

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
BENCH AT AURANGABAD.**

CONFIRMATION CASE NO. 1 OF 2017

The Addl. Sessions Judge, Hingoli.

...The petitioner

Versus

1. Bhagwat S/o Parbati Kshirsagar,
Age : 18 years, Occupation : Labour,
2. Rahul @ Satish S/o Baban @ Masaji Kshirsagar,
Age : 21 years, Occupation : Labour,
Both R/o. Waranga (Masai),
Taluka-Kalamnuri, District-Hingoli (Original accused).

**The accused..
Reference u/s 366 Cr.P.C.
for Confirmation of
sentence of Capital
Punishment.**

.....
Mr Amarjeetsingh B. Girase, Public Prosecutor for petitioner
Mrs Pratibha Bharad, Advocate for the accused.
.....

WITH

CRIMINAL APPEAL NO. 180 OF 2017

1. Bhagwat S/o Parbati Kshirsagar,
Age : 18 years, Occupation : Labour,
2. Rahul @ Satish S/o Baban @ Masaji Kshirsagar,
Age : 21 years, Occupation : Labour,
Both R/o. Waranga (Masai), Taluka-Kalamnuri,
District-Hingoli (Original accused).

The appellants..

Versus

1. The Stae of Maharashtra,
Through the Police Station Officer,
Kalamanuri Police Station,
Tq. Kalamnuri, Dist. Hingoli.

2. Sambhaji S/o Harji Kshirsagar,
Age : Major, Occu. Agri.,
R/o. Waranga (Masai), Tq. Kalamnuri,
Dist. Hingoli. **The respondents...**

**CORAM : S. S. SHINDE &
A. M. DHAVALA, JJ.**

RESERVED ON : 17.11.2017
PRONOUNCED ON : 11.01.2018

JUDGMENT (A. M. DHAVALA, J.) :-

1. In Special (POCSO) Case No. 3 of 2016, accused nos. 1 & 2 were convicted for kidnapping a girl, aged four years for the purpose of subjecting her to illicit intercourse, for committing gang rape and for committing unnatural intercourse and thereafter committing her murder by gagging her mouth by stuffing raw cotton and for causing disappearance of evidence all acts committed in furtherance of common intention of them and sentenced them to various terms as follows.

OFFENCE	SENTENCE		
	Substantive	Fine	In default
363, 34 IPC	7 years	Rs. 500/-	R.I. 3 months
366, 34 IPC	10 years	Rs. 500/-	R.I. 3 months
376(2)(I) r/w 34 IPC.	RI for life	Rs. 1000/-	R.I. 6 months
377, 34 IPC	R.I. for life	Rs. 1000/-	R.I. 6 months
302, 34 IPC	Sentenced to death		
201/34 IPC	7 years	Rs. 500/-	R.I. 6 months

2. They are sentenced to capital punishment for committing murder punishable under Section 302 r/w Sec. 34 of Indian Penal Code. Hence, the ld. Addl. Sessions Judge, Hingoli has made reference under Section 366 Cr.P.C. for confirmation of sentence. Whereas the aggrieved accused have filed appeal against their convictions and sentences. Along with the two accused, their parents and brother of accused no.1, total five in number were also prosecuted, but they were acquitted. Accused nos.1 and 2 were also prosecuted for offences under Sections 3 and 4 of Protection of Children from Sexual Offences Act (hereinafter referred to as 'POCSO Act' for brevity) in the alternative to the charge u/s 376 (2)(f), (i) and 377 of IPC. The judgment is delivered by Special Judge and Additional Sessions Judge, Hingoli (Shri. M. P. Divate) on 7.4.2017.

3. The facts relevant for deciding these proceedings may be stated as follows:

The unfortunate victim Siddhi was aged four years and three months. She was daughter of P.W.1 Sambhaji, residing at Waranga (Masai), Taluka Kalamnuri, District Hingoli. Accused no.1 Bhagwat Kshirsagar and accused no.2 Rahul Kshirsagar are neighbours of P.W.1 Sambhaji and their houses are situated in front of house of P.W.1 Sambhaji. On 7.1.2016, at about 12.00 noon, Siddhi returned from her play school. She took her lunch and she was

playing with her sister Riddhi aged two years in front of her house. Her father's step mother P.W.6 Gayabai was sitting in front of her house. At about 12.30 to 1.00 p.m., accused no.1 Bhagwat and accused no.2 Rahul (appellants) came there and offered to provide chocolates to Siddhi. Siddhi being unaware about evil intention of accused nos.1 and 2, she followed them calling them as 'bhaiya-bhaiya'. They took her along with them to a shop of PW8 Shaikh Bismillah. Thereafter, she did not return. P.W.6 Gayabai started searching for Siddhi. At 3.30 p.m., one Masarao made a phone call and informed to PW1 Sambhaji who was out station for work that Siddhi was missing. PW1 Sambhaji returned home at 4:30 p.m. PW6 Gayabai told him that sometime after 12.00 noon, both the accused had taken away Siddhi towards a shop for providing chocolates and since then she was missing. Then, P.W.1 Sambhaji and his relatives and villagers searched for Siddhi and as she was not found, Sambhaji reached Kalamnuri Police Station at 6.30 p.m. and reported about missing of Siddhi. The police did not record the report but came along with P.W.1 Sambhaji to the village and took both the accused to the Police Station. Then Police Inspector with other staff came to the village for taking search. They inspected one house at 9.45 p.m., which is claimed to be of accused no. 3-Parbati (father of accused no.1-Bhagwat). They found Siddhi in dead condition kept in one white bag of fertilizer with gagging of her mouth by stuffing of raw

cotton in her mouth. There were blood stains on her clothes and there were injuries on her vagina and anus showing bleeding. Then dead body along with white bag was taken to Kalamnuri. The police recorded F.I.R. (Exh.65) of P.W.1 Sambhaji at 4.16 a.m. on 8.1.2016. It was mainly against accused no.1-Bhagwat and it was alleged that accused no.2 Rahul had assisted accused no.1 Bhagwat in committing rape and murder of Siddhi. On the basis of F.I.R. in above terms, the Crime at C.R.No.9/2016 under Sections 201, 302, 363, 376(2) and 377 r/w 34 of Indian Penal Code and under Sections 3 and 4 of POCSO Act came to be registered and the same was investigated into by P.W.19 PSI Premlata Gomase, P.W.20 P.I. Mukund Deshmukh and P.W.21 Dy.S.P. Prasanna. The parents of accused no.1 Bhagwat (accused no. 3-Parbati & accused no.5-Panchafula) and parents of accused no.2 Rahul (accused no.4-Baban and accused no.7-Shobha) and brother of accused no.1 Bhagwat by name Kavinarayan (A6) were also prosecuted for causing disappearance of evidence of murder by concealing the dead body in bag of fertilizer inside the house of accused no.3 Parbati.

4. During the investigation, the Police Officers conducted spot panchnama, carried out inquest panchnama and arranged to get the post mortem conducted. The sample of raw cotton found in the room and chocolate wrapper were seized. The accused were arrested.

Their medical examination was carried out. Their nail clippings and blood samples were also taken. Their nail clippings containing cotton fibres along with cotton taken out from the mouth by Medical Officer were sent for analysis. Their clothes were seized. The birth certificates of the appellants and deceased Siddhi and other documentary evidence was collected. The clothes and other articles of deceased Siddhi were also seized. The seized articles were sent to Chemical Analyst and CA reports were collected and after completion of investigation, the charge-sheet was submitted in the Court. The prosecution had collected evidence of following type:

(I) Last seen together :

P.W.6 Gayabai, grandmother, P.W.8 Shaikh Bismillah, shopkeeper and P.W.13 Kusum, relative.

(II) Evidence of custodial death :

Dead body of Siddhi was found in the house in possession of accused no.3 Parbati, who is father of accused no.1 Bhagwat (PW1, PW2, PW9, PW12, PW18, PW19 & PW20).

(III) Oedema over penis of A1-Bhagwat & absence of Smegma on penises of both the accused :

The medical examination of accused nos.1 and 2 showing

absence of smegma on penises of both the accused and oedema over the glans of penis of accused no.1-Bhagwat (PW11-Dr. Pathade).

(IV) **Stains of semen** of blood group of both the accused found on frock of Siddhi.

(V) **Human blood & semen** found on the underwear of **accused no.2**, when he had no injury.

(VI) **Cotton fibre in nail clippings :**

Nail clippings of both the accused showed fibers of cotton, which was found similar to the sample of cotton seized from the mouth of Siddhi and raw cotton found in the room (PW10-Dr. Gude & PW22 Shri. Vaibhav Deshpande, Asst. Chemical Analyser).

(VII) **The wrapper of chocolate** provided to Siddhi was found near the dead body. Chocolates with similar wrappers were seized from PW8 Shaikh Bismillah.

(VIII) There was a strong reaction of the mob gathered against accused persons particularly accused no. 5-Panchafula, mother of accused no.1-Bhagwat and she was required to be taken out of the village and kept in safe custody of one lady Social Worker. The

accused have contended that, PW1 Sambhaji or a villager have given fist blow on her face.

5. On submission of charge-sheet, in due course the case was committed to the Court of sessions. The learned Addl. Sessions Judge framed charge against seven accused. The present appellants accused nos.1 and 2 were charged under Sections 363, 366/34, 376 (2)(f)(i), 377/34, 302 and 201/34 of IPC. The charges under Sections 376 and 377 are in alternative with charge under Section 4 of POCSO Act.

6. The accused pleaded not guilty. The prosecution examined 22 witnesses. Defence of the accused is of total denial. They have denied that the house where the body was found was belonging to accused no.3 Parbati, father of accused no.1. In statement under Section 313 Cr.P.C., accused no.1 Bhagwat and accused no.2 Rahul did not raise any specific defence. Accused no. 1 has not even stated why the witnesses were deposing against him. Accused no. 2 has taken a flimsy defence that PW1 Sambhaji was insisting him to come for labour work with him and his relatives were objecting on the ground of disturbance in his studies, hence he has been falsely implicated. There is also defence suggested to PW1 that accused nos. 3 to 7 had a dispute with him over flowing of drainage water.

7. Though the accused had not raised any defence about their juvenility, considering the birth certificate of accused no.1 showing his age just above 18 years and admission of PW21 Dy.S.P. More, the prosecution moved an application for medical examination for determining age. Accused No. 3-Parbati and accused no. 4-Baban and accused nos. 1 and 2 were examined as defence witnesses on the point of their age. The prosecution conducted medical examination and examined PW23 Dr. Karwa, PW24 BDO on the point of birth register and PW25 Dr. Sunita on the point of age. Based on the medical report showing age of accused no. 18 with margin of (+) or (-) of one year, the accused no.1 in the present Court has raised defence that he was juvenile at the time of the incident.

8. The learned trial Judge held the accused as not juvenile and accepted the prosecution case as against the present appellants and convicted them for various offences and sentenced them as shown above. Hence this appeal against conviction and in view of capital punishment, this reference for confirmation.

9. Heard Mrs Pratibha Bharad, learned Advocate for the appellants and Mr Amarsing Girase, learned P.P. for the State.

10. Learned Advocate Mrs Bharad has filed her additional written notes of arguments. Learned P.P. Mr Girase has also provided

chart showing the evidence on various aspects. Both have cited number of rulings, which will be considered at the appropriate stage.

11. Mrs Bharad has raised following points :

- (I) The prosecution itself doubted the age of accused no.1 and, therefore, filed application and learned trial Judge referred accused no.1 Bhagwat for medical examination. Medical examination shows that accused no.1 was aged 18 years old with margin of (+) or (-) one year. She argued that accused no.1 Bhagwat was juvenile on giving benefit of doubt.
- (II) On merits, she argued that the evidence of P.W.6 Gayabai, P.W.8 Shaikh Bismillah and P.W.13 Kusum on the point of last seen together is not reliable and trustworthy. P.W.6 Gayabai has a weak eye sight and she identified wrong persons as accused nos.1 and 2 in the court. Therefore, her evidence is unreliable. P.W.8 Sk.Bismillah has stated that her shop is far away from the house of deceased Siddhi. There are shops nearer to the house of Siddhi and, therefore, the accused could not have taken Siddhi towards the shop of P.W.8 Shaikh

Bismillah. There is no proper description regarding the chocolates sold. She has not stated that the accused paid the price. PW3 Kusum had stated that she had seen two accused taking Siddhi to a particular house. The police could have definitely searched that house first but the said house was not searched till 9.45 p.m. P.W.13 Kusum was working in the field from where the said house was not visible. Her evidence is not reliable.

(III) Mrs Bharad argued that the ground of custodial death is also not made out as the house in which the dead body was found is not proved to be the house of accused nos.1 and 2 or their relatives. There is no documentary evidence about the ownership of the said house and the possession thereof. The evidence of witnesses in absence of documentary evidence cannot be relied upon to hold that the house belongs to accused no.3 Parbati, father of accused no.1 Bhagwat.

(IV) Mrs Bharad submitted that absence of smegma is not evidence of commission of rape and as far as injury to the penis of accused no.1 Bhagwat is concerned, it can be caused in forceful masturbation or by any other mode.

- (V) Mrs Bharad argued that the appellants were nabbed on the day of incident but, their arrest was shown on the next date at 8.00 p.m. and there was delay in sending them to medical examination. Meanwhile, they had taken bath many a times. Therefore, no blood was expected on their clothes. The clothes of the accused were seized but those were not sealed. No semen was found in the vaginal and anal swab of Siddhi.
- (VI) As per evidence of P.W.6 Gayabai, Siddhi was wearing underwear, whereas the said underwear is not produced. As per inquest, she had worn legging, but there was no blood found on it.
- (VII) The clothes were not sealed and sent to Forensic Science Laboratory, Aurangabad after four days and meanwhile, those were in possession of P.I. Deshmukh and there is possibility of tampering the clothes so as to prove the presence of blood.
- (VIII) The Investigating Officer committed several mistakes. He did not draw inquest panchnama on the spot. He has

not seized raw cotton gagged in the mouth of victim and it was not weighed. He has not immediately registered the FIR.

- (IX) No traces of chocolate were found in the buccal cavity of deceased Siddhi.
- (X) There is no reliable evidence to show that accused nos.1 and 2 had committed rape and murder and kept the dead body in the place where it was found. The learned trial Judge erred in shifting the burden on the accused u/s 106 of Evidence Act in absence of proof of possession of the house with the accused.
- (XI) The prosecution has not examined some material witnesses.
- (XII) The prosecution attempted but failed to produce more reliable evidence in the form of DNA.
- (XIII) Even if the evidence is taken on its face value, it does not disclose that the accused intended or knew that the gagging of mouth of the victim would result into her

death. There is no proper evidence to show the quantity of raw cotton stuffed in the mouth of deceased Siddhi. Hence, even if the evidence is accepted as it is, still offence u/s 302/34 IPC is not made out. At the most, it will be an offence u/s 304-II IPC.

12. Per contra, ld. PP Shri. Girase strongly supported the judgment of the trial Court. He relied on the circumstantial evidence disclosed in para 4 above to submit that there is cogent, convincing and reliable evidence against both the accused and, therefore, the appeal against the conviction deserves to be dismissed.

13. On the point of confirmation, ld. PP submitted that, the act of the accused in kidnapping a girl aged 4 years who was entrusted to them in trust and committing gang rape, unnatural intercourse and her murder is most cruel, barbaric, inhumane and ghastly act. In order to satisfy their lust, they have subjected Siddhi to most gruesome and unbearable acts and in order to suppress the evidence or to fulfill their lust, she was gagged with raw cotton to death. Their acts are so ghastly, brutal and inhumane that their young age or other mitigating circumstances should not be considered. He has relied on number of rulings to support the sentence of death against both the accused.

14. Per contra, ld. Advocate Mrs Pratibha Bharad has submitted that, both the accused are hardly aged 18 to 19 years. They belong to poor labourer class. There is no previous criminal record against them. It is not clear whether accused no. 2 had actually committed rape and unnatural intercourse or not. There was no injury on his penis. Hence, if the appeal of the appellants is not allowed, their sentence should be reduced to imprisonment for life.

15. Learned Additional Sessions Judge, Hingoli has done a very good job in framing of charge early and recording large number of witnesses to complete the trial within one year and three months from the date of offence.

16. However, we find that learned Additional Sessions Judge committed mistakes in framing charge and recording the conviction under wrong sections on the basis of facts proved.

17. When there was charge under Section 366 read with Sec.34 of Indian Penal Code, no separate charge u/s 363 was necessary, as it is minor offence of Section 366 of Indian Penal Code. Similarly, simultaneous conviction u/s 363 & 366 r/w 34 IPC was also not warranted.

18. In the present case, the victim child was aged four years. After the enactment of POCSO Act, 2012, the persons who commit sexual assault on a child earlier punishable under Section 376 or 377 of Indian Penal Code should be charged only under the provisions of POCSO Act. The POCSO Act being special enactment, it will override the general provisions of Section 376 & 377 IPC. Admittedly, the girl was aged four years. It is not a border line case where the alternative charge under Section 376 and 377 of IPC was necessary. The learned trial Judge framed charge under Section 4 of the POCSO Act for both the offences of rape as well as unnatural intercourse. The facts alleged disclose that the charge should have been framed for aggravated penetrative sexual assault punishable under Section 5(g) and 5(i) r/w Section 6 of POCSO Act. Since definition of penetrative sexual assault is applicable to both rape as well as unnatural intercourse, there should have been two charges u/s 5(g) & 5(i) r/w Section 6 of POCSO Act. We find that there is sufficient material to show that both the accused were made aware about the nature of charges against them. They were provided with all the necessary papers. They were represented by lawyers in the trial Court. Mere wrong reference to Sections 376 & 377 IPC and 4 of POCSO Act instead of Section 5(g) and 5(i) r/w Section 6 does not cause any prejudice to the accused and, therefore, case against the accused can be considered under Section 5(g) and 5(i) r/w Section 6 of POCSO

Act which is identical with Sections 376 & 377 IPC for which the accused are convicted. (However, the sentences passed u/s 376 & 377 IPC cannot be enhanced).

19. The points for our consideration with our findings thereon are as under:

Sr. No.	Point	Finding
(I)	Whether accused nos.1 and 2 were aged under 18 years on the date of the offence ?	In the negative.
(ii)	Whether deceased Siddhi met with a homicidal death ?	Proved.
(iii)	Whether accused nos. 1 and 2 in furtherance of their common intention kidnapped Siddhi, aged 4 years, from lawful custody of her parents for subjecting her to sexual intercourse?	Proved.
(iv)	Whether accused nos.1 and 2 in furtherance of their common intention committed murder of Siddhi?	Proved.
(v)	Whether accused nos.1 and 2, in furtherance of their common intention committed aggravated penetrative sexual assault (by gang rape per vagina) on a girl aged four years?	Proved.

(vi)	Whether accused nos.1 and 2 in furtherance of their common intention committed unnatural carnal intercourse on a girl aged four years punishable under Section 5 (g) & (i) r/w Section 6 of POCSO Act?	Proved.
(vii)	Whether accused nos.1 and 2 in furtherance of their common intention caused disappearance of the evidence of murder, rape and unnatural intercourse?	Proved.
(viii)	Whether this is a rarest of the rare case inviting capital punishment ?	In the negative.
(ix)	Whether any interference in the judgment of conviction and sentence is warranted & what order?	Yes. Conviction u/s 363/34 IPC set aside. Conviction u/s 376/34 & 377/34 IPC altered to Section 5(g) & 5(i) r/w Section 6 of POCSO Act & Section 5(g)& 5(i) r/w Section 6 of POCSO Act. Capital punishment set aside and reduced to life imprisonment of not less than 30 years without remission.

REASONS

[I] **Point No. 1** : ISSUE OF JUVENILITY.

20. The Investigating Officer has produced the school admission form of accused no.1 Bhagwat at Exh.174 and of accused no.2 Rahul at Exh.175. As per Exh.174, accused no.1 Bhagwat was admitted on 13.7.2005 in Zilla Parishad Primary School at Waranga (Masai) and his birth date recorded in the certificate is 30.12.1997. The incident has taken place on 7.1.2016. Thus, as per the certificate, he was aged 18 years and 7 days on the date of the incident. As per certificate Exh.175, accused no.2 Rahul was admitted in the same school on 3.7.2002 and his birth date recorded is 27.8.1996. Thus, as per his certificate Exh.175, accused no.2 Rahul was aged 19 years, 4 months and 12 days at the time of incident. Mrs Bharad has relied on the fact that the learned A.P.P. submitted application Exh.228 on 16.3.2017 to the learned trial Judge after the evidence of almost of all the witnesses was over, for X-ray (ossification) examination of accused no.1 Bhagwat for his age determination. The accused gave no objection and learned trial Judge, by order of relevant date allowed the application in respect of accused no.1 Bhagwat. He recorded that there was no dispute about birth of accused no.2 Rahul as 27.8.1996 and it was proved that accused no.2 Rahul had

completed age of 18 years. The Id. Sessions Judge had recorded the evidence of accused no.1-Bhagwat and his father Parbati on the same day and found it insufficient to determine the age of Bhagwat. In case of accused no.1 Bhagwat, he recorded that Gramsevak, Waranga has submitted report Exh.227 that the relevant record of 1995-1999 regarding birth of accused no.1 Bhagwat was not available. As per evidence of P.W.24 B.D.O. Khillare, the birth of accused nos.1 and 2 was not recorded in the Grampanchayat record.

21. The medical examination of accused no.1 Bhagwat was conducted by Dr. Nandkishore Karwa, who is examined as P.W.23. He has arranged to get X-ray of ulna, iliac crest etc. Those X-rays were produced. There was fusion of radius upper end and radius lower end. Similarly, there was fusion of upper and lower end of ulna and fusion of iliac crest. He has issued certificate Exh.235 that Bhagwat was above 18 years of age. Mrs Bharad relied on the admission given by him that he could not say whether the age of accused no.1 Bhagwat was less than 18 years. He had not examined the teeth, particularly, molar teeth. She argued that the opinion is always subject to margin of (+) or (-) one year and accused no.1 should get benefit of this margin. Besides, the medical examination should have been by Medical Board.

22. Mrs Bharad relied on

(i) **Harpal Singh v State of Himachal Pradesh** AIR 1981 SC 361 wherein it is held , that certified copy of entry in the birth register made by concerned official in discharge of his official duties is admissible u/s 35 of Evidence Act.

(ii) **Hari Ram v State of Rajasthan (2009)13 SCC 211**, Rule 12 introduced in 2007 in JJ Rules is retrospective in effect u/s 7A of 2000 Act. The claim of juvenility is to be raised before any court at any stage. Even if the accused was not juvenile on the date of Act of 2000, he would be governed by the said Act.

(iii) **Abdul Razzaq v State of U.P. AIR 2015 SC 1770. Chhotu v State of Maharashtra** Cr. Appeal 423/09 decided by Marlapalle & A. M. Thipsay, JJ. on 22.03.2011.

Person below 18 years at the time of incident could claim benefit at any time even if he was not entitled to benefit of juvenility prior to amendment of 2000 Act.

(iv) **Rajendra Chandra v State of Chhattisgarh 2002 Cr.L.J. 1014 SC**. Benefit of doubtful date of birth in the birth register was given to the accused.

(v) **Criminal Petition No. 200464/2015 (Siddhu Mane v State of Karnataka)** decided on 23.04.2016 (Kalburgi Bench). In this case it is observed that if the documents referred above are of doubtful nature, the case should be referred to Medical Board (and not to Medical Officer) and the age on the lower side within the margin of one year should be considered for determining juvenility. This ruling is not applicable as the documents on record are not of doubtful nature.

23. The incident took place on 7.1.2016. The Juvenile Justice (Care and Protection of Children) Act, 2015 was brought into force from 12.01.2016. Therefore, the case of the appellants would be governed by The Juvenile Justice (Care and Protection of Children) Act 2000 and the rules framed thereunder. As per Rule 12(3) of the Juvenile Justice Rules, 2007, the procedure prescribed is as follows :

“12. Procedure to be followed in determination of age. -

- (1) Not applicable.*
- (2) Not Applicable.*
- (3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining – (a)(i) the matriculation or equivalent certificates, if available, and in the absence whereof; (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;*

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.”

24. In **Ashwinikumar Vs. State of M.P. AIR 2013 SC 553**, the Apex Court has observed;

(i) On conjoint reading of Section 2(k), 2(l), 7(a), 20, 49 r/w Rules 12 and 98, all persons who were below 18 years on the date of commission of offence, even prior to 01.04.2001 would be treated as juveniles and even if the claim of juvenility was raised after they had attained the age of 18 years and even when they are undergoing sentence on conviction, the court shall determine the age in the manner prescribed in Rule 12 of 2007 Rules.

(ii) The Court has to hold inquiry and not an investigation or trial but evidence should be taken and not the affidavits (Para 27). Such inquiry has to be completed within 30 days (Para 28). The procedure to be followed under the JJ Act is laid down in Rule 12. The Courts have to act as kind of guardian over minors (Para 32 & 33). It is further observed;

34. “Age determination inquiry” contemplated under [section 7A](#) of the Act r/w Rule 12 of the 2007 Rules enables the court to seek evidence and in that process, the court can obtain the

matriculation or equivalent certificates, if available. Only in the absence of any matriculation or equivalent certificates, the court need obtain the date of birth certificate from the school first attended other than a play school. Only in the absence of matriculation or equivalent certificate or the date of birth certificate from the school first attended, the court need obtain the birth certificate given by a corporation or a municipal authority or a panchayat (not an affidavit but certificates or documents). The question of obtaining medical opinion from a duly constituted Medical Board arises only if the above mentioned documents are unavailable. In case exact assessment of the age cannot be done, then the court, for reasons to be recorded, may, if considered necessary, give the benefit to the child or juvenile by considering his or her age on lower side within the margin of one year.

35. Once the court, following the above mentioned procedures, passes an order; that order shall be the conclusive proof of the age as regards such child or juvenile in conflict with law. It has been made clear in subsection (5) or Rule 12 that no further inquiry shall be conducted by the court or the Board after examining and obtaining the certificate or any other documentary proof after referring to sub-rule (3) of the Rule 12. Further, Section 49 of the J.J. Act also draws a presumption of the age of the Juvenility on its determination.

36. Age determination inquiry contemplated under the JJ Act and Rules has nothing to do with an enquiry under other legislations, like entry in service, retirement, promotion etc. There may be situations where the entry made in the matriculation or equivalent certificates, date of birth certificate from the school first attended and even the birth certificate given by a Corporation or a Municipal Authority or a Panchayat may not be correct. But Court, J.J. Board or a Committee functioning under the J.J. Act is not expected to conduct such a roving enquiry and to go behind those certificates to examine the correctness of those documents, kept during the normal course of business. Only in cases where those documents or certificates are found to be fabricated or manipulated, the Court, the J.J. Board or the Committee need to go for medical report for age determination. (underlining is ours)

25. Since accused no. 1-Bhagwat was just above 18 and he is sentenced to capital punishment, we as a matter of caution summoned the Headmaster to produce the original register of school admission. On 27.09.2017, the Headmaster has produced before us the register and extracts of entries of school admission of accused nos. 1 and 2 and also the applications made by Parbati (A3), father of accused no. 1 and Baban (A4), father of accused no. 2 for admission. Those are taken on record. The applications are signed by father of accused nos. 1 and 2, respectively. The copies thereof are taken on record and marked as Exh. 251, 252 and copies of register are marked as Exh. 174-A, 175-A & shall form part of the trial court record. We are convinced that, the birth date registered in the first school of admission of accused nos. 1 and 2 are as per certified copies at Exh. 174 and 175. Since both the accused are not having matriculation or equivalent certificates, the entries in the school admission register will prevail and shall have conclusive value. It was not at all necessary for the prosecution and the trial Judge to subject accused no. 1 for medical examination. Hence, the margin of (+) (-) one year is not applicable at all. Hence, accused no. 1 Bhagwat born on 30.12.1997 was aged 18 years and 07 days on the date of incident and accused no. 2 Rahul born on 27.08.1996 was aged 19 years 4 months and 10 days on date of incident i.e. 07.01.2016. Hence, we

hold that, they were not juveniles. Point no. 1 is answered accordingly.

26. On the point of appreciation of evidence, reliance is placed on;

(i) **Hanumant v State of M.P. AIR 1952 SC 343**

12. It is well to remember that in cases where the evidence in 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 pendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

(ii) **Sharad Sarda v State of Maharashtra AIR 1984 SC 1622**

(iii) **Padala Veera Reddy Vs. State of Andhra Pradesh AIR 1990 SC 79**

(iv) **Shankarlal Vs. State of Maharashtra AIR 1981 SC 765.**

(v) **Abdul Salam Vs State 1951 CJ (J&K) 1**, wherein it is observed in para 10 thus:

10. In a case of circumstantial evidence, the judgment remains essentially inferential. Inferences are drawn from established facts, as the circumstances lead to particular inferences. The Court must draw an inference with respect to whether the chain of circumstances is complete, and when the circumstances therein are collectively considered, the same must lead only to the irresistible conclusion, that he accused alone is the perpetrator of the crime in question. All the

circumstances so established must be of a conclusive nature, and consistent only with the hypothesis of the guilt of the accused.

(vi) **Hukum Singh Vs State of Rajasthan 2011 ALL SCR (O.C.C.) 44.** In para 7, it is observed as under :

7. If the circumstances proved in a particular case are not inconsistent with the innocence of the accused and if they are susceptible of any rational explanation, no conviction can lie.

(vii) In **Sujit Biswas Vs. State of Assam AIR 2013 SC 3817**, it is laid down that suspicion however strong cannot take the place of proof.

[II] **Point No. 2 : WHETHER THE DEATH IS HOMICIDAL?**

27. The evidence of PW1 Sambhaji, PW9 Govind Bedre, PW20 PI – M.R. Deshmukh, disclose that, on 07.01.2016, at 09:45 p.m., Siddhi's body was found in folded condition in a white bag of fertilizer in one house. Her mouth was gagged with stuffed raw cotton. The witnesses realized that she was dead but she was immediately taken in a Police Jeep to Government Hospital at Kalamnuri. Dr. Prafulla Pathade, PW11, stated that she was brought to him at 10:30 p.m. and on examining her, he declared her as dead.

28. On the next day morning at 08:30 a.m., inquest panchanama was drawn in presence of PW3 Tulshiram, he noticed raw cotton stuffed in her mouth. There was bleeding per vagina and per anus and white coloured fluid discharge from the nose. The

panchas opined that, Siddhi died due to gagging of her mouth by stuffed raw cotton. Thereafter, PW10 Dr Mahesh Gude and PW11 Dr. Pathade have conducted post-mortem at 09:45 to 11:50 a.m. They found mild cyanosis over nail beds of finger. Mucoserous fluid was oozing from nostril and making a dribbling continuous marks upto tragus of left ear. They noted following injuries;

Oedema over both labia majora and oozing of blood through vaginal orifice.

- i) *Lacerated wound of size 2x2.5 cm. Exhibit No. extending from ruptured hymens in vaginal canal along its axis.*
- ii) *Laceration having size 1.5 x 0.5 extending from superior portion of external anal sphincter into the anal canal.*
- iii) *Three small contusion marks measuring 2 mm in diameter and 2 cm. From left angle of mouth in an infero-lateral region forming grossly a <<L shaped mark.*

9. 1.

2. Thorax : Wall, ribs, cartilages intact. Pleura intact and congested. Larynx, trachea and bronchi congested with areas of petechial haemorrhages seen. Right and left lungs deeply congested. Pericardium congested with petechial haemorrhages. Heart with weight congested approximately 70 gms. Large vessels intact. No injury seen. On dissection of abdomen following was noticed.

- 1) Laceration of size 1.5 x 0.5 cm. under side of upper level of right upper incisors.

- 2) Oral cavity and pharynx completely filled with packed raw cotton. All teeth were intact in the sockets.
- 3) Oesophagus congested and intact with small cotton particles.
- 4) Stomach and its contents 100 ml. Of semi digested food with greyish yellow colour. Small intestine was empty, was filled and distended and was intact. Large intestine faecal matter was present and intact.
- 5) Liver and gall pancreas and supra ranals were intact.
- 6) Spleen was congested and intact. Kidney was intact. Bladder was empty and intact.
- 7) Organs of generation:- Uterus was intact not fully developed. Small size with intact ovaries masovarium and fallopinc tubes were intact.
- 8) On examination of contents of stomach, he opined that last meal was taken before 2-3 hours of death.

29. All injuries were ante-mortem. They had preserved the viscera and was forwarded to CA and as per CA report Exh. 104 of no poisoning, Dr. Gude has opined that Siddhi died due to asphyxia due to gagging. Their provisional death certificate and PM notes are at Exh. 102 and 103.

30. The defence has not disputed that, Siddhi died due to gagging. However, Mrs. Bharad, learned counsel for the accused argued that, the cotton taken out from the mouth was not weighed and therefore it is not clear whether the person who gagged her

mouth with cotton had intention to commit her death or not. In any case it is not disputed that it is a culpable homicide. Whether it amounts to murder or not will be considered separately. We answer point no. 2 accordingly in the affirmative.

[III] Kidnapping, Rape, Unnatural intercourse, Murder and Disappearance of evidence by A1 & A2:

31. PW6 Gayabai has deposed that, on 07.01.2016 at about 12:30 noon, both the accused took away Siddhi while she was playing in front of her house, by luring her with offer of chocolates. Thereafter, there was hectic search taken but, Siddhi was not traced till 09:45 p.m. At 09:45 p.m. Siddhi was found dead with bleeding from vagina and anus and injuries to orifices of vagina and anus. It is crystal clear that, Siddhi was brutally subjected to rape as well as sodomy and at the same time in order to see that she does not raise shouts, raw cotton of substantial quantity was stuffed in her mouth and thereby her mouth was gagged. This has resulted into her death. It is obvious that, the person who committed rape and sodomy must have committed homicide as well and the circumstances indicate that all three offences must have been committed by the person who were lastly seen together with her.

32. PW6 Gayabai has stated that, after Siddhi came from play school at about 12:00 p.m., she had taken her lunch. As per evidence of PW10 Dr Mahesh Gude and PM notes Exh. 103, 100 ml of semi-digested food with yellowish liquid was found in the stomach of deceased Siddhi. The small intestine was empty. From the above facts, Dr. Mahesh Gude has opined that Siddhi died within 2-3 hours after her last meals. There is no challenge to this evidence. As per this evidence, Siddhi died at about 02:00 to 04:00 p.m.

33. Dr. Mahesh Gude on the basis of the injuries noted on the private parts of the deceased Siddhi gave opinion that, she was subjected to penetrative sexual intercourse per vagina as well as per anus.

34. It was argued that, no semen was found in the vaginal swab and anal swab but, the evidence shows that, Siddhi had a profused bleeding from vagina. The inquest panchanama shows bleeding from anus as well. Considering the nature of the injuries suffered by Siddhi on her vagina and anus, she was definitely subjected to rape and unnatural intercourse.

35. **Krishan Kumar Malik Vs. State of Haryana AIR 2011 SC 2877** (para 43 & 44), relating to collection of sperm for fool proof case is therefore not applicable to the present facts.

36. Taking into consideration all above facts, the act of kidnapping, rape, sodomy and murder have taken place within short time and are integral part of same transaction. It is certain that, the person/persons who had kidnapped her must have committed rape and unnatural intercourse amounting to penetrative sexual assault on her and he/they has/have attempted to cause disappearance of evidence. Therefore, all these points will have to be considered together.

37. The prosecution has examined 22 witnesses. The chronological events, the oral evidence and documentary evidence in respect of those events may be stated as follows.

Sr.No.	Date, time and event.	Evidence
	01/07/16	
1	12:00 noon. Deceased Siddhi came from School and had a lunch. Siddhi was playing in front of her house.	PW6 Gayabai.
2	12:30 to 01:00 p.m. Accused nos. 1 and 2 took Siddhi from the courtyard of PW1 Sambhaji by offering her chocolates and went towards shop.	PW6 Gayabai.
3	12:30 to 1:00 p.m.: Both the accused along with Siddhi went to the shop of Shaikh Bismillah PW8 and PW8 provided four chocolates worth Rs. 2/- free of charge to Siddhi.	PW8 Shaikh Bismillah.
4	01:30 to 02:00 p.m.: Both the accused proceeded along with Siddhi towards their house.	PW13 Kusum
5	2:00 p.m. onwards : PW6 Gayabai and others started search of Siddhi.	PW6 Gayabai.
6	After 2 hrs. Accused no. 1 – Bhagwat came to PW6 Gayabai. PW6 asked him where was Siddhi and he told her that Siddhi went to shop and he would see Siddhi and left the spot and did not return.	PW6 Gayabai.

7	03:30 p.m. : One Masarao gave ring to PW1 Sambhaji, father of Siddhi, and informed that Siddhi was missing.	PW1
8	04:30 p.m. : PW1 Sambhaji came home. PW6 Gayabai told him that after returning from school at 12:00 noon Siddhi had taken lunch and while playing in courtyard, accused nos. 1 and 2 had taken her away for providing chocolates.	PW1 Sambhaji (PW6 Gayabai is silent).
9	04:30 to 06:00 p.m. : PW1 Sambhaji and others searched for Siddhi but she was not found.	
10	06:00 to 06:30 p.m. : PW1 Sambhaji went to Police Station at Kalamnuri (13 kms. from Waranga (Masai) and reported about missing of Siddhi and expressed his suspicions against accused no. 1-Bhagwat and accused no.2-Rahul.	PW1 Sambhaji & PW19 Lady PSI Gomase.
11	07:15 to 08:00 p.m.: PSI Gomase with PW1 Sambhaji came from Kalamnuri to Waranga. PW19 faced a violent crowd and felt that they would have assaulted A1 and A2. She picked up Bhagwat (A1) from a place near his house while NPC Chavan and Driver picked up Rahul (A2) from his house and brought them to the Police Station at 08:00 p.m.	PW1 Sambhaji and PW19 PSI Gomase.
12	PI Deshmukh made inquiry with both the accused. PW1 and many villagers came to the police station for further inquiry and the mob had become aggressive. Attempts of PI Deshmukh to pacify them were unsuccessful.	PW20 - PI Deshmukh & PW1 Sambhaji
13	PI Deshmukh along with PW1 and two constable Mane and Raut r/o Waranga proceeded to Waranga in a Jeep. A1 & A2 left at the Police Station. Several villagers followed them on bikes. PI Deshmukh promised them that there would be proper investigation. Press reporter – Rahul Mene and his friend PW9 Govind accompanied the police.	PW20 - PI Deshmukh & PW1 Sambhaji & PW9 Govind
14	PI Deshmukh went to the field of Parbati (A3), father of Bhagwat (A1). Several villagers came there with torches. Siddhi was not found in the field.	PW20
15	09:30 p.m. : Police Patil, PW1 Sambhaji and villagers showed the house of Parbati (A3). Accused nos. 3 to 7 obstructed them from entering. Panchafula (A3), mother of Bhagwat (A1) told them that there was nothing in the house and they should not take search of the house. Still they entered. PI Deshmukh, PW9 Govind, PW1 Sambhaji and several others entered the house. Siddhi was not found in first two rooms.	PW1 Sambhaji PW19 (Para 3) PW20 (Para 5)
16	09:45 p.m. : PW9 Govind saw a white coloured gunny bag kept behind two pieces of wooden rafters and a barrel near bags of sand. On touching the bag, he found some soft substance. He called Police Driver, his friend Rahul Mene and PI Deshmukh. The bag was opened. Siddhi's body was found in folded condition in the bag. Her mouth was	PW9, PW20, PW1

	gagged with raw cotton. They realized that she was dead.	
17	PW1 Sambhaji and the villagers started weeping. They got annoyed. They started shouting. PI Deshmukh apprehending danger made call to PW19 PSI Gomase and asked her to come to Waranga with all available police staff apprehending danger to the accused (relatives of A1 & A2), he brought the Jeep very near to the house put the gunny bag with dead body and Panchafula and PW1 in the Jeep and proceeded towards Police Station. Constable Bele, Pandit and Police Patil were asked to lock the house and guard it. PW15 Bele guarded it till the next day.	PW20, PW1, PW15, PW19.
18	10:30 p.m. : The police arrived at Civil Hospital, Kalamnuri. PW11 Dr. Pathade opened the gunny bag and examined Siddhi and declared her dead. That time, there was huge mob outside the hospital and there was no light.	PW11
19	11:35 p.m. & 04:15 a.m. (08.01.2016) : FIR of PW1 Sambhaji Kshirsagar was recorded and crime was registered at C.R. No. 9/16.	PW1, PW19, FIR, Exh. 65 & 66.
	01/08/16	
20	04:16 a.m. : FIR registered.	
21	07:00 a.m. : PI Deshmukh drew inquest panchanama.	PW20, PW3, Exh. 70.
22	Request letter by PI Deshmukh for PM and collection of evidence.	Exh. 99, Exh. 101
23	09:45 to 11:15 a.m.: PM conducted, provisional death certificate issued.	PW10, PW11, Exh.100 & 102.
24	11:00 to 12:30 : PI Deshmukh collected four samples of chocolates of the type given by PW8 to Siddhi	PW5, PW8 PW20, Exh.87.
25	01:00 to 01:50 p.m.: Spot panchanama drawn by PI Deshmukh.	PW2 & PW20.
26	07:40 & 07:50 p.m. : PI Deshmukh arrested accused nos. 1 and 2.	PW4, PW20 and Panchanama Exh. 72 & 73.
27	08:30 p.m. PI Deshmukh seized T-shirt and brown pant and underwear of A1. (Articles 4 to 6).	Exh. 74, PW4, PW20.
28	09:10 to 09:40 p.m. : PI Deshmukh seized full-shirt, black	PW4,

	full pant and purple underwear of accused no.2 (articles 7 to 9).	PW20, Exh.75.
29	10:30 p.m. : PW 11 Dr. Pathade examined Bhagwat (A1), noted oedema to his penis and certified that he was potent. Collected samples of pubic hair, semen nail clippings and sealed them. No smegma found.	PW11 Certificate Exh. 116, 117 & 119.
30	10:40 p.m. : PW 11 Dr. Pathade examined Rahul (A2) certified that he was potent. Collected samples of pubic hair, semen, nail clippings and sealed them. No smegma found.	PW11 Certificate Exh. 118.
31	Further investigation carried out by PW19 PSI Gomase, PW20 PI Deshmukh, PW21 Dy.S.P. More.	
	11.01.2016 :	
32	Articles sent to CA through PW14.	PW14, Exh. 135 to 137 (CA reports Exh. 104, 107 to 109).
	13.01.2016	
33	Sending samples for DNA through PW15.	PW15, Exh. 139, Exh. 140. DNA reports not received.

38. **Following are the witnesses and other documents :**

PW1	Sambhaji (father of victim) – last seen/custody death.
PW2	Ramakant Kanthale (spot panch, panchanama Exh.64. Seizure of chocolate wrapper and cotton from the spot). Map Exh. 68.
PW3	Tulshiram – Panch to inquest panchanama (Exh.70).

PW4	Panch to arrest of accused nos. 1 and 2 (Exh.72 & 73). Seizure of clothes of accused nos. 1 & 2 (Exh.74 & 75).
PW5	Vishal, panch to purchase of samples of chocolates Cintu Eclairs from PW8 Shaikh Bismillah (panchanama Exh.87).
PW6	Gayabai (grand-mother of Siddhi) last seen together.
PW7	Ayaj Khan, panch to seizure of white gunny bag, frock and legging (article 1, 2 & 3) after PM (Exh. 95).
PW8	Shaikh Bismillah, Shopkeeper, who lastly saw Siddhi with accused nos. 1 and 2. Identified chocolate wrapper found on the spot (article 11).
PW9	Govind, Search of disputed house at 09:45 p.m. and recovery of dead body in a gunny bag and on conduct of A1 Bhagwan's mother Panchafula.
PW10	Dr. Mahesh Gude conducted PM. Correspondence Exh. 99, 100, 101 & Provisional Certificate and PM Notes (Exh. 102 & 103). CA reports Exh. 104 to 111 and letters to CA Exh. 112 to 114.
PW11	Dr. Pathade. Examination of accused nos. 1 and 2 certifying about their potency. Presence of smegma on their penis and oedima over glance of penis of accused no. 1 and collection of nail clippings. Sealing the same and giving to police. Certificates Exh. 116, 117, 118 & 119.
PW12	Gramsevak – Ambhore. Correspondence and GP extracts and

	Domicile Certificates Exh. 121 to 132.
PW13	Kusum, last seen together.
PW14	PC Namdeo, Carrier (Covering letters Exh. 135 to 137). Carried on 11.01.2016.
PW15	Police Naik Bele, who guarded the spot during the night before spot panchanama and carrier of DNA samples (covering letters Exh.139 & 140). Carried samples on 13.01.2016.
PW16	Circle Inspector Sovitkar (Letter Exh. 142 & map of the spot Exh. 143).
PW17	Revenue Inspector Sule, who conducted nil searches Exh. 145 to 149.
PW18	Sanjay, Photographer (Photos Exh. 153 to 159).
PW19	PSI Smt. Gomase, IO. (Correspondence, 7/12 extract Exh. 161 to 169).
PW20	PI M.R. Deshmukh, IO. Birth certificates of A1 & A2 (Exh. 174 & 175). Correspondence Exh. 171, 176 to 182. Birth certificate of Siddhi (Exh.183). Seizure of white bag of fertilizer (Exh.184). Correspondence (Exh. 185, 186, 198 & other relevant muster rolls).
PW21	Dy.S.P.- Prasanna More, Correspondence Exh. 205 to 208. CA reports (Exh. 214 to 216).

PW22	Vaibhav Deshpande, Asst. Chemical Analyser. Evidence of fibres of raw cotton similar to the spot found in nail clippings & CA reports (Exh.214 to 216, 218 & 219, 222 to 225).
PW23	Dr. Nandkishor Karwa, Radiologist. On x-rays of ossification of accused no.1- Bhagwat.
PW24	BDO Khillare (No birth register maintained from 1995 to 1999 for Waranga Masai.
PW25	Dr. Sunita. On age of accused no. 1 as 18 to 19 (Letter Exh. 247 & Age Certificate Exh. 248).

EVIDENCE OF LAST SEEN TOGETHER :

39. On this point, following rulings are submitted :

(i) **Ram Reddy v State of A.P. [2006 (10) SCC 172]**

27. The last seen theory, furthermore, comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration. (See also Bodh Raj v. State of J. and K. (2002 (8) SCC 45).

(ii) **Shivaji Alhat v State of Maharashtra (2008) 15 SCC 269.**

(iii) **State of U.P. v Satish (2005) 3 SCC 114.**

(iv) **State v Viram Rajput (Confirmation Case No. 3/2014)**

decided by Smt. V. K. Tahilramani & I. K. Jain, JJ. dt. 16.02.2015.

(v) **Nagraj Vs State 2015 Cr. L. J. 2377 SC.**

Absence of explanation by the accused can't lead to adverse inference unless the prosecution discharges its initial burden.

(vi) **Anjan Kumar Sarma Vs State of Assam AIR 2017 SC 2617.**

. Last seen together with absence of explanation is weak piece of evidence. When it is established by the prosecution that the time gap between the point of time when the accused and deceased were found together alive and when the deceased was found dead is so small that possibility of any other person with the deceased could completely be ruled out. The time gap would be material consideration for appreciation of evidence and placing reliance on it. (Reliance on **State of Goa Vs Sanjay Thakaran AIR 2007 SC (Supp.) 61.**

(vii) **Arjun Marik Vs State of Bihar 1994(1) BLJR 688 SC.**

29. it is settled law that the only circumstance of last seen will not complete the chain of circumstances to record the finding that it is consistent only with the hypothesis of the guilt of the accused and, therefore, no conviction on that basis alone can be founded.

(viii) **Sahadevan vs. State of Tamil Nadu AIR 2012 SC 2435.**

31. Even in the case of State of Karnataka v. M.V. Mahesh [(2003) 3 SCC 353], this Court held that merely being last seen together is not enough. What has to be established in a case of this nature is definite evidence to indicate that the deceased had been done to death of which the respondent is or must be aware as also proximate to the time of being last seen together. No such clinching evidence is put forth.

(ix) **The State of Maharashtra v Vasanta Sampat Dupare** (Criminal Confirmation Case No. 1/2012), the Division Bench of Nagpur Bench.

(x) **Shyamal Ghosh v State of West Bengal (2012) 7 SCC 646.**

74. The reasonableness of time gap is therefore of some significance. If the time gap is very large, then it is not difficult but may not even be proper for the court to infer that the accused had last seen alive with the deceased and the former, thus, was responsible for commission of 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. (underlining is ours).

(xi) In **Laxman Naik v State of Orissa (1994) 3 SCC 381**, the accused had taken away his 7 year old niece, when he had been to attend funeral ceremony they were seen together by a witness in a Jungle and later appellant alone reached his house. He made a false representation that the deceased was at the house of her mother. On the next day, the dead body of victim with bleeding injuries on the private part was found in the Jungle. The Apex Court after considering the circumstances held that, those found a complete chain so as not to leave any reasonable ground for a conclusion consistent with the hypothesis of innocence of the appellant.

(xii) **K. Sukumaran Vs State of Kerala 2000(10) SC 365.** In this case, there was evidence of last seen together but most vital circumstance that, blood of blood group of the deceased was found on the clothes of the accused was not established.

40. Ld. Advocate Smt. Bharad relied on **Tomaso Bruno Vs. State of U. P. 2015 ALL MR (Cri) 837**, where CCTV footage though available to show presence of the accused in hotel was not produced, the burden u/s 106 Evidence Act was not shifted to the accused. It is not applicable to the facts of the present case.

41. The sum and substance of these rulings is that normally last seen together with absence of explanation is weak type of evidence but when the time gap between the incident of last seen together and death of a person is so small that any other probability except commission of murder by the accused is ruled out, it becomes a strong piece of evidence and it needs a small corroboration.

42. On this point, the prosecution has examined PW6 Gayabai, grand-mother of deceased Siddhi, PW8 Sheikh Bismilla, the Shop Keeper and PW13 Kusum, maternal cousin of father of the deceased.

43. PW6 Gayabai is step mother of Siddhi's father PW1 Sambhaji. She stated that, Siddhi returned from school at about 12:00 noon and she and Riddhi were playing together in front of her house. That time, accused no.1-Bhagwat and accused no.2-Rahul came there. Siddhi was dancing behind them as Bhaiyya-Bhaiyya. They offered her chocolate and then Siddhi went along with them. As per birth certificate of Siddhi Exh. 183, her birth date was 29.09.2011. Thus, she was then aged 4 years, 3 months and 10 days old. PW6 Gayabai stated that, Siddhi did not return and after two hours, accused no. 1 Bhagwat came. She made inquiry with him and he told her that Siddhi had gone to a shop and he would find her out. Accused no. 1 thereafter left the spot and he did not return. In the evening, PW1 Sambhaji came home. According to him, he came at 4:30 pm whereas PW6 Gayabai stated that, he returned at 6:00 p.m. He stated that Gayabai informed him that Siddhi had gone along with accused nos. 1 and 2. Gayabai did not state that she had disclosed this fact to PW1 Sambhaji. In cross-examination of Gayabai, it is brought on record that she has weak eyesight and cannot see the things at long distance without spectacles. She was using the spectacles for last two years (her evidence was recorded about 9 months and 10 days after the incident). She claimed that, she could see the things from long distance but when she was asked to identify accused nos. 1 and 2, she wrongly identified accused no. 6

Kavinarayan as accused no. 1-Bhagwat and accused no. 4-Baban as accused no.2-Rahul. It must be stated here that she was knowing both the accused since their childhood. They were residing opposite her house, hence there was no question of any identification of the accused. The only issue was about her weak eyesight. In this regard, we find that she must be at a long distance in the court from the accused persons as the witness box is normally 20-25 ft. away from the box of the accused. The ld. APP and ld. trial Judge ought to have asked her to identify the accused from close distance but it was not done. On the spot, she must be in close vicinity from Siddhi and Riddhi. Therefore, there was no problem of identification at that time. Besides, the accused had talked with Siddhi and she had heard their voice. She could have identified them from voice as well.

44. If any doubt lingers about identification by PW6 Gayabai of the accused, it is eliminated by the subsequent facts brought on record. PW1 Sambhaji has stated that he had gone for work in the morning at 06:30 and returned home at 4:30 p.m. He stated that, his step mother Gayabai disclosed that Siddhi had gone along with accused no. 1-Bhagwat and accused no. 2-Rahul as they offered her chocolates and she did not return. He has thereafter taken search of Siddhi and reached Police Station at Kalamnuri from Waranga (Masai) at 06:30 p.m. He narrated the fact to PW19 PSI Premlata

Gomase about missing of Siddhi. PW19 has fully corroborated his evidence on this point. She had then accompanied him to Waranga (Masai) and nabbed accused no. 1-Bhagwat and accused no. 2-Rahul from their houses. Pertinently, these facts are not disputed. In fact, these facts are brought on record for the first time in the cross-examination of PW1. Thus, both the accused were picked up and were brought to the Police Station by 07:30 to 08:00 pm.

45. The evidence shows that there was absolutely no enmity between PW1-Sambhaji and both the accused or their parents. PW1 Sambhaji had no reason to express suspicion against the accused if PW6 Gayabai would not have disclosed their names to him as the persons who had taken away Siddhi at 12:30 p.m., PW19 Premlata Gomase nabbed both the accused from the village at about 07:00 p.m. and brought them to the Police Station at 08:00 p.m. As per the information given by PW1 Sambhaji to PW19, evidence of PW6 Gayabai is strongly corroborated that she had seen both the accused taking away Siddhi at noon time.

46. It was also argued that, PW6 Gayabai had stated that Siddhi followed Ankush (para 7). We find that, it is a wrong translation of Marathi evidence that "सिध्दी अंकुशच्या पाठीमागे लागली होती". It means, Siddhi was pursuing Ankush to meet with her demands. It is

well settled that, when there is difference between English version and Marathi version, the Marathi shall prevail. Thus, there is absolutely no material to show that Siddhi was following Ankush who is her cousin.

47. PSI Gomase should have made Station Diary Entry about the information given by PW1 expressing his suspicion against the accused. She could not have recorded FIR as, by that time no offence was disclosed. The prosecution ought to have produced the said Station Diary Entry on record but in view of the admitted fact, the non-production of Station Diary Entry does not affect the credibility of evidence of PW6 Gayabai.

48. Then, next evidence is of PW8 Shaikh Bismillah. She is having a small grocery shop at the other end of village. Her son was looking after the shop, but in his absence, she was looking after the shop. She stated that, about seven months before the date of deposition, on a Thursday at noon time, when her son had gone for lunch, she was attending the shop. That time, son of Parbati Kshirsagar and son of Baban Kshirsagar came along with the daughter of the complainant. She is resident of Waranga (Masai) where the accused are residing from their childhood. Therefore, though she was not knowing their names, she was knowing that they

are sons of accused no. 3 - Parbati and accused no. 4 - Baban. She identified accused nos. 1 and 2 in the court as the same persons. She stated that, she provided four chocolates worth Rs. 2/- to the daughter of the complainant (informant) and thereafter the sons of Parbati and Baban took away the daughter of the complainant Bandu Kshirsagar. It is pertinent to note that, Bandu is nick name of PW1 Sambhaji and PW8 Shaikh Bismillah was knowing the nick name. It is therefore not unnatural that PW8 provided four chocolates worth Rs. 2/- to Siddhi without taking any money from her or from the accused. Pertinently, one chocolate wrapper was found on the spot. The police have subsequently taken samples of chocolates and those matched with the wrapper found on the spot. PW2 Panch Kanthale has proved recovery of chocolate wrapper (article 11) from the spot. PW8 Shaikh Bismillah has identified the said wrapper as well as the specimen chocolates article 12. PW5 has identified chocolate wrappers (Articles 11 & 12) before the court.

49. It was too much to expect from her by the accused that she should have issued receipt for selling the chocolates worth Rs. 2/-. She admitted that, the shops of Ganga Maharaj and Pandurang Ingale were located near Masai Mandir which was nearer to the house of PW1 Sambhaji whereas her house was situated to the eastern side of Masai temple.

50. The prosecution did not draw a topographic map but the defence has drawn such map and it is marked Exh. 68. It is no doubt true that there were shops nearer to the house of PW1 where the accused could have purchased the chocolates but the main intention of the accused was not to provide the chocolates but to take Siddhi away from her house and therefore they must have selected a shop farther away from the house of PW1 Sambhaji. Therefore, the fact that the shop of PW8 is away from the house of PW1 does not raise any suspicion. PW8 has admitted that she and her son had cultivated land of PW1 Sambhaji on crop share basis but that cannot be a ground for disbelieving her. She is an independent witness. She has no enmity with the accused. Her evidence is not anyway shaken in the cross-examination. She has disclosed facts to the police at the earliest. We do not find any reason to disbelieve her. Hence, the evidence of PW6 is corroborated by the evidence of PW8 Shaikh Bismillah.

51. PW13 Kusum is maternal cousin of PW1 Sambhaji. She stated that, on the date of incident, she was plucking cotton in the field of Ashok Kare, which is situated opposite to the house where the dead body was found. She stated that she had seen both the accused proceeding to their house along with Siddhi and taking entry in the

house. It was at about 2:30 p.m. Then she had a lunch break. When she was returning from lunch, PW6 told her that Siddhi was not traceable. Gayabai told her that, both the accused nos. 1 and 2 had taken Siddhi with them for providing Chocolates. She had disclosed to Gayabai at 1:00 p.m. that both the accused had made entry in their house along with Siddhi the dead body was discovered at about 09:45 p.m. After careful consideration of her evidence, we find, that her evidence that she saw both the accused entering into the house along with Siddhi is not reliable. She has stated that, they entered their house whereas the houses of accused nos. 1 and 2 are different. She is maternal cousin of PW1 Sambhaji. By noon only, she had learnt that Siddhi was missing and all the villagers were making hectic search of Siddhi. If she would have disclosed this fact that both the accused had taken Siddhi to a particular house, PW1 and other villagers would have searched the same house at the earliest but the evidence on record shows that, the said house was not searched upto 09:45 p.m. Evidence of PW20 PI Deshmukh shows that, he made inquiry with the accused at the Police Station and from the clues received, particular house was searched and the dead body was found. Pertinently, the statements of PW13 Kusum was also recorded after eight days. For these reasons, we find it unsafe to rely on the evidence of PW13 Kusum particularly with regard to the entry of both the accused along with Siddhi in the particular house. We,

therefore, discard the evidence of PW13 Kusum on this point. However, from the evidence on record we are thoroughly satisfied that accused nos. 1 and 2 had taken away Siddhi from the courtyard in front of house of PW1 Sambhaji at about 12:30 to 01:00 p.m. and they had taken Siddhi to the shop of PW8 Shaikh Bismillah and purchased chocolates but PW8 did not take money for the same.

52. It also cannot be forgotten that, deceased Siddhi was a girl aged four years and three months. PW6 Gayabai reposed faith in the accused who were neighbours and Siddhi was allowed to go along with them for purchasing chocolates. It was the duty of the accused to leave Siddhi back to her house or deliver her custody to some elderly relative of Siddhi. Siddhi all alone could not have gone away from the accused. The accused could not have left her at some long distance. They were supposed to drop her back to her house. Considering these peculiar facts and small time gap, **we find that the evidence of last seen together is much stronger in the present case to connect the accused with the crime.** In fact, this evidence of last seen together coupled with small time gap and absence of any explanation by the accused is sufficient to show the involvement of both the accused in the crime.

53. In present case, evidence of last seen together is well corroborated by additional evidence of custodial death, injury to penis of A1, blood spot on underwear of A2 & cotton fibers in nail clippings of both accused similar to cotton found in mouth of victim and found on spot.

CUSTODIAL DEATH :

54. Another circumstance relied upon by the prosecution is custodial death. It is claimed that, the house where the dead body of Siddhi was found in a manure bag belongs to accused no. 3-Parbati, father of accused no. 1 Bhagwat. In this regard, there is evidence of following witnesses.

- (i) PW1 – Sambhaji.
- (ii) PW2 – Ramakant, Spot Panch.
- (iii) PW9 - Govind Bedre.
- (iv) PW12-Gramsevak Ambhore.
- (v) PW18-Sanjay, Photographer.
- (vi) PW20 – Police Inspector – M. R. Deshmukh

55. Though PW12 Gramsevak Ambhore has produced house property extracts of the house of accused no. 3 Parbati (Exh. 123) and house of accused no. 4 Baban (Exh. 134) in response to letter Exh. 122, these are not in respect of the disputed house. It is defence of the accused that it is house of Namdeo Gopal Kshirsagar but there

is no documentary evidence in either way. The evidence shows that, the villagers were searching for Siddhi in the village and Siddhi was not found and PW20 P.I. M.R. Deshmukh deposed that both the accused were brought to the Police Station by PSI Gomase (PW19) at 07:45 to 8:00 p.m. on suspicion. Both of them were frightened and looked like Juveniles. The statements given by them before him are definitely not admissible even though at that time they were not accused (**State of U.P. v Deoman Upadhyaya AIR 1960 SC 1125**). Suffice it to say that the information given by them which was not recorded into writing was the clue received by PI Deshmukh. He then came from Kalamnuri to Waranga (Masai) and along with PW1 Sambhaji and other villagers and police constables Raut and Mane, r/o Waranga (Masai) who were on leave, but present in the village, went in search of field and then house of Parbati, father of Bhagwat.

56. PW20 PI Deshmukh deposed that, at that time PW1 Sambhaji and several villagers had gathered there and had a strong feeling. The mob was becoming aggressive. He assured the villagers that he would properly investigate the crime but the mob was uncontrollable. PW20 told PW1 Sambhaji to lodge FIR and the villagers told him that the FIR would be lodged later and they told him to immediately search the house of accused no. 1 Bhagwat from his field. Then he along with PW1 Sambhaji and villagers and Police

Constable Mane and Raut, who are r/s Waranga (Masai) and were on leave, decided to proceed to the spot. Considering the gravity of crime, he gave intimation to Dy.S.P. Jatale. Press reporters Rahul Mene and Govind Bedre were also with them and the villagers had brought torches. Then they went to the field of accused no. 3-Parbati and took search in the entire field. The girl was not found. Then all of them proceeded to the house of Parbati. Police Patil Ambadas Ingole showed him the house. Accused no. 5 - Panchafula, mother of accused no. 1, was sitting in front of the house. The door was latched from the outside. He disclosed his intention to search the house and all the accused present there (except the appellants who were in the police station) restrained him by stating that there was nothing inside the house. Then he asked Panchafula - accused no. 5, mother of accused no. 1 Bhagwat, to move aside and then Police Patil unlatched the door. He, driver Shaikh Rahim, Rahul Mene, Govind Bedre and Panchafula entered the house. There were three rooms. The girl was not found in the first and second room. Govind Bedre found one bag of fertilizer with soft substance inside, kept in a rack. It was taken out and he gave call to driver Rahim and then PI Deshmukh was called there. On opening the bag, the dead body of the girl with folded hands and legs was found with her mouth gagged by raw cotton. There was pink frock and black legging on her person. The Police Patil identified the girl as Siddhi, the missing girl.

Then PW1 Sambhaji also identified it. When Panchafula saw that girl, she had a drama of fainting. Then the mob was getting unruly and PI Deshmukh was busy in providing safety to Panchafula. Then Police Constable Mane and Raut stopped the entry of the public and Police van was brought near the house and the girl in the bag was immediately placed in the van. He apprehended that, the mob would attack Panchafula and they would also attack and damage the house. He made a call to Police Station and asked lady PSI Gomase to send Police staff. Then Constables Pandit and Bele came there. Then Panchafula and the dead body of Siddhi were kept in the Jeep and Bele, Pandit and Police Patil locked the house to guard it until the next order. He took Sambhaji along with him and went to hospital and gave intimation to Dy.S.P. Jatale.

57. PW1 Sambhaji has deposed that, the Police had searched the house of the accused and at 9:45 p.m. dead body of Siddhi kept in a white coloured gunny bag was found. The body was taken out and the injuries on the private parts were noted. The clothes of the Siddhi were stained with blood and her mouth was gagged with cotton. PW20 PI-Deshmukh obviously had no prior knowledge as to whom the house was belonging to. He stated that PW1 Sambhaji stated that the said house was occupied by accused no. 3 Parbati and his family members. Accused no. 3-Parbati was having more than

one houses in the village. One of them is in front of house of PW1 Sambhaji. PW1 admitted that he was not knowing the house number and the owner of the house. His cross shows that, the house was shown by the villagers to the Police.

58. On the next day, the spot panchanama Exh. 62 was drawn in presence of PW2 Ramakant Kanthale, who is from Hingoli. He stated that, the Police Patil showed the spot in the said house. There were household articles in scattered state and there was cotton cake in one room. There was a chocolate wrapper on the spot and there was disturbed flooring. One T.V. set in damaged condition was found in the house. The spot panchanama drawn on 08.01.2016 at 10:30 a.m. is at Exh. 64. PW2 stated that, some cotton and wrapper of chocolate of Éclair company were seized from the spot. He stated that, Sarpanch was present at the time of spot panchanama. He could not tell the house number.

59. In cross-examination, he denied that the articles seized were not sealed on the spot. PW9 Govind Bedre was present at the time of recovery of the dead body from the house. He had been to the police station at 07:30 p.m. and he had accompanied his friend Rahul who was Press reporter. He also deposed that all the villagers took search of the girl in the field but she was not found. Then Police Patil

of the village showed the house of the accused Parbati Kshirsagar, father of accused No. 1 Bhagwat. One woman was sitting outside the house and door was latched. PI Deshmukh told her to get away and allow him to search the house and then the search was conducted. He stated that there were two wooden rafters kept on barrel and bag of sand and through the gap of wooden rafters they noticed the bag one containing sand and one white coloured gunny bag. On touch, he noticed that it was having some soft material inside. Hence he called Police driver Rahim and his friend Bele and PI Deshmukh also came there and dead body with her mouth gagged with cotton was found inside. She was dead and there was pink frock and black legging on her person. He also stated that the villagers got annoyed and started shouting. Hence PI Deshmukh was constrained to put the bag, PW1 Sambhaji and the lady Panchafula, who was sitting in front of house, in the Jeep and immediately moved to the police Station. He stated that the woman sitting there had stated that there was nothing in the house and she was accused no. 5-Panchafula before the court. He identified gunny bag (article 1), frock (article 2) and legging pant (article 3). In cross, he stated that the spot panchanama was not drawn immediately and he was not called by police. They were present in the village for two hours. He stated that there was no electricity available in the village. His evidence that, Panchafula told PI Deshmukh that there was nothing in the house, seems to be an

improvement. PW12 Sandeep is a Gramsevak working at Waranga (Masai) from August 2012. He received a letter dt. 14.01.2016 (Exh. 124) for extracts of Grampanchayat record of the house in question. He provided property tax receipt (Exh. 123) executed in the name of accused no.3 – Parbati, father of accused no. 1. The extract of house of accused No. 4 – Baban, father of accused no. 2 is at Exh. 124. He stated that, the house in question was in possession of Parbati but it was not bearing any house number. He has also issued Domicile Certificates of accused nos. 1 and 2 (Exh. 126 and 127) and other accused showing that they were residing there since birth. In cross-examination, he admitted that he was not resident of Waranga (Masai) and he was not present in the village on the day of incident. He admitted that, the house in question was not entered in the property tax register of the Grampanchayat and therefore he was unable to tell the name of real owner. But, he stated that, it was in the possession of accused no. 3 – Parbati. PW15 Hanuman Bele, Police Naik has visited the house on the spot on the call of PI Deshmukh. Then as per instructions of PI, he had guarded the spot till the next day upto 01:35 p.m. when the spot panchanama was drawn. PW16 Umesh Sovitkar is a Revenue Circle Inspector, who has drawn the sketch of the house and surrounding. The police had shown him the spot. His sketch is at Exh. 142. It shows that, the house in question is in front of a well with a fallow land and in front

of it there is a cement road of 15 ft. width. There is house of Masarao Narayan to the southern side of the house as per map at Exh. 143. PW18 Sanjay is a photographer. He has taken photographs of the spot on the next day morning at the time of spot panchanama. The photographs are at Exh. 153 to 159.

60. PW19 PSI Premlata Gomase has stated that, on that night at 10:10 p.m. driver Shaikh Rahim told her that dead body of Siddhi was found in the house of Bhagwat A1.

61. There is categoric evidence of PW1 Sambhaji, PW9 Govind & PW20 PI Deshmukh that, as per the information taken from Police Patil and Gram Panchayat, the said house was in possession of accused no.3-Parbati, the father of accused no.1-Bhagwat.

62. There is corroborative evidence in the form of conduct of accused no.5-Panchafula, mother of accused no.1 Bhagwat and of other accused persons. PW1 Sambhaji has stated that accused nos. 3 to 7 had obstructed them from entering into the house. He stated that, the villagers had shown the said house to the police. Immediately after the incident on discovery of the dead body in the house, according to PW20 PI Deshmukh, Panchafula made a drama of fainting. There is evidence that the villagers were very angry and

annoyed and there was severe problem of security of Panchafula. PW20 felt that Panchafula would be assaulted by the villagers and hence he did not waste time in drawing any panchanama and called police force, made arrangement for guarding the spot and immediately brought the dead body and Panchafula in his Jeep. PW1 has stated that, along with him Panchafula was in the Jeep. He denied that, he had given fist blow to Panchafula and that she had bleeding injury on nose but, PW20 has admitted that Panchafula had bleeding injury on nose (para 43). Due to security problem, he asked Gomase madam to drop Panchafula at the house of social worker for her security. In cross-examination of PI Deshmukh PW20, it was suggested that Accused nos. 3 to 7 had not obstructed him but had cooperated with him. PW19 Smt. Gomase, PSI, has corroborated him and stated that Panchafula was taken to the house of social Worker Suman Kadam. This part of evidence has not been seriously challenged. PW9 Govind had also stated that Panchafula was sitting in front of the house and told them that she was not knowing about missing girl. His evidence that, Panchafula told Police Inspector that there was nothing in the house seems to be omission but it has not been proved. In fact it was suggested to PW1 that he had given fist blow to Panchafula. Admittedly, PW1 and the villagers had no previous enmity with Panchafula. There is circumstantial evidence to show that the said house was in possession of the accused.

Considering the fact that Panchafula is a mother of accused no.1 Bhagwat, it is incriminating material circumstance suggesting that the said house was in possession of accused no.3 and his family and Panchafula was aware about the dead body inside the house.

63. It is pertinent to note here that, Dy.S.P. Prasanna More PW21 has recorded statement of PW20 PI – M.R. Deshmukh. Mr Girase, learned PP rightly relied on;

- (i) **Pradeep N Madgaonkar vs. State of Maharashtra (1995) 4 SCC 255.**
- (ii) **M. Prabhulal v. The Assistant Director DRI (2003) 8 SCC 449.**
- (iii) **Ravindra Shantram Sawan v. State of Maharashtra (2002) 5 SCC 604.**
- (iv) **Mohd. Hussain Babamiyan v. State of Maharashtra (1994) Cri.L.J. 1020.**
- (v) **Pannalal Damodar v. State of Maharashtra (1979) 4 SCC 526.**
- (vi) **Rameshbhai Mohanbhai Koli v. State of Maharashtra (2011) 11 SCC 111.**

64. In above cases it has been held that when the panch witnesses are not supporting, a police witness cannot be disbelieved merely because he is a police.

65. Mrs. Bharad argued that there is no convincing evidence that the house in which the dead body was found was of accused no.3-Parbati, father of accused no.1 - Bhagwat. There is no documentary evidence that, the house was registered in the Gram Panchayat record but it does not mean that the possession of the said house with accused no. 3-Parbati was not proved. PI - M.R. Deshmukh along with all the villagers, Police Patil and Sarpanch had made inquiry and had gone to the said house. Panchafula, mother of accused no. 1 was sitting there and she and other accused nos. 3 to 7 had obstructed him from taking search of the said house. There is categoric evidence of all the witnesses that the said house was in possession of accused no. 3-Parbati. One must not forget that the incident has taken place in a small village where each villager knows each other. There is unanimous opinion of all the villagers and all the witnesses examined that the said house was belonging to accused no. 3- Parbati. The facts discussed herein above are sufficient to hold that accused no. 3, father of accused no.1, was in possession of the said house. No opinion can be expressed about the ownership of the same.

66. There is one additional material to show that the said house has connection with accused nos. 1 and 2. PW11 - Dr. Prafulla Pathade has carried out the medical examination of both the accused

and had taken nail clippings. He handed over those samples in sealed condition to the Police Constable. PW14 Police Constable Namdeo Jadhav carried the muddemal articles along with covering letters (Exh. 135 to 136) to CA Office at Aurangabad on 11.01.2016. He delivered the articles and obtained the signatures on OC's. OC of the covering letter Exh. 137 bears the acknowledgment signature and stamp of CA office. The nail clippings of accused no. 1 are marked as Exh. F-4 and nail clippings of accused nos. 2 are marked as Exh. G-4. The Investigating Officer received CA reports Exh. 214 and Exh. 216. Exh. D is the cotton seized from the spot. As per CA reports at Exh. 214 and Exh. 216, the nail clippings of accused no. 1 and accused no. 2 showed whitish fibre like material. The evidence of PW22 Vaibhav Deshpande, Asst. Chemical Analyser shows that, the CA office had received muddemal articles as per letter Exh. 135, 136 and 137 and he noticed that as per microscopic examination, the fibre like material found in the nail clippings of the accused nos. 1 and 2 were similar to the fibre found in the cotton Exh. D. He has taken the photographs of the microscopic examination and has produced them before the court and reports to that effect are at Exh. 222 and 223. He has proved his reports of nail clippings Exh. 214 and 216 and reports of fibre quality Exh. 218 and 219 and resemblance report Exh. 222 to 225. In cross-examination, he gave admission that he was not firm that the cotton samples extracted by him was of the

same cotton. Nonetheless he had found similarity between the fibres found in the nail clippings of accused nos. 1 and 2 and the raw cotton seized from the spot and the cotton taken out by Medical Officer from the mouth. Ld. Adv Mrs Bharat submitted that, accused nos. 1 and 2 are labourers and therefore finding of cotton in their nail clippings is not incriminating circumstance but accused nos. 1 and 2 have not given any explanation how similar cotton fibres were found in their nail clippings.

67. Thus, when the dead body was found inside the house possessed by accused no. 3 – Parbati, who is father of accused no. 1 – Bhagwat, the burden was on accused no. 1 to explain how the said body was found there. Both the accused have given no explanation whatsoever in their statement u/s 313 Cr.P.C.

SEMEN OF ACCUSED NOS. 1 AND 2 ON THE FROCK OF VICTIM :

68. The evidence of PW3-Tulshiram, the inquest panch shows that, the frock and legging on the person of Siddhi were having blood stains. PW1 Sambhaji has identified frock article 2 and legging article 3 as that of his daughter Siddhi. He has also stated that, her clothes were stained with blood. PW9 Govind, who had seen the bag containing dead body for the first time has stated that there was a

pink coloured frock and black coloured legging on the dead body. PW10 Dr. Mahesh Gude has stated that, Gunny Bag article 1, frock article no. 2 and legging article 3 were handed over to police. Those clothes were seized from the Police Constable in presence of PW7 Ayaj Khan Pathan.

69. As per covering letter dt. 10.01.2016, muddemal articles were duly received on 11.01.2016. Those were 10 sealed parcels in connection with C.R. No. 9/2016. The prosecution has examined Carrier-PW14. He stated that, on 10.01.2016 he received muddemal articles together with a letter and he delivered them on 11.01.2016 at Forensic Science Laboratory, Aurangabad. The covering letters dt.10.01.2016 and 13.01.2016 are at Exh. 136 and 137. However, three sealed boxes were returned to him as the boxes were not bearing the signatures of Medical Officer. The Medical Officer has admitted that, inadvertently he forgot to sign the boxes but the articles were sealed. PW14 has again taken those boxes with covering letter dt. 13.01.2016 at Exh. 137 and delivered the same and obtained acknowledgment with stamp and signature of CA Office and Inward Clerk. Letters at Exh. 136 and 137 bear such seals. As per CA report Exh. 110, frock and legging were having few blood stains and the blood detected was of human. Besides, the frock (article A1) was also having semen stains of the blood group A and AB. As per

CA report, Exh.109 and 107, the blood samples of accused nos. 1 and 2 were having blood groups of A and AB. The same blood group was noticed in the semen stains on the frock of Siddhi.

70. The Medical Officer has not properly checked the frock and legging of the deceased Siddhi at the time of PM. When there was admittedly bleeding from vagina and anus, the clothes worn by deceased Siddhi were bound to be stained with blood. When the blood stains are shown in the inquest panchanama and in the CA report, the casual observation of Medical Officer that the clothes were not having blood stains cannot be believed. Besides, the frock was having semen stains which could not have been easily detected by the Medical Officer.

71. However, as per admissions of the witnesses those clothes were not sealed.

72. On the point of sealing, Mrs Bharad relied on;

- (i) Devender Pal Singh v Delhi [2002 (5)SCC 234]
- (ii) Devraj Suvarna v State of Maharashtra 1994(4) Bom. C.R. 85.

73 As per evidence of PW20 PI Deshmukh & PW14 Carrier Constable Namdeo, these clothes taken by PW14 to CA Office along with covering letter Exh. 136. As per CA report Exh. 110, stains of semen of blood group A & blood group AB (of accused nos. 1 and 2 respectively) were found on the frock. We agree with ld. Advocate Mrs Bharad that frock was in unsealed condition in the custody of police officers and in view of possibility of tampering, the CA report showing semen stains on the frock cannot be relied upon.

INJURY ON PENIS OF ACCUSED NO.1-BHAGWAT:

74. The medical examination of the accused supports the prosecution story about rape by the accused. As earlier discussed on 07.01.2016 at evening time only, both the accused were kept under surveillance at the Police Station. Unfortunately, their arrest has been shown quite late on 08.01.2016 at 08:00 p.m. PW4 Kanta has proved arrest panchanama Exh. 72 and 73 which disclose the time of arrest as 07:40 and 07:50 p.m. Thereafter, those were taken to PW11 Dr. Prafulla Pathade, Medical Rural Hospital, Kalamnuri for medical examination. As per his evidence and certificates Exh. 118 and 119, he examined accused nos. 1 and 2 at 10:20 and 10:40 p.m. He had seen following injuries on the private parts of accused no. 1. No smegma, not circumcised penis.

Oedema over glance of penis:

75. He opined that such Oedema can be produced by forceful sexual intercourse. Similarly, he found no smegma on the private parts of accused no. 2 Rahul and no injuries on his penis. Thereafter, he has collected samples of pubic hair, semen and nail clippings of both the accused and opined that both the accused were capable of having sex. In para 9, he opined that the injuries noticed on the penis of accused no. 1 must have been caused at the time of penetration.

76. The absence of smegma indicates possibility of sexual intercourse during last 24 hrs.

77. Dr. Pathade has recorded that the accused had taken bath 2-3 times but the evidence shows that both the accused were in custody of the police only and they could not have taken bath since they were nabbed by PW19 PSI Gomase from their house on 07.01.2016 at about 07:00 to 07:30 p.m.

BLOOD & SEMEN ON UNDERWEAR OF A2-RAHUL:

78. As per uncontroverted evidence, accused nos. 1 and 2 were nabbed by PW19 PSI Smt. Gomase on 07.01.2016 from their house at

about 07:30 pm and since then they were at the police station only . The admission of Medical Officer that, the accused told him that they had taken bath three times is certainly unreliable. When the accused were in the police custody they could not have taken bath. As per evidence of PW4 Kanta, both the accused were arrested on 08.01.2016 at about 08:00 p.m. The arrest panchanamas are Exh. 72 & 73. Since the accused were picked up within short time after the incident from their house, there is no possibility of change of their clothes as deposed by PW11 Dr. Pathade. Evidence of PW4 Kanta shows that, T-shirt, brown pant and under-pant of A1- Bhagwat were seized under seizure panchanama Exh. 74. Whereas; black pant, white shirt and underwear were seized from (A2-Rahul) vide Panchanama Exh. 75. He has identified T-shirt, pant & underwear of accused No. 1 Bhagwat (Articles 4, 5 & 6) whereas; shirt, pant and underwear of A2 Rahul were identified as articles No. 7,8 & 9. There is no material cross-examination of this witness to disbelieve him on the point of seizure of clothes. As per evidence of PW14 Namdeo & PW20 PI Deshmukh, these articles were forwarded on 11.01,.2016 to CA office along with covering letter Exh. 136. The covering letter dt. 10.01.2016 Exh. 136 shows that the clothes of the deceased were sealed with the labels and signatures of the panchas and the CA office & were sent in 3 days and CA Office has received the request in sealed condition. There is admission by PW14 that some muddemal

articles were not bearing seal and signature of Medical Officer but as per evidence of PI Deshmukh, forwarding letter, the muddemal were bearing seals and signatures of panch and request was received by CA office in sealed condition. Besides, there is no suggestion to the Investigating Officer that he had tampered with this muddemal property. As per CA report Exh. 110, no blood or semen was detected on the clothes of accused no.1. Similarly, no blood or semen was detected on the shirt or pant of accused no.2 but, on the nicker of accused no.2, blood of blood group A and semen were detected. There is no specific evidence of panch about sealing of these articles. However, absence of blood stains and semen stains on five out of six clothes disclose that there was no tampering. The presence of semen and blood of blood group of A on the underwear is therefore reliable and trustworthy even in absence of sealing. The blood group of saliva of deceased Siddhi is A (CA report Exh.109) whereas; (CA report Exh. 109) blood group of accused no. 2 is AB. Presence of semen and blood of blood group A on his nicker is material incriminating circumstance against him to connect him with the crime.

FAULTY INVESTIGATION :

79. We agree with the submissions of Id. Adv Smt Bharat that

the Investigating Officer has committed several mistakes as follows:

- I. No station diary entry was taken when PW1 Sambhaji on 07.01.2016 at evening time expressed suspicion against accused nos. 1 and 2 and thereafter PSI Smt. Gomase accompanied him to Waranga. However, this fact has been admitted. It is also admitted that both the accused were brought from Waranga to Kalamnuri at 08:00 p.m. Hence, this defect does not affect the prosecution case.

- II. No inquest panchanama was drawn on the spot. The evidence shows that, PI Deshmukh had not ascertained about death of Siddhi from Medical Officer. In absence of such proof, inquest could not have been done. Besides there is evidence of PW9 Govind, PW11 Dr Pathade, PW19 Smt. Gomase, PW20 PI Deshmukh that the villagers were very much disturbed and annoyed due to murder of a village girl from their village. On discovery of the dead body, the mob was getting out of control and there was danger to the life of accused no. 5 Panchafula. Even the mob had visited the hospital. PW20 PI Deshmukh was justified in not drawing the inquest panchanama on the spot. It is true that, as held in **State of Maharashtra through CBI Vs. Yakub Abdul Razak Memon & Ors., (2013) 13 SCC 1**, this deviation in procedure with reasons should have been shown by way of special report but it is not done.

- III. PI Deshmukh did not register the FIR of PW1 immediately after discovery of dead body at 09:40 p.m. The FIR was

registered at 4:16 a.m. on 08.01.2016 but we find that the prosecution is noway benefited by causing delay in recording the FIR. Smt. Bharad relied on **Kanhaiya Lal v State of Rajasthan 2014(4) SCC 715 & Amar S/o. Ramesh Lohkare v. The State of Maharashtra 2016 ALL M.R. (Cri) 4699**, that, unexplained delay in recording of FIR creates suspicion about the prosecution case and raises doubt about trustworthiness of the eye-witnesses. However, we find that, in the present case, PW1 Sambhaji had already intimated to the police his suspicion about accused nos. 1 and 2 at 07:00 p.m. and they were already nabbed at 07:30 p.m. PW1 Sambhaji did not disclose anything new in the FIR. After the recovery of dead body of Siddhi, it was taken to hospital where PW1 Sambhaji was present. There was unruly mob in the hospital premises. PW1 Sambhaji was under shock and grief. It was night time. The delay in recording of FIR cannot be with *mala fide* intention. In such situation, we find that, the delay in lodging the FIR does not create any suspicion.

- IV. The Investigating Officer has not arrested both the accused till 08.01.2016 till 7:40 & 07:50 p.m. but they were already taken into custody on 07.01.2016 at 07:30 pm and they appeared like juvenile and the IO might be in two minds whether they can be arrested or not. No doubt, as held in **State of Gujarat v. Kishanbhai etc. 2014(2) Bom.C.R. (Cri) 167**, he should have arrested them immediately and taken them for medical examination but in the present case, their late production before MO could have been beneficial to the accused. Meantime, there could have

been smegma formation on their penis which could have been adverse to the prosecution but it has not happened. No smegma was found on their penises.

80. Dr. Pathade had examined accused no. 1 on 08.01.2016 at 10:00 p.m. He had found oedema over glance of penis of accused no.1. He opined that, such oedema can be produced by forceful sexual intercourse. He had examined both the accused and had opined that both the were capable of having sexual intercourse. Thus, delay in examination of the accused by Medical Officer has not affected the prosecution case.

81. **Premjibhai Bachubhai Khasiya Versus State of Gujarat**
2009 CJ (Guj) 558.

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

82. The Investigating Officer did not understand the purpose of sending the samples for DNA. He should have collected blood samples of PW1 Sambhaji and sent it with blood stained underwear of accused no.2 for matching of DNA. Similarly, he should have sent

samples of semen of accused nos. 1 & 2 along with semen stains found on the frock of deceased Siddhi. As per samples sent vide letter Exh. 140, he has not done so. When no sperms were found in vaginal swab, sending samples for DNA was of no use and CA report would have been Nil. Therefore, non production of DNA report is not significant.

83. The Investigating Officer has failed to collect documentary evidence about the disputed house where the dead body was found. We find that, there is ample oral evidence to show the possession of the said house with accused no.3-Parbati, father of accused no.1 Bhagwat.

84. The Investigating Officer should have collected from Medical Officer the raw cotton taken out from the mouth of Siddhi and should have weighed it and should have shown its size or volume but the evidence on record shows that there was sufficient cotton stuffed in the mouth of deceased Siddhi which stopped the breathing passage causing death of Siddhi due to suffocation.

85. In **State of UP v Hari Mohan** ther **2001 SC 142**, there was so much faulty investigation that the Apex Court observed that the IO has not left a single stone unturned to help the accused. Still, the

Apex Court relied on other reliable material and held that the defective investigation cannot be always a ground to discard the prosecution story. In **Hema v State Tr. Insp. Of Police, Madras 2013 Cr. L. J. 1011 SC**, it is held, it is also settled law that for certain defects in investigation, the accused cannot be acquitted. This aspect has been considered in various decisions. In **C. Muniappan and others vs. State of Tamil Nadu, 2010 (9) SCC 567**, the following discussion and conclusion are relevant which are as follows:-

“55. There may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the IO and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. 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 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.

86. The defence of the accused that, PW1 was insisting accused nos. 1 and 2 to join him in labour work and since their

parents were opposing the same, PW1 has falsely implicated them is too flimsy and improbable to be accepted. We find that, the prosecution witnesses have no enmity or reason to falsely implicate the accused nos. 1 and 2.

87. It was argued that, assuming without admitting, if the accused have committed crime, they would not have any intention to cause death of the girl. The prosecution has not collected the cotton taken out from the mouth of deceased Siddhi and no opinion of the doctor has been obtained that the stuffing of that much cotton was sufficient in the ordinary course to cause death of Siddhi. We however find that both the accused had taken the small child aged four years and four months to a lonely house of accused no. 4's father and she was there subjected to rape and sodomy. The injury to penis of accused no. 1 corroborates the evidence of last seen together and custodial death. The injuries disclosed in post-mortem notes caused to the deceased girl are obviously caused by the act of sexual intercourse through vagina as well as unnatural intercourse through anal canal. It was argued that, no semen was found in the vaginal swab and anal canal of the deceased but the inquest panchanama and PM notes disclose that there was bleeding from the vaginal orifice and anal orifice. Such bleeding would definitely wash out any semen fallen in the vagina and anal canal. The semen stains were found on

the underwear of accused no.2. In order to complete their unbridled lust, the accused took precautions that the small child should not raise shouts. They had gagged her mouth and there were injuries on her face and inside the buccal cavity sowing the gagging of mouth. Besides they had stuffed cotton in the mouth to such an extent that it resulted into her death by suffocation. Doctor had opined that the cotton from the mouth was taken out and was sent to CA. The act of the accused in stuffing large amount of raw cotton in the mouth of a girl aged four years and four months and then gagging her mouth with cotton is an **act imminently dangerous squarely falling in clause 4 of Section 300 of IPC**. It must be presumed that they intended and knew the consequences of their act. Dr. Mahesh Gude has specifically stated that the victim child died due to asphyxia due to gagging due to packed raw cotton in her mouth. We find no difficulty in holding that, act of both the accused was done in furtherance of their common intention and it was imminently dangerous, which has resulted into death of the poor child. The case of the accused does not fall in any of the exceptions to Section 300 of IPC. We therefore hold that it was a clear case of murder, rape and sodomy by accused nos. 1 and 2.

88. After carefully considering the evidence on record in the light of the arguments advanced and the rulings cited before us, we

find following clinching circumstances which prove that accused nos. 1 and 2 committed the offences of kidnapping a minor girl Siddhi under the pretext of providing her chocolates and then gagged her mouth, committed rape and unnatural intercourse whereby Siddhi has died and thereafter both the accused caused disappearance of the evidence by concealing dead body of deceased Siddhi in a bag of fertilizer. The circumstances;

- (i) The evidence of last seen together duly proved by PW6 Gayabai and PW8-Shaikh Bismillah, supported by indirect evidence of PW1 Sambhaji and PW19 PSI Gomase. Siddhi was last seen in the company of Accused nos. 1 and 2 at 12:30 to 01:00 p.m. and she has died at around 03:00 to 04:00 p.m. She was aged only 4 years and the accused were permitted to take away her in trust and confidence and the time gap between last seen together and death of Siddhi is so small that it excludes any possibility of innocence of the accused.
- (ii) Custodial death: the fact that the dead body of Siddhi was found in a gunny bag kept in the house occupied by father of accused no. 1. At the time of search, accused no. 5-Panchafula mother of accused no. 1 was present and she had opposed the entry of police and panchas stating that there was nothing inside the house.

- (iii) Oedema over glance penis of accused no. 1 on 08.01.2016 at 10:30 p.m. in examination by PW11 Dr. Pathade. Absence of smegma on the penises of accused nos. 1 and 2 on 08.01.2016 at 10:30 p.m. whereas; meanwhile accused nos. 1 and 2 were in the custody of police.
- (iv) Though accused no. 2 had no injury, there was blood found on his nicker which was of the blood group 'A' whereas; his blood group is 'AB'. The blood group of Siddhi was 'A'.
- (v) Cotton fibers similar to the cotton seized from the spot and cotton from mouth of victim found on nail clippings of both the accused.
- (vi) All the villagers felt that A1 & A2 must have committed the rape, sodomy and murder when they had no enmity with the accused. They were aggressive and were likely to assault A1, A2 and their relatives with no previous enmity.

89. In our opinion, the evidence of last seen together itself is sufficient to connect the accused with the crime. Similarly, the evidence of custodial death by itself is also sufficient. The other circumstances are corroborative in nature and they provide strength to the reliability of main evidence. We therefore hold that both the accused have kidnapped deceased Siddhi from her house under the

pretext of providing her chocolate for the purpose of committing rape on her and thereafter they have gagged her mouth and have committed gang rape and act of unnatural intercourse with her. The gagging of mouth by stuffing raw cotton in her mouth which was an act imminently dangerous has resulted into her death and both the accused thereby committed brutal murder of deceased Siddhi. We therefore find that Id. trial Judge has properly appreciated evidence and has arrived at correct findings as against accused nos. 1 and 2. Hence, **we confirm the finding of conviction u/s 366 and 302 IPC.** However, since Siddhi was aged four years and four months, instead of conviction u/s 376 and 377 IPC, we hold both the accused guilty for offences punishable u/s 5(g) and 5(i) r/w Section 6 for committing penetrative sexual assault per vagina and for offence u/s 5(g) and 5(i) r/w S. 6 of POCSO Act for penetrative sexual assault per anus.

RAREST OF RARE CASE:

90. Learned PP Shri. Girase & Learned advocate for the accused Smt. Bharad have relied upon following rulings.

GENERAL PRINCIPLES :

- (i) **Machhi Singh V State of Punjab (1983) 3 SCC 470.**
- (ii) The following propositions emerge from the case of **Bachan Singh Vs. State of Punjab (1980) 2 SCC684:**

- (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 alongwith 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.

. 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 ?*

91. In Bachan Singh's case, it is laid down that aggravating and mitigating circumstances should be considered. Those are shown as follows.

[i] Aggravating circumstances (para 202):

- (a) *Preplanned murder with extreme brutality.*
- (b) *Exceptional depravity*
- (c) *Murder of Military Officer or Police Officer or any public officer on duty. In consequence of anything done during discharge of duty.*
- (d) *Murder of a person who had rendered assistance to the Magistrate or a Police in discharging their duties.*

[ii] Mitigating Circumstances (para 206):

- (a) *Commission of offence under the influence of extreme mental or emotional disturbance.*
- (b) *If the accused is young or old, he shall not be sentenced to death.*
- (c) *Probability of the accused not committing criminal act of violence as would constitute a continuing threat to the society.*
- (d) *Probability of reformation or rehabilitation of the accused.*
- (e) *Murder committed in fact showing that accused believed that he was morally justified in committing the offence.*
- (f) *Murder under duress or domination of another person.*
- (g) *Mentally defective condition of the accused impairing capacity to appreciate criminality of his conduct.*

[iii] In para 207, extreme youth has been recognized as a strong ground for leniency.

92. In **Shankar Khade v State of Maharashtra AIR 2013 SC**

(Supp) 947, it is held as under:

27. In Sangeeta's case this Bench has held that there is no question of balancing the above mentioned circumstances to determine the question whether the case falls into the rarest of rare cases category because the consideration for both are distinct and unrelated. In other words the "balancing test" is not the correct test in deciding whether capital punishment be awarded or not.

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

the will of the judges.

93. **Jashuba Bharatsinh Gohil v. State of Gujarat (1994 (4) SCC 353).**

In the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

94. **Santosh Kumar Satishbhushan V State of Maharashtra.**

Importance of right to life in the constitution is highlighted and case based on statement of approver was held to be fit for life imprisonment.

RAREST OF THE RARE : DEATH SENTENCE CONFIRMED.

- (i) **Machhi Singh V State of Punjab (1983) 3 SCC 470.**

It was a case of 17 murders. Not applicable to the present case.

- (ii) **Laxman Naik v State of Orissa (1994) 3 SCC 381.**

The uncle had kidnapped his 7 year old helpless niece and committed rape and cold blooded brutal murder. Circumstance of last seen together and misrepresentation by the accused were held sufficient to hold him guilty and death sentence was confirmed. This is similar to the present case.

- (iii) **Bantu Versus State of Uttar Pradesh (2008) 11 SCC 113.**

A five year old helpless girl was raped and murdered by the accused by inserting rod of 33 cm in vagina. His act was held depraved to confirm the death sentence.

- (iv) **Shivaji Alhat v State of Maharashtra (2008) 15 SCC 269.**

Here 9 year old helpless girl was raped and murdered by strangulation with a rope. The argument that cases based on circumstantial evidence should not result in death sentence were rejected as illogical and the death sentence was confirmed.

- (v) **Rajendra Wasnik v State of Maharashtra (2012) 4 SCC 37.**

In this case, a married person aged 31 years lured a 3 year old child and subjected her to heinous brutal rape and murder. He had betrayed the trust and confidence. He had taken bites on the chest of the victim girl. It was held as a rarest of the rare case for confirming death sentence.

- (vi) **Vasanta Dupare v State of Maharashtra** (Criminal Confirmation Case No. 1/2012), the Division Bench of Nagpur Bench.

Here a 47 year old man lured 4 year old girl and subjected her to rape and murder. He was a history-sheeter. There was no possibility of reformation. He was likely to remain menace to the society. She was battered to death by assaulting with two heavy stones. It was observed;

"The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a "tsunami" of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of sensitive polity".

- . The death sentence was confirmed.

- (vii) In **State of Maharashtra Versus Shatrughna Baban Meshram** (Criminal Confirmation Case No. 01 of 2015),

the Division Bench of Nagpur Bench upheld the sentence awarded for rape and murder of a four year old girl. It was held in para 41 which is as under :

41. The Apex Court further observed that the principle that when the offence is gruesome and was committed in a calculated and diabolical manner, the age of the accused not be a relevant factor.

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

- (viii) In **The State of Maharashtra Versus Viran Gyanlal Rajput** (Confirmation Case No. 3 of 2014) decided by the Division Bench of Principal Seat (Smt. V. K. Tahilramani & Smt. I. K. Jain, JJ.) on 16.02.2015. It is a Rape and murder of 13½ year old girl by the accused aged 22 years. The accused had acted in beastly manner and after quench of his unbridled lust, the accused killed the victim so that she should not expose him and her naked dead body was thrown into a ditch. It resulted into death sentence and the same has been confirmed.

- (ix) In **Purushottam Dashrath Borate & Anr. V. State of Maharashtra** (Criminal Appeal No. 1439 of 2013) decided by Apex Court the then Hon'ble Chief Justice of India - H. L. Dattu. The death sentence was awarded to the accused who committed rape and murder of an associate in BPO in Wipro Company, Pune.
- (x) In **D. K. Basu v. State of W.B. (2002) 1 SCC 351**, custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare case.
- (xi) In **Dhananjay Chatterjee v State of W.B. (1994) 2 SCC 220**, the accused persons had entered into the house and committed rape, murder and theft of a girl aged about 18 years. The Apex Court observed that, if the security guards behave in this manner, who will guard the guards? The offence was not only inhuman, and barbaric but it was a totally ruthless crime of rape followed by cold blooded murder and an affront to the human dignity of the society.
- (xii) In **Surja Ram v. State of Rajasthan [(1996) 6 SCC 271]**, there was absence of provocation and the manner in which the crime was committed was brutal.

- (xiii) **In Mukesh Vs State (NCT of Delhi) (Nirbhaya's Case) 2017(6) SCC 1**, the Apex Court observed that, it was a case of most savage and inhuman activities causing grave injuries ultimately annihilating the life of rape victim. The acts demonstrated mental perversion and inconceivable brutality and attempted to destroy all evidence. In the context, the Apex Court held balancing of aggravating and mitigating circumstance factors like poverty, young age, dependents, absence of criminal antecedents, post-crime remorse and good conduct in prison cannot be taken as mitigating circumstances to take the case out of the category of “rarest of rare cases”. Incident like gang rape creates ripple in conscience of society and serious doubts are raised whether we live in a civilized society. The court should respond to society's cry for justice against crime. The accused in this case were awarded with death sentence.
- (xiv) **State of Maharashtra Vs Ravi Ghumare** (Confirmation Case No. 1 of 2015) decided by the Aurangabad Bench of Bombay High Court on 20.01.2016 (Coram : A. V. Nirgude

& Indira K. Jain, JJ.) (Confirmation Case No.1/2015). This was a case where two year old child lured by offering chocolates was subjected to rape and assault which resulted into death by asphyxia due to throttling by an accused person aged 25 years. After considering the various judgment of the supreme court, it was held that it was a fit case for death sentence.

CASES OF LIFE IMPRISONMENT :

- (i) In **Bantu Singh v State of M.P. AIR 2002 SC 70**, there was a rape and murder by gagging mouth. Though it was held as a murder, it was held that, it may not be intentional and therefore the death sentence was reduced to imprisonment for life. The facts in the present case are similar. Though the accused can be held guilty u/s 302 r/w 34 on account of doing an act imminently dangerous, it is not clear whether they intended to cause death of Siddhi or not.

- (ii) In **Amit v State of U.P., AIR 2012 SC 1433**, the accused was aged 28 years and a neighbour with no previous criminal record, it was held that the possibility of reformation was not ruled out and hence death sentence was not warranted.

(iii) **Mohinder Singh V State of Punjab 2013 CJ (SC) 48.** The accused was sentenced to death as he had committed rape on his daughter and after undergoing sentence of 12 years, when he returned he committed murder of his wife before his another daughter. The Apex Court held that not only the brutality of the crime but also the circumstances surrounding the offender, both mitigating and aggravating should be considered and in the facts of the said case, it was observed that the offender deserved a chance for reformation. Hence, the sentence was reduced to imprisonment for life.

(iv) **Vashram Narshibhai Rajpara V State of Gujarat (2002) 9 SCC 168.**

Constant nagging by family was treated as mitigating fact as it can mentally imbalance the accused. Intensity of bitterness and the escalation of simmering thoughts into a thirst for revenge or retaliation were also considered to be a relevant factor.

(v) **In State of Maharashtra Versus Rakesh Manohar Kamble @ Niraj Ramesh Wakekar 2014(2) Bom. C. R. (Cri.) 664.**

The accused was a terror. He made forcible entry in house

of victim with threats to her mother and committed rape, murder of a 19 year old girl. It was held, as very serious offence but just short of rarest of rare to award life imprisonment of minimum of 30 years without remission.

(vi) In State of Maharashtra Versus Nisar Ramzan Sayyed (2017) 5 SCC 673, Nissar had poured kerosene on person of his wife Summayya and set her on fire. Ld. Sessions Judge, Shrirampur convicted the accused and sentenced to capital punishment. The High Court set aside the conviction and acquitted the accused. The Apex Court reversed the judgment and restored conviction. While dealing with the sentence, it was observed:

17. The next question, however, is as to whether in a case of this nature death sentence should be awarded. A life is at stake subject to human error and discrepancies and therefore the doctrine of 'rarest of rare cases', which is not res integra in awarding the death penalty, shall be applied while considering quantum of sentence in the present case. Not so far but too recently, the Law Commission of India has submitted its Report No.262 titled "The Death Penalty" after the reference was made from this Court to study the issue of death penalty in India to "allow for an up-to-date and informed discussion and debate on this subject". We have noticed that the Law Commission of India has recommended the abolition of death penalty for all the crimes other than terrorism related offences and waging war (offences affecting National Security). Today when capital punishment has become a distinctive feature of death penalty apparatus in India which somehow breaches the reformatory theory of punishment under criminal law, we are not inclined to award the same in the peculiar facts

and circumstances of the present case. Therefore, confinement till natural life of the respondent-accused shall fulfil the requisite criteria of punishment in peculiar facts and circumstances of the present case.

95. After considering the above judgments on the point of punishment, we have no doubt that the act of the accused nos. 1 and 2 committed in furtherance of their common intention is strongly condemnable. The aggravating circumstances are that a four year old girl was subjected to rape, sodomy and murder. She was hapless helpless, defenceless victim. Normally, in such case, death sentence is awarded. However, in this case following are mitigating circumstances.

- i. *Both the accused are between 18 and 19 years. Accused no. 1 is aged 18 years and 7 days only. Accused no. 2 is aged 19 years and 4 months.*
- ii. *Considering the age, there cannot be any criminal record against the accused. There is no material brought by prosecution showing criminal record of both the accused.*
- iii. *In the present case, though the circumstances disclose that both the accused in furtherance of their common intention subjected a four year old girl to rape, sodomy and murder, there is no direct material showing the parts played by accused no. 1 and accused no. 2 individually. It is not known who has gagged her mouth by stuffing raw cotton.*

96. In **Bantu Singh v State of M.P. AIR 2002 SC 70**, there was a rape and murder by gagging mouth. Though it was held as a murder, it was held that, it may not be intentional and therefore the death sentence was reduced to imprisonment for life. The facts in the present case are similar. Though the accused can be held guilty u/s 302 on account of doing an act imminently dangerous, it is not clear whether they intended to cause death of Siddhi or not. The offence of murder in this case is not diabolical though rape & sodomy are brutal. Extreme young age is recognized as mitigating circumstance. Hence we hold that this is not the rarest of rare case. However, considering the gravity and seriousness of the offences, we feel it necessary to hold that the imprisonment for life should not be less than 30 years without remission.

97. Before parting with the final order, we must appreciate the efforts taken by Id. Advocate Mrs. Bharad for the appellants/accused and learned Public Prosecutor - Mr A. B. Girase. They have thoroughly studied the matter and were fully prepared factually as well as on law points and have provided substantial assistance in deciding the matter on merits. We appreciate their preparations and arguments on all points in very efficient manner.

98. We pass the following order.

ORDER

- (i) The request for confirmation of death sentence is turned down.
- (ii) Criminal Appeal No. 180/2017 is partly allowed. The sentence of both the accused for offence u/s 363 r/w 34 IPC is set aside on technical ground. The conviction u/s 376(2)(i) r/w 34 IPC is altered to conviction u/s 5(g) & 5(i) r/w Section 6 of Prevention of Children from Sexual Offences Act and conviction u/s 377/34 is also converted into Section 5(g) & 5(i) r/w Section 6 of POCSO Act. However, the sentences under those sections are maintained as they are. The conviction u/s 302 r/w 34 IPC is maintained, however, the sentence of capital punishment is set aside and both the accused are sentenced to suffer imprisonment for life which shall not be less than 30 years without remission. Conviction u/s 366 r/w 34 & 201 r/w 34 IPC are maintained as they are.
- (iii) All the sentences shall run concurrently.

- (iv) Both the accused are in custody from 08.01.2016 till date and they shall be entitled for set off as per rules.
- (v) In view of disposal of Criminal Appeal No. 180 of 2017, nothing survives for consideration in Criminal Application No. 2289 of 2017 and same stands disposed of.

[A. M. DHAVALA]
JUDGE

[S. S. SHINDE]
JUDGE

sgp