

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

CRIMINAL CONFIRMATION CASE NO. 01 OF 2015

The State of Maharashtra,
through Police Station Officer,
Police Station, Parwa, Taluka
Ghatanji, District Yavatmal.

... APPELLANT

VERSUS

Shatrughna Baban Meshram,
aged 21 years, Occupation
Labour, R/o Zatala, Taluka
Ghatanji, District Yavatmal.

... RESPONDENT

....

Smt. Bharti Dangre, Public Prosecutor for the appellant/State.
Shri T.G. Bansod, Advocate for the respondent.

....

**WITH
CRIMINAL APPEAL NO. 321 OF 2015**

Shatrughna Baban Meshram,
aged 21 years, Occupation
Labour, R/o Zatala, Taluka
Ghatanji, District Yavatmal.
(In Central Jail, Nagpur).

... APPELLANT/ACCUSED

VERSUS

The State of Maharashtra,
through Police Station Officer,
Police Station, Parwa, Taluka
Ghatanji, District Yavatmal.

... RESPONDENT

....

Shri T.G. Bansod, Advocate for the appellant/accused.
Smt. Bharti Dangre, Public Prosecutor with Shri M.K. Pathan, Additional
Public Prosecutor for the respondent/State.

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CORAM : B.R. GAVAI AND
PRASANNA B. VARALE, JJ.

DATE OF RESERVING THE JUDGMENT : 29TH SEPTEMBER, 2015.
DATE OF PRONOUNCING THE JUDGMENT : 12TH OCTOBER, 2015.

JUDGMENT : (Per Prasanna B. Varale, J.)

The Confirmation Case No. 01 of 2015 arises out of the reference by the learned Additional Sessions Judge, Yavatmal in Special Case (POCSO Act) No. 11 of 2013 for confirmation of the death sentence awarded to original accused.

2. The appellant/original accused has also preferred the Criminal Appeal No. 321 of 2015 challenging the judgment and order dated 14th August, 2015 thereby convicting the appellant for the offences punishable under Section 302 of the Indian Penal Code and sentencing to death, also convicting for the offence punishable under Section 376-A of the Indian Penal Code and sentencing to death, convicting for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) and sentencing to suffer Rigorous Imprisonment for life and to pay fine of Rs.2,000/-, in default, to suffer further Rigorous Imprisonment for three months.

3. On perusal of the material placed on record, the prosecution case emerges as follows -

On the unfortunate day i.e. on 11th February, 2013, the victim who

was a child of two years of age, was in the lap of her grandfather. The appellant (original accused) is the son of the cousin brother of the grandfather of the victim namely Pundlik. The accused approached the house of Pundlik at about 07:30 p.m. He told the grandfather that the father of the victim is back from his work and he has asked him (accused) to bring the victim. The grandfather of the victim was not inclined to allow the child to be taken by the accused on the ground that the father of the victim is yet to come from work. In spite of such resistance, the accused took away the victim with him. The father of the victim had been to attend some religious function in the temple namely Datta Mandir. On his return, when he found that the child was not in the house, he made an enquiry with the grandfather i.e. Pundlik about the child. Pundlik informed that the accused took away the child from his house. The father of the victim Maroti, grandfather Pundlik and one Shrawan Meshram proceeded for the search of the child in the village. They found the victim child was lying at a partially constructed building of Anganwadi. The accused was also lying on the spot. Maroti, Pundlik and Shrawan found that the victim had received severe injuries including bites on lips and cheeks and swelling on her private part. They immediately rushed to the private medical officer Dr. Jafar at Kurli by arranging an auto rickshaw. Dr. Jafar declared that the victim was brought dead. The victim was then brought back to village Zatala. In the meantime, an information was received in the Police Station and API Shri Vanjari along with his other staff members rushed to the village Zatala. He saw the dead body of the victim and took it to Sub District Hospital, Ghatanji. Maroti, father of the victim lodged a report at Police Station, Parwa and on his report,

Crime No. 11/2013 was registered. As the investigating agency was set in motion, Shri Vanjari carried out necessary formalities of the investigation process, such as, effecting the arrest of the accused on the next day i.e. on 12th February, 2013, attending the spot of the incident and drawing the spot panchnama. The clothes worn by the child victim were seized from the spot along with the pieces of flesh and chappal of the accused as well earth from the spot. Accordingly, seizure panchnama was drawn. An inquest panchnama of the dead body was also drawn. The dead body was referred to postmortem and the notes of autopsy surgeon were collected. The apparels worn by the accused were also seized, the samples of blood of the victim were also collected and viscera and the other material were forwarded to the Chemical Analyzer. A request was also made to the Naib Tahsildar to prepare the map of the spot. The Investigating Officer also recorded the statements of the witnesses.

4. On completion of the investigation process, charge-sheet came to be filed in the Court of learned Judicial Magistrate First Class, Ghatanji. Since the case was exclusively triable by the learned Sessions Judge, the same committed to the learned Additional Sessions Judge, Yavatmal. The accused was charged for the offence punishable under Sections 376(1)(2)(f)(m), 376-A, 302 of the Indian Penal Code and under Section 6 of the Protection of Children from Sexual Offences Act, 2012. The accused pleaded not guilty and claimed to be tried. His defence was of two folds; one of total denial and other was of false implication and the defence theory put up was that the father of the victim himself killed the victim so as to please the Goddess. In

short, a case of human sacrifice was put up by the accused as defence. The prosecution, in its support, examined 13 witnesses. The learned Additional Sessions Judge, Yavatmal, on appreciation of the evidence, came to the conclusion that the prosecution was successful in proving the incriminating circumstances and also successful in establishing chain of proved circumstances leading to no other conclusion than the guilt of the accused. The learned Sessions Judge thus found that the accused is guilty of the offences charged against him and further found that the case being a brutal rape and murder of helpless minor victim child, the same falls in the category of “rarest of rare” case warranting imposition of death sentence of the offence punishable under Sections 376-A and 302 of the Indian Penal Code. Since the death penalty was imposed, the learned trial Judge preferred the matter to this Court for confirmation of the said sentence. The appellant also assailed the said finding by way of an appeal assailing the order of conviction. Both, Confirmation Case and the Appeal, are heard and decided by us together.

5. Smt. Bharti Dangre, the learned Public Prosecutor, in support of the judgment and order passed by the learned Additional Sessions Judge, Yavatmal, submits that the learned Sessions Judge appreciated the oral evidence as well as the scientific evidence in its proper perspective and arrived at a just and proper conclusion. She further submits that considering the peculiar facts, such as the victim being a minor child and hardly two years of age, subjected to a brutal sexual exploitation resulting in death of the child and the accused being the maternal uncle of the child, this is a fit case

where no lesser punishment than the death penalty can be awarded to the appellant/accused. The learned PP also relies on the various judgments of the Apex Court as well as this Court in support of her submission.

6. Per contra, Shri Bansod, the learned Counsel for the respondent (original accused) submits that the learned Sessions Judge utterly failed to appreciate the evidence and was swayed away on the superficial circumstances, such as the victim was a child. The learned Counsel further submits that as the case is based on the circumstances, it was the first and foremost duty of the prosecution to establish each and every circumstance with clinching evidence against the accused. Shri Bansod also submits that there are many missing links in the evidence brought by the prosecution. He further submits that the learned Sessions Judge also failed to consider the defence put up by the appellant/accused. The learned Counsel for the appellant/accused then submits that assuming but not admitting that there is some evidence against the appellant/accused, the same is not sufficient enough to award a capital punishment to the appellant/accused. Shri Bansod then submits that the appellant/accused was in his prime youth when the unfortunate incident took place and it is alleged that the appellant/accused is the author of the said crime. Considering these facts, an opportunity ought to have been given to the appellant/accused to rehabilitate and reform him in his life. In stead of adopting such an approach, the learned Sessions Judge awarded the death penalty to the appellant/accused. Thus, it is an alternative submission of the learned Counsel for the appellant/accused that the appellant/accused be awarded a

lesser punishment if his plea of acquittal is not accepted by this Court.

7. With the assistance of the learned Counsel, we have gone through the material placed on record. As stated above, the prosecution has examined 13 witnesses. For better appreciation, we would classify these witnesses, such as the witnesses who support the prosecution case of the accused and the deceased last seen together and the dead body of the deceased being found seen thereafter, the panch witnesses, the witnesses on scientific aspects and the police personnel carrying out various formalities of the investigation as well the Investigating Officer.

8. In the first category of witnesses, PW-1 Maroti Pendor, father of the victim, PW-2 Pundlik Masram, grandfather of the victim and PW-9 Chandrakant Bijapwar, owner of grocery shop would find their place. PW-3 Ravindra Masram and PW-4 Raju Dhadewar are the panch witnesses on various panchnamas, such as spot panchnama, seizure of the clothes of the victim, effecting arrest of the accused, seizure of the clothes of the accused, seizure of viscera etc. PW-5 Ganesh Ghose, PW-8 Ramesh Yedme and PW-11 Prakash Uddhaorao Kshirsagar are the police personnel who took part in the process of investigation, such as carrier of dead body, carrier of muddemal property etc. PW-12 Ramesh Mendhe is the Naib Tahsildar who prepared the map of the spot. PW-13 Panjab Vanjari, the API and is the Investigating Officer. PW-6 Dr. Jafar and PW-7 Dr. Lingawar are the Medical Officers who are on the scientific aspects such as medical examination of the victim and medical examination of the accused. PW-10 is Dr. Gadge and through this

witness, postmortem notes are proved.

9. Firstly, we would deal with PW-2 Pundlik, grandfather of the victim child. PW-2 Pundlik states that PW-1 Maroti is his son-in-law; whereas Vaishali is his daughter. He further states that the couple was initially residing at a place Tekadi-Rampur, District Adilabad and four months prior to the incident, they shifted to Zatala wherein PW-2 and his family were residing. The couple started residing near the house of PW-2 Pundlik and was doing labour work. He further states that the victim deceased Srushti was the daughter of PW-1 Maroti and Vaishali; whereas the accused is the son of his cousin brother. He then states that on 11th February, 2013 at about 07:30 p.m., both the grand daughters namely Srushti and Drushti were in his lap. The accused came there and informed that the father of Srushti had come from work and asked him to bring Srushti. PW-2 Pundlik also states that in spite of his resistance on account that the father of Srushti was yet to return back from his work, the accused paid no heed and took away Srushti. He further states that after some time, he along with his wife went to the house of PW-1 Maroti and asked as to whether Srushti was brought to him by the accused. PW-1 Maroti replied in negative. Therefore, Pundlik, PW-1 Maroti and one Shrawan took search of Srushti. When they were on their way to water tank, one Vikas Masram informed them that he saw accused with Srushti going towards Anganwadi. On receiving this information, Pundlik, Maroti and Shrawan proceeded to the site of construction of the Anganwadi and on reaching there, they found Srushti and accused were lying in the premises of Anganwadi. He then states that

the jeans pant of Srushti was lying aside; whereas T-shirt was on her person. He further states that they found Surshti had sustained biting wounds on her lips, cheeks, chest and hip and also found that there was bleeding from the private part of Srushti. He also states that they immediately took Surshti to their house and thereafter immediately she was taken to one Dr. Jafar of village Kurli. Dr. Jafar declared her dead. Then they came back to their house. The police personnel also reached their house and took the dead body of Srushti to Ghatanji. Pundlik identified the accused who was present in the Court. PW-2 Pundlik further states about drawing inquest panchnama in his presence and another panch Arvind Sidam. He then states that on 13th February, 2013, his statement was recorded by the police as well as on 08th March, 2013 in the Court.

10. This witness was subjected to cross-examination. An attempt was made to suggest that the witness is deposing false and also an attempt was made to suggest that the victim Srushti was killed by him for getting certain benefit as human sacrifice to please the Goddess. The witness has flatly denied this suggestion. Though certain omissions were brought on record, these omissions are not sufficient enough to discredit the witness or falsify the version of this witness on the material aspect i.e. the accused took away the victim in spite of his resistance and within a short span of time, the victim found at a place and she was subjected to a violent sexual exploitation and the accused was lying on the spot. Perusal of the inquest panchnama shows that there were bite marks on the cheeks, lips, chest and on the buttock.

11. PW-1 Maroti is the father of the victim. Maroti states that the victim child Srushti was his daughter and she was of two years of age. He deposes that he was residing in a house near the house of his father-in-law PW-2 Pundlik and on 11th February, 2013, there was a programme of Mahaprasad in Datta Mandir and he had gone to the temple at about 07:00 p.m. and came back about 07:30 p.m. He further states that on finding that Srushti was not in a house, he made enquiry with the father-in-law Pundlik and he told that the accused took away Srushti to his house. PW-1 further states that as the accused had not brought Srushti to him, a search was taken in the village by himself, his father-in-law and one Shrawan. Then he states that he saw his daughter Srushti lying on the spot i.e. a partially constructed building of Anganwadi and the accused was also lying there and the pant of the child victim was not on her person and the same was lying aside. He further states that it was a jeans pant of blue colour and there were wounds of bites on the lips and cheeks of his daughter and swelling on her private part. He also states that he took the daughter from the spot to the house and thereafter immediately by arranging an auto rickshaw took her to private doctor at village Kurli. After examining his daughter, Dr. Jafar declared her dead. He brought back the dead body of his daughter to his house. PW-1 Maroti further states that by approaching Parwa Police Station, he lodged the report. On his oral report, offence was registered and a printed FIR was prepared and the same bears his signature. He also states about showing the spot to the police personnel, conducting the postmortem and thereafter handing over the dead body to him by the police. He then states that his

statement was recorded on 13th February, 2013 and he identified the jeans pant (Article-1) and T-shirt (Article-2). He also identified the accused was present in the Court.

12. This witness was also subjected to a detailed cross-examination. Suggestions were given to this witness that the spot namely the said Anganwadi was surrounded by various houses and it was in the middle of the village. A suggestion was also given to this witness that he along with his father-in-law killed his daughter as human sacrifice to please the Goddess and the accused on coming to know this fact, threatened them to lodge report against them. It was also suggested that to save themselves, PW-1 Maroti lodged a false report against the accused and he was beaten by PW-1 Maroti and others. These suggestions are flatly denied by the witness. Certain omissions were brought on record in respect of beating of the accused by Shrawan, Govardhan and Vikas.

13. Perusal of the version of this witness who was subjected to detailed cross-examination, shows that this witness was not at all shattered and stood firm on material aspect such as receiving an information from PW-2 Pundlik that the accused took away the child Srushti and then finding the child lying on the spot. He also stood firm on the aspect of reaching the spot, finding that the jeans pant of the victim was not on her person but was lying aside and the accused was also lying there and marks of violence on the body of the child victim.

14. PW-9 Chandrakant Bijapwar, was sought to be examined on the aspect of the accused visiting his shop on 11th February, 2013 along with Srushti and purchasing biscuits and chiwda, however this witness turned hostile. It will be useful to note that to the cross-examination of this witness by the learned APP, this witness admits that he was having good relations with the accused and his family and also admits that on the day of his cross-examination in the Court, he was accompanied by the relatives of the accused.

15. PW-3 Ravindra Masram, PW-4 Raju Dhadewar, PW-5 Ganesh Ghose, PW-8 Ramesh Yedme and PW-11 Prakash Kshirsagar are the panchas and the police personnel. PW-12 Ramesh Mendhe is the Naib Tahsildar who prepared the map of the spot. They support the case of the prosecution on the role played by them and nothing damaging could be brought by the defence in their cross-examination.

16. It will be useful to refer to the medical evidence. PW-6 Dr. Jafar is the medical officer to whom PW-1 Maroti and PW-2 Pundlik approached with the victim child. Dr. Jafar states that on 11th February, 2013, when he was in his clinic, at about 09:30 p.m. to 10:00 p.m., three persons from Zatala brought one girl child patient. He further states that the child was wrapped in bed sheet, she was aged about 2 and ½ to three years and on her examination, he found that she was dead. There were wounds of bites on her mouth and thereafter those persons took away her dead body. He also states that the police had recorded his statement. In the cross-examination, Dr.

Jafar states that he had not seen the cutting marks on the lips of the deceased. He further deposes in the cross-examination that he had seen the wounds on the mouth of the deceased and merely he examined the heart beats and pulse.

17. PW-10 is Dr. Gadge and he conducted the postmortem. He states that on 12th February, 2013, he received a requisition letter and a letter for video shooting of the process of postmortem and also received certain queries. He further states that the postmortem examination was conducted on 12th February, 2013 between 1505 to 1705 hours along with Dr. Major Kuchewar, Dr. R.D. Meshram, Dr. R.R. Khetre and Dr. L.P. Durgawad. Dr. Gadge. He then states that he found both upper and lower lips were missing and there was evidence of perennial tear with merging of vaginal and anal orifice, the details of which were referred in column Nos.17 and 21. He further states that dried blood and dried blood stains and faecal matter over genital and perennial region were found, limbs were straight and hands were partly clenched. Dr. Gadge further states about the injuries found on the dead body as under :-

- “(1) Multiple abrasions over right zygomatic region of sizes ranging from 0.5 cm x 0.5 cm to 0.3 cm x 0.2 cm reddish.
- (2) Abrasion over left upper eyelid of size 0.5 cm x 0.5 cm reddish.
- (3) Abrasion over right cheek of size 4 cm x 4 cm reddish.
- (4) Abrasion over left cheek of size 8.5 cm x 7 cm reddish.
- (5) Evidence of missing both upper and lower lips exposing

labial fat with clean cut margins seen periorally without blood infiltration (postmortem in nature).

- (6) Lacerated wound over chin, midline of size 3 cm muscle deep with tissue missing, margins irregular and blood infiltrated reddish.
- (7) Bite mark over and around right nipple over a region of size 5 cm x 5 cm, margins contused reddish.
- (8) Bite mark over and around left nipple over a region of size 3 cm x 3 cm, margins contused reddish.
- (9) Bite mark over abdomen, 1 cm right at the level of umbilicus over a region of size, 4 cm x 3.5 cm, margins contused reddish.
- (10) Bite mark over abdomen in the midline, 5 cm below the umbilicus, over a region of size 3 cm x 3 cm, margins contused reddish.
- (11) Bite mark over abdomen in the midline, 5 cm below the umbilicus, over a region of size 3 cm x 3 cm, margins contused reddish.
- (12) Bite mark over lateral aspect of right shoulder, over a region of size 5 cm x 3 cm, margins contused reddish.
- (13) Bite mark over right buttock, over a region of size 3 cm x 3 cm, margins contused reddish.
- (14) Bite mark over right buttock, over a region of size 3 cm x 3 cm, margins contused reddish, separated from injury No.13 by 1.5 cm.
- (15) Bite mark over right buttock, over a region of size 3 cm x 2.5 cm, margins contused, reddish, separated from injury No.14 by 1 cm.
- (16) Bite mark over left buttock, over a region of size 3.7 cm x 3 cm, margins contused reddish.
- (17) Multiple lacerations over vaginal and anal region merging vaginal and anal orifice (perennial tear at 3, 6 and 9 O' clock positions), margins irregular, blood infiltrated, reddish.
- (18) Abrasion over left knee joint region, in anterior aspect of size 1 cm x 0.5 cm reddish."

PW-10 Dr. Gadge further states that the injury No.6 was caused by nibbling by teeth and injury Nos.7 to 16 are caused by human bites and injury No.17 is caused by forceful sexual assault. He also states that on internal examination, he found that under scalp contusion over fronto-parietal region of size 6 cm x 5 cm, irregular and reddish and under the scalp contusion over left temporal region of size 2.5 cm x 2 cm, irregular and reddish. No evidence of fracture to vault and base of skull. Ribs and cartilages intact no injury. Haemotoma over left side of chest wall, anteriorly corresponding to injury No.8 under column No.17 of size 4.5 cm x 3 cm with blood infiltration in surround tissue, reddish. Dr. Gadge further states about the evidence of tear (perforation) in victim rectum of size 3 cm x 2.5 cm, margins irregular with blood infiltration present corresponding to injury No.17 under column No.17 with evidence of faecal matter coming out through the vent. He then states that the evidence of tear in the posterior vaginal wall with merging of vaginal and anal canal (perennial tear) surface ragged, margins irregular, blood infiltrated and reddish extending and tearing (perforating) the rectum corresponding to injury No.17 under column No.17. Dr. Gadge then states that the deceased died within three hours from last meal. He further states that the viscera was preserved and blood soaked gauged piece kept for D.N.A. analysis and comparison and skin and tissue kept for D.N.A. analysis. He then states that the blood soaked gauged piece kept for blood group, nail clippings kept for detection of foreign blood group and the skin and tissues kept for histopathological examination. Dr. Gadge then states that the cause of death is shock and haemorrhage

following perennial tear with multiple injuries. He further states that there was forceful sexual assault on the child and the injury No.17 was caused by forceful insertion of penis. PW-10 Dr. Gadge further deposes that the material was sent for histopathological examination and also for DNA analysis to rule out whether it is of the same deceased. He then submits that according to the Exh.54, the DNA report shows the perfect matching that of deceased.

18. The witness was subjected to cross-examination. An attempt was made to suggest that the injuries referred by the witness could not have been caused by teeth bite. An attempt was also made to suggest that the mentioning of injuries in column Nos.21 and 17 is a false opinion of the witness. An attempt was also made to suggest that at the instance of the Investigating Officer and the relatives of the complainant, the witness is giving a false version. The suggestions are flatly denied. Perusal of the evidence of this witness leaves us no doubt that the victim was subjected not only to a forceful sexual violation but a brutal and beastly manner.

19. The accused was also subjected to medical examination. It will be useful to refer to the evidence of PW-7 Dr. Lingawar. He states that on 12th February, 2013, while he was on duty and was attached to Primary Health Centre, Parwa and Medical Officer, the accused was brought. Dr. Lingawar, on examination the accused, states that there was injury of abrasion on the tip of the glans penis of 5 mm x 3 mm size and the said injury was caused within 24 hours and the accused was found capable for sexual intercourse.

He further states that he collected the sample of blood, pubic hair, nails and the sample was handed over to Head Constable after sealing the same. He then states that a query letter was issued on 19th February, 2013 to him through API about the injury on the penis of the accused. He further states that he had opined that the sign of sexual intercourse within 24 hours was present and the injury in the certificate could have been possible due to sexual intercourse.

20. The witness was subjected to cross-examination. In the cross-examination, he states that the injury of abrasion is a superficial injury and the healing period depends on the nature of abrasion. Though it was suggested that he wrongly referred the age of injury, the suggestion was denied. In the cross-examination, it is stated by the witness that the abrasion could be possible due to sexual intercourse or for some other reasons. A suggestion was also given to this witness that he had given a false opinion and issued false injury report at the instance of the Investigating Officer and the suggestion was denied.

21. PW-3 Ravindra Masram is the panch witness. He states that PSI Vanjari had called him and one Yadao Todsam to act as a panch on the spot. The spot panchnama (Exh.19) prepared by the police, bears his signature. He further states that the seizure panchnama (Exh.20) also bears his signature. He further states that from the spot, the police had seized the pant, pair of chappal, pieces of flesh and earth from the spot. This witness was subjected to cross-examination. In cross-examination, he states that he

had not received summons from police and was called in the police Station. An attempt is made to suggest that the panchnama was already prepared and he deposed falsely at the instance of the father of the victim, he flatly denied the suggestion.

22. PW-5 Ganesh Ghose is the Police Constable attached to Parwa Police Station at the relevant time. He states about receiving the duty pass for referring dead body of the victim to conduct postmortem along with one questionnaire. This witness also deposes about the letter issued by PI Amol Malve to the hospital authorities for video shooting of the postmortem being conducted by the hospital authorities. Then he refers to sealing of the articles, such as viscera, clothes etc., being done by Dr. R.R. Khetre and the articles handed over to him. He also deposes about the letter given by PSI Vanjari to Head of the Department of Forensic Sciences for examination and sealing the pieces of flesh and the earth seized from the spot. Though the witness was subjected to cross-examination, nothing was elicited from this witness so as to shake the version of this witness.

23. PW-4 Raju Dhadewar is also the panch witness. He states that he and one Hadao Todsam were called by the police as panch. He further states that the accused was arrested in their presence and the arrest panchnama (Exh.23) prepared by the police, bears his signature. He further states that the seizure panchnama (Exh.24) also bears his signature. PW-4 also states that on 12th February, 2013 at 06:00 p.m., he and one Naresh were called as panch and Head Constable Ramesh had brought the sample of blood, hair

and nail of the accused. A seizure panchnama (Exh.26) bears his signature. This witness was subjected to cross-examination. In cross-examination, he states that he does not always go to police station as witness. He further states that it is false that the articles were brought in the police station. Though it was suggested that the panchnama was not prepared in his presence and he deposed falsely, he flatly denied the same.

24. PW-8 Ramesh Yedme is the Head Constable who took the accused for medical examination and received the injury certificate from the Medical Officer. He was also handed over the blood sample, pubic hair, nail and stained blood by the doctor. This witness also deposes that these articles were sealed. Nothing damaging was brought in the cross-examination.

25. PW-11 Prakash Kshirsagar is the Head Constable and is the carrier of muddemal property to Chemical Analyser along with the letters issued by PSI Vanjari.

26. PW-12 Ramesh Mendhe was working as Circle Officer at the relevant time. He deposes that on the directions of Naib Tahsildar, he had prepared the map of the spot by visiting the spot in presence of two panchas. The said panchnama is at Exh.74. Perusal of the said document reveals that the spot is the partially constructed building of the Anganwadi and the actual spot is one of the corners of this partially constructed building.

27. Thus, on considering the evidence brought on record by the

prosecution, we have no hesitation to say that the prosecution has established and proved that the child victim Srushti was subjected to a forceful sexual violence. The death of the victim is homicidal. On considering all the circumstances, such as the victim was lastly seen in the company of the accused, within a short span the victim found dead subjected to sexual violation, the accused who was lying near the victim, Medico Legal Certificate proved by PW-7, we are of the considered view that the accused and the accused alone is the author of the crime of rape and murder of child victim Srushti.

28. Insofar as the aspect of confirmation of the death sentence is concerned, it is the submission of Smt. Bharti Dangre, the learned PP that the accused who is the maternal uncle of the victim, took away the child victim from the custody of her grandfather on a pretext and then the victim was subjected to a violent sexual assault. The learned PP further submits that the act of the accused is not only cruel but showing the utmost perversity of the psyche of the accused satisfying his lust and overpowering the helpless child victim and such heinous act of the accused has shocked the conscious of the society and for the said act, the only punishment is the death punishment. The learned PP places heavy reliance on the judgments of the Apex Court as well as this Court in the cases of **Bachan Singh .v. State of Punjab (reported in AIR 1980 SC, 898); Machhi Singh and others .v. State of Punjab (reported in AIR 1983 SC 957); Laxman Naik .v. State of Orissa (reported in 1994 (3) SCC, 381); Dhananjoy Chatterjee alias Dhana .v. State of West Bengal (reported in 1994 (2) SCC, 220); Molai and another .v. State of Madhya**

Pradesh (reported in AIR 200 SC, 177); Kunal Majumdar .v. State of Rajasthan (reported in 2012 (9) SCC, 320); Rajendra Pralhadrao Wasnik .v. State of Maharashtra (reported in 2012 (4) SCC, 37); Shankar Kisanrao Khade .v. State of Maharashtra (reported in 2013 (5) SCC, 546); Gurvail Singh alias Gala and another .v. State of Punjab (reported in 2013 (2) SCC, 713); Bhaikon alias Bakul Borah .v. State of Assam (reported in 2013 (9) SCC, 769); Vasanta Sampat Dupare .v. State of Maharashtra (reported in 2015(1) SCC, 253); Sangeet and another .v. State of Haryana (reported in 2013 (2) SCC, 452); Sandeep .v. State of Uttar Pradesh (reported in 2012 (6) SCC, 107); State of Maharashtra .v. Rakesh Manohar Kamble @ Niraj Ramesh Wakekar and another (reported in 2014 All MR (Cri), 2043); Purushottam Dashrath Borate and another .v. State of Maharashtra (Criminal Appeal No. 1439 of 2013, decided on 08th May, 2015); Swamy Shraddhananda alias Murali Manohar Mishra .v. State of Karnataka (reported in 2008 (13) SCC, 767); and Deepak Rai .v. State of Bihar (reported in 2013 (10) SCC, 421).

29. Per contra, Shri Bansod, the learned Counsel for the appellant/accused submits that the appellant/accused is a young boy having a poor family background and the case would not fall in the category of “rarest of rare” cases. He submits that there is every possibility that the appellant/accused could be rehabilitated and would not commit any offence in future. He further submits that at the most, the appellant/accused can be directed to serve the maximum term in jail without remission. Shri Bansod also submits that the witnesses on which the prosecution relies are the

interested witnesses being the father and the grandfather of the victim. In support of his submission, the learned Counsel for the appellant/accused places heavy reliance on the judgments of the Apex Court in the cases of **Rameshbhai Chandubhai Rathod .v. State of Gujarat (reported in AIR 2011 SC, 903)** and **Neel Kumar alias Anil Kumar .v. State of Haryana (reported in 2012 (5) SCC, 766)**.

30. Before we deal with the aspect referred to above, it will not be out of place to state that this Court recently was posed with the similar question in the matter of **State of Maharashtra .v. Rakesh Manohar Kamble @ Niraj Ramesh Wakekar and another (cited supra)** to which, one of us (Justice B.R. Gavai) is a party.

31. As the victim in the case is a child, it will not be out of place to quote the words of **Kahlil Gibran** in his famous work "**The Prophet**" as -

"Your children are not your children.

They are the sons and daughters of Life's longing for itself.

They come through you but not from you,

And though they are with you yet they belong not to you.

You may give them your love but not your thoughts,

For they have their own thoughts.

You may house their bodies but not their souls,

For their souls dwell in the houses of tomorrow, which you cannot visit, not even in your dreams."

Here is the case wherein the victim, a minor child of 2 and ½ years, was subjected to a violent sexual act in most gruesome and least to say in beastly manner.

32. As stated above, this Court in somewhat the similar circumstance, while considering the confirmation of death penalty, in depth and detailed, considered the various aspects in the matter of State of Maharashtra .v. Rakesh Manohar Kamble @ Niraj Ramesh Wakekar and another (cited supra). It will not be out of place to refer the relevant observations of this Court in the matter of State of Maharashtra .v. Rakesh Manohar Kamble @ Niraj Ramesh Wakekar and another (cited supra). In the said matter, the accused Rakesh and accused Amar asked for drinking water to PW-1 Prabha and she gave water through window of the house. Accused Rakesh asked PW-1 Prabha to open the door. As she paid no heed to his demand, by giving blows on the door, he made PW-1 Prabha to open the door. Accused Rakesh was behind the daughter of PW-1 Prabha, namely Kanchan. PW-1 Prabha sensing danger, gave signal to daughter Kanchan to run away. Thereafter Kanchan ran away. Accused Rakesh and Amar chased her. Though Kanchan made an attempt to take shelter of one Bhimrao, they led assault on Bhimrao and took away Kanchan towards the land owned by one Mankar. When the witness PW-1 Prabha and other witnesses rushed towards the said land, they found that Kanchan was lying in the land. She was dead and having injuries on her cheek, head and breast. In the case of Rakesh Kamble, this Court found that the deceased was last seen with the

accused persons in late night and the dead body was discovered in the next morning. This Court, on appreciating the evidence of those witnesses who heard the screams of the deceased for help, immediate disclosure of the names of the accused by the mother to the police patil and finding the body in the morning, held that the last seen theory was established by the prosecution. In the present matter, the time gap between the deceased last seen with the accused and finding the dead body of the deceased victim who was subjected to sexual exploitation and the accused lying near the dead body is very narrow and proximate.

33. In the present case, the evidence of the grandfather shows that the victim was carried by the accused at 07:30 p.m. and within a short span of lesser than an hour, the grandfather and the father found the dead body of the victim. The material on record shows that on the very day i.e. on 11th February, 2013, PW-1 Maroti had lodged the report in the police station at about 21:25 hours. This Court, in the matter of Rakesh Kamble, by referring to various judgments of the Apex Court, observed thus -

“71. What is most important in the present case is the time gap between the period when the accused were last seen together with the deceased and finding of the dead body of the deceased. From the evidence of the prosecution witnesses, it can safely be concluded that the deceased was last seen together with the accused between 3.00 to 3.30 a.m. in the midnight of 17 to 18 December, 2005. The dead body was discovered immediately thereafter in the morning after P.W.4 Sanjay Mankar had noticed blood stained

clothes of the deceased in his farm. It will be appropriate to refer to the observations made by the Hon'ble Apex Court in the case of *State of Uttar Pradesh vs. Satish (cite supra)* which are as under:-

"22. The last-seen theory comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses Pws 3 and 5, in addition to the evidence of P.W.2."

(emphasis supplied)"

34. Shri Bansod, the learned Counsel for the appellant/accused submits that the witnesses brought by the prosecution are the interested witnesses being the father and grandfather of the victim. This Court also considered that aspect in the matter of *Rakesh Kamble* wherein a similar stand was taken by the defence. This Court observed thus -

"47. The another limb of attack on the evidence of these witnesses is that they are the interested witnesses and as such reliance could not be placed on the evidence of these witnesses. It will be relevant to refer to paragraph no.39 of the Judgment of the Apex Court in the case of *Subal Ghorai and others vs. State of*

West Bengal, reported in (2013) 4 Supreme Court Cases, 607 : [2014 ALL SCR 184], which reads as under:

"39. It is true that the prosecution has relied on the evidence of interested witnesses but, interested witness is not necessarily a bad witness. In fact, if the witness is related to the deceased, there is less chance of his leaving aside the real assailants. The evidence of interested witness has to be analysed with care. But, once the court comes to the conclusion that it is truthful and in accord with the relevant circumstances on record, the court should not hesitate to accept it and record conviction on the basis thereof. In this case, all the eyewitnesses are consistent about the prosecution case as regards assault on the deceased and setting on fire of the houses of Dharas. We are, therefore, not inclined to reject their evidence on the ground that they are related to the deceased. As already noted, two of the eye witnesses i.e. P.W.12 Jamini and P.W.13 Mandakini are injured witnesses, whose presence at the scene of offence cannot be doubted. They completely bear out the prosecution case."

(emphasis supplied)

48. It can, thus, be clearly seen that the attack on the ground that these witnesses are interested witnesses would also be not sustainable."

35. In the present matter also, as we find that the version of the witnesses namely the father and grandfather i.e. Maroti and Pundlik respectively is truthful and reliable version, we are unable to accept the submission of the learned Counsel for the appellant/accused. It is also not in dispute that the present case is based on the circumstantial evidence. The law is well settled on this aspect. It will not be out of place to refer the oftenly quoted the judgment of the Apex Court on the circumstantial evidence i.e. in

the case of **Sharad Birdichand Sarda .v. State of Maharashtra (reported in 2009 ALL SCR (O.C.C.), 281)**. The same is also referred by this Court in the matter of **Rakesh Kamble** and the observations read thus -

“37. Undoubtedly, the present case is based on the circumstantial evidence. The law on the aspect of conviction in the case of circumstantial evidence has now been very well crystalized. It will be relevant to refer paragraphs 152, 153 and 154 of the Judgment of the Apex Court in the case of *Sharad Birdhichand Sarda vs. State of Maharashtra*, 116 : [2009 ALL SCR (O.C.C.) 281] which read as under:-

"152. Before discussing the cases relied upon by the High Court, we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is *Hanumant V. State of Madhya Pradesh*. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of *Tufail (Alias) Simmi .v. State of Uttar Pradesh* and *Ramgopal v. State of Maharashtra*. It may be useful to extract what Mahajan, J has laid down in Hanumant case:

It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in *Shivaji Sahabrao Bobade vs. State of Maharashtra* where the following observations were made: (SCC para 19, p. 807; SCC(Cri)p.1047).

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

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

36. We have already referred to the circumstances on which the prosecution relies, we need not repeat the same. Suffice to say that these circumstances are proved by the prosecution. The crucial question for our consideration is now whether the death penalty awarded to the appellant/accused needs to be confirmed or not. This aspect is also now

crystallized by the judgments of the Apex Court in the cases of Bachan Singh .v. State of Punjab and Machhi Singh and others .v. State of Punjab (*cited supra*) as -

“75. The Constitution Bench of the Hon'ble Apex Court in the case of *Bachan Singh vs. State of Punjab* (*supra*) while upholding the constitutionality of Section 302 of the Indian Penal Code, insofar as it provides death sentence and section 354(3) of Cr.P.C. has observed thus :

195. In *Jagmohan*, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallised by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since *Jagmohan* - as we have discussed already - do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354 (3) and 235 (2), namely : (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability : (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.

196. We will first notice some of the aggravating circumstances which, in the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

197. Pre-planned, calculated, cold-blooded murder has always been regarded as one of an aggravated kind. In *Jagmohan*, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V. R. Krishna Iyer, J., speaking for the Bench, in *Ediga Anamma*, in these terms :

"The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence."

198. It may be noted that this indicator for imposing the death sentence was crystallised in that case after paying due regard to the shift in legislative policy embodied in Section 354 (3) of the Code of Criminal Procedure, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In Paras Ram's case, also, to which a reference has been made earlier, it was emphatically stated that a person who in a fit of anti-social piety commits "bloodcurdling butchery" of his child, fully deserves to be punished with death. In Rajendra Prasad, however, the majority (of 2 : 1) has completely reversed the view that had been taken in Ediga Anamma regarding the application of Section 354 (3) on this point. According to it, after the enactment of Section 354 (3), 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons" necessary for imposing death penalty "must relate not to the crime as such but to the criminal".

199. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354 (3) and 235 (2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard-both-to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

200. Drawing upon the penal statutes of the States in U. S. A. framed after *Furman v. Georgia*, 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."

201. 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.

202. In *Rajendra Prasad*, 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, 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 Sec. 302, 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 West Bengal*, (1979) 3 SCC 714, which follows the dictum in Rajendra Prasad (ibid).

203. 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.

204. 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."

205. 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.

206. According to some Indian decisions, the postmurder remorse, penitence or repentance by the murderer is not a factor which may induce the Court to pass the lesser penalty (e. g. Mominuddin Sardar). AIR 1935 Cal 591. But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235 (2) and 354 (3). We have already extracted the views of Messinger and Bittner (ibid), which are in point.

207. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354 (3). Judges should never be blood-thirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is,

therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Sec. 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

77. The Apex Court in the case of *Machhi Singh and others vs. State of Punjab* (*supra*) has observed thus;

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 realised 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 to 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

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.

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; (c) a murder is committed in the course for betrayal of the motherland.

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

(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.

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.

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.

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

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

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

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

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

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

circumstances which speak in favour of the offender?

This Court, in the judgment of Rakesh Kamble by referring the judgments of the Apex Court, observed thus -

“76. It can, thus, be seen the Constitution Bench of the Apex Court clearly held that in finding out presence or absence of special reasons the court must pay due regard both to the crime and the criminal. It has been held that what is the relative weight to be given to the aggravating and mitigating factors, depends upon the facts and circumstances of the particular case. It has further been held that in many cases the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. It has been held that only when the culpability assumes the proportion of extreme depravity that special reasons can legitimately be said to exist.

78. It has, thus, been held that when community's 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 Apex Court has further held that the factors that are to be taken into consideration while considering as to whether the death sentence is to be inflicted or not, are the manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime and magnitude of crime and personality of victim of murder. It has been further held that life imprisonment is the rule and death sentence is an exception. It has been further held that the balance sheet of

aggravating and mitigating circumstances has to be drawn, full weightage is to be given to mitigating circumstances and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. It has been further held that while taking decision question may be asked and answered as to whether there is something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence. Another question that is required to be answered is, 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.”

37. By applying yardstick set by the Apex Court in the case of Bachan Singh .v. State of Punjab and Machhi Singh and others .v. State of Punjab (cited supra) and the observations of this Court in the matter of Rakesh Kamble if the present matter is considered, in our opinion, in the guidelines of aggravating circumstances, there is a mention of clause (b) which deals with the murder which involves exceptional depravity. In the light of this clause, if the present matter is seen, the record reveals that the victim is a child of two and half years of age. The victim was subjected to a forceful sexual exploitation. The medical evidence shows that the death is caused due to the forceful intercourse. In our opinion, the present case also covers clause (a) of “aggravating circumstances” wherein it is referred that if a murder is committed after previous planning and involves extreme brutality. In the present matter, a child was taken from the custody of the grandfather and in spite of his resistance, a child was subjected to sexual violence and

then was done to death. In our opinion, the act of the appellant/accused falls in clauses (a) and (b) of the “aggravating circumstances”. We would also take into consideration the mitigating circumstances referred to in the judgment of the Apex Court in the case of Bachan Singh .v. State of Punjab (cited supra). In our opinion, the only mitigating circumstance on which the appellant/accused seeks benefit is clause (2) i.e. the accused is a young boy. Even though the said mitigating circumstance of being at young age is available to the appellant/accused while balancing the aggravating and mitigating factors, we are of the opinion that the said mitigating circumstance would not be of any help to the appellant/accused.

38. In our opinion, as the Apex Court observed in Machhi Singh and others .v. State of Punjab (cited supra), the act of the appellant/accused is of such a nature wherein the collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty. The Apex Court further observed that 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. (emphasis supplied). The Apex Court then quoted certain instances. Under the caption of manner of commission of murder, the Apex Court refers that 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. The Apex Court then also refers to the category of personality of victim of murder. When it refers to 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. In the present case, there is absolutely no doubt in our mind that the murder is committed in extremely brutal and dastardly manner. While considering the aspect of the personality of the victim, the record clearly reveals that the victim is an innocent child of two and half years who hardly could have either provided even an excuse or a provocation and was a helpless victim of the lust and the appellant/accused not only ravished the girl with a violent sexual attack but also acted in beastly manner. The medical evidence has shown that the victim received bite wounds on the parts of her body namely the cheeks, chest and buttock. The material also shows that the body was lying on the spot having the jeans pant removed from the person of the victim. The inquest panchnama shows that the victim was subjected to sexual violence and the victim had received wounds and bites on cheeks, chest and buttock. The version of the witnesses namely Maroti and Punclik, the scientific evidence in the form of postmortem report, leaves no doubt that the accused acted in absolute pervert, inhuman and beastly manner.

39. In the matter of Rakesh Kamble, wherein the victim was a girl of 19 years of age, this Court by considering the cruel and gruesome act of the appellant/accused, posed certain questions and arrived at a conclusion that the case would surely fall in the category of “rarest of rare” cases. This Court observed thus -

“99. Would the society not expect the accused who have committed such terror and in extreme brutal, dastardly,

gruesome, cruel manner committed rape of helpless victim and killed her for no fault of her, to be hanged. Would the society not expect, the holders of the judicial powers centre, to award proportionate sentence to the accused who have no respect for human values and have treated a young girl of 19 years in the most brutal, cruel and dastardly manner. Would the Society not expect such depraved act to be dealt with in a stern manner. We also cannot ignore the recent amendments brought to the Indian Penal Code on account of huge public hue and cry that arose on account of dastardly act in the heinous and gruesome rape and murder of *Nirbhaya*. The amendment as a matter of fact echo's the sentiments of the Society at large. The sentiment of the Society is glaring explicit, that such heinous crime on hapless women are required to be dealt with an iron hand. We have, therefore, no hesitation to hold that, in the perception of the Society it would surely be a "rarest of rare" case wherein the death sentence is required to be imposed."

In the present case, as we have stated above, the victim was of two and half years of age, as such, the heinous and gruesome rape and murder of the child victim at the hands of the appellant/accused, needs to be dealt with the deterrent punishment like death sentence. It will not be out of place to refer to certain judgments of the Apex Court. The Apex Court in the matter of Laxman Naik .v. State of Orissa (cited supra) has held that the death sentence imposed by the trial Court and confirmed by the High Court was justified. The facts of the case were the victim was a child of seven years of age and the accused was her uncle. After committing rape on the victim, the accused committed murder of the victim. The Apex court referred to the evidence relating to the injuries on the deceased as under -

“16. The search party which discovered the dead body of the deceased in jungle, noticed that her clothes were soaked with blood and there were multiple injuries on the person of the deceased as are described by Dr Pushp Lata PW-11 in her post-mortem report Ex. 11 as well as in her statement made in the Court. There was abrasion on the and fifth lumbar vertebra, as well as on left index finger, back of forearm, right middle finger. There was lacerated wound in the vagina extending towards rectum and bruises over neck, right and left sternomastoid muscles. On dissecting the underlined tissues of the neck, the doctor noticed extravasation of blood into subcutaneous tissues as well as in the underlying sternomastoid muscles. The larynx and trachea were congested containing frothy mucous. Bloody froths were coming out from the mouth and nostrils. This evidence eloquently speaks that the innocent, helpless soul was first subjected to brutal and forcible sexual intercourse and then mercilessly done to death by throttling so that there remains no direct evidence against the culprit.”

The Apex Court then on the backdrop of the evidence of Medical Officer, observed thus -

“28. The evidence of Dr Pushp Lata, PW 12, who conducted the post-mortem over the dead body of the victim goes to show that she had several external and internal injuries on her person including a serious injury in her private parts showing the brutality which she was subjected to while committing rape on her. The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly

manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code. As regards the punishment under Section 376, neither the learned trial Judge nor the High Court have awarded any separate and additional substantive sentence and in view of the fact that the sentence of death awarded to the appellant has been confirmed we also do not deem it necessary to impose any sentence on the appellant under Section 376.”
(emphasis supplied).

40. The Apex Court in the matter of Rajendra Pralhadrao Wasnik .v. State of Maharashtra (cited supra), wherein the victim was a child of three years of age, by referring to various judgments including the judgment of the Apex court in the case of Machhi Singh and others .v. State of Punjab and Bachan Singh .v. State of Punjab (cited supra), observed that the Court has to strike a balance between aggravating and mitigating circumstances. It will not be out of place to state that in the case of Rajendra Pralhadrao Wasnik .v. State of Maharashtra (cited supra), the victim was subjected to sexual

violence and there were bite marks on chest left side around nipple elliptical with diameters 1 ½" x ¼" x muscle-deep. The Apex Court in the said case observed thus -

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

38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of “trust-belief” and “confidence”, in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self.”

41. In the present case also, the accused is the maternal uncle of the victim child. The Apex Court recently in the matter of Purushottam Dashrath Borate and another .v. State of Maharashtra (cited supra), wherein the victim deceased who was serving in a private company and was subjected to rape and murder at the hands of the security guard and was

awarded death sentence on consideration of the submission that the appellant/accused is a person of young age, observed that such compassionate grounds are present in most of the cases and are not relevant for interference in awarding death sentence. The Apex Court further observed that the principle that when the offence is gruesome and was committed in a calculated and diabolical manner, the age of the accused may not be a relevant factor.

“15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.”

The Apex Court also made it clear that lack of criminal antecedents also cannot be considered as mitigating circumstances, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

42. The Apex Court in the matter of Vasanta Sampat Dupare .v. State of Maharashtra (cited supra), wherein the victim was a girl of four years of

age and the appellant/accused, a neighbour luring the victim for giving her chocolate, raped her and done her to death by hit of stones. The Apex Court on the backdrop of the medical evidence, namely the victim was subjected to forceful sexual intercourse, the deceased was last seen with the accused and the immediate lodgement of report by the father of the girl, lending credence to the prosecution case, observed thus -

“60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned Counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not

premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned Counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.

62. As we perceive, this case deserves to fall in the category of the rarest of rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven makes a four-years minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of the rarest of the rare case and we unhesitatingly so hold.”

43. In view of the aforesaid discussion, we uphold the order of conviction and sentence as recorded by the learned trial Judge and confirm the death sentence awarded by him to the appellant/accused.

In view of the judgment and order passed in aforesaid reference, no orders are required to be passed in Criminal Appeal No. 321 of 2015 filed by the appellant/accused. In the result, the Criminal Appeal No. 321 of 2015 is dismissed.

JUDGE

JUDGE

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