

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A
Death Sentence Ref. No.01 of 2023

1. The Special Judge (POCSO), North Tripura, Dharmanagar.

.....Appellant

-VERSUS-

1. The State of Tripura.
2. Sri Sourabh Chandra Nath, son of Sri Sushil Chandra Nath of Padmapur, Madhubari Road, P.S. Dharmanagar, District: North Tripura.
3. Sri Dibakar Das, son of Sri Biswajit Das of Padmapur, near Cook Well, P.S. Dharmanagar, District: North Tripura.

..... Respondents.

For Appellant(s)	:	xxx
For Respondent(s)	:	Mr. Raju Datta, Public Prosecutor.

Crl.A(J). No. 58 of 2023

1. Sri Sourabh Chandra Nath, son of Shri Sushil Chandra Nath, aged about 23 years, resident of Padmapur, Madhubari Road, P.S. Dharmanagar, District: North Tripura.
2. Sri Dibakar Das, son of Shri Biswajit Das, aged about 24 years, resident of Padmapur, New Cook Well, P.S. Dharmanagar, District: North Tripura.

..... Appellants

-VERSUS-

1. The State of Tripura.

..... Respondent.

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

For Appellant(s)	:	Mr. S. Lodh, Advocate. Mr. A. Bhattacharjee, Advocate.
For Respondent(s)	:	Mr. Raju Datta, Public Prosecutor.
Date of hearing	:	12.02.2024
Date of delivery of judgment and order	:	21.02.2024
Whether fit for reporting	:	YES

JUDGMENT & ORDER

[T. Amarnath Goud, J]

Heard Mr. S. Lodh, learned counsel and Mr. A. Bhattacharjee, learned counsel appearing for the convict-appellants also heard Mr. Raju Datta, learned Public Prosecutor appearing for the respondent.

[2] Challenge here is the judgment and order of conviction and sentence dated 30.09.2023 and 03.10.2023 respectively, passed by the learned Special Judge (POCSO), Dharmanagar, North Tripura, in Case No. Special (POCSO) 35 of 2019 whereby and whereunder the learned Special Judge (POCSO), North Tripura, Dharmanagar, convicted the appellants for committing offence, punishable under Section-6 of the Protection of Children from Sexual Offences Act, 2012 and under Sections-376D & 302 of Indian Penal Code and sentenced them to suffer imprisonment for life which shall mean imprisonment for remainder of their natural life and to pay a fine of Rs.5,000/- each and in default, to suffer imprisonment for 6 months for committing offence punishable under Section-6 of the POCSO and further sentenced them to suffer imprisonment for life which shall mean imprisonment for remainder of their natural life and to pay a fine of Rs.5,000/- each in default to suffer imprisonment for 6 months for committing offence punishable under Section-376D of the IPC and further sentenced them to death and to pay fine of Rs.5,000/- each in default to suffer imprisonment for 6 months for committing offence punishable under Section-302 of IPC.

[3] The convict-appellants have been sentenced to death and it was directed that the convicts will be hanged by neck till their death. The death sentence, however, is subject to confirmation by this Court as provided under Section-366 of the Code of Criminal Procedure, 1973. The conviction and sentence are challenged by the accused-persons. In view of the capital punishment, reference for confirmation of death sentence under Section-366 of Cr. P.C. is also placed for our consideration.

[4] The prosecution story, in a nutshell, as unfolded, is that The informant, Shukla Tanti lodged an ejahar with Dharmanagar Women PS on 18/06/2019 to the effect that on 17/06/2019 she left her home at Padmapur, Madhubari road, PS-Dharmanagar for her work leaving

behind her three children including the victim who is a six years old girl. She returned back home at about 6:00 p.m. and found that the victim is not available in the house. (Since it is a case under POCSO Act, the name of the victim is withheld). She asked her other children and they informed her that the victim was playing outside and she did not return home. The informant thereafter searched for the victim in the nearby places and also informed her relatives but nobody could say the whereabouts of the victim. On 18/06/2019 at about 9:00 a.m. some workers in the Huplong Chera Tea Estate noticed the body of a small girl lying upside down in a drain. The matter was immediately brought to the notice of Dharmanagar Women PS and the staff of Dharmanagar Women PS went to that place and recovered the dead body of the girl. Later the informant was informed regarding recovery of the dead body of a girl and she also went to that place and she identified that girl as her daughter. Thereafter the informant lodged the FIR with Dharmanagar Women PS against unknown miscreants.

[5] On receipt of this written complaint, police registered a case vide Dharmanagar P.S. Case No.20 of 2019 under Section-302 read with Section-201 of IPC. After registration of the case, police started investigation and arrested the appellants. After completion of investigation, police filed charge sheet before the learned Court below against the appellants for committing offences punishable under Sections-363/376D/302/201 of IPC and under Section-6 of the POCSO Act.

[6] That the Investigating Officer, Sub-Inspector of Police, Sri Pijush Kanti Saha in course of investigation perused the written Ejhar, visited the place of occurrence, prepared the hand sketch map with index in separate sheets of paper and seized one yellow plastic jericane of petrol, half burnt cotton of quilt (Tusak), some burnt soil, burnt piece of mosquito net, violet colour gas lighter, burn piece of a printed lungi and he also seized the viscera of the deceased. He recovered one but nylon rope about 6 meter 30 cm length and ½ cm diameter from the hut of the deceased which was allegedly used in the murder.

[7] After receipt of the charge-sheet, learned Court below took cognizance of the offences, punishable under Sections-376D/302 read with Section-34 of the IPC & Section-6 of POCSO Act against the appellants. After perusal of the papers submitted by the prosecution and also hearing the prosecution as well as the defence, framed charge against the appellants for committing offences punishable under Sections-376D/302 of the IPC and under Section-6 of the POCSO Act, to which the appellants pleaded not guilty and claimed to be tried.

[8] To substantiate the charges, the prosecution examined as many as 41 witnesses in support of the charge, and exhibited some documents, but the defence examined none. On closure of prosecution evidence, the accused-appellants were examined separately under Section-313 of Cr.P.C. for having their response in respect of the incriminating materials surfaced in the evidence, as adduced by the prosecution, wherein, the accused-persons declined to adduce any evidence in support of their defence. Thereafter, on appreciation of the evidence and materials on record, the learned Court below, has passed the judgment dated 30.09.2023 and convicted the appellants.

[9] After hearing both the sides, learned Special Judge (POCSO), North Tripura, Dharmanagar, vide impugned Judgment of Conviction and Sentence dated 30.09.2023 and 03.10.2023 respectively passed by the Ld. Special Judge (POCSO), North Tripura, Dharmanagar, in SPECIAL (POCSO) 35 of 2019, whereby the learned Special Judge (POCSO), North Tripura, Dharmanagar convicted the appellants for committing offence, punishable under Section-6 of the POCSO Act, 2012 and under Sections 376D & 302 of the IPC, and sentenced them as under:

“ORDER ON SENTENCE

13. (1) The convicts namely (1) Sri Sourabh Chandra Nath and (2) Sri Dibakar Das are sentenced to imprisonment for life which shall mean imprisonment for the remainder of natural life under section 6 of the POCSO Act.

The convicts are also sentenced to pay fine of Rs.5,000/- each under section 6 of the POCSO Act and in default of payment shall undergo imprisonment for a further term of six months.

(ii) The convicts namely (1) Sri Sourabh Chandra Nath and (2) Sri Dibakar Das are sentenced to imprisonment for life which shall mean imprisonment

for the remainder of natural life under section 376D of the Indian Penal Code.

The convicts are also sentenced to pay fine of Rs.5,000/- each under section 376D of the Indian Penal Code and in default of payment shall undergo imprisonment for a further term of six months.

The sentences of imprisonment shall run concurrently.

(ii) The convicts namely (1) Sri Sourabh Chandra Nath and (2) Sri Dibakar Das are sentenced to death under section 302 of the Indian Penal Code.

The convicts are also sentenced to pay fine of Rs.5,000/- each under section 302 of the Indian Penal Code and in default of payment shall undergo imprisonment for a further term of six months.

The convicts shall be hanged by the neck till death.

14. The sentence of death is subject to confirmation by the Hon'ble High Court of Tripura. Send the case record accordingly.

The period of detention undergone by the convicts during the investigation and trial shall be set off.

15. The Court Inspector, Dharmanagar Police Court is directed to destroy the seized articles on expiry of the appeal period except the Aadhaar card of the victim after observing all formalities.

16. The convicts. Furnish a copy of this judgment free of cost to both the convicts.

This case stands disposed of on conviction.

Make necessary result entry in TR.”

[10] Being aggrieved by and dis-satisfied with the said judgment and order of conviction dated 30.09.203 and 03.10.2023 respectively passed by the learned Court below in connection with Special (POCSO) 35 of 2019, the appellants herein have preferred this appeal before this Court.

[11] Mr. S. Lodh, learned counsel appearing for the appellants has submitted that the learned Court below committed serious error in law and facts in passing the impugned judgment of conviction and sentence moreover, the prosecution has hopelessly failed to bring home the charges brought against the appellants. Learned Court below ought to have acquitted the appellants since the prosecution has failed to prove the charges beyond the shadow of reasonable doubts. Further, the learned Court below while passing the impugned judgment also failed to appreciate the depositions of PW- 1, PW-4, PW-5 and PW-6 and hence, the impugned Judgment of Conviction and Sentence is liable to be set aside.

[12] He contended that the victim was missing on 17.06.2019 at 3.30 p.m. from her house whereas from the deposition of PW-4, it would be evident that the deceased on the relevant date was found available playing near Radharaman Ashram at about 3.00 p.m., and PW-6, brother of the deceased in his cross-examination stated that his sister (now deceased) went out of the house to play near Radharaman Ashram at about 2.00 p.m. and he was in his house upto 3.30 p.m. He further in his cross-examination stated that the mother of the appellant, Sourabh Chandra Nath and his brother also returned home along-with the appellant No. 1, and thereafter, they went out after a little while, and hence, the impugned Judgment of Conviction and Sentence is liable to be set aside.

[13] The learned Court below failed to appreciate that from the statements of PW-1, PW-4, PW-5 and PW-6, it can easily be dis-earned that the deceased was last seen in front of Radharaman Ashram at about 3.00 p.m. and the mother of the appellant No. 1 and his brother along with the appellant No. 1 returned home by 3.30 p.m. and further they altogether went of the house after a little while, and thus, the impugned Judgment is liable to be set aside. The learned Court below also failed to appreciate the statement of PW-1 wherein PW-1 also agreed that after midnight while police visited her house, the appellant no. 1 was present in his house with his brother and he also searched his daughter along with the police and also used his torch of his mobile during search by the police.

[14] It has been further contended that the learned Court below further failed to appreciate the deposition of PW-5 who stated in her examination-in-chief that while they started for their house, they found the appellants, Sourabh Chandra Nath and Dibakar Das riding a Scooty went to Dharmanagar police station and both the appellants were detained at the police station. While passing the impugned judgment misread the statements of the informant (PW-1) and PW- 4 and PW-5 that they did not find the accused persons in their house when the victim went missing and also these witnesses were searching for the victim.

[15] The learned Court below was completely silent so far the deposition of PW-6 in his cross-examination where he clearly deposed that he found the appellant No.1 along with his mother and brother at his residence

within 3.30 p.m. on the day of missing of the victim i.e. on 17.06.2019, hence, the impugned judgment is liable to be set aside.

[16] On bare perusal of the deposition of PW-35, it will be evident that in his cross-examination he has agreed that he did not mention the name of the accused persons whose blood samples were received on 23.08.2019. He also agreed that he did not mention the date of receipt of the second blood sample of the accused persons in the Allelic Distinguishing Table in Annexure 'A' of Page 14 of the DNA Profiling (Exhibit 33). He also agreed that he did not mention in the report at page no. 10 that the conclusion from the DNA profiling could be drawn from the second blood sample of the appellants.

[17] It is clandestinely clear from the deposition of PW-41, the Investigating officer, that the Investigating Officer never stated that the chronological marks of the exhibits is done by the Investigating Officer and even the Investigating Officer (PW-41) is completely silent so far the sending of the second sample of blood of both the appellant at TSFSL, which on the face of it belies the claim of PW-35 that he had received any second sample of blood of both the appellants on the subsequent date, and thus, the conclusion of PW-35 so far the DNA profiling comes under serious doubt.

[18] The learned Court below failed to appreciate the circumstances along with the report received from the SFSL in concluding the chain of circumstances and if properly appreciated the cross-examination of the witnesses as well as the lapses in the report of SFSL, ought to have come to a conclusion that the chain of circumstantial evidence was not complete at all.

[19] The learned Court below has also committed an error in appreciating the blood sample of the appellants were collected for second time and sent to the SFSL with the same marking as Exhibit 1-1 for appellant No. 2 and Exhibit K-1 for appellant No. 1.

[20] Section-29 of the POCSO Act while wrongly attributing the burden upon the appellants to prove as to how their semen stain were found in the panty and vaginal swab of the deceased. The semen, if at all, found in the panty and vaginal swab of the deceased can easily be planted as deposition of PW-35 clearly says that the blood samples collected got degenerated and putrefied, which means that due care and caution was not taken while

receiving, seizing and dispatching to the SFSL, which leaves much room for framing both the appellants when on record it is available that both the appellants were detained and arrested not on the basis of any specific FIR, and furthermore credence was given on the so-called disclosure statement of the appellants during their police custody and recovery of certain articles which could in no way lead to the involvement or presence of the appellants at the place of occurrence. The prosecution has failed to bring on record the ingredients of Section 6 of POCSO Act and Sections 376D & 302 of IPC, and thus, the impugned Judgment is liable to be set aside.

[21] Learned Court below committed serious mistake in awarding sentence under Section-376D of IPC and Section-6 of the POCSO Act. As per Section-42 of POCSO Act, if any person convicted for committing offence punishable under Section-376D of IPC or any other provision of POCSO Act, the punishment can be imposed either under POCSO Act or under IPC, which is greater in degree. Learned Court below failed to appreciate the mandate of Section-42 of POCSO Act and punished for both the sections and hence the impugned judgment of conviction and sentence is liable to be interfered with.

[22] Learned counsel appearing for the appellants has averred that PW-35 in his report did not state from whom the second blood sample was collected. It was also contended that no date of receipt of second sample is mentioned. Further it was contended that there is no whisper in the SFSL report that it was prepared based on second sample. It was also contended on the issue as to who marked the blood samples of both the accused as exhibit-1-1 and K-1. It was also stated that neither the IO nor PW-35 did deposed as to who actually has done the marking of exhibits which were sent to SFSL for report.

[23] Learned Counsel for the convict-appellants has drawn our attention to a case of Shri Paramesha versus State of Karnataka in Criminal Appeal No. 1959 of 2019 and contended that the Court in the said case has referred to the judgment of Karnataka High Court in the case of Nagappa versus State of Karnataka reported in 2020 (3) KCR 1704 at para no.14. wherein, it has been held that “No doubt Article 20(3) on the Constitution of India, if it is contended that the accused is not bound to give the blood test, however, in order to have an investigation, the Investigating Officer or the Court can direct him to give the blood for DNA sample. Merely because he has

given the consent for taking the blood, then under such circumstances, the report which has been given cannot be accepted as a gospel truth. When there is ample chance of tampering, then under such circumstances it is going to be highly prejudice the accused person. The science may be infallible, but human action, which controls the result of the scientific forensic examination, is always fallible and there is probability of manipulation and tampering with the scientific evidence.”

[24] It is thus clear that positive DNA report can be of great significance, where there is supporting evidence, depending of course on the strength and quality of that evidence. If the DNA report is the sole piece of evidence, even if it is positive, it cannot conclusively fix the identity of the miscreant, but, if the report is negative, it would conclusively exonerate the accused from the involvement or charge.

[25] On the point of Circumstantial evidence, the duty of courts to safeguard themselves against basing decision suspicions, confession, must be accepted or rejected as a whole. Self-exculpatory statement containing admission of incriminating facts and admission of incriminating portion as true rejecting exculpatory portion as false, he has relied on a decision of the Apex Court in **Palvinder Kaur v. State of Punjab, reported in (1953) Cr. LJ 154**, where the Court has observed thus:

“It is true that strictly speaking exculpatory statements in which the prisoner denies her guilt cannot be regarded as confessions, but these statements are often used as circumstantial evidence of guilty consciousness by showing them to be false and fabricated.

It was also found that though Palvinder might have desired to continue her illicit intrigue with Mohinderpal she may not have desired to sacrifice her wealth and- position at the altar of love. She may have had' a motive to kill her husband but a stronger motive to preserve her own position as the wife of a prospective chief of Bhareli and that in this situation it was by no means impossible that the murder was committed by Mohinderpal alone without the consent and knowledge of Palvinder, and that though a strong suspicion attached to Palvinder, it was impossible to state with confidence that poison was administered by her. Therefore, it was not possible to convict her under Section-302, Indian Penal Code.”

The result, therefore, is that we are constrained to hold that there is no material, direct or indirect, for the finding reached by the High Court that the death of Jaspal was caused by the administration of potassium cyanide. If we believe the defence version his death was the result of an accident. If

that version is disbelieved, then there is no proof as to the cause of his death. The method and manner in which the dead body of Jaspal was dealt with and disposed of raise some suspicion but from these, facts a positive conclusion cannot be reached that he died an unnatural death necessarily, Cases are not unknown where death- is accidental and the accused has acted in a peculiar manner regarding the disposal of the dead body for reasons best known to himself. One of them might well be that he was afraid of a false case being started against him. Life and liberty of persons cannot be put in jeopardy mere suspicions, howsoever strong, and they can only be deprived of these the basis of definite proof. In this case, as found by the High Court, not only were the Sub- Inspector of police and police constables and other witnesses guilty of telling deliberate lies but the prosecution was blameworthy in introducing witnesses in the case to support their lies and that being so, we feel that it would be unsafe to convict the appellant the material that is left after eliminating the perjured,, false and inadmissible evidence.”

[26] Learned counsel appearing for the appellants has placed his reliance on a decision decided by this Court in ***Bikash Koiri v. State of Tripura*** reported in **2014 CRI. L. J. 186** on the point of extra-judicial confession made by the accused persons and for the purpose of reference the relevant portion may be extracted hereunder:

“45. The extra-judicial confession made by the accused to PW-12 cannot be considered as admissible evidence in view of the decision of the Division Bench of the Gauhati High Court in *State of Assam v. Anupam Das*, 2008 Cri LJ 1276, which reads 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 [Section 25](#) prohibits the proof of a confession made to a police officer, [Section 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 [Section 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 : [Bheru Singh v. 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."

[27] On the point of DNA, learned counsel for the appellant has relied on a decision the Hon'ble Apex Court in ***Manoj and Others v. State of Madhya Pradesh***, reported in (2023) 2 SCC 353, wherein the Court has held thus:

"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](#)⁴¹ 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) Cr 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 report⁴², 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, 15th Edn. Para-14.32).

Thus, DNA may be more useful for purpose of investigation but not for raising any presumption of identity in a court of law.”

[28] Another reliance has been placed in a case ***Rahul v. State of Delhi, Ministry of Home Affairs and Another with Ravi Kumar v. State of NCT of Delhi***, reported in **(2023) 1 SCC 83**, wherein, it has been held that:

“35. The learned Senior Advocates appearing for the appellants have also rightly drawn the attention of the Court to the timings and the manner in which the samples were collected during the course of post-mortem of the deceased, to submit that PW 48 P-1 Sandeep Kumar was present at the hospital when the post-mortem was conducted on 14-2-2012, and therefore there was no reason to collect the samples from the body of the deceased on 16-2-2012. The collection and sealing of the samples during the MLC of the accused which had taken place on 14-2-2012 at RTMR Hospital, Jaffarpur also does not inspire confidence. The story of bloodstains and semen found on the seat covers of the Indica car seized on 13-2-2012 and sent to the CFSL for examination also appears to be highly improbable and unreliable. There is no clear evidence as to who was in custody of the said car after its seizure till it was sent to CFSL for examination and as to whether the car was sealed during the said period.

36. The learned Amicus Curiae has also assailed the forensic evidence i.e. the report regarding the DNA profiling dated 18-4-2012 (Ext. P-23/1) giving incriminating findings. She vehemently submitted that apart from the fact that the collection of the samples sent for examination itself was very doubtful, the said forensic evidence was neither scientifically nor legally proved and could not have been used as a circumstance against the appellant-accused. The Court finds substance in the said submissions made by the Amicus Curiae. The DNA evidence is in the nature of opinion evidence as envisaged under Section 45 and like any other opinion evidence, its probative value varies from case to case.”

[29] Regarding recovery of materials, Mr. Lodh, learned counsel has placed his reliance in a case ***Sitaram Das v. State of West Bengal***, reported in **2020 SCC Online Cal 522**, wherein, it has been held as under:

“29. Let us now address the applicability of Section 29 of the POCSO Act dealing with availability of presumption to be attracted to against the accused/appellant, in the given set of facts.

30. Most of the witnesses during trial either being declared hostile to prosecution, or not having rendered desired support to the prosecution version, shown in FIR, for the reasons ascribed in the judgment, learned Trial Judge thought it prudent to make the presumption applicable against the accused person, available under Section 29 of the POCSO Act. The principal thrust of this appeal was the imperfect application of Section 29 of the POCSO Act dealing with presumption in a case, where victim herself had given a go-by to the persecution story developing a separate story in her own version, contrary to the case set up in F.I.R, and subsequently in her 164 statement. The evidence adduced by the prosecution irresistibly indicates one and only important feature that the foundational evidence with respect to the offence charged has not been led in the instant case. It would be most improper, if the presumption available in Section 29 of the POCSO Act is straightway made applicable in a case even in absence of foundational evidence being led by prosecution. As has already discussed that besides medical evidence, there was no other evidence in making out a case, either of rape or aggravated sexual penetrative assault, and that medical evidence cannot be considered to be conclusive in sense in the given set of facts, so in the absence of proof of foundational evidence corresponding to the charges framed in this case against the accused person, there hardly left any circumstances for making any application of presumption available under Section 29 of the POCSO Act. The words appearing in Section 29 of the POCSO Act "Where a person is prosecuted" embraces a complete exercise on the part of the prosecution to prove the prime allegation set out In F.I.R. corresponding to the charge framed against the accused person during the course of trial, which is of course rebuttable subject to developing a strong case, contrary to that established by prosecution during cross-examination by defence. When a different story is developed during trial by the victim prosecutrix, contrary to the story of prosecution, and that developed story received ratification from the near relatives of the victim prosecutrix, in the given facts situation, it stands to reasons that despite having been provided with sufficient opportunity to prove the case, prosecution failed to probalise the incident complained of in the FIR.

31. The concept of reverse burden of proof can only be made applicable in a case, where prosecution has already led substantial evidence, as regards the offence complained of. There is hardly any scope for direct application of Section 29 of the POCSO Act, even in a case where there is no foundational evidence being led by the prosecution.

32. The issue under reference was addressed by Division Bench of this court in the case of Subrata Biswas v. The State reported in (2019) 3 C Cr. LR (Cal) 331, where the ratio decided was that proof of penetrative sexual assault is sine-qua-non prior to making application of the presumption available under Section 29 of the POCSO Act. 33. Learned advocate for the appellant thus rightly proposed that before making adherence to Section 29 of the POCSO Act, so as to make the presumption applicable.

33. In the instant case, the prosecution ought to have led foundational evidence revealing the ingredients of the offence on preponderance of probability, and only upon laying such foundation by leading cogent and

reliable evidence. It is only on proof of foundational evidence being led, the onus gets shifted to accused to prove the contrary in order to discharge the reverse burden of proof, as contemplated in Section 29 of the POCSO Act. We would sincerely accept the interpretation, offered by the Division Bench of this in the case shown herein above, so as to make the presumption available in connection with trial under POCSO Act.”

[30] In cases depending largely upon circumstantial evidence there is always a danger that conjecture or suspicion may take the place of legal proof and in this regard he has placed his reliance on a decision of the Apex Court in ***Jaharlal Das v. State of Orissa***, reported in (1991) 3 SCC 27, wherein the Court has observed infra:

“4. No doubt the offence is a shocking one but the gravity of the offence cannot by itself outweigh as far as legal proof is concerned. Invariable in such cases a person last seen with the victim, unless otherwise there are circumstances prima facie exonerating him, would be the prime suspect but in the ultimate judicial adjudication suspicion, however strong, cannot be allowed to take the place of proof. With that caution in mind we shall now proceed to examine the facts and circumstances as put forward and the various arguments advanced.

8. As already mentioned this case rests purely on circumstantial evidence. It is well-settled that the circumstantial evidence in order to sustain the conviction must satisfy three conditions:

- 1) The circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- ii) Those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused;
- iii) The circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, and it should also be incapable of explanation on any other hypothesis than that of the guilt of the accused.

In the leading case *Hanumanant and Another v. The State of Madhya Pradesh*, [1952] SCR 1090 it is also cautioned thus: "In dealing with circumstantial evidence there is always the danger that conjecture or suspicion may take the place of legal proof. It is therefore right to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

Mahajan, J., as he then was, has also aptly referred to a passage containing the warning addressed by Baron Alderson to the Jury in *Reg v. Hodge*, [1838] 2 Lew 227 which is stated as under;

"The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matter, to over-reach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

In *Dharam Das Wadhvani v. State of Uttar Pradesh*, [1974] SCR 607 it was held that " unlike direct evidence the indirect light circumstances may throw may vary from suspicion to certitude and care must be taken to avoid subjective pitfalls of exaggerating a conjecture into a conviction. " In *Jagta v. State of Haryana*, [1975] 1 SCR 165 it was held that "The circumstances that the accused could not give trustworthy explanation about the injuries on his person and about his being present on the scene of occurrence are hardly sufficient to warrant conviction.

[31] On the point of examination under Section-313 of Cr. P.C. that long series of facts cannot be asked and in this regard the Gauhati High Court in *Gopal Goraik v. State of Assam*, reported in **2011 (2) GLT 425**, wherein, the Court has observed as under:

"19. The basic purpose of Section-313 Cr. P.C. as it stands today is to give an opportunity to the accused to "personally explain the circumstances appearing against him in the evidence and that is why the word "personally" has now found a place in the present Section-313 Cr. PC. This is significant because his statement can be taken into consideration in judging his innocence or guilt.

20. In *Tara Singh v. State of Punjab*, reported in AIR 1951 SC 441, in the context Court had stated that it cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section-342 of the Code and it is not sufficient compliance to string together a long series of facts and ask the accused what he had to say about them. Bearing in mind the aim and object of the section, which is to afford a fair and proper opportunity of explaining the circumstances which appeared against him, logically and rationally, the questioning must be done in such manner and in such a form which even an ignorant and illiterate person can appreciate and understand. Even otherwise, an accused would be somewhat perturbed when he is facing charge and, therefore, fairness demands that each material fact would be put simply and separately. The Apex Court also noted that every error or omission to record the statement in that behalf would not necessarily vitiate a trial because errors of this type fall within the domain of curable irregularities. The fall out of such omission or errors in each case depends upon the degree of error and whether prejudice had been occasioned or is likely to have occasioned.

23. In *Ajay Singh (supra)*, the Supreme Court, in paragraphs 13 and 14 stated thus:

“13. The object of examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. The word “generally” in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature of the general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused’s failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section-313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give.

26. In view of what has been stated herein above, we are of the opinion that the examination of the accused appellant under Section-313 Cr. P.C., in the facts and circumstances of the case, do not satisfy the requirement of the section. Accordingly, conviction recorded and sentence awarded are hereby quashed. The matter is remanded to the learned trial Court with a direction that the learned trial Court in accordance with the underlying principles of Section-313 Cr. P.C., shall put all the circumstances appearing against the accused appellant to him to enable him to explain all opportunity to adduce evidence, if he wishes, in his defence. The learned trial Court is directed to complete the trial of the case within a period of 2 months from today. We also quash the statements of the accused appellant recorded earlier under Section-313 Cr. P.C. The learned trial Court would dispose of the case after hearing the parties.

[32] Learned counsel in view of above observations and legal propositions, at the fag-end, has submitted that there were many lacunas or laches in the process of investigation and in the judgment of the trial Court as well as in the development of the chain of events during the trial and as such, the order of conviction and sentence is erroneous. More particularly, the present case does not fall under the category of rarest of the rare case warranting a death sentence and, is liable to be set aside and needs strapping interference of this Court and prayed for allowing the appeal. Mr. Lodh, learned counsel finally contended that the prosecution has not made out a case beyond reasonable doubt and the trial Court judgment stands with negative mind and the doubts upon investigation and laches committed more so, prosecution not

made out a rarest of rare case for death sentence and prayed to set aside the judgment and sentence and allow the appeal.

[33] On the other hand, Mr. Raju Datta, learned Public Prosecutor appearing for the respondent-State has submitted that the prosecution has successfully proved the charges against the accused persons to the hilt and there is no iota of doubt about the commission of the crime by the accused persons. He has submitted that the convicts deserve no leniency rather they deserve deterrent and exemplary punishment, so that before committing such an act everyone should think twice and thinking about the consequence of such an act, dare to do any such act at any point of time and the crime committed by the convicts is well established and they should not be spared, rather the offence committed comes under the “rarest of the rare” offence and thereby they deserve capital punishment only.

[34] 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 who has not even gained the senses of the nature and consequences of the crime committed against her. 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.

[35] It has been further contended on the point of burden of proving fact especially within occupied only by both of them. The facts relevant to cause of death being only known to accused persons. In this respect he has relied upon a decision of the Apex Court in **State of Rajasthan v. Thakur Singh**, reported in (2014) 12 SCC 211, wherein the Court has held thus:

“The question for consideration is whether the facts and circumstances of the case require the application of Section 106 of the Evidence Act, 1872 and if so, whether the respondent/accused is guilty of the murder of his wife Dhapu Kunwar. In our opinion, both questions need to be answered in the affirmative and the High Court rendered a decision, perverse in law, in acquitting Thakur Singh and reversing the decision of the Trial Court.

10. The Trial Judge held, on the basis of the evidence on record, that no one except Thakur Singh could have caused the death of Dhapu Kunwar. He had confined her and their daughter inside a room and although no one saw him killing his wife, since the room was bolted from inside, he had not opened it for the whole day and the door had to be forced open, no one

else could have caused her death. The Trial Judge found that there was nothing to suggest that any other person had entered Thakur Singh's room and there was no possibility of anybody else having caused Dhapu Kunwar's death by strangulation. It was also noted that Thakur Singh gave absolutely no explanation in his statement under Section 313 of the Code of Criminal Procedure as to how Dhapu Kunwar had died of asphyxiation inside their room.

This [Section 101] lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word "especially" stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

17. In a specific instance in *Trimukh Maroti Kirkan v. State of Maharashtra*[3] this Court held that when the wife is injured in the dwelling home where the husband ordinarily resides, and the husband offers no explanation for the injuries to his wife, then the circumstances would indicate that the husband is responsible for the injuries. It was said: "Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime."

21. More recently, in *Gian Chand v. State of Haryana*[7] a large number of decisions of this Court were referred to and the interpretation given to Section 106 of the Evidence Act in *Shambhu Nath Mehra* was reiterated. One of the decisions cited in *Gian Chand* is that of *State of West Bengal v. Mir Mohammad Omar*[8] which gives a rather telling example explaining the principle behind Section 106 of the Evidence Act in the following words: "During arguments we put a question to learned Senior Counsel for the respondents based on a hypothetical illustration. If a boy is kidnapped from the lawful custody of his guardian in the sight of his people and the kidnappers disappeared with the prey, what would be the normal inference if the mangled dead body of the boy is recovered within a couple of hours from elsewhere. The query was made whether upon proof of the above facts an inference could be drawn that the kidnappers would have killed the boy. Learned Senior Counsel finally conceded that in such a case the inference is reasonably certain that the boy was killed by the kidnappers unless they explain otherwise."

23. Applying this principle to the facts of the case, since Dhapu Kunwar died an unnatural death in the room occupied by her and Thakur Singh, the cause of the unnatural death was known to Thakur Singh. There is no evidence that anybody else had entered their room or could have entered

their room. Thakur Singh did not set up any case that he was not in their room or not in the vicinity of their room while the incident occurred nor did he set up any case that some other person entered the room and caused the unnatural death of his wife. The facts relevant to the cause of Dhapu Kunwar's death being known only to Thakur Singh, yet he chose not to disclose them or to explain them. The principle laid down in Section 106 of the Evidence Act is clearly applicable to the facts of the case and there is, therefore, a very strong presumption that Dhapu Kunwar was murdered by Thakur Singh.

27. The High Court expressed the view that since the prosecution did not produce Gotu Singh as its witness, its case ought to fail. In our opinion, Gotu Singh could not have added to the case of the prosecution. He had arrived on the fateful day after Thakur Singh had locked himself, Dhapu Kunwar and their child in their room. He did not even meet them on the fateful day and was oblivious of the events that had taken place that day. Therefore, producing him in the witness box would not have been of any consequence.

28. On a consideration of the facts of the case we are of the opinion that the approach arrived at by the Trial Court was the correct approach under the law and the High Court was completely in error in relying primarily on the fact that since most of the material prosecution witnesses (all of whom were relatives of Thakur Singh) had turned hostile, the prosecution was unable to prove its case. The position in law, particularly Section 106 of the Evidence Act was completely overlooked by the High Court making it arrive at a perverse conclusion in law."

[36] It has been further submitted that only in exceptional cases where there are compelling circumstances and the judgment in appeal is found to be perverse, the appellate Court can interfere with the order of the acquittal. The appellant Court should bear in mind the presumption of innocence of the accused and further that the trial Courts acquittal bolsters the presumption of innocence. In this regard he has relied upon a decision of the Apex Court in **Ramesh Harijan v. State of U.P.** reported in (2012) CRI. L. J. 2914, wherein the Court has held thus:

"24. In *Sucha Singh v. State of Punjab*, AIR 2003 SC 3617, this Court had taken note of its various earlier judgments and held that even if major portion of the evidence is found to be deficient, in case residue is sufficient to prove guilt of an accused, it is the duty of the court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim *falsus in uno falsus in omnibus* has no application in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of credence, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance, it

does not necessarily follow as a matter of law that it must be disregarded in all respects as well.

25. In *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra*, AIR 1973 SC 2622, this Court held :

“...Thus too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. For all these reasons it is true to say, with Viscount Simon, that "a miscarriage of justice may arise from the acquittal of the guilty no less than from the conviction of the innocent ..." In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analyzing the evidence and appraising the soundness of the contrary conclusions reached by the courts below.

26. Therefore, in such a case the paramount importance of the court is to ensure that miscarriage of justice is avoided. The benefit of doubt particularly in every case may not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. A reasonable doubt is not an imaginary trivial or merely possible doubt, but a fair doubt based upon reason and common sense.

27. In view of the above, we are of the considered opinion that the acquittal in the instant case by the trial court was totally illegal, unwarranted and based on mis-appreciation of evidence for the reason that the court had given undue weight-age to unimportant discrepancies and inconsistencies which resulted in miscarriage of justice. Thus, the High Court was fully justified in reversing the order of acquittal.”

[37] 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 anyway interested in fabricating the dying declaration.”

[38] 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.”

[39] 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. 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 beendoubted in these proceedings.”

[40] 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 he 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.”

[41] Regarding importance of chain of circumstances learned P.P. has placed his reliance in a case *Laxman Naik versus State of Orissa*, reported in (1994) 3 SCC 381, wherein, the Court has stated as follows :

“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 pre-planned 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 pre-planned 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.”

[42] In respect to the confessional statement of the convict appellants has relied on a decision of the Hon'ble Apex Court in ***State of Haryana v. Padam and Others***, reported in ***2019 SCC online P&H 5453***, wherein, the Court has held thus:

“40. According to us even with the best of intention if there is no statutory expression of the intention, the court cannot supply words for the sake of achieving the alleged intention of the law maker. It is entirely within the realm of the law makes to express clearly what they intend. No doubt, there is a limited extent to which the court can interpret a provision so as to achieve the legislative Intent. That is in a situation where such an interpretation is permissible, otherwise feasible, when it is absolutely necessary, and where the intention is clear but the words used are either Inadequate or ambiguous. That is not the situation here. The Full Bench replaced the authority and jurisdiction of the "Magistrate" by "Judicial Magistrate which is a major change which could be made only by the Legislature. The court, in the process of interpretation, cannot lay down what is desirable in its own opinion, it from the words used, the legislative intention is otherwise discernible. As we have already noted above, the duty of the court is not to lay down what is desirable in its own opinion. Its duty is to state what is discernible from the expressions used in the statute. The court can also traverse to an extent to see what is decipherable but not to the extent of laying down something desirable according to the court if the legislative intent is otherwise not discernible. What is desirable is the jurisdiction of the law-maker and only what is discernible is that of the court.

45. Having held that Executive Magistrate is a Magistrate for the purposes of Section-26 of the Evidence Act, we are bound to clarify in the light of the settled legal principles regarding confessions, that the proof or admissibility of such confessions cannot be all and end all of the matter. To repeat, admissible evidence of confession as per Section-26 of the Evidence Act as discussed above is one of the pieces of evidence and may require corroboration in the given circumstances. We need not quote the said settled legal position herein.”

Regarding Section-29 of the POCSO Act, learned Public Prosecutor has placed his reliance in a decision of the Hon'ble Gauhati High Court in *Latu Das v. State of Assam*, reported in 2019 SCC online Gau. 5947, wherein, the Court has observed as follows:

“24. We also take note of the presumption under Section 29 of the POCSO Act which provides that when a person is prosecuted for committing or abetting or attempting to commit any offence under Section 3, 5, 7 and section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence as the case may be, unless the contrary is proved. The above statutory presumption, which a Court is bound to raise in a prosecution for offence under Section 3, 5, 7 and 9, of the POCSO Act put a reverse burden on the accused, which is an exception to the general principle of criminal justice, that burden to prove the guilt beyond reasonable doubt lies on the prosecution, and the accused has a right to remain silent. The statutory presumption under Section 29 of the POCSO Act creates a restriction on the accused's right to remain

silent. Because once there are adequate material for raising a presumption under Section 29 of the PCSO Act, the special court is justified in recording conviction on the basis of such presumption, unless the accused rebut, the presumption, or proves the contrary, to what was/were the basis of raising presumption.

25. However, one must bear in mind that presumption is not in itself evidence, it is only inference of fact drawn from other known or proved facts; and as such, in order to draw a presumption, statutory or otherwise, there must be existence of proved facts, from which a presumption can be raised. Therefore, presumption under Section 29 of the POCSO Act, does not absolve the prosecution from its usual burden to prove the guilt of the accused beyond reasonable doubt. It only lessen its burden to some extent and put a corresponding burden on the accused. Initial burden in a criminal case is always on the prosecution to bring on record reasonable evidence and materials to prove that the accusation brought against the accused is true. Once such evidence or materials are brought on record prima facie establishing the case of the prosecution, then only the Court is obliged to raise presumption under Section 29 of the POCSO Act and in that situation only the burden stands shifted to the accused to rebut the presumption. If the accused fails to rebut the presumption, Court is justified to hold the accused guilty of offence under Section 3, 5, 7 & 9 of the POCSO Act.”

[43] Heard both sides. In the present case our careful analysis of the statements of the prosecution has created an impression on our minds that to some extent there are some corroboration as well as discrepancies in the statement of the PWs. Insofar as the appellants are concerned, the evidence of all the witnesses have been accepted and acted upon by the Court below. The conviction and sentence are challenged by the accused-persons. In view of the capital punishment, reference for confirmation of death penalty is also placed for our consideration. For the purpose of consideration, let us delve into the evidences of the relevant PWs.

[44] PW-1 has deposed that she is a maid servant and on the fateful day she served breakfast to her children including the victim and thereafter went for her work. She deposed that she returned home at about 3:30 p.m. and inquired about the victim from her elder son, Bapi Tanti and came to know that the victim went out of the house saying that she was going to meet someone. She also deposed that she searched for her daughter but could not trace her and the local people advised her to inform the matter to the police. She deposed that police came to her house but they also failed to find the victim. She also deposed that the police during that time took the mobile number of accused Saurabh Nath and asked her to inform them if her daughter could be traced. She deposed that on the next day morning she got information from the police that

the dead body of her daughter was found at Kargil Tilla and she went there and saw the dead body of her daughter which was recovered by police and the dead body was covered with a plastic.

[45] She also deposed that she lodged an oral ejahar regarding the incident with Dharmanagar PS and it was written down as per her version and she signed on it which she identified as exhibit-1. She also stated that during her stay in the house of accused Saurabh Nath, the accused was maintaining a very good relation with her children and on many occasions gave chocolate and other snacks to her children and the victim was very much loved by the accused and she used to go for a ride with the accused in his scooty. She also deposed that on several occasion the accused took the victim at Office Tilla, Dharmanagar and gave her chocolates, chips and other snacks and allure her to accompany him. She deposed that the accused Saurabh was living with his brother and police took the mobile phone of the accused from the possession of his younger brother on subsequent date. She further deposed that the other accused Dibakar Das who is a friend of accused Saurabh used to visit the house of accused Saurabh frequently with some foods and they used to share those foods with her children in the dwelling hut and she suspected that both of them are behind the death of her daughter.

[46] PW 5 similar to the informant and PW 4 deposed that the victim was playing with some clay beside the road near Radha Raman temple and she went missing and PW 5 along with the informant searched for her but could not trace her till the midnight. She also corroborated the fact that they went to Dharmanagar PS and police also visited their house but could not trace the victim. Further she corroborated the fact that on the next day the dead body of the victim girl was found at Huplong Tea Estate near Kargil Tilla and she along with the informant went there and saw the dead body. She deposed that she along with the informant went to Dharmanagar PS and police examined them and while they were returning back home they found both the accused riding a scooty towards Dharmanagar PS. She also stated that the informant and her family used to stay in the house of accused Saurabh Nath as tenant and both the accused were detained in the PS on that date.

[47] PW 6 Master Bapan Tanti is brother of the victim and he also stated that the victim was playing with some clay near Radha Raman Ashram

and after his mother returned she inquired about the victim and he informed his mother that the victim was playing near Radha Raman Ashram and she did not return home till night. He also corroborated the fact that his mother and other relatives searched for the victim but could not trace her and on the next day the dead body of the victim was recovered from a drain near Kargil Tilla at Huplong Tea Estate.

[48] It is to be mentioned herein that these witnesses merely suspected the accused persons behind the incident as the accused persons used to give chocolates, snacks etc., to the victim and many a times the victim along with accused persons went on his scooty for a ride. These witnesses faced cross examination from the side of the accused persons and it transpired that they stated certain facts for the first time before the Court and they did not give any statement in this regard to the I.O. The importance of these witnesses is limited to the extent that they came to know that the victim went missing and subsequently, the dead body of the victim was recovered.

[49] PW-4, in his testimony has stated that both the accused frequently visited the rented house of the victim and they used to call her to play with them and they used to show her laptop and mobile phone and the victim did not like the way both the accused played with her and she become annoyed and used to leave the house and stay outside till return of her mother.

[50] PW 5 similar to the informant and PW 4 deposed that the victim was playing with some clay beside the road near Radha Raman temple and she went missing and PW 5 along with the informant searched for her but could not trace her till the midnight. She also corroborated the fact that they went to Dharmanagar PS and police also visited their house but could not trace the victim. Further she corroborated the fact that on the next day the dead body of the victim girl was found at Huplong Tea Estate near Kargil Tilla and she along with the informant went there and saw the dead body. She deposed that she along with the informant went to Dharmanagar PS and police examined them and while they were returning back home they found both the accused riding a scooty towards Dharmanagar PS. She also stated that the informant and her family used to stay in the house of accused Saurabh Nath as tenant and both the accused were detained in the PS on that date.

[51] PW 7, Sri Kajol Das, PW 12, Smt. Gayatri Ghosh, PW 13, Smt. Prabha Rani Acharjee, PW 14, Sri Milan Nag, PW 33, Sri Paritosh Roy, PW 34, Sri Manik Chakraborty and PW 39 Sri Dibyendu Das are relevant in this case as in their presence both the accused persons gave disclosure statements and in that statement they stated as to how they committed the incident and what laid to the death of the victim girl.

[52] The prosecution also examined Dr. Sudipa Biswas as PW 37 and Dr. Pradipta Narayan Chakraborty as PW 40 in this case and both the witnesses along with Dr. Prasenjit Das and Dr. Utpalendu Debnath conducted autopsy over the dead body of the victim and they opined that the cause of death in this case is combined effect of suffocation and compression of the neck and there is evidence of recent forceful sexual intercourse and the manner of death is homicidal in nature. Both these witnesses are important to understand that the victim prior to her death was subjected to forceful sexual intercourse.

[53] The prosecution in this case also examined PW 41, Smt. Sanchita Nath, the IO of this case and as we go through the testimony of the witness it is found that she arranged for examination of the wearing apparels of the victim, blood sample, vaginal swab, anal swab, oral swab of the victim and also her nail scraping as well as blood sample, glance penis, swab body of penis, urethral swab of both the accused persons along with the jeans pant of accused Saurabh Ch. Nath at SFSL, Narsinghar and the examination resulted in a positive report and according to the report the semen detected in Exbt. A which is the panty of the victim is of accused Dibakar Das.

[54] The prosecution to establish that both the accused gave disclosure statements before the Executive Magistrate adduced PW 34, Sri Manik Chakraborty, who was posted as Deputy Collector and Magistrate, Dharmanagar and he stated that on 30/06/2019 a requisition was received from Dharmanagar Women PS to depute an Executive Magistrate for recording disclosure statement of accused Saurabh Chandra Nath and he was deputed by the Sub-Divisional Magistrate, Dharmanagar and he went to the PS and in his presence accused Saurabh Nath gave his disclosure statement.

[55] PW 39, Sri Dibyendu Das was also posted as Deputy Collector and Magistrate at Dharmanagar and he stated that on 21/06/2019 a requisition

was received from the IO to depute one Deputy Collector and Magistrate for recording disclosure statement of accused Dibakar Das and he was deputed by the Sub-Divisional Magistrate, Dharmanagar and in his presence accused Dibakar Das gave disclosure statement describing as to how he along with other accused executed the incident.

[56] The prosecution also adduced PW 7, Kajol Das and PW 14, Milan Nath in order to prove that disclosure statement by accused Dibakar Das was given in their presence. The prosecution also adduced PW 13, Prabha Rani Acharjee and PW 12, Gayatri Ghosh in order to prove that the disclosure statement by accused Saurabh Ch. Nath was given in their presence and in presence of an Executive Magistrate.

[57] The prosecution has also relied on the report received from SFSL, Narsinghgarh, Agartala after examination of the blood sample, semen and the wearing apparels of the victim and the accused persons. In this respect the deposition of PW 35, Dr. Subhankar Nath, Deputy Director, SFSL is reproduced here in below for ready reference:- *"On 09-08-2019 I was posted as Dy. Director, SFSL, Tripura. On that day the DNA Division received one sealed parcel from Toxicology Division and on 23-06-2019 the office of the Director received another sealed parcel in connection with Dharmanagar Women P.S. case no. 2019 WDN 020 dated 18-06- 2019 under section 363/376D of IPC and 06 of POCSO Act, 2012 which was forwarded by the SDPO, Dharmanagar, North Tripura vide No. 5252/SDPO/DMN dated 22-08-2019. The Director endorsed me the exhibits and relevant papers for examination and opinion. The period of examination was 13-08- 2019 to 17-09-2019."*

[58] PW-35 in his evidence also stated categorically that the DNA extracted from the exhibits were highly degraded and as a result no amplification was observed. This particular observation by PW-35 cannot lead failure of the prosecution case. The report presented by PW-35 categorically says that the semen stain of both the accused persons were found in the panty as well as vaginal swab of the deceased and this evidence is a clinching one to hold that the accused persons actually committed the incident with the victim of this case.

[59] Before concluding we shift our focus on the investigation of this case. PW-41, the Investigating Officer in course of the investigation found that there is no eye witness of the incident. The laudable task done by PW 41 is seizure of the wearing apparels of the victim and also collection of blood, vaginal and semen sample from the deceased as well as from the accused persons of this case and sending those for examination and report from SFSL, Agartala. It is a case where nobody saw the victim and the accused persons together proceeding towards the place of occurrence. No one also saw the accused persons leaving the PO after commission of the incident. It is a case absolutely based on circumstances and the report from SFSL, Agartala. However, the IO in course of the investigation should have looked for CCTV footage right from the place from where the victim went missing to the place of occurrence. Now a day's most of the shops and residence have CCTV installed and collection of CCTV footage would have added further strength to the prosecution case. The IO also seized the mobile phone of the accused Sourabh Chandra Nath but she did not arrange for collection of the tower location of the mobile from the time the victim went missing. This court also failed to understand while the scooty of one of the accused was seized. The IO could have collected the tyre mark of that scooty and could have used it to detect any tyre marks in an around the PO in order to establish that the accused persons rode the scooty to the PO during the incident. None the less the investigation appears to be proper and the report collected from the SFSL is the clinching evidence.

[60] PW-11 in his deposition has stated that about 6/7 years back one day SI Sanchita Nath came to Sarala Petrol Pump and he was working there as Accountant till date. When the investigating officer asked to see the CCTV footage of 17.06.2019 but CCTV footage could not be seen to her as it was deleted from memory due to lapse of time. He has further stated that in connection with this case he had seen a photograph of the person involved in this case in Facebook and on 17.06.2019 in the evening came to petrol pump and took some petrol and left the petrol pump without taking the receipt.

[61] PW-15, Dr. Kallol Biswas in his deposition has stated that on 27.06.2019 he was posted as Medical Officer at Dharmanagar District Hospital and on that day Sub-Inspector, Sanchita Nath made a prayer before Medical Superintendent of Dharmanagar District Hospital for collection of blood

samples and other samples i.e. pubic hair, glans and penis swab, urethral swab etc. of accused persons Dibakar Das and Sourav Ch. Nath and also produced them before the Medical Superintendent who endorsed their medical examination and collection of samples of the accused persons to him. Thereafter, he examined the accused persons and collected their blood sample and other samples i.e. pubic hair, glans and penis swab, urethral swab etc. in presence of the Investigating Officer and other witnesses and preserved those samples in different containers and handed over those samples to the Investigating Officer, Sub-Inspector, Sanchita Nath who seized those samples under a proper seizure list. Subsequently prepared the medical examination report of accused Dibakar Das and Sourav Ch. Nath in his own hand writing which bears his signatures marked as Exhibit-10 & Exhibit-11 respectively and the signatures of the witness on the reports are marked as Exhibit 10/1 & Exhibit-11/1 respectively.

[62] In view of above, evidences on record, let us discuss the facts once again. The witnesses faced cross examination from the side of the accused persons and it transpired that they stated certain facts for the first time before the Court and they did not give any statement in this regard to the I.O. The importance of these witnesses is limited to the extent that they came to know that the victim went missing and subsequently the dead body of the victim was recovered from Huplong Tea Estate near Kargil Tilla.

[63] While cross-examining PW-1, has drawn our attention to her statement recorded by the I.O. and it is found that she did not state to the I.O. that both the accused used to bring foods and used to share those foods with her child. During the cross-examination of PW-4 it transpired that he did not state to the police that both the accused used to play with the victim in such a way that she used to get annoyed and leave the room and used to remain outside till her mother returned home. Learned counsel for the accused persons during argument contended that the aforesaid facts are not sufficient to draw conclusion based on circumstances that the accused persons committed the alleged incident.

[64] Further, it has been contended that the informant in her ejahar did not mention the name of accused persons and also did not allege that the accused persons have committed the incident. It was also submitted that mere

suspicion cannot draw conclusion regarding involvement of the accused persons in the alleged incident. PWs.1 and 4 in their testimony stated the name of both the accused but on consideration of their evidence it appears that they suspected that the accused persons are involved in the incident. Their suspicion is based on the fact that both the accused used to give chocolates, chips etc. to the victim and the victim accompanied them for a ride on scooty.

[65] PW-4 in particular suspected the accused persons behind the incident as they used to play with the victim in such a manner that the victim used to leave their company and wait outside till arrival of her mother. The prosecution cannot deny the fact that there is no eye witness of the incident. The prosecution also cannot confront the fact that no one saw the victim and the accused persons together before the incident. The prosecution also cannot deny the fact that PW 1 and PW 4 suspected the involvement of the accused persons in the said incident. There is also no eye witness who saw the victim and the accused persons going towards the place of occurrence and no witness also saw the accused persons leaving the place of occurrence after the incident. Thus the concept of last seen together is also not applicable in this case.

[66] The accused side also contended that PW 1 and PW 4 have made major improvements in their statements in course of trial which they did not state in course of their examination under section 161 of Cr.P.C. This court find force in the submission made by the accused side as it is found that the contradictions noted above are statements given by the accused persons for the first time before this Court.

[67] However what has transpired from the testimony of both the witnesses is that accused Saurabh Nath and the family of the victim were staying in the said house and the other accused Dibakar Das used to visit the house of accused Saurabh Nath. It automatically leads to the conclusion that the accused persons and the victim and her family knew each other. This particular fact has been deposed by PW 4 and the accused side during cross-examination failed to confront PW 4 on this particular point. It is also evident from the aforesaid discussion that the informant on reaching her house and on finding that the victim is missing did not state anything regarding presence of the accused persons in the house at that time. Similarly PWs 4 and 5 on reaching the house of the informant did not find the accused persons. Although these

witnesses did not state anything specifically that they did not find the accused persons in the house but it is clear from their testimony that the accused persons were not available in their house when the victim went missing otherwise they could have spoken directly regarding presence of both the accused persons in the house at the time when the victim went missing.

[68] The accused persons after giving the disclosure statements also led the witnesses to the place of occurrence where the incident took place and from that place the I.O. recovered a "Hucca" and 3 packets of ganja packed with three pieces of newspaper which were seized and those are marked as exhibit MO-VII and IX in this case. The aforesaid fact is also confirmed by PW 12, Gayatri Ghosh and PW 13, Prabha Rani Acharjee. In the case in hand one "Hucca" and 3 bundles of ganja were recovered from the place of occurrence based on the disclosure statement given by the accused persons. The pertinent question is whether these two articles have any direct relation with the alleged incident. The prosecution during the argument failed to place any evidence to establish a direct relation between the two articles recovered from the place of occurrence based on the statements of the accused persons with the incident in hand. It is possible that such type of articles was taken by someone else and was left at the place of occurrence.

[69] Here we also need to appreciate that the incident in this case took place on 17/06/2019 and discovery of the aforesaid two articles were made from the place of occurrence on 30/06/2019 after a lapse of almost 13 days. More so, there is no evidence on the record to connect the recovery of the two articles having any relation directly with the incident.

[70] Learned P.P. has also relied on the report received from SFSL, after examination of the blood sample, semen and the wearing apparels of the victim and the accused persons. In this respect the deposition of PW 35, Dr. Subhankar Nath, Deputy Director, SFSL is reproduced here in below for ready reference:-

"On 09-08-2019 I was posted as Dy. Director, SFSL, Tripura. On that day the DNA Division received one sealed parcel from Toxicology Division and on 23-06-2019 the office of the Director received another sealed parcel in connection with Dharmanagar Women P.S. case no. 2019 WDN 020 dated 18-06-2019 under section 363/376D of IPC and 06 of POCSO Act, 2012 which was forwarded by the SDPO, Dharmanagar, North Tripura vide No. 5252/SDPO/DMN dated 22-08-2019. The Director endorsed me

the exhibits and relevant papers for examination and opinion. The period of examination was 13-08-2019 to 17-09-2019.

The sealed parcel which was received from Toxicology Division contained the following exhibits:

- (1) Exhibit-A-One white and red printed child panty.
- (2) Exhibit-B- One wearing apparel of deceased (one frock).
- (3) Exhibit-C-Dry blood of deceased.
- (4) Exhibit-D-1- Vaginal swab of deceased.
- (5) Exhibit-D-2- Anal swab of deceased.
- (6) Exhibit-D-3- Oral swab of deceased.
- (7) Exhibit-E- Nail scraping from the both hands of the deceased.
- (8) Exhibit-1-1-Blood sample of accused Dibakar Das.
- (9) Exhibit-1-2- Glans penis of accused Dibakar Das.
- (10) Exhibit-1-3- Swab body of penis of accused Dibakar Das.
- (11) Exhibit-1-4- Urethral swab of accused Dibakar Das.
- (12) Exhibit-J- One blue colour jeans pant of accused Dibakar Das.
- (13) Exhibit-K-1- Blood of accused Sourabh Chandra Nath.
- (14) Exhibit-K-2- Swab glans of accused Sourabh Chandra Nath.
- (15) Exhibit-K-3-Swab body of penis of accused Sourabh Chandra Nath.
- (16) Exhibit-K-4- Urethral swab of accused Sourabh Chandra Nath.
- (17) Exhibit-L- One black colour jeans pant of accused Sourabh Chandra Nath.

The second parcel contained the following exhibits.

- (1) Exhibit-1-1- Blood sample of accused Dibakar Das.
- (2) Exhibit-1-1- Blood sample of accused Dibakar Das in EDTA vial.
- (3) Exhibit-K-1- Blood sample of accused Sourabh Chandra Nath.
- (4) Exhibit-K-1-Blood sample of accused Sourabh Chandra Nath in EDTA vial.

Biological Examination:-

The exhibits marked A, B, C, D-1, D-2, D-3, E, 1-1, 12, 13, 14, J, K-1, K-2, K-3, K-4, L and 1-1 and K-1 were examined by visual examination under different light sources, TMB Tests, Phenolphthalein Tests and Takayama Test for detection of blood.

The exhibits marked A, B, D-1, D-2, D-3, E, 1-2, 1-3, 1-4, J, K-2, K-3, K-4 and L were examined under different light sources, Acid phosphate and Microscopic examination for detection of seminal stain/spermatozoa of human origin.

Results of Biological Examination:-

- (1) Blood stain was detected in the exhibits marked B, C, I-1, K-1. I-1 and K-1.
- (2) Blood stain was not detected in the exhibits marked A, D-1, D-2, D-3, E, 1-2, 1-3, 1-4, J, K-2, K-3, K-4 and L.
- (3) Seminal Stain of spermatozoa of human origin was detected in the exhibits mark A and D-1.
- (4) Seminal Stain of spermatozoa of human origin was not detected in the exhibits mark B, D-2, D-3, E, 1-2, 1-3, 1-4, J, K-2, K-3, K-4 and L.

DNA Examination:-

A portion of semen stain cloth of exhibit-A, a portion of blood stain cloth of exhibit-B, a portion of blood stain gauge of exhibit-C, semen stain cotton piece of exhibit-D-1, a portion of blood stain gauge of exhibit-1-1, exhibit-K-1, a portion of blood stain gauge of Exbt.I-1 and Exbt.K-1 were subjected for DNA isolation by organic extracting method.

The DNA recovered from the above mentioned exhibits were subjected to multiplex PCR reaction for co- amplification of the 15 STR loci & Amelogenin using AmpFL/STR Identifier Plus TM PCR amplification 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.

After examination the following was observed:-

- (1) Male genetic profile was generated from Exhibit-A.
- (2) No allele has been amplified from exhibit-B and C.
- (3) Mixed male genetic profile was generated from exhibit-D-1.
- (4) No allele has been identified from exhibit-I-1 and K-1.
- (5) Male genetic profile was generated from exhibit-I-1.
- (6) Male genetic profile was generated from exhibit-K-1.
- (7) The alleles of the amplified loci of DNA profile of exhibit-A matches with the alleles of the amplified profile of DNA profile of exhibit-1-1.
- (8) The alleles of the amplified loci of DNA profile of exhibit-D- 1 matches with the alleles of the amplified profile of DNA profile of exhibit-I-1 and K-1.

Conclusion:-

(1) The semen stain detected in exhibit-A originate from single source of exhibit-1-1.

(2) A semen stain detected in exhibit-D-1 originate from two different sources of exhibit-I-1 and K-1.

(3) The DNA extracted from exhibit-B, C, I-1 and K-1 was highly degraded as a result no amplification was observed.

[71] It was contended that in course of investigation a white and red printed panty of the victim along with her frock, dry blood, vaginal swab, anal swab, oral swab and nail scrapping from both the hands of the victim along with blood sample, glans penis, swab body of penis, urethral swab and jeans pant of accused Dibakar Das along with blood, swab glance, swab body of penis, urethral swab and one blue colour jeans pant of accused Saurabh Chandra Nath and subsequently blood sample of accused Dibakar Das and accused Saurabh Chandra Nath along with blood sample of both the accused in EDTA vial were forwarded to the SFSL and those were examined and the report specifically stated that the semen stain detected in exhibit-A which is the panty of the victim originates from exhibit-I-1 which is the blood sample of accused Dibakar Das. The semen stain detected in exhibit-D-1 which is the vaginal swab of the victim originates from exhibit-1-1 and K-1 which are the blood sample of accused persons namely Dibakar Das and Sourabh Chandra Nath respectively.

[72] It has been contended by the counsel for the accused persons 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 chance of contamination. In case of dead body, the seminal stain if present in the vaginal swab can be detected within 72 hours and if the environment is dry then, the chance of getting seminal stain is more than 72 hours.

[73] At this juncture let us read the deposition PW-35, Dr. Subhankar Nath who examined the blood samples along with other samples as well as the vaginal swab and the wearing apparels of the victim including her panty and in the report he categorically stated that the semen detected in Exbt.A which is the panty of the victim originates from accused Dibakar Das. He also stated that the semen stain detected in the vaginal swab of the deceased marked as Exbt. D-1

originates from the blood sample of accused Dibakar Das marked as Exbt.I-1 and from the blood sample of accused Sourabh Chandra Nath marked as Exbt.K-1.

[74] The relevant statement recorded under Section-313 of the accused persons i.e. Shourabh Ch. Nath in connection with the present is as follows:

‘Q.109. PW-30, Sri Jyotirmoy Paul in his examination in chief has stated that on 27.06.2019 in the afternoon PW-30 went to Dharmanagar Sub-Jail accompanied by the Medical Officer, Dr. Kallol Biswas for collection of biological samples of the accused persons namely Dibakar Das and Sourav Ch. Nath.

Do you have anything to say in this regard?

Answer: Yes.

Q.120. PW-35 has deposed that the sealed parcel which was received from Toxicology Division contained the exhibits namely Exhibit-A- One white and red printed child panty, Exhibit-B- One wearing apparel of deceased (one frock), Exhibit-C- Dry blood of deceased, Exhibit-D-1- Vaginal swab of deceased, Exhibit-D-2- Anal swab of deceased, Exhibit-D-3- Oral swab of deceased, Exhibit-E- Nail scraping from the both hands of the deceased, Exhibit-1-1- Blood sample of accused Dibakar Das, Exhibit-1-2- Glans penis of accused Dibakar Das, Exhibit-1-3- Swab body of penis of accused Dibakar Das, Exhibit-1-4- Urethral swab of accused Dibakar Das, Exhibit-J- One blue colour jeans pant of accused Dibakar Das, Exhibit-K-1- Blood of accused Sourabh Chandra Nath, Exhibit-K-2- Swab glans of accused Sourabh Chandra Nath, Exhibit-K-3-Swab body of penis of accused Sourabh Chandra Nath, Exhibit-K-4- Urethral swab of accused Sourabh Chandra Nath, Exhibit-L- One black colour jeans pant of accused Sourabh Chandra Nath.

Do you have anything to say in this regard? Ans:- I don't know.

Q.122:- Pw 35 in his examination in chief has stated that during biological examination the exhibits marked A, B, C, D-1, D-2, D-3, E, I-1, 1-2, 1-3, I-4, J, K-1, K-2, K-3, K-4, L and I-1 and K-1 were examined by visual examination under different light sources, TMB Tests, Phenolphthalein Tests and Takayama Test for detection of blood and the exhibits marked A, B, D-1, D-2, D-3, E, 1-2, 1-3, 1-4, J, K-2, K-3, K-4 and L were examined under different light sources, Acid phosphate and Microscopic examination for detection of seminal stain/spermatozoa of human origin.

Do you have anything to say in this regard?

Ans: I have no idea.

Q.123:- PW 35 further deposed that during biological examination of the aforesaid exhibits blood stain was detected in the exhibits marked B, C, I-1, K-1, I-1 and K-1 and seminal Stain of spermatozoa of human origin was detected in the exhibits mark A and D-1.

Do you have anything to say in this regard?

Ans:- I have no idea.

Q. 124:- PW 35 also deposed that DNA examination was conducted for a portion of semen stain cloth of exhibit-A, a portion of blood stain cloth of exhibit-B, a portion of blood stain gauge of exhibit-C, semen stain cotton piece of exhibit-D-1, a portion of blood stain gauge of exhibit-1-1, exhibit-K-1, a portion of blood stain gauge of exhibit-1-1 and exhibit- K-1 were subjected for DNA isolation by organic extracting method.

Do you have anything to say in this regard? Ans:- I have no idea.

Q. 125:- PW 35 has further deposed that after examination the following was observed:-

- (1) Male genetic profile was generated from Exhibit A.
- (2) No allele has been amplified from exhibit-B and C.
- (3) Mixed male genetic profile was generated from exhibit-D-1.
- (4) No allele has been identified from exhibit-1-1 and K-1.
- (5) Male genetic profile was generated from exhibit-1-1.
- (6) Male genetic profile was generated from exhibit-K-1.
- (7) The alleles of the amplified loci of DNA profile of exhibit-A matches with the alleles of the amplified profile of DNA profile of exhibit-I-1.
- (8) The alleles of the amplified loci of DNA profile of exhibit-D-1 matches with the alleles of the amplified profile of DNA profile of exhibit-I-1 and K-1.

Do you have anything to say in this regard?

Ans: I have no idea.

Q.172. Do you have anything more to say in connection with this case?

Ans: I did not commit any wrong. I was never involved with the alleged incident.”

[75] The relevant statement recorded under Section-313 of the accused persons i.e. Dibakar Das in connection with the present is as follows:

Q.2. PW-1 Smt. Sukla Tanti in her examination-in-chief has stated that she is a maid servant by profession and deceased Jhuma Tanti was her younger daughter.

Do you have anything to say in this regard?

Ans: I do not know Smti. Sukla Tanti and her children.

Q.118. PW 35, Dr. Subhankar Nath in his examination in chief has stated that on 09-08-2019 he was posted as Deputy Director, Tripura State Forensic Science Laboratory and on that day the DNA Division of SFSL, Tripura received one sealed parcel from Toxicology Division and further

on 23-06-2019 the office of the Director, SFSL, Tripura also received another sealed parcel forwarded by the Sub-Divisional Police Officer, Dharmanagar, North Tripura vide No. 5252/SDPO/DMN dated 22-08-2019 in c/w Dharmanagar Women PS case no. 2019 WEN 020 dated 18-06-2019 under Sections 363/376D of IPC and under Sections 6 of POCSO Act, 2012.

Do you have anything to say in this regard?

Ans:- False report has been submitted.

Q.119:- PW 35 further deposed that the Director, SFSL, Tripura endorsed the exhibits to PW 35, Dr. Subhankar Nath and all relevant papers for examination and opinion. Subsequently PW 35 examined the exhibits w.e.f. 13-08-2019 to 17-09-2019.

Do you have anything to say in this regard?

Ans:- False report is submitted.

Q.120:- PW 35 has deposed that the sealed parcel which was received from Toxicology Division contained the exhibits namely Exhibit-A- One white and red printed child panty, Exhibit-B- One wearing apparel of deceased (one frock), Exhibit-C-Dry blood of deceased, Exhibit-D-1- Vaginal swab of deceased, Exhibit-D-2- Anal swab of deceased, Exhibit-D-3- Oral swab of deceased, Exhibit-E- Nail scraping from the both hands of the deceased, Exhibit-1-1- Blood sample of accused Dibakar Das, Exhibit-1-2- Glans penis of accused Dibakar Das, Exhibit-1-3- Swab body of penis of accused Dibakar Das, Exhibit-1-4- Urethral swab of accused Dibakar Das, Exhibit-J- One blue colour jeans pant of accused Dibakar Das, Exhibit-K-1- Blood of accused Sourabh Chandra Nath, Exhibit-K-2- Swab glans of accused Sourabh Chandra Nath, Exhibit-K-3- Swab body of penis of accused Sourabh Chandra Nath, Exhibit-K-4- Urethral swab of accused Sourabh Chandra Nath, Exhibit-L- One black colour jeans pant of accused Sourabh Chandra Nath.

Do you have anything to say in this regard? Ans:- I cannot say.

Q.121:-PW 35 also deposed that the second parcel contained Exhibit-1-1- Blood sample of accused Dibakar Das, Exhibit-1-1- Blood sample of accused Dibakar Das in EDTA vial, Exhibit-K- 1- Blood sample of accused Sourabh Chandra Nath, Exhibit-K-1- Blood sample of accused Sourabh Chandra Nath in EDTA vial. Do you have anything to say in this regard?

Ans:- I don't know.

Q.122:- Pw 35 in his examination in chief has stated that during biological examination the exhibits marked A, B, C, D-1, D-2, D-3, E, 1-1, 1-2, 1-3, 1-4, J, K-1, K-2, K-3, K-4, L and 1-1 and K-1 were examined by visual examination under different light sources, TMB Tests, Phenolphthalein Tests and Takayama Test for detection of blood and the exhibits marked A, B, D-1, D-2, D-3, E, 1-2, 1-3, 1-4, J, K-2, K-3, K-4 and L were examined under different light sources, Acid phosphate and Microscopic examination for detection of seminal stain/spermatozoa of human origin.

Do you have anything to say in this regard? Ans:- I have no idea.

Q.123:- PW 35 further deposed that during biological examination of the aforesaid exhibits blood stain was detected in the exhibits marked B, C, I-1, K-1, 1-1 and K-1 and seminal Stain of spermatozoa of human origin was detected in the exhibits mark A and D-1.

Do you have anything to say in this regard?

Ans:- I have no idea.

Q. 124:- PW 35 also deposed that DNA examination was conducted for a portion of semen stain cloth of exhibit-A, a portion of blood stain cloth of exhibit-B, a portion of blood stain gauge of exhibit-C, semen stain cotton piece of exhibit-D-1, a portion of blood stain gauge of exhibit-I-1, exhibit-K-1, a portion of blood stain gauge of exhibit-1-1 and exhibit- K-1 were subjected for DNA isolation by organic extracting method.

Do you have anything to say in this regard?

Ans:- I have no idea.”

[76] The accused, in his examination under Section-313 Cr.P.C., had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in the 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain.

[77] In the present case our careful analysis of the submissions of the parties have created an impression on our minds that to some extent there are some corroboration as well as discrepancies in the statement of the PWs. Insofar as the appellants are concerned, the evidence of all the witnesses have been accepted and acted upon by the Court below. But the learned counsel for the appellants has failed to demonstrate as to why disbelieve the prosecution story regarding DNA. No proper explanation has been given nor could the defence get over on the point of semen of the accused persons on the victim as we have already discussed above in the exhibited documents. For ready reference, the conclusion part of the SFSL Report may be extracted hereunder:

“On the basis of the above observations it can be concluded that:

1. The semen stain detected in the exhibit-A (source: one white and red print child panty) originate from single source of exhibit- 11 (source: blood sample of a/p Dibakar Das).
2. The semen stain detected in the exhibit-D1 (source: vaginal swab of deceased) originate from two different sources of exhibit 11 (source: blood sample of a/p Dibakar Das) and exhibit- K1(source: blood sample of a/p Sourabh ch. Nath).

3. The DNA extracted from exhibit- B (source: wearing apparel of deceased, frock), exhibit- C (source: Dry blood of deceased), exhibit 11 (source: blood sample of a/p Dibakar Das) and exhibit- K1(source: blood sample of a/p Sourabh ch. Nath) was highly degraded as a results no amplification was observed, except amelogenin.”

[78] It was also contended that the disclosure statement given by both the accused persons in course of investigation in presence of Executive Magistrate and as per the directions given in the case of Bikash Koiri (supra) such disclosure statements are not admissible in evidence. The Court in the aforesaid judgments in respect of Magistrate mentioned in Section-26 of the Evidence Act categorically held that the word Magistrate indicates a judicial Magistrate and not Executive Magistrate and therefore any disclosure statement before an Executive Magistrate is not admissible in evidence.

[79] This Court after noticing the above stated principle on imposing death sentence the Court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. Most of the heinous crimes under IPC are punishable by death penalty or life imprisonment that by itself does not suggest that in all such offences, penalty of death alone should be awarded. We must notice, even at the cost of repetition that in such cases awarding of life imprisonment would be a rule, while death would be the exception. The term rarest of rare case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case.

[80] While determining the questions relatable to sentencing policy, the Court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

(1) The Court has to apply the test to determine, if it was the “rarest of rare” case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.”

[81] Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do complete justice between the parties.

[82] Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the Courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of rarest of rare cases and the Court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the Court may award death penalty. Wherever, the case falls in any of the exceptions to the rarest of rare cases, the Court may exercise its judicial discretion while imposing life imprisonment in place of death sentence.

[83] Having dealt with these contentions at some length in the earlier part of the judgment, we do not consider it necessary to again deliberate on these questions. Suffices it to note that if the accused are guilty of the offences for which they were charged, it is correct that the

possibility of their being reformed cannot be ruled out. The Court has to consider various parameters afore-stated and balance the mitigating circumstances against the need for imposition of capital punishment. The factors to be considered could be different than the mitigating circumstances.

[84] While we cumulatively examine in the death sentence matter, various principles and apply them to the facts of the present case, it appears to us that the age of the accused, possibility of the death of the deceased occurring accidentally and the possibility of the accused reforming themselves, they cannot be termed as social menace. But it cannot be held with certainty that this case falls in the rarest of rare cases. On appreciation of the evidence on record and keeping the facts and circumstances of the case in mind, we are unable to hold that any other sentence but death would be inadequate.

[85] The doctrine of “rarest of rare” confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of “rarest of rare” and secondly, when the alternative option is unquestionably foreclosed. **Bachan Singh** suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.

[86] In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end to anything to do with life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. The “rarest of rare” dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment would be pointless and completely devoid of any reason in the facts and circumstances of the case. As discussed above, life imprisonment can be said to be completely futile, only

when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the “rarest of rare” doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.

[87] Learned counsel laid stress on the observation of the Hon’ble Apex Court that apart from the mitigating circumstances noted, there are numerous other circumstances justifying the passing of the lighter sentence; that the mitigating factors in the area of death penalty must receive a liberal and expensive construction by the Court and that judges should not be bloodthirsty. It is not the question of taking of an eye for an eye, rather it is the question of doing justice to the deceased and the convicts as well. Justice does not require us to punish murderer by death. It only requires that the gravest crimes receive the severest punishment that our moral principles would allow us to impose.

[88] The five golden principles as stated supra, if we may say so, constitute the panchasheel of the proof of a case based on circumstantial evidence. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in *The King v. Horry*,⁽¹⁾ thus: *"Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that up on no rational hypothesis other than murder can the facts be accounted for."*

[89] On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are “especially” within the knowledge of the accused and which he could prove without difficulty or inconvenience. The word “especially” stresses that. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not.

[90] The test of proximity cannot be too literally construed and practically reduced to a cut and dried formula of universal application so as to be confined in a straitjacket. Distance of time would expend or varies with the circumstances of each case. For instance, where death is a logical culmination of a continuous drama long in process and is, as it were, a final of the story, the statement regarding each step directly connected with the end of the drama would be admissible because the entire statement would have to be read as an organic whole and not torn from the context. Sometimes statements relevant to or furnishing an immediate motive may also be admissible as being a part of the transaction of death.

[91] It is settled proposition of law that the charge framed against the accused persons has to be established and proved beyond any shadow of doubt. Suspicions, however, grave in nature, should not amount to prove. The discrepancies which are found in this case as analyzed above, appeared to be abnormal in nature which is not expected from a normal person.

[92] It was submitted that in cases based on circumstantial evidence, the five “golden principles” enunciated by this court in ***Sharad Birdichand Sarda v. State of Maharashtra*** have to be fully established and that the court should be convinced that the accused “must be” guilty and not “may be” guilty. Further, 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 are guilty. The circumstances should be of a conclusive nature and tendency.

[93] The circumstances should exclude every possible hypothesis except the one to be proved and 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.

[94] The conclusion recorded by this court in ***Sarda*** is listed in Para 152 which is characterized in Para 153 as “five golden principles” and they are extracted below:

“(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 & Anr v State of Maharashtra* 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."

[95] This Court has time out of number, observed that while appreciating circumstantial evidence the Court must adopt a very cautious approach and should record a conviction only if all the links in the chain are complete pointing to the guilt of the accused and every hypothesis of innocence is capable of being negative on evidence. Great care must be taken in evaluating circumstantial evidence and if the evidence relied on is being reasonable capable to two inferences, the one in favour of the accused must be accepted. The circumstance relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt. But this is not to say that the prosecution must meet any and every hypothesis put forward by the accused however far-fetched and fanciful it might be. Nor does it mean that prosecution evidence must be rejected on the slightest doubt because the law permits rejection if the doubt is reasonable and not otherwise.

[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.”

SENTENCE

[97] It is a case where the convict-appellants have committed an abhorrent crime and due to that, a girl of six years lost her life. They not only committed a barbaric act like rape upon her rather killed her also. But, according to the submissions made by the learned counsel for the accused persons, this is totally based on circumstantial evidence as there is/was no direct eye witness of the alleged occurrence of offence. The accused-persons are teenagers at the time of the incident and there is no previous record of criminal antecedents against the accused-persons or there is no evidence on record that they are habitual offenders. Contemplating the above facts and circumstances of the case and in view of the principles 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 into life imprisonment.

[98] Accordingly, the appeal filed by the convict-appellants is hereby dismissed being devoid of merit but the death sentence awarded by the learned Court below is converted to life imprisonment for 20 years and during that period the appellants shall not be released on parole or on remission. The death reference at the same time is accordingly disposed of. As a sequel, miscellaneous application(s), pending if any, shall stand closed.

[99] A copy of this order be communicated to the learned Special Judge (POCSO), North Tripura, Dharmanagar for information and necessary compliance.

[100] Send down the LCRs forthwith.

B. PALIT, J

T. AMARNATH GOUD, J

A.Ghosh

ANJAN GHOSH
Digitally signed by ANJAN
GHOSH
Date: 2025.07.11 15:14:32 +05'30'

