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HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 21.8.2017****Judgment Delivered on 17.11.2017****CRREF No. 1 of 2016**

- In Reference Of Chhattisgarh Through Thana Kotwali, District Raigarh Chhattisgarh.

---- Petitioner**Versus**

- Lochan Shrivass, S/o Tilakram Shrivass, aged about 23 years, R/o Gram Pusalda Thana Pusoure, Distt. Raigarh Chhattisgarh. At Present Nagar Nigam Aawas Colony Bajrangpara, H. No. D-15, Second Floor, Thana Kotwali District Raigarh Chhattisgarh.

---- Respondent**And****CRA No. 888 Of 2016**

- Lochan Shrivass S/o Tilakram Shrivass Aged About 23 Years R/o Village Pulsada, Thana Pusoure District Raigarh, Chhattisgarh. Present Address Nagar Nigam Aawas Colony, Bajrangpara, House No. D 15 Second Floor, Thana Kotwali, District Raigarh, Chhattisgarh.

---- Appellant (In Jail)**Vs**

- State Of Chhattisgarh Through The Police Station Kotwali Raigarh, District Raigarh, Chhattisgarh.

---- Respondent**Cr. Ref. No.1 of 2016**

For Appellant	:	Shri N.K. Malviya,	Advocate
For Respondent	:	Shri Vivek Sharma,	Government Advocate

Cr.A No. 888 Of 2016

For Appellant	:	Shri Vivek Sharma,	Government Advocate
For Respondent	:	Shri N.K. Malviya,	Advocate

Hon'ble Shri Justice Pritinker Diwaker
Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgement**Per P. Diwaker, J****17/11/2017**

1. This death reference was made to this Court under Section 366 of the Criminal Procedure Code, 1973 for confirmation of the sentence passed against the appellant before this Court. The appeal of the accused and the death reference case were heard together and this judgment will govern both the reference and the appeal.
2. A large number of cases in recent times coming before the Courts of law involving rape and murder of young girls, is a matter of concern. In the instant case girl was about three years of age who was the victim of sexual assault and animal lust of the accused-appellant; she was not only raped but was murdered by the accused/appellant.
3. This death reference and the criminal appeal arise out of the judgment dated 17.6.2016 passed by the Court of Additional Sessions Judge, Fast Track Court, Raigarh in Special Case No.19/2016 in which, the accused/appellant herein was tried, found guilty, convicted and sentenced to undergo death sentence (he was directed to be hanged by neck until he dies) and to pay a fine of Rs.5,000/- for the offence punishable under Section 302 of the Indian Penal Code (for short 'the IPC'); to undergo rigorous imprisonment for three years and to pay a fine of Rs.500/-, in default of payment of fine, to undergo additional rigorous imprisonment for one month for the offence punishable under Section 363 IPC; to undergo rigorous imprisonment for seven years and to pay a fine of Rs.500/-, in default of payment of fine to undergo additional rigorous imprisonment for two months for the offence punishable under Section 366 IPC; to undergo rigorous imprisonment for life and to pay a fine of Rs.1,000/-, in default of

payment of fine to undergo additional rigorous imprisonment for six months for the offence punishable under Section 377 IPC; to undergo rigorous imprisonment for five years and to pay a fine of Rs.500/-, in default to undergo additional rigorous imprisonment for one month for the offence punishable under Section 201 IPC and also to undergo rigorous imprisonment for life and to pay a fine of Rs.1,000/-, in default of payment of fine to further undergo additional rigorous imprisonment for six months for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act, 2012. The substantive sentences of imprisonment were directed to run concurrently.

4. According to the prosecution case, the victim, a 3 years old girl, along with her parents was residing at Flat No. D-15 situated at 4th floor of the building in which the accused/appellant was residing at 2nd floor in Flat No.D-19. On 24.2.2016 the victim girl went missing. Her family members and neighbourers searched for her relentlessly and also reported the matter to the police vide Ex.P-1 based on which un-numbered FIR (Ex.P-2) was registered at Police Outpost Jute Mill, Rajnandgaon. Thereafter, registered FIR (Ex.P-36) under Section 363 IPC was registered at Police Station Kotwali, Rajnandgaon against unknown person for the offence punishable under Section 363 IPC. Having come to know on 25.2.2016 that the accused/appellant is claiming that he can trace the whereabouts of the girl within an hour by performing pooja, the parents of victim girl approached him and asked him to perform pooja and also provided him material required for performing pooja. Accused/appellant informed them that the girl is packed in a gunny bag lying in the bushes near the pole at Amlibhauna. This disclosure made by the accused/appellant has created doubt in the mind of not only the

parents of the girl but also the neighbourers and according the police was called. Accused/appellant was thoroughly interrogated on the basis of suspicion and during interrogation, the accused/appellant disclosed that when the victim was walking down, he took the girl inside his room, undressed her and after removing his clothes committed sexual intercourse with her as a result of which she started crying loudly, therefore, he gagged her mouth by pillow. On account of forcible sexual intercourse, the prosecutrix began to bleed profusely and seeing this he got frightened and therefore, in order to ensure that he is not caught and to further ensure that he leaves no trace of brutal incident, firstly he killed the girl by pressing her neck and then washed the blood & spermatozoa present on the male organ by a towel. Thereafter, he tied her hands and legs, put her body in the gunny bag and tied the same with the rope and dropped the gunny bag in the bushes near the electric pole at Amlibhauna Road. He had also thrown the clothes of the victim in the dustbin. He further contends that he will show the place where he had thrown the dead body if the police accompanied. Memorandum statement of accused/appellant to the aforesaid effect was recorded vide Ex.P-11 in presence of witnesses Mohammed Shahid (PW-3) & one Hamid Ali (not examined). On the basis of disclosure statement of accused/appellant, the police party along with accused/appellant visited the aforesaid place and with the help of witness Mohd. Shahid alias Raju Khan (PW-3), the gunny bag containing the corpse was taken out from the bushes. Prior to that, the photographer was called by the police vide Ex.P-24 and the photographs of the spot and dead body were taken by him. Dead body was identified as of the deceased prosecutrix by Mohammed Aman, father of girl, vide Ex.P-3. Inquest was conducted over the dead body

vide Ex.P-5. In the course of investigation, birth certificate of the deceased girl was seized vide seizure memos of Ex.P-6 & P-7. One blue colour plastic sack having the label of '*No.1 Dall Best Quality*' was seized vide Ex.P-14. Jeans half pant of the deceased was recovered at the instance of accused/appellant vide Ex.P-15. Bloodstained gamchha having imprints of small flowers and stains like blood and sperm, one colourful pillow and one yellow-white colour plastic bag were seized at the instance of accused/appellant vide seizure memo of Ex.P-16.

On 25.2.2016 Body was sent for post-mortem examination which was conducted by Dr. S. Lakda (PW-10) and found as follows;-

“Rigor mortis near to passes over. Head skull intact. Cervical spine broken. Head freely moving like without skeletal muscle resistance only. Face cyanosed. Eyes and mouth semi-closed. Frothing from mouth. Blood tinged skull intact. Throat bluish in colour. Chest and abdomen dislodged. Bluish clotted blood abrasions over upper limbs, thighs, inner parts and private (soft) parts bleed line over cheek from nostrils and mouth. Semen like fleshy, drop and post fornix of vagina along with blood clot around the anus, there are lacerations and clotted blood. Left calf also has blood wiped. Layer blood clot and flow line up to foot through calf. Soft part is dark brownish red. Inner and back of thighs abraded. Bruise lips. Nose, lips, nail beds with hand pale. Toe nail bed. Feet pulp and cyanosed. All the injuries were ante mortem in nature.

According to autopsy surgeon, the cause of death was asphyxia and homicidal in nature. Duration of death was 24 to 28 hours prior to post-mortem examination. He also prepared, packed and sealed two

vaginal contents slides. Two slides of anal contents were also prepared by him. All these slides were handed over to the police team to be dispatched for chemical examination. Accused/appellant was also medically examined by Dr. Vinod Nayak (PW-12) vide Ex.P-33 and opined him to be capable of performing sexual intercourse. He did not notice any injury on the penis of the accused/appellant. Kishore Kumar Sriwas, a Barber, was called for cutting the nails of the accused and the nails of both the hands of the accused/appellant were cut by him and were seized vide seizure memo Ex.P-20. Seized articles were sent for chemical examination to the Forensic Science Laboratory from where report of Ex.P-46 has been received, according to which, Article - A (gunny bag), Article-B (gamchha), Article C1 & C2 (slides of deceased) & Article - D (nails of accused) were found to be stained with blood. Statements of the witnessed were recorded under Section 161 Cr.P.C.

5. On completion of investigation, the police filed the charge sheet for the offence punishable under Sections 363, 376, 377, 302, 201 IPC and Section 6 of the Act of 2012 before the competent court on 26.4.2016 against the accused/appellant and accordingly the charges were framed against them by the trial Court. In order to hold the accused/appellant guilty, the prosecution had examined as many as 19 witnesses. Statement of accused/appellant was also recorded under Section 313 of Cr.P.C. in which he denied the circumstances appearing against him in the prosecution case and pleaded innocence & false implication.
6. After assessing the evidence on record and hearing both the parties, the trial Court found the accused/appellant guilty of the offences, convicted him and imposed the sentence as stated in the opening paragraph by the impugned judgment.

7. We have heard counsel for the parties quite in *extenso* and also perused the record of the trial Court including the impugned judgment.

8. Counsel for the appellant submits that:-

- there is no direct evidence to connect the appellant with the incident in question and conviction is based on the circumstantial evidence but the circumstances relied upon by the prosecution do not warrant conclusion of guilt of the appellant. Since the conviction was based on circumstantial evidence, no death sentence should have been awarded by the trial Court and in any event this is not a case where death sentence should have been imposed.
- when an infant girl is subjected to rape by a fully developed man, there must appear injuries on the male organ, but here in this case the doctor, who had medically examined the appellant, did not notice any injury whatsoever on the male organ of the appellant. Absence of injury would point to the appellant's innocence.
- there is total non-compliance of Section 53A of the CrPC as the sample of semen were not sent for DNA profiling and matching. Compliance of Section 53-A Cr.P.C. is mandatory, therefore, non-compliance thereof supports the defence of the appellant that he had never had sexual intercourse with the prosecutrix and he has been falsely implicated in the case. Reliance is placed on the judgment reported in (2011) 7 SCC 130; (2014) 5 SCC 108 & (2009) 14 SCC 607.
- recovery of body of deceased allegedly at the instance of appellant was from the open place which was accessible to the public and therefore the same is not admissible in evidence.

- the actual culprit is Raju Khan (PW-3) who had committed the offence in question but the appellant has been falsely implicated at his instance.
- Pushpa Chouhan (PW-18) has not supported the prosecution case.
- lastly it has been submitted that if this Court reaches to a conclusion that the judgment impugned does not warrant any interference then death sentence may be substituted by life imprisonment. Reliance is placed on
- even after coming to know about the whereabouts of their daughter at 3.30 a.m., her parents did not inform the said fact to the police and the police reached the house of deceased at 6.30 a.m. only and thereafter the body of deceased was recovered at 9.05 am. This delay in sending intimation to the police is indicative of the fact that the appellant is innocent and has been falsely implicated in the crime in question.

9. Learned counsel for the respondent-State on the other hand submitted that trial court has analysed the evidence in great detail to show the horrendous manner in which a tiny girl was done to death after ravishing her. The circumstances relied upon by the prosecution establish the guilt of the appellant to the hilt. He further submits that only from the disclosure statement of the accused it discovered that after committing the murder of the deceased, he had thrown her body in the bushes near electric pole at Amlibhona and thereafter he had taken the police to the spot and pointed out the place where he had thrown the body. The said place was not accessible to the public at large and was within the special knowledge of the accused only. The remote and isolated nature of place where the body was found clearly establishes the complicity of

accused/appellant. Reliance is placed on the judgement in the matter of (2011) 5 SCC 317. The memorandum and seizure witnesses have duly supported the prosecution case. He further submits that the nail clippings collected from the accused/appellant were found to be stained with blood in the FSL report (Ex.P-46). The accused in order to ensure that he is not caught and to further ensure that he leaves no traces of the brutal incident, systematically attempted to destroy all the evidence of the incident. He first killed the deceased and then cleaned the blood & semen on his penis with the towel, threw the clothes of the deceased in the dustbin and thereafter the body of deceased after wrapping it in a gunny bag at the isolated place.

He further submits that though all the incriminating circumstances which point to the guilt of accused/appellant had been put to him, yet he chose not to give explanation under Section 313 CrPC except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or give a false answer, the same can be counted as providing a missing link for building the chain of circumstances. In the case at hand, though a number of circumstances were put to the accused, yet he has made a bald denial and did not offer any explanation whatsoever. Thus, it is also a circumstance that goes against him.

It is true that on medical examination no injury or blood or semen was found on the penis of the appellant but on this ground alone, the prosecution evidence with regard to rape committed by the appellant on the prosecutrix cannot be disbelieved. It is not necessary that there should always be marks of injuries on the penis of the accused and

therefore the accused cannot take any benefit simply because of the absence of the injuries on his penis.

He further submits that due to sudden and untimely death of their daughter, the parents of deceased might have been under shock and for this reason they could not have informed the police immediately, but this does not make the prosecution story doubtful or unreliable.

He also submits that taking into consideration the brutality of attack, age of the victim and acts of perversion on the person of the victim, cumulatively, the sentence awarded by the trial Court is just and proper and do not call for any interference by this Court in exercise of its appellate jurisdiction.

10. We have heard counsel for the parties and perused the record of the trial Court including the impugned judgment.
11. Gudiya Parveen (PW-1), mother of victim, has stated that she resides at Flat No.D-29, 4th Floor, Bajrang Dheepa Colony. Accused/appellant was residing at Flat No.D-15, 2nd Floor of the same building. On 24.2.2016 at about 10.00 am when she made enquiry from her husband about the deceased, he informed that she had gone downstairs to play with her friends. She went downstairs and found that her daughter is not there and thereafter she went up and informed the said fact to her husband and thereafter both of them came downstairs and searched for their daughter, but they could not find her and then they lodged a missing report of their daughter with the police vide Ex.P-1. She has further stated that on 24th at about 3-4 in the morning Raju Khan (PW-3) came and informed them that the accused/appellant is claiming that he would trace the whereabouts of their daughter within one hour subject to performing pooja. She gave her consent to the appellant for performing pooja and

also made available him vermilion, lemon, *diya*, incense stick & coal. After about 15-20 minutes, the accused informed us that the deceased is lying in a gunny bag in the bushes near a pole beside the road at Amlibhauna. This creates doubt in our mind and therefore we disclose the aforesaid fact to Raju Khan (PW-3) who called the police by making a telephone call. The police inquired from the accused as to what had he done with the girl. The accused/appellant told that while the victim was going downstairs for playing, he took her inside his house by gagging her mouth, committed sexual intercourse with her and thereafter smothered her by closing her mouth by pillow. Thereafter, he packed the body of deceased in yellow colour bag and threw it in the bushes near the pole at Amlibhona. On such disclosure being made by accused, they along with police and accused had gone to Amlibhona where the accused had taken out the gunny bag from the bushes which was cut by Raju Khan and the body of her daughter was taken out. The gunny bag was full of blood. Nail injuries were present on the thighs of her daughter. Inquest on the body of her daughter was prepared and thereafter the body was sent for post-mortem examination. Nothing material could be elicited by the defence in the cross examination of this witness so as to make her testimony unreliable or untrustworthy.

12. Mohammed Arman (PW-2), father of deceased, has repeated almost the similar statement which has been made by PW-1, mother of deceased. He has stated that on interrogation by the police, the accused/appellant admitted his guilt of murdering his daughter after committing bad work with him and thereafter throwing her body in a gunny bag in the bushes near the pole at Amlibhauna. He has further stated regarding identification proceeding of the body of deceased conducted by the police

and that he has identified the dead body as of his daughter. He has further stated that during identification proceeding, the police had taken the photographs of her deceased daughter. The police had seized birth certificate of the deceased from him vide seizure memo of Ex.P-6. In the cross examination this witness has admitted that the accused had taken out yellow colour gunny bag from the bushes.

13. Mohammed Shahid alias Raju Khan (PW-4) has stated that he had lodged the missing report of deceased at the instance of her mother (PW-1). On 25.2.2016 at about 3.00-3.30 in the morning when they returned to the building in their occupation, one Munni Khatoon, one of the occupants of the said building, had told that accused/appellant had disclosed her to ascertain the whereabouts of the deceased through ritual ceremonials but nobody should know about this. Thereupon, after disclosure of this fact by him to the mother of deceased, the essentials like vermilion, lemon, oil etc. for that ritual were arranged. On completion of such ritual, the accused made a disclosure about the location of the body of the deceased lying in the shrubs thrust in a gunny bag. He nurtured suspicion and informed the police accordingly. He has further stated that the accused in his presence told the police that while the deceased was going downstairs, he took her inside his house and committed sexual intercourse with her after undressing her and when she started shouting and crying, he pressed her mouth by pillow. The accused further told that when he saw blood coming out from the private part of the deceased, he strangulated her to death. Thereafter he wrapped the body in a gunny bag and thrown it in the shrubs near the pole at Amlibhona. This witness has also stated that the accused further disclosed that he had thrown the half pant of the deceased in the street dustbin and pillow

& gamchha were kept in his house. Memorandum statement of accused/appellant was recorded vide Ex.P-1. Thereafter, they along with the police and accused reached Amlibhona where the accused/appellant pointed out the place where he had thrown the body of deceased by putting it in a gunny bag. The accused/appellant had taken out the gunny bag from the shrubs and on opening the same by this witness, the body of deceased was found in it. Body of the deceased was seized vide seizure memo (Ex.P-12). Dead body was identified by Mohammed Shahid (PW-2) as of his daughter. Identification proceeding memo is Ex.P-3. He has further stated that a spot map (Ex.P-13) was prepared by the police. He has further stated that on opening the plastic gunny bag by blade, it was also found to be stained with blood of the deceased. He has further stated that on being produced by accused/appellant, one black colour half jeans pant was seized by the police vide seizure memo Ex.P-15. Likewise, one white colour gamchha stained with substance like semen & blood, one dust-coloured pillow and yellow colour bag were also seized at the instance of accused/appellant vide seizure memo Ex.P-16. Nails of the accused/appellant were also got cut and were seized vide seizure memo Ex.P-20. In the cross-examination this witness has reiterated his testimony as submitted by him during examination-in-chief.

14. Mohammed Amir (PW-4) is the witness of inquest (Ex.P-5). He has stated that seeing the crowd going towards Amlibhauna, he also followed and reached on the spot. On reaching there, he saw that accused/appellant had taken out a gunny bag from the shrubs which was cut by one person with blade. Dead body of a girl was found in the said gunny bag. Blood was coming out from the left ear, private part and annul of the girl.

15. Munni alias Sarbari (PW-5) is the lady to whom the accused told that he can trace the whereabouts of the deceased through ritual ceremonials. According to this witness, on 25.2.2016 at 3.30 a.m. in the morning the accused/appellant came to him and told her to ascertain the whereabouts of the deceased by worshipping and in turn, she disclosed this fact to Raju Khan (PW-3). She has further stated that after completing ritual, accused/appellant informed that the girl is lying in a gunny bag near the pole beside the road and that she is alive. Such disclosure nurtured suspicion in the mind of Raju Khan (PW-3) and he had called the police. She has further stated that upon interrogation by the police, the accused/appellant confessed to have murdered the deceased after committing sexual intercourse with her. The defence has not been able to elicit anything incriminating in her cross-examination so as to make her testimony unreliable or untrustworthy.
16. Sheikh Tarannum (PW-6) is the landlady in whose house the accused/appellant was residing as tenant.
17. Krishna Kumar Jaiswal (PW-7) is the Photographer who had taken the photos of the deceased and the place where the accused/appellant performed ritual ceremonials and proved the same as Article A-1 to Article A-18. This witness has also done the video shooting of the entire proceedings conducted by the prosecution.
18. Kishore Sriwas (PW-8), is the Barber who had taken the sample of nails of the accused/appellant on asking by the police and proved the panchnama of Ex.P-19.
19. Dr. S. Lakda (PW-10) is the person who conducted post-mortem examination over the body of the deceased and noticed the injuries as described above.

20. Dr. Vinod Nayak (PW-12) is the doctor who medically examined the accused/appellant and opined him to be capable of performing sexual intercourse. His report is Ex.P-33.
21. Chameli Sarthi (PW-9), Sunil Kumar Pradhan (PW-11), Chandresh Pandey (PW-13), Chamar Sai (PW-14), Anup Kumar Sahu (PW-15), Dinesh Bahidar (PW-16) and Rajesh Mishra (PW-17) are the formal witnesses and no purpose will be served in marshalling the evidence of these witnesses.
22. PW-19 is the investigating officer who has duly supported the prosecution case.
23. We have given our anxious thought to the rival submissions made by learned counsel for the appellant and learned counsel for the State and also carefully gone through the material on record.
24. Admittedly, there is no eye-witness to the occurrence and the judgment of conviction is based on the circumstantial evidence. The main circumstances which the learned Additional Sessions Judge appears to have taken note of, are;
- recovery of body of the deceased on the showing of accused/appellant. Accused pointed out the place where the body of deceased was lying in a gunny bag, tied with rope, inside the shrubs;
 - recovery of jeans pant of the deceased from the dustbin near his house at his instance;
 - presence of blood on *gamchha* (a piece of cloth) and nail clippings of the accused.
 - presence of human spermatozoa on the vaginal slides of the deceased.

25. The law relating to circumstantial evidence is well settled. In dealing with circumstantial evidence, there is always a danger that conjecture or suspicion lingering on mind may take place of proof. Suspicion, however, strong cannot be allowed to take place of proof and, therefore, the Court has to judge watchfully and ensure that the conjectures and suspicions do not take place of proof. However, it is no derogation of evidence to say that it is circumstantial. Human agency may be faulty in expressing picturization of actual incident but the circumstances cannot fail. Therefore, many a times, it is aptly said that —men may tell lies, but circumstances do not||. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself/themselves, is/are are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves

complete, then a false plea or false defence may be called into aid only to lend assurance to the Court. If the circumstances proved are consistent with the innocence of the accused, then the accused is entitled to the benefit of doubt. However, in applying this principle, distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of basic or primary facts, the Court has to judge the evidence and decide whether that evidence proves a particular fact or not and if that fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should be no missing links in the case, yet it is not essential that every one of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences or presumptions, the Court must have regard to the common course of natural events, and to human conduct and their relations to the facts of the particular case.

26. There are plethora of decisions in this regard. It is unnecessary to refer all of them and mention of some would be sufficient. In the leading case i.e. **Hanumant & another v. The State of Madhya Pradesh** reported in **(1952) SCR 1090** the Court has held thus;-

"In dealing with circumstantial evidence there is always the danger that conjecture or suspicion may take the place of legal proof. It is therefore right to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established and all the facts so established

should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency, and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

27. A reference may be made to a later decision in **Sharad Birdhichand Sarda v. State of Maharashtra** reported in **AIR 1984 SC 1622** wherein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity or lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent before conviction could be based on circumstantial evidence, must be fully established, and they are;-

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

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

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

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

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

28. In **Padala Veera Reddy v. State of A.P. & ors** reported in **AIR 1990 SC 79**, it was laid down that when a cast rests upon circumstantial evidence, such evidence must satisfy the following tests;

- "(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
- (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
- (3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

29. We may also make a reference to a decision of this Court in **C. Chenga Reddy & ors v. State of A.P.** reported in **(1996) 10 SCC 193**, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence...."

30. In the decision reported in **Vinay D Nagar v. State of Rajasthan** reported in **(2008) 5 SCC 597** it was held as follows:

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

31. In **Chattar Singh v. State of Haryana** reported in **AIR 2009 SC 378**, the Supreme Court held as follows:-

"It has been consistently laid down by this 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"

32. Keeping the above caution in mind, we shall now proceed to examine the facts and circumstances as put forward and the various arguments advanced. Our endeavour in this case is to consider whether all these tests have been satisfied.
33. The important and crucial circumstance heavily relied upon by the prosecution is the alleged recovery of dead body of the deceased on showing of the accused/appellant and the accused pointed the place where the body of the deceased was lying.

34. It is not disputed that on 24.2.2016 the deceased went missing and a report to this effect was also lodged by her parents with the police and based on which unregistered FIR under Section 363 IPC was registered against unknown person. It is the prosecution case that disclosure of whereabouts of deceased by the accused/appellant nurtured suspicion in the mind of parents of deceased and accordingly, at their instance, the accused/appellant was taken into custody and soon thereafter he had led to the police along with the parents of the deceased to Amlibhauna from where a gunny bag containing body of deceased was taken out by him from a particular spot i.e. from the shrubs. From the evidence of Gudiya Parveen (PW-1), Mohammed Arman (PW-2), Raju Khan (PW-3), Mohammed Amir (PW-4) & Munni alias Sarwari (PW-5), it is clear that the body of the deceased was recovered at the instance of accused/appellant. Evidence of aforesaid witnesses further show that Munni alias Sarwari (PW-5), one of the occupants of the said building where deceased was residing with her parents, informed Raju Khan (PW-3) that the accused/appellant had disclosed her to ascertain the whereabouts of the deceased through ritual ceremonies. After disclosure of this fact by Raju Khan (PW-3) to the mother of deceased, the essentials like vermilion, lemon, oil etc. for that ritual were arranged. On completion of such ritual, the accused made a disclosure about the location of the body of the deceased lying in the shrubs thrust in a gunny bag. This nurtured suspicion in the mind of parents of deceased and accordingly they called the police. The fact that the accused/appellant had performed ritual ceremonies in the house of deceased stands established from the recovery of pieces of coal, lemon, lamp, incense stick, vermilion etc. from the house of deceased vide

seizure memo Ex.P-18. Mohammed Shahid & Hamid Ali are the witnesses of this recovery and they have duly supported the prosecution case.

Further, this circumstance is corroborated by Krishna Kumar Jaiswal (PW-7), a Photographer who stated in the Court that being called by the police, he went to the spot and took the photographs of the deceased, place of recovery of dead body at Amlibhauna and the place where the accused/appellant had performed pooja. He has further stated that he prepared video movie of the entire proceedings conducted at the spot in his presence. After preparing the photographs and CD, he handed over the same to the police and the same were seized from him vide seizure memo of Ex.P-23.

So, from the discussion mentioned above, it is clear that the dead body of deceased was recovered on 25.2.2016 in pursuance of the information that was supplied by the accused/appellant from a secluded place which was the matter of exclusive knowledge of the accused/appellant only. The entire proceedings regarding recovery of the dead body of deceased was also filmed by the Photographer PW-7 and photographs and film were also taken into possession. The witnesses to recovery in most categorical and explicit manner have given vivid detail of the manner in which the entire proceedings of recovery was carried out and they have been extensively cross-examined by the defence, but has not been able to create any dent in their testimonies.

35. We have gone through the video movie prepared and after watching the video, we are of the view that the recovery of dead body was made from a place which cannot be said to be accessible to an ordinary person without

prior knowledge as the body recovered was kept concealed in a gunny bag inside the shrubs situated at sufficient distance from the main road. In the statement under Section 313 CrPC, the accused/appellant failed to explain how he came to know that the deceased had been murdered and thrown in the shrubs after wrapping her in a gunny bag. In **Ibrahim Musa Chauhan @ Baba Chauhan v. State of Maharashtra** reported in **2013 (3) SCALE 207**, the Supreme Court has held thus;-

“133. Undoubtedly, the appellant’s disclosure statement had been made before the police, as well as the panch witness. The fact that he did not disclose the place where the contraband had been hidden remains entirely insignificant, for the reason that he had led the police party to the said place, and that the said recovery had been made at his behest. The open space from where the recovery had been made though was accessible to anybody, it must be remembered that the contraband had been hidden, and that it was only after digging was done at the place shown by the appellant, that such recovery was made. Hence, it would have been impossible for a normal person having access to the said place, to know where the contraband goods were hidden.

36. That apart, the jeans pant of the deceased from the dustbin and one gamchha & pillow from the house of accused/appellant were also recovered at the instance of accused/appellant vide Ex.P-15 & Ex.P-16 respectively. To prove these recoveries the prosecution has relied upon Mohammed Shahid (PW-3). From the statement of Mohammed Shahid

(PW-3) it is apparent that after getting the body of deceased recovered, the accused/appellant took them to the colony and produced the jeans pant of the deceased thrown by him in the dustbin and accordingly the jeans pant was seized vide Ex.P-15 at the instance of accused/appellant. He has further stated that accused/ appellant got recovered one *gamchha* & pillow from his house vide seizure memo of Ex.P-16. In the cross-examination this witness not only remained firm on the issue of recovery of aforesaid articles at the instance of accused/appellant but denied the suggestion of putting signature on Ex.P-20 without reading it or at the instance of police. This apart, Gamchha seized from accused/appellant was sent for chemical examination and as per FSL report (Ex.P-46), the blood was found on it. No explanation in regard to presence of blood on said Gamchha was offered by accused/appellant in his examination under Section 313 CrPC.

37. In **Aftab Ahmad Ansari v. State of Uttaranchal** reported in (2010) 1 SCC 471, the Hon'ble Supreme Court, while dealing with aspect of discovery in consequence of information given by accused, has held thus;-

"The part of the disclosure statement, namely, that the appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the appellant pursuant to the voluntary disclosure statement made by the appellant, the prosecution has failed to prove that the clothes so recovered belonged to the deceased and therefore, the recovery of the clothes should not

be treated as an incriminating circumstance, is devoid of merits".

In **State of Maharashtra v. Damu** reported in **(2000) 6 SCC 269** it has been held as follows:

" ... It is now well settled that recovery of an object is not discovery of a fact as envisaged in [Section 27 of the Evidence Act, 1872]. The decision of the Privy Council in [Pulukuri Kotayya v. King Emperor](#) is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

38. In the case at hand, as is perceptible, the recovery had taken place when the appellant was accused of an offence, he was in custody of a police officer, the recovery had taken place in consequence of information furnished by him and the panch witnesses have supported the seizure and nothing has been brought on record to discredit their testimonies. Thus, in these circumstances, we are of the firm view that the prosecution has been able to prove the recovery of dead body of deceased and other articles like jeans pant of the deceased etc. at the instance of accused/appellant beyond doubt. Recovery of incriminating material at his disclosure statement duly proved is a very positive circumstances against him.

39. Another circumstance relied upon by the prosecution is the circumstance that the blood was found in the nail clippings of accused/appellant. According to the investigating officer, in the course of investigation one Barber namely Kishore Kumar Sriwas was called for cutting the nails of the accused. Nails of both the hands of accused/appellant were cut by

said Barber and the same were seized by him vide seizure memo Ex.P-20. The nail clippings were subjected to forensic chemical examination and it was revealed that the nail clippings of accused/appellant were stained with blood. Query being raised by the police as to whether injuries present on the thigh & back of the deceased could be caused by human finger nails has also been answered by the autopsy surgeon (PW-10) vide Ex.P-29. Thus, this is also, according to us, a very crucial circumstance but the same has not been explained by accused/appellant in his statement under Section 313 CrPC.

So far as the origin of blood is concerned, sometimes it happens, either because the stain is too insufficient or disintegrated, that a chemical analyst might fail to detect the origin of blood, but that does not mean that the blood found on the nail clippings of accused would not have been human blood at all. In the present case also the reason assigned by the chemical analyst for not being able to determine the origin of blood is its insufficiency for test. Notwithstanding the absence of specific evidence that the blood in nail clippings of accused/appellant were human blood or blood of the group of the deceased, the significance of the circumstance is not lost. This circumstance also is quite a formidable circumstance against the accused/appellant.

40. Insofar as homicidal death of the deceased, the learned counsel for the accused offered no argument at all. Even otherwise, the prosecution has proved beyond reasonable doubt that the deceased suffered homicidal death as the evidence of the doctor (PW-10) and post-mortem report (Ex.P-9) given by him clearly depicts various external and internal injuries on the body of the deceased as afore-noticed. Evidence of the doctor

(PW-10) and the contents of post-mortem report (Ex.P-28) further prove that the injuries were ante-mortem in nature and time since the death was fixed at 24-28 hours prior to conducting post-mortem examination and death was due to asphyxia and spinal & multi vital organs injury, intense pain & shock. To a query put by to the doctor by the Court whether such injuries were caused to the deceased prosecutrix are indicative to have done with intention, he has given reply in positive. Nothing has been elicited in the cross-examination of PW10 to discredit his evidence or the contents of Ex.P-28 issued by him and wherefore, the prosecution has proved beyond reasonable doubt that Sakamma suffered homicidal death.

41. Dr. S. Lakda (PW-10) who conducted the post-mortem examination on the body of the deceased. The post-mortem report graphically depicts the injuries on the private parts of the deceased prosecutrix which could be caused by sexual intercourse only. According to this witness, he had noticed bluish clotted blood and abrasion over thighs, inner parts and private part. Semen like fleshy drop and post fornicis of vagina along with blood clot around the anus and there is laceration and clotted blood. Inner and back of thighs abraded. Thus, evidence of the doctor is very clear that there was external and internal injury especially on some of the important parts, like, the vulva, perineum & thighs. He had also prepared two vaginal slides of the deceased and handed over the same to the police for chemical examination. These slides were sent for chemical examination to determine living or dead spermatozoa on it and as per report of Ex.P-28, human spermatozoa was found on the vaginal slides of the deceased. On query being made by the police as to whether the deceased was subjected to sexual & unnatural intercourse, has been

answered by this witness in affirmative vide Ex.P-29 by opining that vaginal and anal sexual assaulted was done with the deceased. To a query put to the doctor by the Court to the effect that the grievous injuries found on almost every body part of the deceased prosecutrix is indicative of her subjection to sexual and unnatural intercourse in a most brutal and barbaric manner, the reply is given in positive emphatically stating that the deceased died only on account of such barbarism and animalism. The doctor was very firm in his opinion that the deceased prosecutrix was subjected to sexual and unnatural sex and he remained unshaken during exhaustive cross-examination. Thus, from the aforesaid medical evidence, it is clear as crystal that the deceased prosecutrix received injuries on her private parts i.e. vagina, anus etc. and that there was forcible sexual and unnatural intercourse was committed with the deceased prosecutrix.

42. We find no force in the argument advanced on behalf of accused/appellant that mandatory provision of Section 53(A) of Cr.P.C. has not been followed and so, right of accused/appellant is found prejudiced. The accused/ appellant was medically examined by Dr. Vinod Nayak (PW-12) and opined that nothing has been found by him which would indicate that he is not capable to perform sexual intercourse. Thus, there is no denial of the fact that the accused/appellant was physically fit to perform penile sexual intercourse with a female. Furthermore, application of aforesaid provision is in favour of the prosecution and not in favour of accused. It is not mandatory one rather it happens to be optional and its application is only to enable the prosecution to get additional evidence, in case accused is examined soon after commission of rape, if apprehended otherwise as per "Medical Jurisprudence by

Modi”, the connecting evidence would disappear as soon as accused urinates. That being so, submission regarding non-compliance of provision of Section 53A of CrPC has got no leg to stand.

43. As regards the submission of counsel for the accused/appellant that presence of injury on the male organ of accused/appellant is essential because of the tender age of the deceased prosecutrix. It is true that the doctor examining the accused/appellant did not notice any external injury on his penis. It is also true that normally an injury is caused to the male organ when sexual act is committed by a fully developed man with a girl of tender age who is virgin. However, this is not a universal phenomenon. It is relevant to quote Para-9 at Page No.380 of Modi's Medical Jurisprudence and Toxicology, 21st Edition;-

“9. Injuries to the genital parts may result from force exerted by the accused or from forces applied by the victim. In addition to scratches or lacerations on the penis caused by the finger nails of the victim during a struggle, an abrasion or a laceration may be discovered on the prepuce or glans penis, but more often on the franeum, due to forcible introduction of the organ into the narrow vagina of a virgin, especially of a child, but it is not necessary that there should always be marks of injuries on the penis in such cases.”

The Hon'ble Supreme Court also in catena of judgements has held that absence of the injuries on the private parts of the victim or on the penis of the accused would not be treated as fatal for the case of the prosecution. Thus, we are of opinion that the accused/appellant cannot take any benefit simply because of the absence of the injuries on his penis.

44. We notice from the record that though all the incriminating circumstances which point to the guilt of the accused/appellant had been put to him, yet he chose not to give any explanation under Section 313 CrPC except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances. In **State of Maharashtra v. Suresh** reported in (2001)... **SCC 471**, the Supreme Court reckoned a blunt and outright denial of incriminating circumstances pointed out by the prosecution against the accused is sufficient to connect the accused with the offence. In **Harivadan Babubhai Patel v. State of Gujarat** reported in (2013) 7 **SCC 45** the Supreme Court has held thus:-

"28. Another facet is required to be addressed to. Though all the incriminating circumstances which point to the guilt of the accused had been put to him, yet he chose not to give any explanation under Section 313 CrPC except choosing the mode of denial. It is well settled in law that when the attention of the accused is drawn to the said circumstances that inculpated him in the crime and he fails to offer appropriate explanation or gives a false answer, the same can be counted as providing a missing link for building the chain of circumstances. ([See State of Maharashtra v. Suresh.](#)) In the case at hand, though a number of circumstances were put to the accused, yet he has made a bald denial and did not offer any explanation whatsoever. Thus, it is also a circumstance that goes against him."

45. The above principle of law has been repeated and reiterated in **Phula Singh v. State of Himachal Pradesh** reported in **(2014) 4 SCC 9** and relevant portion of the above decision is quoted below:-

"11. The accused has a duty to furnish an explanation in his statement under Section 313 CrPC regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section 313 CrPC is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide *Ramnaresh v. State of Chhattisgarh*, [Muhish Mubar v. State of Haryana](#) and [Raj Kumar Singh v. State of Rajasthan](#).)"

46. In the case in hand also, though incriminating circumstances were put to the accused/appellant while recording his statement under Section 313 CrPC, yet he has made a bald denial and did not offer any explanation whatsoever. Thus, it is also a circumstance that goes against the accused/ appellant.
47. Thus, on critical analysis of the entire evidence on record, we are convinced that the circumstances relied upon by the trial Court stand fully established and the chain of circumstances is so complete that there was no escape from the conclusion that within all human probability, the

deceased prosecutrix was raped and murdered by none other but the accused alone. Thus, we do not find any reason to interfere with the finding of the trial Court convicting the accused/appellant for commission of offence punishable under Sections 302, 363, 366, 377, 201 of IPC and Section 6 of the Act of 2012.

48. Upholding the conviction of the appellant, we proceed to consider the question of death sentence awarded to him by the court below under Section 302 IPC.
49. Capital punishment has been the subject-matter of great social and judicial discussion and catechism. From whatever point of view it is examined, one indisputable statement of law follows that it is neither possible nor prudent to state any universal form which would be applicable to all the cases of criminology where capital punishment has been prescribed. Thus, it is imperative for the court to examine each case on its own facts, in the light of enunciated principles and before opting for the death penalty, the circumstances of the offender also required to be taken into consideration along with the circumstances of crime for the reason that life imprisonment is the rule and death sentence is an exception.
50. Before going into the legality and propriety of question of sentence imposed upon the appellant, it is profitable to have a look at the various decisions of the Apex Court in the matter. The decision in **Bachan Singh v. State of Punjab** reported in **AIR 1980 SC 898** pronounced by the Constitutional Bench of the Hon'ble Apex Court stands first among the class making a detailed discussion after the amendment of Cr.P.C. in 1974. In this case the Apex Court has held that provision of death penalty

was an alternative punishment for murder and is not violative of Article 19 of the Constitution of India. Para-132 of the said judgment is relevant and the same is reproduced herein below;-

“To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302 of the Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelized through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death

penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware — as we shall presently show they were — of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235 (2) and 354 (3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before the Parliament and presumably considered by it when in 1972-1973 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302 of the Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19.”

51. While dealing with the circumstances in which the death sentence may be imposed, the Supreme Court has summarized the circumstances and following guidelines have been issued in Bachan Singh's case (supra) for imposition of death sentence;-

“185. Soon after the decision in Furman, the Georgia Legislature amended its statutory scheme. The amended

statute retains the death penalty for six categories of crime: murder, kidnapping for ransom or where victim is harmed, armed robbery, rape, treason, and aircraft hijacking. The statutory aggravating circumstances, the existence of any of which may justify the imposition of the extreme penalty of death, as provided in that statute, are :

- (1) The offence of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, (or the offence of murder was committed by a person who has a substantial history of serious assaultive criminal convictions).
- (2) The offence of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offence of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.
- (3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.
- (4) The offender committed the offence of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.
- (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.
- (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offence of murder, rape, armed robbery, or kidnapping was outrageously or want only vile horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offence of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance or his official duties.

(9) The offence of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.”

The Supreme Court in *Bachan Singh's case* (supra), did not only state the above guidelines, but also specified the mitigating circumstances which could be considered by the Court while determining such serious issue and they are as follows:-

“204.....**Mitigating circumstances:** In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances :

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

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

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

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

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

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

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

52. In **Machhi Singh v. State of Punjab** reported in (1983) 3 SCC 470 a three-Judges Bench of the Supreme Court has made an attempt to cull out certain aggravating and mitigating circumstances and it has been held that it was only in rarest of rare cases, 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 this judgment the Supreme Court has summarized the instances on which death sentence may be imposed, which reads thus;-

“38. xxxxxxxxxxxx

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
- (iii) Life Imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;

- (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has 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.”

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

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.” (Emphasis supplied)

53. In **Devender Pal Singh v. State of NCT of Delhi & anr**, reported in **(2002) 5 SCC 234**, after referring to the Bachan Singh and Machhi Singh cases (supra), the Supreme Court held that when the collective conscience of the community is so shocked, it will expect the judiciary to inflict death penalty. Para-58 of the same reads thus;-

“58.From Bachan Singh v. State of Punjab and Machhi Singh and others v. State of Punjab, the principle culled out is that when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, the same can be awarded. It was observed:

54. In **Union of India & ors v. Devendra Nath Rai** reported in **(2009) 2 SCC 243** the Hon'ble Supreme Court after examining Bachan Singh's case (supra), Machhi Singh's case (supra) and Devender Pal Singh's case (supra) culled out the broad principles with regard to the infliction of the

death penalty in the following terms:

“The community may entertain such sentiment in the following circumstances:

1. 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.
2. 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-à-vis whom the murdered is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.
3. When murder of a member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; 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.
4. 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.
5. When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.”

55. The issue again came up before Hon'ble Apex Court in **Ramnaresh & others v. State of Chhattisgarh** reported in **(2012) 4 SCC 257**, wherein the Supreme Court reiterated the 13 aggravating and 7 mitigating circumstances as laid down in the case of Bachan Singh (supra) required to be taken into consideration while applying the doctrine of "rarest of rare" case.

56. After considering the issue regarding imposition of death sentence at

length, the Supreme Court in **State of Maharashtra v. Goraksha Ambaji**

Adsul reported in **AIR 2011 SC 2689** has held as under:

“Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty.” (See also: [Bachan Singh v. State of Punjab](#) AIR 1980 SC 898; [Machchi Singh & Ors. v. State of Punjab](#) AIR 1983 SC 957; and [Devender Pal Singh v. State NCT of Delhi & Anr.](#) AIR 2002 SC 1661).”

57. A similar view has been taken by the Hon'ble Supreme Court in **Haresh Mohandas Rajput v. State of Maharashtra** reported in **(2011) 12 SCC 56** observing as under:

“The rarest of the rare case” comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of “the rarest of the rare case”. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must

be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and [pic] meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded.”

58. Recently, the question of imposition of death sentence has come up for consideration before the Hon'ble Supreme Court in **Mukesh & Anr. v. State for NCT of Delhi & ors** reported in **(2017) 6 SCC 1**, popularly known as “**Nirbhaya's case**”. In this case four accused persons were convicted and awarded death sentence by the Special Fast Track Court, Saket, New Delhi holding that it is a case falling under the category of 'rarest of rare' and the same was confirmed by the High Court of Delhi also. After referring catena of judicial pronouncements and authorities on such issue, that is to say, the authorities where in cases of rape and murder, the death penalty was awarded and some authorities where death penalty was not awarded, a three-Judge Bench of the Hon'ble Apex Court has held thus:-

“**363.** Now, we shall focus on the nature of the crime and manner in which it has been committed. The submission of Mr Luthra, learned Senior Counsel, is that the present case amounts to devastation of social trust and completely destroys the collective balance and invites the indignation of the society. It is submitted by him that a crime of this nature creates a fear psychosis and definitely falls in the category of the rarest of rare cases.

364. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons viz. the assault on the informant, PW 1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the appellants; their brutish behaviour in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, inter alia, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ext. PW-50/A and Ext. PW-50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so that there would be no evidence against them. They made all possible efforts in destroying the evidence by, inter alia, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves.

365. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her along with her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the

loathsome bestiality of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy a “tsunami” of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.

366. When we cautiously, consciously and anxiously weigh the aggravating circumstances and the mitigating factors, we are compelled to arrive at the singular conclusion that the aggravating circumstances outweigh the mitigating circumstances now brought on record. Therefore, we conclude and hold that the High Court has correctly confirmed the death penalty and we see no reason to differ with the same.”

59. Having recorded concurrence as a whole an addendum on the core issue has been stamped by Hon'ble Shri Justice R. Banumathi. Fewer valuable portion is being adumbrated as under;-

116. Question of awarding sentence is a matter of discretion and has to be exercised on consideration of circumstances aggravating or mitigating in the individual cases. The courts are consistently faced with the situation where they are required to answer the new challenges and mould the sentence to meet those challenges. Protection of society and deterring the criminal is the avowed object of law. It is expected of the courts to operate the sentencing system as to impose such sentence which reflects the social conscience of the society. While determining sentence in heinous crimes, Judges ought to weigh its impact on the society and impose adequate sentence considering the collective conscience or society's cry for justice. While considering the imposition of appropriate punishment, courts should not only keep in view the rights of the criminal but also the rights of the victim and the society at large.

119. Whether the Case falls under rarest of rare cases: Law relating to award of death sentence in India has evolved through massive policy reforms-nationally as well as internationally and through a catena of judicial pronouncements, showcasing distinct phases of our view towards imposition of death penalty. Undoubtedly, continuing prominence of reformatory approach in sentencing and India's international obligations have been majorly instrumental in facilitating a visible shift in court's view towards restricting

imposition of death sentence. While closing the shutter of deterrent approach of sentencing in India, the small window of 'award of death sentence' was left open in the category of 'rarest of rare case' in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, by a Constitution Bench of this Court.

137. Another significant development in the sentencing policy of India is the 'victim-centric' approach, clearly recognised in *Machhi Singh* (Supra) and re-emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: *Gurvail Singh @ Gala and Anr. v. State of Punjab* (2013) 2 SCC 713; *Mohfil Khan and Anr. v. State of Jharkhand* (2015) 1 SCC 67; *Purushottam Dashrath Borate and Anr. v. State of Maharashtra* (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In *Mohfil Khan* (supra), this Court specifically observed that 'it would be the paramount duty of the Court to provide justice to the incidental victims of the crime – the family members of the deceased persons.'

143. In *Purushottam Dashrath Borate and Anr. v. State of Maharashtra* (2015) 6 SCC 652, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

144. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the

administration of criminal justice system. As held in *Om Prakash v. State of Haryana* (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

149. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, “the best thermometer to the progress of a nation is its treatment of its women.” Crime against women not only affects women’s self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye-opener for a mass movement “to end violence against women” and “respect for women and her dignity” and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other pro-active steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same.”

60. Thus, it is evident from the above that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand. Therefore, the instant case is required to be examined in the light of the aforesaid settled legal propositions.

61. The present case before us reveals a sordid story which took place sometime in the night of 24.02.2016 in which the appellant took the victim girl inside his house with a view to commit rape and after satisfying his

lust on three years old girl, he committed her murder in a brutal and merciless manner. Accused/appellant is neighbour of the deceased and this fact obviously encouraged the deceased to go with the appellant inside his house. The victim was totally helpless child there being no one to protect her in the house where she was taken by the appellant misusing her confidence to fulfil his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the deceased inside his house to execute his dastardly act. Post-mortem report (Ex.P-28) of the deceased revealed that she had been raped as well as sodomized and had died due to asphyxia, spinal & multi-vital organ injuries plus intense shock and pain. A number of injuries were observed on her person. Thus, the appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, he with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only three springs, and thereafter he wrapped the unclothed body of the deceased in a gunny bag and thrown it in the shrubs near the pole at Amlibhona road.

After the savage act was over, the coolness of the appellant is evident, that he washed the bloodstained pillow by which he pressed the face of deceased and the towel by which he cleaned the blood on his penis and also took proper care to hide things like pillow, towel and jeans pant of deceased etc. Not only this, after finishing off the deceased, the appellant had expressed his desire that he can trace the whereabouts of girl within an hour by performing rituals and thereafter he disclosed the place where the body of deceased was lying with the accuracy that the

same is wrapped in a gunny bag and lying inside the bushes. The appellant's conduct exhibits total disregard for human values and shows a totally depraved, brutal and scheming mind taking advantage of helplessness of a child, who had only seen three springs of life.

62. As is manifest, the accused/appellant even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of a three year old girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, accompanied the accused who extinguished her life spark. The barbaric act of appellant does not remotely show any concern for the precious life of a minor child who had really not seen life. The criminality of conduct of appellant is not only depraved and debased, but can have a menacing effect on the society. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. It is diabolical and barbaric. The appalling cruelty shown by the accused to minor girl child is extremely shocking and it gets accentuated, when her age is taken into consideration. Life of a girl was taken away in a gruesome and barbaric manner which pricks not only the judicial conscience but also the conscience of the society. The crime in question was not committed under any mental stress or emotional disturbance and therefore it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated.

According to Lord Denning, the punishment inflicted for grave crimes should reflect the revulsion felt by the great majority of citizens. To him, deterrence, reformation or prevention are not the determinative factors. His statement to the Royal Commission on Capital Punishment made in 1950 reads thus:

“Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformatory or preventive and nothing else... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong doer deserves it, irrespective of whether it is a deterrent or not.”

63. On appreciation of the evidence on record and keeping the facts and circumstances of the case in mind, we are of the definite and considered view that the trial Judge rightly held that the accused/appellant deserved capital punishment. The death reference is answered accordingly.
64. Consequently, Criminal Appeal preferred by the accused/appellant against his conviction under Sections 302, 363, 366, 376, 377, 201 of IPC and Section 6 of the Act of 2012 and sentences imposed under those sections is dismissed. Impugned judgment passed by the trial Court is hereby maintained.
65. A copy of this judgment under the seal of this Court attested by the concerned official, with signature, shall be sent to the court below, without delay as per the mandate of Section 371 Cr.P.C.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(RP Sharma)
Judge

roshan/-