

HIGH COURT OF TRIPURA
AGARTALA
Death Sentence Reference 01 of 2022

The Special Judge (POCSO),
Khowai District, Tripura

----- Petitioner(s)

Versus

1. The State of Tripura

2. Sri Kali Kumar Tripura @ Abhijit Tripura,
son of late Sashi Kumar Tripura
of Harbatali near BOP, Satchand, P.S. Sabroom,
South Tripura District

----- Respondent(s)

Crl.A.(J)No.35 of 2022

Shri Kali Kumar Tripura @ Abhijit,
son of Shri Sashi Kumar Tripura
of Harbatali near BOP, Satchand, P.S. Sabroom,
South Tripura District

----- Appellant(s)

Versus

The State of Tripura

----- Respondent(s)

For Appellant(s)	:	Mr. S. Sarkar, Sr. Adv. Ms. V. Poddar, Adv.
For Respondent(s)	:	Mr. Raju Datta, P.P. Mr. S. Debnath, Addl. P.P.
Date of Hearing	:	17.01.2024
Date of Judgment & Order	:	29.01.2024
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE T. AMARNATH GOUD
HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

(T. Amarnath Goud, J)

This appeal has been filed under Section-374 of Code of Criminal Procedure, 1973 against the judgment and order of conviction and sentence dated 29.06.2022 passed by the Learned Special Judge

(POCSO), Khowai District, Khowai in c/w Spl. (POCSO) 02 of 2021 under Section 376-AB/302 of IPC read with Section 6 of POCSO Act convicting the appellant to death keeping Section 42 of the POCSO Act subject to confirmation by the High Court of Tripura. Since the subject matter is same, so both the matters are taken up together for hearing and decision accordingly.

2. That apart on 08.07.2022, a letter was received from the Learned District & Sessions Judge, Khowai Tripura, Khowai vide No.F.4(18)/DJ/KH/Bench/2021-22/4224 dated 04.07.2022 along with the record of the case bearing No.Special (POCSO)02 of 2021 in three files namely File-A, File-B and one Supplementary filed for exhibit documents containing 224, 179 and 64 sheets of paper respectively, for confirmation of death sentence of the convict Sri Kali Kumar Tripura @ Abhijit Tripura under Section 366(1) and under Section 376-AB/302 of IPC read with Section 6 of POCSO Act convicting the appellant to death keeping Section 42 of the POCSO Act subject to confirmation by the High Court of Tripura.

3. The genesis of the prosecution story in a nutshell is that on 22.02.2021 at about 9 am the informant Baishak Debbarma went out for his work. In the afternoon, when he returned home, he found his 5 years old daughter missing. In spite of thorough search of several places, he could not find out his daughter. Hence, he lodged the ejahar. On 26.02.2021 at 20:19 hours on receipt of the ejahar from Baishak Debbarma, a case was registered being TLM PS case No.2021/TLM/026 under Section 363 of IPC. Subsequently, after lodging of the ejahar, the dead body of the victim was recovered from a jungle. The case was endorsed to SI Bidhyeswar Sinha for investigation. During investigation, the I/O visited the PO and prepared hand sketch map with index of the P/O from where the victim was

missing. He also prepared another hand sketch map with the index from where the dead body was recovered, seized the alamats by preparing seizure lists, arranged for medical examination of the accused Abhijit Tripura, arranged for post-mortem examination of the deceased, collected the medical examination reports, forensic report and recorded the statements of the witnesses under Section 161 of Cr.P.C. and on completion of investigation, a prima facie case having been appeared, the IO submitted charge sheet being No.TLM PS case No.10/2021 dated 25.03.2021, under Section 363/376AB/302/201/419 read with Section 416 of IPC and section 4(2) of POCSO Act under Section 6 of POCSO Act against the accused Kali Kumar Tripura @ Abhijit Tripura to stand trial in the open Court of law. Charge was framed against the appellant/accused person under Section 376AB/302/201 of IPC and under Section 6 of POCSO Act, 2012 to which he pleaded not guilty and claimed to be tried.

4. In order to substantiate the charge, the prosecution has adduced as many as 35 witnesses and 101 documents were duly marked as exhibits. The accused has been examined as per Section 313(1)(b) of Cr.P.C. He denied to adduce evidence on his behalf. From the drift of the cross examination of the witnesses and the examination of the accused under Section 313(1)(b) of Cr.P.C. it appears that the defence case is that of total denial. In order to decide the fate of the case, the following points was taken up for decision :

"POINT FOR DETERMINATION"

(I) Whether the accused on 22.02.2021 at any time after 9 am or thereafter on any date and at any time till 27.02.2021 at Nishan Chandra para committed rape upon Arya Debbarma aged about 5(five) years and murdered her ?"

5. Finally, after considering the evidence on record and also after hearing arguments of both the sides Learned Court below found

the appellant guilty and convicted him and sentenced him to death for which the present appellant has preferred appeal before the High Court. We have heard detailed argument of learned counsels of both the sides.

6. In course of hearing of arguments, Mr. S. Sarkar, Learned Senior counsel appearing for the appellant-convict has submitted that the Court below has failed to appreciate the law, facts and evidences and circumstances of the case. Moreover, he has stated that the examination of the appellant under Section 313 of Cr.P.C. was not done in accordance with law by the Learned Sessions Court below. The Learned Trial Court has not taken into consideration that prosecution had failed to prove beyond reasonable doubt that it was the accused who had committed the offence of rape and murder of the deceased girl. The Court below has convicted the appellant merely on conjectures and surmises and hence, the order of conviction and sentence is liable to be set aside and quashed. According to Mr. Sarkar, Learned Senior counsel the Learned Court below has not taken into consideration the evidence of PW-11 who has stated that :

"I know deceased Arya Debbarma aged about 4/5 years. Near about one year back one day in the morning I saw Arya Debbarma going towards a jungle. On being asked she told that she was going to her father."

7. According to Learned Senior counsel, the Learned Court below did not consider the fact that victim was neither going with the convict nor was last seen with him. He has further stated that if it is presumed that accused was not found in the marriage ceremony going on the village, that neither connect the accused with the crime in question nor an inference can be drawn that the accused is the author of the crime. The Court below did not take into consideration that when the victim girl was going towards the jungle she was alone. The facts elicited in cross-examination were not at all considered by the

Learned Trial Court below and hence, the order of conviction and sentence is liable to be set aside and quashed. The Learned Court below has not taken into consideration the evidence given in the cross-examination by PW-28 where he has stated as follows :

"In case of dead body, the seminal stain if present in the vaginal swab can be detected within 72 hours."

8. There are material discrepancies between the statements of the witnesses, yet this fact was not at all considered by the Learned Sessions Court below and hence, the order of conviction and sentence is liable to be set aside and quashed. PW-20 stated in his examination-in-chief stated that "the body was naked." But PW-23 stated that "we found a half-naked dead body of a girl in the jungle."

9. He has further stated that there is a delay of three days for lodging the FIR of missing. Complainant even did not give any valid reason for the delay which puts the present FIR in question doubtful which the learned Trial Court did not consider while convicting the appellant.

10. According to Learned Senior counsel a four-fold criticism is advanced against the reception of such evidence :

**"(i) First is that is not possible to test the correctness of the canine movements through the normal method available in criminal cases i.e. in cross-examination.
(ii) Second is that the life and liberty of human beings should not be made to depend on animal sensibilities.
(iii) Third is that the possibility of dog misjudging the smell or mistaking the track cannot be ruled out, or many a times such mistakes have happened.
(iv) Fourth is that even today, the science has not finally pronounced about the accuracy of canine tracking."**

11. The Court below has shifted the burden of proof most illegally on the defence and hence the order of conviction and sentence is liable to be set aside. Only on account of unfortunate rape and murder, liability could not be fastened upon the appellant without any admissible and legal evidence. The prosecution has tried to connect the appellant in crime in question without evidence of any eye-

witnesses and it is a false and concocted story implicating the name of the convict person. During the process of investigation as well as in the development of the chain of events, the investigating officer did not record any statement of the independent officer and also did not record any statement of the independent neighbouring persons residing nearby, which creates a doubt about the investigation of IO.

12. The prosecution also has failed to prove the circumstances. Even, the circumstances could not form a complete chain for drawing inference that it was the accused persons who killed the deceased. The prosecution has further failed to establish the exact time of death of the deceased. The medical evidence as well as other evidence brought on record by the prosecution clearly stated that "time of since death : 5 to 7 days." Therefore, time of death is not established and proved by the prosecution. In the absence of time of death it is highly unsafe to connect the accused within the crime in question.

13. It has been further alleged that merely a alleged chappal was found on the next day of the recovery of body by the police near the place where the deceased body was lying which may create a suspicion about involvement of the accused for want of appropriate explanation of the prosecution in this regard, however, that suspicion cannot take place of legal proof and unless and until there are other corroborative circumstances on record. The Court below has not taken into consideration that it creates serious doubts that the case against the appellants was a frame-up and was manipulated. The Court below has not taken into consideration that the accused used to go out of the village and come back after 5/6 days, which was a normal practice for him. The statement of PW-18 was not considered in this regard.

14. In order to buttress his submission, Learned Senior counsel has relied on a decision of the Supreme Court of India in **Manoj and**

Others versus State of Madhya Pradesh reported in (2023) 2 SCC

353 which reads as under :

".....Collection and Preservation of Evidence

If DNA evidence is not properly documented, collected, packaged, and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting, and preserving DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose, or other part of the face and then touches area that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among victim(s), suspect(s), scene of crime for solving the case should be identified, preserved, packed and sent for DNA Profiling."

152. In an earlier judgment, *R v Dohoney & Adams* : (1997) 1 Cr. App Rep 369 (CA) the UK Court of Appeal laid down the following guidelines concerning the procedure for introducing DNA evidence in trials: (1) the scientist should adduce the evidence of the DNA 41 1997 (1) CrI App Rep 369 comparisons together with his calculations of the random occurrence ratio; (2) whenever such evidence is to be adduced, the Crown (prosecution) should serve upon the defence details as to how the calculations have been carried out, which are sufficient for the defence to scrutinise the basis of the calculations; (3) the Forensic Science Service should make available to a defence expert, if requested, the databases upon which the calculations have been based.

153. The Law Commission of India in its report : 185th Report, on Review of the Indian Evidence Act, 2003 observed as follows:

"DNA evidence involves comparison between genetic material thought to come from the person whose identity is in issue and a sample of genetic material from a known person. If the samples do not "match", then this will prove a lack of identity between the known person and the person from whom the unknown sample originated. If the samples match, that does not mean the identity is conclusively proved. Rather, an expert will be able to derive from a database of DNA samples, an approximate number reflecting how often a similar DNA "profile" or "fingerprint" is found. It may be, for example, that the relevant profile is found in 1 person in every 100,000: This is described as the 'random occurrence ratio' (Phipson 1999).

Practical guidelines to collect mitigating circumstances

248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

249. To do this, the trial court must elicit information from the accused and the state, both. The state, must - for an offence carrying capital punishment - at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court

disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in Bachan Singh. Even for the other factors of (3) and (4) - an onus placed squarely on the state - conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

215. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

- a) Age
- b) Early family background (siblings, protection of parents, any history of violence or neglect)
- c) Present family background (surviving family members, whether married, has children, etc.)
- d) Type and level of education
- e) Socio-economic background (including conditions of poverty or deprivation, if any)
- f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)
- g) Income and the kind of employment (whether none, or temporary or permanent etc);
- h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any) etc. This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances."

According to Learned Senior counsel, this is not a case that DNA is unique that they matches up ourselves who have similar DNA. DNA may be used for the purpose of investigation but not for racing any presumption of identity in a Court of law.

15. Further, Learned senior counsel has referred the above judgment regarding reliability of DNA evidence in a criminal trial and the relevant paras are extracted hereunder :

"154. In Dharam Deo Yadav v. State of U.P. : (2014) 5 SCC 509 this court discussed the reliability of DNA evidence in a criminal trial, and held as follows:

"The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines.....DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is

being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory.

155. The US Supreme Court, in *District Attorney's Office for the Third Judicial District v. Osborne* : (2009) SCC OnLine US SC 73 dealt with a post-conviction claim to access evidence, at the behest of the convict, who wished to prove his innocence, through new DNA techniques. It was observed, in the context of the facts, that :

"Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue.... DNA testing has exonerated wrongly convicted people, and has confirmed the convictions of many others."

156. Several decisions of this court - *Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh* : (2009) 14 SCC 607, *Santosh Kumar Singh v. State* : (2010) 9 SCC 747, *State of T. N. v. John David* : (2011) 5 SCC 509, *Krishan Kumar Malik v. State of Haryana* : (2011) 7 SCC 130, *Surendra Koli v. State of U.P.* : (2011) 4 SCC 80, *Sandeep v. State of U.P.* : (2012) 6 SCC 107, *Rajkumar v. State of M.P.* : (2014) 5 SCC 353 and *Mukesh v. State (NCT of Delhi)* : (2017) 6 SCC 1 have dealt with the increasing importance of DNA evidence. This court has also emphasized the need for assuring quality control, about the samples, as well as the technique for testing in *Anil v. State of Maharashtra* : (2014) 4 SCC 69.

"18. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable but variance in a particular result depends on the quality control and quality procedure in the laboratory."

157. This court, in one of its recent decisions - *Pattu Rajan v. State of T.N.* : (2019) 4 SCC 771, considered the value and weight to be attached to a DNA report:

"52. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the

weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible. Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party."

158. This court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance, was to corroborate. This court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it also held that being an opinion, the probative value of such evidence has to vary from case to case."

From the above quoted paras it is clear that the Hon'ble Apex Court has nowhere said that it is infallible, it is fallible like any other evidence.

16. In **Sharad Birdhichand Sarda versus State of Maharashtra** reported in **(1984) 4 SCC 116** the Hon'ble Apex Court has observed as follows :

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

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

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

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

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

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

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

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

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

17. If we take a case where an accused after an offence has judicially confessed before the Magistrate. So, when trying the case how the Court proceed? Would we take the confession first and then proceed with the other evidence? The Apex Court in a catena of decisions have stated that the Court have to proceed with the other evidence and the confession has to be an added factor adding weightage to the other evidence on record. DNA is also same. In the absence of any other thing or any other circumstances linking him with the crime. If a person rapes a four to five year old girl there is also bound to be injuries in the private parts of the accused. So, only on the basis of a singular evidence which is not infallible and the circumstances on which it is done and the circumstances in which it is preserved are not beyond suspect. PW-28, the Dy. Director, DNA Typing Division of State Forensic Science Laboratory has stated in the cross-examination that he has stated that any biological sample can be preserved in dry form and packed in paper envelop. If, any liquid blood sample is collected, also preserved in dry form in gauze cloth as well as EDTA vial and preserved in ice box. This is the way it is supposed to be done, he does not say that he has done that. It is supposed to be done by the collectors. So, there is no evidence with the collectors how they have done the work, how they have preserved it.

18. Learned Senior counsel during the course of his submission has referred to a decision of the Gauhati High Court in **State of Assam versus Anupam Das** reported in **2007 (3) GLT 697** as under :

"27. In the light of the above we are of the opinion that the expression "Magistrate" occurring under Section 26 of the Indian Evidence Act can only mean a Judicial Magistrate as the functions of a Magistrate recording a confession of a person in police custody is likely to expose the person making the confession to a punishment. This conclusion of ours gains further support from the very scheme of the provisions of Sections 25 to 27 of the Evidence Act. Section 25 of the Evidence Act makes a declaration in no uncertain terms that a confession made to a police officer shall not be proved against the accused. The rationale behind this declaration is too well settled by a catena of decisions to the effect that in the absence of such provisions the police are likely to extract confession from the accused by unwholesome methods. Section 26 of the Act is a great distinction to Section 25. While Sec 25 prohibits the proof of a confession made to a police officer, Sec 26 prohibits the proof of a confession made to any person while the accused is in the custody of police. Obviously, the provision is made in order to prevent the police from extracting confession from the accused while he is under custody and ingeniously circumventing the prohibition of law contained under Sec 25 by making it appear that the confession was not in fact made to a police officer but somebody else. The scheme of the provisions of Sections 25 to 27 was examined by the Supreme Court in (1994) 2 SCC 467 : Bheru Singh Vs. State of Rajasthan wherein at para 16 the Supreme Court held:

"16. By virtue of the provisions of Section 25 of the Evidence Act, a confession made to a police officer under no circumstance is admissible in evidence against an accused. The section deals with confessions made not only when the accused was free and not in police custody but also with the one made by such a person before any investigation had begun. The expression "accused of any offence" in Section 25 would cover the case of an accused who has since been put on trial, whether or not at the time when he made the confessional statement, he was under arrest or in custody as an accused in that case or not. Inadmissibility of a confessional statement made to a police officer under Section 25 of the Evidence Act is based on the ground of public policy. Section 25 of the Evidence Act not only bars proof of admission of an offence by an accused to a police officer or made by him while in the custody of a police officer but also the admission contained in the confessional statement of all incriminating facts relating to the commission of an offence. Section 26 of the Evidence Act deals with partial ban to the admissibility of confessions made to a person other than a police officer but we are not concerned with it in this case. Section 27 of the Evidence Act is in the nature of a proviso or an exception, which partially lifts the ban imposed by Sections 25 and 26 of the Evidence Act and makes admissible so much of such information, whether it amounts to a confession or not, as relates to the fact thereby discovered, when made by a person accused of an offence while in police custody. Under Section 164 CrPC a statement or

confession made in the course of an investigation, may be recorded by a Magistrate, subject to the safeguards imposed by the section itself and can be relied upon at the trial.”

28. The Legislature was obviously of the view that any kind of confession by an accused while he is under the custody of police is not to be used as evidence against the accused at the time of the trial of any offence of which the accused is charged. A principle based on the experience of the lawmakers and the history of mankind. However, the Legislature recognized an exception to the rule contained under Section 26, i.e. a confession made by an accused, who is in the custody of the police, to some person other than a police officer, if such a confession is made in the immediate presence of a Magistrate. The only reason we can imagine is that having regard to the separation of powers between the Executive and the Judiciary and the requirement, belief and expectation that the Judiciary functions absolutely independent and uninfluenced by the authority of the Executives and, therefore, the presence of a Judicial Magistrate eliminates the possibility of confession being extracted from the accused by a police officer by methods which are not permissible in law. The presence of an independent Magistrate by itself is an assurance against the extraction of confession by legally impermissible methods. Even if any such impermissible influences are exercised on the accused before producing the accused before the Magistrate for recording the confession the Legislature expected that the accused would have the advantage to complain to the Magistrate that he was being compelled to make a confession and on such a complaint the Magistrate is expected to protect the accused from the tyranny of police. A very sacred duty cast on the Magistrates, which must always be kept in mind by the Judicial Magistrates who are required to record or to be present at the time of recording the confessional statement by an accused while he was in the custody of the police. In the final analysis, any kind of compelled testimony by an accused person would be squarely violative of Article 20 Sub Article 3 of the Constitution. It is precisely for the above mentioned reasons the Parliament expressly stipulated certain duties Under Section 164(2) CrPC on the Judicial Magistrate recording statement Under Section 164 CrPC. It would be strange logic that while a statement recorded by a Judicial Magistrate Under Section 164 CrPC would be vitiated for non-compliance of the conditions stipulated Under Section 164(2) & (4) of the CrPC and cannot, therefore, be used against the maker of the statement, but the Magistrate contemplated Under Section 26 of the Evidence Act need not even be a Judicial Magistrate and, therefore, is under no obligation to comply with the requirements of Section 164(2) & (4) of the CrPC, but the confession recorded by such a magistrate can

be proved against the accused for establishing his guilt.

29. From the foregoing discussion we have no alternative but to reach an irresistible conclusion that the expression "Magistrate" occurring in Section 26 of the Evidence Act can only mean a Judicial Magistrate but not an Executive Magistrate."

Referring the same, Learned senior counsel has submitted that there was no scope to place any reliance on the statement of DCM, Executive Magistrate as she was not judicial Magistrate as mandated by the aforesaid citation.

19. Mr. Raju Datta, Learned P.P. appearing for the State-respondent has argued keeping reliance upon the depositions of the witnesses and the evidences on record in consideration with the exhibits and material objects and further, he submitted that the present case is a crime of sexual offence against a minor child aged about 5 years who has not even gained the senses of the nature and consequences of the crime committed against her.

20. The case is depending on circumstantial evidences and the evidences gathered during the trial has finally reached to a conclusion which pin-points to the guilt of the appellant herein. He further submitted that the accused was initially identified by a police sniffer dog. Thereafter, from the evidence of the father-in-law of the accused i.e. PW-4 who is an independent witness and relative of the accused. PW-4 has stated that:

".....the accused Abhijit Tripura is the husband of my daughter. At the time of incident the accused was in my house. Police came with a dog who caught the accused Abhijit Tripura. He was arrested by the police at night. Police recovered the dead body of the deceased from a jungle which was shown by the accused. At the time of recovery of the dead body in the jungle I was also present. The accused showed the dead body. He also showed the place from where the dead body was recovered. The incident occurred before one year in the month of Fulguna according to BS. The accused Abhijit Tripura raped and murdered Arya. The chappal which was found

near the dead body in the jungle was worn by the accused Abhijit Tripura."

From the said evidence, it has been corroborated that the accused was identified by the police dog and later on, arrested by the police. There is no denial about the rape and murder of the victim in the cross-examination.

21. Learned P.P. further referred the evidence of PW-1, Sri Ram Bahadur Debbarma. He has stated that :

"Deceased Ariya Debbarma was my cousin. At the time of her death she was aged about 4/4 & 1/2 years. Near about one year back Abhijit Tripura raped Ariya Debbarma and killed her in the jungle. I know the accused as he was our co-villager."

22. In the cross-examination regarding rape and murder there is no denial. PW-18, Sri Mahendra Debbarma has stated that :

"Baishak Ch. Debbarma is my co-villager. Before one year Abhijit Tripura raped Arya Debbarma and murdered her."

23. In respect of rape and murder there is no denial. The accused did not deny the facts that he has raped and murdered the deceased girl. PW-19, Sri Swapan Debbarma has stated that :

"Before one year, one day a child of our village namely, Arya Debbarma aged about 5 years was missing. I along with the father of Arya searched Arya, but we did not find. The father of Arya informed police. Subsequently, Abhijit Tripura was arrested by police. He showed the dead body of Arya in a jungle. At that time I was there with police as a villager."

24. Learned P.P. has further referred the evidence of PW-20, Sri Paritosh Sarkar where PW-20 has stated that :

"On 06.03.2021, again he was called by the police. He went to PS and found the accused Abhijit Tripura at the PS. The DCM was also present. The accused was narrating the incident in presence of DCM. I made a video of it. Afterwards, the accused went to the spot. Subsequently, they came to know that the original name of the accused was Kalikumar Tripura."

25. In respect of statement made by the accused before the DCM there is no cross-examination particularly on that issue he was

under threat or like that. During 313 Cr.P.C. also the accused was silent. The accused did not say a single line about the incident or any statement recorded by the DCM nothing was said.

26. Learned P.P. also referred the evidence of PW-23 who has stated that :

"..... He stated that he raped and murdered one Arya Debbarma. He further stated that if, he is taken to the spot, he would be able to show the place of occurrence. Accordingly, we went to the spot led by the accused Abhijit Tripura. The spot was shown by the accused Abhijit Tripura. We found a half naked dead body of a girl in the jungle. The body was swollen. The body was recovered and sent for post-mortem examination."

27. In the cross-examination she has stated that :

"I did not personally record the statement of the accused. When I reached the PS, police was with Abhijit. When we went to the spot, police and photographers were there with us. I introduced myself as Magistrate to Abhijit Tripura at the PS. It is not a fact that voluntarily Abhijit Tripura confess anything in my presence and did not lead us to the place of occurrence. It is not a fact that the accused did not show the dead body and the place of occurrence to us."

28. According to Learned P.P. DNA report has matched with the accused. During argument, he has highlighted the deposition of PW-28, Dr. Subhankar Nath, Dy. Director, DNA Tying Division at SFSL, Narsingarh. In that deposition, Dr. Nath has categorically stated that Exbt.A (Dried blood of Sri Abhijit Tripura) matches with the Y-STR profile generated from Ext.Bi(vaginal swab of deceased). Learned P.P. also pointed out the deposition of PW-31, Dr. Jhutika Debbarma the concerned Doctor who conducted postmortem over the dead body of the deceased victim. PW-31, Dr. Jhutika Debbarma has specifically stated that how the victim was raped and she was murdered. In her deposition, Dr. Debbarma has clearly stated that :

"The cause of death was opined as shock resulting from multiple genital injuries caused by forceful penetration of vagina by adult penis or penis sized object."

29. During cross-examination also Dr. Debbarma gave stress upon the genital injury (Injury No.7) to be fatal. Thus, the reason of death of the victim clearly points towards sexual assault and forceful penetration causing multiple genital injuries. Learned P.P. has also discussed about the disclosure statement (Exbt.21/1) of the accused person where the relevant portion has been pointed out by Learned P.P. and is extracted hereunder :

"I reside in the slum of Nishan Chandrapara. I am staying there for the last one year as son in law who live in his father in law's house. The name of my wife is Annalaxmi Debbarma and I am staying in her father's house.

.....I came out of my house in the morning to bring timber from the jungle. At that time it was 8 O' Clock. A girl also came behind me. The name of the girl is Ariya Debbarma. She had passed me taking my right side. I also followed her to see that what she is doing. She was collecting woods in the jungle. After collecting the woods, I asked her whether she will not go to her house. Thereafter she slept in the jungle. Then once I have done a bad act. I have moved her a little. Thereafter (...) tied the neck (.....)by one "orna"(a piece of cloth) from a tree in 'V' shape."

30. Similar statement has been made in the second time disclosure statement of the accused how the dead body of the girl was recovered. The disclosure statement has also corroborated with PW-11. PW-11 has also specifically stated that he saw the girl going towards a jungle and similar statement has been made in the disclosure statement of the accused.

31. In the statement recorded under Section 313 Cr.P.C. the accused did not explain or even did not say anything about the disclosure statement that the said statement was made by force or the statement is not true or anything which he did not made. He only pleaded ignorance. It was his primary duty to say that the statements made before the DCM was not correct or under pressure he made this statement. He told nothing rather he was totally silent about the fact.

32. Statement of PW-19 also stated that the dead body was recovered in his presence and the accused showed the place of occurrence and accordingly, the dead body was shown and it was recovered by the police. Learned P.P. also relied on Section 27 of the Evidence Act where it has been specifically stated that :

"27. How much of information received from accused may be proved.-

Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

33. In this respect, Learned P.P. has relied on a judgment of Supreme Court in **Pattu Rajan versus State of Tamil Nadu** reported in **(2019) 4 SCC 771** where it has been stated as follows :

"42.....Be that as it may, if a confession is made by the accused before the police and a portion of the confession leads to the recovery of any incriminating material, such portion alone is admissible under Section 27 of the Indian Evidence Act. Since only such portion of the confession relating to the recovery of certain material objects was admitted in evidence and relied upon, such reliance was in accordance with law."

Thus, on the basis of confession and disclosure statement of the accused the dead body was recovered which attracts Section 27 of the Evidence Act and thus, the conviction is appropriate.

34. In respect of Executive Magistrate, he has referred to another judgment of the apex Court in **Ravi Chander and Others versus State of Punjab** reported in **(1998) 9 SCC 303** where it has been stated as follows :

"6. We have also looked at the reverse side of the page and considering the same it does not appear to us that there is any occasion to doubt that such writing was subsequently made by the Executive Magistrate. The Executive Magistrate has also deposed in the case and he has specifically deposed that he recorded the dying declaration in question and answer form. He has denied the suggestion in the cross-examination that there was any antedating or

fabrication on his part in recording the dying declaration. The Executive Magistrate is a disinterested witness and is a responsible officer. There is no circumstance or any material on record to suspect that he had any animus against the accused or was in any way interested in fabricating the dying declaration."

35. Learned P.P. submitted that in the present case the statement which is recorded by the DCM who is not also an interested witness, her statement cannot be disbelieved as she is a responsible and independent Officer not from police Department, she has no enmity with the accused person. Thus, the conviction was appropriate considering the disclosure statement.

36. In respect of DNA test, Learned P.P. has relied on a decision of the apex Court in **Nandlal Wasudeo Badwaik versus Lata Nandlal Badwalk and Another** reported in **(2014) 2 SCC 576** where it has been stated that :

"13.....It has been recognized by this Court in the case of Kamti Devi v. Poshi Ram : (2001) 5 SCC 311 that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child."

Nowhere has it been stated that DNA test is not genuine. When there is no denial or suggestions then it is considered to be accurate. Initially, the convict-appellant has accepted the DNA report and in the appellate stage he cannot say that the DNA is not correct.

37. In **Dharam Deo Yadav versus State of Uttar Pradesh** reported in **(2014) 5 SCC 509** it has been stated that :

"36.....So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings."

38. Learned P.P. has relied on an identical case of the apex Court in **Manoj Pratap Singh versus State of Rajasthan** reported in **(2022) 9 SCC 81** wherein it was stated that :

"83. We need not elongate this discussion by assembling various other decisions rendered in variegated circumstances and factual matrices but deem it appropriate to refer to the decision in the case of **Shankar Kisanrao Khade v. State of Maharashtra: (2013) 5 SCC 546**, wherein this Court surveyed a large number of cases on either side that is, where death sentence was upheld/awarded or where it was commuted; and pointed out the requirement of applying 'crime test', 'criminal test' and 'rarest of rare test'. This Court recounted, with reference to previous decisions, the aggravating circumstances (crime test) and the mitigating circumstances (criminal test) as follows:

49. In **Bachan Singh v. State of Punjab : (1980) 2 SCC 684** and **Machhi Singh v. State of Punjab : (1983) 3 SCC 470** this Court laid down various principles for awarding sentence: **(Rajendra Pralhadrao Wasnik v. State of Maharashtra : (2012) 4 SCC 37**

'33.....Aggravating circumstances – (Crime test)

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is 51 of a person who had

acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances – (Criminal test)

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though

the prosecution has brought home the guilt of the accused."

84. This Court further said: Shankar Kisanrao Khade v. State of Maharashtra : (2013) 5 SCC 546.

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, *whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges.*" (emphasis and extra emphasis supplied)

108. The heinous nature of the crime, like that of the present one, in brutal rape and killing of a mentally and physically challenged girl, who was only about seven-and-a-half year-old, definitely carries excessively aggravating circumstances, particularly when the manner of commission of both the major offences of rape and murder shows depravity of highest order and would ex facie shock anyone's conscience. The horrific manner of killing the victim, by causing ghastly head injuries had been nothing less than beastly conduct of the appellant. However, as noticed, gruesome nature of the action and the crime, by itself, may not be decisive, particularly as regards the question of capital punishment. Thus, we need to cautiously examine the other relevant factors, particularly those of the tests pertaining to the criminal himself.

109. Undoubtedly, the appellant was 28 years of age at the time of commission of crime and was having family comprising of his wife, an eight-year-old daughter and parents. He is not shown to be coming from any affluent background but, at the same time, it is also not shown if he comes from a very poor socio-economic background. Taken as a whole, these factors of the age, family and socio-economic background of the appellant are not so clinching as to overwhelm and override the aggravating factors.

117. We may also observe that even though rarest of rare doctrine and its accompanying principles, as enunciated and explained in *Bachan Singh v. State of Punjab* : (1980) 2 SCC 684 and *Machhi Singh v. State of Punjab* : (1983) 3 SCC 470, have been almost uniformly applied by Courts in the country while dealing with the question of sentencing when the statute provides for death penalty; and over the time, even the proposition of larger/longer term of actual imprisonment with no remission or curtailed remission has also evolved but, it has never been the effort of the Courts to somehow make this punishment (sentence of death) redundant and non-existent for all practical purposes. The quest for justice in such cases, with death sentence being awarded and maintained only in extreme cases, does not mean that the matter would be approached and examined in the manner that death sentence has to be avoided, even if the matter indeed calls for such a punishment. The judicial process, in our view, would be compromising on its objectivity if the approach is to nullify the statutory provision carrying death sentence as an alternative punishment for major offences (like that of Section 302 IPC), even after it has passed muster of judicial scrutiny and has been held not unconstitutional. The pursuit in collecting mitigating circumstances could also not be taken up with any notion or idea that somehow, some factor be found; or if not found, be deduced anyhow so that the sentence of death be forsaken. Such an approach would be unrealistic, unwarranted and rather not upholding the rule of law.

121. In the present case, where all the elements surrounding the offence as also all the elements surrounding the offender cut across the balance sheet of aggravating and mitigating circumstances, we are clearly of the view that there is absolutely no reason to commute the sentence of death to any other sentence of lesser degree. Even the alternative of awarding the sentence of imprisonment for whole of the natural life with no remission does not appear justified in view of the nature of crimes committed by the appellant and looking to his incorrigible conduct."

39. Learned P.P. also relied on another judgment of the Hon'ble Apex Court in ***State rep. by The Deputy Superintendent of Police, Embal Police Station Versus Samivel*** reported in **(2022) SCC OnLine Mad 212** wherein it has been stated that :

" 14. The learned Public Prosecutor further submitted that the guilt of the accused was duly established through witnesses, more particularly P.Ws.2 to 5, depositions and recovery of material objects used for the crime. The accused, taking advantage of his familiarity with her and mental retard of her mother, ravished the deceased child and murdered her brutally, hence, he does not deserve any leniency from this Court, hence, in terms of Section 354(3) of Cr.P.C., the Trial Court has clearly explained the aggravating circumstances to impose death penalty on the accused, which is in consonance with the judgment of the Apex Court in the case of Ramnaresh v. State of Chhattisgarh, reported in (2012) 4 SCC 257, wherein the Apex court drew a broad distinction between aggravating circumstances and mitigating circumstances as under :

"76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in the case of Bachan Singh (supra) and thereafter, in the case of Machhi Singh (supra). The aforesaid judgments, primarily dissect these principles into two different compartments-one being the 'aggravating circumstances'. The Court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the Court. It will be appropriate for the Court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354(3) Code of Criminal Procedure.

Aggravating Circumstances :

(1) The offences relating to the commission of heinous crimes like

murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the persons having a substantial history of serious assaults and criminal convictions.

- (2) The offence was committed while the offender was engaged in the commission of another serious offence.
- (3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
- (4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
- (5) Hired killings.
- (6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
- (7) The offence was committed by a person while in lawful custody.
- (8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 of Code of Criminal Procedure.
- (9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
- (10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.
- (11) When murder is committed for a motive which evidences total depravity and meanness.
- (12) When there is a cold blooded murder without provocation.
- (13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances :

- (1) The manner and circumstances in and under which the offence was

committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

- (2) The age of the accused is a relevant consideration but not a determinative factor by itself.
- (3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
- (4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.
- (5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
- (6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
- (7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

15. The learned Public Prosecutor further submitted that the accused had gone to the extreme level of murdering an innocent girl for his sexual pleasures and acted in a cruel manner by injuring the sexual organ of the girl, besides, causing other injuries. Thus, it was submitted that the prosecution was able to prove the aggravating circumstances of the case, which would fall under Clause Nos.6 and 10 of the aggravating circumstances as per as the aforesaid judgment and hence, it was prayed that the death sentence needs to be confirmed.

28. At this juncture, it is appropriate to refer to the judgment of the Hon'ble Supreme Court rendered in Mahendra v. State of Tamil Nadu reported in (2019) 5 SCC 67, wherein the Hon'ble Supreme Court has observed that if the delay in registering the F.I.R. is satisfactorily explained, the credibility of the complaint need not be suspected. Similarly,

contradictions, inconsistencies, exaggerations or embellishments if minor in nature and inconsequential, the same will not discredit the credibility of the witnesses. This case squarely falls within the said category. Therefore, this Court has not hesitation or doubt to hold that it is a case of homicide death caused by the accused Samivel @ Raja after committing aggravated penetrative sexual offence.

30. In the instant case, the crime is aggravated penetrative sexual offence coupled with murder. The victim is a 7 years old daughter of a mentally retarded mother, who incidentally also from suppressed community. The doer of the crime is a 26 years old male of the same village and he has committed the crime exploiting the trust of the innocent girl. The accused, in order to satisfy his sexual algolagnia and abnormal sexual desire, had deprived the life of a minor girl even at the bud. The Trial Court, finding all the factors and circumstances against the accused had imposed death penalty, recording special reasons as mandated under Section 354(3) of the Code of Criminal Procedure. This Court, having held that the guilt of the accused proved, has to necessarily see whether death sentence is appropriate for the same committed by the accused. Though Section 6 of the POCSO Act, 2012 and Section 302 IPC contemplate death or life imprisonment, the alternate sentence of death can be imposed for 'special reasons.'

45. It is pertinent to mention here that everyone's mind contains a liar, a cheat and a sinner and a man cannot be judged by his outer appearance, as Adolf Hitler, who ordered the execution of some eight million people and was responsible for the deaths of many millions more, hated cruelty to animals and was a vegetarian. If a person like the accused herein is allowed to survive in this world, he will finitely pollute the mind of other co-prisoners, who will be at the verge of release from jail in which he is confined. When the attitude of a man turns into the one of a beast having no mercy over other creatures, he should be punished and sent to the eternal world.

46. In all fairness, we find that the judgment of the Trial Court fulfilled all the touchstone to determine that it is one of the rarest of rare cases for imposition of death sentence, as imposition of any other punishment much less life imprisonment is completely insufficient and inadequate and would not meet the ends of justice. Taking into consideration the brutality of attack, the barbaric manner in which the deceased child was murdered and the mental agony undergone by the parents, we find that except death sentence, no other sentence will be adequate. We have examined this case more carefully and having given our anxious thought to the facts, we have found that the mitigating circumstances in favour of the

accused herein is no match to the aggravating circumstances.

53. In the result, CrI.A.(MD) No.534 of 2021 is dismissed. The judgment of the learned Sessions Judge, (Mahila Court), Pudukkottai, sentencing the accused to hang till death for the offence punishable under Section 302 IPC, Section 5(m) r/w 6(1) and Section 5(j)(iv)/ r/w 6(1) of POCSO Act and imprisonment for a term of seven years R.I. with fine of Rs.5,000/- in default to undergo two months S.I. for each offences under Sections 363, 201 IPC and imprisonment for life for offence under Section 3(2)(V) of SC/ST (POA) Act with fine of Rs.5,000/- in default to undergo two months S.I., passed in Spl.S.C.No.28 of 2020 dated 29.12.2020 is hereby confirmed and upheld. "

40. In another case relied by Learned P.P. in **Laxman Naik versus State of Orissa** reported in **(1994) 3 SCC 381** the apex Court has stated as follows in respect of death sentence:

"25.The aforementioned circumstances found to be established against the appellant form a complete chain of evidence as not to leave any reasonable ground for a conclusion consistent with the hypothesis of the innocence of the appellant but on the contrary the same are of exclusive nature consistent only with the hypothesis of the guilt of the appellant and conclusively lead to irresistible conclusion that it was the appellant and he alone who had committed murder of the girl Nitma after subjecting her to forcible sexual intercourse.

26.This brings us to the question of sentence to be imposed upon the appellant for the offences for which he has been found guilty by the two courts below as well as by us as discussed above. In this connection it may be pointed out that this Court in the case of **Bachan Singh v. State of Punjab** while discussing the sentencing policy, also laid down norms indicating the area of imposition of death penalty taking into consideration the aggravating and mitigating circumstances of the case and affirmed the view that the sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime guided by the legislative policy discernible from the provisions contained in Sections 253(2) and 354(3) of the Code of Criminal Procedure. In other words, the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty it may be noticed that there are absolutely no mitigating circumstances in the present case. On the contrary the facts of the case disclose

only aggravating circumstances against the appellant which we have to some extent discussed above and at the risk of repetition shall deal with that again briefly.

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

28. The evidence of Dr Pushp Lata, PW 12, who conducted the postmortem over the dead body of the victim goes to show that she had several external and internal injuries on her person including a serious injury in her private parts showing the brutality which she was subjected to while committing rape on her. The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen 3 (1980) 2 SCC 684: 1980 SCC (Cri) 580 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."

41. Learned P.P. also relied another judgment of the Hon'ble Apex Court in **Nawabuddin versus State of Uttarkhand** reported in **(2022) 5 SCC 419** where the apex Court has held in respect of Section 6 of the POCSO Act which reads as under :

"22. In view of the above discussion the impugned judgment and order of Nawabuddin versus State of Uttarkhand, Criminal Appeal No.280 of 2018 dated 22.08.2019 passed by the High Court and the learned Special Court convicting the accused for the offences punishable under Sections 376(2)(i) of IPC and Section 5 of the POCSO Act and imposing the punishment under Section 6 of the POCSO Act is hereby upheld. The accused is rightly held guilty for the aforesaid offences. However, for the reasons assigned hereinabove the sentence of life imprisonment is converted to that of fifteen (15) years RI with fine/compensation imposed by the Trial Court confirmed by the High Court. Now the accused shall undergo fifteen (15) years RI with fine imposed by the Trial Court confirmed by the High Court for the aforesaid offences instead of life imprisonment. The present appeal is partly allowed to the aforesaid extent only."

42. In respect of Section 27 of the Evidence Act and in respect of doctrine of confirmation Learned P.P. has referred a judgment of the apex Court in **Harivadan Babudhai Patel versus State of Gujarat** reported in **(2013) 7 SCC 45** where it has been held as follows :

"20. In the case at hand, the factum of information related to the discovery of the dead body and other articles and the said information was within the special knowledge of the present appellant. Hence, the doctrine of confirmation by subsequent events is attracted and, therefore, we have no hesitation in holding that recovery or discovery in the case at hand is a relevant fact or material which can be relied upon and has been correctly relied upon."

43. Curtailing the submissions of Learned Senior counsel regarding the delay in recovery of the dead body of the victim girl followed by the postmortem examination, Learned P.P., has argued that there was no delay under the facts and circumstances of the case and the appellant has made a heinous crime committing rape upon a four year girl.

44. According to Mr. Sarkar, Learned senior counsel in reply to the submission of Learned P.P. there is no any single iota of evidence that the accused was present in the village at the time of occurrence. Learned senior counsel further referred the evidence of PW-18 and submitted that if the evidence is accepted than the entire prosecution story becomes doubtful and regarding the forensic report, he has further submitted that the same appears to be contaminated.

45. Regarding the confessional statement by dint of Section 24, 25 and 26 whether it is made to the Executive Magistrate or whoever else except for a judicial Magistrate and that also after following the safeguards of Section 164(2) and 164(4) otherwise in the custody of police it may be made to anyone. Therefore, whether it is a partial authority or impartial authority does not arise because the law has made such a statement to be inadmissible except for the poise of Section 27. Therefore, the confessional statement is of no relevance and that is barred *ab-initio*.

46. In each and every cross examination there is deemed denial of the event. In a case of circumstantial evidence, motive assumes great importance. In the postmortem report they have said the cause of death was opined as shock resulting from multiple genital injuries caused by forceful penetration of vagina by adult penis or penis sized object. Injury to the genetalia (injury No.7) was ante-mortem in nature, fatal, fresh in duration caused by hard and blunt object sufficient to cause death in ordinary course of nature. The manner of death was homicidal. Injury No.1 and 2 were ante-mortem in nature, fresh in duration, non-fatal and caused by hard and blunt object. Injury No.3 to 6 were post-mortem injuries which were caused by hard and blunt object. On a reading of the same it simply appears that the intention of the accused was to simply rape the girl not to cause death.

Death was a consequence as a result of the rape. Now the intention to kill her on any injury is absent.

47. Mr. Sarkar, Learned senior counsel has relied on a decision of the apex Court in **Irappa Siddappa Murgannavar versus State of Karnataka** reported in **(2022) 2 SCC 801** where it has been held that :

"37. There is no doubt that the appellant has committed an abhorrent crime, and for this we believe that incarceration for life will serve as sufficient punishment and penitence for his actions, in the absence of any material to believe that if allowed to live he poses a grave and serious threat to the society, and the imprisonment for life in our opinion would also ward off any such threat. We believe that there is hope for reformation, rehabilitation, and thus the option of imprisonment for life is certainly not foreclosed and therefore acceptable.

38. Thus, we find sufficient mitigating factors to commute the sentence of death imposed by the Sessions Court and confirmed by the High Court into imprisonment for life, with the direction that the appellant shall not be entitled to premature release/remission for the offence under Section 302 of the Code until he has undergone actual imprisonment for at least thirty (30) years. While maintaining other sentences, we direct that the sentences shall run concurrently and not consecutively. We say so as the appellant has been sentenced to imprisonment for life for the offence under section 376 of the Code, which sentence is also imposed for the offence under section 302 of the Code."

48. Mr. Sarkar, Learned senior counsel has relied on a decision of the apex Court in **Manoj**(supra) as under :

"Practical guidelines to collect mitigating circumstances

248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

249. To do this, the trial court must elicit information from the accused and the state, both. The state, must - for an offence carrying capital punishment - at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of

timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in Bachan Singh. Even for the other factors of (3) and (4) - an onus placed squarely on the state - conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

250. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

- a) Age
- b) Early family background (siblings, protection of parents, any history of violence or neglect)
- c) Present family background (surviving family members, whether married, has children, etc.)
- d) Type and level of education
- e) Socio-economic background (including conditions of poverty or deprivation, if any)
- f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)
- g) Income and the kind of employment (whether none, or temporary or permanent etc);
- h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any) etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances."

49. Now, before coming to the conclusion of the case, let us revisit the evidence on record of the prosecution recorded by Learned Court below for proper appreciation of evidence of the case.

50. PW-1, Sri Ram Bahadur Debbarma has deposed that the deceased Ariya Debbarma was his cousin. At the time of her death, she was aged about 4/4 & 1/2 years. Near about one year back

Abhijit Tripura raped Ariya Debbarma and killed her in the jungle. He knows the accused as a co-villager and identified him.

51. In the cross examination, he has stated that after the death of Ariya he did not go to the spot and see her. He did not know the exact location of the house of the accused. There is a jungle near the house of Ariya. It takes 10 minutes to reach the jungle on foot from the house of Ariya. Near the jungle, there is no house. So, the place of occurrence is ten minutes walking distance from the house.

52. PW-2, Sri Pritam Bhowmik, has deposed that on 27.02.2021 he was posted as a constable at Teliamura P.S. On that date, the I.O. of the case seized one mobile phone set of Samsung brand of the accused Abhijit Tripura by preparing a seizure list. He put his signature as a witness on the seizure list. On identification, the signature is marked as Exbt.2/1. The seized mobile set is identified by the witness and on identification, the same was marked as Exbt.MO-1.

53. PW-3, the complainant is the father of the victim and his deposition has already been discussed above and does not require any repetition.

54. PW-4 is the uncle of the victim and the father-in-law of the appellant. He confirmed that the appellant was identified by the police dog and was arrested. He also deposed that the dead body of the victim was recovered from a jungle on identification of the convict appellant. The witness was present at that time. Moreover, the witness also identified the shoe (chappal, Exbt.MO-3) that was recovered from the place of occurrence. In his cross-examination, there was nothing relevant other than denials.

55. PW-5, Sri Chandra Kumar Debbarma in his examination in chief has deposed that near about one year back Abhijit raped and

killed Arya Debbarma and the convict appellant was identified by him. There is nothing relevant in the cross-examination.

56. PW-6, Sri Sambhuram Debbarma has deposed that deceased Arya Debbarma was his cousin and at the time of her death, she was only 3/4 years old. On 22.02.2021, Arya was missing and they searched a lot but they could not find her. He along with the father of Arya went to TLM PS and informed the police about her missing. After 2/3 days, police came to their village and arrested Abhijit Tripura. The accused Abhijit Tripura raped Arya and murdered her. Abhijit Tripura showed the dead body to police in a jungle. Police seized the wearing apparel of Abhijit Tripura in his presence. He put his signature on the seizure and identified his signature marked as Exbt.9/1. The trousers and the shirt of the accused are identified by the witness and marked as Exbt.MO-4 and Exbt.MO-5 respectively. In his cross-examination there was nothing much relevant but only an admission that he was not present during recovery of the dead body of the victim.

57. PW-7, Smt. Matila Debbarma in her examination-in-chief has deposed that deceased Arya Debbarma was her cousin and the time of death she was only 3/4 years old. On 22.02.2021, Arya was missing. They searched a lot but they did not found the dead body of Arya. Father of Arya went to TLM PS and informed the police about her missing. The accused Abhijit Tripura raped Arya and murdered her. Abhijit Tripura showed the dead body to police in a jungle. Police seized the wearing apparel of Abhijit Tripura in his presence. He put his signature on the seizure list and marked as Exbt.9/2. Witness identified the wearing apparels of the accused Abhijit Tripura which were already marked as Exbt.MO-4 and Exbt.MO-5 respectively.

In the cross-examination there is nothing but only denials.

58. PW-8, SPO, Sri Prasant Marak has deposed that on 01.03.2021 he was working as SPO at TLM PS. On that day, he went to the Morg of GB hospital. In his presence, viscera of deceased Arya Debbarma, wearing apparels of deceased, tube containing annual swab, vaginal swab etc. were seized by the IO by preparing a seizure list. He put his signature on the seizure list and the signature marked as Exbt.10/1. The cross-examination was declined.

59. PW-9, Sri Rajib Das, a Constable of Police has deposed that on 02.03.2021 he was posted as a constable at TLM PS. On that date, daroga babu seized one medical report and one blood sample by preparing a seizure list and on being asked by daroga babu he put his signature on the seizure list and the signature has been marked as Exbt.11/1. In the cross-examination he confirmed that the seized blood sample was collected from one Abhijit Tripura.

60. PW-10, Sri Sukanta Dasgupta another Constable has deposed that on 02.03.2021 he was posted as a constable at TLM PS. On that date, daroga babu seized one medical report and one blood sample by preparing a seizure list and on being asked by daroga babu, he put his signature on the seizure list and identified his signature marked as Exbt.11/2. In cross-examination also he confirmed that the blood sample was collected from Abhijit Tripura.

61. PW-11, Sri Amarjit Debbarma has deposed in the examination-in-chief that deceased Arya Debbarma aged about 4/5 years. Near about one year back one day in the morning he saw Arya Debbarma going towards a jungle and on being asked, she told that she was going to her father.

62. PW-12, Sri Bimal Das has deposed that on 28.02.2021 he was posted as a constable at TLM SDPO PS. On that day, he went with SI Bideswar Singha to a jungle at Nisha Ch. Para. He along with other

police personnel entered into the jungle and found a dead body of a child namely, Arya Debbarma. On searching the nearby area, they found one right foot chappal (mesanda coloured) of right leg and they also found one violet coloured underwear near the area. The IO seized the violet coloured underwear and one light mesanda coloured right foot chappal by preparing a seizure list and he put signature in the seizure list and the signature marked as Exbt.12/1 and the witness confirmed the Exb.MO-2 and MO-3. In the cross-examination he has confirmed that they entered the jungle at 11.30 a.m.

63. PW-13, Sri Adhir Mandal has deposed that on 01.03.2021 he was posted as Nayek of Police at Dhalabil under Khowai PS. On 01.03.2021, the blood sample of Abhijit Tripura was collected in his presence. He put his signature on the blood sample authentication form and identified his signature marked as Exbt.13/1. Cross was declined.

64. PW-14, Sri Jayanta Das has deposed in the examination-in-chief that on 01.03.2021 he was posted as a constable at KHW PS. On 01.03.2021, the blood sample of Abhijit Tripura was collected in his presence. He put his signature on the blood sample identification form and marked his signature as Exbt.13/2. On being asked by IO, he put his signature on the consent of medical examination form of accused Abhijit Tripura. The thumb impression of Abhijit Tripura was obtained on the consent for medical examination in his presence. He put his signature on the consent for medical examination form of the accused Abhijit Tripura and put his signature marked as Exbt.14/1. He also put his signature on the medical examination report of the accused Abhijit Tripura and the signature on the medical examination marked as Exbt.15/1. Cross was declined.

65. PW-15, Sri Jhakta Dayal Jamatia has deposed in his examination-in-chief that on 25.02.2021 on being requested by one Baishak Ch. Debbarma, wrote a missing diary and the missing diary was written by him and marked as Exbt.1. Cross was declined.

66. PW-16, Sri Uttam Debbarma in his examination-in-chief has stated that before one year, the dead body of Arya Debbarma aged about five years was recovered from a jungle which belongs to him. Cross was declined.

67. PW-17, Smt. Kamala Rani Murasingh in her examination-in-chief has deposed that on 05.03.2021 she was posted as an SI of police at TLM PS. On that date, she recorded the statement of one Anya Laxmi Debbarma under Section 161 of Cr.P.C. under the instruction of the IO Bideswar Singa and recorded the statement as the witness did not know Bengali, she was a Kokborok speaking lady. In the cross-examination there was only simple denial.

68. PW-18, Sri Mahendra Debbarma has deposed in his examination-in-chief that Baishak Ch. Debbarma is his co-villager. Before one year, Abhijit Tripura raped Arya Debbarma and murdered her. At the time of incident, one marriage ceremony was going in their village. Every villagers of that locality attended the marriage ceremony but Abhijit Tripura did not. When the father of the deceased came back from the marriage ceremony, he found his daughter missing. They also searched Arya but they did not find. When the father of Arya informed police, police came and arrested the accused who showed the place of occurrence to police and also identified the accused. In the cross-examination by defence nothing relevant came out other than denials.

69. PW-19, Sri Swapan Debbarma in his examination-in-chief stated that before one year, one day a child of their village namely Arya Debbarma aged about five years was missing. He along with the

father of Arya searched Arya, but they did not find. The father of Arya informed the police. Subsequently, Abhijit Tripura was arrested by the police and he showed the dead body of Arya in a jungle. At that time, he was there with a police as a villager. Police informed that Arya was killed by Abhijit. He put his signature on a paper on being asked by the police and the signature has been marked as Exbt.2. The accused is identified and he know him as he used to reside in their village.

70. In the cross-examination all were denials other than missing of his statement under Section 161 of Cr.P.C. regarding identification of the dead body by the accused during recovery of the same.

71. PW-20, Paritosh Sarkar is a journalist by profession. In the examination-in-chief he has deposed that on 27.02.2021, at about 15 minutes to 11 p.m. he received one information as to the fact that a dead body of a girl was found at Nishan Chandra Para, Duski area. Immediately he rushed to the spot and saw one decomposed body of a girl. The body was naked. He collected some photographs of the body and also made a video and returned. On the following day, he again went to the spot with police and found one sandle and one short pant at the spot. He went to the house of the accused person with police. One relative of the accused informed that the sandle belonged to the accused person. On 06.03.2021, again he was called by the police. He went to PS and found the accused Abhijit Tripura at the PS. The DCM was also present. The accused was narrating the incident in presence of DCM. He made a video of it. Afterwards, the accused went to the spot. Subsequently, they came to know that the original name of the accused was Kalikumar Tripura. Police seized one violet coloured underwear which was recovered from a nearby place of the PO where the dead body was lying and one light mesanda coloured right foot chappal. Police prepared a seizure and on being asked by the police he

put his signature on the seizure list marked as Exbt.12/2. MO-2 and MO-3 are confirmed by the witness. He put his signature on the seizure list and identified as Exbt.14/1. On being asked by the police, he gave a certificate under Section 65B of the Indian Evidence Act. which on identification marked as Exbt.15 and signature Exbt.15/1. There are 19 photographs taken by him with his signature and identification has been marked as Exbt.16(series). A pen-drive given to the police with the recordings made by him and the identification has been marked as Exbt.MO-4. This is the envelop with his signature in which he kept the pen-drive and the identification has been marked as Exbt.MO-4/1. This is the DVD caset with his recording given to the IO and the identification has been marked as Exbt.MO-5. In the cross-examination nothing adverse was stated.

72. PW-21, Sri Titu Das has stated in the examination-in-chief that on 06.03.2021, he was posted as Rifel man in TSR at TLM PS. On that day, he was under TLM PS. He went to Sabroom in the house of Kali Kumar Tripura. They collected the Adhar card of Kali Kumar Tripura from his brother. Police seized the Adhar card. He put his signature in the seizure list and the identification has been marked as Exbt.16/1. Cross was declined.

73. PW-22, Sri Rakesh Sutradhar has stated in his examination-in-chief that on 08.03.2021 he was working in the Adhar card Section of SDM, Teliamura. On that day, on being asked by the police he has verified the Adhar card of one Kali Kumar Tripura which was found genuine. He put his signature on a letter issued by SDM Vashar Bhattacharjee addressed to SI of TLM. This is his signature on the said letter and the identification has been marked as Exbt.17/1. On being asked by the police, he also put his signature on a seizure list and the signature has been marked as Exbt.18/1. Cross was declined.

74. PW-23, Miss Debapriya Das has stated in her examination-in-chief that on 27.02.2021, she was posted as Deputy Collector & Magistrate, SDM Office Teliamura. On that date, as per the order of SDM, TLM, she went to TLM, PS as the accused Abhijit Tripura was supposed to confess his guilt. On reaching the PS, he found him. He stated in her presence that he raped and murdered one Arya Debbarma. He further stated that if, he is taken to the spot, he would be able to show the place of occurrence. Accordingly, they went to the spot led by the accused Abhijit Tripura. The spot was shown by the accused Abhijit Tripura. They found a half naked dead body of a girl in the jungle. The body was swollen. The body was recovered and sent for postmortem examination. The inquest report of the deceased Arya Debbarma was prepared by the IO in her presence. She put her signature in the inquest report and the signature with a note of the body of the inquest report and the identification has been marked as Exbt.18/1. She also put her signature on the pointing out of memorandum prepared by the IO and this is her signature and the signature marked as Exbt.19/1. She also put her signature on the disclosure statement of the accused Abhijit Tripura. This is her note with signature on the 2nd page of the said disclosure statement of the accused and the identification has been marked as Exbt.20/1. She also put her signature on another disclosure confessional statement of the accused and the signature has been marked as Exbt.21/1.

75. In the cross-examination, she did not personally record the statement of the accused. When she reached the PS, police was there with Abhijit. When they went to the spot, police and photographers were there with them. She introduced herself as Magistrate to Abhijit Tipura at the PS. Others were simple denials.

76. PW-24, Sri Raba Kumar Tripura in his examination-in-chief has stated that Kali Kumar Tripura is his younger brother. The Adhar card of his younger brother Kali Kumar Tripura was taken by the police. On being asked by the police, he put his signature on a paper and this is his signature and it has been marked as Exbt.16/2. This is the Adhar card of his younger brother Kali Kumar Tripura and the identification has been marked as Exbt.22. Cross was declined.

77. PW-25, Smt. Sarmila Debbarma in her examination-in-chief has stated that on 08.03.2021, she was working as Anganwadi worker at Bisarad Para center. Arya Debbarma used to study in that Anganwari school. She gave a certified copy of admission register to the police. This is the certified copy of admission register and the identification has been marked as Exbt.23. This is her signature on the certified copy of the admission register and marked as Exbt.23/1. On being asked by the police, she put her signature on the seizure list and the signature has been marked as Exbt.24/1. Cross declined.

78. PW-26, Sri Pradip Kumar Debbarma in his examination-in-chief has deposed that Sarmila Debbarma is his wife and she is an Anganwari worker. On being asked by the police, he put his signature on the seizure list and marked as Exbt.24/2.

79. PW-27, Sri Jagat Debbarma in his examination-in-chief has narrated that he knows Arya Debbarma and she was raped and murdered by Abhijit Tripura and she was murdered before one year. He put his signature on the inquest report of the deceased and the signature has been marked as Exb.18/2. In the cross-examination, it has been stated that Arya Debbarma was raped and murdered by Abhijit Tripura. Cross-examination was or simple denial.

80. PW-28, Dr. Subhankar Nath has deposed in his examination-in-chief that on 05.03.2021 he was posted as Dy.

Director, DNA Typing Division at State Forensic Science Laboratory. On that date, the DNA Division received ten exhibits from Bio-Serology Division of SFSL Tripura in connection with TLM PS case No.2021/TLM/026 dated 26.02.2021 under Sections 363 of IPC and adding Section 376 A B/302 of IPC and Section 04(2) of POCSO Act, 2012 for examination and opinion.

The exhibits are as follows :

- “(1) Exbt-A :- Dry blood sample of accused Abhijit Tripura.**
- (2) Exbt-B :- Vaginal swab of deceased.**
- (3) Exbt-Bii :- Vulval swab of deceased.**
- (4) Exbt-Biii :- Anal swab of deceased.**
- (5) Exbt-Biv :- oral swab of deceased.**
- (6) Exbt-Bv :- Dry blood of deceased.**
- (7) Exbt-Di :- Cloth pieces of shirt of deceased.**
- (8) Exbt-Dii :- Cloth pieces of dupatta of deceased.**
- (9) Exbt-E :- Cloth pieces of pant of deceased.**
- (10) Exbt.F1 :- Swab collected from chappal.”**

A portion of blood stain gauze of exhibit-A(Dry blood sample of accused Abhijit Tripura), a portion of blood stain gauze of Exbt.Bv (Dry blood of deceased), a portion of blood stain cloth of Exbt.Di(Cloth pieces of shirt of deceased), a portion of blood stain cloth Exbt.Dii (Cloth pieces of dupatta of deceased), a portion of blood stain of Exbt.E (Cloth pieces of pant of deceased) and a portion of gauze swab of Exbt.F1 (Swab collected from chappal), were subjected for DNA isolation by DNA organic extraction method.

The cotton swab of Exbt.Bi (Vaginal swab of deceased), Exbt.Bii (Vulval swab of deceased), Exbt. Biii (Anal swab of deceased) and Exbt.Biv (Oral swab of deceased) were subjected for DNA isolation by differential extraction method.

DNA recovered from the above-mentioned exhibits were subjected to multiples of PCR reaction for co-amplification of the 15 STR loci & Amelogenin using AmpF/STR Identifiler Plus TM PCR amplification kit and for co-amplification of the 16 Y-STR loci using AmpF/STR Y-file kit. The amplified products along with controls were

run on the Automated DNA Sequencer. The sizing of the fragments was carried out using Gene Mapper ID software V3.2 with respect to Gene Scan 500 LIZ size standard. The resultant allelic distribution for the studied loci in the different exhibits is shown in the table of Annexure-A.

"Observations :-

- (1) Male genetic profile was generated from Exhibit-A.
- (2) Male genetic profile was generated from Exhibit-Bi.
- (3) No allele has been amplified from Exhibit-Bii, except, amelogenin indicative of human male origin.
- (4) No allele has been amplified form Exhibit-Biii, except, amelogenin indicative of human female origin.
- (5) No allele has been amplified form Exhibit-Biv, except, amelogenin indicative of human male origin.
- (6) Female genetic profile was generated from Exhibit-Bv.
- (7) No allele has been amplified form Exhibit-Di, except, amelogenin indicative of human female origin.
- (8) No allele has been amplified form Exhibit-Dii, except, amelogenin indicative of human female origin.
- (9) Female genetic profile was generated from Exhibit-E.
- (10) No allele has been amplified form Exhibit-F1, except, amelogenin indicative of human male origin.
- (11) Y-STR profile was generated from Exhibit-A
- (12) Y-STR profile was generated from Exhibit-Bi.
- (13) Y-STR profile was not generated from Exhibit-Bii.
- (14) Y-STR profile was not generated from Exhibit-Biii.
- (15) Y-STR profile was not generated from Exhibit-Biv.
- (16) The alleles of the amplified loci of DNA profile generated from Exhibit-Bi. (vaginal swab of deceased) matches with the alleles of the amplified loci of DNA profile of exhibit-A (blood sample of Sri Abhijit Tripura).
- (17) The alleles of the amplified loci of DNA profile generated from Exhibit-Bv (dry blood of deceased) matches with the alleles of the amplified loci of DNA profile of Exhibit-E (cloth pieces of pant of the deceased).
- (18) Y-STR profile generated from exhibit-A (dried blood of Sri Abhijit Tripura) matches with the Y-STR profile generated from exhibit-Bi (vaginal swab of deceased).

Conclusion :-

On the basis of above descriptions, it is concluded that :-

- (1) The male DNA profile detected in the Exhibit-Bi (vaginal swab of deceased) matches with the DNA profile generated from Exhibit-A (dried blood of Sri Abhijit Tripura).
- (2) The female DNA profile detected in the Exhibit-E (cloth pieces of pant of deceased) matches with the DNA profile generated from Exhibit-Bv (dry blood of deceased)."

The report was prepared by him in their official computer in eleven sheets and signed by him on each sheets dated 16.03.2022. The report was submitted to the Bio-Serology Division of SFSL Tripura. This is his report in eleven sheets and on identification marked as Exbt.25(in 11 sheets). These are his signatures on each page of his report marked as Exbt.25/1 series.

81. In the cross-examination, he has stated that any biological sample can be preserved in dry form and packed in paper envelop. If, any liquid blood sample is collected, also preserved in dry form in gauze cloth as well as EDTA vial and preserved in ice box. If there is any mishandle of exhibits, there may be a chance of contamination. Being a DNA analyst, he has prepared his DNA profile to check any contamination occurred from his side during examination. In case of dead body, the seminal stain if present in the vaginal swab can be detected within 72 hours. If, the environment is dry then the chance of getting seminal stain is more than 72 hours.

82. PW-29, Sri Swapan Debbarma in his examination-in-chief has stated that on 26.02.2021 he was posted as O/C Teliamura P/S. On that day, on receipt of an ejahar from one Baishak Chandra Debbarma, he registered a case at 2019 hours being Teliamura P/S case No.2021/TLM/026 under Section 363 of IPC. This is his note with signature on the body of the ejahar and the identification has been marked as Exbt.1/2. He has also filled up the FIR form. This is the FIR form filled up by him and the identification has been marked as Exbt.26. This is his signature on the FIR form and the identification has been marked as Exbt.26/1. Being O/C he has endorsed the case to SI Bidweswar Singha to investigate the case.

83. PW-30, Suman Kumar Chakraborty has deposed in his examination-in-chief that on 28.02.2021 he was posted as Deputy Director in State Forensic Science Laboratory. On that day, at 9 a.m. he received a telephonic call from SDPO, Teliamura regarding spot visit in c/w Teliamura P/S case No.2021TLM026 dated 26.02.2021 under Section 363 of IPC. Accordingly, he has visited the spot on the same day at about 1 p.m. By this time, the body was shifted to the Mortuary. They collected one reddish colour hawaii chappal from the

P/O which was handed over to the police. The detailed observation of the P/O has been noted in his report along with photographs. This is the report in three sheets and the identification has been marked as Exbt.27 in three sheets. These are his signatures on each page of his report marked as Exbt.27/1 (series). Cross declined.

84. PW-31 is Dr. Juthika Debbarma an Associate Professor of the Department and Toxicology at AGMC and GBP Hospital, Agartala. She deposed that she along with Dr. Pradipta Narayan Chakraborty, Asstt. Professor and Dr. Suanjan Das, Junior Resident conducted postmortem on the body of the deceased Arya Debbarma. After postmortem examination according to her, the cause of death was opined to be shock resulting from multiple genital injuries caused by forceful penetration of vagina by adult penis or penis sized object. She also opined that the manner of death was homicidal. Her postmortem report prepared was marked as Exbt.28 in 6 sheets. Her signatures were identified on each page and marked as Exbt.28/1(series). She also deposed that a final opinion was given by her on the death of the victim and the said on identification marked as Exbt.29 and her signatures on each page on identification marked as Exbt.29/1 series. During cross-examination, she confirmed that Injury No.7(genital injury) was fatal in nature.

85. PW-32, Dr. Pradipta Narayan Chakraborty, Asst. Professor, Department and Toxicology at AGMC and GBP Hospital, Agartala has also deposed that he conducted postmortem on the body of the deceased Arya Debbarma along with Dr. Juthika Debbarma and Dr. Suanjan Das. He deposed in the line of Dr. Juthika Debbarma, PW-31 and corroborated the opinion of the cause of death to be shock resulting from multiple genital injuries caused by forceful penetration

of vagina by adult penis or penis sized object. Cross examination was declined.

86. PW-33- Dr. Suanjan Das who is a Junior Resident of Department and Toxicology at AGMC and GBP Hospital, Agartala has also deposed that he conducted postmortem on the body of the deceased Arya Debbarma along with Dr. Juthika Debbarma and Dr. Pradipta Narayan Chakraborty. He deposed in the line of Dr. Juthika Debbarma, PW-31 and corroborated the opinion of the cause of death to be shock resulting from multiple genital injuries caused by forceful penetration of vagina by adult penis or penis sized object. Cross examination was declined.

87. PW-34, Dr. Ajit Debbarma, Medical Officer of Teliamura Sub-Divisional Hospital. He deposed that on 28.02.2021 police produced one raped victim to their Hospital for postmortem but postmortem could not be conducted due to lack of infrastructure in his hospital and forensic specialist in his hospital. As a result, he wrote a letter addressing SDM, Sadar for arrangement of postmortem examination of the raped victim. The said letter to the SDM, Sadar is marked as Exbt.32 and his signature marked as Exbt.32/1. There was no cross-examination.

88. PW-35, Bideswar Singha, The Investigating Officer elaborately deposed how he investigated the case. In his deposition he stated that after the arrest of the accused he recorded confessional statement in presence of Executive Magistrate and on disclosure in presence of Executive Magistrate, Debapriya Das they proceeded with the accused to the place of occurrence and recovered the dead body. He also seized one blue coloured track suit pant contain some seminal stain in front part along with a red coloured cotton shirt of the accused person by preparing seizure list. The said seizure list was marked as

Exbt.9. After collection of the postmortem report, forensic report and other relevant reports such as final opinion of the Doctors, he submitted charge-sheet against the accused.

89. The appellant-convict in spite of thorough cross-examination of the witnesses of the prosecution could not raise any cloud/doubt to disbelieve their evidence on record. Even, in 313 Cr.P.C., the Court below has examined the accused where specific portions have been asked with regard to the conducting and committing the crime. The appellant herein has only pleaded ignorance of the crime but there is no specific denial. He has not spoken in his defence to prove that he is not guilty.

90. For appreciation of the case under Section 27 of the Evidence Act is extracted hereunder :

**"27. How much of information received from accused may be proved.-
Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."**

91. The evidence of PW-4 who is the father-in-law of the accused person has deposed that the accused person was staying with him during the period of occurrence of the crime and as per the independent evidence of PW-4 who followed the accused person to the place of occurrence. They have recovered the body. PW-4 has categorically identified the material object, the 'chappal' of the accused person which was recovered from the place of occurrence.

92. The Medical evidence indicates the cause of death is because of forceful sexual penetration. Conclusion of the Postmortem Report of the Doctors is extracted hereunder :

"The cause of death is shock resulting from multiple genital injuries caused by forceful penetration of vagina by adult penis or penis sized object. Injury to the genitalia(No.7) is entemortem

in nature, fatal, fresh in duration, caused by hard and blunt object sufficient to cause death in ordinary course of nature. The manner of death is homicidal in nature. Injury No.1 and 2 entimortem in nature, fresh in duration, non fatal and caused by hard and blunt object. Injury No.3 to 6 are postmortem injuries which are caused by hard and blunt object. However, viscera have been preserved to rule out any associated intoxication/poisoning. The vaginal, vulval, oral and anal swab are preserved to rule out resent sexual intercourse"

93. In so far as Forensic reports are concerned, PW-28, DNA expert, Tripura Forensic Science Laboratory have categorically stated that the swab samples which they have collected from the body of the deceased i.e. the vaginal swab in the samples collected from the accused person which were sent and tested for the DNA test and the report says that both the samples of the deceased and that of the accused have matched each other. The relevant portion of the forensic report is extracted hereunder :-

**"1. The male DNA profile detected in the exhibit-Bi (source : vaginal swab of deceased) matches with the DNA profile generated from exhibit-A (source : dried blood of Sri Abhijit Tripura).
2. The female DNA profile detected in the exhibit-E (source : dry blood of deceased)."**

94. In view of the above, this Court is of the view that the accused person has committed heinous crime by committing rape upon the minor child thereafter, he committed murder. Thus, this Court also finds him guilty of offences punishable under Section 376-AB/302 of IPC read with Section 6 of POCSO Act. The Special Judge (the Learned Session Judge) also rightly sentenced the convict-appellant with capital punishment sentencing him to death.

95. Now coming to the question of sentence, we are of the considered opinion that since the convict-appellant has no previous criminal background and he is not a habitual offender and in the course of argument, Learned P.P. also did not point out anything about his previous conduct that if he is allowed to survive, he would be proved dangerous to the society.

96. Thus, in regards to the death punishment, the Court has relied on the decisions upheld by the Hon'ble Supreme Court in the aforementioned decisions. This Court considering the seriousness of such offence committed against the society, is taking into account the opinion of Hon'ble Supreme Court in **Irappa Siddappa Murgannavar versus State of Karnataka** reported in **(2022) 2 SCC 801** where it has been held that :

"37. There is no doubt that the appellant has committed an abhorrent crime, and for this we believe that incarceration for life will serve as sufficient punishment and penitence for his actions, in the absence of any material to believe that if allowed to live he poses a grave and serious threat to the society, and the imprisonment for life in our opinion would also ward off any such threat. We believe that there is hope for reformation, rehabilitation, and thus the option of imprisonment for life is certainly not foreclosed and therefore acceptable.

38. Thus, we find sufficient mitigating factors to commute the sentence of death imposed by the Sessions Court and confirmed by the High Court into imprisonment for life, with the direction that the appellant shall not be entitled to premature release/remission for the offence under Section 302 of the Code until he has undergone actual imprisonment for at least thirty (30) years. While maintaining other sentences, we direct that the sentences shall run concurrently and not consecutively. We say so as the appellant has been sentenced to imprisonment for life for the offence under section 376 of the Code, which sentence is also imposed for the offence under section 302 of the Code."

97. There is no dispute on record that the appellant-convict has committed an abhorrent crime and due to his crime, a girl of five years lost her life. He not only committed a barbaric act like rape upon her rather killed her also. This case was totally based on circumstantial evidence as there is/was no direct eye witness of the alleged occurrence of offence. There is also no any previous record of conviction against the appellant or there is no evidence on record that he is a habitual offender. So, considering the facts and circumstances and in view of the principles of law as laid down by the Hon'ble Apex

Court as referred above, we are of the considered opinion that it would be proper for fair ends of justice if the sentence of death is converted to life imprisonment.

98. Accordingly, the appeal filed by the appellant-convict is hereby dismissed being devoid of merit but the death sentence awarded by Learned Sessions Court below is converted to life imprisonment till the appellant-accused breaths his last in the prison.

The death reference at the same time is accordingly disposed of.

Pending application/s, if any, also stands disposed of.

A copy of this order be communicated to the Learned Sessions Court below for information and necessary compliance.

JUDGE

JUDGE

