

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CONFIRMATION CASE NO.3 OF 2014
 (Reference made by Shri P. R. Bharad,
 Addl. Sessions Judge, Mangaon, Dist.Raigad)
IN
SESSIONS CASE NO.8 OF 2013

The State of Maharashtra,]
 (Through Pali Police Station, District]
 Raigad, Vide C.R.No.32 of 2012)] ... **Complainant**

Versus

Viran Gyanlal Rajput,]
 Age - 22 years,]
 R/o. Panna, Taluka-Rithi, District-Katni,]
 Madhya Pradesh.] ... **Accused**

Mr. Arfan Sait, APP for State.
 Mr. Vinit Kulkarni, Advocate (Appointed) for Accused.

.....

WITH
CRIMINAL APPEAL NO.760 OF 2014

Viran Gyanlal Rajput,]
 Age - 22 years, Occupation - Nil,]
 R/o. Panna, Taluka-Rithi, District-Katni,]
 Madhya Pradesh.]
 (At present lodged in Yerawada] ... **Appellant/**
 Central Prison, Pune)] **Orig. Accused**

Versus

The State of Maharashtra,]
 (Through Pali Police Station, District]
 Raigad, Vide C.R.No.32 of 2012)] ... **Respondent**

Mr. Vinit Kulkarni, Advocate (Appointed) for Appellant.
 Mr. Arfan Sait, APP for State.

CORAM :- SMT. V. K. TAHILRAMANI AND
SMT. I. K. JAIN, JJ.

RESERVED ON :- FEBRUARY 05, 2015
PRONOUNCED ON :- FEBRUARY 16, 2015

JUDGMENT (PER SMT. I. K. JAIN, J.) :-

The Confirmation Case No.3 of 2014 arises out of the reference made by the learned Additional Sessions Judge, Mangaon, Raigad, in Sessions Case No.8 of 2013 for confirmation of death sentence awarded to Appellant/accused Viran Gyanlal Rajput. By the Judgment and Order dated 25/06/2014 in Sessions Case No.8 of 2013, learned Additional Sessions Judge convicted the accused for the offence punishable under Section 302 of the Indian Penal Code (for short 'IPC') and sentenced him to capital punishment of death. By the very same Judgment and Order, accused was also convicted under Section 366 IPC, Sections 10 and 4 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act, 2012') and Section 201 of IPC, as follows :

- (i) Section 366 IPC - R.I. for 10 years and to pay a fine

of Rs.200/-; in default further R.I. for a period of one year.

- (ii) Section 10 of the POCSO Act, 2012 - R.I. for 7 years and to pay a fine of Rs.200/-; in default further R.I. for one year.
- (iii) Section 4 of the POCSO Act, 2012 - imprisonment for life and to pay a fine of Rs.500/-; in default further R.I. for 2 years.
- (iv) Section 201 IPC - R.I. for a period of 7 years and to pay a fine of Rs.200/-; in default further R.I. for one year.

2. As indicated above, in view of the sentence of death imposed on the accused, the learned Additional Sessions Judge made a reference to this Court for confirmation of death sentence. The accused being aggrieved by the said Judgment and Order, preferred Criminal Appeal No.760 of 2014. As the Confirmation Case and the Appeal are directed against the same Judgment and Order, both were heard and are being decided together.

3. The facts in the present case disclose a sordid story in which the alleged sexual assault followed by brutal and merciless murder by the dastardly act of the accused is said to have been committed. The most disgusting feature is that a school going girl of the tender age of 13½ years fell a prey to the lust of the accused which sends shocking waves to anyone having slightest sense of human values and human dignity. The gruesome nature of the crime and the diabolical manner in which the act was executed, poses a question whether the author of such crime can ever be reformed and if death penalty is given in such a case, whether it would be justified irrespective of the fact whether it acts as deterrent or not.

4. The prosecution case briefly stated is as under :-

(i) The victim girl was the daughter of Ganesh Pandurang Parab and PW 6 Gita Ganesh Parab, residents of Kamthekarwadi in Taluka Sudhagad, District Raigad. The victim girl was about 13½ years old at the time of incident. She was studying in 9th standard at Sharda Vidyamandir,

Pedali. The distance between Kamthekarwadi and Pedali was about 4 kms. She used to go by walk to the school. Accused was residing at Village Panna, Taluka Rithi, District Katni, Madhya Pradesh. At the relevant time he was found at the bank of river Amba where Pardhi people used to reside near the village of victim girl.

(ii) On 17/10/2012, victim girl had been to her school. In the evening, she did not return home. So her father Ganesh Pandurang Parab asked his nephew PW 3 Samir Vishnu Parab to search her whereabouts. Then PW 3 Samir, with the help of villagers, went in search on the way from Pedali to Kamthekarwadi but she was not found.

(iii) During search on 18/10/2012 at about 3.00 a.m. in the jungle area, sandal of victim girl was found. At around 8.00 a.m., her school bag and wristwatch could be seen lying near the place where sandal was found. On that day at about 8.30 a.m. PW 3 Samir filed a missing complaint to Pali Police Station.

(iv) According to prosecution on 17/10/2012 in the evening PW 4 Vijay Maruti Parab was proceeding from Kamthekarwadi to Pedali. At about 5.30 p.m., he saw victim girl coming alone from the school. He stopped her and asked whether she was going alone. That time PW 4 Vijay saw one unknown person following the victim girl. The said person was wearing red T-Shirt.

(v) On lodging missing complaint, informant PW 3 Samir, along with PW 14 PSI Ajit Patil, was proceeding towards village Pedali. They saw PW 4 Vijay Parab, PW 5 Abhijit Chavan, Sanjay Divekar, Jitendra Parab and some other villagers coming with the said unknown person. Police took the custody of unknown person.

(vi) During interrogation, he had shown the place towards eastern side of Kamthekarwadi Phata in jungle area. The said person removed the grass and mud from the place. Then dead body of victim girl was found lying there in naked condition with odhani/scarf tied around the neck. The person

disclosed his name as Viran Gyanlal Rajput. Thereafter PW 3 Samir lodged report against the accused with Pali police station. Crime No.32 of 2012 was registered under Sections 302 and 201 of IPC against the accused.

(vii) PW 14 PSI Ajit Patil who inquired into missing complaint continued the investigation. Inquest panchanama of the dead body was prepared in the presence of panch witnesses. Photographs of the dead body were taken that time. Thereafter the dead body was sent for post-mortem examination to Primary Health Centre, Nagothane. PW 13 Dr.Manisha Mhatre with Dr.Ghumare performed post-mortem on the dead body of victim girl. They found that deceased was forcibly subjected to sexual intercourse. Multiple ante-mortem injuries were noticed on the dead body. Doctors opined probable cause of death due to asphyxia with cardio respiratory arrest due to strangulation.

(viii) During investigation, PW 14 PSI Patil recorded spot panchanama. From the spot, he seized incriminating articles

viz. school bag, two wrist watches and ear-rings. In the school bag, ID card, school books and notebooks of victim girl were found. As dead body was found covered with mud, sample of earth was collected from the spot. The seized muddemal was deposited to muddemal room. Then PW 14 PSI Patil handed over further investigation to PW 15 PI Dilip Gavade. Accused was arrested on 18/10/2012 at 20.20 hours and clothes on his person were seized.

(ix) On 19/10/2012, accused was sent for medical examination to Primary Health Centre, Pali. PW 12 Dr.Bhartivinod Jaiswal examined the accused and found multiple injuries on his person. The samples of pubic hair, semen and blood of the accused were collected by the Medical Officer.

(x) On 23/10/2012 while the accused was in police custody, he gave a memorandum to produce the clothes of victim girl. Accordingly his memorandum was recorded by PW 15 PI Gavade in the presence of PW 9 Sunil Zunjarrao and

another panch Sanjay Divekar. Accused then led them to Kamthekarwadi Phata and discovered the clothes of victim girl which were kept sealed in a hole covered with a stone. The clothes were piled with mud. Petticoat was found torn from top to bottom. PW 15 PI Gavade recorded seizure panchanama of the clothes of victim girl in the presence of panchas. They were sealed in different packets and deposited with muddemal room.

(xi) As it was revealed during investigation that victim girl was sexually assaulted, Section 376 of IPC was added later on. Statements of witnesses were recorded. To confirm the age of victim girl, school certificates were collected from Sharda Vidyamandir, Pedali. A request was made to Tahsildar, Sudhagad, Pali, for drawing a rough sketch of the spot. It was drawn and sent to police station. The seized muddemal was forwarded to Forensic Science Laboratory, Kalina. On completion of investigation, charge-sheet was filed before J.M.F.C., Pali, who, in own turn, committed the case for trial to the Court of Sessions.

5. Charge came to be framed against the accused under Section 376 IPC, Sections 3 and 4 POCSO Act, 2012 and under Sections 364, 366, 302 and 201 IPC at Exh.3. Accused pleaded not guilty to the charge and claimed to be tried. His defence is of total denial and false implication on mistaken identity. Prosecution examined 15 witnesses during trial. After going through the evidence adduced in the case, the learned Additional Sessions Judge convicted and sentenced the accused as stated in para 1 *supra*.

6. We have heard the learned Advocate for Appellant/accused and the learned APP for State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, Judgment and Order delivered by the learned Additional Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that the prosecution has proved its case beyond reasonable doubt and the Appellant/accused has committed offences punishable under Sections 302, 366 and 201 IPC and Section

4 of the POCSO Act, 2012. So far as Section 10 of the POCSO Act, 2012 is concerned, we have noticed that charge was not framed under this Section. It was obligatory on the part of the learned Additional Sessions Judge to frame charge. For not framing specific charge, in the facts and circumstances of this case, we are of the view that conviction of the Appellant/accused under Section 10 of the POCSO Act, 2012 would not sustain.

7. Needless to state that in a case of murder, exclusive burden lies on the prosecution to establish that death of a human being is caused. Further, prosecution has to overrule by adducing reliable and convincing evidence the possibility of natural, accidental or suicidal death indicating totally a homicidal death beyond reasonable doubt. In the present case, to prove homicidal death, prosecution has mainly relied on medical and circumstantial evidence.

8. So far as medical evidence is concerned, PW 13 Dr.Manisha Rajesh Mhatre is the witness who throws light on the factum of homicidal death. PW 13 Dr.Manisha was a

Medical Officer at PHC, Gadab. On 18/10/2012, she was deputed from PHC, Gadab to PHC, Nagothane for conducting post-mortem. Dr. S. P. Ghumare was with her. It has come in the evidence of PW 13 Dr.Manisha that on 18/10/2012 at 2.30 p.m. dead body of victim girl was brought to Primary Health Centre, Nagothane by a constable of Pali Police Station for autopsy. She, along with Dr.Ghumare, conducted post-mortem between 3.30 p.m. and 6.00 p.m. Age of the deceased was between 14 and 15 years. The dead body was fully naked. According to PW 13 Dr.Manisha, reddish dupatta was tied to the neck of deceased with two knots on the right side of the neck below the ear. The dead body was fully covered with mud. It is stated by PW 13 Dr.Manisha that there were ligature marks over the neck and below thyroid cartilage completely encircling the neck to the size of 18 cms in length and 3 cms in breadth. It was found superficially brownish, dry and parchment like. There were abrasions, bruises around ligature marks due to the tying of dupatta. The abrasions and bruises were rough and irregular. On examination, reddish, copious haemorrhagic areas were seen

below ligature mark under the skin in subcutaneous tissue.

On external examination, doctors noticed the following injuries :

- i) Scratch mark on left side of cheek reddish brownish in colour size 5 cm x 1 cm,
- ii) Scratch mark on left breast present 6 cm x 1 cm,
- iii) Scratch mark on right forehead 3 cm x 1 cm,
- iv) Scratch mark on right forearm 2 cm x 1 cm,
- v) Scratch mark on right hand 3 cm x 1 cm,
- vi) Scratch mark on right thigh region lateral side 6cm x 1cm,
- vii) Scratch mark on right gluteal region 7 cm x 2 cm,
- viii) Scratch mark on left gluteal region 8 cm x 2 cm.

On examination of genitals, doctors found labia majora swollen. Hymen was torn in the position of 6 O'Clock and 9 O'Clock and torn edges were fresh. These injuries were mentioned in Column Nos.15 and 17 of the post-mortem report (Exh.35). The injuries were ante-mortem. Doctors preserved viscera. Samples of vaginal swab, nail clip, pubic hair and blood of the deceased were collected. It is stated by

PW 13 Dr.Manisha that while taking vaginal swab in 2-3 attempts, mud came out with the swab and so sample of vaginal swab with mud was required to be taken. Doctors opined cause of death due to asphyxia with cardio respiratory arrest due to strangulation.

9. It is also stated by PW 13 Dr.Manisha that on 23/10/2012 she and Dr.Ghumare had given opinion about rape on the deceased. She stated that injuries in Column No.15 and scratch marks in Column No.17 of the post-mortem notes are the results of rape. According to PW 13 Dr.Manisha, death of the victim occurred after 3-4 hours of last meal. When examined, in the stomach, some food particles were found present and stomach was congested. Small intestine was also congested and partially digested food was noticed present in the small intestine. PW 13 Dr.Manisha stated that post-mortem was conducted after 22 to 24 hours of the death of victim girl. It is totally consistent with the prosecution case that death occurred between 5.30 p.m. to 6.00 p.m. on 17/10/2012.

10. After conducting post-mortem, Medical Officers PW 13 Dr.Manisha and Dr.Ghumare prepared post-mortem report Exh.35. The opinion of Medical Officers that deceased was subjected to rape is at Exh.37. It has come in the evidence of PW 13 Dr.Manisha that scratch marks over the breast, thigh and both gluteal regions as well as cheeks were the results of sexual assault on the victim. According to PW 13 Dr.Manisha, knots of dupatta found around the neck of deceased was so tied that both the Medical Officers and their assistant could not remove the same. The knots were tied so tightly due to which there was strangulation and the same was homicidal strangulation. In the cross-examination of PW 13 Dr.Manisha, nothing substantial could be elicited to disbelieve her testimony.

11. In addition to medical evidence, prosecution has relied upon uncontroverted inquest panchanama (Exh.40) and photographs (Exhs.8/1 to 8/8). The genuineness of inquest panchanama is not disputed by the accused. The photographs were taken on the spot by PW 7 Vinod Bhoir and

developed by PW 1 Rajesh Jamdhare. Photographs Exhs.8/1 to 8/8 show no date and time. It appears from the evidence of Investigating Officer and PW 1 Rajesh that photographs taken by PW 7 Vinod were developed on 26/12/2012 i.e. after more than two months of the incident. Prosecution has not explained the delay in getting the photographs developed. In such circumstance, the safer course would be to keep the photographs out of consideration.

12. However from the testimony of PW 13 Dr.Manisha, post-mortem report (Exh.35), medical certificate (Exh.37) and unchallenged inquest panchanama (Exh.40), an irresistible conclusion must follow that death of victim girl was homicidal in nature.

13. Now in order to ascertain whether the accused is responsible for the rape on victim girl and causing her death, we have to evaluate the evidence of prosecution witnesses. There is no direct evidence in the matter. Prosecution case exclusively rests on the circumstantial evidence. It may be

stated that for a crime to be proved, it is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct or ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or "*factum probandum*" may be proved indirectly by means of certain inferences drawn from "*factum probans*" i.e. evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence on various other facts in issue that taken together forms a chain of circumstances from which the existence of a principal fact can be legally inferred or presumed.

14. On the law relating to circumstantial evidence, Mr. Arfan Sait, learned APP for State, referred to the decision of the Supreme Court in ***Sudam Alias Rahul Kaniram Jadhav v. State Of Maharashtra***¹ in which it has been held in para 19 that-

"19. In our opinion, to bring home the

1 (2011) 7 Supreme Court Cases 125

guilt on the basis of the circumstantial evidence the prosecution has to establish that the circumstances proved lead to one and the only conclusion towards the guilt of the accused. In a case based on circumstantial evidence the circumstances from which an inference of guilt is sought to be drawn are to be cogently and firmly established. The circumstances so proved must unerringly point towards the guilt of the accused. It should form a chain so complete that there is no escape from the conclusion that the crime was committed by the accused and none else. It has to be considered within all human probability and not in a fanciful manner.”

15. Mr. Vinit Kulkarni, learned Advocate for Appellant/accused, submitted that in the present case, circumstances by themselves are not enough to connect the accused with the commission of act and so accused deserves to be acquitted of the alleged offences. In support of his submissions, Mr. Kulkarni placed reliance on ***Eradu And Others V/s. State Of Hyderabad***² , in which it has been

² AIR 1956 SC 316

held that -

“10.It is a fundamental principle of criminal jurisprudence that circumstantial evidence should point inevitably to the conclusion that it was the accused and the accused only who were the perpetrators of the offence and such evidence should be incompatible with the innocence of the accused.....

.....these circumstances, by themselves, are not enough without anything more to connect the accused with the crime and the accused are entitled to be acquitted of the offences with which they have been charged.”

Mr. Kulkarni further relied on, ***Shankarlal Gyarsilal Dixit v. State Of Maharashtra***³. The Supreme Court observed thus :

“In case of circumstantial evidence, the circumstances on which the prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing cases of

3 AIR 1981 SUPREME COURT 765

circumstantial evidence should be set out in the Judgment. Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis.

13. Since this is a case of circumstantial evidence, it is necessary to find whether the circumstances on which the prosecution relies are established by satisfactory evidence, often described as 'clear and cogent' and secondly, whether the circumstances are of such a nature as to exclude every other hypothesis save the one that the appellant is guilty of the offences of which he is charged. In other words, the circumstances have to be of such a nature as to be consistent with the sole hypothesis that the accused is guilty of the crime imputed to him.

26.the crucial link in the chain of circumstances is the presence of the

appellant in his house at the time when the dead body of Sunita was discovered. Once that link snaps, the entire case would have to rest on slender tit-bits here and there.....”

16. It has been consistently laid down by the Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. A legal trend would further show that for a conviction in murder case on circumstantial evidence, following conditions must be fulfilled :

- i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is, they should not be explainable on any other hypothesis except that the accused is guilty.
- iii) The circumstances should be of a conclusive nature and tendency.

- iv) They should exclude every possible hypothesis except the one to be proved.
- v) 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 it must show that in all human probability, the act must have been done by the accused and the accused alone.

17. Keeping in view the ratio laid down by the Supreme Court, we shall examine the circumstantial evidence on which reliance is placed by the prosecution. In the present case, prosecution has relied upon the following incriminating circumstances which according to prosecution, prove the guilt of the accused beyond reasonable doubt.

- A) Deceased was last seen with the accused,
- B) Recovery of dead body and incriminating articles at the instance of accused,
- C) Discovery of clothes of the deceased at the instance of accused,

- D) Seizure of pants of accused stained with mud,
- E) No explanation to the injuries found on the person of accused,
- F) Medical evidence showing that the girl was forcibly raped and then done to death,
- G) Motive,
- H) Failure of the accused to offer plausible explanation to the incriminating circumstances against him.

18. (A) DECEASED WAS LAST SEEN WITH THE ACCUSED :-

(i) PW 3 Samir Parab, PW 4 Vijay Parab and PW 5 Abhijit Chavan are the witnesses on last seen. It is stated by PW 4 Vijay that on 17/10/2012 he was proceeding from Kamthekarwadi to Pedali by tractor. At about 5.30 p.m., he saw the victim girl coming from school. She was alone. He asked her whether she was going alone. She told him that she was going alone. According to PW 4 Vijay, that time he saw an unknown person following victim girl and the

unknown person was wearing red T-Shirt. PW 4 Vijay then left to Pedali. He came back to Kamthekarwadi from Pedali at about 7.00 p.m. As victim girl did not return home, there was panic in the village. PW 4 Vijay then told PW 3 Samir and father of victim girl Ganesh Parab that he had seen her near Kamthekarwadi Phata at about 5.30 p.m. Thereafter PW 4 Vijay, PW 3 Samir, father of victim girl Ganesh Parab, with other villagers, went in search of victim girl. During search, her chappal was found near Kamthekarwadi Phata but she was not found. PW 3 Samir, cousin brother of victim girl, then lodged missing complaint to police station on the next day.

(ii) It is further stated by PW 4 Vijay that when they were searching victim girl, PW 5 Abhijit, resident of Toranpada, met them and told that when he was grazing buffaloes, he had seen one unknown person wearing red T-Shirt running towards Toranpada village. They went ahead and found the unknown person in red T-Shirt near the bank of river where persons from Pardhi community were residing.

They took the unknown person with them. When they were proceeding towards village Avandhe, they noticed police jeep coming. The unknown person was given in the custody of police. Police interrogated that person in the presence of PW 4 Vijay and others. The said person told police that he would show the place where victim girl was kept. Thereafter, he took police and others to Kamthekarwadi Phata. He led them to the field of one Deshmukh. Then he removed the grass and mud and shown the dead body of victim girl which was in naked condition with odhani tied around the neck. PW 4 Vijay identified the accused as the same person who was following victim girl on 17/10/2012 at 5.30 p.m. while she was coming back from school. PW 4 Vijay has identified odhani (Art.6) found tied around the neck of victim girl, her school uniform i.e. top (Art.10) and Payjama (Art.11). He could also identify red T-Shirt (Art.7) of accused.

(iii) The testimony of PW 4 Vijay is assailed on the ground that he is the relative of victim girl and she did not tell him that person with red T-Shirt was following her. It is

not known whether victim girl was knowing that somebody was following her. If she did not know, how could she disclose to PW 4 Vijay. So far as relation between PW 4 Vijay and victim girl is concerned, the learned APP argued that merely because witnesses are related, their testimonies cannot be rejected. To substantiate his submission, the learned APP placed reliance on ***Shyamal Ghosh Vs. State of West Bengal***⁴. In this case, the Supreme Court reiterated settled position of law that testimony of related witness has to be evaluated very carefully. It means, relationship *ipso-facto* cannot be a ground to question their credibility and the only caution to be exercised in such a case is to evaluate the evidence with great care and circumspection.

(iv) Keeping in mind this caution, evidence of PW 4 Vijay and PW 3 Samir who are related to victim needs to be scrutinized. From the entire testimony of PW 4 Vijay, it can be seen that his evidence is natural throughout and the same could not be shattered in the cross-examination. From his evidence, prosecution has established that on 17/10/2012

4 [(2012) 7 Supreme Court Cases 646]

when he was proceeding from Kamthekarwadi to Pedali by tractor, he saw victim girl coming from school at 5.30 p.m. and that time accused was following her.

(v) The evidence of PW 4 Vijay is fully corroborated by PW 3 Samir Parab. He is the first informant and cousin of victim girl. He had also lodged missing complaint. According to PW 3 Samir, victim girl was studying in school at Pedali. She was residing at Kamthekarwadi along with her parents. The distance between Kamthekarwadi and Pedali is about 4 kms. He stated that the road going from Kamthekarwadi to school at Pedali is through jungle area. The school timings were from 11.00 a.m. to 5.00 p.m. She used to return home between 7.00 and 7.30 p.m.

(vi) PW 3 Samir then stated that on 17/10/2012, he was at his house. As victim girl did not return home, her parents made inquiry with Samir. PW 3 Samir then inquired from the friend of victim girl and he was informed that she did not accompany her. Then PW 3 Samir, with his other

relatives, went in search of victim girl. On the way, PW 4 Vijay met and informed them that at 5.30 p.m. near Kamthekarwadi Phata, he saw victim girl and one person in red T-Shirt with her. Thereafter they went to jungle area near Kamthekarwadi Phata in search of victim girl. At around 3.00 a.m., they found sandal of victim girl lying at the distance of 200 meters from Kamthekarwadi Phata on the eastern side. In the morning, they noticed school bag and a wristwatch of Fastrack company belonging to PW 3 Samir used by victim girl on that day. These articles were lying at the distance of 50 meters from the place where sandal was found. Thereafter PW 3 Samir, with his friends, had been to Pali Police Station and filed missing complaint (Exh.14).

(vii) Then along with police, PW 3 Samir came to village Pedali. When proceeding towards Kamthekarwadi, they saw PW 4 Vijay, PW 5 Abhijeet, Sanjay Divekar, Jitendra Parab and some other villagers along with the same unknown person. Police took custody of the unknown person.

(viii) PW 3 Samir stated that during the course of interrogation, the said unknown person took them to Kamthekarwadi Phata and from there, led them to the field of one Raghunath Deshmukh at the distance of 300 meters from Kamthekarwadi Phata. In the said field, there were no crops but grass was found grown. PW 3 Samir also stated that the said person kept the grass and mud aside and thereafter they found dead body of his sister in naked condition having odhani tied around the neck. After the dead body was shown by the unknown person, PW 3 Samir went to police station Pali and lodged report (Exh.15). It is stated by PW 3 Samir that the unknown person had disclosed his name as Viran Gyanlal Rajput. He identified the accused before the trial Court as the same person. He also identified odhani (Art.6), a wristwatch and school bag (Arts.1 and 2) respectively.

(ix) In the cross-examination of PW 3 Samir, it is brought that Kamthekarwadi is the village consisting 25 houses. The distance between Kamthekarwadi, Avandhe and

Toranpada is within the range of 3-4 kms. Village Pedali is the Bazarpeth for village Kamthekarwadi. The road between Pedali and Kamthekarwadi is the metal road. River Amba flows from Pedali to Kamthekarwadi. From village Kamthekarwadi, only victim girl and her brother Darshan were going to school at Pedali.

(x) The evidence of PW 3 Samir is attacked by the defence on the ground that he did not disclose in missing report (Exh.14) filed on 18/10/2012 at 8.20 a.m. that on 17/10/2012, PW 4 Vijay informed him that one unknown person wearing red T-Shirt was with the victim girl. If missing complaint (Exh.14) is minutely looked into, it is apparent that no suspicion was expressed on anyone by PW 3 Samir in this report. From his evidence, it is clear that they continued search of victim girl from 17/10/2012 till the accused had shown the dead body of victim girl. It is pertinent to note that evidence of PW 3 Samir is consistent throughout. There is no contradiction or omission in his evidence. There is no reason for him to depose a lie against the accused. As the

evidence of PW 3 Samir inspires confidence, it has to be believed. Through the evidence of PW 3 Samir, prosecution could succeed in proving that victim girl was found missing on 17/10/2012 when she did not return home from school. PW 4 Vijay disclosed to them that at 5.30 p.m., he saw victim girl near Kamthekarwadi Phata and that time accused was seen with her.

(xi) The next star witness on the theory of last seen is PW 5 Abhijit Chavan. He is the resident of village Toranpada. At 17/10/2012 at about 11.00 a.m., he was at his house. PW5 Abhijit stated that at that time, one unknown person wearing red T-Shirt asked him the way to go to Pedali. Abhijit had shown him the way. On the same day at around 6.00 to 6.30 p.m. when PW 5 Abhijit was grazing the cattle in the vicinity of village Avandhe, he saw the same person wearing red T-Shirt running towards village Toranpada. He stated that pants of the unknown person was seen piled with mud that time. According to him, he was the same person to whom he had seen in the morning near his house.

(xii) On 18/10/2012, PW 5 Abhijit saw some persons making search of victim girl. PW 4 Vijay was with them. He asked Abhijit whether he had seen the person wearing red T-Shirt on the previous day. PW 5 Abhijit informed PW 4 Vijay that he had seen the said person in the morning near his house and in the evening running towards the village. Thereafter PW 4 Vijay, along with other villagers, went to the bank of river Amba. They saw the unknown person in red T-Shirt to whom PW 5 Abhijit saw in the morning and evening and also found his pants piled with mud. They asked the unknown person to accompany them. When they were proceeding towards Avandhe Phata, they found police jeep coming along with PW 3 Samir. The said person was given in the custody of police. When police interrogated him, the said unknown person told them that he had kept victim girl in the jungle area. Thereafter along with unknown person and police, they reached Kamthekarwadi Phata. The said person took them to the field of one Deshmukh in jungle area at the distance of 300 meters towards eastern side of Kamthekarwadi Phata. He fully corroborated the evidence of

PW 3 Samir and PW 4 Vijay that accused had shown the dead body by keeping aside grass and mud and the dead body was in naked condition having odhani tied around the neck. PW 5 Abhijit also identified the accused as the same person to whom he saw on 17/10/2012 in the morning near his house and in the evening running towards Toranpada village. Red T-Shirt of accused (Art.7), his pants (Art.8) and odhani (Art.6) have been identified by PW 5 Abhijit. Nothing worth could be elicited in the cross-examination of this witness to discard his testimony. No contradiction or omission could be noticed in his evidence.

(xiii) On identification of accused, it was vehemently submitted by Mr. Vinit Kulkarni, learned Advocate for accused, that no Test Identification Parade was held and on the mistaken identity of red T-Shirt, accused was implicated. He submitted that in the absence of TIP, accused could not have been connected with the crime, particularly in a case where serious charge of rape and murder is levelled against him. On last seen and failure to hold TIP, Mr. Kulkarni relied

upon the following authorities -

- a) ***Kanan And Others V. State Of Kerala***⁵ In this case, the Supreme Court held -

“Where a witness identifies an accused who is not known to him, in the Court for the first time, his evidence is absolutely valueless unless there has been a previous T.I. parade to test his powers of observation. The idea of holding T.I. parade under Section 9 of the Evidence Act is to test the veracity of the witness on the question of his capability to identify an unknown person whom the witness may have seen only once. If no T.I. parade is held then it will be wholly unsafe to rely on his testimony regarding the identification of an accused for the first time in Court.”

- b) ***Lakhanpal v. The State Of Madhya Pradesh***⁶ in which it has been held -

“In prosecution for offence of murder the mere fact that the accused and the deceased (the real brother of the

5 (1979) 3 Supreme Court Cases 319

6 AIR 1979 Supreme Court 1620

accused) were together in the field prior to the occurrence does not by itself lead to irresistible inference that the accused must have murdered the deceased.”

c) ***Mohanlal Gangaram Gehani v. State Of Maharashtra***⁷. The Supreme Court observed -

“20. Thus, as Shetty did not know the appellant before the occurrence and no test identification parade was held to test his power of identification and he was also shown by the police before he identified the appellant in court, his evidence becomes absolutely valueless on the question of identification. On this ground alone, the appellant is entitled to be acquitted.

25In these circumstances, therefore, if the appellant was not known to him before the incident and was identified for the first time in the court, in the absence of a test identification parade the evidence of P.W. 3 was valueless and could not be relied upon.”

⁷ AIR 1982 Supreme Court 839

d) ***Sadashiv Bajrang Sutar v. The State Of Maharashtra***⁸. In this case, it has been held -

“.....the failure to hold identification parade cuts at the very root of the testimonials of witnesses and the very circumstance that the deceased was last seen in the company of the accused is not established at all.

9. The investigating officer has shown a marked degree of negligence in his duty in not holding an identification parade in such a case. All these witnesses, who claim to have seen the accused last in the company of Bhagwat on 4th of Oct., 1975, have identified the accused, according to their own versions, for the first time in the open Court after the date of the incident. We do not appreciate the competence of these witnesses to identify a person whom they say they had seen in the company of Bhagwat on the day in question.”

Against this, on TIP and last seen, Mr. Arfan Sait, learned APP for State, strongly placed reliance on -

8 1982 CRI. L. J. 2056 (Bom.)

- a) ***Visveswaran v. State REP. BY S.D.M.***⁹. In this case, it has been held -

“11.....The identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of crime can be proved also by circumstantial evidence. In the present case, there are clinching circumstances unerringly pointing out the accusing finger towards the appellant beyond any reasonable doubt.

12. Before we notice the circumstances proving the case against the appellant and establishing his identity beyond reasonable doubt, it has to be borne in mind that the approach required to be adopted by courts in such cases has to be different. The cases are required to be dealt with utmost sensitivity, courts have to show greater responsibility when trying an accused on charge of rape. In such cases, the broader probabilities are required to be examined and the courts are not to get

9 (2003) 6 Supreme Court Cases 73

swayed by minor contradictions or insignificant discrepancies which are not of substantial character. The evidence is required to be appreciated having regard to the background of the entire case and not in isolation. The ground realities are to be kept in view. It is also required to be kept in view that every defective investigation need not necessarily result in the acquittal. In defective investigation, the only requirement is of extra caution by Courts while evaluating evidence.

....The testimony of PW1 and PW2 was straightforward. The witnesses, immediately after the commission of offence, had named the appellant. The non-holding of the test identification parade, having regard to the facts of the case, is not fatal and does not create any reasonable doubt in the case of the prosecution. We are unable to accept the contention that the identity of the appellant had not been proved.....”

- b) ***Shyamal Ghosh v. State Of West Bengal***¹⁰. In this case, it has been laid down -

“72. Then, it is also contended and of

¹⁰ (2012) 7 Supreme Court Cases 646

course with some vehemence that where the prosecution is relying upon the last seen theory, it must essentially establish the time when the accused and deceased were last seen together as well as the time of the death of the deceased. If these two aspects are not established, the very application of the 'last seen theory' would be impermissible and would create a major dent in the case of the prosecution.

73. Application of the 'last seen theory' requires a possible link between the time when the person was last seen alive and the fact of the death of the deceased coming to light. There should be a reasonable proximity of time between these two events. This proposition of law does not admit of much excuse but what has to be seen is that this principle is to be applied depending upon the facts and circumstances of a given case.....

74. The reasonableness of the time gap is, therefore, of some significance. If the time gap is very large, then it is not only difficult but may even not be proper for the court to infer that the accused had been last seen alive with

the deceased and the former, thus, was responsible for commission of the offence. The purpose of applying these principles, while keeping the time factor in mind, is to enable the Court to examine that where the time of last seen together and the time when the deceased was found dead is short, it inevitably leads to the inference that the accused person was responsible for commission of the crime and the onus was on him to explain how the death occurred.

79. The whole idea of a test identification parade is that witnesses who claim to have seen the culprits at the time of occurrence are to identify them from the midst of other persons without any aid or any other source. The test is done to check upon their veracity. In other words, the main object of holding an identification parade, during the investigation stage, is to test the memory of the witnesses based upon first impression and also to enable the prosecution to decide whether all or any of them could be cited as eyewitnesses of the crime.

80. It is equally correct that the Code of Criminal Procedure does not oblige the investigating agency to necessarily hold the test identification parade. Failure to hold the test identification parade while in police custody, does not by itself render the evidence of identification in court inadmissible or unacceptable. There have been numerous cases where the accused is identified by the witnesses in the court for the first time. One of the views taken is that identification in court for the first time alone may not form the basis of conviction, but this is not an absolute rule. The purpose of the test identification parade is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of the witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence is however subjected to exceptions.

81. In para 81 principles have been enunciated as under :-

Identification Parade is a tool of investigation and is used primarily to strengthen the case of the prosecution on the one hand and to make doubly sure that persons named as the accused in the case are actually the culprits. The identification parade primarily belongs to the stage of investigation by the police. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court. Thus, it is only a relevant consideration which may be examined by the court in view of other attendant circumstances and corroborative evidence with reference to the facts of a given case."

The crux of the above authorities is that there is no absolute rule that identification of the accused in the Court for the first time alone may not form the basis of conviction.

(xiv) In the present case, considering voluminous incriminating circumstances and corroborative evidence, failure to hold TIP cannot be said to be fatal to the prosecution case. PW 4 Vijay and PW 5 Abhijit have duly

identified the accused in the Court. They did so without any demur or hesitation. They had sufficient opportunity to see the accused at the relevant time. Therefore, there is no question of suspecting their evidence and objection raised on behalf of the accused in respect to failure to hold identification parade needs to be rejected in the facts of the present case.

(xv) From the evidence of PW 3 Samir, PW 4 Vijay and PW 5 Abhijit, it is clear that the deceased was last seen with the accused. On 17/10/2012, PW 4 Vijay had seen the accused following the victim girl at 5.30 p.m. In such a case, provisions of Section 106 of the Evidence Act would be attracted. Section 106 of the Evidence Act provides that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. In this connection, Mr. Arfan Sait, learned APP for State, relied upon the decision in **State Of Rajasthan v. Kashi Ram**¹¹. The Supreme Court observed thus -

11 (2006) 12 Supreme Court Cases 254

“23.The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his

innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain....”

19. It is important to note that in his statement under Section 313 of Cr.P.C., accused has not given any explanation whatsoever for the clinching circumstance of last seen. Further, silence on the part of accused is a very strong circumstance against him as the dead body of victim girl was found at his instance on 18/10/2012.

PW 8 Vilas Burumuar is the panch witness on recovery of dead body at the instance of accused. His evidence is to be discussed in detail little later at an appropriate stage. Suffice it to say that seizure panchanama Exh.23 proved by PW 8 Vilas supports the prosecution case that dead body was found at the instance of accused. The said panchanama commenced on 18/10/2012 at 12.15 hours and concluded at 13.20 hours. The fact that accused was seen following the victim girl at 5.30 p.m. on 17/10/2012 and the proximity of time within which the dead body of victim

girl was recovered at his instance is enough to hold him responsible for causing the death of victim girl.

20. (B) RECOVERY OF DEAD BODY AT THE INSTANCE OF ACCUSED :

PW 8 Vilas and Investigating Officer PW 14 PSI Ajit Patil are the witnesses examined by the prosecution to establish recovery of dead body at the instance of the accused. It is stated by PW 8 Vilas that on 18/10/2012, he was called by police near Kamthekarwadi Phata for panchanama. Divekar was another panch with him. The accused was present there. He stated that accused took them to about 200 meters towards eastern side of Kamthekarwadi. A school bag was found lying. By the side of school bag, two wristwatches were found. The strips of watches were found broken. School bag and wristwatches were seized by police. Thereafter accused took them to the field of one Deshmukh. It was a barren land. Two ear-rings were found near the place where the dead body was found. Ear-rings were seized. Sample of earth was taken from the

spot. It was jungle area and the dead body was found in a ditch. He proved seizure panchanama (Exh.23) and identified school bag (Art.1), wristwatches (Arts.2 and 3) and ear-rings (Art.4).

The testimony of PW 8 Vilas is supported by PW 14 PSI Patil. PSI Patil was attached to Pali Police Station at the relevant time. He was a Probationary Officer. On 18/10/2012, he was on duty at the police station from 8.00 a.m. It appears from his evidence that PSO Mhatre registered missing report of victim girl lodged by PW 3 Samir Parab. The inquiry into missing report was handed over to PSI Patil by PW 15 PI Gavade. So on taking entry in station diary, PSI Patil, along with PW 3 Samir and others proceeded from the police station. At village Avandhe, they saw some people with a person in their custody. PSI Patil interrogated the said person about missing girl. He disclosed his name as Viran Gyanlal Rajput, resident of Madhya Pradesh. He also disclosed that he had hidden the girl in jungle area. Thereafter accused took them to Kamthekarwadi Phata. At

the distance of 300 meters in jungle, he removed the mud and shown the dead body of victim girl. It was identified by parents and brother of victim girl who had accompanied them. It has come in the evidence of PW 14 PSI Patil that when the dead body was taken out from the mud, it was fully naked and maroon odhani was tied around the neck. The articles school bag, two wristwatches of which belts were broken, ID card of victim girl, school books, notebooks, in the school bag were seized from the spot.

The evidence of PW 8 Vilas and PW 14 PSI Patil is assailed on the ground that no separate panchanama of the articles found on the spot was drawn and the articles which were recovered, were easily available in the market.

In respect to the contention that no seizure panchanama of the articles found on the spot was drawn, learned APP Mr. Sait vehemently submitted that during the course of recording spot panchanama, articles were found scattered and so there was no need to draw a separate

seizure panchanama. In support of his submission, learned APP relied upon -

- a) ***Himachal Pradesh Administration V/s Om Prakash¹²,***
- b) ***Prakash Chand V/s The State (Delhi Admn.)¹³,***
and
- c) ***A. N. Venkatesh and another V/s. State of Karnataka¹⁴.***

In the first authority, it has been held by the Supreme Court,

“It is not necessary either in law or in practice that where recoveries have to be effected from different places on the information furnished by the accused different sets of persons should be called in to witness them. The evidence relating to recoveries under Section 157 is not similar to that contemplated under Section 103, Criminal Procedure Code.”

12 AIR 1972 SUPREME COURT 975

13 AIR 1979 SUPREME COURT 400

14 (2005) 7 Supreme Court Cases 714

In ***Prakashchand*** (*supra*), the Supreme Court observed,

“There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 Criminal Procedure Code. What is excluded by Section 162 Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen Articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether

any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act.”

In the case of **A. N. Venkatesh** (*supra*) almost similar issue was before the Supreme Court wherein it was held that,

“By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand v. State (Delhi Admn.)*. Even if we hold that the disclosure statement made by the accused-appellants (Exts.P-15 and P-16) is not admissible

under Section 27 of the Evidence Act,
still it is relevant under Section 8.”

The principles laid down in the above authorities are *mutatis-mutandis* applicable to the present case. PW 14 PSI Patil, PW 8 Vilas, another panch Divekar and others had been to the spot in pursuance to the information given by the accused that he would show the place where he had kept the girl. The accused had shown the place. The said articles were found scattered on the spot. They were referred in panchanama (Exh.23). In such a situation, it was not necessary for the investigating agency to draw an independent seizure panchanama. Therefore we do not find any force in the submission of learned Advocate for Appellant/accused that seizure panchanama was required to be drawn separately.

So far as the availability of articles in the market is concerned, evidence of PW 2 Headmaster Sarjerao Shrikhande and PW 6 Gita Parab, mother of the victim girl, is relevant. It is stated by PW 2 Headmaster Shrikhande that the uniform of their school for girl students is maroon

payjama and reddish pink kurta having white checks on it and maroon odhani. He identified Art.6 odhani, Art.10 kurta and Art.11 payjama as school uniform for girl students.

According to PW 6 Gita Parab, in 2012, her daughter was studying in 9th standard. She identified Art.6 odhani, Art.10 top and Art.11 payjama of her daughter/victim girl. The evidence of PW 2 Headmaster Shrikhande and PW 6 Gita, mother of the victim girl, is not challenged in the cross-examination, particularly in respect to the identification of school uniform. In view of this, contention raised by the Appellant/accused that the articles found on the spot were easily available in the market, holds no water.

It is significant to note that in the school bag (Art.1), ID card of victim girl, school books and notebooks were found. PW 8 Vilas and PW 14 PSI Patil have stated about it in their evidence. So far as ear-rings are concerned, PW 6 Gita, mother of victim girl, has stated that Art.4 ear-rings were on the person of her daughter on the relevant day.

Spot panchanama (Exh.23) refers to seizure of these articles from the spot.

It is stated by PW 14 PSI Patil that two wristwatches were found at the place. One wristwatch of Fastrack company belonged to PW 3 Samir. The victim girl was wearing the same on the day of incident. In respect to the wristwatch of Titan company, it is submitted on behalf of the Appellant/accused that there is no evidence to indicate to whom it belonged and it creates doubt about involvement of the accused. He also submitted that to protect the real culprit, investigating agency deliberately avoided to investigate about Titan wristwatch. PW 14 PSI Patil admitted in cross-examination that he did not make investigation about Titan wristwatch found on the spot. He, however, denied that investigation was conducted in wrong manner.

It is brought in the cross-examination of PW 15 PI Gavade that during investigation it could not be revealed who was the owner of Titan wristwatch.

True, investigating agency ought to have investigated in respect to second wristwatch considering the seriousness of crime. But inaction on the part of Investigating Officer cannot be said to be fatal to the prosecution case in view of recoveries of other incriminating articles. In this connection, learned APP placed reliance on :

Hema V/s State, through Inspector of Police, Madras¹⁵.

The Supreme Court has held that -

“..... If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and

15 2013 CRI. L. J. 1011 (Supreme Court)

as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.”

Further it was observed -

“..... merely because of some defect in the investigation, lapse on the part of the I.O., it cannot be a ground for acquittal. Further, even if there had been negligence on the part of the investigating agency or omissions etc., it is the obligation on the part of the Court to scrutinize the prosecution evidence dehors such lapses to find out whether the said evidence is reliable or not and whether such lapses affect the object of finding out the truth.”

From the evidence discussed above, we find that prosecution has proved beyond reasonable doubt recovery of dead body at the instance of accused and incriminating articles from the spot.

21. (C) DISCOVERY OF CLOTHES OF DECEASED AT THE INSTANCE OF ACCUSED :

According to prosecution, the clothes of victim girl were recovered on the information given by the accused. PW 9 Sunil and PW 15 PI Gavade are the witnesses on recovery of clothes of deceased under Section 27 of the Evidence Act. It is stated by PW 9 Sunil that on 23/10/2012 he was called at Pali Police Station. Another panch Sanjay Divekar was present with him. Accused was also present in the police station. PW 9 Sunil stated that accused disclosed to them that he is ready to produce clothes of the girl. Accordingly, memorandum of the accused was recorded as per his say. Memorandum (Exh.25) is proved by this witness. It bears signatures of both the witnesses, PI Gavade and thumb impression of the accused.

The evidence of PW 9 Sunil further shows that after memorandum was recorded, accused led them in police jeep to Kamthekarwadi Phata. Accused and others alighted from the jeep near Kamthekarwadi Phata. Thereafter

accused took them towards eastern side to about 200 meters downward and produced clothes hidden in a hole covered with a stone. Those clothes were Art.10 kurta, Art.11 payjama, Art.12 petticoat and Art.13 knicker. Those clothes were wet and piled with mud. Petticoat was found torn from top to bottom. The clothes were dried and kept in different packets which came to be sealed. Discovery panchanama (Exh.26) was recorded by PW 15 PI Gavade at the place from where clothes were seized. PW 9 Sunil identified the accused before the Court as the same person who gave memorandum and in pursuance to memorandum, discovered the clothes of deceased.

The testimony of PW 9 Sunil is attacked on the ground that he was also a panch to inquest panchanama (Exh.40) and another panch Divekar has not been examined. It is needless to state that quality of evidence matters and not the quantity. If one witness has been examined on the point and his evidence is found to be reliable and believable, we do not see any necessity for the prosecution to examine

other witnesses on the same point. Accused could not elicit anything otherwise in the cross-examination of PW 9 Sunil to create a doubt regarding credibility of his evidence.

According to Appellant/accused, no bloodstains on the clothes of deceased were found. This submission appears to be against the record. C.A. report (Exh.61) shows that petticoat (Exh.6) was stained with blood on one side. As stated by PW 9 Sunil and PW 15 PI Gavade, petticoat was completely torn. According to prosecution, dead body of victim girl was found in naked condition having odhani tied around the neck. It shows that victim girl was disrobed before the act was committed. So there is no question of bloodstains being found on her other clothes.

A futile attempt was made on behalf of the Appellant/accused that he is illiterate and his thumb impression was obtained by force on panchanama (Exh.26). Accused never made any complaint immediately after recording seizure panchanama of the clothes (Exh.26) that

his thumb impression was forcibly obtained. There is no evidence to substantiate his defence. In the absence of such evidence, seizure panchanama (Exh.26) was rightly held to be duly proved.

The learned Advocate for Appellant then submitted that stone which was on the hole was not seized and this would adversely affect the discovery of clothes. Investigating Officer ought to have seized the stone. In our opinion, failure to do so would not bring memorandum (Exh.25) and seizure panchanama (Exh.26) under the clouds of doubt as PW 9 Sunil and PW 15 PI Gavade stood the test of exhaustive cross-examination. Through their evidence, prosecution has established discovery of clothes of deceased under Section 27 of the Evidence Act at the instance of accused.

22. (D) SEIZURE OF PANTS OF ACCUSED PILED WITH MUD :

It is the prosecution case that on 18/10/2012, the

accused was arrested at 20.20 hours. That time, clothes on his person were seized. PW 11 Waman Jadhav is the panch on arrest panchanama and seizure of clothes on the person of accused. He stated that on 18/10/2012, PI Gavade called him to Pali Police Station. Accused was arrested in his presence. Another panch Gafur was also present. Accused disclosed his name as Viran Gyanlal Rajput. At the time of arrest, clothes on the person of accused were seized. The clothes were T-Shirt (Art.7), pants (Art.8) and knicker (Art.9). PW 11 Waman also stated that knicker and pants were stained with blood. The clothes were seized and sealed in the presence of panch witnesses by PI Gavade. Accordingly panchanama (Exh.31) was drawn.

The testimony of PW 11 Waman is fully corroborated by PW 15 PI Gavade. Nothing is brought in their cross-examination. There is no reason for these witnesses to falsely implicate the accused. Relying upon the cogent evidence of PW 11 Waman and PW 15 PI Gavade, it can be safely believed that at the time of arrest of the accused on

18/10/2012 at 20.20 hours, clothes on his person were seized in the presence of panch witnesses.

It appears that Investigating Officer PW 15 PI Gavade sent the seized clothes to C.A. C.A. report (Exh.61) shows that two semen stains of about 1 cm each in diameter were found at the middle portion on half slack (Exh.10) i.e. knicker of the accused. Further, C.A. report (Exh.62) clearly shows that mud which was found on the full pant (Exh.9) of the accused tallied with earth (Exh.1) seized from the spot. This is the most clinching circumstance against the accused which connects him to the commission of crime.

23. (E) NO EXPLANATION TO THE INJURIES FOUND ON THE PERSON OF ACCUSED :

(i) After arrest, accused was referred for medical examination. PW 12 Dr.Jaiswal examined the accused on 19/10/2012 at PHC, Pali. On examination, PW 12 Dr. Jaiswal found :

- i) Scratch mark about 3cm x 0.5 cm on right side of cheek,
- ii) Scratch mark 2 cm x 0.5 cm on right side of cheek just below the above mark,
- iii) Scratch mark 1 cm x 0.5 cm on right mastoid process,
- iv) Contusion with redness left eye,
- v) Scratch mark just below the left eye,
- vi) Scratch mark 5cm x 0.5 cm left side of face,
- vii) Scratch mark 3 cm x 0.5 cm on left side of neck,
- viii) Scratch mark 2 cm x 0.5 cm on left side of neck just below the above.

In the opinion of PW 12 Dr.Jaiswal, the above injuries were due to the use of rough object and the age of injuries was within 24 hours. It is stated by Dr.Jaiswal that such injuries are possible due to nail marks when a woman resists a sexual assault on her. Exh.33 is the medical certificate proved by PW 12 Dr.Jaiswal showing the scratch marks on cheeks, left eye, left face, left neck of the accused. The parts of body where the scratch marks were noticed by Dr.Jaiswal further

strengthens the case of prosecution to show that there was resistance by the victim girl at the time of commission of offence. The accused has not explained the injuries on his person. Failure of the accused to explain the injuries tilts in favour of the case of prosecution.

24. (F) MEDICAL EVIDENCE SHOWING THAT THE GIRL WAS FORCIBLY RAPED AND THEN DONE TO DEATH:

The next circumstance is that the girl was forcibly raped and thereafter accused caused her death. We have already reproduced in para 8 above injuries which were noticed by PW 13 Dr.Manisha and Dr.Ghumare at the time of performing post-mortem. The medical evidence clearly shows that victim girl was forcibly raped and thereafter she was done to death. PW 13 Dr.Manisha has specifically stated that labia majora was found swollen. Hymen was seen torn in the position of 6 O'Clock and 9 O'Clock and torn edges were fresh. Both the Medical Officers opined that scratch marks over the breast, thigh and right gluteal regions as well

as cheeks were the results of sexual assault on the victim. Medical certificate (Exh.37) shows that the victim girl was sexually assaulted. All the incriminating circumstances shown above do establish beyond reasonable doubt that accused and accused alone caused the death of victim girl. This is totally consistent with the prosecution case.

25. (G) MOTIVE :

(i) Another circumstance relied upon by the prosecution is the motive to commit the crime. It is needless to state that in a case based on circumstantial evidence, motive assumes pertinent significance as existence of motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive however, puts the court on its guard to scrutinize the circumstances more carefully to ensure that surmises and conjectures do not take place of legal proof.

From the incriminating circumstances discussed in the foregoing paras, motive of the accused in the present

case has been established i.e. to satisfy the unbridled lust of the accused and then to cause death of victim girl so that she does not implicate him. As motive is apparent, prosecution does safely cross this hurdle too.

26. (H) FAILURE OF ACCUSED TO OFFER PLAUSIBLE EXPLANATION TO THE INCRIMINATING CIRCUMSTANCES AGAINST HIM :

(i) The last circumstance against the accused is his failure to offer plausible explanation to the incriminating circumstances against him. The evidence of PW 3 Samir, PW 4 Vijay and PW 5 Abhijit shows that the deceased was last seen alive with the accused. The dead body, incriminating articles and clothes of the deceased were recovered in pursuance to the information given by the accused. C.A. report (Exh.62) establishes that mud found on the full pant of accused tallied with the earth collected from the spot. Another C.A. report (Exh.61) shows that two semen stains were found on the knicker of accused. It is significant to note that in his statement under Section 313 Cr.P.C., accused has

not given any explanation whatsoever for any of the circumstances brought on record by the prosecution against him.

27. Commenting upon the deficiencies in the investigation, particularly in respect to Titan wristwatch and non-seizure of sandal and stone, Mr. Vinit Kulkarni, learned Advocate for Appellant, submitted that the chain in circumstantial evidence cannot be said to be complete. He submitted that prosecution case is based on suspicion and so benefit of doubt must go to the accused. In support, Mr. Kulkarni placed vehement reliance on ***Mohd. Faizan Ahmad alias Kalu V/s. State of Bihar***¹⁶. In the above authority, Supreme Court has observed that -

“..... Criminal courts recognise only legally admissible evidence and not far-fetched conjectures and surmises.

“..... suspicion, however grave, cannot take the place of proof.”

16 (2013) 2 Supreme Court Cases 131

28. We have observed above that in such a serious crime, investigating agency ought to have investigated in connection to the Titan wristwatch, sandal and the stone. The moot question despite lapses, infirmities, and inaction would be why the criminal justice system should suffer and why the courts should forget victim of crime particularly when reliable, truthful, convincing incriminating and clinching circumstances have been legally established by the prosecution against the accused.

29. However, this case is an example once again to remind the investigating agency and the prosecution of its onerous duty to place the truth before the Court with utmost sensitivity instead of adopting an overconfident approach in such a serious crime where question of life and death of a person is involved and where victim is none else then a 13½ years old small, innocent, helpless and powerless girl student.

30. Be that as it may, on a close and critical examination of the evidence on record, it can be safely said that prosecution has established the following incriminating circumstances against the accused in this case:

- i) Deceased was last seen with the accused.
- ii) Accused took away the girl in jungle area and sexually assaulted her.
- iii) Recovery of dead body and incriminating articles in pursuance to the information given by the accused.
- iv) Discovery of clothes of deceased at the instance of accused.
- v) Pants of the accused found stained with mud tallied with the earth seized from the spot.
- vi) Failure to explain injuries on the person of accused.
- vii) Medical evidence showing that the girl was forcibly raped and then done to death.
- viii) Motive to gratify the lust.

- ix) Failure of the accused to offer plausible explanation about the incriminating circumstances established against him.

31. All these circumstances conclusively prove that all links in the chain are so complete that they do not leave any reasonable ground for a conclusion consistent with the hypothesis of the innocence of the accused. On the contrary, the same are of exclusive nature consistent only with the hypothesis of the guilt of the accused and conclusively lead to an irresistible conclusion that it is the accused who took away the victim girl to a jungle, sexually assaulted her and caused her death. Further to screen himself from the legal punishment, he buried the dead body in a ditch and covered the same with grass and mud so that no one should suspect him. These acts are squarely covered under Sections 366, 376, 302, 201 of IPC and Sections 3 read with 4 of POCSO Act, 2012.

32. This takes us to the quantum of sentence. Accused Viran Gyanlal Rajput is heard on the point of sentence. He stated that he is 22 years old married man having two children aged 3 years and 2 years. His parents are dependents on him. On behalf of Appellant, Mr. Kulkarni submitted that it is not a rarest of rare case and capital punishment ought not to have been awarded in this case. Appellant/accused does not want to point out any other mitigating circumstance except his age and family responsibilities for imposing lesser punishment. On mitigating circumstances, Mr. Kulkarni referred and relied upon the following decisions -

- a) ***Shankarlal Gyarsilal Dixit V/s. State of Maharashtra*** (*Supra*),
- b) ***Shidagouda Ningappa Ghandavar V/s. State of Karnataka***¹⁷,
- c) ***Jashubha Bharatsinh Gohil and Others V/s. State of Gujarat***¹⁸,

17 AIR 1981 SUPREME COURT 764

18 (1994) 4 Supreme Court Cases 353

- d) ***Ronny alias Ronald James Alwaris and Others V/s. State of Maharashtra¹⁹,***
- e) ***Swami Shraddananda @ Murali Manohar Mishra V/s. State of Karnataka²⁰,***
- f) ***Gurvail Singh alias Gala @ Anr. V/s. State of Punjab²¹,***

33. The cases on which the reliance is placed by the learned Advocate appearing on behalf of the Appellant/accused can be distinguished.

34. In the case of ***Shankarlal*** (*supra*), it was held by the Supreme Court that in a case of circumstantial evidence, the circumstances on which prosecution relies must be consistent with the sole hypothesis of the guilt of the accused. The presence of Appellant was not proved when the dead body was discovered. The chain in circumstances was not complete and so Appellant was acquitted. In the case in hand, prosecution has succeeded in establishing the

19 (1998) 3 Supreme Court Cases 625

20 AIR 2008 SUPREME COURT 3040

21 AIR 2013 SUPREME COURT 1177

guilt of the accused beyond all reasonable doubt as discussed above. Thus, the facts in the above-mentioned case cannot be said to be identical to the facts in the case on hand.

35. In the decision in ***Shidagouda*** referred above, Appellant committed murder of a young boy and it appeared that there was a land dispute between the deceased's father and certain other persons which led to the murder of unfortunate young boy. In the present case, Appellant committed rape on a minor girl and then committed her murder.

36. In ***Jashubha Bharatsinh Gohil and Others*** (*supra*), the accused formed an unlawful assembly and caused multiple murders. As occurrence took place almost 10 years ago and for more than 6 years the specter of death was hanging over the head of Appellants, it was held that sentence should not have been enhanced from life imprisonment to death sentence.

37. ***Ronny alias Ronald Vs. State of Maharashtra***

referred above was a case wherein accused committed gang-rape on a lady aged over 45 years, robbed her and caused her death. From the facts and circumstances, particular role played by each of the Appellants and whose case fell in the rarest of rare category was not ascertainable. In such circumstance, sentence of death was reduced to sentence of life imprisonment. In the instant case, from the facts and circumstances, specific role is attributed to the accused and it can be ascertained from the circumstances that it falls in the rarest of rare category.

38. In the case of ***Swami Shraddhananda*** (*supra*), accused committed murder of his wife in greed of money. In the facts of the case, death sentence was substituted by life imprisonment for rest of life.

39. Accused were found guilty of killing 4 members of family in the case of ***Gurvail Singh alias Gala*** referred above. Considering mitigating circumstances, death

sentence was held improper and accused were awarded sentence of minimum 30 years imprisonment without remission.

40. As facts in the above referred cases were different, the Judgments on which reliance is placed by the learned Advocate appearing on behalf of Appellant/accused, cannot be relied upon.

41. During the course of extensive arguments, Mr. Arfan Sait, learned APP for State, submitted that considering the nature of offence, manner in which it was committed and its impact on the society at large, no leniency be shown to the Appellant/ accused. According to Mr. Sait, it is a rarest of rare case and the trial Court has rightly awarded capital punishment. On the point of death sentence, the learned APP relied upon the following authorities -

- a) ***Macchi Singh and Others V/s. State of Punjab²²,***

22 (1983) 3 Supreme Court Cases 470

- b) ***Dhananjoy Chatterjee alias Dhana V/s. State of W.B.*²³,**
- c) ***Surja Ram V/s. State of Rajasthan*²⁴,**
- d) ***Molai and Another V/s. State of M.P.*²⁵,**
- e) ***Bantu V/s. State of Uttar Pradesh*²⁶,**
- f) ***Shivaji alias Dadya Shankar Alhat V/s. State of Maharashtra*²⁷,**
- g) ***Rajendra Pralhadrao Wasnik V/s. State of Maharashtra*²⁸,**
- h) ***Shyam Narain V/s. State of NCT of Delhi*²⁹,**
- i) ***Vasanta Sampat Dupare V/s. State of Maharashtra*³⁰,**
- j) ***The State of Maharashtra V/s. Raju Jagdish Paswan*³¹,**

42. In ***Macchi Singh's*** case (*supra*), the Supreme Court justified capital sentence in rarest of rare cases. It was

23 (1994) 2 Supreme Court Cases 220

24 (1996) 6 Supreme Court Cases 271

25 (1999) 9 Supreme Court Cases 581

26 (2008) 11 Supreme Court Cases 113

27 (2008) 15 Supreme Court Cases 269

28 AIR 2012 SUPREME COURT 1377

29 AIR 2013 SUPREME COURT 2209

30 2014 AIR SCW 6952

31 2013 ALL MR (Cri) 1431 (Bom)

observed that death sentence can be awarded when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. In paragraphs 32, 34, 35, 36 and 37 of the judgment various circumstances were stated where the community may entertain such sentiments. They are :

- (i) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.
- (ii) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
- (iii) When murder of member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on

account of infatuation.

- (iv) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed.
- (v) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

In this case, Their Lordships have observed that guidelines indicated in ***Bachan Singh vs. State of Punjab***³² will have to be culled out and applied to the facts of each individual case where the question of imposing the death sentence arises. The following positions emerge from ***Bachan Singh*** case (*supra*) :

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the “offender” also require to be taken into consideration along with the circumstances of the “crime”.
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence

³² AIR 1980 SC 898

must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

43. Before the new Code of Criminal Procedure both alternative sentences provided in Section 302 of the Indian Penal Code were normal sentences but position is now modified by Section 354(3) of the Code of Criminal Procedure which mandates the Courts convicting a person for an offence punishable with death or in the alternative with imprisonment for life or any other term of imprisonment not to impose sentence of death on that person unless there are “special reasons” to be recorded by the Court for such

sentence. The expression “special reasons” in Section 354(3) means “exceptional reasons” founded on exceptional grave circumstances of the crime as well as the criminal as held in Bachan Singh's case. In this connection, it is necessary here to refer the relevant paragraph from the judgment in **Bachan Singh's** case (*supra*) :

“As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of “special reasons” in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because style is the man. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not

desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

44. In the case of ***Dhananjoy Chatterjee*** (*supra*), accused committed rape and murder of a young girl of about 18 years in the society where he was working as a security guard. The Supreme Court observed that the measure of punishment in a given case must depend upon the atrocity of the crime, conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Supreme Court further observed that the Courts

must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

45. In the decision of **Surja Ram** referred above, the Appellant was facing charge under Sections 302, 307 and 450 IPC. He committed murder of his real brother, two nephews and aged aunt. The Supreme Court held that cold-blooded barbaric murder of brother, his two minor sons and aged aunt and attempt to murder brother's wife and daughter with a view to wipe out entire family of his brother in a calculated manner when they were fast asleep by cutting their necks with a sharp cutting weapon was a rarest of rare case and death sentence concurrently awarded by the Courts below was justified. In this case, the Supreme Court considered retributive and deterrent aspects of punishment in awarding death sentence.

46. In the case of **Molai** (*supra*), the Supreme Court awarded the death sentence to the accused for committing

rape and murder of a 16 years old girl.

47. In **Bantu** referred above, a 5 year minor girl was raped and murdered and the Appellant was awarded death sentence by the trial Court which was affirmed by the High Court. The Supreme Court reiterated the principles stated in **Bachan Singh** (*supra*), **Macchi Singh** (*supra*) and **Devender Pal Singh V/s. State of NCT of Delhi**³³ and held that the case fell in the rarest of rare category in which capital punishment was warranted.

48. In the decision in **Shivaji** (*supra*), rape and murder of a small child of 9 years was committed. The case was exclusively based on circumstantial evidence. Plea that in case of circumstantial evidence, death penalty should not be awarded was held without logic. The Supreme Court held that circumstances proved establish the depraved acts of the accused and they call for only one sentence that is the death sentence.

³³ (2002) 5 SCC 234

49. In the case of **Rajendra Wasnik** referred above, the accused aged 31 years committed rape on a 3 year old minor girl and thereafter committed her murder. In the said case, death sentence was confirmed. The Supreme Court, after considering earlier decisions relating to sentencing policy in cases of death sentence, observed that the Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/ balance of justice tilts.

50. **Shyam Narain V/s. State of NCT of Delhi** referred above was a case under Section 376 IPC. Victim girl of 8 years was sexually assaulted by the accused. On sentencing policy, the Supreme Court held that on certain occasions, opportunities may be granted to the convict for reforming himself but the principle of proportionality between an offence committed and the penalty imposed are to be kept in mind. It is obligatory on the part of the Court to see

the impact of the offence on the society as a whole and its ramifications on the immediate collective as well as its repercussions on the victim.

51. In the recent decision of ***Vasanta Dupare V/s. State of Maharashtra*** referred above, accused was found guilty of kidnapping, rape and murder of 4 year old girl. Confirming the death sentence, the Supreme Court observed-

“As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous. Not only the rape was committed in a brutal manner but murder was also

committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances. Further the appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed by accused under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed and rehabilitated. As the circumstances would graphically depict, he would remain a menace to the society, for, a defenceless child has become his prey. Thus, there are no mitigating circumstances. It is

inconceivable from the perspective of the society that a married man aged about two scores and seven make a four year minor innocent girl child a prey of his lust and deliberately cause her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. It meets the test of rarest of rare case and therefore, death sentence is affirmed.”

52. The case of **Raju Paswan** (*supra*) is almost identical to the facts in present case. The death sentence was awarded as accused committed rape and murder of 9 years old girl. Based on the circumstance of last seen and the fact that the accused showed the dead body of the deceased, conviction and death sentence was confirmed.

53. Keeping in view the propositions of law and guidelines laid down by the Supreme Court time and again, we now propose to deal with the aggravating and mitigating circumstances in the present case.

54. **AGGRAVATING CIRCUMSTANCES :**

- (a) The offence committed by the accused had not been committed on the spur of moment. It was pre-planned. Accused took away the victim girl to a secluded place in jungle area. Even villagers had not thought of searching the place till the accused led them to the spot.
- (b) Accused committed the offence in order to satisfy his lust. He forcibly raped 13½ year old defenceless school going girl and eliminated her life which is the ultimate insult of womanhood.
- (c) The crime was committed in beastly, brutal and barbaric manner.
- (d) The subsequent conduct of the accused indicates that he had felt no remorse. After commission of

crime, he was found coolly wandering in the village.

- (e) The victim had not offered any provocation to the accused.
- (f) Neither the victim nor her family members had any animosity with the accused.
- (g) The modus-operandi to commit the crime by resorting to diabolical method exhibits depravity, degradation and uncommonality of the crime which had shocked the collective conscience of the community as well as the villagers who are required to send their minor girls to another village for education, in the era in which right to education is the constitutional guarantee.

MITIGATING CIRCUMSTANCES :

- (a) Accused was 22 years old at the relevant time.
- (b) He has family responsibilities of his wife, two children 3 years and 2 years old and parents.

55. The hard facts of the present case are that accused took away the victim in jungle area while she was returning from school, sexually assaulted her and then caused her murder. Further, in order to screen himself from the legal punishment, he caused certain evidence of the offence, as discussed above, to disappear.

56. As said above, victim was studying in 9th standard in Sharda Vidyamandir which was at the distance of 4 kms from Kamthekarwadi where she was residing with her parents. It has come on record that she used to go on foot to her school and on the unfortunate day, she was returning alone from the school. Accused had taken this opportunity and helpless girl was subjected to sexual and brutal assault in a remote place where there was nobody to protect her. Accused had acted in a beastly manner and after satisfying his lust, he thought that victim might expose him before others so buried her body in a naked condition in a ditch and covered the place with grass and mud. The modus-operandi of the accused clearly shows that he would be a menace to

the society and there is no possibility of the accused being reformed.

57. Considering the nature of offence, manner in which it was committed and upon evaluating the aggravating and mitigating circumstances, according to us, this is a case which falls in the category of rarest of rare case.

58. In our view, the reasons and findings recorded by the learned Additional Sessions Judge are based upon due appreciation of evidence and are consistent with the evidence on record as well as the settled legal principles. We have, therefore, no hesitation in confirming the sentence of death awarded by the trial Court.

59. Before we part with the Judgment, we record our appreciation for the efforts and pains taken by Mr. Vinit Kulkarni, Advocate appointed to represent the Appellant/accused. We found that Mr. Vinit Kulkarni argued the matter with complete sincerity and hard-work without

bothering for monetary gains. We quantify legal fees to be paid to Mr. Vinit Kulkarni by the High Court Legal Services Committee to Rs.12,000/- (Rupees Twelve Thousand).

60. As far as Mr. Arfan Sait, learned APP for State is concerned, one may say that it was his duty to conduct the matter. But when the duty is performed with utmost zeal, caution and care, then it should not go unrewarded. For his endless efforts, we also record our appreciation for learned APP Mr. Arfan Sait.

61. In the light of the above and in the totality of the circumstances, we pass the following order :-

ORDER

- (i) The conviction and sentence of death imposed under Section 302 of the Indian Penal Code on the accused Viran Gyanlal Rajput is confirmed.
- (ii) The conviction and sentence under Sections 366, 201 IPC and under Section 4 of the Protection of Children from Sexual Offences Act, 2012 is

maintained.

- (iii) The reference is answered accordingly.
- (iv) Criminal Appeal No.760 of 2014 is dismissed.
- (v) However for want of specific charge, the conviction of the Appellant/accused under Section 10 of the Protection of Children from Sexual Offences Act, 2012 does not sustain. We set aside the same. Appellant/accused is acquitted of the offence punishable under Section 10 of the Protection of Children from Sexual Offences Act, 2012.
- (vi) Office to furnish copy of the Judgment and Order free of cost to the Appellant/accused who is in jail through the concerned prison authorities.

(SMT. I. K. JAIN, J.)

(SMT. V. K. TAHILRAMANI, J)