right side of chest 2 cm, oblique, reddish in colour.

2. Abrasion over left zygomatic area, 5 x 2 cm.

3. Linear abrasion, left side of neck, above clavicle reddish, about 1 cm in length and 2 in number.

4. Linear abrasion, left scapular region, two in number, one below other 2½ cm. reddish in colour.

5. Abrasion, 5 in number, at the centre over lower back, ½ x 1 cm each in size.

6. Contrusion over vault ½ x ½ cm.

7. Abrasion over right sub mandibular region, 1 cm reddish.

8. Abrasion, right supra clavicular region, 2 in number, ½ cm each, over above other.

20. The panel of doctors further found following injuries on the internal examination of the body:-

1. Neck dissection under the skin, contusion to muscle and subcutaneous tissues corresponding to abrasions on skin.

2. Right and left lungs congested.

3. Heart was found congested.

4. Right side of the heart was full of blood and left side was empty.

5. Tongue was inside the mouth between the teeth.

6. Stomach was congested and was containing semi-digested food.

21. On the vaginal examination of the victim, evidence of tear at posterior vaginal wall and triangular shape tear 2x1x½ cm. was noticed and hymen was found ruptured. Dr.Survase (P.W.7) has deposed that "on perusal of report as to examination of anal swab in DNA report, and, considering observation in clause 15 of the post mortem report, I opine that there was unnatural sex." Similarly, Dr.Bedarkar (P.W.8) after perusing the same DNA report and post mortem report has stated that, " I opine that vaginal and anal intercourse was performed."

22. It, therefore, stands established beyond any pale of doubt that the victim child was subjected to forcible vaginal and anal/unnatural intercourse and she died of asphyxia due to throttling.

Connection between the appellant and the crime

23. Azbar (P.W.2) had known the appellant since their childhood as both of them had been residing in the same lane.

On 06.03.2012, while going towards his house at about 3.30 to 4.00 p.m. he met the appellant who was drunk and was distributing chocolates to children near Maroti Temple. His friend Gayas called him [Azbar (P.W.2)] at 5.00 p.m. to inform that the victim, daughter of Iliyas, was missing. They started looking for the child near Bhagya Nagar Railway Station, Mhada Colony, Aurangabad Chouphuly, Sanjay Nagar, etc. Then he got to know that the victim had been traced in the house of the appellant. P.W.2 then went to the appellant's house at Indira Nagar. There was a crowd of people there and police was already present when he entered the house and saw that the child was lying on a cot and a blanket was put on her body. The appellant was under the said bed. The witness also slapped the appellant 2-3 times before the police took the later. P.W.2 was called on the next day on 07.03.2012 for spot panchnama. One white paper, a pencil, blue broken bangle, one pass book carrying names of Reena and Lakshmi Bai Ghumare and one piece of a saree was found and seized by the police and kept in an envelope. The panchnama bears his signatures. In his cross-examination, P.W.2 has categorically stated that though the parents of the appellant are alive but they were not present at his house at the time of occurrence.

He has explained in detail as to how the panchnama was prepared.

24. Dilip Pralhadrao Tejan (P.W.3) the police official, had been attached to Kadim Jalna police station on 06.03.2012. The missing report lodged by Ilias (P.W.9) about his 2-year old daughter was handed over to P.W.3 for inquiry. P.W. 3 along with policemen Katake, Jawale, Rathod and Chavan was in Indira Nagar area of Jalna where he got to know that the appellant was seen distributing chocolates and icecream/fruits to minor children. P.W.3 along with other police officials, therefore, went to the house of the appellant between 9.30 to 9.45 p.m. and found that there were two doors, one was locked from outside and the other from inside. P.W.3 peeped through the gap in the door and noticed some cloth around the bed. He called the appellant by name but nobody responded. The witness then broke open the door and entered the house and found the appellant outraging the modesty of the victim child under the bed. The police-party covered the baby with a quilt and placed her on the bed. Meanwhile about 20 persons followed them including Aslam, the maternal uncle of the missing child. The victim child was sent along with Aslam for medical treatment. Since several more agitated

persons gathered at the scene, the police rescued the appellant and took him to the police station. The peole were demanding that the appellant be handed over to them. On a specific court question as to in which manner and in what circumstances P.W.3 saw the accused and the deceased, he had answered in no uncertain terms that the “deceased kid was found naked and blood was oozing from her mouth and private parts. There was no shirt on the person of the accused, his jean and trouser was found on his knee. Accused was also found naked.”

25. Constable Sanjay Katake (P.W.4) was also a member of the police team led by API Dilip Pralhadrai Tejan which was looking for the missing child in Indira Nagar area of Jalna. P.W.4 has also unequivocally deposed that they were informed by the people in the vicinity that the appellant `used’ to distribute icecream and chocolates among the children and on that day also he was seen doing so. The police team, therefore, went to the house of the appellant which had two doors. One of the door was locked from outside whereas the other was from inside. The police party called the appellant by name, but he did not respond. Then, they peeped through the slit of the door and noticed a bed and some piece of cloth

around it and got suspicious that there was somebody under the bed. They broke open the door and entered the house. A.S.I. Tejankar removed the cloth around the bed and the police team found the appellant and the victim child under the bed in naked condition. Tejankar placed the child over the bed. “Blood was found oozing from mouth and private part of that kid”. The victim was wrapped in a blanket and rushed to the hospital through her maternal uncle. 4-5 persons who had entered the house along with the police team insisted on having the custody of the appellant. Meanwhile, 150-200 more persons gathered at the spot. The appellant was rescued from the mob and taken to the police station. The mob became aggressive and started pelting stones on the police vehicles and the policemen. Some loss was also caused to the house of the appellant. P.W.4 is the same police official who lodged the report at Kadim Jalna Police Station (Exbt. 45). In his cross-examination, it was suggested to P.W.4 that there is a population of about 5000 in the vicinity and that he never accompanied Mr. Tejankar, ASI and he knew nothing about the incident.

26. Aslam (P.W.5) has deposed that deceased was daughter of his sister. The husband of his sister, Iliyas informed him on

06.03.2012 on telephone that deceased was missing and he asked him to bring a photograph of the victim to the police station. Aslam brought one photograph of the child to Kadim Jalna police station and lodged the missing report. The witness thereafter went to look for the missing child in Ambad Chouphuly Railway Station and Moti Bagh area. While he was still looking for her, one Hussain Pathan informed him on phone that the child had been found so he immediately went to the Indira Nagar area, Jalna to the house of the appellant. He noticed that the appellant was under the bed while the victim was lying on the bed. There were no clothes on the person of the child; she was wrapped in a blanket. He then took the victim to Deepak Hospital, Jalna, then to the Civil Hospital, Jalna where the doctors declared her brought dead. The witness has denied in the cross-examination that there was any quarrel between Ilias (P.W.9), father of the victim and the appellant.

27. Nand Kumar Vinayakrao Tope (P.W.6) is a police head constable, who was on duty at Kadim Jalna police station on 12.03.2012. He has deposed that on 11.03.2012 he was asked to carry muddemal along with a covering letter which he deposited on 12.03.2012 in C.A. Office, Mumbai. The

covering letter is Exbt. P-51. He also carried the blood sample of the appellant to C.A. Office, Mumbai and deposited the same on 14.03.2012. He has categorically stated in his cross-examination that the blood sample of the appellant bore signatures of the doctors and panches.

28. We may now briefly refer to the statement of Ilias (P.W.9) – father of the victim girl. He has deposed that the child was about two years old; he resides in Indira Nagar, Jalna along with his family, including his wife Aysha; the appellant was also residing in the same lane. On the date of occurrence, i.e, 06.03.2012 he was selling fruits in Nutan Vasahat area of Jalna when his wife informed him on phone at about 5.00 p.m. that their daughter had been missing since 4.00 p.m. He immediately went home where his father and brother had already reached. They started looking for the child in the adjoining localities. The witness informed the police about his missing daughter who also started searching for her. Azhar Usman meanwhile informed him that the appellant while under the `influence of liquor' was distributing chocolates to children. P.W.9 then went to the house of appellant which was found locked from outside. The missing report of the child was lodged around 8.00-8.30 p.m. The witness also passed on the

information to the police that he had gathered from Azhar. The Police party too, therefore, reached at the house of appellant and they broke open one of the doors. The witness and his brother entered the house along with the police and found that his daughter was lying under the bed and the appellant was also lying under the bed. His daughter was naked and there were injuries on her person aw well as private parts. Police laid the child on the bed and after covering her with a cloth she was taken to Deepak Hospital, Jalna where doctors informed that the victim was already dead. The appellant killed her by pressing her throat. The witness also identified his signatures on the report lodged by him Exbt. P-67. The witness in his cross-examination denied any dispute with the father of the appellant in connection with the purchase of the premises.

29. The other witness whose statement has a direct bearing on connecting the appellant with the crime is API Rajendrasingh Prabhusingh Gaur (P.W.12), who was attached to Kadim JalnaPolice Station on 06.03.2012. He arrested the appellant at 1.00 a.m. on 07.03.2012. The appellant was brought to the police station by ASI Tejankar. He has further stated that “blue jeans and green shirt on the person of

accused was seized. There were blood-stains and semen stains on it. The seizure panchnama Exbt. P-19 bears my signature and also of the accused." He has further deposed that the father of the victim produced knicker and frock worn by the deceased victim and also the blanket in which she was wrapped. Blue bangle, painjan were also seized under panchnama Exbt. P-32, which bears his signatures along with those of the panches. Muddemal articles shown at S.No. 125 in the chargesheet were the same. Muddemal article Nos. 6 and 7 in the chargesheet were the clothes of the appellant. The police officer (P.W.12) went to the spot and also collected a paper having blood-stains, piece of blue bangle, a passbook of post office and yellow piece of a saree having blood-stains. All these articles were seized under his signatures and of the panches. P.W.12 has further stated that the appellant was referred to Ghati Hospital, Aurangabad for his medical examination and report Nos. 21 and 21A were obtained. Appellant's blood sample was taken on 11.03.2012 from S.D.H. Ambad and all the blood samples were sent to Mumbai for DNA examination along with a forwarding letter Exbt. P-51. Since the said blood sample was not sent as per the prescribed format, another blood sample of the appellant was

taken by the Medical Officer at S.D.H. Ambad on 13.03.2012 and it was sent along with the covering letter Exbt. P-52. P.W.12 also sent viscera of the victim on 12.03.2012 along with letters which bear his signatures. The report of the viscera Exbt. P-81 was also obtained. P.W.12 had further identified the reports regarding clothes on the person of the victim and the appellant Exbt. P-82. P.W.12 has been subjected to a fairly long cross-examination but no discrepancy, having bearing on the merits of the case, has been extracted.

30. After a tenacious analysis of the testimonies of the witnesses with respect to the facts seen by each one of them, there remains no room to doubt that on 06.03.2012 the appellant after taking liquor was seen distributing chocolates to children sometime around 3.30/4.00 p.m. The victim child went missing around 4.00 p.m. as was informed to Ilias (P.W.9) by his wife at about 5.00 p.m. The information of her missing was immediately circulated amongst the family members/relatives and all of them desparately started searching for her. Meanwhile, the missing report was lodged with police as well. During such search operations by the police and also the family members of the missing child, it surfaced that the appellant was distributing chocolates to

allure children near Maroti Temple on that day and around that time the child went missing. The police-team, Iliyas – the father of the victim and his brother, genuinely apprehensive and smelling something foul, reached the house of the appellant and nabbed him red-handed under the bed with the victim in naked condition. It further stands established conclusively that deceased had been brutally assaulted and subjected to vaginal and unnatural intercourse. The victim had been inflicted multiple injuries on face, head, neck, external genetalia as well as inside the uterus and urethra. We may in this regard refer to, in particular, the deposition of Dilip Pralhadrai Tejan (P.W.3), who after making forceful entry inside the appellant's house, found him outraging the modesty of the child. The appellant had the special knowlege as to in what circumstances the victim child suffered those multiple injuries. The burden to prove that those injuries were not caused by him was on the appellant alone in view of Section 106 of the Evidence Act, which he has miserably failed to discharge though the evidence on record proves beyond doubt that the victim child was in unlawful custody of the appellant from about 4.00 p.m. till she breathed her last breath due to the beastly attack on her.

Scientific Evidence connecting the appellant with the Crime:

31. Dr. Bhanu Das Survase (P.W.7) was a member of the panel of doctors, who conducted post mortem on the dead body of the victim. He has testified that samples of swabs, blood sample and nails sample of the victim were taken by them. So is the statement of Dr. Bedarkar (P.W.8) who has stated that "various types of swabs, nasal swabs, superficial vaginal swab, deep vaginal smear on slide, superficial vaginal smear on slide, anus swab, skin scraping of blood on thigh and abdomen, nails and blood samples of xxx.. were taken." He has further deposed that all samples were seized and handed over to the police. Police Inspector Rajendrasingh Prabhusingh Guar (P.W.12) has stated on oath that after arresting the appellant, the blue jeans and green shirt on his person were seized and that there were blood-stains and semen stains on it. The knicker and frock of the victim along with blanket in which she was wrapped as well as various articles collected from the scene of crime including a piece of saree having blood-stains, were seized. The blood sample of the appellant was also taken and all the seized articles/samples were sent to Mumbai for examination.

32. Shrikant Hanamant Lade (P.W.11) Assistant Director in Forensic Science Laboratory, Mumbai, who got training in CDFD Institute, Hyderabad also, has authored about 30 papers on DNA, besides a well known book `Forensic Biology'. He has testified that they conducted the DNA test as per the guidelines issued by the Director of Forensic Science, Ministry of Home Affairs, New Delhi. Their office received the sealed muddemal from Kadim, Jalna Police Station sent vide letter dated 11.03.2012 as also the blood sample of the appellant sent vide letter dated 13.03.2012 (Exbt. P-52). The blood sample of the victim was received on 12.03.2012 along with samples of oral swabs and other articles. P.W.11 analysed the oral swabs and other articles of the victim, nasal swabs, superficial vaginal swab, deep vaginal smear on slide, superficial vaginal smear on slide, anus swab, skin scraping of blood on thigh and abdomen, nails as also other blood samples. P.W.11 has further deposed that,

> "I have extracted DNA from blood sample of Accused Ravi Ghumare, Superficial vaginal swab on Exhibit No.3, deep vaginal swab Exhibit No.4, Deep vaginal swab on slide Exhibit No.5 superficial vaginal swab on slide Exhibit No.6, anal swab Exhibit No.7, skin scrapping of blood on thigh and abdomen Exhibit No.8, blood & semen detected on Exhibit No.3 Jeans pant. This DNA was amplified by using Y-chromosome specific marker, Y-chromosome short tandem repeat

polymorphism [YSTR] and by using Polymerase Change Reaction [for short PCR] amplification technique. DNA profile was generated. I analyzed all these DNA profiles. My interpretation is male haplotypes of semen detected on Exhibit No.3 Superficial vaginal swab Exhibit No.4 deep vaginal sway Exhibit No.3 Superfinal vaginal swab Exhibit No.4 deep vaginal sway Exhibit No.5 deep vaginal smear on slide, Exhibit No.6 superficial vaginal smear on slide, Exhibit No.7 anal swab, Exhibit No.8 skin scrapings of blood on thigh and abdomen and blood and semen detected on Exhibit No.3, jeans pant of F.S X. ML Case No.DNA 951/12 matched with the male haplotypes of blood sample of Exhibit No.1, Ravi Ashok Ghumare of F.S.L. ML Case No.DNA-209/12.

My opinion is DNA profile of semen detected on Exhibit No.3 superficial vaginal swab, Exhibit 4 deep vaginal swab, Exhibit No.5 deep vaginal smear on slid Exhibit No.6 superficial vaginal smear on slide, Exhibit No.7 anal swab, Exhibit No.8, skin scrapings of blood on thigh and abdomen, blood and semen detected on Exhibit No.3 jeans pant of F.S.L ML Case No.DNA-951/112 and blood sample of Exhibit No.1 Ravi Ashok Ghumare of F.S.LML Case No.DNA-209/12 is from the same paternal progeny.

Accordingly, I prepared examination report filed with list Exhibit No.71 bear my signature, Contents are correct. It is at Exhibit No.75. Analysis of all above DNA profiles is shorn in table in the same report. Blue jeans pant and shirt of Accused Exhibit No.3 & 4 were referred by biological section of our office. I extracted DNA from blood and semen detected Exhibit No.3, full jeans pant, blood detected on Exhibit No.4 full bush shirt, and sample of Ravi Ghumare. Then this DNA was amplified by using 15 STR Loci using PCR amplification technique. My interpretation is DNA profile of blood and semen detected on Exhibit No.3 full jeans pant, blood detected on Exhibit No.4 full bush shirt [torn] of F.S.l. ML. Case No.DNA-951/12 and blood sample of Ravi Ashok Ghumare is identical and from one and same source of male origin. DNA

> profiles match with the maternal and paternal alleles in the source of blood."

33. Shrikant Lade (P.W.11) accordingly prepared the DNA report which is duly attested by the Assistant Chemical Analyser also. On seeing the contents of his report, P.W.11 has pertinently deposed that "I can opine on going through the reports Exbts. 75-76 that there were sexual intercourse and unnatural intercourse on the victim by the accused Ravi." [emphasis applied].

34. The unshakable scientific evidence which nails the appellant from all sides, is sought to be impeached on the premise that the method of DNA analysis "Y-STR" followed in the instant case is unreliable. It is suggested that the said method does not accurately identify the accused as the perpetrator; and unlike other methods say autosomal-STR analysis, it cannot distinguish between male members in the same lineage.

35. We are, however, not swayed by the submission. The globally acknowledged medical literature coupled with the statement of P.W.11 – Assistant Director, Forensic Science Laboratory leaves nothing mootable that in cases of sexual assualt, DNA of the victim and the perpetrator are often

mixed. Traditional DNA analysis techniques like “autosomal-STR” are not possible in such cases. Y-STR method provides a unique way of isolating only the male DNA by comparing the Y-Chromosome which is found only in males. It is no longer a matter of scientific debate that Y-STR screening is manifestly useful for corroboration in sexual assault cases and it can be well used as excalpatory evidence and is extensively relied upon in various jurisdictions throughout the world.[1&2]. Science and Researches have emphatically established that chances of degradation of the `Loci’ in samples are lesser by this method and it can be more effective than other traditional methods of DNA analysis. Although Y-STR does not distinguish between the males of same lineage, it can, nevertheless, may be used as a strong circumstantial evidence to support the prosecution case. Y-STR techniques of DNA analysis are both regularly used in various jurisdictions for identification of offender in cases of sexual assault and also as a method to identify suspects in unsolved cases. Considering the perfect match of the samples and there being nothing to discredit the

1“Y-STR analysis for detection and objective confirmation of child sexual abuse”, authored by Frederick C. Delfin – Bernadette J. Madrid – Merle P. Tan – Maria Corazon A. De Ungria.

2“Forensic DNA Evidence: Science and the Law”, authored by Justice Ming W. Chin, Michael Chamberlain, A,y Roja, Lance Gima

DNA analysis process, the probative value of the forensic report as well as the statement of P.W.11 are very high. Still further, it is not the case of the appellant that crime was committed by some other close relative of him. Importantly, no other person was found present in the house except the appellant.

36. There is thus overwhelming eye-witness account, circumstantial evidence, medical evidence and DNA analysis on record which conclusively proves that it is the appellant and he alone, who is guilty of committing the horrendous crime in this case. We, therefore, unhesitatingly uphold the conviction of the appellant.

Motive

37. Though the High Court has observed that `satisfaction of lust' and `removal of trace' was the appellant's motive but motive is not an explicit requirement under the Indian Penal Code, though `motive' may be helpful in proving the case of the prosecution in a case of circumstantial evidence. This Court has held in a catena of decisions that lack of motive would not be fatal to the case of prosecution as sometimes human beings act irrationally and at the spur of the moment. The case in hand is not entirely based on circumstantial

evidence as there are reliable eye-witness depositions who have seen the appellant committing the crime, may be in part. Such an unshakable evidence with dense support of DNA test does not require the definite determination of the motive of the appellant behind the gruesome crime.

Sentencing:

38. On the question of sentence, Learned Counsel for the appellant vehemently urged that the Courts below have been largely influenced by the `nature' and `brutality' of the crime while awarding the extreme sentence of death penalty. She referred to a list of as many as 35 decisions rendered by this Court in the cases of rape and murder of a child-victim in which the death sentences were commuted to life imprisonment. It was urged that brutality of the crime alone is not sufficient to impose the sentence of death; it is imperative on the State to establish that the convict is beyond reform and to this end it is relevant to see whether this is the first conviction or there has been previous crimes. The socio-economic conditions of the convict and the state of mind must be assessed by the Court before awarding such a penalty; the death penalty must not be awarded in a case of circumstantial evidence as any chink in the culpability calculus would

interdict the extreme penalty. Learned Counsel heavily relied upon (i) ***Kalu Khan v. State of Rajasthan*** (2015) 16 SCC 492 in which a three-Judge Bench of this Court commuted the death sentence in murder, abduction and rape, holding that the life imprisonment would serve the object of reformation, retribution and prevention and that giving and taking life is divine, which cannot be done by Courts unless alternatives are foreclosed. Another three-Judge Bench decision in ***Sunil v. State of Madhya Pradesh*** (2017) 4 SCC 393 where a 25-year old was held guilty of murder and rape of a 4-year old child, but not sent to gallows on the parameters that he could be reformed and rehabilitated, has been pressed into aid. She, in specific, cited several three-Judge Bench judgments where the young age of the accused was taken as a mitigating circumstance and in the absence of previous criminal history, the conduct of the accused while in custody and keeping in view the socio-economic strata to which he belonged, the possibility of reform was not ruled out and death penalty was commuted.

39. Learned Counsel for the appellant placed great reliance on a three-Judge Bench decision of this Court dated December 12, 2018 rendered in ***Rajindra Pralhadrao Wasnik v. State***

of Maharashtra in Review Petition(Crl.) Nos. 306-307/2013 in which the appellant was held guilty of rape and murder of a 3-year old child and the death sentence was substituted by the life imprisonment with a rider, "that the convict shall not be released for the rest of his life". This Court viewed in that case that (a) the case was solely based on circumstantial evidence, (b) probability of reformation and rehabilitation could not be ruled out, (c) DNA sample of the accused was taken, but not submitted in the Trial Court, and (d) the factum of pendency of two similar cases against the accused reflecting on his bad character was not admissible. Yet another three-Judge Bench decision of this Court in ***Parsuram v. State of Madhya Pradesh*** (Criminal Appeal Nos. 314-315 of 2013), decided on 19th February, 2019 where also death sentence awarded to a 22-year old who was found guilty of rape and murder of a minor girl, was commuted on the principles quoted above, has been relied upon.

40. The appellant's Counsel urged that the High Court ought not to have followed (i) ***Dhanjoy Chaterjee v. State of West Bengal*** (1994) 2 SCC 220, which was later on doubted by this Court in ***Shankar Kishanrao Khade v. State of Maharashtra*** (2013) 5 SCC 546 and (ii) ***Shivaji v. State of***

Maharashtra (2008) 3 SCC 269 which too was held to be *per curian* in ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*** (2009) 6 SCC 498. She very passionately urged that neither the High Court nor the Trial Court have given reasons for imposition of death penalty as both the Courts have been influenced by the nature of the crime. The mitigating circumstances of the appellant were inadequately represented. The brutality of the crime is the pre-dominant ground for imposition of death penalty though this Court has cautioned contrarily in a catena of decisions. Both the Courts have failed in recording a finding that the appellant was beyond reform and unless it was so found, the case cannot belong to the `rarest of the rare' category.

41. Relying upon the facts like (i) lack of criminal antecedents; (ii) no record of anti-social conduct prior to the crime; (iii) appellant being 25-30 years of age; (iv) brutality of crime cannot be a ground to award death sentence; and (v) the appellant belongs to poor section of society, his learned Counsel urged that this is not a fit case for imposition of death penalty.

42. Learned State Counsel, contrarily, maintained that the instant case satisfies the principle of `rarest of the rare cases'

and the appellant who committed the crime of rape and murder of a barely 2-year old innocent toddler in the most dastardly manner, does not deserve any liniency. According to him, the appellant is a menace to the society and to deter such like crimes against mankind, this Court should show no misplaced sympathy.

43. The question which eventually falls for consideration is whether the instant case satisfies the test of `rarest of the rare cases' and falls in such exceptional category where all other alternatives except death sentence, are foreclosed and whether this Court should explore the award of actual life imprisonment as prescribed by this Court in ***Swamy Shraddananda @ Murli Manohar Mishra v. State of Karnataka*** (2008) 13 SCC 767 which has got seal of approval of the Constitution Bench in ***Union of India v. V. Sriharan @ Murugan & Ors.*** (2016) 7 SCC 1.

44. The Constitution Bench of this Court in ***Bachan Singh v. State of Punjab*** (1980) 2 SCC 684, while upholding the constitutionality of death penalty under Section 302 IPC and the sentencing procedure embodied in Section 354(3) of the Code of Criminal Procedure, struck a balance between the protagonists of the deterrent punishment on one hand and the

humanity crying against death penalty on the other and elucidated the strict parameters to be adhered to by the Courts for awarding death sentence. While emphasising that for persons convicted of murder, life imprisonment is the `rule' and death setnence an `exception', this Court viewed that a rule abiding concern for the dignity of the human life postulates resistance in taking the life through laws instrumentality and that the death sentence be not awarded "save in the rarest of the rare cases" when the alternative option is foreclosed.

45. In ***Machhi Singh v. State of Punjab*** (1983) 3 SCC 470, this Court formulated the following two questions to be considered as a test to determine the rarest of the rare cases in which the death sentence can be inflicted:

> "(a) Is there something uncommon, which renders sentence for imprisonment for life inadequate calls for death sentence?
>
> (b) Rather the circumstances of the crime such that there is no alternative, but to impose the death sentence even after according maximum weightage to the mitigating circumstances which speaks in favour of the offender?"

46. ***Machhi Singh*** then proceeded to lay down the circumstances in which death sentence may be imposed for the crime of murder and held as follows:-

"32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self- preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. ***Manner of commission of murder***

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,

(i) when the house of the victim is set aflame with

the end in view to roast him alive in the house.

(ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. ***Motive for commission of murder***

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

III. ***Anti-social or socially abhorrent nature of the crime***

35. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(b) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. ***Magnitude of crime***

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

are committed.

V. ***Personality of victim of murder***

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

47. It thus spells out from ***Machhi Singh*** (supra) that extreme penalty of death sentence need not be inflicted except in gravest cases of extreme culpability and where the victim of a murder is ... (a) an innocent child who could not have or has not provided even an excuse, much less a provocation for murder...", such abhorent nature of the crime will certainly fall in the exceptional category of gravest cases of extreme culpability.

48. This Court in ***Machhi Singh's*** case confirmed the death sentence awarded to Kashmir Singh - one of the appellants as he was found guilty of causing death to a poor defenceless child (Balbir Singh) aged 6 years. The appellant Kashmir Singh was categorised as a person of depraved mind with grave propensity to commit murder.

49. ***Bachan Singh*** and ***Machhi Singh***, the Constitution Bench and the Three-Judge Bench decisions respectively, continue to serve as the foundation-stone of contemporary sentencing jurisprudence though they have been expounded or distinguished for the purpose of commuting death sentence, mostly in the cases of (i) conviction based on circumstantial evidence alone; (ii) failure of the prosecution to discharge its onus re: reformation; (iii) a case of residual doubts; and (iv) where the other peculiar `mitigating' circumstances outweighed the `aggravating' circumstances.

50. It is noteworthy that the object and purpose of determining quantum of sentence has to be `society centric' without being influenced by a `judge's' own views, for society is the biggest stake holder in the administration of criminal justice system. A civic society has a `fundamental' and `human' right to live free from any kind of psycho fear, threat, danger or insecurity at the hands of anti-social elements. The society legitimately expects the Courts to apply doctrine of proportionality and impose suitable and deterent punishment that commensurate(s) with the gravity of offence.

51. Equally important is the stand-point of a `victim' which

includes his/her guardian or legal heirs as defined in Section 2(wa), Cr.P.C. For long, the criminal law had been viewed on a dimensional plane wherein the Courts were required to adjudicate between the accused and the State. The `victim'- the de facto sufferer of a crime had no say in the adjudicatory process and was made to sit outside the court as a mute spectator. The ethos of criminal justice dispensation to prevent and punish `crime' would surreptitiously turn its back on the `victim' of such crime whose cries went unheard for centuries in the long corridors of the conventional apparatus. A few limited rights, including to participate in the trial have now been bestowed on a `victim' in India by the Act No. 5 of 2009 whereby some pragmatic changes in Cr.P.C. have been made.

52. The Sentencing Policy, therefore, needs to strike a balance between the two sides and count upon the twin test of (i) deterrent effect, or (ii) complete reformation for integration of the offender in civil society. Where the Court is satisfied that there is no possibility of reforming the offender, the punishments before all things, must be befitting the nature of crime and deterrent with an explicit aim to make an example out of the evil-doer and a warning to those who are still

innocent. There is no gainsaying that the punishment is a reflection of societal morals. The subsistence of capital punishment proves that there are certain acts which the society so essentially abhores that they justify the taking of most crucial of the rights – the right to life.

53. If the case-law cited on behalf of the appellant where this Court commuted death sentence into life imprisonment for the `rest of the life' or so is appreciated within these contours, it won't need an elaborate discussion that the peculiarity of the facts and circumstances of each case prompted this Court to invoke leniency and substitute the death sentence with a lesser punishment. The three-Judge Bench decision in *Rajendra Pralhadrai Washnik* (supra) is clearly distinguisahable on this very premise as that was a case, not only based on circumstantial evidence but where even the DNA sample of the accused though taken was not submitted in the trial Court. It was thus a case of "residuary doubts" as explained by this Court in ***Ashok Debbarma v. State of Tripura*** (2014) 4 SCC 747. The same analogy takes away the persuvasive force in *Parsuram* (supra), for that too was a case where the guilt was established only on the basis of circumstantial evidence.

54. Contrary to it, a Three-Judge Bench of this Court in ***Vsanta Sampat Dupare v. State of Maharashtra*** (2017) 6 SCC 631, which is very close on facts to this case, found the convict guilty of raping and battering to death a little girl of 4 years after luring her by giving chocolates. The prosecution established its case by relying upon the `last seen theory' as the appellant was seen taking away the victim on a bicycle on the fateful day. The eye-witness account, the disclosure statement made by the accused coupled with the other circumstantial evidence nailed him. The death setence was confirmed by this Court on 26th November, 2014. He, thereafter filed a Review Petition after about three years, claiming that post-confirmation of his death sentence, he had improved his academic qualification, completed the Gandhi Vichar Pariksha and had also participated in the Drawing Competition organised sometime in January, 2016. It was also asserted that his jail record was without any blemish and there was a possibility of the accused being reformed and rehabilitated. This Court dismissed the Review Petition by way of a self-speaking judgment, holding that the aggravating circumstances, namely, the extreme depravity and the barbaric manner in which the crime was committed and the

fact that the victim was a helpless child of four years clearly outweigh the mitigating circumstances now brought on record.

55. In ***Khushwinder Singh v. State of Punjab***, (2019) 4 SCC 415, this Court affirmed the death sentence of an accused who had killed six innocent persons, out of which two were minors, by kidnapping three persons, drugging them with sleeping tablets, and then pushing them into a canal. Thereafter, three other members of the same family were also done away with. This Court upheld the award of capital punishment observing as follows:-

> "14. Now, so far as the capital punishment imposed by the learned Sessions Court and confirmed by the High Court is concerned, at the outset, it is required to be noted that, as such, the learned counsel appearing on behalf of the accused is not in a position to point out any mitigating circumstance which warrants commutation of death sentence to the life imprisonment. In the present case, the accused has killed six innocent persons, out of which two were minors — below 10 years of age. Almost, all the family members of PW 5 were done to death in a diabolical and dastardly manner. Fortunately, or unfortunately, only one person of the family of PW 5 could survive. In the present case, the accused has killed six innocent persons in a pre-planned manner. The convict meticulously planned the time. He first kidnapped three persons by way of deception and took them to the canal and after drugging them with sleeping tablets, pushed them in the canal at midnight to ensure that the crime is not detected. That, thereafter he killed another three persons in the second stage/instalment. Therefore, considering

> the law laid down by this Court in *Mukesh v. State (NCT of Delhi*), (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673] , the case would fall in the category of the "rarest of rare case" warranting death sentence/capital punishment. The aggravating circumstances are in favour of the prosecution and against the accused.
>
> Therefore, striking a balance between the aggravating and mitigating circumstances, we are of the opinion that the aggravating circumstance would tilt the balance in favour of capital punishment. In the facts and circumstances of the case, we are of the opinion that there is no alternative punishment suitable, except the death sentence. The crime is committed with extremist brutality and the collective conscience of the society would be shocked. Therefore, we are of the opinion that the capital punishment/death sentence imposed by the learned Sessions Court and confirmed by the High Court does not warrant any interference by this Court. Therefore, we confirm the death sentence of the accused imposed by the learned Sessions Court and confirmed by the High Court while convicting the appellant for the offence punishable under Section 302 IPC."

56. In a recent Three-Judge Bench decision of this Court in ***Manoharan v. State by Inspector of Police, Variety Hall Police Station, Coimbatore***, (2019) SCC Online 951, the appellant's capital punishment was confirmed by the High Court in a case in which he along with his co-accused was held guilty of kidnapping a 10-year old girl and her 7-year old brother. After committing gang rape of the minor girl, both the victims were done away with by throwing them into a canal

which caused their death by drowning. This Court (by majority) upheld the death sentence, concluding as follows:-

> "41. In the circumstances, we have no doubt that the trial court and High Court have correctly applied and balanced aggravating circumstances with mitigating circumstances to find that the crime committed was cold blooded and involves the rape of a minor girl and murder of two children in the most heinous fashion possible. No remorse has been shown by the Appellant at all and given the nature of the crime as stated in paragraph 84 of the High Court's judgment it is unlikely that the Appellant, if set free, would not be capable of committing such a crime yet again. The fact that the Appellant made a confessional statement would not, on the facts of this case, mean that he showed remorse for committing such a heinous crime. He did not stand by this confessional statement, but falsely retracted only those parts of the statement which implicated him of both the rape of the young girl and the murder of both her and her little brother. Consequently, we confirm the death sentence and dismiss the appeals."

57. It is equally apt at this stage to refer the recent amendments carried out by Parliament in the Protection of Children from Sexual Offences Act, 2012 by way of The Protection of Children from Sexual Offences (Amendment) Act, 2019 as notified on 6th August, 2019. The unamended Act defines "Aggravated Penetrative Sexual Assault" in Section 5, which included, "whoever commits aggravated penetrative sexual assault on a child below the age of 12 years." Originally, the punishment for an aggravated sexual assault

was rigorous imprisonment for a term not less than 10-years but which may extend for imprisonment for life with fine.

58. The recent amendment in Section 6 of 2012 Act has substituted the punishment as follows:-

> "Post the Amendment, Section 6 has been substituted as follows:-
>
> "6. (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."
>
> [Emphasis applied]

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

60. The Legislature has impliedly distanced itself from the propounders of "No-Death Setence" in "No Circumstances"

theory and has re-stated the will of the people that in the cases of brutal rape of minor children below the age of 12 years without murder of the victim, `death penalty' can also be imposed. In the Statement of Objects and Reasons of amendment, Parliament has shown its concern of the fact that "in recent past incidents of child sexual abuse cases administering the inhuman mindset of the accused, who have been barbaric in their approach to young victim, is rising in the country." If the Parliament, armed with adequate facts and figures, has decided to introduce capital punishment for the offence of sexual abuse of a child, the Court hitherto will bear in mind the latest Legislative Policy even though it has no applicability in a case where the offence was committed prior thereto. The judicial precedents rendered before the recent amendment came into force, therefore, ought to be viewed with a purposive approach so that the legislative and judicial approaches are well harmonised.

61. In the light of above discussion, we are of the considered opinion that sentencing in this case has to be judged keeping in view the parameters originating from ***Bachan Singh*** and ***Machhi Singh*** cases and which have since been strengthened, explained, distinguished or followed in a catena

of subsequent decisions, some of which have been cited above. Having said that, it may be seen that the victim was barely a two-year old baby whom the appellant kidnapped and apparently kept on assaulting over 4-5 hours till she breathed her last. The appellant who had no control over his carnal desires surpassed all natural, social and legal limits just to satiate his sexual hunger. He ruthlessly finished a life which was yet to bloom. The appellant instead of showing fatherly love, affection and protection to the child against the evils of the society, rather made her the victim of lust. It's a case where trust has been betrayed and social values are impaired. The unnatural sex with a two-year old toddler exhibits a dirty and perverted mind, showcasing a horrifying tale of brutality. The appellant meticulously executed his nefarious design by locking one door of his house from the outside and bolting the other one from the inside so as to deceive people into believing that nobody was inside. The appellant was thus in his full senses while he indulged in this senseless act. Appellant has not shown any remorse or repentance for the gory crime, rather he opted to remain silent in his 313 Cr.P.C. statement. His deliberate, well-designed silence with a standard defence of `false' accusation reveals his lack of

kindness or compassion and leads to believe that he can never be reformed. That being so, this Court cannot write off the capital punishment so long as it is inscribed in the statute book.

62. All that is needed to be followed by us is what O' Conner J. very aptly observed in *California v. Ramos*, 463 U.S. 992 that the "qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination" and in order to ensure that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has to be with the *procedure* by which the death sentence is imposed than with the substantive factors laid before it.

63. For the reasons aforestated, we dismiss the appeals and affirm the death sentence.

.....J.
(ROHINTON FALI NARIMAN)

..... J.
(SURYA KANT)

NEW DELHI
DATED : 03.10.2019

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS. 1488-1489 OF 2018

Ravi S/o Ashok Ghumare ...Appellant

Versus

The State of Maharashtra ...Respondent

J U D G M E N T

R. Subhash Reddy, J.

1. I have gone through the opinion of my learned Brother, Surya Kant, J. I am in agreement with the view expressed in the said judgment, to the extent of confirming the conviction recorded against the appellant, for the offence under Sections 363, 376, 377 and 302 of the Indian Penal Code, 1860 (for short 'IPC'). However, as I am of the view that, this is not a fit case where the appellant is to be awarded capital punishment, i.e, death penalty, as such, I wish to share my view separately, in this judgment.

2. The appellant was tried for committing the rape and murder on the minor girl child *"Zoyabano"* and he was

charged for offence punishable under Sections 363, 376, 377 and 302 IPC. After the trial, learned Additional Sessions Judge at Jalna, by judgment dated 16.09.2015, has held that appellant is guilty for the charges framed against him.

3. By order dated 18.09.2015, the trial court, by recording a finding that crime committed by the appellant is heinous, brutal and inhuman, convicted and sentenced the appellant to death for the offence punishable under Section 302 IPC and ordered that he shall be hanged by neck till he is dead, subject to confirmation by the High Court as per Section 366 of Code of Criminal Procedure and also imposed a fine of Rs.500/- (Rupees Five Hundred Only). Similarly, learned Additional Sessions Judge has convicted the appellant for offence punishable under Section 376 of IPC and ordered sentence to suffer life imprisonment and a fine of Rs. 500/-(Rupees Five Hundred Only) and a sentence of rigorous imprisonment for 10 years for the offence punishable under Section 377 IPC with a fine of Rs.500/-(Rupees Five Hundred Only) and a sentence of R.I. for one year for the offence punishable under Section 363 with a fine of Rs.500/-(Rupees Five Hundred Only). Further, it was ordered

that all the sentences of imprisonment shall run concurrently.

4. The reference which was made to the High Court under Section 366 was numbered as Confirmation Case No.1 of 2015 and the appeal preferred by the appellant was numbered as criminal appeal No. 783 of 2015. The High Court by the Common Judgment and Order dated 20.01.2016, while dismissing the criminal appeal preferred by the appellant, has confirmed the death sentence imposed under Section 302 IPC. Hence, these appeals.

5. I am in agreement with the view expressed by my learned Brother, to the extent of upholding conviction, as such, there is no need to appreciate the evidence on-record in detail. As such, I confine consideration of such evidence on-record to the extent to modify the sentence on the appellant.

6. For the conviction recorded against the appellant for the offences alleged against him, by balancing the aggravated and mitigated circumstances, I am of the view that the death sentence imposed on the appellant requires modification to that of the life imprisonment, without any remission, for the following reasons.

7. For the offence under Section 302 of IPC the punishment prescribed for committing murder is death or imprisonment for life. At first instance, challenge to Section 302 of IPC was turned down by this Court in the case of ***Jagmohan Singh v. State of Uttar Pradesh***[3]. Further, in Constitution Bench, this Court in the case of ***Bachan Singh v. State of Punjab***[4]***,*** concluded that Section 302, providing death penalty for offence of murder is constitutional. In the aforesaid judgment, this Court has indicated the standards and norms, restricting the area for imposition of death penalty. Further, for considering the imposition of sentence of death, aggravating and mitigating circumstances were also broadly indicated. In the aforesaid judgment, while considering the scope of Section 235(2) read with Section 354(3) of the Code of Criminal Procedure, this Court has held that, in fixing the degree of punishment or in making the choice of sentence for various offences, including one under Section 302, IPC, the Court should not confine its consideration "principally or merely" to the circumstances connected with the particular crime, but also due consideration to the circumstances of the criminal. However, it is

3 1973(1) SCC 20
4 1980(2) SCC 684

observed that, what is the relative weight to be given to the aggravating and mitigating factors, depends on facts and circumstances of each case. The aggravating and mitigating circumstances, as suggested by Dr.Chitale were mentioned in the Judgment. Paragraphs 202 to 207 of the judgment reads as under:

> "**202**. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v. Georgia [33 L Ed 2d 346 : 408 US 238 (1972)] , in general, and clauses 2 (a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr Chitale has suggested these "aggravating circumstances":
>
> ***"Aggravating circumstances***: A court may, however, in the following cases impose the penalty of death in its discretion:
>
> (a) if the murder has been committed after previous planning and involves extreme brutality; or
>
> (b) if the murder involves exceptional depravity; or
>
> (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—
>
> (i) while such member or public servant was on duty; or
>
> (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."

203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

204. In *Rajendra Prasad* [(1979) 3 SCC 646 : 1979 SCC (Cri) 749] , the majority said: "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and Society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)". Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302 of the Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its "ethos" nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of

Section 302 of the Penal Code, fully apply to the case of Section 354(3), Code of Criminal Procedure, also. The same criticism applies to the view taken in Bishnu Deo Shaw v. State of W.B. [(1979) 3 SCC 714 : 1979 SCC (Cri) 817] which follows the dictum in Rajendra Prasad [(1979) 3 SCC 646 : 1979 SCC (Cri) 749] .

205. In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first-degree which, in the absence of any ameliorating circumstances, is punishable with death. Such rigid categorisation would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of 'murder' or its further classification. Then, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of "special reasons" in Section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

206. Dr Chitale has suggested these mitigating factors:

"Mitigating circumstances— In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a "child", that is, "a person who at the date of murder was less than 16 years of age", cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children."

8. Further in the three Judge Bench Judgment of this Court, in the case of ***Machhi Singh and Ors. v. State***

of Punjab[5], this Court has considered tests to determine "rarest of rare" case, to impose death sentence under Section 302 IPC.

9. In the aforesaid judgment, this Court has held that the following questions may be asked and answered, in order to apply the guidelines indicated in ***Bachan Singh*** case[2], where the question of imposing the death sentence arises.

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

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

10. In this judgment, it is held by this Court that the guidelines indicated in ***Bachan Singh*** *case*[2], will have to be culled out and applied to the facts of each individual case, where the question of imposing death sentence arises. Paragraph 38 of the said judgment reads as under:

> **"38.** In this background the guidelines indicated in *Bachan Singh case*[2] will have

5 1983(3) SCC 470

to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following prepositions emerge from *Bachan Singh case*[2] *:*

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

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

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

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

11. In this judgment, on facts, by holding that it is a cold-blooded, calculated and gruesome multiple murders, as a reprisal in a family feud and 17 helpless, defenceless, innocent men, women and children were gunned down while asleep on the same

night in quick succession in different neighbouring villages, confirmed the death sentence imposed on Machhi Singh and two others.

12. In this case, learned counsel for the appellant has contended that the Trial Court as well as the High Court, fell in error in confining nature and brutality of crime alone, to award the sentence of death. It is submitted that nature of crime alone is not sufficient to impose the sentence of death, unless State proves by leading cogent evidence that the convict is beyond reform and rehabilitation. It is submitted that the socio-economic conditions of the convict and the circumstances under which crime is committed are equally relevant for the purpose of considering whether a death penalty is to be imposed or not. It is submitted that as the case on hand, rests on circumstantial evidence, same is also the ground not to impose capital punishment, of death.

13. In support of his argument, learned counsel for the appellant has relied on the three Judge Bench Judgment of this Court, in the case of ***Kalu Khan v. State of Rajasthan***[6], wherein the accused was charged for offence of abduction, rape and murder of 4 year old

6(2015) 16 SCC 492

girl child, death sentence was commuted to life imprisonment. Paragraphs 32 and 33 of the said judgment reads as under:

> "**32.** In our considered view, in the impugned judgment and order, the High Court has rightly noticed that life and death are acts of the divine and the divine's authority has been delegated to the human courts of law to be only exercised in exceptional circumstances with utmost caution. Further, that the first and foremost effort of the Court should be to continue the life till its natural end and the delegated divine authority should be exercised only after arriving at a conclusion that no other punishment but for death will serve the ends of justice. We have critically appreciated the entire evidence in its minutest detail and are of the considered opinion that the present case does not warrant award of the extreme sentence of death to the appellant-accused and the sentence of life imprisonment would be adequate and meet the ends of justice. We are of the opinion that the four main objectives which the State intends to achieve, namely, deterrence, prevention, retribution and reformation can be achieved by sentencing the appellant-accused for life.
>
> **33.** Before parting, we would reiterate the sentiment reflected in the following lines by this Court in *Shailesh Jasvantbhai case* [Shailesh Jasvantbhai v. State of Gujarat, (2006) 2 SCC 359 : (2006) 1 SCC (Cri) 499] : (SCC pp. 361-62, para 7)
>
> "7. … Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a cornerstone of the edifice of 'order' should meet the challenges confronting the

> society. Friedman in his Law *in a Changing Society* stated that: 'State of criminal law continues to be — as it should be — a decisive reflection of social consciousness of society.' Therefore, in operating the sentencing system, law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be, and tempered with mercy where it warrants to be."

14. In the case of ***Lehna v. State of Haryana***[7], it was held that the special reasons for awarding the death sentence must be such that compel the court to conclude that it is not possible to reform and rehabilitate the offender. Paragraph 14 of the said judgment reads as under:

> ".....Death sentence is ordinarily ruled out and can only be imposed for "special reasons", as provided in Section 354(3). There is another provision in the Code which also uses the significant expression "special reason". It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898, (in short "the old Code"). Section 361 which is a new provision in the Code makes it mandatory for the court to record "special reasons" for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever itis possible to do so and to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and

7(2002) 3 SCC 76

> rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors."

15. Learned counsel for the appellant has also relied on the three Judge Bench Judgment of this Court, in the case of ***Sunil v. State of Madhya Pradesh***[8]***,*** wherein the accused, aged about 25 years at the relevant time, was charged for offence of rape and murder of 4 year old child, death sentence was commuted to that of life imprisonment. In the said judgment, this Court has held that one of the compelling/mitigating circumstances that must be acknowledged in favour of the appellant is his young age at which he had committed the crime and further that the accused can

8(2017) 4 SCC 393

be reformed and rehabilitated, are the other circumstances which could not but have been ignored by courts below.

16. Reliance is also placed by learned counsel for the appellant, on the three Judge Bench Judgment of this Court, in the case of ***Rajendra Pralhaderao Wasnik v. State of Maharashtra***[9], where accused was found guilty of rape and murder of 3 year old child, death sentence was substituted by life imprisonment, with a rider that the convict shall not be released from custody for the rest of his normal life.

17. The aforesaid three judgments relied on by the learned counsel for the appellant, supports the case of the appellant, when we consider to balance the aggravating and mitigating circumstances of this case on hand.

18. From the deposition of PW-9, it is clear that he is a fruit vendor, residing in Nutan Vasahat area, Jalna and the appellant also resides in the same lane. Further, it is also clear from his deposition that accused was under influence of liquor, on the day of occurrence of crime. As such, it is clear that on the day of occurrence, he was under influence of liquor

9Review Petition (Criminal) Nos. 306-307 of 2013

and he is aged about 25 years and he had no previous history of any crimes and in absence of any evidence from the side of the prosecution to show that he cannot be reformed and rehabilitated to bring in to the main stream of the society, the judgments relied on by learned counsel for the appellant, fully support the case of the appellant, to modify the sentence.

19. In the case of ***Machhi Singh and Ors. v. State of Punjab***[3]***,*** this Court has confirmed that the death sentence to Machhi Singh and two others, mainly by recording a finding that it was a cold-blooded, calculated and gruesome murders, as a reprisal in a family feud, in which, 17 helpless, defenceless, innocent men, women and children were gunned down, as such, same can be termed as "rarest of rare" case. In the case on hand, it cannot be said to be a pre-planned and pre-meditated one. To record a finding that a particular crime committed is a pre-planned and pre-meditated one, something more is required of planning to commit a murder on a day earlier to the date of occurrence. In the case on hand, where it is clear from the evidence on-record that the appellant was under influence of liquor and committed the offence, cannot be termed as a pre-planned one, to

count the same as an aggravating circumstance, for balancing aggravating and mitigating circumstances.

20. In the case of ***Sandesh v. State of Maharashtra***[10], this Court, once again, acknowledged the principle that it is for the prosecution to lead evidence, to show that there is no possibility that the convict cannot be reformed. Similarly, in ***Mohinder Singh v. State of Punjab***[11], it was held in Paragraph 23 of the judgment as under:

> ".....As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the "rarest of rare" doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme."

21. In the case of ***Sushil Sharma v. State (NCT of Delhi)***[12], this Court acknowledged that among various factors, one of the factors required to be taken into consideration, for awarding or not awarding capital punishment, is the possibility of reformation and rehabilitation of the convict. This acknowledgment was made in paragraph 103 of the judgment, which reads as under:

10(2013) 2 SCC 479
11(2013) 3 SCC 294
12(2014) 4 SCC 317

> "**103.** In the nature of things, there can be no hard-and-fast rules which the court can follow while considering whether an accused should be awarded death sentence or not. The core of a criminal case is its facts and, the facts differ from case to case. Therefore, the various factors like the age of the criminal, his social status, his background, whether he is a confirmed criminal or not, whether he had any antecedents, whether there is any possibility of his reformation and rehabilitation or whether it is a case where the reformation is impossible and the accused is likely to revert to such crimes in future and become a threat to the society are factors which the criminal court will have to examine independently in each case. Decision whether to impose death penalty or not must be taken in the light of guiding principles laid down in several authoritative pronouncements of this Court in the facts and attendant circumstances of each case."

22. In the case of ***Amit v. State of Maharashtra***[13], this Court adverted to the prior history of the accused and noted that there is no record of any previous heinous crime and also there is no evidence that he would be a danger to the society if the death penalty is not awarded to him. Paragraph 10 of the said judgment reads as under:

> "**10.** The next question is of the sentence. Considering that the appellant is a young man, at the time of the incident his age was about 20 years; he was a student; there is no record of any previous heinous crime and also there is no evidence that he will be a danger to the society, if the death

13(2003) 8 SCC 93

> penalty is not awarded. Though the offence committed by the appellant deserves severe condemnation and is a most heinous crime, but on cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases......"

23. In the case of ***Surendra Pal Shivbalakpal v. State of Gujarat***[14], this Court has held that the involvement in any previous criminal case by the accused, was considered to be a factor, to be taken into consideration, for the purpose of awarding death sentence. Paragraph 13 of the said judgment reads as under:

> "**13.** The next question that arises for consideration is whether this is a "rarest of rare case"; we do not think that this is a "rarest of rare case" in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case. We confirm conviction of the appellant on all the counts, but the sentence of death penalty imposed on him for the offence under Section 302 IPC is commuted to life imprisonment."

24. Further, this case on hand, rests solely on the

circumstantial evidence.

25. In the case of ***Bishnu Prasad Sinha v. State of Assam***[15], this Court has held that ordinarily, death penalty would not be awarded, if the guilt of the accused is proved by circumstantial evidence, coupled with some other factors that are advantageous to the convict. Paragraph 55 of the said judgment reads as under:

> "**55.** The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, Appellant 1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt."

26. Further, in the case of ***Aloke Nath Dutta v. State of West Bengal***[16], the principle that death penalty should ordinarily not to be awarded, in a case arising out of circumstantial evidence, was broadly accepted with the

15 (2007) 11 SCC 467
16(2007)12 SCC 230

rider that there should be some "special reason" for awarding death penalty. Paragraph 174 of the said judgment reads as under:

> "**174.** There are some precedents of this Court e.g. Sahdeo v. State of U.P.[(2004) 10 SCC 682] and Sk. Ishaque v. State of Bihar[(1995) 3 SCC 392] which are authorities for the proposition that **if the offence is proved by circumstantial evidence ordinarily death penalty should not be awarded. We think we should follow the said precedents** instead and, thus, in place of awarding the death penalty, impose the sentence of rigorous imprisonment for life as against Aloke Nath. **Furthermore we do not find any special reason for awarding death penalty which is imperative.**"

27. In the case of ***Swamy Shraddananda v. State of Karnataka***[17], this Court has held that the convictions based on seemingly conclusive circumstantial evidence, should not be presumed to be fool-proof. Paragraph 87 of the said judgment reads as under:

> "**87.** It has been a fundamental point in numerous studies in the field of death penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as foolproof incidences and the fact that the same are based on circumstantial evidence must be a definite factor at the sentencing stage deliberations, considering that capital

17(2007) 12 SCC 288

> punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder."

28. From the above judgments referred, it is clear that in a case of conviction based on circumstantial evidence, ordinarily the extreme punishment of death penalty should not be imposed. In a given case, guilt of the accused is proved beyond reasonable doubt, by establishing chain of circumstances, resulting in conviction, such cases, by considering balancing aspects of aggravating and mitigating circumstances, in appropriate cases, death penalty can be imposed. But, at the same time ordinarily, if no special reasons exist, in a case of conviction based on circumstantial evidence, death penalty should not be imposed. In this case on hand, the conviction of the appellant is mainly based on circumstantial evidence. On this ground also, I am of the view that the death sentence, imposed on him, is to be modified.

29. From the materials placed on record, it is clear that accused is a permanent resident of Indira Nagar, Jalna. The father of the deceased, PW-9, himself has stated that he is a fruit vendor in Nutan Vasahat

area, Jalna, and accused also resides in the same lane, nearby his residence. It is also clear from the evidence of PW-9, to the East and West side of the house of the appellant, a person having buffaloes used to reside at the relevant time. From such evidence on-record, it is easy to assess the socio-economic condition of the appellant and it can certainly be said that he is a person below poverty line.

30. In a judgment of this Court, in the case of ***Sunil Damodar Gaikwad v. State of Maharashtra***[18], while holding that court must not only look at the crime but also offender and to give due consideration to circumstances of offender, has further held that in imposing penalty, socio-economic condition can be considered as one of the mitigating factors, in addition to those indicated in ***Bachan Singh***[2] and ***Machhi Singh***[3]. Para 20 of the said judgment reads as under:

> **"20.** When there are binding decisions, judicial comity expects and requires the same to be followed. Judicial comity is an integral part of judicial discipline and judicial discipline the cornerstone of judicial integrity. No doubt, in case there are newer dimensions not in conflict with the ratio of the larger Bench decisions or where there is anything to be added to and explained, it is always permissible to

18(2014) 1 SCC 129

> introduce the same. Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] cases. Thus, we are bound to analyse the facts in the light of the aggravating and mitigating factors indicated in the binding decisions which have influenced the commission of the crime, the criminal, and his circumstances, while considering the sentence.

31. In view of the aforesaid judgments of this Court and evidence on record in this case, which establishes the socio-economic condition of the appellant, as a person below poverty line, can also be considered as one of the mitigating factors, while balancing the aggravating and mitigating factors.

32. I am conscious of recent amendments carried out to the Protection of Children from Sexual Offences Act, 2012 (for short ‘POCSO Act’), by way of Protection of Children from Sexual Offences Amendment Act, 2019. By virtue of the said amendments, taking note of increasing trend of crimes against the children, minimum sentence is increased for various offences and for offence under Section 6 of the Act i.e aggravated penetrative sexual assault, minimum imprisonment, which shall not be less than 20 years, which may

extend to natural life or penalty of death. Prior to the amendments made by recent amending Act of 2019, for offence under POCSO, death penalty was not provided. By virtue of the amendments made in appropriate cases, for offences falling under provisions of the POCSO Act alone, a penalty of death sentence can be imposed. In the case on hand, the offence was committed prior to coming into force, of the Act.

33. Even then, we cannot forget the legislative intent which resulted in amendments to POCSO, while dealing with the offences against the children. At the same time, even for imposing the death sentence, for cases arising out of the provisions under POCSO Act, 2012, it is the duty of the courts to balance the aggravating and mitigating circumstances. To balance such aspects, the guidelines in ***Bachan Singh v. State of Punjab***[2] and further reiterated in the case of ***Machhi Singh and Ors. v. State of Punjab***[3] and in the case of ***Sushil Murmu v. State of Jharkhand***[19]***,*** will continue to apply. Further, repeatedly, it is said by this Court, in the various judgments that the aggravating and mitigating factors are to be

19(2004) 2 SCC 338

considered with reference to the facts of each case and there cannot be any hard and fast rule for balancing such aspects.

34. I am clear in my mind that in this case on hand, the mitigating circumstances of the appellant, dominate over the aggravating circumstances, to modify the death sentence to that of life imprisonment. Even as per the case of prosecution, the appellant was under influence of liquor at the time of committing the offence, and there is no evidence on record from the side of prosecution, to show that there is no possibility of reformation and rehabilitation of the appellant. Further, age of the appellant was 25 years at the relevant time and conviction is solely based on circumstantial evidence. Taking all such aspects into consideration, the death penalty imposed on the appellant is to be modified to that of life imprisonment, for the offence under Section 302 IPC.

35. Long line of cases decided by this Court are cited by learned counsel for the appellant, in similar set of facts and circumstances, this Court has modified the death sentence to that of imprisonment for life, without any remission. Few recent decisions of this Court are:

36. In a three Judge Bench Judgments of this Court, in the case of ***Nand Kishore v. State of Madhya Pradesh***[20] dated 18.01.2019 and in the case of ***Raju Jagdish Paswan v State of Maharashtra***[21] dated 17.01.2019, for which I am party, in similar circumstances, this Court has modified the death penalty to that of life imprisonment, without any remission.

37. Further, in a recent three Judge Bench Judgment of this Court, in the case of ***Vijay Raikwar v. State of Madhya Pradesh***[22]***,*** where there was an offence involving rape and murder of a girl aged about 7½ years, while confirming the conviction of the offences under Section 376(2)(f) and Section 201 IPC and also under Sections 5(i), 5(m) and 5(r) read with Section 6 of the POCSO Act, this Court commuted the death sentence to life imprisonment.

38. In the aforesaid judgments, in a similar set of facts, this Court has modified the sentence to life imprisonment. In this case also there is no previous crime record for the appellant. The above referred judgment, supports the case of the appellant.

39. For the aforesaid reasons, these appeals are allowed

20 Criminal Appeal No. 94 of 2019
21Criminal Appeal No. 88-89/2019
22(2019) 4 SCC 210

in part. While confirming the conviction recorded by the Trial Court, death sentence imposed on the appellant is modified to that of life imprisonment i.e to suffer for life till his natural death, without any remission/commutation.

.....J
[R.Subhash Reddy]

New Delhi;

October 03,2019