

Santosh/Suchitra

IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPEALS NO.52/2019, 55/2019 &
CRIMINAL APPEAL NO.6 OF 2020
CRIMINAL APPEAL NO.52/2019

Osban Fernandes,
 presently lodged at
 Central Jail, Colvale.

.... Appellant.

Versus.

State, P.I. Collem Police Station,
 Goa Police through P.P.

..... Respondent.

Mr. Arun Bras D'Sa, with Mr. S. Sardessai, Advocates for the
 Appellant.

Mr. S. R. Rivonkar, Senior Advocate/Public Prosecutor with Mr. G.
 Nagvenkar, Addl. Public Prosecutor for the State-Respondent.

CRIMINAL APPEAL NO.55/2019

State, P.I. Collem Police Station,
 Goa Police through P.P.

.... Appellant.

Versus.

Osban Fernandes,
 presently lodged at
 Central Jail, Colvale.

..... Respondent.

Mr. S. R. Rivonkar, Senior Advocate/Public Prosecutor with Mr. G.
 Nagvenkar, Addl. Public Prosecutor for the State-Appellant.

Mr. Arun Bras D'Sa, with Mr. S. Sardessai, Advocates for the
 Respondent.

CRIMINAL APPEAL NO.6/2020

Ramesh Bagve,
presently lodged at
Central Jail, Colvale.

.... Appellant.

Versus.

State, P.I. Collem Police Station,
Goa Police through P.P.

..... Respondent.

Mr. Vibhav Amonkar, Advocate for the Appellant.

Mr. S. R. Rivonkar, Senior Advocate/Public Prosecutor with Mr. G.
Nagvenkar, Addl. Public Prosecutor for the State-Respondent.

***Coram : M.S. Sonak &
Smt. M.S. Jawalkar, JJ.***

***Reserved on : 03/08/2020
Pronounced on : 07/08/2020***

JUDGMENT: (Per M.S. SONAK, J.)

Heard Mr. Arun Bras D'Sa for the Appellant in Criminal
Appeal No. 52/2019 (A.1).

2. Heard Mr. Vibhav Amonkar for the Appellant in Criminal
Appeal No. 55/2019 (A.2).

3. Heard Mr. S.R. Rivonkar, the learned Senior Advocate/
Public Prosecutor for the State in all the three appeals.

4. These three appeals are directed against the Judgment and Order dated 30th April, 2019, made by the learned Children's Court in Special Case No.73/2013, convicting A.1 and A.2 for some serious offences and sentencing them, *inter alia*, with life imprisonment and fine.

5. The operative portion of the impugned Judgment and Order, which gives details of the precise provisions under which the A.1 and A.2 came to be convicted and the sentences therefor, is transcribed below for reference of convenience :

“ The accused No.1 and 2 are sentenced to imprisonment for life and are directed to pay fine of Rs.1,00,000/- each, in default, to undergo simple imprisonment for 2 years each, for the offence punishable under Section 364, r/w Section 34 of I.P.C.

The accused No.1 and 2 are sentenced to imprisonment for life and are directed to pay fine of Rs.1,00,000/- each, in default, to undergo simple imprisonment for 2 years each, for the offence punishable under Section 307, r/w Section 34 of I.P.C.

The accused No.1 and 2 are sentenced to undergo rigorous imprisonment for a term of 7 years each and are directed to pay fine of Rs.25,000/- each, in default, to undergo simple imprisonment for 6 months each, for the offence punishable under Section 354-B, r/w Section 34 of I.P.C.

The accused No.1 and 2 are sentenced to undergo rigorous imprisonment for a term of 5 years each and are

directed to pay fine of Rs.20,000/- each, in default, to undergo simple imprisonment for 4 months each, for the offence punishable under Section 354, r/w Section 34 of I.P.C.

The accused No.1 and 2 are sentenced to undergo rigorous imprisonment for a term of 3 years each and are directed to pay fine of Rs.1,00,000/- each, in default, to undergo simple imprisonment for 2 years each, for the offence punishable under Section 2(m), punishable under Section 8(2) of the Goa Children's Act, 2003.

The accused No.1 is sentenced to imprisonment for life and is directed to pay fine of Rs.2,00,000/-, in default, to undergo simple imprisonment for 3 years, for the offence under Section 16, punishable under Section 17 of the Protection of Children from Sexual Offences Act, 2012.

The accused No.2 is sentenced to imprisonment for life and is directed to pay fine of Rs.2,00,000/-, in default, to undergo simple imprisonment for 3 years, for the offence under Section 2(y)(i), punishable under Section 8(2) of the Goa Children's Act, 2003 and under Section 3(b), punishable under Section 4 of the Protection of Children from Sexual Offences Act, 2012.

The substantial sentences of imprisonment imposed on the accused no.1 and 2 to run concurrently.

The fine amount, if any, recovered from the accused no.1 and 2 shall be deposited jointly in the names of the victim children in Fixed Deposit in any Nationalized Bank, till they attain majority.

In addition to that, it is held reasonable to recommend the award of compensation in the amount of Rupees ten

lakhs each to the victim children, who were in the age group of 5 years to 7 years at the time of offence, under the provision of Section 357-A(3) of Cr.P.C., read with Rule 7(2) of the Protection of Children from Sexual Offences Rules, 2012, read with the Goa Victim Compensation Scheme, 2012, further read with the Goa Victim Compensation (First Amendment) Scheme, 2015.

The matter shall be referred to the District Collector, South Goa, at Margao, for award of compensation to the victim children within 30 days from the date of receipt of this order, under the provisions of 357-A(3) of Cr.P.C., read with Rules 7(4) and (5) of the Protection of Children from Sexual Offences Rules, 2012, and to report compliance.

The I.O. Shall furnish the information about the verdict and the order of award of compensation to the victim children, their support person and the Institution in whose custody they are kept by the Child Welfare Committee, in compliance of the provision of Rule 4(12) of the Protection of Children from Sexual Offences Rules, 2012 and report compliance.”

6. Criminal Appeal No.52/2019 and Criminal Appeal No.6/2020 have been instituted by A.1 and A.2 respectively, challenging their conviction and sentencing. Criminal Appeal No.55/2019 has been instituted by the State, seeking enhancement of sentence and imposition of death penalty upon A.1 and A.2.

7. All these appeals were heard extensively on 28/7/2020,

30/7/2020, 31/7/2020, 2/8/2020 and 3/8/20. The learned Counsel for the parties agree that these Appeals may be disposed of by a common judgment and order since, the challenge in all these three appeals is to the common Judgment and Order dated 30th April, 2019.

8. The case of the prosecution concerns an unfortunate couple engaged as labourers at the work site of A.1 (referred to as '*Patrao*') and their two minor children, then aged about 7 ½ and 5.4 years respectively. According to the prosecution, on or about 9/5/2013, A.1 and A.2, *inter alia*, tied the labourer to a pole and mercilessly assaulted him. The labourer's wife intervened and treated the wounds of her husband on the night intervening 9/10th May, 2013 by applying turmeric. Unfortunately by 12 noon of 10th of May, 2013, the labourer died. A.1 and A.2, on the pretext of taking the labourer to the hospital, moved the labourer's wife and the two minor children to A.1's residence at or near the work site itself, where they remained for 2-3 days. A.1 and A.2 thereafter, with the help of a JCB, buried the labourer at the site behind a toilet. Upon labourer's wife questioning A.1 and A.2 about whereabouts of her husband, A.1 and A.2 offered to reach the labourer's wife and the two minor children to their native place in Maharashtra. By hatching a conspiracy to eliminate them, A.1 and A.2 took them to Anmodghat in the dark night intervening 13/5/2013 and 14/5/2013. There, A.1

and A.2, strangled the labourer's wife, removed her clothes so as to avoid detection and threw her in a valley. The labourer's minor son was then strangled, his clothes removed and thrown outside the car in the ghats. A little later, the minor daughter was also strangled, stripped and sexually assaulted by A.2 and thrown outside the car in a similar manner. The minor son and the minor daughter, however, managed to survive and climb upto the road's edge at the dawn of 14.5.2013, where they were spotted by PW.1 and PW.6 naked, traumatized and injured. At the spot, the minor girl spoke about strangulation of their mother and themselves by the 'Patrao' and 'Maratho' to PW.1 who, reached the two minor children to the nearest Police Station, from where the investigations commenced.

9. Based upon the investigations carried out by the Police, Charge-sheet was filed in the Children's Court by invoking *inter alia*, the provisions of the Goa Children's Act, 2003. Charges were framed and explained to both, A.1 and A.2. Upon their denying the guilt, trial ensued.

10. The prosecution, in all examined 41 witnesses in support of its case. Thereafter, statements of A.1 and A.2 were recorded under Section 313 of the Cr.P.C. Despite opportunity, neither A.1, nor A.2 chose to lead any defence evidence in the matter. Upon hearing

arguments, the Children's Court has made the impugned Judgment and Order. Hence the Appeals on behalf of A.1 and A.2, questioning their conviction and sentencing. The State, as noted earlier, has also instituted the appeal seeking enhancement of the sentence to death penalty.

11. Mr. Vibhav Amonkar, the learned Counsel for A.2 opened the arguments in these Appeals by submitting that the case of the prosecution is riddled with serious inconsistencies, and is even otherwise inherently improbable, to say the least. He submits that if the two minor children in the age range of 6-8 years and 5-6 were really thrown in the valley of about 19 metres depth in the dead night of intervening 13/14th May, 2013, then, it is inconceivable that the two minor children who were alleged to have been strangled before they were so thrown, should climb up to the edge of the road and be spotted by PW.1 and PW.6. He submits that there is no medical evidence that the two minor children suffered from any fracture injuries, which is impossible, if the prosecution version is to be believed. He submits that these factors cast a very serious doubt on the case of the prosecution, thereby rendering the same inherently improbable.

12. Mr. Amonkar submits that the testimony of PW.1 and PW.6, who are alleged to have found the two minor children in the

ghats at the dawn of 14.5.2013 is unworthy of credence. He submits that these witnesses spoke about covering the two minor children with T-shirts given by them. However, these T-shirts have not at all been attached by the prosecution. He points out that PW.6 speaks about spotting the two minor children at Anmodghat on 13/5/2013, when, in fact, it is the case of the prosecution that they were spotted on 14.5.2013. He points out that the evidence on record otherwise bears out that the minor victim girl (PW.4) was conversant with Marathi language and, yet, PW.1 quotes PW.4 speaking in Hindi. He submits that these serious discrepancies render the testimony of PW.1 and PW.6 uncreditworthy.

13. Mr. Amonkar then points out that the four recoveries, upon which the prosecution places reliance, were all stage managed and, therefore, the alleged statements made by A.1 and A.2, which led to the alleged recoveries were liable to be excluded from the evidence on record. He points out that the investigations, at least on 14.5.2013, have proceeded at a pace which is almost impossible to achieve. He points out that the panchas, forensic experts, photographers were all kept ready by the I.O. even before any alleged disclosures were made by A.1 or A.2. He points out that even letters were written to the Government Departments to depute panchas for recoveries that were to be made on the following days. He submits that the recoveries have been made in 4 stages, without any explanation for such

staggered recoveries. He points out that in one of the instances, Police Guards were found at the location, guarding the site from which the alleged recoveries were made. He submits that all these factors clearly establish that there were no recoveries as contemplated by Section 27 of the Evidence Act and, therefore, no part of the statements allegedly made by A.1 and A.2 leading to such alleged recoveries could ever have been admitted as legal evidence in this matter.

14. Mr. Amonkar also pointed out that the case of the prosecution is inherently improbable inasmuch as the keys of the Maruti car and the motor cycle which were attached, were allegedly found in their respective ignitions at the time of their so called recoveries and attachment. He argued that the recovery of 21 metres rope with which A.1 and A.2 are alleged to have strangled the victims, was claimed to be recovered from the fast flowing stream which is inherently improbable. He pointed out that on one hand the prosecution urged that the clothes which A.1 and A.2 were wearing at the time of the alleged incident, were the clothes in which A.1 and A.2 were arrested. On the other hand, the investigation agencies have purported to recover one shirt which A.2 was allegedly wearing from a fast flowing stream. He points out that even the knife which was recovered, is not the knife which is alleged to have been used in the incident. He submits that all these serious discrepancies

render inadmissible the statements allegedly made by A.1 and A.2 in the evidence by resort to the provisions of Section 27 of the Evidence Act.

15. Mr. Amonkar submits that the confession of A.2 was not recorded by complying with the mandatory provisions of Sections 164 and 281 of the Cr.P.C. which, according to him, are to be read and construed along with the instructions in the Criminal Manual issued by the High Court. In particular, he points out that when A.2 was produced before the JMFC on 22.5.2013, there is no record of any questions posed to A.2 or the A.2, being apprised of the consequences of a confession before he was sent to the judicial custody, purportedly to reflect over the matter. He points out that it is only on 27/5/2013 that the JMFC posed A.2 some of the questions provided in Part I, paragraph 18 of the Criminal Manual and, thereafter immediately proceeded to record the confession of A.2, without granting A.2 mandatory 24 hours to reflect upon whether to confess or not. Mr. Amonkar submits that opportunity for reflection is mandatory and such opportunity can be meaningful only after the consequences of the confession are explained to the potential confessor.

16. Mr. Amonkar pointed out that in the present case, oath was administered to A.2 though, this is prohibited in law. Mr. Amonkar

submits that for all these reasons, the so called confession of A.2 which, in any case, was retracted by A.2 when questioned under Section 313 of the Cr.P.C. ought not to have been relied upon by the learned Children's Court for convicting A.1 and A.2. He relies upon *Babubhai Udesinh Parmar vs State of Gujarat* – (2006) 12 SCC 268; *Dhananjaya Reddy vs. State of Karnataka* – (2001) 4 SCC 9; *Bhagwan Singh and ors. vs. State of M.P.* - (2003) 3 SCC 21; *Akanman Bora vs State of Assam* 1988 Cri LJ 573; *Pralhad Gajbhiye Vs. State of Maharashtra* 1997 Bom CR (Cri) 338 and *Philips Vs. State of Karnataka* – 1980 Cri. LJ 171 in support of these contentions.

17. Mr. Amonkar submits that the testimony of PW.4, the minor victim girl, is also not creditworthy because the same is riddled with contradictions, omissions and exaggerations which have been brought on record. He submits that there is absolutely no evidence on record to establish that A.1 and A.2 were indeed “*Patrao*” and “*Maratho*” . He submits that the Test Identification(TI) Parade, in the present case was a mere farce because, there is evidence on record that the witnesses were already shown the faces of A.1 and A.2 prior to the TI Parade. He points out that even the instructions set out in the Criminal Manual for conduct of TI Parade, were observed only in breach. Mr. Amonkar submits that for all these reasons, the learned Children's Court was not justified in convicting the A.1 and A.2.

18. Mr. D'Sa, whilst adopting the submissions made by Mr. Amonkar, attacked the testimony of PW.4 by pointing out to several contradictions, omissions and exaggerations recorded during the course of cross examination of PW.4. He points out that there is total variance between the deposition of PW.4 in Sessions Case No. 53/2013 which concerns the alleged murder of the labourer *i.e.* the father of the victim children and the statements in the course of deposition in the present matter. He submits that there is variance in the statements of PW.4 given before the Police, CWC and the NGO . He points out that PW.4, in her deposition before the Court, has admitted that she had seen A.1 ad A.2 in the Police Station prior to the TI Parade. There is evidence that PW.5 and PW.15 were also shown the accused persons prior to the TI Parade.

19. Mr. D'Sa pointed out that even the identification by PW.4 in the Children's Court was totally contrary to the well established procedures for identification. He points out that the identification only from sideways or in profile by the child witness, can never be safely relied upon. He submits that there is absolutely no evidence on record to link A.1 or for that matter, A.2 with the construction site or to hold that A.1 is indeed the '*Patrao*' to whom PW.4 refers or A.2 is indeed the '*Maratho*' to whom PW.4 refers. He submits that the chaff and grain is inseparable and, therefore, entire testimony of

PW.4 is required to be discarded.

20. Mr. D'Sa submits that in this case, several mobile phones belonging to A.1 and A.2 were attached by the investigating agencies and even call detail records were called for. However, no such call detail records were ever produced by the prosecution in evidence and this calls for adverse inference against the prosecution. He submits that the prosecution by lodging the two separate charge-sheets have made it possible to A.1 and A.2 to point the serious contradictions and inconsistencies in the deposition of PW.4 in the two cases. Mr. D'Sa submits that for all these reasons, the impugned Judgment and Order deserves to be set aside.

21. Mr. D'Sa and Mr. Amonkar, in unison, submit that no case has been made out by the prosecution to sustain the conviction and consequently, the prosecution is not at all justified in seeking enhancement of sentence to death penalty in the present case. They point out that merely because the crime may be heinous, that is no reason to conclude that A.1 and A.2 are authors of such crime. They point out that, it is settled principle in criminal jurisprudence that more heinous the crime, more rigorous the standard of proof. They submit that mere suspicion can never be a substitute for proof and any conviction based upon some suspicion is unsustainable. They rely on *Ashish Batham vs. State of M.P.* - (2002) 7 SCC 317 and

Anthony Fernandes vs. Police Inspector, Margao Town Police and ors. - 2020 All MR (Cri) 1239 in support of these contentions.

22. Mr. Rivonkar, the learned Public Prosecutor defended the impugned Judgment and Order on the basis of the reasoning reflected therein. He submits that this is a fit case where death penalty should have been awarded to A.1 and A.2. He points out that PW.4, in the present case, has deposed clearly and cogently. He points out that PW. 4 has withstood the cross examination and the so called contradictions or omissions or exaggerations have not even been established by the manner known to law. He pointed out that the previous statements were never put to PW.4 and PW.4 was never offered an opportunity to explain. Moreover, he pointed out that the so called contradictions or omissions were never put to the I.O. In the absence of all this, he urges that the contentions made on behalf of the Appellants deserve no acceptance. He relies on ***Tahsildar Singh and another vs. State of U.P.*** - AIR 1959 SC 1012 in support of these contentions.

23. Mr. Rivonkar submits that there is no rule that the testimony of a child witness has to be corroborated. He submits that at the highest this is requirement of prudence which has been more than satisfied in the present case. He submits that there is corroborating evidence by way of confession of A.2, recoveries and

more particularly medical evidence which is clearly consistent with the testimony of PW.4. He, therefore, submits that the conviction is liable to be sustained only on the basis of the testimony of PW.4, which has withstood cross-examination admirably. He relies on *State of Madhya Pradesh Vs. Ramesh and another* - (2011) 4 SCC 786; *Golla Yelugu Govindu Vs. State of Andhra Pradesh* – 2008 (16) SCC 769; *State of M.P. Vs. Dayal Sahu* – (2005) 8 SCC 122; and *Surajsinh vs. State of Gujarat* – (2017) 13 SCC 128 in support of these contentions.

24. Mr. Rivonkar submits that there is no infirmity in regard to the confession, particularly as the material on record establishes that the twin test of voluntariness and truthfulness have been satisfied in the present case. He submits that on the basis of some minor irregularities or deviations from the procedure set out in the Criminal Manual, the testimony in the form of confession of A.2 cannot be discarded. He relies on *Dagadu and others Vs. State of Maharashtra* – (1977) 3 SCC 68 in support of his submissions.

25. Mr. Rivonkar submits that the recoveries in this case have been made in accordance with law and the prosecution was entitled to the benefits of the provisions of Section 27 of the Evidence Act. He submits that even the medical evidence on record, which has virtually gone unchallenged, offers sufficient corroboration to the

testimony of PW.4 or the confession of A.2. He points out that in terms of Section 10 of the Evidence Act, the confession of A.2 can as well be used against A.2 since, there is ample evidence in the present case of conspiracy between A.1 and A.2 and that A.1 and A.2 committed the crime with common intention.

26. Mr. Rivonkar submits that this is one of the most heinous crimes committed in Goa and, therefore qualifies as '*rarest of rare*' case. He points out to the unusually cruel conduct of A.1 and A.2, particularly in the matter of their dealings with the parents of minor victim children and the minor victims themselves. He submits that the sentences imposed by the Children's Court are too lenient and this is a fit case where death penalty should have been awarded to A.1 and A.2.

27. On the basis of the aforesaid, Mr. Rivonkar submits that the criminal appeals instituted by A.1 and A.2 may be dismissed and the criminal appeal instituted by the State be allowed.

28. Mr. D'Sa and Mr. Amonkar made further submissions by way of rejoinder. They pointed out that administration of oath to A.2 by the JMFC (PW.29) is contrary to the clear and precise prohibitory mandate in Section 164(5) of the Cr.P.C. and the Criminal Manual. They point out that this virtually amounts to

compelling A.2 to be a witness against himself, which is expressly prohibited by Article 20(3) of the Constitution. They rely on *Selvi & ors. Vs. State of Karnataka* - (2010) 7 SCC 263.

29. Mr. Amonkar pointed out that PW.4, at one stage referred to A.2 whom he represents, as '*Maratho*' and at some other stage as '*Marathi*' or '*Marathe*', which contradiction, according to Mr. Amonkar, goes to the root of the matter. He points out that PW.4 in her deposition in present case admitted that her father used to consume alcohol, but in Sessions Case No.53/2013, deposed that her father used to not take alcohol. He points out to the deposition of PW.4 where she says that *Maratho* used to stay in *Patrao's* room, but he submits that the other evidence on record does not back this position. This, again according to Mr. Amonkar, shows that PW.4 is not a truthful witness.

30. Mr. Amonkar points out that the witnesses spoke about while coloured rope with which the alleged strangulation took place, but the rope ultimately recovered is of brown colour. He further points out that the so called identification by PW.10 of A.2 is not at all creditworthy. He submits that this witness has deposed to certain matters which never found place in the statement recorded before the Police. This witness has not produced any employment letter or proof that he was paying any salary to A.2. The photograph

produced by this witness was never proved and consequently not even admitted in evidence and yet, the learned Children's Court has relied upon the same. He submits that the entire testimony of PW.10 is required to be discarded and upon such discard, it is evident that there is absolutely no evidence that A.2 is *Maratho*, as referred to by PW.4.

31. Mr. D'Sa and Mr. Amonkar submit that in this state of evidence, the accused persons are entitled to a clean acquittal or at least, an acquittal by extending the benefit of doubt. In any case, they submit that this is certainly not a case to even think of imposition of a capital punishment. They rely on some ruling in support of their contentions.

32. For all the aforesaid reasons, Mr. D'Sa and Mr. Amonkar urge that that Criminal Appeals No.52/2019 and 6/2020 be allowed and Criminal Appeal No.55/2019 be dismissed.

33. Rival contentions now fall for our determination.

34. The first contention regards inherent improbability of the prosecution case, commends no acceptance. The contention proceeds on the basis that the evidence on record suggests that the minor victim children, together with their strangulated mother, were

thrown in a valley of almost 19 metres depth from the road level. However, though the evidence on record does establish finding the mother's dead body in the valley at a depth of almost 19 metres, there is no evidence that the minor victim children were also thrown at the same spot and at the same depth. Rather, the evidence on record clearly establishes that the two minor children were thrown out of the Maruti car, after strangulation, at two different spots, away from the spot at which their mother's body was thrown. There is absolutely no evidence to suggest that the two victim children were thrown in the valley with a depth of 19 metres. The injuries on the person of the minor victim children are sufficiently consistent with what was deposed to by the minor victim girl PW.4. The contention that the absence of any fractures or the impossibility of the minor children finding their way upto the road's edge, therefore, deserves no acceptance in the position of the evidence on record.

35. PW.1, the witness who actually found the children in the ghat at the dawn of 14th May, 2013 has deposed to what was informed to him by PW.4 in Hindi. From the wordings deposed to by PW.1, there is really nothing unnatural or improbable about PW.4 using the same, though, it is true, that her mother tongue was Marathi. The evidence on record establishes that PW.4 was about 7 ½ years at the time of the incident. From her deposition or from the statements which she had made before several authorities, the fact

that she spoke a bit of Hindi to PW.1, who, in all probabilities, may have posed questions in Hindi, hardly renders the prosecution case inherently improbable as contended by Mr. Amonkar.

36. The non-attachment of the T-shirts offered by PW.1 and PW.6 to the minor victim children in order to cover their nudity can hardly be some infirmity as to cast any doubt on the prosecution version. The T-shirts, in the present context, did not constitute any incriminating material or material having some direct nexus with the crime. Therefore, the non-attachment of the T-shirts, neither casts any doubt on the testimony of PW.1 and PW.6, nor does it render the prosecution version inherently improbable as contended by Mr. Amonkar.

37. On the perusal and evaluation of the testimonies of PW.1 and PW.6, we are satisfied that there is absolutely no good reason to not accept their clear and cogent depositions. There was not even any suggestion put to these witnesses that they had even the remotest stake or interest in the case of the prosecution. These witnesses are the most natural witnesses at the site and at that time and it is these witnesses, who stopped their vehicles in order to assist the minor victim children standing all naked and all traumatized at the edge of the road in the early hours of 14th May, 2013. The conduct of these witnesses is perfectly natural and in fact noble. These witnesses,

offered T-shirts to the minor victim children to cover their nudity. These witnesses immediately contacted the nearest Police Outpost and even made calls to the ambulance services. Thanks to these witnesses, who can be truly described as good samaritans, the two victim children were saved.

38. PW.1 Boventura D'Souza, who is the complainant in this matter has deposed that on 12th May, 2013 he had gone to his in-law's place at Alnavar Karnataka, along with his family in his Scorpio jeep bearing No.GA-08-F-2656 driven by his driver Titus Mendeth. On 14th May, 2013, at about 4.30 a.m. he was returning in the same jeep with the same driver to come to Margao, when, at about 5.30 a.m. in the Anmodghat, he saw a naked minor girl, 7 to 8 years old standing on the right side of the road.

39. PW.1 has deposed that he, immediately asked his driver to stop the vehicle and got down from the vehicle. Some other people who were also proceeding in the same direction also got down at the spot. This included some persons on a bike and a Zen car. This is important because PW.6, who was on the bike and whose friends were in the Zen car has also deposed similarly. PW.1 has then deposed that he approached the girl and made inquiries. He has deposed that the girl, in Hindi language told him that *"Mere Patraon aur Maratho ne mere mummyko ko pehla marke udaya aur mere*

chotta bhai ko bhandke udaya". He has deposed that she further told him "*mera bhi kapda surise kat ke gala dabake idhar udaya*".

40. PW.1 has then deposed that he took the girl in his car and proceeded towards the Mollem Police Outpost. He also deposed that one of the persons, who had stopped at the spot where the minor girl was found standing, had given a T-shirt to the girl. PW.1 has then deposed that after they went further from this spot, he noticed one naked boy, 2 to 3 years old, standing on the right side of the road waving his hand and seeking help. PW.1 has deposed that he again stopped the car and the minor victim girl told him that this minor boy was her brother.

41. PW.1 has deposed that the minor boy was not in a position to speak and he saw an injury mark, which was red in colour round his neck. He has deposed that this injury mark appeared to be a mark of strangulation. He has deposed that he realized that this was a serious matter and immediately dialed 100 for assistance before coming to the Mollem Police Outpost. He has also deposed that the minor girl told him that they were brought to the Anmodghat in a black vehicle. PW.1 has finally deposed that he is the one who filed the complaint and further showed the scene of offence *i.e.* the spots where the children were found. He has deposed that the children were ultimately taken in a 108 ambulance from the Mollem Police

Outpost.

42. PW.1, has withstood the cross-examination admirably. In fact, mostly suggestions were put to him, which he denied. In the cross examination, he in fact stated that he had shouted at both the spots where the two children were found to find out if someone was there. The so called contradiction in the context of use of the term “mummy” and “ma”, which is brought on record, is too trivial contradiction to suggest any taint to the clear and cogent testimony of PW.1.

43. PW.6, as noted earlier, has corroborated what was substantially stated by PW.1 insofar as the material particulars are concerned. In fact PW.6 is the one who took out his inner T-shirt and gave it to the minor victim girl to wear as, she was frightened and shivering of cold. PW.6 has also deposed to the minor victim boy having a swelling on his neck. There was hardly any cross-examination and there is absolutely no reason not to accept the testimony of PW.6, who has, again explained that he had gone to Ramnagar on 11th or 12th May, 2013 to distribute wedding cards of his friend's *i.e.* Munna's wedding. He has deposed that a friend of Munna was following him in the Zen car and it is at around 5.30 to 6.00 a.m. that one person, whose name they later learnt, was D'Souza, waved them to stop. The said D'Souza lifted the minor

victim girl and made inquiries with her. PW.6 has also deposed to the said D'Souza taking the girl in his vehicle and thereafter seeing a small boy *i.e.* the brother of the small girl. The circumstance that PW.6 has referred to the date of finding the children as 13th May, 2013, according to us, is hardly of any significant consequence. Based upon such triviality, it is not possible to discard the clear and cogent evidence of PW.6.

44. Irrespective of the conclusion in the matter, we cannot resist complimenting both, PW.1 Boventura D'Souza and PW.6 Hassan Mulla, for discharging their civic duty with utmost sensitivity in the early hours of 14th May, 2013. This is necessary because there is a tendency to drive away, lest one is involved in police investigations. PW.1 and PW.6, undoubtedly displayed both, courage and compassion, which is extremely commendable. They were indeed good samaritans, who never shirked from their civic duty to render all possible assistance to the two minor children in extreme distress.

45. According to us, one of the most important piece of evidence in this matter is the testimony of the minor victim girl PW.4, who is, really an eye witness – an injured eye witness in the matter. Her evidence, will however, have to be evaluated with caution and circumspection, taking into consideration that she was a child witness. Mr. Amonkar relied on *Bhagwan Singh* (supra) to

submit that the law recognizes the child as a competent witness, but a child, particularly at a tender age of 6 years, who is unable to form a proper opinion about the nature of the incident because of immaturity of understanding, is not considered by the Court to be a witness to sole testimony can be relied upon without corroborative evidence. The evidence of a child is required to be evaluated carefully because he is an easy prey to tutoring. Therefore, always the Court looks for adequate corroboration of other evidence to the testimony of a child witness.

46. *Bhagwan Singh* (supra) also refers to the decision in ***State of Assam v. Mafizuddin Ahmed*** – (1983) 2 SCC 14, in which there are observations that it is hazardous to rely on the sole testimony of the child witness as it was not available immediately after the occurrence of the incident and before there was any possibility of coaching and tutoring him.

47. Although, there can be no dispute about the proposition that the testimony of a child witness will have to be evaluated with caution and circumspection, it is necessary to note that *Bhagwan Singh* (supra) was a case where the child witness was alleged to have seen the murder of his mother and grandfather at night and thereafter gone back to sleep. In these circumstances, the Court noted that the conduct of the child was unusual, having regard to child psychology.

Besides, the statement of the child was not recorded by the police immediately after the occurrence, but recorded after a few days. Having regard to the unusual conduct of the child witness and the delay in the record of his statement by the police, the court observed that the possibility of his not having seen the incident and his version being tutored, cannot be ruled out. The observations upon which Mr. Amonkar placed heavy reliance, were made in such a fact situation, which is not the fact situation in the present case.

48. There is medical evidence on record which establishes that PW.4 was about 7 ½ years at the time of the incident and about 9 ½ to 10 years at the time when she deposed before the Children's Court. There was no serious challenge to the evidence relating to age of the minor victim girl. There is overwhelming evidence on record about the PW.4 reporting of what happened to her mother, her brother and herself at the Anmodghat at the hands of one *Patrao* and *Maratho*, whom, she has identified in the Court, as A.1 and A.2. This reporting was first to PW.1, in the early hours of 5.30 to 6.00 a.m. on 14th May, 2013. At this stage, there was absolutely no possibility of any tutoring because, there was really no person available for tutoring. The father of the victim girl had already died, possibly a few days earlier. The mother was strangled before her eyes and thrown into the valley hardly two to three hours earlier. Her younger brother, who had also suffered the same fate, was in no

position to even depose or make a statement on account of the trauma suffered by him.

49. Thereafter, PW.4, gave a similar statement clearly referring to *Patrao* and *Maratho* from Ribandar, Mercas, Goa as authors of the crime at about 7.30 a.m. in the Police Station. There is evidence on record which indicates that PW.4 knew *Patrao* and *Maratho* very well, as, she was staying along with her parents at the construction site of *Patrao*. There is evidence that the victim girl's mother was even working in the house of *Patrao*. There is evidence that for about two to three days the victim girl, her brother and mother stayed in the house of *Patrao*, when they were informed by *Patrao* and *Maratho* that her father had been taken to the hospital after the incident of 9th/10th of May, 2013 at the construction site.

50. Thus, there is absolutely nothing unusual about the conduct of PW.4 as was the position of the child witness in *Bhagwan Singh* (supra). Further, unlike in the case of *Bhagwan Singh* (supra), the statements have been made by PW.4 at the earliest instance, without even the remotest possibility of any tutoring from any source. The fact situation in the present case is entirely different from the fact situation in *Bhagwan Singh* (supra). Nevertheless, the observations that the testimony of a child witness is required to be evaluated with caution and circumspection, needs to be applied and

the testimony of PW.4, appreciated and evaluated keeping the same in focus.

51. Section 118 of the Evidence Act provides that all persons shall be competent to testify, unless Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other cause of the same kind. The explanation provides that even a lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them.

52. The law has not provided for any precise age limit below which the evidence of the child witness is excluded on the presumption that such child witness is unable to understand the questions put to her, or is unable to give rational answers to the same. TAYLOR, 12th Edition S.1377, p.869 points out that in all, questions of this kind must depend upon the good sense and discretion of the judge and in practice, it is not unusual to receive the testimony of children of 8 to 9 years of age when they appear to possess sufficient understanding. The competency of a child witness is usually ascertained by questioning her to find out intelligence to understand the occurrence witnessed and duty to speak the truth

before the Court.

53. The Supreme Court in *Suresh v. State of U.P.* - AIR 1981 SC 1122 accepted the evidence of a child of 5 years, who was the sole witness to the murder by a domestic servant. In *Dattu Ramrao Sakhare v. State of Maharashtra* – (1997) 5 SCC 341, the Supreme Court has held that even in the absence of oath the evidence of a child witness can be considered, provided that such a witness is able to understand the questions and is able to give rational answers thereof. The only precaution which the Court should bear in mind while assessing the evidence of a child witness is that the witness must be reliable one and his/her demeanour must be like any other competent witness and there must be no likelihood of tutoring.

54. In *Golla Yelugu Govindu* (supra), the Hon'ble Supreme Court has held that the decision on the question whether the child witness has sufficient intelligence, primarily rests with the trial Judge, who notices his manners, his apparent possession or lack of intelligence, and the said Judge may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of obligation on an oath. The decision of the trial Court may, however, be disturbed by the higher Court if from what is preserved in the records, it is clear that his conclusion was erroneous. This precaution is necessary because child witnesses are amenable to

tutoring and often live in a world of make beliefs. Though it is an established principle that child witnesses are dangerous witnesses as they are pliable and liable to be influenced easily, shaped and moulded, but it is also an accepted norm that, if, after careful scrutiny of their evidence the Court comes to the conclusion that there is impression of truth in it, there is no obstacle in the way of acceptance of the evidence of a child witness.

55. In *State of Uttar Pradesh Vs Krishna Master & ors* – AIR 2010 SC 3071, the Hon'ble Supreme Court has held that there is no principle of law that it is inconceivable that a child of tender age would not be able to recapitulate facts in his memory witnessed by him long ago. In the instant case, the child witness claimed on oath before the Court that he had seen five members of his family, his father, mother and brother being ruthlessly killed by the accused persons by firing gun shots. It is not likely to forget the incident for his whole life and would certainly recapitulate facts in his memory when asked about the same at any point of time, notwithstanding the gap of ten years. A child of tender age is always receptive to abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future.

56. Therefore, the principles which emerge from the aforesaid rulings of the Hon'ble Supreme Court will have to be kept in mind by us in evaluating and assessing the evidence of the minor victim girl PW.4, who, as we have noted earlier, was about 7 ½ years on the date of the incident and about 10 years on the date when she actually deposed before the learned Children's Court. Further, on perusal of the manner in which the testimony of PW.4 came to be recorded and the manner in which the same has been evaluated in the impugned judgment and order, we are quite satisfied that even the learned Children's Court, has undertaken the recording and evaluation of the evidence of PW.4 keeping in mind the above principles laid down by the Hon'ble Supreme Court in such matters.

57. As the learned Children's Court has had the benefit of observing the demeanour of PW.4, some additional credence is due to its evaluation. In appeal, normally interference is warranted if from what is preserved in the records, it transpires that the learned Children's Court was not alive to the principles laid down by the Hon'ble Supreme Court or if its conclusions were erroneous. In the present case, we are satisfied that the learned Children's Court has followed the principles laid down by the Hon'ble Supreme Court both, in matters of recording and evaluation of the testimony of the child witness and conclusions recorded by the learned Children's Court cannot be said to be erroneous.

58. The evidence on record bears out that PW.4 at the earliest instance *i.e.* hardly within two to three hours from the incident, spoke about the same to PW.1 and even indicated that *Patrao* and *Maratho* were the perpetrators of the crime. This was at about 5.30 to 6.00 a.m. on 14th May, 2013, when the crime, according to both ocular and medical evidence, was committed at around 2.00 to 3.00 a.m. on 14th May, 2013 in the forest of Anmodghat. Statement of PW.4 was soon thereafter recorded at the Police Station at about 7.30 a.m. on 14th May, 2013, in which she reiterated this position. There is no dispute that both the father and the mother of PW.4 were dead by this time. There was absolutely no possibility of any person tutoring PW.4 at the earliest instance when she made the disclosures/statements. No less than four to five statements of PW.4 were thereafter recorded before various authorities and there is a clear ring of consistency in them. The possibility of tutoring from any source is absolutely ruled out. In such circumstances, the learned Children's Court, was absolutely justified in relying upon the testimony of PW.4, after the learned Children's Court ascertained that PW.4 was in a position to understand the questions posed to her and give rational answers to the same.

59. The record very clearly indicates that the learned Children's Court was alive to the principles laid down by the Hon'ble Supreme

Court in the matters of record of evidence of child witnesses. Besides, the learned Children's Court, has also adverted to the statutory provisions of Section 32(1)(m) of the Goa Children's Act, 2003 and Section 33(2) of the Protection of Children from Sexual Offences Act, 2012 and complied with the same.

60. To begin with, the learned Children's Court, posed certain questions which are a part of the record in a question-answer form, in order to ascertain whether PW.4 could understand the questions posed and give rational answers to the same. On evaluation of such record, we see no ground whatsoever not to endorse the satisfaction recorded by the learned Children's Court that PW.4, aged about 10 years at the time of her deposition, was a competent witness who had given logical answers to the questions posed to her.

61. Thus, applying the principles laid down by the Hon'ble Supreme Court in matters of recording assessment and evaluation of the testimony of child witnesses, even we are independently satisfied that PW.4 was a competent witness in this matter. Further, looking to the nature of the incident and the fact that PW.4 was herself the victim, we are satisfied that it is unlikely that PW.4 forgets this incident or is in no position to depose to this incident hardly two years later. As was observed by the Hon'ble Supreme Court in *Krishna Master* (supra), a child of tender age is always receptive to

abnormal events which take place in its life and would never forget those events for the rest of his life. The child would be able to recapitulate correctly and exactly when asked about the same in future. This was in the context of the child witness deposing to the incident of murder of his family members almost ten years prior to the record of deposition. In our case, the deposition has been recorded hardly two years from the date of the incident. Therefore, even after applying the test of caution as well as circumspection, we are quite satisfied that PW.4 was a competent witness in the present matter.

62. PW.4, in the present case, has been quite clear and cogent in her testimony. She has deposed that she was residing at Mercedes, along with her parents and younger brother at the work site of *Patrao*, whom she eventually identified as A.1 before the Court. She has deposed that her father was a mason and even her mother used to work in the house of A.1. She has deposed that on one day, when her father brought a dress for her, he was beaten up by *Patrao* and *Maratho* after he was tied to a big pole outside their house at the construction site. No doubt, at one stage, she has admitted to not personally witnessing such beating, but being informed of it by her mother. However, she is quite categorical in stating that her father was brought into the hut in the injured condition upon the intervention of her mother. She is also categorical in stating that her

mother tended to the injuries sustained by her father by applying turmeric on the wounds and at this time she was very much in the house witnessing all this.

63. PW.4 has then deposed that on the next day, *Patrao* took her and her younger brother to his room and put on the T.V. for them, while he took their father somewhere. She has deposed that later on *Patrao* took her, her younger brother and mother to another house where they stayed for two days. She has then deposed that her mother stated that they wanted to go to their native place and told *Patrao* about the same. Thereafter *Patrao* and *Maratho* took her, her brother and her mother in a vehicle to Anmodghat.

64. PW.4 has then graphically deposed that initially she was sitting in the hind seat along with her brother and mother, while *Patrao* was driving the car and *Maratho* sitting by his side. She has deposed that on the way, *Patrao* stopped the vehicle and required her mother to sit in the front. She has deposed that *Maratho* then tied a rope around the neck of her mother, removed the mother's clothes and threw her out of the vehicle in the valley and the vehicle proceeded further.

65. PW.4 has then deposed that *Patrao* removed the clothes of her younger brother, tied a rope around his neck, strangled him and threw him out of the vehicle and the vehicle proceeded further.

66. PW.4 has then deposed that *Maratho* pressed her neck with his hands, *Patrao* removed her clothes and then *Maratho* inserted his finger in her private part and then she was thrown out of the vehicle.

67. PW.4 has then deposed that in the morning, she came up to the road and waved her hand to one vehicle, which stopped. She has deposed that there were some people in the vehicle whom she did not know, but that she was taken in the vehicle and given a T-shirt to wear. PW.4 has deposed that as the vehicle proceeded further, she saw her brother standing on the road and the vehicle stopped as she asked them to stop. She has deposed that the persons in the vehicle gave clothes to her brother as well and took him in the vehicle. She has deposed that they were then taken to the Police Station and given tea. She has deposed that thereafter they were taken by an ambulance to a hospital in Bambolim and were kept in the hospital for many days. She has deposed that upon discharge they were taken to Apna Ghar and thereafter shifted to a Boarding at Matruchaya.

68. PW.4 has categorically deposed that her statement was recorded by the Police on 14.05.2013 itself and it was also recorded

at Apna Ghar after some days. She has deposed that she was wearing a chappal on the date of the incident. This is relevant because a sandal was ultimately recovered from the car of *Patrao* and this was identified by PW.4 as being her chappal. The learned Counsel for the appellants did attempt to urge that there is a difference between a chappal and the sandal. They submitted that PW.4 deposes to wearing a “*chappal*” and the prosecution claiming to have found a “*sandal*” and that this amounts to some serious discrepancy. According to us, there is absolutely nothing unnatural in a rustic child witness like PW.4 referring to the “*sandal*” as a “*chappal*” and this is hardly any discrepancy, much less any serious discrepancy, as suggested on behalf of the accused persons.

69. PW.4 has deposed about the clothes which she, her brother and mother were wearing at the time of the unfortunate incident. She has deposed that they were taken in a black Maruti vehicle and the seat covers were black. She has deposed to the colour and nature of the clothes worn by *Patrao* and *Maratho*. As quite correctly observed by the learned Children's Court, PW.4, in her innocence, has also deposed that the T-shirt given to her by the people who found her was a very big T-shirt going below her knees, though, she does not remember its colour. She has deposed that the rope which was used for strangulation was white, thick and appeared like a cloth rope. She, in fact showed the string of the file board and stated that

the rope was of that type, but thicker.

70. PW.4 has deposed that she had seen the saree of her mother being removed, but she does not know if all the clothes which her mother was wearing, were removed. She has deposed that her entire clothes, including underwear, were removed and the same was the position with her brother.

71. PW.4 has given the description of *Patrao* and *Maratho* and stated that she will be in a position to identify them if shown. There is a note made in the record by the learned Children's Court that when the Court staff went to draw aside the curtain behind which the two accused persons were seated, PW.4 was very scared, pale and started crying. That PW.4 was unwilling to see them and became quiet. After lot of convincing also, PW.4 was unwilling to see the persons behind the curtain. Subsequently however the witness was taken away from the Court and while she was standing at the door of the chamber of the Presiding Officer, along with the learned P.P., PW.4, with great reluctance, agreed to see the persons behind the curtain.

72. The record further indicates that the curtain was drawn aside and the accused persons, who were sitting behind the curtain, were shown to PW.4. Thereupon, PW.4, identified the person in the

blue shirt as *Patrao* and the person sitting next to him in a white shirt with black stripes, as *Maratho*. The record states that the person in blue shirt was A.1 and the person in white shirt, with black stripes, was A.2.

73. The record also indicates that Mr. D'Sa the learned Counsel for A.1 objected to the procedure adopted by the learned Children's Court for the purpose of identification. Mr. D'Sa, who appears for A.1 in this Court as well, reiterates such objection by pointing out that such identification was not in accordance with law. He submits that identification from the side or in profile, is no identification at all.

74. According to us, the objection to the identification was quite correctly rejected by the learned Children's Court. In the first place, there was absolutely nothing unnatural in the conduct of PW.4. It is quite natural that PW.4 would be scared and unwilling to see the accused persons, particularly from a very close range. This is a trial which was held in the Children's Court, where, the law itself requires that the Courts must be children friendly. The Children's Court is not only empowered, but is expected to hold the trial in a manner as will not further traumatize the victim child or child witnesses. In this case, the witness, was only taken upto the door of the chamber of the Presiding Officer, from where, she identified the

two accused persons. In fact, the provisions of Section 32(1)(m) of the Goa Children's Act, 2003 and the provisions of Section 33(2) of the Protection of Children from Sexual Offences Act, 2012 contemplate that the accused persons are made to sit behind a drawn curtain, so that they are not exposed to the child victim or the child witnesses. The procedure adopted by the learned Children's Court was entirely in accordance with law and we do not see any infirmity in the identification process. The objection raised by Mr. D'Sa was quite correctly overruled by the learned Children's Court and we see no infirmity in this ruling.

75. Besides, there is evidence on record which establishes that PW.4 was knowing *Patrao* and *Maratho* and therefore, this is not a case where the witness was called upon to identify the accused persons of whom she may have had only some fleeting or momentary glance. PW.4, as noted earlier, has clearly deposed to being taken to the house of *Patrao*, who had put on the television for her and her brother. PW.4 has deposed to have been taken to another house by *Patrao* and *Maratho*, where she along with her brother and mother, stayed for about two days. PW.4 has deposed that she was staying in the room at the construction site of *Patrao*, where she had seen *Maratho* along with *Patrao* many times. She has deposed that even *Maratho* was staying in a room of the *Patrao*. She has deposed that even the room where she was staying with her family was close to the

room of the *Patrao*. Taking into consideration all these circumstances, amply established from the evidence on record, we see no ground to fault the identification of the accused persons by PW.4 before the learned Children's Court.

76. Mr. D'Sa and Mr. Amonkar emphasized on the so called inconsistencies or rather omissions in the evidence of PW.4, particularly when compared to the evidence tendered by PW.4 in Sessions Case No.53/2013 which concerns the murder of her father. They pointed out that the two versions of PW.4 contradict each other, thereby rendering the entire testimony of PW.4 uncreditworthy or at least unsafe to rely upon. They submit that the chaff and grain is so well mixed with each other that separation is impossible and therefore no reliance can be placed on the testimony of PW.4.

77. The aforesaid contentions of the learned Counsel for the appellants are mainly based upon some responses of PW.4 in the course of, we must say, her grueling cross examination. From the perusal and evaluation of the responses of PW.4 in the course of cross-examination, the first thing which is necessary to be noted is that the defence has merely tried to point out that certain aspects deposed to by PW.4 in the present case, were not deposed to in Sessions Case No.53/2013 concerning the murder of her father. Therefore, what is sought to be pointed out are not really

contradictions, but mainly omissions. There is also substance in the contention of Mr. Rivonkar that even these omissions have not been brought on record in the manner contemplated by Section 145 of the Evidence Act and the law laid down by the Hon'ble Supreme Court in *Choudhary Ramjibhai Narasanghbai vs. State of Gujarat* - AIR 2004 SC 313 and *Tahsildar Singh* (supra).

78. That apart, we have to note that the scope of the two criminal cases is different inasmuch as Sessions Case No.53/2013 concerns the murder of PW.4's father and the present case concerns not only the murder of PW.4's mother, but also serious attempt to murder PW.4 herself and her younger brother. In this case, PW.4 has also deposed that she was sexually assaulted by A.2. The deposition of PW.4, will therefore, have to be evaluated keeping in mind the scope of the two separate prosecutions.

79. Thirdly, we do not agree with the contention of Mr. D'Sa that this is a case where the chaff and the grain is so mixed as to render it inseparable. The grain or rather the crux of PW.4's deposition is brought on record by the prosecution in the form of her examination-in-chief. This grain has remained intact, notwithstanding the grueling cross-examination. In the context of the so called omissions, PW.4, has herself explained that she might have been confused on some occasions, which is quite natural.

However, there is no confusion whatsoever in so far as the grain or the crux of the evidence is concerned and we must say that no dent has been made to this grain or crux in the course of the cross-examination.

80. PW.4 is unshaken when it comes to the circumstances on basis of which she explains that she knows and has seen A.1 and A.2 on several occasions, at close quarters. PW.4 is unshaken when she deposes to and describes their journey in A.1's black Maruti car to Anmodghat. PW.4 is unshaken when she deposes to witnessing A.2, with the help of A.1, strangulating her mother and throwing her out of the car, after A.1 removed her clothes. PW.4 is unshaken when she deposes to witnessing a similar treatment being meted out to her younger brother a little later. Finally, PW.4 is unshaken when she deposes to A.2 pressing her neck and sexually assaulting her and together with A.1 throwing her out of the car a little later. This is really the grain in the evidence of PW.4 and we are quite satisfied that the same is neither mixed with any chaff or in any case, not so mixed as to be inseparable as urged by the learned Counsel for the Appellants.

81. The so called omissions or inconsistencies, make no dent whatsoever to the grain or the crux of the PW.4's deposition in so far as the present case is concerned. PW.4 as candidly admitted not

remembering whether she had stated to the Police that she had seen the assault on her father, but in the present case, she does, at one place says that she had not seen the assault on her father. She deposes to having stated to the Police that her mother intervened and brought her father inside the house when he was being assaulted. She admits that this is not recorded in some of the statements which she was confronted with. PW.4 deposes that her mother was present along with her and her younger brother, when they were watching television in the house of *Patrao* (A.1). But she states that she does not remember whether she had stated this to the Police. She however adds that she had not seen her father any time thereafter.

82. PW.4 deposes that A.1 had told her mother that Police are searching for them and that they should pack up their things and go and thereafter their mother said that they should go to their native place. As noted earlier, these are mainly omissions and they were never put to the I.O. in terms of the law laid down in *Tahsildar's* case (supra). That apart, omissions of such nature, make no dent whatsoever to the crux of PW.4's deposition in so far as the present case is concerned. The otherwise clear and cogent testimony of PW.4 does not deserve to be rejected on the basis of such so called omissions.

83. The learned Counsel for the Appellants pointed out that

there is no clarity as to who precisely removed the clothes of PW.4's mother after she was strangled and about to be thrown out of the car. We have seen the evidence on this aspect and according to us, PW.4 is quite clear on this aspect in her examination-in-chief. In her cross examination, she admits to being a little confused as to whether she had informed the Police authorities that her mother's clothes were removed by A.1 or A.2. According to us, in the totality of the circumstances, this is hardly material. There is ample evidence on record indicating the conspiracy hatched by A.1 and A.2. Therefore, whether the clothes of PW.4's mother were removed by A.1 or A.2, hardly makes any difference to the crux of the matter.

84. According to us, the accused persons cannot draw much mileage from the circumstance that PW.4 has sometimes referred to A.2 as *Maratho*, and other times as '*Marathi*' or '*Marathe*'. In the first place, these variations are too trivial to affect the otherwise clear and cogent testimony of PW.4. Secondly, there is ample evidence on record that PW.4 had seen and was knowing both, A.1 and A.2, whom she referred to as *Patrao* and *Maratho*, much prior to the incident in question. Normally, in Goa, the employer is referred to as '*Patrao*' which is a Portuguese language term that has crept into the local language. Thirdly, PW.4 has identified both, A.1 and A.2 before the learned Children's Court. Therefore, according to us, the so called discrepancy or variation makes no dent whatsoever to the clear

and cogent testimony of PW.4 in this matter.

85. Similarly, though it is true that PW.4 in her deposition in the present matter has admitted that her father used to consume alcohol and has denied this fact in her deposition in Sessions Case No.53/2013, that is hardly any reason to discard her clear and cogent testimony or to hold that this witness is an untruthful witness. There is no discrepancy in her statement that *Maratho* used to stay in *Patrao's* room, if, such statement, is considered together with the other evidence on record, in which, PW.4 states that even her family used to stay in *Patrao's* rooms. All that she means is that she and her family were staying in the room provided by the *Patrao* at the construction site, where her parents were labourers. Based upon such so called discrepancies, we cannot hold that PW.4 is an unreliable or untruthful witness. We are satisfied that the testimony of PW.4 has a ring of truth about it and it inspires confidence.

86. As noted earlier, most of the so called inconsistencies or contradictions pointed out by the learned Counsel for the Appellants relate to omissions, which, according to us, are mainly trivial and make no dent to the crux of the matter. Ultimately, it is necessary to keep in mind the trauma which PW.4 was forced to suffer and the impact with such trauma would have possibly for her entire remaining life. Some amount of confusion, resulting in some

omissions, is absolutely natural. In fact, the absence, may have been unnatural and suggestive of some tutoring. The discrepancies of the omissions pointed out by the learned Counsel for the Appellants in fact lend assurance to the inference that there was absolutely no tutoring of PW.4.

87. Besides, it is also necessary to note that several statements of PW.4 came to be recorded before several authorities in a span of few days, immediately after the incident. To urge that some thing was said in some of the statements but not said in the others or that somethings which were deposed to in the Court find no place in some of the statements given by her, is really not a manner in which the testimony of PW.4, which is otherwise clear and cogent, can be discredited.

88. In this case, we are quite satisfied that the testimony of PW.4 has a ring of truth and inspires confidence. Ultimately, we cannot forget that PW.4 is an injured witness, apart from being an eye witness to the murder of her mother and an attempt to murder her younger brother. There is no good reason to discard her clear and cogent testimony on the basis urged on behalf of the accused persons or even otherwise. In fact, the conviction of the appellants can be sustained only on the basis of the testimony of PW.4, particularly because there is absolutely no evidence about tutoring or even

opportunity for tutoring. However, we do not propose to sustain the conviction of the appellants solely on the basis of the testimony of PW.4. Rather, we propose to examine whether this testimony finds corroboration with the other evidence brought on record by the prosecution.

89. In *State of Madhya Pradesh Vs. Ramesh and another* (supra) the Hon'ble Supreme Court has held that the deposition of a child witness may require corroboration, but in case his deposition inspires confidence of a Court and there is no embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection, because he is susceptible to tutoring. Only in case, there is evidence on record to show that the child has been tutored, Court can reject his statement, partly or fully. However, an inference has to be whether the child has been tutored or not, can be drawn from the contents of his deposition.

90. In the present case, we are satisfied that there was neither any opportunity, nor any source to tutor PW.4. The deposition of PW.4, as well as evidence relating to surrounding circumstances which has been brought on record by the prosecution, rules out the possibility of any tutoring. Nevertheless, we propose to examine whether the testimony of PW.4 has corroboration in other evidence

brought on record by the prosecution.

91. From the testimony of PW.1 and PW.6, there is absolutely clear evidence that PW.4 and her younger brother were found at about 5.30 to 6.00 a.m. on 14/5/2013, standing naked and traumatized at the edge of the road in Anmodghat, from where they were brought by PW.1 in his vehicle to the nearest Police Outpost. Even the evidence regards PW.1 calling the Ambulance or reporting the matter to the nearest Police Station has gone unchallenged. Further, the evidence indicates that it is in this very area *i.e.* the Anmodghat that the dead body of PW.4's mother was found with injuries as described by PW.4. The clothes of PW.4's mother were also removed, as was deposed to by PW.4.

92. The very presence of PW.4, then aged 7 ½ years and her younger brother, then aged 5.4 years at the dawn of 14/5/2013, in the Anmodghat, which is a forest area in a naked condition and with injuries on their persons, offers corroboration to the testimony of PW.4. There is absolutely no explanation as to why these minor children should be found in such a condition, at such a spot at the dawn of 14/5/2013 unless, the version deposed to by PW.4 is true. In the 313 of the Cr.P.C. statements recorded by the learned Children's Court, these circumstances have been clearly put to both, A.1 and A.2 and their responses is that they do not know anything

about this.

93. The medical evidence in this case speaks about the strangulation injuries on the neck of PW.4's mother and younger brother. PW.4 has described the rope with which her mother and younger brother were strangled. This rope has also been recovered by the investigating agencies, in pursuance of a statement made by A.2. There is evidence regards the purchase of such rope by A.2 from the Panjim market and the shopkeeper from where such purchase came to be made, has also deposed to this fact. The injuries on the persons of PW.4's mother and brother are entirely consistent with the deposition of PW.4 as to the manner in which such injuries were made by A.1 and A.2 before her own eyes. According to us, the medical evidence regards the injuries on the persons of PW.4's mother and brother, offer sufficient corroboration to the testimony of PW.4.

94. Thereafter, the medical evidence regards the injuries on the person of PW.4 herself are entirely consistent with what is deposed to by her. PW.4 has deposed to A.2 pressing her neck, as also inserting his finger in her private part. The Doctors who have been examined by the prosecution, have deposed to the injuries on the person of PW.4. These injuries are entirely consistent with what has been deposed to by PW.4 and therefore, offer sufficient corroboration to

the testimony of PW.4.

95. Although, we do not propose to take into consideration the circumstance of recovery of the knife at the instance of A.2 because we find that there is some discrepancy regards the marking on the knife, we are satisfied that there was no infirmity in the proceedings leading to the recovery of the rope at the instance of A.2. The contention that panchas or the forensic experts or the fire brigade authorities were already kept ready even before A.2 could make any disclosure, deserves no acceptance.

96. There is really no evidence that the Fire Brigade authorities were kept ready at the Police Station or at the site from where the rope was recovered. The I.O. *i.e.* PW. 41 has already explained that in the matter of this nature, a letter was written to the Mamlatdar to depute two government servants as witnesses on the previous day because in such matters, there is likelihood of disclosures.

97. There is also no merit in the contention that the recovery of the rope is doubtful because the same was from a source which had flowing water. The record indicates that the rope was almost 21 metres length and a portion of the same was on land and only a portion in the flowing waters. The contention based upon the colour of the rope is also too trivial to doubt the recovery. There is nothing

unnatural in one of the witnesses in referring to the colour of the rope as brown, particularly after the rope was recovered from a source which had flowing water.

98. The evidence of PW.4 that rope was used for strangulation, coupled with the opinion of doctors that the injuries on the dead body or the brother of PW.4 could be caused with a rope of this nature, cannot be wiped out on account of such a trivial discrepancy arising out of deposition of only one of the witnesses. There is really nothing to doubt the recovery of the rope and consequently, the statement made by A.2, which led to the recovery of the rope, was correctly admitted in evidence by the learned Children's Court by resort to the provisions of Section 27 of the Evidence Act.

99. At this stage, it is necessary to note that this very rope was shown to the doctors who deposed in this matter in the context of the injuries on the person of PW.4's mother and brother and they categorically deposed that such injuries could have been made by a rope of this nature. Even PW.4 had deposed to the nature of the rope by even pointing out to the strings attached to the board files, but had hastened to add that the rope with which her mother and brother were strangled, was thicker. According to us, all this evidence also offers sufficient corroboration to the testimony of PW.4.

100. There is ample medical evidence on record which offers substantial corroboration to the otherwise clear and cogent testimony of PW.4. Though, it was not necessary because it was never seriously disputed, the prosecution has even brought on record evidence in the form of DNA profiling to establish the relationship between the deceased mother and her two minor children.

101. In the context of medical evidence, which we find is quite overwhelming, reference can usefully be made only to the testimony of Dr. Madhu S.G. Ghodkirekar (PW.18) who was the Asst. Professor in the Department of Forensic Medicine, Goa Medical College and who conducted the autopsy on the deceased and also medically examined PW.4. His testimony, according to us, is very significant and offers substantial corroboration to the testimony of PW.4.

102. PW.18 has deposed to the several injuries found on the body of the deceased. In particular, he has deposed that the first injury was the faint pressure abrasion of ligature mark of 1 cm width, transversely placed and encircling entire neck for length of 29 cms, placed just at the upper border of thyroid cartilage over the front of neck, 7.5 cms below both mastoid process and 3 cms below hairline. He deposed that there was mild patchmatization effect for the base of ligature mark with red line of vital reaction at margins.

103. PW.18 has also deposed that upon internal examination of the deceased, he found effusion of blood for scalp, neck structures and buccal cavity under injuries present in those areas. He deposed that the brain was pale and little froth was present in the lumen of trachea. Patechial haemorrhages were present for plurae. Both lungs were pale and mildly edematous. The chambers of the heart had little blood. PW.18 also deposed to the several injuries on the person of the deceased, which injuries are consistent with PW.4's testimony that her mother was strangled, stripped and then thrown into the valley. PW.18 has deposed that the injuries on the person of the deceased were caused within 24 hours from the time of the autopsy. Significantly, he has deposed that to the best of his knowledge and belief the cause of death was due to damage to liver and asphyxia, as a result of constriction of neck by ligature mark, vide injury no.1, to which we have adverted to earlier, with compression of mouth and nostrils, vide injury nos. 2 and 3, which were antemortem and fresh at the time of death. This opinion, which is backed by overwhelming evidence on record, is, in fact, entirely consistent with the testimony of PW.4, who, as an eye witness, has quite graphically described the manner in which her mother was put to death by the accused persons.

104 PW.18 was shown the rope (MO. 38) which was recovered on the basis of the statement of A.2 and PW.18 has categorically

deposed that the ligature mark on the neck of the deceased described as injury no.1 in the autopsy report, could be caused by such a rope. In the course of cross examination, we find that no dent whatsoever has been made to the clear and cogent testimony of PW.18. In fact, in the course of cross examination, PW.18 has further clarified his testimony. In the cross examination, pursuant to his reexamination, PW.18 has clearly deposed that the injuries, which according to him were caused by blunt force impact, could have been caused either by assault, or by violent fall. All this evidence offers very substantial corroboration to the otherwise clear and cogent testimony of PW.4 in this matter.

105. PW.18 also medically examined PW.4, within 24 hours from the time of the incident and has deposed to the various injuries on the person of PW.4 as well. He has deposed that there was an abrasion of 0.5 cms x 0.2 cms. over left cheek and of 0.5 x 0.5 cms, on right molar region. He has deposed that there was faint pressure abrasional mark present all around neck, mild reddish, transversely placed with bruising on thyroid cartilage (width 1.5 cms) with subconjunctival haemorrhage for left eye, at lateral side. PW.18 further deposed that there was pressure abrasion mark around the neck like that of attempted strangulation by ligature. This testimony is entirely consistent with the version deposed to by PW.4 that A.2 pressed her neck in order to strangulate her. Consequently, this

medical evidence offers substantial corroboration to the version deposed to by PW.4 in this matter.

106. PW. 4 has categorically deposed that A.2 inserted his finger in her private part. PW.18 has deposed that upon examination of the private part of PW.4, he noticed that her vulva was edematous and with blood stains. There was laceration, non-bleedings of 1 x 0.3 cm superficial for left labia minora at 3 oclock position and another 0.4 cm x 0.2 cm over labia minora. He deposed that all injuries were within 24 hours duration and there were genital injuries like that of genital penetration. Again, we find that the medical evidence, very clearly corroborates the version deposed to by PW.4 on this vital aspect.

107. On the aspect of TI Parade, though, we are unable to accept the contentions of Mr. D'Sa and Mr. Amonkar that there was any serious breach of the procedure prescribed in the Criminal Manual, we prefer not to rely on the evidence in relation to the TI Parade for reasons indicated hereafter.

108. The identifying witnesses in this case were PW.5 and PW.15, apart from PW.4. PW.5 is the shopkeeper from whom A.2 is alleged to have purchased the knife with which the clothes of PW.4's mother and brother and herself were allegedly cut. However, there is

evidence that the mask on A.2 was lifted when A.2 was taken by the Police to the market in order to indicate the place from which he purchased the knife. This was much prior to the TI Parade. Similarly, though PW.15 in his deposition has denied that he was shown the face of A.2, when A.2 was brought to the market by the Police to show the place from which he purchased the rope, the pancha witness PW. 25 speaks of A.2's mask being raised and his face being shown to PW.15. In this state of the evidence, we do not deem it safe to rely upon the evidence in the form of TI Parade.

109. In so far as identification by PW.4 is concerned, however, we are quite satisfied that even the holding of the TI Parade was quite unnecessary. PW.4 has in fact deposed that she saw the accused persons in the Children's Court for the first time after the incident. However, there is a stray sentence in the course of cross-examination that she was shown the accused persons at the Police Station. It is possible, as contended by Mr. Rivonkar, that PW.4, who was about 7 ½ years at time of the incident and 10 years old at the time of her deposition, may have confused the place where the TI Parade was held as the Police Station. However, according to us, there was really no necessity for holding any TI Parade, in so far as identification by PW.4 was concerned.

110. This is because, as has been repeatedly noted, there is ample

evidence on record that PW.4 knew the accused persons before the incident. PW.4 has deposed that she, along with her mother and brother, were taken to A.1's house, where they stayed for 2-3 days. She has deposed about the journey on the night intervening 13th/14th May, 2013 along with the accused persons. She has deposed to the accused persons strangulating her mother and throwing her into the valley in front of her own eyes. She has deposed to strangulation of her younger brother soon thereafter. She has deposed to the sexual assault on her by the accused persons and how she was thrown out from the car.

111. As was pointed out by the Hon'ble Supreme Court, it is extremely unlikely, in such a situation, that PW.4 would forget the identity or confuse the identity of the accused persons and implicate some strangers to the crime. In such circumstances, there was absolutely no necessity of holding any identification parade. Therefore, even if the evidence in the form of TI Parade is excluded from consideration, the clear identification by PW.4 of the accused persons, stands and together with other corroborating evidence referred earlier, is sufficient to sustain the conviction of the accused persons.

112. In this case, apart from the identification by PW.4 of both the accused persons in the Court, which is by itself substantive

evidence, particularly since PW.4 knew the accused persons and further she has deposed that it is these accused persons who took her, along with her mother and brother in a black Maruti car to Anmodghat, where they killed her mother, strangled her brother and sexually assaulted her, the prosecution has also established that A.2 was known as *Maratho* by examining PW.10. This witness has deposed that A.2 was in his employment as a watchman and has even identified A.2 in the Court. From the tenor of cross examination of PW.10 and the answers given by PW.10 in the cross-examination, it can hardly be said that any dent is made to his testimony. The omissions which Mr. Amonkar alleges, were never put to PW.10 or the I.O. and, therefore, the same can hardly be taken into consideration. There was no cross-examination in so far as the photograph was concerned, though, it is true that the photograph was admitted in evidence, only subject to production of negative or compliance with the provisions of Section 65 B of the Evidence Act. However, this is not a case where the Children's Court has relied as such upon the photograph. There is no case made out for discard of evidence of PW.10, which, in any case, only corroborates PW.4's testimony that A.2 was known as *Maratho*. As noted earlier, since, PW.4 has actually identified A.2, the issue as to whether he was known as *Maratho* or not, cannot be overemphasized.

113. Besides, the evidence on record bears out that PW.4

indicated the names of A.1 and A.2 *i.e. Patrao and Maratho* at the earliest instance to PW.1 and in her statement to the Police which was also taken at the earliest instance. As noted earlier, this is not a case where there was any opportunity or for that matter, source for tutoring PW.4. This is not some case where PW.4 never knew the accused persons earlier, or had only a fleeting glance of the accused person in the course the incident which is alleged to be the crime in question. Both, A.1 and A.2 in their Section 313 Cr.P.C. Statements have no doubt stated that they have been falsely implicated in this matter, however, there is absolutely nothing suggested as to why the minor victim girl like PW.4 will want to implicate A.1 and A.2. On account of all these factors, we are satisfied that there was absolutely no necessity of PW.4 having to identify the accused persons in the TI parade before she could actually identify them before the learned Children's Court.

114. In *Dana Yadav and ors. Vs State of Bihar* - (2002) 7 SCC 295, the Hon'ble Supreme Court has held that where the accused was well known to the prosecution witness from before, there was no necessity of holding TI parade. In *Amit Vs. State of Uttar Pradesh* - (2012) 4 SCC 107, the Hon'ble Supreme Court has held that where the accused was a neighbour and known, there was no necessity of holding test identification parade.

115. In *Asha vs. State of Rajasthan* - AIR 1997 SC 2828, the Hon'ble Supreme Court has held that where the incident of murder took place during the day an FIR was lodged within an hour of the incident mentioning the names of the accused, there was no possibility of erroneous identity or concoction of a false story, non-holding identification parade did not matter.

116. In *Yuvaraj Mohite vs. State of Maharashtra* (2006) 12 SCC 512 the Hon'ble Supreme Court has held that where sufficient description of the accused was given in the FIR and he was arrested soon thereafter, TI parade was not necessary.

117. In *State of H.P. vs. Prem Chand* (2002) 10 SCC 518, where a child witness had clearly seen the accused on two occasions and whom he had known to be his uncle, holding of TI parade was held, unnecessary by the Hon'ble Supreme Court.

118. In *Sayed Ahsan vs. State of West Bengal and anr.* (2012) 4 SCC 352, Hon'ble Supreme Court has held that where the accused and the eye witnesses belong to the same locality and they knew him before the incident, holding of TIP was not necessary. It is only if the accused was a stranger to them that TIP would have been necessary at the time of investigation. In *Motilal Yadav vs. State of Bihar* - (2015) 2 SCC 647, the Hon'ble Supreme Court held that where the

witness had enough time to identify the accused, the holding of a TIP would be futile and was really not necessary.

119. Taking into consideration the above rulings of the Hon'ble Supreme Court and applying them to the fact situation in the present case, we are satisfied that there was, in fact, no necessity of holding any TI Parade in aid to the identification by PW.4 of the accused persons before the Children's Court.

120. The recovery of the dead body of PW.4's mother renders admissible the statements made by the accused persons which led to such recovery. The same is the position of the black Maruti car and the black motor cycle. The prosecution has examined the RTO authorities who have deposed that these vehicles belong to A.1. In his Section 313 Cr.P.C. statement even A.1 has admitted this position, but simply stated that his relatives or friends were using these vehicles. It is necessary to recall that PW.4 was both, consistent and categorical about being taken to Anmodghat in a black Maruti vehicle. The circumstance that the keys were found in the ignition at the time of the recovery, is hardly a circumstance which creates any doubt on the recovery. The statements of the accused persons leading to such recoveries, have been quite correctly admitted in evidence by the learned Children's Court relying upon the provisions of Section 27 of the Evidence Act. Therefore, even if the statement leading to

the recovery of the knife is excluded from consideration, the other statements could have been taken into consideration by the learned Children's Court, they being legal evidence. Such evidence also offers corroboration to the testimony of PW.4.

121. Thus, we are quite satisfied that PW.4 was a competent witness in this matter and further, there is a ring of truth in her deposition before the Children's Court. Her deposition inspires confidence and we do not agree with Mr. D'Sa's contentions that chaff and grain is so intermixed as to render it inseparable. According to us, the grain of the matter remains untainted in the clear and cogent testimony of PW.4. Further we are satisfied that there is ample corroboration to be found on record to the clear and cogent testimony of PW.4. This corroboration is *inter alia* in the form of medical evidence, as well as ocular evidence. We, therefore, have no hesitation to rely upon the well corroborated testimony of PW. 4 in order to sustain the conviction in this matter, even without going to the issues of TI Parade and judicial confession of A.2.

122. In so far as the judicial confession of A.2 is concerned, learned Counsel for the appellants pointed out to two infirmities, which according to them, were quite serious and went to the root of the admissibility of such confession in evidence. Firstly, they pointed out that there was a breach of the mandatory provisions of Sections

164, read with Section 281 of the Cr.P.C. and the instructions in the Criminal Manual issued by the High Court inasmuch as not even 24 hours were given to A.2 to reflect on the matter of making a confession. They point out that such time for reflection can be meaningful only after the potential confessor is informed of the consequences of such confession. They point out that in the present case, the record, at the highest, indicates that A.2 was sent to judicial custody for a period of 5 days prior to his alleged confession, but there is absolutely no evidence on record to indicate that A.2 was informed of the consequences of making a confession and thereafter given at least 24 hours to reflect on the matter. They submit that this is the first serious infirmity in the matter of admissibility of the confession.

123. The learned Counsel for the appellants then point out that in this case oath was administered to A.2 in order to make his confession. They point out that this is prohibited taking into account the fundamental right guaranteed in Article 20 (3) of the Constitution of India. They point out that administration of oath creates a pressure on the accused and also renders retraction of the confession extremely difficult for the fear of charge of perjury. They rely on *Babubhai Parmar* (supra); *Dhananjaya Reddy* (supra); *Pralhad Gajbhiye* (supra) and *Akanman Bora* (supra) in support of their contentions.

124. Mr. Rivonkar, the learned Public Prosecutor has, however, submitted that there is no breach of any statutory provisions or for that matter instructions in the criminal manual when it came to record of confession of A.2. He submits that voluntariness and truthfulness are the main ingredients of a valid confession and both these ingredients have been established in the present case. He submits that though A.2 claims to have retracted the confession, there is no record of such retraction. He points out that it is only in Section 313 Cr.P.C. Statement that there is some semblance of retraction on the basis of a vague statement that A.2 was threatened by the police. He points out that time and again PW.29, who is a Judicial Magistrate, inquired with A.2 as to whether, after having stayed for almost for 5 days in Judicial Custody, A.2 requires any further time for reflection and A.2 answered in the negative. He, therefore, submits that the statutory provisions, as well as instructions, were complied with and there is no infirmity in the record of the confession.

125. Mr. Rivonkar submits that there is no statutory prohibition to administration of oath and in fact, there is no evidence that oath was actually administered to A.2. In any case, he submits that no prejudice whatsoever has been demonstrated by A.2 on account of any alleged administration of oath and therefore, the solemn

confession of A.2 ought not to be excluded from consideration.

126. According to us, there is really no necessity to go into the rival contentions on the aspect of admissibility of the confession of A.2 in evidence. This is because even if we exclude the entire confessional statement of A.2 from consideration, there is ample evidence on record to sustain the conviction of the accused persons. As noted earlier, the prosecution has produced on record the testimony of an injured witness, which is clear, cogent and inspires confidence. Though not strictly speaking necessary, this evidence finds ample corroboration in medical and ocular evidence placed on record by the prosecution. There is evidence in the form of statements admissible under section 27 of the Evidence Act, particularly when it comes to the recovery of the dead body of PW.4's mother and the rope with which PW.4's mother and her younger brother were strangled.

127. There is yet another aspect of this matter which needs to be adverted to. This is a case where the accused persons were charged with the offences punishable under the Goa Children's Act, 2003. The evidence on record is quite sufficient to convict the accused persons of the offences so charged. There is absolutely no dispute that the two victim children answered the definition '*child*' as provided in Section 2(d) of the Goa Children's Act, 2003. The

evidence on record establishes that the two minor victim children were subjected to '*child abuse*', as defined in Section 2(m) of the Goa Children's Act, 2003.

128. This is also a case where the two children, by practicing deceit, were taken by the accused persons in a black Maruti car on 13/5/2013. Thereafter, these two minor victim children were made to watch the gruesome murder of their mother committed by the accused persons. The accused persons then assaulted the minor victim boy by strangulating him and then throwing him out of the car in Anmodghat in early hours of 14/5/2013. The accused persons sexually assaulted the minor victim girl, pressed her neck and again threw her from the car in Anmodghat in the early hours of 14/5/2013. All this is sufficiently borne out from the evidence on record.

129. Section 2(m) of the Goa Children's Act, 2003 refers to maltreatment of a child and includes psychological and physical abuse, neglect, cruelty, sexual abuse and emotional maltreatment. This offence also includes any act by deeds or words which debases, degrades or demeans the intrinsic worth and dignity of a child as a human being. The nature of the crime committed by the accused persons clearly qualifies the description of the '*child abuse*', as provided in Section 2(m) of the Goa Children's Act, 2003.

130. In so far as the minor victim girl is concerned, the accused persons are guilty of committing the grave sexual assault upon her. This offence of '*grave sexual assault*' is defined under Section 2(y)(i) of the Goa Children's Act, 2003. In fact, this section defines '*sexual offences*', which includes '*grave sexual assault*'. Section 2(y)(i) defines '*grave sexual assault*', to cover different types of intercourse; vaginal or oral or anal, use of objects with children, forcing minors to have sex with each other, deliberately causing injury to the sexual organs of children, making children pose for pornographic photos or films, and also includes rape. Sexual assault which covers sexual touching with the use of any body part or object, voyeurism, exhibitionism, showing pornographic pictures or films to minors, making children watch others engaged in sexual activity, issuing of threats to sexually abuse a minor, verbally abusing a minor using vulgar and obscene language, is also included in the expression '*sexual offences*'.

131. There is both, ocular as well as medical evidence on record, which establishes that A.2 inserted his finger in the private part of the minor victim girl. There is also evidence that A.1 and A.2 removed the clothes of the minor victim girl, as well as the minor victim boy. According to us, there is evidence on record to sustain the conviction of the accused persons for having committed the sexual offences against the minor victim girl. In fact, this is a case of

grave sexual assault, committed on the minor victim girl.

132. The trial in the present case was held before the Children's Court and the same was, at no stage, quite correctly objected by any of the accused persons. Section 32 of the Goa Children's Act, 2003, including in particular, Section 32(1)(l) of the Goa Children's Act, 2003, provides that whenever any offence is alleged to have been committed against a child, the burden of proving that such offence has not been committed by the accused, lay on the accused if the child was in his custody at the time of his arrest or at the time of committal of offence or at the time of rescue or removal of the child victim, as the case may be.

133. In the present case, there is evidence that the accused persons, to begin with, murdered the mother of the two minor victim children and thereafter threw her in a valley in Anmodghat. From this moment onward at least, the two minor children were in the custody of the two accused persons. Whilst in such custody, the prosecution had alleged and in fact, PW.4 the minor victim girl, has categorically deposed that the accused persons strangled her younger brother and threw him out of the car. Thereafter, the accused persons physically and sexually assaulted PW.4, the minor victim girl and, threw her out of the car. In such circumstances, the provisions contained in Section 32(1)(l) of the Goa Children's Act,

2003 were clearly attracted and the burden of proving that such offences against the two minor children were not committed by them, lay on the accused persons.

134. However, in the present case, the accused persons, despite opportunity, have chosen not to lead any defence evidence, or otherwise discharged this burden, which the law casts upon them. However, we hasten to add that this is only an additional ground for sustaining the conviction of the accused persons.

135. The material on record, according to us, is more than sufficient to sustain the conviction of the accused persons for the offences under the Goa Children's Act, 2003, even on the basis that the entire burden of establishing the guilt of the accused persons was upon the prosecution. In this case, we are satisfied that the prosecution has discharged this burden beyond reasonable doubt. The reference to Section 32(1)(l) is made only because we feel that this provision was attracted to the facts and circumstances of the present case and the burden, in fact, lay upon the accused persons in terms thereof, which burden the accused persons have not even attempted to discharge. Again, it is clarified that this is only an additional ground to sustain the conviction and by no means, the basis to sustain the conviction.

136. In this case, we have carefully perused the statements of the accused persons recorded under Section 313 of the Cr.P.C. A.1 has no doubt denied the prosecution version by mostly stating that he does not know anything about the matter. In so far as recoveries are concerned, he has denied having made any voluntary statements. He has denied that he was known as *Patrao*. He has admitted that the black Maruti car and the motor cycle which were attached in the present case belong to him, but stated that they were driven/ridden by his family members or friends. He has admitted to his being arrested from Ribandar/Merces area. He has finally stated that he is innocent and this is a case of mistaken identity.

137. According to us, there is ample evidence on record to establish that A.1 was known as *Patrao*. In any case, consequent upon the identification of A.1 by PW.4, who was an eye witness and who was knowing A.1 quite well before the incident in question, the defence of any mistaken identity can really hold no good. Therefore, even upon considering the defence raised by A.1 in the course of his statement under Section 313 of Cr.P.C., we are quite satisfied that such defence is untenable and he was correctly convicted by the learned Children's Court in this matter.

138. The defence raised by A.2 in the course of his Section 313 Cr.P.C. statement, is no different from that of A.1. In fact, A.2, has

denied practically everything and claimed that he has been falsely implicated. Upon consideration of this defence, we are quite satisfied that the same is untenable and there is really no case made out to disturb his conviction as recorded by the learned Children's Court.

139. The rulings upon which reliance was placed by the learned Counsel for the accused persons are mostly distinguishable. The ruling in *Narayan Datavale & ors. vs. State of Maharashtra*, - 1997 Cri. LJ 1788 provides that the testimony of the child witness should be evaluated with greatest caution and circumspection. There can obviously be no dispute about this general proposition. However, in the said case, the child witness had disclosed that the accused had assaulted his father with an axe, but the medical evidence indicated that there was no incise wound found on the body of the deceased. The testimony of the child witness was not at all corroborated by the medical evidence. It is in these circumstances that the testimony of the child witness was discarded, as it did not inspire confidence. In the present case, the testimony of PW.4, is substantially corroborated by the medical evidence, as well as other evidence on record.

140. In *Vikram Jadhav vs. State of Maharashtra* – 2012 All MR (Cri) 2548, there was evidence that the child witness aged 5 years at the time of the incident was tutored by his brother and relatives. It is in these circumstances that the evidence of child

witness was not accepted by the Court. In the present case, we have found that there was neither any opportunity, nor source for tutoring PW.4.

141. In *Subhash Pandit vs. State of Maharashtra* - 1997 Bom. CR (Cri) 175, the learned Trial Judge, before recording the statement of the child witness, had made an observation that the child witness was not possessed of any understanding. That apart, the child witness had deposed to witnessing assault on the deceased with a knife by the accused person. However, the medical evidence indicated no knife injury on the dead body. It is in these circumstances that the testimony of the child witness was discarded. Again, the fact situation in the present case is entirely different.

142. The fact situation in *Arun Dhumal vs. State of Maharashtra* - 2007 (1) Bom. CR (Cri) 500, is also entirely different from the fact situation in the present case. Therefore, some of the observations made in the said ruling, in the context of completely different fact situation, can hardly assist the case of the accused persons in the present case.

143. In *Parminder Kaur vs. State of Punjab* - (2020) SCC OnLine SC 605, the Hon'ble Supreme Court reversed the conviction of the appellant having found that the same was a result of sweeping

generalizations and superficial analysis, shoddy investigation and prosecution, gross misapplication of conflicting testimony and failure to refute section 313 of the Cr.P.C. statement. According to us, the fact situation in the said ruling is entirely different from the fact situation in the present case. We have carefully compared the testimony of PW.4 in the present case, with her testimony in Session Case No.53/2013. According to us, this is not at all a case of any conflicting testimonies. In the first place, the scope of the two matters was different. Secondly, in so far as the crux is concerned, there is absolutely no inconsistency or conflict. Based upon some omissions, or even some variations, we can hardly say that PW.4 has given conflicting testimonies in the two matters. Therefore, the ruling in *Parminder Kaur* (supra) can also offer no assistance to the case of the accused persons.

144. ***Digamber Vaishnav Vs. State of Chhattisgarh*** - (2019) 4 SCC 522, was a case based on circumstantial evidence. There was unexplained delay in reporting the crime and even the FIR was registered against unknown persons. The recoveries under Section 27 of articles far less valuable than many articles found at the home of the victim were not reliable, nor establishing motive for robbery. The testimony of the child witness was found to be fraught with serious inconsistencies. This is again quite different from the fact situation in the present case and therefore, this ruling offers no assistance to the

accused persons.

145. *Surender Kumar Khanna vs. Intelligence Officer* - (2018) 8 SCC 271, was relied upon to explain the scope of admissibility of a confession against the co-accused persons. Since, in this case, we have proceeded on the basis that the confession of A.2 is to be excluded from consideration, there is no necessity to advert to this ruling in any greater detail.

146. For all the aforesaid reasons, we are satisfied that the conviction of the accused persons in the present case is required to be sustained. Consequently, Criminal Appeals No.52/2019 and 6/2020 are liable to be dismissed.

147. We now turn to Criminal Appeal No.55/2019 instituted by the State seeking enhancement of the sentence and imposition of death penalty upon A.1 and A.2.

148. Mr. Rivonkar submits that the crime which is committed by the accused persons in the present case and the circumstances in which the same was committed, attracts '*rarest of rare*' principle and, therefore, the death penalty is liable to be awarded in this case. He points out that this is a case where the accused persons have abused the trust placed in them by the victims. He points out that

this crime shocks the collective conscience of the community, more particularly looking to the manner in which the two minor victim children were dealt with and were required to witness the gruesome murder of their mother. For all these reasons, Mr. Rivonkar submits that this is a fit case for award of death penalty. He relies on ***Bachan Singh vs. State of Punjab*** - (1980) 2 SCC 684; ***Machhi Singh and ors. vs. State of Punjab*** – (1983) 3 SCC 470 and ***Manoharan vs. State*** - (2019) 7 SCC 716.

149. Mr. D'Sa and Mr. Amonkar, the learned Counsel for the accused persons maintain that the accused persons deserve to be acquitted, at least by extending the benefit of doubt. In any case, they submit that this is not at all a matter for imposition of capital punishment. They refer to several rulings on the subject, including the ruling in ***Panchai and ors. Vs. State of U.P.*** - 1998 7 SCC 177.

150. Having anxiously considered the rival submissions, we are satisfied that this is not a matter which attracts the '*rarest of rare*' principle. By now, it is a settled principle in criminal jurisprudence that life imprisonment in such matters is the rule and death sentence is an exception. Death sentence can 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. As has been held in *Panchhi and ors.* (supra), brutality of the crime is not the sole criteria for awarding capital punishment.

151. Besides, in the present case, we have not gone into the issue as to whether the confession of A.2 was admissible in evidence or not or the evidentiary value to be assigned to the confession of A.2. This was because we were satisfied that even if we were to exclude the confessional statement of A.2 from consideration, there was ample evidence on record to sustain the conviction of A.1 and A.2. Mainly, we were satisfied that the testimony of PW.4, the minor victim girl had ring of truth about it and inspired confidence. Further, we were satisfied that even though no corroboration was necessary, there was ample corroboration to the testimony of PW.4 in the present case. Nevertheless, the point remains that the fulcrum of the prosecution case to a great extent, rests upon the well corroborated testimony of PW.4, the victim child witness.

152. In such circumstances, we have to remind ourselves of the rulings of the Hon'ble Apex Court in *Suresh Vs. State of U.P.* (supra) and *State of H.P.* (supra), in which it is clearly held that normally capital punishment should not be imposed relying only upon the

testimony of child witness, even if such testimony is found to be creditworthy and true. The Hon'ble Supreme Court has held that the extreme sentence cannot seek its main support from evidence of this kind which, even if true, is not safe enough to act upon for putting out a life.

153. For these reasons, we are not inclined to accept the State's appeal seeking imposition of death penalty on the accused persons in this matter. Consequently, even Criminal Appeal No.55/2019 is liable to be dismissed.

154. Accordingly, we dismiss all these three appeals and leave the parties to bear their own costs. We, however, direct the State to comply with the recommendations in the impugned Judgment and Order for payment of compensation to the two minor victim children, if not already complied with. A compliance report to be filed in this Court within a period of four weeks from today and a copy of the same to be furnished to the Member Secretary of the Goa Legal Services Authority for follow up action.

Smt. M.S. Jawalkar, J.

M.S. Sonak, J.