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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

**CRIMINAL APPEAL No. 891 of 2010.
ALONG WITH
CRIMINAL APPLICATION No. 1290 of 2012.
IN
CRIMINAL APPEAL No. 891 of 2010.**

Vijay Babasaheb Nanavare, **..Appellant.**
age 30 years, resident of MIG Building No.21,
Thane at present Flat No.14, Room No.12, 6th
Scheme, Nashik taluka and District Nashik, r/o
Padmapur, taluka Patoda, District Beed (at
present in Central Prison, Nashik Road, Nashik.

Vs.

The State of Maharashtra, (Through the **.. Respondent.**
Inspector of Police, Satpur PS.Taluka and District
Nashik.

WITH

CRIMINAL APPEAL No. 448 of 2011

The State of Maharashtra,
(Through the Inspector of
Police, Satpur Police Station,
Taluka and District Nashik.

Vs.

..Appellant.

Vijay Babasaheb Nanavare,
age 30 years, resident of MIG Building
No.21, Thane at present Flat No.14,
Room No.12, 6th Scheme, Nashik taluka
and District Nashik, r/o Padmapur,
taluka Patoda, District Beed (at present **..Respondent**
in Central Prison, Nashik Road, Nashik.

Mr. Abhaykumar Apte, Advocate appointed by Legal Aid Committee for the appellant in Cr.Appeal No.891/2010 and Cr.Appln.No.1290/2012 and for Respondent in Cr. Appeal No. 448/2011.

Mr. H.J. Dedhia, APP for Respondent/State in Cr. Appeal No. 891 of 2010 and for the Appellant/State in Cr.Appeal No.448 of 2011.

CORAM:- B.R. GAVAI & SMT. BHARATI H. DANGRE, JJ.

Date :- 13th January, 2018.

JUDGMENT (PER: Smt. BHARATI, H. DANGRE,J):-

1 This present appeal, preferred by the original accused (referred as “appellant”), arises out of a judgment dated 15/10/2010 passed by the learned Additional Sessions Judge-2 Nashik in Sessions Case No. 88 of 2006, whereby the appellant is convicted and

sentenced for kidnapping minor girl, aged about ten years, with intent to commit rape on her and for murdering said girl and thereby committing offences punishable under sections 366-A, 376(2) (f), 302 of the Indian Penal Code. On conviction under Section 302 of IPC, the appellant is sentenced to suffer imprisonment for life and to pay a fine of Rs.1000/-. For conviction of offences under Section 366-A and 376 (2) of IPC, the appellant is sentenced to suffer RI for ten years and to pay fine of Rs.1000/-on each count. In default to pay fine imposed against the appellant as aforesaid, he is directed to suffer Simple Imprisonment (SI) for three months. All the sentences have been directed to be run concurrently.

2 The case of prosecution in nut-shell is reproduced below:-

On 23/2/2006 a dead body of one girl of tender age was found lying in the field of one Shri. Darade. At that time, one Shri Sanjay Nikam visited the spot and identified the dead body as of his daughter namely Swapna @ Rinku. It is the case of prosecution that a missing complaint was filed by one Sanjay Nikam on 22/2/2006. Sanjay

Gangadhar Nikam who is examined as PW 17 residing at Shivpuri Chowk, Nashik stated that he has two daughters namely Sonal and Rinku. According to the prosecution, the unfortunate incident took place on 22/2/2006 when that day, at 8:30 p.m. PW. No.17 had gone to see Ramlila along with deceased Rinku. At that time, daughter Rinku said to him that she would bring her younger sister Sonal there and she left the place. At 11:00 p.m. PW No.17 Sanjay Nikam went to his house and he found that Rinku had not returned home and therefore he took search of Rinku till about 12:30 a.m. or 1:00 a.m. and thereafter he went to police station, Satpur and lodged missing report. He also handed over photograph of Rinku to the police. Thereupon, Police started investigation. On 23/2/2006 Nitin Metkar (PW 19) who was working as Senior Police Inspector at Satpur Police Station, at 9:30 to 10:00 a.m. was informed by one Vitthal Bhandure that a dead body of a small girl was lying in the field of Darade and he, Dalvi and other policemen had gone to the spot and had seen that a dead body of a girl was lying in the wheat crop and her Salwar and nicker were lying near the dead body. There were stains of mud on

both sides of Salwar. Blood stains were also found on the plants of wheat which were fallen down. The mud nearby was also blood stained. Mouth of the girl was also filled with mud. By sending wireless message to the Control Room, he made inquiry as to whether any girl was missing and he had asked Shivaji Dalvi, Police Inspector, In-charge of Satpur Police Station to prepare inquest panchnama and called a photographer and dog-squad to the spot. Thereafter, Accidental Death (A.D.) No.14/2006 was registered with Police Station and when the inquest was going on, a person, namely, Sanjay Nikam (PW 17) came to the spot and identified the dead body of his daughter Swapna @ Rinku. The Investigating Machinery was set in motion and the dead body was sent for postmortem. The search of the accused person was initiated.

On 25/3/2006 at about 3:00 a.m. Ramesh Patil, Senior Police Inspector of Ambad Police Station was on patrolling duty. When his vehicle reached near Atul Dairy, Ambad Link Road, he was stopped by ten to eleven women. Out of those women, Pranpati Kanojiya

complained that when she and her grand-daughter Puja were sleeping on the Ota/plinth of her house at Shivpuri Chowk, somebody had taken away Puja. At that time, one Vitthal Wani told that he had seen one person taking a girl on his shoulder. Ramesh Patil started taking search and near More Nala, Ambad Link Road the accused was found with said Puja. The accused and Puja were taken to Pranpati Kanojiya and she identified Puja. In respect of this Cr. No.111/2006 was registered against the accused with Ambad Police Station.

3 During the course of investigation of Cr.No.111/2006, it was transpired that on 22/2/2006 the accused had kidnapped deceased Swapna @ Rinku, committed rape on her and thereafter put her to death. Statement of accused was recorded under Section 27 of the Evidence Act. During investigation, the accused revealed the spot where he committed rape and murdered the victim girl. During the course of investigation, blue colour bicycle used by the accused during the course of commission of crime, pants, shirt, a pair of chappal and under-pant were recovered from the accused. On 27/3/2006 Ramesh

Patil sent all papers and muddemal to Satpur Police Station. The accused was sent for medical examination to Medical Officer, District Hospital, Nashik on 28/3/2006. The samples of semen, blood, nail and pubic hair of the accused were obtained and were sent to Forensic Science Laboratory with his clothes and plastic covers inserted on both the sides of handle of bicycle on which mud was found.

4 After reading the news in respect of arrest of this accused published in Newspaper, witnesses Pravin Nikumbh, Maruti Fad and Arun Dalvi went to police Station and stated that they had seen the accused while taking the deceased. Their statements were recorded. Two other witnesses also claimed that on 22/2/2006 at 11:00 p.m. the accused had come to their liquor shop to consume liquor with bicycle and having mud stains on his clothes. Their statements were also recorded. The Test Identification Parade (T.I.Parade) of the accused was held and after collecting evidence, charge-sheet came to be filed against accused Vijay in the Court of the learned Judicial Magistrate, First Class, Nashik for offences punishable under Sections 366-A, 376

and 302 of IPC. The offences under Section 376 and 302 of IPC being triable by Court of Session, the learned JMFC committed the case to Court of Session, Nasik (the “Trial Court” for short).

5 The learned Trial Judge after considering the papers of investigation, framed charges against the appellant/accused vide Exh.10. The accused was charged with an offences punishable under Sections 363, 366-A of IPC along with Section 376 of IPC for committing forcible rape on the deceased Swapna @ Rinku and thereafter committing her murder, intentionally and knowingly causing her death by inserting mud in her mouth and throttling her and thereby committing the offence under Section 302 of IPC. The said charge was read over and explained to the accused in Marathi. The appellant pleaded not guilty and claimed to be tried. His defence was that of total denial.

6 In order to bring home the guilt of the accused, the prosecution has examined twenty witnesses. The case of the

prosecution is based on circumstantial evidence and in order to link the circumstances in a chain, the prosecution examined the witnesses to establish that the deceased was last seen alive in the company of the accused and thereafter she was found dead. Sanjay Nikam, father of deceased was examined as PW 17 who deposed that, on the day of incident at about 8:30 p.m. when he went to see Ramlila programme, his daughter Rinku came there and she caught hold his hand. She said to him that she would bring her younger sister and left and she thereafter did not come back. From that point of time, Rinku was found to be missing and could not be found though extensively searched which resulted in he approaching the Police Station and lodging a missing complaint. He also tendered photograph of his daughter to the Police Station.

7 The prosecution examined PW No.5 Shri Pravin Pandharinath Nikumbh who had gone to see Ramlila being performed along with his friend Maruti Fad (PW No.7). The said witness has deposed before the Court that when he had been to Shivpuri Chowk to

watch Ramlila programme and when the programme was going on, he saw one person wandering on bicycle. PW No.5 deposed that said person spoke to one girl and thereafter took that girl on his bicycle. He further stated that said person had come near them. After seeing the programme of Ramlila, the witness had gone home. He stated that when he read in the newspaper that one person had committed rape on the minor girl, after some days he went to the police station and when he was shown the photograph of the girl he had identified the said girl to be the one when he had seen with the accused person. He identified the accused sitting in the dock as the one who had accompanied the girl. He also identified the bicycle on which the accused had taken away girl. The testimony of this witness is corroborated by PW 7 Maruti Fad who had deposed, that on 22/2/2006 he along with his friend (PW 5) had gone to watch the programme of Ramlila at Shivpuri Chowk which was situated at the distance of 15 to 20 minutes from his house. He deposed that a boy was standing by their side with a bicycle. A small girl was with him. Thereafter, that boy and girl had left that place. They had left at about

10:00 p.m. He had not seen in which direction they had gone. PW 7 Maruti Fad has categorically stated that the boy was standing at the distance of five feet from him and he was there for about 5 to 10 minutes and he can identify the boy, if shown to him. PW 7 has identified the accused sitting in the dock as the same boy though he expressed his inability to identify the bicycle. This witness was also called for the identification parade, conducted by the police in Central Jail after one month and he stated that he had identified the accused from 5 to 6 persons. This witness has been put to extensive cross-examination. In cross-examination, he was not able to give the details of the clothes on the person of boy and girl and he had stated that he had not seen the girl carefully. The testimony of this witness was also attempted to be brought in disrepute on the ground that an offence was registered against him for an attempt to commit murder of the Councilor Shri Thakare and he was in jail for four months.

8 In order to further establish the chain of events, the prosecution has examined PW 6 Arun Dalvi, an auto-rickshaw driver and who had deposed before the Court on the day of incident at about

10:15 p.m., he left the passengers at Ambad-Link Road and was coming back to Trimurti Chowk, Nashik and while proceeding to Keval Park, the wheel of his auto-rickshaw got punctured. At that time, he was changing the stepney (spare wheel), he saw one person going on bicycle from city to Ambad-Link road. He deposed before the Court that at that time one auto-rickshaw was coming from Ambad-Link road and approaching to CIDCO, the bicycle rider applied brake and he came near his auto-rickshaw and he lost his balance on the bicycle. Witness deposed that a brief conversation took place within him and the person on the bicycle apologized to him. This witness deposed that he noticed that one girl was sitting on the backside of the bicycle and she was crying and saying “Mala Pappa Kade Jayche Ahe” (“मला पप्पा कडे जायचे आहे”) and the bicycle rider was saying her “Apan Pappa Kade Chalalo Ahe” (आपण पापाकडे चाललो आहे.). This witness then deposed that bicycle rider along with that girl proceeded to Ambad Link road. He stated that he could identify the said bicycle rider, if shown to him and he identified the accused sitting in the dock to be the same person. He also stated that he would identify the bicycle if

shown to him. However, he was unable to identify said bicycle. The said witness was also cross-examined at length and he was not able to disclose the details about the clothes worn by the accused and the girl but he mentioned that the bicycle rider was thin and heighted. The next witness examined by the prosecution to establish the chain of events is PW 9 Mohan Dafedar who was working as a Manager in a country liquor shop situated at village Ambad. He deposed before the Court that on the date of incident at about 11:00 to 11:15 p.m., he along with one Shankar Khamkar (PW 10) was present in the shop and one person came there asking liquor worth Rs.10/-. This witness stated that there were stains of mud on the person of that person. He consumed liquor and left. This witness stated that the person was wearing a white shirt and he was in the shop for about 2 to 5 minutes. Though he was unable to give complexion of said person, he stated that he can identify him if shown to him. He identified the accused as the person who had come to the shop by pointing out to the accused who was present in the dock. He also stated before the Court that he was called in Central Jail and he had identified the person who had

come to his shop to consume liquor.

His version is corroborated by PW 10 Shankar Khamkar who has stated that the person who came in the liquor shop on bicycle is the same person who was asking liquor for Rs.10/-. He deposed before the Court that since he noticed mud on his shirt and pant he asked him as to why there was mud on his clothes and he answered that he was in tension and nothing should be asked from him. This witness deposed that he consumed liquor and left on his bicycle. This witness had identified the accused sitting in the Court by pointing out finger towards him.

9 Through the above witnesses, the prosecution has attempted to establish its case that the deceased who had been to watch Ramlila programme at Shivpuri Chowk, went missing from the said spot at around 8:30 p.m. PW No.4 had seen the deceased girl along with the accused who was wandering at the place of Ramlila on his bicycle and he was seen talking to the said girl and later on she

was taken by him on his bicycle. He is corroborated by PW No.7 who had seen the deceased in the company of the accused and leaving the place of Ramlila at around 10:00 p.m. PW No.9 and PW No.10 had seen the deceased person who had approached the liquor shop on his bicycle wearing a white shirt which was stained with mud at about 11:00 p.m. The said accused person was all alone and he consumed liquor. On the basis of evidence of these witnesses, the prosecution has aimed to establish that the deceased was last seen in the company of the accused at Ramlila event and while leaving the place, he took deceased until and then when the accused approached the liquor shop, he was all alone and the deceased girl was not with him.

10 The prosecution then relies upon the evidence of PW 3 Sandip Bhandure who had been to the wheat field of one Shri. Darade on 23/2/2006 and he saw the dead body of a girl lying in the said field. He stated that the police were present at the said spot and there was a blue colour Salwar which was identified by him. Further evidence of the prosecution is in the form of deposition of PW 1

Shivaji Dalvi who is Police Inspector of Satpur Police Station and he was informed by one Vithal Savliram Bhandure at about 9:00 a.m. that in the agriculture land of one Darade dead body of one girl aged about eight to ten years is lying. On receipt of such information, he visited the spot situated in Satpur locality which was wheat field and found the body lying there. On reaching the spot he prepared the spot panchnama, also carried inquest panchnama with the assistance of panchas and on coming to police station he lodged the complaint to the effect that the girl had become victim to sexual assault.

11 The prosecution, then, relied upon the testimony of PW No. 16, Dr. Dipti Vaida, Medical Officer, Civil Hospital Nashik, who carried out the postmortem of the deceased along with one Dr. Aher. The said witness had deposed that the body brought for postmortem was of a girl aged about 8 to 10 years and she was wearing a blue colour Kurta which had mud stains. The said witness deposed that she found the following external injuries on the body of deceased.

- (i) External genital was swollen and blood stains,
- (ii) There were injuries over the neck. There was bruising mark over the neck just below mandible with nail marks on both sides of trachea. The finger impression contusions,
- (iii) There was abrasion on left lateral vail 1 x 1 cm.
- (iv) There was evidence of vaginal bleeding with tear extending upto anus with anus sphincter lost.

The witness has further deposed that the age of the above injuries was within 12 to 15 hours and they were ante-mortem. The doctors opined cause of death of the deceased as to “asphyxia due to throttling”. The prosecution has therefore established that the deceased was subjected to sexual assault and then done to death. The age of injuries found on the body of deceased was within 12 to 15 hours old. The postmortem of the dead body was started at around 2:30 p.m. and was completed at 3:30 p.m. on 23/2/2006. The said witness gave details of the injuries to the external genital of the dead body which was described as follows : (i) External genital was swollen and blood stains were found and (ii) There was evidence of vaginal

bleeding with tear extending upto anus with anus sphincter lost. The said witness / doctor had also revealed in cross-examination that there was some semi-digested food in the stomach of the deceased and deceased might have taken last meal prior to death within 4 to 6 hours. The doctor also stated that skin of the deceased was mud stained and blood stained and Rigor mortis was in developing stage. She had also deposed that there was mud in the mouth and blood was oozing from the nose of the deceased. Said witness proved P.M.notes at Exh.79. The said P.M. notes mentioned about injury in column no.17 to be fresh about 12-15 hours. Stomach and its contents revealed exact cause of death and this is perfectly in the tune with the evidence of the father of deceased (PW 17) who had stated that he had meal with the deceased at around 8:00 to 8:30 p.m. and then went for watching Ramlila.

Thus, the prosecution has brought on record the evidence in the form of PW 17, PW 6, PW 7, PW 9 and PW 10 to establish the last seen theory and also establish that the time gap between the deceased last seen alive with the accused and the time when her dead body was

found, that would lead to an inference and conclusion in the form that it was only the deceased who had an opportunity to murder the deceased.

12 Through the aforesaid prosecution witnesses, the prosecution has established and proved the following circumstances:-

(a) The deceased Swapna @ Rinku, resident of Shivpuri Chowk, Nashik had been to watch the programme of Ramlila at Shivpuri Chowk on 22/2/2006;

(b) The deceased Swapna @ Rinku met her father (PW 17) at the said place who had last seen her and he parted with her company at 8:30 p.m.

(c) PW 5 Pravin Nikumbh and PW 7 Maruti Fad were present at the spot at Ramlila at Shivpuri Chowk who had seen the accused chitchatting with the deceased girl.

(d) On 22/2/2006 at about 10:00 to 10:15 p.m. PW 6 Arun Dalvi, an Auto-rickshaw driver, while passing from Ambad Link Road, had seen the accused and the deceased girl on the bicycle and noticed that the girl was crying and saying to the bicycle rider to take her to her father.

(e) On 22/2/2006 at about 11:00 p.m. the

accused visited a country liquor shop situated at village Ambad and he was served with liquor by Mohan Dafedar (PW 9) and Shankar Khamkar (PW 10).

(f) On 23/2/2006 the dead body of the deceased was found at the agricultural field of one Darade situated at Satpur and the body was identified by the father.

(g) The cause of death of the deceased was attributed due to throttling and the Medical Officer (PW 16) established that the deceased was sexually assaulted, raped and died a homicidal death.

13 In order to link the aforesaid circumstances, the prosecution also brought on record other material to support its case that it was the accused person who had caused death of the deceased on 22/2/2006 between 8:30 p.m. to 11:00 p.m. The accused came to be arrested on 25/3/2006 and he made a statement leading to the spot where he had taken the deceased and then murdered her and this place was in the field of Darade. Prosecution relied on statement of the accused under section 27 of the Evidence Act which lead to the recovery of the clothes and chappal which the deceased had concealed

in his house. There was also recovery and seizure of a bicycle used by the accused to carry the deceased. Prosecution has examined PW No.11 Nandu Pawar, who deposed that on 25/3/2006 he was called by Police Ambad for the purpose of preparation of a panchnama. This witness deposed before the Court that the accused had made a disclosure statement in his presence that he will show the clothes and bicycle which he had kept in his house. The statement of the accused was recorded which lead to recovery of one blue colour bicycle at the house of the accused located at CIDCO. The statement further lead to the production of the clothes by the accused which were taken out from the bag kept in the cupboard. The bicycle, the clothes and the chappal were seized on executing a panchnama. The prosecution examined one Balu Salve (PW No.12) in whose presence the mud particles from the grip of handle of bicycle were removed after drawing the panchnama. The said witness had identified the grip of bicycle as Article 12 and 13 respectively.

14 The Prosecution also examined Ramesh Nimbaji Patil, Senior Police Inspector attached to Ambad Police Station who was

posted there from 4/6/2005 to 27/4/2007. He deposed that on 25/3/2006 he was on night round duty. He stated that when he was going in his vehicle at around 3:00 a.m. in the night some persons stopped him near Atul Dairy, Ambad Link Road. He deposed that he had seen a group of men and women and one of the women namely Pranpati Kanojiya informed him that when she and her grand-daughter namely Puja was sleeping on the Ota of the house, Puja was taken away. It was revealed to him that Puja Kanojiya was residing at Shivpuri Chowk. On enquiry from this witness, one person namely Vitthal Mali reveal that when he had gone for attending nature's call, he had seen one person taking away girl on his shoulder. When search was carried out in the nearby area, Shubham Park, Ambad Link Road, one person was found with girl Puja who was identified by Pranpati Kanojiya to be her grand-daughter. The said person who had carried Puja was taken to Police Station and on complaint of Lalji Kanojiya C.R.No.111/2006 was registered. The said witness identified the accused who was taken into custody by him. This witness had carried out the investigation in the crime relating to the kidnapping and

murder of deceased Rinku i.e. the victim in the present crime. This witness had prepared the spot panchnama and also the panchnama of recovery of clothes, bicycle and chappal. It is this witness who had referred the accused for medical examination and received the report that the accused was capable of committing sexual intercourse. The prosecution has also relied on the testimony of Nitin Mitkar (PW No.19) who was working as Senior Police Inspector at Satpur Police Station. It is this witness who was informed about the dead body of a small girl lying in the field of one Darade. This witness had called for the photographer and dog squad on the spot after registering A.D.No.14/2006. PW 19 Mitkar deposed before the Court that he had recorded the statement of witnesses and collected viscera and PM report from the Civil Hospital and sent the muddemal to the Chemical Analyser. This witness had forwarded the muddemal in the form of grips of bicycle recovered at the instance of the accused for chemical analysis.

The CA reports which are produced on record as Exhs.87 to 94, support the case of the prosecution. Though Exhs. 87, 88 and

89 reflect inconclusive results, Exh.90 reveals that the earth collected from the spot tallied with the particles of earth found on the cover of the bicycle in respect of physico chemical characteristic. Exh.92 is the report of nail and sample of mud found on the mouth of the deceased and the report reveals that the earth collected from the spot tallied with the earth found on the mouth of the deceased in respect of physico chemical characteristic. Exh. 93 and 94 is the report of Salwar, nicker and Kurti of the deceased and that of the vegetable plants and the plain earth and earth mixed with blood. The report disclose that the plants were stained with blood and earth was mixed with blood. So also blood stains were found on the Kurti. The report further reveals that the earth found on the vegetable plants and the earth from the spot tallied in respect of physico chemical characteristic so also the particles found on Salwar had components of mud similar to that which were collected from the spot.

15 The prosecution also placed reliance on the test identification parade to establish that it was the accused who was seen by the prosecution witnesses. PW 14 Mahendra Mandle, Special

Judicial Magistrate held the test identification parade in the crime as per the directions of CJM Nashik on 22/4/2006. He deposed before the Court the procedure followed by him in detail for holding the test identification parade and gave the details of letters addressed to the police as well as Prison Authority Nasik Road. He had issued summons to witnesses Mohan Dafedar, Shankar Khamkar, Pravin Nikumbh, Maruti Fad and Arun Dalvi to remain present for conducting of T.I. Parade in Central Prison Nashik on 22/4/2006 at 10:00 a.m. He deposed that except Arun Dalvi, summonses were served to all witnesses and on 22/4/2006 test identification parade was conducted in presence of two panch witnesses namely Bhaurao Shinde and Bhagwan Salunkhe. Bhaurao Shinde has been examined as PW 15. He executed the memorandum panchnama and which was proved by him at Exh.72 and 73. The memorandum panchnama narrates the procedure which has been followed by the Special Executive Magistrate for conducting test identification parade and the witness Maruti Fad, Pravin Nikumbh, Shankar Khamkar and Mohan Dafedar identified the accused to be the same person whom they have

mentioned as one who was seen by them on the night of 22/2/2006. Identification Parade in respect of Arun Dalvi came to be cancelled. The memorandum is proved by Bhaurao Shinde (PW 15).

16 The prosecution has established its case based on circumstantial evidence. The circumstances relied upon by the prosecution are fully established and chain of evidence furnished by it is complete in all aspect and it does not leave any reasonable ground for conclusion consistent with the innocence of the accused. Each and every circumstance established by the prosecution is conclusive in nature and consistent only with the hypothesis of the guilt of the accused and it points out only to the guilt of the accused. The prosecution was successful in establishing the circumstances beyond doubt and all these circumstances cumulatively taken together lead to irresistible conclusion that it is the accused who has caused the death of the deceased Rinku after sexually assaulting her. The prosecution has also heavily relied upon on the last seen theory. The deceased last parted the company of her father (PW 17) who had deposed that he had gone to see Ramlila event at 8:30 p.m. and his daughter Rinku

accompanied him. He parted with the company of the deceased after 8:30 p.m. The deceased was seen by PW 5 Pravin Nikumbh and PW 7 Maruti Fad at the spot of Ramlila at Shivpuri Chowk at around 10:00 p.m. with the accused and that the accused carried the deceased on his bicycle. The next circumstance which the prosecution relies upon is the evidence of PW 6 Arun Dalvi, an auto-rickshaw driver, who had seen the deceased on the bicycle of a person whom he identified as the accused at around 10:00 p.m. to 10:15 p.m. on Ambad Link Road. The prosecution then relies upon the testimony of PW No. 9 and 10 who had deposed that at around 11:00 p.m. one person having a bicycle had come to the shop to consume liquor and he consumed liquor. PW 10 had noticed mud stains on the shirt and pant of the accused and on enquiry from him, the accused had answered that he was under tension and he should not be asked anything. All the aforesaid witnesses of the prosecution had identified the accused in the dock and also in the identification parade conducted by the prosecution for the purposes of investigation. The deceased was found dead in the village Satpur in the field of wheat of Darade and

this was informed to PW 1 Shivaji Dalvi by one Vitthal Bhandure at about 9:00 a.m. The time gap between the two events i.e. when the accused and the deceased were last seen together alive and when the deceased was found dead, lead to a possibility that it was only the accused in whose company deceased was seen alive but then at about 10:00 p.m. accused was seen all alone and under the tremendous tension. This chain of circumstance clearly establish that the accused is the author of the crime and his guilt is established by the chain of evidence laid by the prosecution which is complete in all aspects and all the circumstances taken together establish the guilt of the accused.

17 Though the counsel for the appellant/accused Shri Abhaykumar Apte would vehemently argue that the prosecution has failed to prove the circumstances and the appellant is falsely implicated, we do not agree with the submission of learned Counsel. The Counsel for the appellant would argue that the body of deceased was found in wheat field on 23/2/2006 and accused came to be arrested on 25/3/2006 by Ambad Police Station when he was rescuing a minor girl from Ambad Police Station area and he was falsely

implicated in Crime No. 28/2006 at Satpur Police Station since there was huge public outcry for not detecting the criminal of kidnapping and raping of minor girl Rinku. The learned Counsel for the appellant have also made unsuccessful attempt to discredit the testimony of the witnesses and also by arguing that the witnesses had no opportunity to see the appellant at the time of crime since it was late night and he would also argue that the test identification parade that has been conducted is not validly conducted as per procedure. All the prosecution witnesses which the prosecution relies upon for relying the last seen theory, have identified the present appellant in the dock before the trial Court. We do not find any infirmity in the conduct of the test identification parade and even if it is so, test identification parade is not a substantive piece of evidence but is only of assistance to the prosecution to show that it is investigating in right direction. Identification of the accused in the dock is sufficient and therefore we do not find any substance in the argument of learned counsel for the appellant. The test identification parade has also been sought to be doubted by the counsel for the appellant since according to him police

machinery immediately after the arrest of accused, had published the photograph in local newspaper that he was the person who had committed rape on missing girl Rinku and therefore the test identification parade cannot be said to inspire confidence since the photograph was already widely circulated. The Counsel for the appellant would argue that chain of circumstance is not fully established by the prosecution and did not inspire any confidence and his conviction based on such chain of circumstances warrants reversal. He would also argue that motive is completely absent in the prosecution case and it was not the case of the prosecution that the appellant had pervert mentality and he was sex addict and therefore he had kidnapped the girl, raped her and later murdered her.

We did not find any force in the submission of learned Counsel for the appellant. In his statement, recorded under Section 313 of Criminal Procedure Code (Cr.P.C.) the appellant/accused had deposed that on 25/3/2006 at around 4:00 a.m., he was attending the duty and at that time two boys were going through the road and a girl was with them. It is deposed by him that on seeing him, they left that

girl on the road and had ran away. As the said girl was weeping, he had gone near to her and at that time police vehicle came there. He deposed that he informed the police what had happened but they said whatever he wanted to tell he should tell in police station by accompanying the police and by beating him he was asked to admit the crime. He has stated that he was falsely implicated in the said crime. Nonetheless to say that he did not examine any witness or adduce any other evidence on this point.

It was obligatory on the part of the accused while being examined under Section 313 of the Cr.P.C. to furnish some explanation with respect to incriminating circumstances associated with him and court must take note of such explanation even in a case of circumstantial evidence, in order to decide as to whether or not, the chain of circumstances is complete. When the attention of the accused is drawn to such circumstances that inculcate him in relation to commission of crime and if he fails to offer an explanation, the said act must be counted as missing link for completing the chain of circumstances.

The culpability of the appellant/accused in the absence of any direct evidence has to be judged on the basis of the circumstances narrated above. The principles of law governing proof of a criminal charge by circumstantial evidence is by now well established and hardly require any reiteration, save and except, the circumstances on which the prosecution relies must be proved, beyond reasonable doubt, such circumstance must be capable of giving rise to inference which is inconsistent with any other hypothesis except the guilt of the accused. It is only in such a contingency, the conviction can be sustained on the basis of circumstantial evidence. At this stage, a reference is made to the “five golden principles” known as “Panchsheel” enunciated by the Hon'ble Apex Court in the case of **Sharad Birdichand Sarda Vs. State of Maharashtra (1984) 4 SCC 184** needs a reproduction of paragraph 153.

“A close analysis of this decision would show that following conditions must be fulfilled before a case against an accused can be said to be fully established;

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade Vs. State of Maharashtra [SCC para 19, p.807) where the following observations were made.

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

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

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

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

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.”

19 By now it is settled proposition of law that each and every incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form a chain of events from which the only irresistible conclusion about guilt of the accused can be safely drawn and no other hypothesis against the guilt is possible. The chain of circumstances established by the prosecution in the present case is complete in all aspects and the prosecution has also based its case on the last seen theory and have positively established that the gap between the deceased last seen alive in the company of the accused and the recovery of her dead body in the wee hours absolves the prosecution of the burden which it has to discharge to prove the guilt of the accused when it is established that the accused was last seen in the company of the deceased. The prosecution is then exempted from proving the exact happening of the incident as it is the accused who only had special knowledge of the

incident and he has to discharge the burden of proof as per Section 106 of the Evidence Act. The prosecution in the present case has adduced clinching evidence in support of the last seen theory and therefore it has shifted its burden to the accused and it is for him to establish as to when he parted with the company of deceased girl and the circumstances in which he parted her company. No explanation has come from the appellant except a plea of false implication and this confirms the conclusion that it is the accused who had kidnapped the deceased on the date of the incident, sexually assaulted her and caused her death which is fully attributable to the sexual act since the girl was of a tender age and the appellant being a fully grown man.

20 After examining the entire case of the prosecution, we are of the firm view that the evidence led by the prosecution in support of its case, though based on circumstantial evidence satisfied the test of being reliable evidence and establish the circumstances which point out towards guilt of the accused. The circumstances on which the prosecution has relied on are cogent and unmistakably point towards guilt of the accused. The accused is a young boy about 20 years,

appeared to have carried a girl of tender age for satisfying his lust, kidnapped and raped her girl. On 25/4/2006 he had again attempted to carry another girl from the same locality and came to be intercepted by police squad and another young life was prevented from being crushed and destroyed. There is no need for any motive to be established in such a crime and it can be safely inferred that it is lust of the appellant/accused which had induced him to adopt such a un-human and barbaric approach. On appreciation of the evidence of the prosecution, we can safely infer that the witnesses examined by the prosecution inspire confidence and except the father of the deceased (PW 17), all the witnesses are independent and natural witnesses. There is no reason why the said witnesses have pointed out the finger of guilt towards the accused only and there is no reason why they were falsely implicating the accused who is complete a stranger to them. The accompanying circumstances brought on record by the prosecution establish the guilt of the accused. We feel no substance in the argument of learned counsel for the appellant nor we are ready to show any compassion to such an accused. The finding recorded by the

Session Court therefore cannot be faulted with, nor it can be said that there is any perversity in the said findings since it is based on the evidence before it. We do not find any infirmity either legal or factual in the judgment passed by the Session Court warranting an interference.

In the light of aforesaid discussion, we pass the following order:

- (a) The appeal arising out of Sessions Case No. 88 of 2006 decided on 15/10/2010 in the case of State Vs. Vijay Babasaheb Nanavare is dismissed;
- (b) In view of disposal of the above appeal, Criminal Application No.1290 of 2012 taken out in Criminal Appeal No. 891 of 2010 does not survive and the same is also disposed of;
- (c) Fees of Mr. Abhaykumar Apte, Advocate appointed by Legal Aid Committee for the Appellant in Criminal Appeal No. 891 of 2010 and for Respondent in Criminal Appeal No. 448 of 2011 is quantified at Rs.5000/-.

CRIMINAL APPEAL No. 448 of 2011 :-

1 The present appeal is filed by the State of Maharashtra under Section 366 of the Code of Criminal Procedure, praying for enhancement of the sentence imposed on the accused Vijay Nanavare convicted in Sessions Case No. 88 of 2006. The learned Sessions Court imposed the following sentence:-

The appellant is convicted and sentenced for kidnapping minor girl, aged about ten years, with intent to commit rape on her and for murdering said girl and thereby committing offences punishable under sections 366-A, 376(2) (f), 302 of the Indian Penal Code. On conviction under Section 302 of IPC, the appellant is sentenced to suffer imprisonment for life and to pay a fine of Rs.1000/-. For conviction of offences under Section 366-A and 376 (2) of IPC, the appellant is sentenced to suffer RI for ten years and to pay fine of Rs.1000/-on each count. In default to pay fine imposed against the appellant as aforesaid, he is directed to suffer Simple Imprisonment (SI) for three months. All the sentences have been directed to be run concurrently.

2 By the said appeal, the State has sought enhancement on the following grounds :-

A) That the order of sentence passed by the Additional Sessions Judge, Nashik, District Nashik in respect of the Respondent/Original accused is inadequate and deserves to be enhanced.

B) In view of the evidence laid by the prosecution learned Lower Court though came to the conclusion that offence is duly proved against the accused he was pleased to show leniency while awarding the sentence. There was no valid ground for the leniency.

C) That the learned Sessions Court ought to have seen that the prosecution by way of placing on record credible evidence has proved that the accused induced the deceased to come with him from Ramlila to the spot and after reaching to the spot accused committed rape on her.

(v) That the learned Sessions Court ought to have seen that all the circumstances are cogently and firmly established by prosecution to prove the guilt of accused.

G) That the learned Sessions Court ought to have seen that the offence committed by accused comes within the category of rarest of rare case and ought to have awarded death sentence.

3 We have heard learned APP on the said issue. We need not repeat the case of the prosecution and also the evidence brought before the Trial Court to conclusively establish the case of the prosecution leading to the conviction of the accused since we have already dealt with the same while dealing with the appeal filed by the accused/appellant. The learned APP Shri Dedhia, would argue that the learned Sessions Judge has held that the case of the prosecution was proved beyond doubt and the prosecution has led the evidence which inspire confidence and pinpoint towards guilt of the accused. The learned APP would argue that a girl of tender age was ravished and then done to death and the act of the accused is total inhuman, barbaric and needs to be dealt with stringently in order to curb such rising tendencies. According to the learned APP, the learned Trial Court has taken a lenient view and imposed penalty of imprisonment of life for an offence under section 302 of IPC but the said crime warranted a harsh penalty and the circumstances warranted imposition of death sentence on the accused.

4 We have also heard learned counsel for the appellant in response to the said appeal filed by the prosecution.

5 It is no doubt true that the prime object of criminal law is imposition of adequate, appropriate, just and proportionate sentence which would commensurate with the gravity of the crime and by taking into consideration various factors including the manner in which the crime is committed. The sentence imposed on a finding of guilt being recorded is intended to serve two-fold purpose, namely, punishing the offender and also to act as a deterrent on the members of the society to indulge into such type of activity. That there is no straitjacket formula for imposition of sentence on an accused, when the crime against him is fully established. The object of sentencing being deterrence and corrections, the penalty imposed should be proportionate with the offence committed. The paramount consideration is that it should meet the ends of justice. Though the question of sentence is a matter of discretion but it is well settled proposition that such discretion is not unfettered and is to be

discharged by the sentencing court by applying well known principles established in law and it is expected that the imposition of sentence would commensurate with the nature of crime, the manner of commission of crime, the object/motive in committing the crime, the age of the accused, the brutality of the offence and also impact of the said crime on the society at large and the manner in which the society has reacted to such a crime.

6 While considering an appeal, praying for enhancement of the sentence that has been imposed, the law is well settled that if the discretion has been properly exercised in consonance with the accepted norms, the appellate court would be slow in interfering with the sentence imposed. The Hon'ble Apex Court in the case of *Bed Raj v. State of Uttar Pradesh*, AIR 1955 S.C. 778 in paragraph 15 as follows :-

“(15) A question of a sentence is a matter of discretion and it is well settled that when discretion has been properly exercised along accepted judicial lines, an appellate court should not interfere to the detriment of an accused person except for very strong

reasons which must be disclosed on the face of the judgment; see for example the observations in 'Dalip Singh v. State of Punjab, AIR 1953 SC 364 at pp.367-368 (A) and Nar Singh v. State of Uttar Pradesh, AIR 1954 SC 457 at pp.458-459(B).

In a matter of enhancement there should not be interference when the sentence passed imposes substantial punishment. Interference is only called for when it is manifestly inadequate. In our opinion, these principles have not been observed. It is impossible to hold in the circumstances described that the Sessions Judge did not impose a substantial sentence, and no adequate reason has been assigned by the learned High Court Judges for considering the sentence manifestly inadequate.

In the circumstances, bearing all the considerations of this case in mind, we are of opinion that the appeal (which is limited to the question of sentence) should be allowed and that the sentence imposed by the High Court should be set aside and that of the Sessions Court restored.”

7 In the present case, we have already held that the prosecution has proved its case by laying down cogent and reliable evidence before the Sessions Court resulting into conviction of the accused for the offence punishable under Sections 302, 366A, 376(2)

(f) of the IPC. We have also recorded that we find no justifiable ground to take a different view from the view of the learned Sessions Judge and we are in complete agreement with the conclusion of guilt drawn by the Court below and we hold that the evidence and the material on record proved beyond reasonable doubt that it is the appellant/accused who has committed offence with which he was charged. Protection of society and deterring the criminal is the object of penal law and in the present case a young girl has been done to death with a petty object of satisfying lust at the hands of a young man and we can not resist ourselves from taking judicial note of the fact that this tendency is increasing and the society at large is of the opinion that such crimes have to be dealt with sternly especially when it takes within its sweep innocent, helpless girl of tender age. In order to deal with such crime, the penal laws including substantive and procedural law were required to be amended, making such type of offences affecting the dignity of the woman more vicious and requiring more sensitization in order to respond the public outrage and to deal with such crimes by imposition of appropriate harsh

sentence. However, it is also to be noted that for the offences of such nature resulting in conviction under section 302 of IPC the sentence to be imposed as provided under the Penal Code is either death or imprisonment for life. However, whenever a death sentence is to be imposed, it should be accompanied with the reasons for imposing such a death sentence and various factors that would lead to justification of imposition of such a sentence.

Section 354 (3) of Cr.P.C. contemplates recording of exceptional reasons inflicting imposition of death penalty, as a departure from normal rule.

The learned Sessions while imposing the sentence has afforded an opportunity to the accused to be heard on the point of sentence and also considered the arguments of learned APP who had requested for imposition of a death sentence by relying upon catena of judgments of the Hon'ble Apex Court as well as this Court. On consideration of the said judgments, the learned Sessions Judge has recorded a finding that the said case did not fall within the category of 'rarest or rare case'. The learned Sessions Judge have taken note of the

fact that the accused is aged about 30 years and therefore he choose to award imprisonment for life for the offence committed under Section 302 of the IPC. The learned Sessions Judge was conscious of the fact that the deceased was aged about ten years and he imposed the sentence of RI for 10 years, for conviction under Section 376 (2) (f) of the IPC.

8 Since the imposition of sentence is a matter of discretion and in our opinion that discretion has been properly exercised by the learned Sessions Judge with the accepted principles and we do not find any strong reason to muddle with the said discretion exercised by the Sessions Court. For the reasons recorded above, we refuse to interfere in the sentence imposed by the learned Sessions Judge. Resultantly, we dismiss the appeal filed by the State seeking enhancement of the sentence.

(SMT. BHARATI H. DANGRE, J)

(B.R. GAVAI, J)