

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

CRIMINAL CONFIRMATION CASE NO. 01 OF 2020

The State of Maharashtra ... Appellant

Versus

Vishnu S/o Madan Gore ...Respondent

.....

Shri. S. D. Ghayal, APP for the appellant/State
Shri. Sudarshan J. Salunke, Advocate for respondent-accused

.....

**WITH
CRIMINAL APPEAL NO. 402 OF 2020**

Vishnu Madan Gore,
Age : 34 years, Occupation : Labour,
R/o. Shelgaon, Tq. Sonpeth,
Dist. Parbhani.

... Appellant
(Orig. Accused)

Versus

1. State of Maharashtra

2. Prabhakar Shamrao Gaywal,
Age : 70 years, Occupation : Labour,
R/o. Shelgaon, Tq. Sonpeth,
Dist. Parbhani.

...Respondents

.....

Shri. Sudarshan J. Salunke, Advocate for the appellant-accused
Shri. S. D. Ghayal, APP for respondent/State

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**CORAM : RAVINDRA V. GHUGE
AND
B. U. DEBADWAR, JJ.**

DATE : 05th FEBRUARY, 2021
08th FEBRUARY, 2021
09th FEBRUARY, 2021
11th FEBRUARY, 2021

ORAL JUDGMENT [*PER RAVINDRA V. GHUGE, J.*] : -

1. The accused in Special Case (POCSO) No. 02/2017, Shri. Vishnu Madan Gore, has been convicted for having committed the offence punishable u/s 376-A and Section 302 of the Indian Penal Code along with Sections 5 and 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO' Act). He has also been held guilty of committing the offence punishable u/s 201, 363 and 364 of the IPC. He has been awarded the sentence of hanging by the neck till he is dead u/s 354(5) of the Code of Criminal Procedure. As such, the trial Court has forwarded the said case under Section 363 of the Code of Criminal Procedure for confirmation, to this Court. So also, the accused has preferred Criminal Appeal No. 402 of 2020 praying for quashing the impugned Judgment and, consequentially, for acquittal.

2. The case put forth by the prosecution against the accused, is as follows : -

[a] The informant is PW1 - Prabhakar Shamrao Gaiwal, who is the grandfather of the deceased minor victim girl, who

was aged about 5 years. Her name is not set out in this order. The informant had three sons and three married daughters. His elder son Sham, who is the biological father of the deceased, died of a heart attack within eight years of his marriage. The deceased was the only daughter born from the said marriage. After the death of Sham, his wife remarried and left the deceased daughter with the informant.

[b] On 27.10.2016, at about 08:30 am, PW1, along with his wife (grandmother of the deceased), left for reaping Soyabean crop in the agricultural field belonging to a villager. The deceased and the minor biological son of PW1, i.e. PW3 Krishna, were in the house. When they returned back at about 04:00 pm, the deceased was found missing and hence, the grandparents started searching for her. Despite searching in the village and also in the neighbouring villages, the deceased was not found. Fearing for the worst, PW1 registered a missing complaint with the concerned Police Station on 29.10.2016. A crime came to be registered as C.R. No.

199 of 2016 and the investigation in the crime was handed over to the Investigating Officer.

[c] On 31.10.2016, during the course of investigation, the Police Patil of village Shelgaon informed the Police Station as regards a dead body of a minor girl having been found floating in a well in the agricultural field of Vishwambhar Ganpatrao Londhe, PW7. The Police arrived at the scene and prepared a spot panchanama (Exh.32), the inquest panchanama (Exh.25) and a letter (Exh. 80) was issued to the Medical Officer, Government Hospital, Gangakhed for conducting post-mortem of the said body. Statements of witnesses were recorded and on 02.11.2016 and the I.O. prepared a seizure panchanama vide Exh. 45, having found a quilt with reddish colour stains within the premises of the house of the accused.

[d] The I.O. sent the seized muddemal articles and blood samples for chemical analysis along with letters (Exh. 81 and 82). On 05.11.2016, he issued a letter Exh. 83 to the Forensic Science Laboratory, Santacruz, Mumbai for

a DNA test. On 06.11.2016, letter (Exh. 64) was issued as a questionnaire. Under the directions of the Superintendent of Police, Parbhani, the investigation was handed over to PW23, Sub-Divisional Police Officer Shri. Shirgaonkar.

[e] The investigation revealed, that PW2 Shesherao Haribhau Dandane had seen the accused taking away the deceased to his house on 27.10.2016 at about 1:30 pm. The minor uncle of the deceased, PW3 deposed that around 2:30 pm, when he left for bringing water from the well, the victim was at home with him. PW4, a Pan stall owner - Ratnakar Digambar Dukre had seen the accused at 10:00 am. PW13 - Govind Ranba Datar, a Grocery Shop Owner stated that the deceased had been to his shop around 12:30 noon to purchase chocolates. In all, 23 witnesses were examined.

[f] During investigation, it was also revealed that the accused was a married person and a girl child was born from the said marriage. His wife Ashwini had left him as

she did not approve of his wayward and atrocious behaviour.

[g] The naked body of the victim was found in a gunny bag wrapped with a piece of a lungi, a nylon rope having been tightened around her neck and with a few stones, in the sack, which were brought out from the well of PW7.

[h] A sniffer dog was pressed into service and the said dog, in the course of investigation, is said to have travelled quite close to the house of the accused situated on a hilltop commonly known as 'माळ रान' in Marathi. Since the sniffer dog stood on the road barking towards the homes on the opposite side, that the police suspected a few persons from the said village. After interrogating several persons from the said village, the accused was arrested from a place called as Ooncha, State of Karnataka where he had reached along with his mother and brother as a part of the sugarcane cutting toli (the english word used for 'toli' is 'gang of sugarcane cutters').

- [i] Having been arrested on 20.11.2016, the accused is said to have issued a memorandum statement (Exh.72) dated 22.11.2016, under Section 27 of the Indian Evidence Act. Since he expressed a desire to point out the place where he had allegedly committed the crime, the police travelled in the said direction as per the instructions of the accused who eventually showed them the same house in which direction the sniffer dog was barking. A seizure panchanama was drawn, (Exh.73). The door of the room in the house was opened by using the key seized by the police on 20.11.2016 from the accused while arresting him. He showed a piece of a nylon string (85 cms.), which was seized. It was placed in a packet and by drawing a panchnama Exh. 73, the signatures of the panch witnesses and the deceased were obtained on the paper.
- [j] The accused was produced before the competent Court on 20.11.2016 at Sonpeth and since then, he is behind bars. After a complete trial, the accused was found guilty of having ravished a minor girl aged about 5 years and having strangled her to death. He was convicted

of the charge of raping and murdering the deceased and attempting to destroy evidence.

[k] The learned trial Court found that a heinous crime was committed by the accused in cold-blood and had heard the learned Advocate for the accused on the quantum of the sentence. Finally the accused, as noted in the opening paragraph, was sentenced to suffer death by hanging.

3. We have extensively heard the submissions of the learned Prosecutor and the learned Advocate for the accused on 01.02.2021, 02.02.2021, 03.02.2021, 04.02.2021 and 05.02.2021, who have referred to the appeal paper-book, the record and proceedings and the muddemal.

4. The learned Advocate for the appellant-accused has placed reliance on the following Judgments : -

- (i) Latesh alias Dadu Baburao Karlekar v. State of Maharashtra
Anil Ankush Gadekar v. State of Maharashtra
Vishnu Maruti Bule v. State of Maharashtra
Vijay alias Vijay Istriwala Ramdulari Nirmal v. State of Maharashtra
Sunil Kashinath Chandanshiva v. State of Maharashtra
2018 Cri. L. J. 1812

- (ii) Bodhraj alias Bodha and others Versus State of Jammu & Kashmir
(2002) 8 SCC 45
- (iii) Ganpat Singh Versus State of Madhya Pradesh
(2017) 16 SCC 353
- (iv) Baby @ Sebastian & Anr. Vs. Circle Inspector of Police, Adimaly
2016 ALL SCR (Cri) 1273
- (v) Dhanraj Jago Koli & Ors. Vs. State of Maharashtra
2001 ALL MR (Cri) 2354
- (vi) Navaneethakrishnan Versus State by Inspector of Police
(2018) 16 SCC 161
- (vii) Keshav Versus State of Maharashtra
(2007) 13 SCC 284
- (viii) Nazir Pathyekhanvar v. State of Goa
2019 (3) ABR (Cri) 525
- (ix) Bharat Laxman Bidwe Vs. The State of Maharashtra
2019 ALL MR (Cri) 485
- (x) Jaffer Husain Dastagir v. The State of Maharashtra
AIR 1970 SC 1934
- (xi) Digamber Vaishnav & Anr. Vs. State of Chhattisgarh
2019 ALL SCR (Cri) 1009
- (xii) Mayur Panabhai Shah Versus State of Gujarat
(1982) 2 SCC 396
- (xiii) State of H.P. Versus Jai Lal and others
(1999) 7 SCC 280
- (xiv) Machindra Versus Sajjan Galfa Rankhamb and others
(2017) 13 SCC 491
- (xv) Tomaso Bruno and another Vs. State of Uttar Pradesh
(2015) 7 SCC 178
- (xvi) Takhaji Hiraji v. Thakore Kubersing Chamansing and others
2001 AIR SCW 2077
- (xvii) Mohan Ambadas Meshram v. State of Maharashtra
2018 (2) ABR (Cri) 947

5. The learned Prosecutor has relied upon the following

Judgments : -

- [i] Barku @ Avinash Dnyaneshwar Zodage Versus State of Maharashtra
2014 (3) Bom.C.R. (Cri.) 330
- [ii] Amit @ Ammu Versus State of Maharashtra
2003 Cri.L.J. 3873
- [iii] Pulukuri Kottaya Vs. King-Emperor
1947 (49) BLR 508
- [iv] Shivaji @ Dadya Shankar Alhat Versus State of Maharashtra
2009 AIR (SC) 56
- [v] State of Uttar Pradesh Versus Satish
2005 AIR (SC) 1000
- [vi] State of Rajasthan Versus Jamil Khan
2014 (1) Mh.L.J. (Cri) 42
- [vii] Swamy Shraddananda @ Murali Manohar Mishra Versus
State of Karnataka
2008 AIR (SC) 3040

6. Both the sides have tendered brief written notes.

7. The prosecution has examined the following witnesses : -

PW1- Prabhakar, grandfather of the victim.

PW2- Shri. Sheshrao Dandane, who runs a grocery shop at
Someshwar Nagar, Shelgaon and who deposed in support
of the 'last seen alive together' theory.

PW3- Krishna Gaiwal, who is the minor uncle of the deceased.

PW4- Ratnakar Dukare, a Pan stall owner residing in the same village.

PW5- Rajabhau Kamble, co-employee of the appellant.

PW6- Ashroba Kurade, the village Police Patil and spot panch witness.

PW7- Vishwambhar Londhe, an agricultural land owner who witnessed the floating gunny bag in his well and which revealed a dead body along with other articles.

PW8- Maroti Dhavle, the maternal uncle of the victim.

PW9- Ravi s/o Shivaji Borade, who has identified the piece of 'Lungi' supposedly used by the father of the accused.

PW10- Munja Sukhdeo Gabale, a co-worker of the accused.

PW11- Shivaji Deorao Bagwale, former Sarpanch of the village from whom the accused had asked for Rs. 2,000/- by making a phone call on 27.10.2016.

PW12- Arjun Tulshiram Kamble, who had seen the victim near the house of the accused.

PW13- Govind Ranba Datar, who runs a grocery shop from which the victim had purchased chocolates on 27.10.2016 at about 12:30 noon.

PW14- Sunil Dattatray Gore, quilt seizure panch.

PW15- Parmanand Mahalingappa Jamshete, panch witness for the WELL Spot Panchanama (Exh.32), house property search and seizure (Exh.45), and panch witness to the house of the accused - spot panchanama (Exh. 49).

PW16- Vishnu Nivrutti Dhaigude, who had worked along with the accused as a sugarcane cutter.

PW17- Balasaheb Vaijnath Sonwane, Photographer, who had taken about 24 photographs outside the house of the accused, the field with Tur (pigeon pea) crop, the well and surrounding area.

PW18- Goutam Dharmaraj Sarode, panch witness to the cloth seizure panchanama and toli leader of the workers indulging in sugarcane cutting activity.

PW19- Namdeo Balaji Gharjale, carrier of articles to the Forensic Laboratory.

PW20- Nagnath Vishwanath Kothule, panch witness of the memorandum of discovery and recovery panchanama.

PW21- Dr. Prakash Digambarrao Chavan, who conducted the post-mortem on the body of the victim.

PW22- Sadanand Kishanrao Yerekar, the first Investigating Officer.

PW23- Narayan Devdas Shirgaonkar, SDPO at Gangakhed and second Investigating Officer.

8. Though we have perused the original record and proceedings, gone through the marathi recording of the testimonies and perused the muddemal, we deem it appropriate to record certain exhibits that were repeatedly referred to, as follows:-

- [a] Section 313 Cr.P.C. questionnaire of the accused (Exh. 101).
- [b] First Information Report filed by PW1 which is the FIR, Exh. 19, dated 29.10.2016.
- [c] The inquest panchanama (Exh. 25) which is admitted by the accused.
- [d] The provisional post-mortem report-cum-death certificate admitted by the accused dated 31.10.2016/01.11.2016 (as the post-mortem commenced at 11:45 p.m. on the earlier day and concluded at 01:15 am on the subsequent day) Exh.26.

- [e] The spot panchanama of the well (Exh.32).
- [f] Spot verification panchanama of the place where the offence is alleged to have been committed (Exh.49).
- [g] Requisition letter dated 23.01.2016 issued by the second Investigating Officer (PW23) to the Dy. Director, Forensic Science Laboratory, Mumbai (Exh.65).
- [h] The sketch map of the location of the well in which the body of the victim was found floating and the location of the house of the accused and the path that he had allegedly used to drop the body into the well, (Exh. 66) which is admitted by the accused.
- [i] The memorandum u/s 27 of the Evidence Act (Exh.72) vide which the accused allegedly volunteered to produce the remaining part of the nylon string used for strangulating the victim and the place where her frock was burnt.
- [j] The discovery panchanama (Exh.73) by which the said string and the ash residue of the frock were seized.
- [k] The arrest panchanama dated 20.11.2016 which is admitted by the accused (Exh.74).
- [l] The memorandum of the post-mortem examination, (Exh.77).

- [m] The requisition by the Assistant Police Inspector, Sonpeth Police Station, addressed to the Dy. Director of the Forensic Science Laboratory, Mumbai (Exh. 81).
- [n] The query report to the Autopsy Surgeon / Medical Officer, Exh. 82 and Exh. 83 with regard to the DNA test.
- [o] The sniffer dog investigation report (Exh.84) prepared by the sniffer dog handler.
- [p] The bunch of reports received from the Directorate of Forensic Science Laboratory (Exh.93), (Exh. 94), (Exh.95), (Exh.96), (Exh.97) and (Exh.98).

9. The submissions of the learned Prosecutor can be summarized as under : -

- [i] The case is based on circumstantial evidence and by perusing the entire oral and documentary evidence, the links in the chain of circumstances would be complete.
- [ii] The death of the victim was undisputedly homicidal.
- [iii] The 'last seen alive together' theory is proved by the prosecution.

- [iv] Slight discrepancies in the time stated by PW2 and PW3 will have to be ignored as these are villagers and have mentioned approximate time of having seen the victim with the accused.
- [v] The lungi that was used by the accused for wrapping the dead body is an important link as two independent witnesses, who were villagers residing in the same village, identified it to be belonging to the father of the accused.
- [vi] The seizure of articles, in view of the disclosure by the accused u/s 27 of the Indian Evidence Act, is an equally strong link in the chain to prove the commission of the offence.
- [vii] Not a single panch witness has turned hostile and all of them have strongly supported their roles as are seen from the spot panchanama and the seizure panchanama.
- [viii] Though the sniffer dog did not sniff his way into the house of the accused, he stood in front of a road which was known as the Sonpeth-Gangakhed road which had traffic frequency due to which he lost the smell track. However, the house of the accused was on the other side of the road on a slight mound (maal) and the sniffer dog was continuously barking at that spot (माळ).

- [ix] The 85 cms part of the nylon rope seized u/s 27 at the instance of the accused, is identical to the nylon rope that was found around the neck of the deceased which was used for strangulating her.
- [x] There were three witnesses who described the conduct of the accused after the commission of the offence.
- [xi] The arrest of the accused on 20.11.2016 in the State of Karnataka indicates that he had left the village and had travelled to Karnataka as a part of the sugarcane harvesters' toli, to escape from the police.
- [xii] The identity of the victim was established by the DNA sampling procedure and she was the same missing girl who was the granddaughter of PW1 and the niece of PW3.
- [xiii] The accused has not disputed the homicidal death of the child and her identity.
- [xiv] There appears to be some resistance put up by the child of a tender age considering the wounds on her thigh, arms and the area surrounding her private part.
- [xv] The accused has rightly been sentenced to death as he had mercilessly committed an offence punishable u/s 376

of the IPC on a five year old child and had brutally murdered her in order to silence her and destroy the evidence of his crime.

10. The strenuous submissions of Shri. S. J. Salunke, learned Advocate representing the appellant, can be summarized as under : -

- [a] The impugned Judgment is perverse and cannot be sustained in view of the trial Court's failure in noticing the various missing links in the chain of circumstantial evidence.
- [b] The 'last seen alive together' theory, has discrepancies in abundance. While dealing with such theory, the time factor is most important and the version of the witnesses as regards the approximate time would create doubt and the benefit of doubt necessarily has to go to the accused.
- [c] PW2 had claimed to have seen the victim along with the deceased at around 01:30 pm. PW3, real uncle of the deceased, has stated in his deposition that the victim was with him inside their house till 02:30 pm and the same witness has earlier stated to the Investigating Officer PW22 in his statement u/s 161 that the victim was with him till 03:30 pm.
- [d] The above discrepancy clearly indicates that even though the accused may have been seen with the deceased at 01:30 pm, the fact that the victim was with PW3 till

03:30 pm, demolishes the last seen alive together theory put forth by the prosecution.

- [e] PW2 kept quiet for two days and did not tell anybody that he had allegedly seen the accused with the deceased. Even on 31.10.2016, when he came near the well as the body of the deceased was retrieved from the well, he did not divulge this aspect to any person.
- [f] A sexual assault has to be proved beyond doubt and the presence of maggots on the private part of the victim, creates a doubt as to whether there was any such assault.
- [g] No semen stains were found on the clothes of the accused or even on the quilt that was seized on the alleged voluntary disclosure by the accused.
- [h] Conviction cannot be based on assumptions and inference.
- [i] Merely because the accused travelled to Karnataka for his livelihood would not mean that he was absconding.
- [j] The sniffer dog investigation exercise is a weak piece of evidence.
- [k] Medical evidence has to be tested in the light of the post-mortem report and by taking into account the entire evidence before the court.

- [l] The seizure of the rope and the ash is improbable and is stage planned.
- [m] The accused had allegedly burnt the frock of the victim on 27.10.2016 and the ash residue of such burnt frock was said to be recovered on 22.11.2016, which is most improbable as the ash would not remain as it is for about 25 days.
- [n] The room which had a lock, was unlocked with the aid of the keys which the police had allegedly seized from the accused at the time of his arrest, two days ago.
- [o] The arrest panchanama (Exh.74) admitted by the accused indicates that two keys were seized from the accused when he was arrested on 20.11.2016.
- [p] This creates a doubt as the police already had the keys to the lock on the door of the room used by the accused and had access to the room.
- [q] The 'conduct subsequent to the crime' theory is a worthless circumstance as the accused had travelled to Karnataka for his livelihood and because of the language barrier, the Maharashtra workers used to speak less and were mostly silent.
- [r] His absence from work for about 04 days preceding the day on which the victim disappeared and also on the said

day of her disappearance, would not mean that the accused had committed the offence.

[s] A lungi is a wrap around cloth which is commonly used by several villagers and on the basis of the testimony of co-villagers, it cannot be concluded that the lungi in which the victim was wrapped, belonged to the father of the accused.

[t] The accused had attended the funeral of the victim which disproves the contention of the prosecution that he was absconding.

[u] Neither is the accused guilty of the crime alleged to have been committed, nor would the case fall within the category of rarest amongst the rare cases.

11. Having noted the extensive submissions of the learned Counsel for the respective sides, having gone through the record and the proceedings available and having considered the testimony of the witnesses threadbare and the law cited by both the sides, we find that the following issues need to be dealt with by this Court : -

[A] Whether the victim suffered a homicidal death.

[B] Whether the victim suffered rape prior to her death.

[C] Whether the accused can be said to have committed the crime.

(i) The 'last seen alive together' theory.

(ii) Recovery of incriminating articles u/s 27 of the Evidence Act.

(iii) Conduct of the accused after the incident.

(iv) Whether the links complete the chain of circumstantial evidence?

[D] If the accused is guilty, whether this case would appear to be a rarest of the rare cases for awarding Capital Punishment.

A] WHETHER THE VICTIM SUFFERED A HOMICIDAL DEATH? : -

12. There is no dispute as regards the disappearance of the victim on 27.10.2016 and a body found floating in the well of PW7, on 31.10.2016. It is undisputed that after the body was brought out of the well and the police inspected the body before sending it for conducting post-mortem, a nylon string having three twines (3 smaller lengths of the nylon string twined together to appear as a rope) tightly tied around her neck. The body was covered by a lungi in a sack containing stones aimed at drowning the sack and for preventing the same from being afloat.

13. The post-mortem report (Exh. 77), indicates absence of *rigor mortis* in the whole body which would establish that the death may have been caused more than, at least, four days prior to the body being brought out from the well. *Rigor mortis* is known to set in from around the eyes after about three hours of the death and gradually spreads over the entire body in a period of about 12 hours. *Rigor mortis* disappears from the body after 3 to 4 days.

14. The lengthy summary of the surface wounds and other injuries at clause 17 and 18 read as under : -

17.	Surface wounds and injuries - their nature, position, dimensions (measured) and directions to be accurately stated - their probable age and causes to be noted. If brushes be present, what is the condition of the subcutaneous tissues? (N.B.- (when injuries are numerous and cannot be	(i) Double ligature mark in the form of imprint abrasion present around neck, horizontally placed, at and above the level of thyroid cartilage, running on both sides of neck. Ligature mark of total length – 31 cm and maximum 0.5 cm broad. Ligature mark situated 7.5 cm below chin, 6 cm above suprasternal notch, 4 cm below right angle of mandible 3.8 cm below left angle of mandible. On dissection of neck, area under ligature mark pale. Evidence of haemorrhages in superficial and deep muscles of neck corresponding to ligature mark. No evidence of fracture of thyroid cartilage and hyoid bone. (2) Laceration present on left labia majora medially, of size 2.3 x 0.7 cm x tissue deep, margins irregular contused with maggots of size 0.3 cm length seen crawling over perineum. (3) Laceration present on right labia majora and minora, medially, size 1.8 x 0.7cm x tissue deep, margins irregular, contused, maggots of length 0.3 cm seen crawling over perineum. (4) Contusion with irregular margins present on left thigh, posterio medially area of size 8 x 6 cm, reddish brown. (5) Contusion with irregular margins present on left knee anterior aspect, size 4.3 cm, reddish brown. (6) Contusion present on left thigh, antero – medially, size 10.5 x 4.5 cm, reddish brown. (7) Contusion with irregular margins present on upper border of right ankle joint, antero medially, size 2 x 1 cm, reddish brown. (8) Contusion with irregular margins present just below right knee area, antero medially, size 6 x 3 cm, reddish brown. (9) Contusion with irregular margins present on right knee area, antero medial, size 4 x 3 cm reddish brown. (10) Contusion present with irregular margins on right
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	mentioned within the space available they should be mentioned on a separate paper which should be signed).	thigh, posterior lateral aspect, size 11.5 x 7.5 cm, reddish brown. (11) Contusion with irregular margins present on right thigh, anterior medial aspect, size 6x4 cm, reddish brown. (12) Contusion with irregular margins present on forehead extending from mid part to right temporal area, size 9 x 7.5 cm, reddish brown. (13) Contusion with irregular margins present on right zygomatico-maxillary area and right cheek, size 11 x 8.5 cm reddish brown. (14) Contusion present on right arm, upper third area, anterior aspect, size 5x3 cm, irregular margins, reddish brown. (15) Contusion with irregular margins present on right forearm, anterior aspect, size 7 x 5 cm, reddish brown. (16) Contusion present on right arm, posterior aspect, involving elbow size 4 x 3 cm, irregular margins, reddish brown. (17) Contusion with irregular margins present on right forearm, upper half, posterior aspect, size 7 x 3 cm, reddish brown. (18) Contusion with irregular margins present on left arm, upper half, anterior aspect, size 7.5 x 3cm, reddish brown. (19) Contusion with irregular margins present on left forearm, anterior aspect involving cubital and upper third area, size 6 x 3 cm, reddish brown. (20) Multiple contusions present with irregular margins on dorsal aspect of right hand involving little, ring and middle fingers of varying size 4 x 2 cm to 1 x 0.5 cm, reddish brown. (21) Multiple contusion with irregular margins present on left hand, palmar aspect involving middle, ring and little fingers of varying sizes from 3 x 2 cm to 1 x 0.5 cm, reddish brown. (22) Contusion present on chest involving left axillae, size 7 x 4 cm, irregular margins, reddish brown. (23) Contusion with irregular margins present on chest and abdomen right anterior laterally extending from 4 th intercostal space upto upper border of right iliac region, size 18 x 12 cm, reddish brown.
18	Other injuries discovered by external examination or palpation as fractures etc.	No fracture
	(a) Can you say definitely that the injuries shown against serial Nos. 17 and 18 are ante mortem injuries?	Yes, Ante mortem.

15. At clause (iii) of internal examination reveals injuries to the Head as under : -

III.	Internal Examination -	
19.	Head-	
	(i) Injuries under the scalp, their nature.	Under scalp haemorrhage present in right fronto-temporal region, reddish brown.
	(ii) Skull - Vault and base - describe fractures, their sites, dimensions, directions, etc.	Cranial vault sutural separation present suggestive of Diastatic or sutural fracture.

16. Below clause 21 - abdomen, the organs of generations and remarks thereunder, read as follows : -

21.	Abdomen-	
	Organs of generations	Soft, flabby, brownish, cavity empty.
	Additional remarks with where possible, medical officer's deduction from the state of the contents of the stomach as to time of death and last meal.	Nil
	State which viscera (if any) have been retained for chemical examination and also quote the numbers on the bottles containing the same.	(1) Viscera preserved as Bottle no.1 - Stomach and loops of intestines with their contents. Bottle no.2 - Stices of liver, spleen, kidneys, preservative used is saturated solution of common salt. (2) Postmortem blood soaked gauge piece, air dried kept for blood grouping & cross matching. (3) Swabs from vagina, high vagina cervix, perianal, anal and oral taken, air dried kept for semen analysis. (4) Nails, nail clippings, scalp hairs kept for detection of foreign material. All items packed, labelled, signed, sealed and handed over to PC on duty.

17. The autopsy surgeon, who conducted the post-mortem, has recorded the probable cause of death as being "ligature strangulation associated with evidence of multiple injuries on body". The post-mortem was conducted by Dr. V. V. Rathod, Associate Professor and by Dr. P. D. Chavan, Resident Department of Forensic

Medicine (PW21). His testimony at Exh. 76 leaves no room for doubt that the victim suffered homicidal death. He has opined that the death was due to ligature strangulation associated with evidence of multiple injuries on the body. Injury nos. 2 & 3 in column no. 17 of the Autopsy Report can be possible by penetration and injury nos. 4 to 23 may be possible while committing the offence of rape.

In view of the above, it is apparent that the victim suffered homicidal death.

08th February, 2021 : -

**B] WHETHER THE VICTIM SUFFERED RAPE PRIOR TO
HER HOMICIDAL DEATH?**

18. Exh. 26 is the provisional post-mortem report cum death certificate issued by PW21 and Dr. V. V. Rathod. The said document has been admitted by the accused. The provisional opinion as to the cause of death is said to be "*Ligature strangulation associated with evidence of multiple injuries on body*". The injuries suffered by the victim have been set out in the memorandum of the post-mortem examination (Exh.77). The surface wounds and injuries have been

reproduced in paragraph 11 herein above. The injuries described at clause 2 and 3 below column 17, clearly indicate that there was a laceration on the left labia majora medially, of size 2.3 x 0.7 cm x tissue deep, margins irregular contused with maggots of size 0.3 cm length seen crawling over the perineum. Laceration present on the right labia majora and minora, medially, size 1.8 x 0.7 cm x tissue deep, margins irregular, contused, maggots of length 0.3 cm seen crawling over the perineum.

19. The injuries at clause 4 and 5 below Column 17 also indicate that the victim seems to have struggled and as a consequence suffered injuries on the left thigh, posterio medially area of size 8 x 6 cm, reddish brown and contusion with irregular margins present on left knee anterior aspect, size 4 x 3 cm, reddish brown and contusion present on left thigh, antero - medially, size 10.5 x 4 cm.

20. The victim also suffered injuries on the upper border of the right ankle, just below the right knee, on the right knee area, right thigh, anterior and posterior and several injuries on the arms. She also suffered injuries on her cheeks and even on the fingers of her hand. She also suffered injuries on her chest, abdomen and therebelow. The body was found in the well in a naked condition.

21. PW21 is Dr. Chavan who has deposed at Exh. 76. He has reproduced all injuries suffered by the victim from clause no. 1 on internal page no. 2 of Exh. 76 till clause no. 3 on internal page no.4. Having assessed these injuries, he has specifically opined that injury nos. 2 to 3 in column 17 of the Autopsy Report, are possible if there is a penetration in the vagina of the girl. The injuries at clauses 4 to 23 are possible while committing the offence of rape. In his cross-examination, he has opined that injury no. 3 is not an injury caused to the vaginal canal and it is injury which has been caused to its external covering of the vaginal part. He then expressed his opinion that in case of deep penetration, injury to the vaginal canal can be possible.

22. The learned Advocate for the accused has relied upon Mayur Panabhai Shah (supra) to contend that the evidence of the doctor has to be appreciated like the evidence of any other witness. There is no irrefutable presumption that a doctor is always a witness of truth. He also relies upon Machindra (supra) to contend, that the expert opinion is valuable in certain circumstances and at times, could be of no use to the court.

23. In **Mayur** (supra), the Hon'ble Apex Court has held in paragraph no. 2 as under : -

“2. This is an appeal by special leave directed against the judgment passed by a Single Judge of the Gujarat High Court summarily dismissing an appeal preferred by the appellant against an order passed by the Additional Sessions Judge No. 11/Ahmedabad convicting the appellant of the offence under Section 376 of the Indian Penal Code and sentencing him to imprisonment for a period of one year. We think that this is not a case which should have been summarily rejected by the learned Single Judge and moreover we do not think the learned Judge was right in observing that "our courts have always taken the doctors as witnesses of truth". Even where a doctor has deposed in court, his evidence has got to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth. We would therefore allow the appeal, set aside the judgment of the Single Judge and remand the appeal to the High Court with a direction that the appeal may be admitted and after issuing notice to the State it may be disposed of on merits. It would be preferable if the appeal is heard by a Judge other than the learned Judge who heard the appeal at the stage of admission.”

24. In **Machindra** (supra), the Hon'ble Apex Court has held in paragraph nos. 14 to 18 as under : -

14. On perusal of the record, it has further been noticed by us that there was six days delay in lodging the FIR which remained unexplained throughout the trial and in the appeal before the High Court. One last fact which is imperative and crucial to be mentioned here is that the opinion on the cause of injuries was neither mentioned by the doctor PW-6 in his deposition, nor in post-mortem report. In criminal cases pertaining to offences against human body, medical evidence has a decisive role to play. A medical witness who performs a post-mortem examination is a witness of fact though he also gives an opinion on certain aspects of the case. This proposition of law has been stated by this Court in Smt. Nagindra Bala Mitra v. Sunil

Chandra Roy, as follows :- (AIR p. 721, para 43)

“43. the value of a medical witness is not merely a check upon the testimony of eye witnesses; it is also independent testimony because it may establish certain facts quite apart from the other oral evidence. If a person is shot at a close range, the marks of tattooing found by the medical witness would draw that the range was small, quite apart from any other opinion of his. Similarly, fractures of bones, depth and size of the wounds would show the nature of the weapon used. It is wrong to say that it is only opinion evidence; it is often direct evidence of the facts found upon the victim's person.”

15. Further it was observed in *State of U.P. Vs. Krishna Gopal*, in the following words: (SCC p. 313, para 24)

“24. It is trite that where the eye-witnesses account is found credible and trustworthy, medical-opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the orality of the trial-process. Eye-witnesses account would require a careful independent assessment and evaluation for their credibility which should not be adversely prejudged making any other evidence, including medical-evidence, as the sole touch-stone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be credit-worthy; consistency with the undisputed facts; the “credit” of the witnesses; their performance in the witness-box; their power of observation, etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.”

16. But looking at the post-mortem report, cause of injuries was not stated nor was any opinion formed to create independent testimony. We would like to emphasize on the vital role played by the opinion of the expert which is simply a conclusion drawn from a set of facts coming to his knowledge and observation. Experts opinion should be demonstrative and should be supported by convincing reasons. The court cannot be

expected to surrender its own judgment and delegate its authority to a third person, however great. If the report of an expert is slipshod, inadequate or cryptic and information on similarities or dissimilarities is not available in the report of an expert then his opinion is of no value. Such opinions are often of no use to the court and often lead to the breaking of very important links of prosecution evidence which are led for the purpose of prosecution. Therefore, we are of the considered opinion that the prosecution has failed to prove that death was caused due to the injuries inflicted by the recovered weapons.

17. Furthermore, looking at the facts and circumstances of this case, we have noticed that PW-3 the eye-witness to the incident has neither stated as to when the accused came with alleged weapons nor he extended any help to the deceased. Rather he fled away from the spot as per his deposition, and came to know about the death of the deceased in the evening. This peculiar fact of the case completely over-rides the direct evidence rule, because ultimately probabilities creating doubts with respect to the cause and modus-operandi of offence increase when alleged eye-witnesses flee away from the place of occurrence. Where the medical evidence is such that it does not give any clear opinion with respect to the injuries inflicted on the body of the victim or the deceased, as the case may be, the possibilities that the injuries might have been caused by the accused are also ruled out. Such medical evidence is also very important in assessing the testimonies of the eye-witnesses and in determining whether the testimonies of eye-witnesses can be safely accepted. Moreover, it is settled law of criminal jurisprudence as has been recognized by this Court in *State of U.P. Vs. Krishna Gopal*, that : (SCC p.313, para 25)

“25. A person has, no doubt, a profound right not to be convicted of an offence which is not established by the evidential standard of proof beyond reasonable doubt.”

25. The evidence before us indicates several injuries on the vagina and parts of the body surrounding the private part of the victim. The injuries as described by the doctor, based on the post-mortem report; would indicate that there was an attempt to

penetrate. As the body was fished out from the well on the fourth day of her death, the doctor could not trace out stains of semen or an injury to the vaginal canal. The doctor has fairly stated in his cross-examination that, the injuries found on the vaginal part are possible by penetration but, it is only in the case of deep penetration that an injury could be caused inside the vaginal canal, which the doctor did not notice. The doctor has then stated that the injuries at sr. nos. 4 to 23 are possible in case of rape and if the child of five years, she would make a hue and cry.

26. There is no doubt that a bald statement by a doctor witness or such statements which are not acceptable to medical science and are not supported by any medical record or the post-mortem report, cannot be accepted especially in matters of crimes being investigated. Statements made by a medical expert as an opinion would stand on a different footing and a statement made by a doctor concerning the death of a girl, has to be based on the post-mortem report and the medical evidence available. If the testimony of a doctor witness is in tune with the post-mortem report and if the injuries described are said to be caused by the acts of the offender committed in a particular way, such an opinion will surely

assist the Court, which is not equipped with deep knowledge in medical science, as like a doctor. In such circumstances, the Court should avoid drawing a conclusion on its own and must rely upon the documentary medical evidence and the analysis of the said evidence by a person who has conducted the post-mortem and who is a competent authority to analyze the injury found on proper examination of the body while conducting the post-mortem.

27. Section 375 of the IPC defines as rape as under : -

[375. Rape. —A man is said to commit "rape" if he-

(a) penetrates his penis, to any extent, into the vagina, mouth urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person, under the circumstances falling under any of the following seven descriptions :-

First. — Against her will.

Secondly. — Without her consent.

Thirdly. — With her consent, when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Fourthly. — With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly.— With her consent when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.— With or without her consent, when she is under sixteen years of age.

Seventhly. – When she is unable to communicate consent.

Explanation 1.— For the purposes of this section, “vagina” shall also include labia majora.

Explanation 2. – Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1. – A medical procedure or intervention shall not constitute rape.

Exception 2. – Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape.

28. There is no dispute that the victim was about five years of age. The medical evidence indicates penetration of penis to some extent in the vagina. There is no question of will or consent of the victim keeping in view that she was a minor, had not even attained

the age of puberty and therefore was, mentally and physically, completely oblivious of the feeling of a sexual act.

29. Section 2(i) of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "2012 Act") defines a sexual act to have the same meaning as is assigned to it in Section 7. Section 2(j) defines sexual harassment to have the same meaning as is assigned to it in Section 11.

30. Section 3 and 5 of the 2012 Act read as under : -

3. Penetrative sexual assault. - A person is said to commit "penetrative sexual assault" if –

- (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
- (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
- (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
- (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

5. Aggravated penetrative sexual assault. - (a) Whoever, being a police officer, commits penetrative sexual assault on a child--

- (i) within the limits of the police station or premises at which he is appointed; or
 - (ii) in the premises of any station house, whether or not situated in the police station, to which he is appointed; or
 - (iii) in the course of his duties or otherwise; or
 - (iv) where he is known as, or identified as, a police officer; or
- (b) whoever being a member of the armed forces or security forces commits penetrative sexual assault on a child—
- (i) within the limits of the area to which the person is deployed; or
 - (ii) in any areas under the command of the forces or armed forces; or
 - (iii) in the course of his duties or otherwise; or
 - (iv) where the said person is known or identified as a member of the security or armed forces; or
- (c) whoever being a public servant commits penetrative sexual assault on a child; or
- (d) whoever being on the management or on the staff of a jail, remand home, protection home, observation home, or other place of custody or care and protection established by or under any law for the time being in force, commits penetrative sexual assault on a child, being inmate of such jail, remand home, protection home, observation home, or other place of custody or care and protection; or
- (e) whoever being on the management or staff of a hospital, whether Government or private, commits penetrative sexual assault on a child in that hospital; or
- (f) whoever being on the management or staff of an educational institution or religious institution, commits penetrative sexual assault on a child in that institution; or
- (g) whoever commits gang penetrative sexual assault on a child.

Explanation. - When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone; or

- (h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or
- (i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or
- (j) whoever commits penetrative sexual assault on a child, which –
 - (i) physically incapacitates the child or causes the child to become mentally ill as defined under clause (l) of section 2 of the Mental Health Act, 1987 (14 of 1987) or causes impairment of any kind so as to render the child unable to perform regular tasks, temporarily or permanently; or
 - (ii) in the case of female child, makes the child pregnant as a consequence of sexual assault;
 - (iii) inflicts the child with Human Immunodeficiency Virus or any other life threatening disease or infection which may either temporarily or permanently impair the child by rendering him physically incapacitated, or mentally ill to perform regular tasks;
 - “(iv) causes death of the child; or”;
- (k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or
- (l) whoever commits penetrative sexual assault on the child more than once or repeatedly; or
- (m) whoever commits penetrative sexual assault on a child below twelve years; or

- (n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or
- (o) whoever being, in the ownership, or management, or staff, of any institution providing services to the child, commits penetrative sexual assault on the child; or
- (p) whoever being in a position of trust or authority of a child commits penetrative sexual assault on the child in an institution or home of the child or anywhere else; or
- (q) whoever commits penetrative sexual assault on a child knowing the child is pregnant; or
- (r) whoever commits penetrative sexual assault on a child and attempts to murder the child; or
- (s) whoever commits penetrative sexual assault on a child in the course of [communal or sectarian violence, or during any natural calamity or in similar situations]; or
- (t) whoever commits penetrative sexual assault on a child and who has been previously convicted of having committed any offence under this Act or any sexual offence punishable under any other law for the time being in force; or
- (u) whoever commits penetrative sexual assault on a child and makes the child to strip or parade naked in public, is said to commit aggravated penetrative sexual assault.

31. We find that clauses A to D found below Section 375 IPC are identical to the said 04 clauses found below Section 3 of the 2012 Act.

32. An amendment to Section 5 indicates that clause (iv) was introduced below Section 5 and which deals with any such

aggravated penetrative sexual act that causes death of the child. So also, sub-section (m) below Section 5 deals with an offender who commits a sexual attack on a child below 12 years. Sub-section (r) below Section 5 deals with an offender who commits sexual assault on a child and attempts to murder the child. Section 5(j) deals with an offender who commits penetrative sexual assault on a child and causes death of the child.

33. Considering the post-mortem report and the testimony of PW21, we are of the view that the trial Court has not committed any error in concluding that the victim had suffered rape prior to her death. As held herein before, the victim has suffered a homicidal death.

C] **WHETHER THE ACCUSED CAN BE SAID
TO HAVE COMMITTED THE CRIME?**

34. We are of the view that as we deal with this aspect of the case, it would be necessary for us to consider the evidence on record in its entirety so as to evaluate the “last seen together alive” theory and thereafter the incriminating material pointing towards the offence committed and the conduct of the accused.

(i) **“LAST SEEN ALIVE TOGETHER”** : -

35. On 27.10.2016, the victim went missing. Since a search by the family members did not yield any results, a missing complaint was filed by PW1 on 29.10.2016. PW7 was the first person to see the dead body of the victim as it was retrieved / fished out from his well.

36. PW1 is the paternal grandfather of the victim, who was in the custody of the PW1. It is stated by PW1 in his testimony at Exh. 18 that he had gone to the agricultural land of a farmer namely Vishnu Nile for doing labour work of harvesting Soyabean crop. His minor son Krishna, PW3, was with the victim at their house. After PW1 returned at about 4:00 to 4:30 pm, he did not find the victim in the house. A frantic search for two days yielded no result and hence, PW1 approached the Sonpeth Police Station and lodged the FIR. After the body of the victim was traced out, PW1 identified the same to be his granddaughter considering the string of beads worn around the neck and bracelets of beads on her hand. In his cross-examination, he has stated that his youngest son PW3 was a school going boy of about 15 years of age. The victim used to go to the Anganwadi School behind the house of PW1. She used to play with children in the neighbourhood and also used to play with Chaya,

daughter of Pandurang Alase. He searched for the victim by visiting residences of those villagers who had television sets in their homes. He, however, did not make any inquiry by visiting the house of Chaya, which we find to be intriguing.

37. The learned Advocate for the appellant has relied upon **Takhaji Hiraji** (supra) and **Tomaso Bruno** (supra) to contend that the failure on the part of the prosecution in producing its best evidence/witness, is fatal and the case must fail against the accused. In paragraph no. 19 of Thakaji Hiraji (supra), the Hon'ble Apex Court has held as under : -

“19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. It is true that if a material witness, which would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness which though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the Court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the Court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself - whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing

an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the Court can safely act upon it uninfluenced by the factum of non-examination of other witnesses.”

38. In Tomaso Bruno (supra), the Hon’ble Apex Court has held in paragraph no. 27 as under : -

27. As per Section 114 illustration (g) of the Evidence Act, if a party in possession of best evidence which will throw light in controversy withholds it, the court can draw an adverse inference against him notwithstanding that the onus of proving does not lie on him. The presumption under Section 114 illustration (g) of the Evidence Act is only a permissible inference and not a necessary inference. Unlike presumption under Section 139 of Negotiable Instruments Act, where the court has no option but to draw a statutory presumption, under Section 114 of the Evidence Act. Under Section 114 of the Evidence Act, the Court has the option; the court may or may not raise presumption on the proof of certain facts. Drawing of presumption under Section 114 illustration (g) of Evidence Act depends upon the nature of fact required to be proved and its importance in the controversy, the usual mode of proving it; the nature, quality and cogency of the evidence which has not been produced and its accessibility to the party concerned, all of which have to be taken into account. It is only when all these matters are duly considered that an adverse inference can be drawn against the party.”

39. It is, therefore, canvassed by the accused that Chaya was the best witness and failure on the part of the prosecution in examining Chaya, would be fatal to it’s case.

40. PW2 is a grocery shop owner, who knew PW1 and his deceased son Sham (father of the victim) as well as her mother Radha. He was also acquainted with the victim. On 27.10.2016, the

accused had been to his shop at around 1:30 pm. He appeared to have consumed liquor. He asked for liquor and PW2 informed him that he did not have liquor in his shop. He then noticed that two girls were playing in the area near the shop and one of them was the victim. He then saw the accused taking the victim towards his (accused) home.

41. PW2 has deposed that around 4 to 5 pm, on the same day, he came to know that the victim was missing. On 31.10.2016, PW2 came to know from the Police Patil Ashruba that a gunny bag was floating in the well of Balu Dev. As the police was informed, the police personnel arrived in a jeep, brought out the body from the well and upon opening the gunny bag, the naked dead body of the victim was found.

42. In cross-examination, PW2 has stated that one Puja Alase was playing with victim. He stated that he had no knowledge as to who committed the murder of the victim. As the relatives of the deceased did not inquire with him as to whether he had seen the victim, he did not tell them or any of the villagers who had gathered near the well of Balu Dev, subsequently, that he had seen the victim going along with the accused towards his home.

43. PW3 is the paternal uncle of the victim who was about 15 years of age and was taking education in the 10th std. The learned Judge of the trial Court put him the necessary questions to evaluate whether PW3 is aware of the meaning of administering oath while deposing in Court and whether he was giving rational answers, to evaluate his competency to narrate the truth before the Court. Upon being satisfied, an oath was administered to PW3. In the first paragraph of his testimony Exh. 23, he narrated the background in which the deceased victim started residing in their house.

44. From paragraph no. 2, PW3 stated that, on 27.10.2016, his parents had gone to the agricultural field for doing labour work and he was along with the victim, at their home. The victim was about five years of age and used to attend the Anganwadi. At around 2:30 pm, he left home for fetching water and the victim was at home at that time. When he returned at about 04:00 pm, he did not notice the victim. After PW1 and his wife returned in between 04:00 to 04:30 pm, he informed them that the victim was missing. He had gone near the well of Balu Dev on 31.10.2016 on hearing that a gunny bag was brought out of the well and a body of a girl was

noticed. He could identify the body due to the beads worn by her. The victim was in a naked condition. In his short cross-examination, he stated that he did not inform the police that, he had gone to fetch water at about 03:30 pm (mentioned as 02:30 pm in his examination-in-chief). He could not assign any reason why this time of 02:30 pm was not mentioned and why 03:30 pm was mentioned in his statement recorded u/s 161 of the Cr.P.C.

45. The learned Counsel for the appellant has strenuously canvassed, that PW2 has mentioned that he saw the accused in his shop at 01:30 pm. PW2 has mentioned that the victim was inside the house at 02:30 pm. PW2 has stated that after the accused left his shop, he has taken the victim to his house.

46. PW13, a grocery shop owner, stated that on 27.10.2016, the victim had been to his grocery shop at 12:30 noon. She purchased chocolates and went away with her friends. In cross-examination, he has stated that he was unaware whether a girl namely Puja had accompanied the victim or not.

47. It requires no debate that these witnesses have given approximate timings in their deposition before the Court. Such

witnesses, before stepping into the witness box, are not to be trained or their memories are not to be refreshed by the prosecution before the recording of their testimonies, except when the Court permits them to read or go through a particular document so as to refresh their memory.

48. PW2 has stated approximate timings when he saw the accused at about 1:30 pm insisting for liquor and as liquor was not available, he began to proceed to his house. En route to his house, he appears to have lured the victim and PW2 noticed the accused taking away the victim towards his home. The learned Counsel for the appellant therefore contends that there is a gap of 01 hour in between the accused allegedly taking away the victim and PW3 having noticed the presence of the victim at 2:30 pm in his residence and having stated the said time as 3:30 pm in his statement u/s 161 Cr.P.C.

49. The learned Counsel for the appellant has relied upon Bodhraj @ Bodha, (supra) wherein the Hon'ble Apex Court has concluded that the last seen together theory comes into play when the possibility of another person coming in between the deceased and the accused is non-existent. The learned Advocate for the appellant has further contended that, according to the deposition of PW3 (uncle of

the victim), he and the victim were at home at 02:30 pm. In his statement to the police u/s 161 of Cr.P.C., he stated that he left the home at 03:30 pm for fetching water and until then, the victim was in his company at their residence. The learned Counsel therefore canvasses that, even if the accused may have been seen along with the victim at about 01:30 pm, she was lastly seen in the company of her real uncle either upto 02:30 pm going by his statement before the court or upto 03:30 pm going by his statement recorded u/s 161 on 29.10.2016.

50. The first Investigating Officer (PW22) had carried out investigation till 05.11.2016. Under the orders of the Superintendent of Police, the investigation was handed over to PW23, SDPO Gangakhed on 06.11.2016. With regard to the issue of timing of about "1:30 pm" in the statement of PW2 and the discrepancy in the statement of PW3 as regards "02:30 pm" and "03:30 pm", PW22 was confronted with the said aspect and he stated that he had recorded the statement of PW3 in which he has specifically mentioned that the victim was in his company in his house till 03:30 pm when he had gone to fetch water. In view of this aspect, the last seen together theory narrated by PW2, is demolished.

(ii) **RECOVERY OF INCRIMINATING ARTICLES**
U/S 27 OF THE EVIDENCE ACT : -

51. We are aware of the law that, the sniffer dog exercise is a weak piece of evidence and, at times, may not be considered at all, keeping in view attending circumstances/corroborative evidence. Depending upon the facts of each case, the report of the sniffer dog handler may be of assistance in unfolding the mystery of a murder. Needless to state, there cannot be conviction of an accused based purely on this solitary ground. This is well settled. It could only be a thread/piece of evidence which may have the effect of corroborative evidence provided the sniffer dog exercise perfectly fits into the chain of corroborative evidence and leaves no room for doubt that the probable case of the accused may not be the truth.

52. Exh. 84 is the report of the sniffer dog "Johny", prepared by the dog handler and the I.O. Johny was pressed into service on 31.10.2016 around 03:30 pm after the body of the victim was brought out from the well. It needs no debate that since the body was inside the well probably from the end of 27.10.2016 till it was taken out from the well before noon on 31.10.2016, that water inside the well may have been a cause for disappearance of the semen stains, blood stains etc.

53. On 31.10.2016, the Dy.S.P. Shri. Shirgaonkar had conducted an inspection of the spot near the well. A cloth which turned out to be lungi used by a male person, was wrapped around the victim's body. Johnny was asked to sniff that piece of lungi. He started loitering around the said spot and was once again given the scent of the lungi. Thereafter, he set upon a path by sniffing and travelled upto a State highway and stood in front of a small tekdi [mound which in the local language is known as Maal (माळ)]. He started loitering around the said spot. Once again, he was made to sniff the lungi and he started barking at that spot. He, however, did not cross the road. We need to mention here that though at that time, the police did not know the owner of the house on the tekdi, evidence subsequently brought on record indicated that the said house, amongst a cluster of houses, belonged to the accused. Based on the barking of the Johnny, the police had also directed a few people living in the vicinity like Shalubai, Rama Kamble, Bhagubai Kamble, Ravi Borde, Abhimanyu, Arjun Kamble, Balu Alase, Hanuman Alase and Ram Argade, to remain present for the inquiry. This direction was conveyed through the Police Patil. The accused was not in his house at that time.

54. PW6 is the spot-cum-seizure panchanama Panch. In his testimony at Exh. 32, he has stated that he was called near the well on 31.10.2016 at about 1:30 pm. A gunny bag was removed from the well which contained the dead body of a five year old girl. There were marks of strangulation on her neck. In the bag, there was a torn lungi along with a nylon rope used for strangulating the child, two stones used for drowning the body and a green coloured pant (described as leggings). The well was filled with water and there were flies around the gunny bag. The articles were seized in the presence of PW6, who identified all these articles while deposing before the court. He identified his signatures on the chits attached to such articles. The two stones were marked as article 'A' & 'B', the nylon rope was marked as article 'C', the torn lungi was marked as article 'D' and the green coloured pant was marked as article 'E'. Mr. Jamshete, Talathi was another panch. When the villagers gathered around the well, as the news of the body being fished out spread like wildfire, PW6 did not find the accused amongst the said crowd. The sniffer dog was brought by the police on the spot.

55. PW6 further deposed, that the sniffer dog stopped in front of the courtyard of the house of Shalubai. On suspicion,

Shalubai and Ram Argade were interrogated. PW6 then stated that he met the accused on 01.11.2016 at 07:00 am in front of the Narayandev Temple. He asked the accused to show him the houses of Shalubai, Raju Kamble, Bhagubai Kamble, Ravi Borade, Abhimanyu Suryawanshi, Arjun Kamble, Balu Alase and Hanuman Alase, since he was instructed by the police to inform these persons not to leave the village as senior police men were coming for investigation. He, however, denied that the accused accompanied him to pass on this information to these persons. He then deposed that about 100 to 200 persons attended the funeral of the victim and the accused was present at the funeral. The sister of the accused was residing in the same lane in which the victim was residing and she died 15 days after the incident. PW6 has then deposed that the father of the accused moved to Beed district about 2 years prior to the incident for doing agricultural activities. Chits were pasted on the articles which were seized by the investigating officer.

56. Insofar as the spot panchanama and the seizure of the articles at that spot is concerned, there is no controversy. The map set out at internal page 4 of the spot panchanama (Exh. 32) indicates the well and little bit of the surrounding area. It also indicates a short

road at a little height which connects to the hamlet (vasti). It has further come in evidence vide Exh. 66, which is a sketch map admitted by the accused which indicates the crime spot which is the house of the accused and the shortest route towards the well from which the body of the victim was recovered. This short route connects the well to the house of the accused by crossing a small road which is also known as Sonpeth to Gangakhed road. Further evidence has then revealed that the sniffer dog Johnny had sniffed his path from the well upto the said road, but not upto the tekdi (Maal) on which the house of the accused is situated, abutting the said road.

57. PW15 is the Talathi - Mr. Jamshete, who was the panch along with PW6 - Ashruba. He also identified the lungi, the green coloured pant / legging, which appeared to have been worn by the deceased before she was ravished, the stone found in the sack and the nylon rope tied around the neck of the victim. It is this nylon rope, which is also referred to as a string in the evidence of PW21 - Dr. Chavan, was removed from the neck of the victim by the said doctor. He has identified it's colour as being grayish and other witnesses have identified it's colour as being light yellowish. We have ourselves perused the same from the muddemal and it is a minor

discrepancy owing to colour perception that the said colour is in between light yellowish/greenish and grayish.

58. PW15 is also the panch witness. When the police called him on 02.11.2016 to the house of the accused on the maal at village Shelgaon, another panch witness Sunil Gore (PW14) was with him. On the northern side of the house of the accused, a quilt was found having red colour stains resembling human fecal matter. The seizure panchanama (Exh.45) was prepared and PW15 has identified the same.

59. A memorandum statement of the accused u/s 27 of the Evidence Act, dated 22.11.2016, Exh. 72, was drawn. The voluntary statement of the accused admissible in evidence is limited to the crime spot that he desired to show and bring out one part of the same nylon rope by which the neck of the victim was strangulated and her frock that was burnt.

60. PW15 was again the panch witness along with another panch Shri. Pawar, a peon from the Government Hospital. On 22.11.2016, when the police called him to the house of the accused on the maal, a panchanama was prepared at Exh. 49, which indicates

that the accused had volunteered to show the spot at which the crime was committed. It needs mention that the accused is said to have attended the funeral of the victim on 01.11.2016 and, later on, was arrested from the State of Karnataka on 20.11.2016 and was brought to village Shelgaon. Exh. 49 indicates that the accused led the police party into his house. The room, in which they entered, gave no leads to the investigating party and there was no seizure of articles. A cement platform adm. 12 ft. in the east-west direction and 10 ft. in the north-south direction was noticed, below which there were certain articles for domestic use. In front of this platform, there was a tin sheet room. In the front yard of the tin sheet room, were the alleged ashes residue of a burnt quilt. This panchanama was drawn in between 16:45 to 17:10 hrs on 22.11.2016.

61. The accused, in pursuance to Exh. 72, had led the police party to the crime spot. As per his directions, the driver of the police Jeep had moved on and halted at the place as instructed by the accused. Various turns and different road directions were given by him. He had led the panch and the police party on foot towards the west of the road and by climbing the small mound, he took them to the south facing tin sheet compound within which a west facing cement and bricks construction with tin sheets on the top were shown

to be his house. The accused is said to have pointed towards the western direction and indicated the ash residue of the burnt frock. Little bit of the ash found at the spot was taken as sample.

62. The accused then took the party and entered the house which had two internal doors. He pointed towards the room on the north side which had a lock and the said lock was opened with the keys that were seized earlier when the accused was arrested vide arrest panchanama Exh. 74 dated 22.11.2016. This document has been admitted by the accused.

63. The learned Counsel for the appellant has strenuously contended that the fact about the keys being in the custody of the police when they arrested the accused would indicate that they had access to the alleged spot of the crime. They may have planted the nylon rope or the ash residue at the said place to frame the accused. We do not find that this contention could be well placed in view of the fact that no such statement had been made by the accused u/s 313 of the Cr.P.C., inasmuch as, no such suggestion was given to any of prosecution witnesses, especially the I.O. who investigated the crime. The piece of nylon rope having light yellowish colour and about 85 cms, has been perused by us. The 32 cms nylon rope

handed over to the I.O. by PW21 Dr. Chavan after he removed it from around the neck of the deceased, as well as, the piece of the nylon string, 85 cms., seized vide panchanama Exh. 73 on 22.11.2016, were forwarded to the Regional Science Forensic Laboratory for seeking an opinion as to whether both the pieces are a part of the same rope. Though both the pieces were perused by the trial Court and noticed that, they appeared to be two parts of the same rope, the report of the analysis from the R.S.F.L. was never placed before the trial Court.

64. In the above backdrop, this piece of the rope seized u/s 27 of the Evidence Act could be a weak piece of evidence. The other issue that remains is the lungi used by the accused to wrap around the body of the victim.

65. PW9, was called to Sonpeth Police Station for interrogation with regard to the lungi, that was found in the gunny bag, wrapped around the victim. The police asked him to see the lungi and asked whether any of the villagers used such type of lungi. PW9 stated that, Madan (father of the accused) used to use such lungi. The learned Advocate for the accused has contended that when his father had migrated to Beed for doing agricultural labour work, about four years ago, why would he keep back a lungi in his house.

66. We find that there is no dispute that the house and the property in the custody of the accused, was the property of his father. There is nothing on record that after his father migrated to Beed, he had given up the said house and never ever returned to the village. PW9 clearly stated in cross-examination that as Madan (father of the accused) did not have good relations with the mother of the accused, he would not frequently come to the village. He has lastly stated in his cross-examination that, he cannot say firmly as to whether the piece of the cloth 'article-D' which is the piece of lungi found with the dead body, was used by the father of the accused.

67. In view of the above, the prosecution examined another witness, PW12 at Exh. 41. He has deposed that he had seen the victim along with 3 to 4 children playing near the house of Dnyanoba Dhangar at about 11:30 am on 27.10.2016. The house of the accused is very close to the spot where the victim was playing. When the body was found, PW12 had gone near the well. The body of the victim was naked and had two stones, a piece of lungi and nylon wire. The police interrogated him as regards the type of lungi. He identified the stones, the wire and the piece of lungi, in the Court.

Father of the accused was doing labour work in Beed district and used to visit Shelgaon and PW12 had seen him using the said type of lungi.

68. He further deposed that the house of the deceased was three bungalows ahead of the house of Devidas Alase. The police had taken the assistance of the sniffer dog Johny who smelt the articles that were brought out from the well and he went upto the dung pit of Shalubai and started hovering around the same place. After the sniffer dog exercise was over, he left the scene. PW12 has then stated that he had not seen any other villager using the lungi like article 'D'.

69. We are of the view that article 'D' lungi cannot be discarded as a worthless piece of evidence. In view of the discrepancy in the last seen alive together theory, the lungi would assume some importance, provided more evidence is available. As discussed above, the sniffer dog exercise would never be a clinching piece of evidence unless there is strong corroboration. It should perfectly fit into the chain of circumstantial evidence and should become such a link in the chain that it would not appear out of place. Two independent witnesses, who have no animosity towards the accused, have identified the lungi as belonging to the father of the accused who was

residing in the same village for several decades in view of it being his birth place. Wearing of a particular type of a lungi by a person in a small place like village Shelgaon, would not be a difficult task for any witness to identify the owner of the said lungi. As the accused may not have found any piece of cloth to wrap the body and place it in the gunny bag, he may have got panicky and may have pulled out the old lungi of his father which was lying in the house. The issue is, as to whether the accused could be convicted on the basis of a lungi, as a solitary piece of evidence in the absence of corroboration.

70. PW14 was a quilt seizure panch, Exh. 45. There were multiple coloured portions of threads in the said quilt. It had reddish colour stains and was partly burnt. The said quilt was seized and kept in a corrugated box. A seizure panchanama was prepared and the panchas signed the same. The quilt article 'A' was identified by PW14, the Police Patil. Exh. 45 indicates that the quilt was recovered from near the house of the accused slightly on the northern side. The exact description of the place has been mentioned in Exh. 45. This seizure was not u/s 27 of the Evidence Act and was carried out on 02.11.2016 in between 13:30 to 14:00 hrs., much prior to the arrest of the accused.

(iii) **“CONDUCT OF THE ACCUSED AFTER THE INCIDENT” : -**

71. Section 8 of the Indian Evidence Act, explanation (i) and

(ii) and the illustrations thereunder, read thus : -

8. Motive, preparation and previous or subsequent conduct.

— Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

“Explanation 1. — The word “conduct” in this section does not include statements, unless those statements accompany and explain acts other than statements; but this explanation is not to affect the relevancy of statements under any other section of this Act.

Explanation2. — When the conduct of any person is relevant, any statement made to him or in his presence and hearing, which affects such conduct, is relevant.

Illustrations

(a) A is tried for the murder of B.

The facts that A murdered C, that B knew that A had murdered C, and that B had tried to extort money from A by threatening to make his knowledge public, are relevant.

(b) A sues B upon a bond for the payment of money, B denies the making of the bond.

The fact that, at the time when the bond was alleged to be made, B required money for a particular purpose, is relevant.

(c) A is tried for the murder of B by poison.

The fact that, before the death of B, A procured poison similar to that which was administered to B, is relevant.

(d) The question is, whether a certain document is the will of A.

The facts that, not long before, the date of the alleged will, A made inquiry into matters to which the provisions of the alleged will relate; that he consulted vakils in reference to making the will, and that he caused drafts of other wills to be prepared, of which he did not approve, are relevant.

(e) A is accused of a crime.

The facts that, either before, or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant.

(f) The question is, whether A robbed B.

The facts that, after B was robbed, C said in A's presence — "the police are coming to look for the man who robbed B," and that immediately afterwards A ran away, are relevant.

(g) The question is, whether A owes B rupees 10,000.

The facts that A asked C to lend him money, and that D said to C in A's presence and hearing— "I advise you not to trust A, for he owes B 10,000 rupees," and that A went away without making any answer, are relevant facts.

(h) The question is, whether A committed a crime.

The fact that A absconded, after receiving a letter warning him that inquiry was being made for the criminal, and the contents of the letter, are relevant.

(i) A is accused of a crime.

The facts that, after the commission of the alleged crime, he absconded, or was in possession of property or the proceeds of property acquired by the crime, or attempted to conceal things which were or might have been used in committing it, are relevant.

(j) The question is, whether A was ravished.

The facts that, shortly after the alleged rape, she made a complaint relating to the crime, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that, without making a complaint, she said that she had been ravished is not relevant, as conduct under this section, though it may be relevant

as a dying declaration under section 32, clause (1), or

as corroborative evidence under section 157.

(k) The question is, whether A was robbed.

The fact that, soon after the alleged robbery, he made a complaint relating to the offence, the circumstances under which, and the terms in which, the complaint was made, are relevant.

The fact that he said he had been robbed, without making any complaint, is not relevant as conduct under this section, though it may be relevant,

as a dying declaration under section 32, clause (1), or

as corroborative evidence under section 157.”

72. PW5 was along with the accused and persons such as Balu, Hanuman, Shalubai, Salubai, Ujjwala, Sangita, who had undertaken work of harvesting Soyabean crop in the agricultural land of Balu Dev on contract basis. They were doing the work for about 20 days. For a period of about 5 days, prior to the incident of the victim going missing, the accused stopped attending the work of harvesting. Being a co-villager, PW5 visited the house of the accused and asked him to come to work. The accused refused. Each of these persons had taken Rs. 5000/- for completing the work of harvesting, from Balu Dev.

73. In cross-examination, he has stated that the accused was along with him for showing the houses of all residents of the village to Police Patil - Shri. Kurhade. Balu Dev had sown 29 bags of Soyabean. PW5 and the co-workers had taken the contract of harvesting the Soyabean crop at the rate of Rs. 2300/- per bag. Some of the villagers who were sugarcane cutters had left the village. The accused performed the work of Soyabean harvesting for about 10 days. While his statement was recorded u/s 161 of the Cr.P.C., he had gone to the house of the accused and requested him to come to work which he refused. He, however, cannot assign any reason as to why this statement does not appear in his statement u/s 161 of the Cr.P.C. This is, therefore, an omission.

74. PW10 has deposed that the accused is his friend. He used to visit the agricultural land of PW10 for seeking work. When he was called by the Police on 02.11.2016, he told the police that prior to 07 days from 02.11.2016, the accused had met him near the temple at village Shelgaon and he requested for Rs. 2000/- since he desired to go out of station. PW10 declined to lend Rs. 2000/- because of his financial position. The accused then inserted his sim

card in the mobile phone of PW10 and called up Shivaji Bagwale, PW11 for borrowing Rs. 2000/-. PW11, Sarpanch of the village, did not have money and declined to give a hand loan.

75. PW11 corroborated the statement of PW10 that he had received a call from the accused on 27.10.2016, when he demanded Rs.2000/-. PW11 did not pay the said amount.

76. PW16 is another worker who was the owner of a tractor bearing registration No. MH24-AG-704 which he engaged for transporting sugarcane to Satish Sugar Factory in the State of Karnataka. He had received a call from his friend Balu Kolhe, who was the Mukadam, who takes contracts for sugarcane harvesting by engaging sugarcane cutters (labourers). PW16 went along with his tractor at Yadod and therefrom, he along with the accused, his brother Shankar and his mother, went with the group of labourers. All these persons in the said group were sugarcane cutters. A few days later, Maharashtra police came (in the State of Karnataka) and took away the accused, his brother Shankar and his mother along with a small boy. The accused was working in the group of PW16 in Karnataka and was very silent, was not talking to anybody and appeared to be frightened.

77. In cross-examination, PW16 has stated that in their language of sugarcane harvester, one koyta (sickle) means one couple comprising of two persons. All such koytas working in his group were from Maharashtra. A mukadam controls the vehicle used for transportation of sugarcane. He stated in cross-examination, that as Kannada language is spoken in the State of Karnataka, workers from Maharashtra are unable to speak that language and sometimes Marathi speaking neighbours behave shy in that part of the State.

78. PW18 is the cloth seizure panch. He was working as a Mukadam of the Sugarcane cutters toli at Satish Sugar Factory, Ooncha, Karnataka. At that time, the accused, his brother and their mother had been with him for harvesting sugarcane. The accused appeared upset, frightened and was not vocal. He was working in the group of PW18 when police arrested him and took him away. On the same day, the police seized one shirt and a pant in the presence of PW18 and Siddharth Kadam, which were brought by brother of the accused under panchanama Exh. 61. The police identified the shirt and the pant by its' colour and description and prepared a seizure panchanama by obtaining the signature of PW18 and Siddharth.

These signatures were identified by PW18. Seizure panchanama Exh.61 and articles no. 12 and 13, were identified by him. In cross-examination, he denied that the police had not seized any clothes in his presence.

09th February, 2021 : -

79. In cross-examination of PW18, he has denied that the Maharashtra labourers do not talk much or are silent while working in the State of Karnataka. He however has stated that labourers taken from Maharashtra 'remained upset till the sugarcane cutting work of 4-5 field owners is done'. We have perused the Marathi recording of the testimony of PW18 and we find that a correct translation has not been set out in the English version. What is mentioned in the Marathi statement is that, 'as such workers perform the work of sugarcane harvesting in 4-5 fields in Karnataka, they are restless (बेचैन)'.

80. Section 8 of the Evidence Act gives importance to the conduct of the accused at the time of the commission of the offence and importantly after the commission of the offence. The testimonies of PW10, PW11, PW16 and PW18 indicate that the accused appeared

to be frightened and subdued. His behaviour was unusual. He appeared to be under stress. After the accused was arrested on 20.11.2016, he was brought to Police Station, Sonpeth in district Parbhani, after travelling from Karnataka and was lodged in Police Custody.

IV] **WHETHER THE LINKS COMPLETE THE CHAIN OF CIRCUMSTANTIAL EVIDENCE?**

81. The quilt seizure panchanama (Exh. 45) is of no assistance to the prosecution. It was said to have been seized from the northern side portion in front of his house on 02.11.2016, in half burnt condition. Nothing turns on the said quilt as neither semen stains nor blood stains were found on it. Material resembling human fecal matter also did not render any assistance to the case of the prosecution. The Forensic Science laboratory, vide Exh. 98, submitted its report with regard to the partly burnt quilt and opined that there was no DNA profile available from the same.

82. The string C-1, piece of cloth (the lungi) C-2, and the leggings (kid wear) C-3, were forwarded to the Forensic Science Laboratory. Vide Exh. 93, the laboratory noticed that C-1 was stained with blood, C-2 was also stained with blood, but appeared to be

washed and C-3 was also stained with blood and appeared to be washed. C-2 and C-3 appeared to be washed because they were under water in the well for about 4 to 5 days. Fecal matter appeared on C-3. No semen or hair, were detected on any of these articles. Exh. 97 is the DNA analysis with regard to C-1, C-2 and C-3 which revealed no DNA profile from the blood. Exh. 98 is the analysis report with regard to the partly burnt quilt and no DNA profile was obtained.

83. PW12 has stated in his deposition that 3 to 4 children were playing near the house of one Dnyanoba Dhangar. The victim was playing along with 3 to 4 small children near the said house, at about 11:30 am. The said spot is very close to the house of the accused. PW12 has also deposed that he saw her dead body on 31.10.2016 when it was removed from the gunny bag. Two stones, a piece of lungi and some wire were also sealed by him. After the police inquired with him, he told them that the father of the accused was using that type of lungi which was found near the dead body. He further deposed that the father of the accused has moved to district Beed for doing yearly agricultural labour work. In paragraph 7, he has mentioned the houses adjacent to his house and the house of

Dnyanoba Dhangar, in whose vicinity the victim was playing. The house of the accused is two houses adjacent to the house of PW12.

84. As we progressed with the dictation of this judgment in open court, we were assessing as to whether the accused was involved in this crime based only on his conduct of not reporting for work about two to three days prior to the disappearance of the victim, on the day she disappeared and the subsequent about five days since her disappearance. He appeared frightened, inhibited and his co-worker found him to be jittery. When the sniffer dog reached the Sonpeth Gangakhed road opposite to the houses of Dnyanoba Dhangar, Malhar Alase, Devidas Alase and the house of the accused, the Police did not find it necessary to knock at his doors. On 02.11.2016, they reached the same place again for investigation and they found a half burnt quilt with blood like material stains on it on the northern side of the house of the accused, which turns out to be a worthless piece of evidence.

85. PW23, SDPO was handed over the investigation on 06.11.2016 by the District Superintendent of Police. He formed three squads of the officers belonging to the Local Crime Branch and began

searching for the accused, as suspicious material like the quilt was found near his house. Investigation led the police to the State of Karnataka from where the accused was picked up and brought back to Police Station, Sonpeth. In view of his memorandum statement u/s 27 of the Evidence Act, the police followed the directions and instructions of the accused and reached his house from where he brought out a nylon rope by stating that it is an 85 cms piece. One piece of the said rope was alleged to be used for strangulating the victim.

86. We find that the piece of the nylon rope retrieved from around the neck of the victim was sent to the Forensic Science Laboratory vide Exh. 81, O.W. No. 1401/2016 dated 02.11.2016 (article C-1) along with several other articles. Article-E is the 85 cms piece of the nylon rope which is alleged to be the other part of C-1. We find that blood stains were on the string, lungi and the pant worn by the victim as per the report of the Forensic Science Laboratory Exh.93.

87. Subsequently, the SDPO addressed a communication Exh. 65 dated 23.11.2016 to the Dy. Director of the Forensic Science Laboratory raising certain issues which included a query as to

whether Exh.E and Exh. C-1 are two pieces of the same rope. The said communication was received by the Laboratory on 24.11.2016. No response thereafter has been received by the I.O. and the Investigating Agency remained silent on this issue. We are of the view that this could have been a clinching piece of evidence which the investigating agency has ignored.

88. We have noted that PW23, of the rank of the SDPO, has stated in the first paragraph of his deposition that he had issued a letter to the Magistrate for recording the statements of the sister and brother-in-law of the accused u/s 164 of the Cr.P.C. We did not find such statements in the R&P and we also do not know as to what happened with the said two persons since they were not examined before the trial Court.

89. The learned Advocate for the accused has canvassed that this Court cannot consider any statement of any person which is not made as a witness before the trial Court and he rightly canvassed that such statement cannot be read as substantive evidence. The learned Prosecutor had no answer as to why these persons were not examined before the trial Court, except the brother-in-law of the accused viz. Avinash Prabhakar Mule, in whose context an application was

filed by the prosecution at Exh. 58 stating that the said witness does not desire to support the case of the prosecution.

90. In the midst of this dictation, the learned Prosecutor desired to trace out Exh. C-1 and the fate of Exh. 65 to address this Court and prayed that the matter be posted after two days.

91. We, therefore, adjourned this matter to 11th February, 2021.

11th February, 2021 : -

92. We have heard the learned Prosecutor on the purpose and effect of Chapter XXVII - Section 366 and 367. He has placed reliance upon the Judgment of the Hon'ble Apex Court in the matter of **Kunal Majumdar Vs. State of Rajasthan**, 2012 (9) SCC 320 and an order of this Court dated 02.02.2017 delivered in Criminal Confirmation Case No. 3 of 2016, **the State of Maharashtra Vs. Krushna Ramrao Ridde and another**.

93. The learned Prosecutor strenuously submits that the nylon string by which the victim was strangulated by the accused, C-1, is unfortunately not available in the muddemal. Despite the best

efforts of the concerned police authorities, the same is not found. Exh.65 by which “C-1” and the 85 cms nylon string “E” were sent to the Forensic Science Laboratory to test whether the fiber of the two pieces of nylon string are one and the same so as to make them two parts of the same string. That report has also not been received by the prosecution. He, therefore, submits that Section 391 of the Cr.P.C. need not be invoked in this case and instead, this Court should invoke Section 367 along with Section 311 for directing further investigation or recording of further evidence before the trial Court.

94. The learned Counsel for the accused has vehemently opposed this request contending that the judgments cited do not apply to this case, inasmuch as, the accused himself has preferred an appeal and therefore, Section 391 of the Cr.P.C. would become applicable and which would put fetters on the jurisdiction of this Court.

95. We find that in **Kunal Majumdar** (supra), it has been held in paragraph 15 to 19 as under : -

“15. In a case for consideration for confirmation of death sentence under Section 366 (1) Cr.P.C., the High Court is bound to examine the Reference with particular reference

to the provisions contained in Sections 367 to 371 Cr.P.C. Under Section 367, Cr.P.C., when Reference is submitted before the High Court, the High Court, if satisfied that a further enquiry should be made or additional evidence should be taken upon, any point bearing upon the guilt or innocence of the convict person, it can make such enquiry or take such evidence itself or direct it to be made or taken by the Court of Sessions. The ancillary powers as regards the presence of the accused in such circumstances have been provided under sub-Clauses (2) and (3) of Section 367, Cr.P.C. Under Section 368, while dealing with the Reference under Section 366, it inter alia provides for confirmation of the sentence or pass any other sentence warranted by law or may annul the conviction itself and in its place convict the accused for any other offence of which the Court of Sessions might have convicted the accused or order for a new trial on the same or an amended charge. It may also acquit the accused person. Under Section 370, when such Reference is heard by Bench of Judges and if they are divided in their opinion, the case should be decided in the manner provided under Section 392 as per which the case should be laid before another Judge of that Court who should deliver his opinion and the judgment or order should follow that opinion. Here again, under the proviso to Section 392, it is stipulated that if one of the Judges constituting the Bench or where the appeal is laid before another Judge, either of them, if so required, direct for rehearing of the appeal for a decision to be rendered by a larger Bench of Judges.

16. When such a special and onerous responsibility has been imposed on the High Court while dealing with a Reference under Section 366 (1), Cr.P.C., we are shocked to note that in the order impugned herein, the Division Bench merely recorded to the effect that the counsel for the appellant pleaded for sympathy to commute the death sentence into one for life for the offence falling under Section 302, IPC while praying for maintaining the sentence imposed for the offence under Sections 376/511, IPC and that there was no opposition from the learned Public Prosecutor. The Division Bench on that sole ground and by merely stating that there was no use of force of severe nature on the victim at the hands of the appellant and that the commission of offence of murder cannot be held to be brutal or inhuman and consequently the death sentence was liable to be altered as one for life for the

offence under Section 302, IPC. The Division Bench of the High Court did not bother to exercise its jurisdiction vested in it under Section 366(1) Cr.P.C. read with Sections 368 to 370 and 392, Cr.P.C. in letter and spirit and thereby, in our opinion, shirked its responsibility while deciding the Reference in the manner it ought to have been otherwise decided under the Code of Criminal Procedure. We feel that less said is better while commenting upon the cursory manner in which the judgment came to be pronounced by the Division Bench while dealing with the Reference under Section 366 (1) while passing the impugned judgment.

17. We are, however, duty bound to state and record that in a Reference made under Section 366 (1) Cr.P.C., there is no question of the High Court short-circuiting the process of Reference by merely relying upon any concession made by the counsel for the convict or that of counsel for the State. A duty is cast upon the High Court to examine the nature and the manner in which the offence was committed, the mens rea if any, of the culprit, the plight of the victim as noted by the trial Court, the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit vis-a-vis the public interest, the conduct of the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependants or the custodians of the victim. There should be very wide range of consideration to be made by the High Court dealing with the Reference in order to ensure that the ultimate outcome of the Reference would instill confidence in the minds of peace loving citizens and also achieve the object of acting as a deterrent for others from indulging in such crimes.
18. It is unfortunate that the Division Bench of the High Court of Rajasthan was oblivious of the above vital factors while disposing of the Reference in such a cursory manner. It will have to be stated that if the submissions of the counsel for the appellant before us are to be considered on merits, they would only result in dealing with the issue in such a manner which in the normal course should have been considered and examined by the Division Bench while dealing with the Reference under Section 366 (1). Since the said exercise ought to have been carried out by

the Division Bench while dealing with a Reference along with the appeal preferred by the appellant, in fitness of things the Division Bench is allowed to carry out that exercise as ordained upon it. To emphasize upon the duty cast upon the Division Bench in such cases of Reference, we reiterate that resorting to any such shortcut course would reflect very badly upon the concerned Court.

19. We are convinced that it is the bounden duty of the Division Bench to carry out such exercise in the manner set out above and we feel it appropriate, therefore, to set aside the judgment impugned in this appeal for that reason and remit the matter back to the High Court for deciding the Reference under Section 366 Cr.P.C. in the manner it ought to have been decided. Inasmuch as the conviction and sentence imposed on the appellant was by the judgment dated 09.03.2007 of the trial Court and the offence alleged was dated 16.01.2006, while remitting the matter back to the High Court, we direct the High Court to dispose of the Reference along with the Appeals expeditiously and in any case within three months from the date of receipt of the records sent back to the High Court. The appeal stands disposed of with the above directions to the High Court.”

96. It is, therefore, obvious from the facts in **Kunal Majumdar** (supra) that the High Court of Rajasthan relied upon a concession given by the counsel for the convict and the counsel for the State. Duty was cast upon the High Court to examine the nature and the manner in which the offence was committed, the *mens rea* if any, of the culprit, the plight of the victim as noted by the trial Court and the diabolic manner in which the offence was alleged to have been performed, the ill-effects it had on the victim as well as the society at large, the mindset of the culprit, the public interest, the conduct of

the convict immediately after the commission of the offence and thereafter, the past history of the culprit, the magnitude of the crime and also the consequences it had on the dependents or the custodians of the victim. The Hon'ble Apex Court thereafter remitted the matter (reference for confirmation of death sentence) back to the High Court for deciding the reference as per the procedure laid down in Section 366 Cr.P.C.

97. Our conscience reminded us that we were required to hear the prosecutor on Section 367 of the Cr.P.C. and find out as to whether this was a fit case for directing further evidence to be recorded. We, however, cannot be oblivious to the evidence that was before the trial Court and that is placed before us to assess whether the prosecution could not have led more evidence despite its best efforts put in, in the trial of the case. We are presently dealing with a reference case as well as an appeal preferred by the accused. While appreciating the contention of the learned Prosecutor that Section 367 r/w Section 311 of the Cr.P.C. alone could be attracted, we cannot turn a blind eye to the law laid down by the Hon'ble Apex Court in **Rajvinder Singh v. State of Haryana, (2016) 14 SCC 671**, wherein it was held that additional evidence at the appellate stage,

u/s 391 Cr.P.C., would not be permitted when it was certainly possible to lead the best evidence available at the trial stage. It was further held that it was certainly possible to examine Forensic Expert at the trial stage itself and the High Court was right in rejecting the prayer to lead additional evidence at appellate stage. We are of the view that, **Rajvinder Singh** (supra) was not cited before the learned Division Bench of this Court when it exercised powers u/s 391 of the Cr.P.C. while passing the order dated 02.02.2017 in Criminal Confirmation Case No. 3 of 2016.

98. Since the accused has preferred an appeal before us and the same has been taken up for adjudication along with the Confirmation case, we have no hesitation in holding that we cannot ignore Section 391 of the Cr.P.C. In **Brig. Sukhjeet Singh (Retd), MVC Vs. The State of Uttarpradesh**, (2019) 16 SCC 712, the Hon'ble Apex Court held that the key words in Section 391(1) of the Cr.P.C. are "if it thinks additional evidence to be necessary". The word necessary is interpreted to mean 'necessary for deciding the appeal'. Power to take additional evidence u/s 391 Cr.P.C. is with an object to appropriately decide the appeal by the appellate court to secure ends of justice. A wide discretion is conferred on the appellate court and

the additional evidence may be necessary for a variety of reasons. Additional evidence must be necessary not because it is impossible to decide the appeal or pronounce the judgment, but because there would be failure of justice without it. There are no fetters u/s 391 Cr.P.C., on the power of the appellate Court. All powers are conferred on the court to secure the ends of justice.

99. The only issue before us begging for the attention of Section 367 *inter alia* Section 391 is whether the nylon string “E” brought out by the accused and ‘C-1’, which is seized by the police u/s 27 of the Evidence Act, is a piece of the same string/nylon rope. It requires no debate that discovery u/s 27 of the Evidence Act has its own limitation and conviction cannot be handed down purely on the solitary piece of evidence of seizure u/s 27. There have to be corroborative pieces of evidence which nail the accused and in such circumstances, such a seizure would be an additional piece of evidence provided it completes the chain of circumstantial evidence. As noted above, this case rests purely on circumstantial evidence. If other pieces of evidence with the aid of Section 27 complete the chain of circumstantial evidence, the seizure of the nylon rope u/s 27 of the Evidence Act would assume importance.

100. In the above backdrop, we summarize the evidence before us so as to assess as to whether the seized string “E” matches the fiber of the nylon rope ‘C-1’, found around the neck of the victim, and could be two pieces of the same rope so as to complete the chain of circumstantial evidence : -

- A. The last seen alive together theory put forth by the prosecution on the basis of the solitary testimony of PW2 is demolished by the evidence of PW3 and PW22.
- B. Insofar as the sniffer dog investigation is concerned, which is normally never considered to be substantive evidence, indicates that Johny had travelled upto the Sonpeth-Gangakhed road and lost his track thereafter. The prosecution contends that, after crossing the road, there are a few houses and on a little mound (maal), the house of the accused was situated. We do not find this factor to be a link in the chain of circumstantial evidence pointing towards the guilt of the accused, in the absence of corroborative evidence.
- C. The police had found a half burnt quilt on the northern side of the house of the accused on 02.11.2016. The CA report does not indicate that the quilt had semen stains or blood stains belonging to the blood group either of the victim or the accused. This piece of evidence is therefore worthless.

- D. A lungi was found wrapped around the victim when the body was fished out of the well. Two villagers residing in the same village have deposed before the trial Court that such type of lungi was being worn by the father of the accused. Neither the father of the accused was examined, nor is there any evidence before the trial Court to indicate that the father of the accused purchased the said lungi.
- E. Insofar as the conduct of the accused is concerned, keeping in view Section 8 of the Evidence Act and the observations of the Hon'ble Apex Court in paragraph 17 of the **Kunal Majumdar** (surpa), three co-workers of the accused have deposed before the trial Court stating that he was not talking, was a bit silent, appeared to be under tension and was asking for money. In the absence of corroborative evidence, this piece of evidence could hardly form the foundation of a judgment of conviction.

101. In the above backdrop, we find that even if the nylon rope "C-1" was before us so as to be compared with the colour and pattern of the string/rope "E", we are afraid that we do not have the expertise to conclude as to whether the fiber of both the pieces of the nylon rope can be said to be identical so as to conclude that both these pieces together form a single nylon rope. In these premises, it would be futile to direct the trial Court, firstly to trace out the missing

nylon rope “C-1” and after tracing it, resend “C-1” and “E” to the Forensic Science Laboratory for analyzing its fiber. On this solitary piece of evidence, we cannot support the conclusion of ‘guilty’ by the trial Court.

102. In view of the above, we do not find such evidence before us which would convince us that it was this accused and no other person who can be said to have committed the crime. The chain of circumstantial evidence is broken at the stages of (a) last seen alive together, (b) sniffer dog, (c) the lungi and (d) the nylon rope. Unless all these links could have held themselves together so as to complete the chain of circumstantial evidence, the accused could not have been held guilty of having committed the crime [**Sharad Birdhichand Sarda Vs. State of Maharashtra**, (1984) 4 SCC 116].

103. In plethora of judicial pronouncements, the Hon’ble Apex Court has concluded that suspicion, however strong, cannot take the place of proof. An accused is presumed to be innocent unless proved guilty beyond reasonable doubt. In **Shanti Devi v. State of Rajasthan**, (2012) 12 SCC 158, the Hon’ble Apex Court reiterated the following principles for conviction of the accused based on circumstantial evidence : -

- “10.1. The circumstances from which an inference of guilt is sought to be proved must be cogently or firmly established.
- 10.2. The circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused.
- 10.3. The circumstances taken cumulatively must form a chain so complete that there is no escape from the conclusion that within all human probability, the crime was committed by the accused and none else.
- 10.4. The circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”

104. In this backdrop, we find that Section 29 of the POCSO Act, which enumerates presumption of the person being tried to be guilty of committing the said offence, would not be applicable as it is established before us that the evidence brought on record by the prosecution does not conclusively prove that the accused has committed the crime beyond any doubt. The special Court can presume that such person (accused) has committed the offence, unless the contrary is proved. In the instant case, though the victim is proved to have suffered a sexual assault and met with a homicidal death, it is unfortunate that the prosecution could not bring on record such evidence which could have proved that the offence was committed by the accused beyond any doubt.

105. In **Mohan Ambadas Meshram Vs. State of Maharashtra**, 2018 (2) ABR (Cri) 947, presumption u/s 29 of the POCSO Act would arise only after the prosecution proves/establishes the basic foundational fact beyond reasonable doubt. In the absence of establishing that the accused had committed the crime, the effect of Section 29 of the POCSO Act would be neutralized.

106. In view of the above, we grant the benefit of doubt to the accused. The Criminal Appeal No. 402 of 2020 is allowed. The impugned Judgment of the trial Court dated 18.02.2020 delivered in Special (POCSO) Case No. 2 of 2017, stands quashed and set aside. The Criminal Confirmation Case No. 1 of 2020 stands disposed off. The accused - Vishnu Madan Gore is, therefore, acquitted of the charges u/s 363, 364, 376-A, 302 and 201 of the IPC and Sections 5 and 6 of the POCSO Act, by giving him the benefit of doubt. The accused shall be set at liberty, if not required in any other crime/case. The fine amount of Rs. 50,000/- (Rupees Fifty Thousand), if paid in full or in part, shall be refunded to the accused after the appeal period is over.

107. Internal page no. 2 of Exh. 73, which is below the narration in Exh. 72, which was missing from the paper-book as the

said page was placed by the trial Court in D-file, shall be placed as page no. 2 below Exh. 73 and shall be a part and parcel of the R&P. The R&P be returned to the trial Court and the muddemal be destroyed after the appeal period is over.

108. Before we part with this case, we have no hesitation in observing that we are indeed disturbed by the manner in which the prosecution has investigated the crime, collected evidence and conducted the trial in a most insensitive manner. The learned Prosecutor - Shri. S. D. Ghayal deserves compliments for the tremendous efforts that he has put in and the manner in which he has marshalled the facts of the case before us. It is unfortunate that such amount of hard work is met with an order of acquittal at our unfortunate hands only because the prosecution has not collected evidence and has not even taken efforts to get a result from the Forensic Science Laboratory as regards the nylon string "C-1" and "E". Though PW23 had approached the learned Magistrate for recording the statements of the mother, sister and son-in-law u/s 164 of the Cr.P.C., no further steps were taken in this direction. We perceive that the said step was taken by him on the basis of some material that he had gathered during investigation after he took over as the I.O. on

06.11.2016 under the orders of the District Superintendent of Police. We find no hesitation in directing the Directorate of Prosecution, State of Maharashtra to initiate action against those responsible for the loss of the nylon string "C-1", failure to acquire the report from the Regional Forensic Science Laboratory as regards the matching of the fiber of the nylon string "C-1" and "E" and for the failure in examining material witnesses.

109. We are equally surprised by the manner in which the learned Additional Sessions Judge (Special Judge), Gangakhed, Dist.Parbhani has decided Special (POCSO) Case No. 2 of 2017. We find that the learned Judge has referred to portions of the examination-in-chief of prosecution witnesses and has overlooked their cross-examination, while drawing his conclusions. So also, the said Presiding Officer was under a duty to direct the prosecution to bring forth such witnesses or pieces of evidence which were necessary for reaching to the correct conclusion. He should have paid attention to the fact that the nylon string "C-1" by which the victim was strangled had also gone missing. Every case has to be dealt with by the Presiding Officer with sensitivity and such cases involving children of a tender age, should be dealt with, with utmost sensitivity. We deem it appropriate to reproduce paragraph 35 of the judgment

of the Hon'ble Apex Court in **Zahira Habibullah Shaikh and Anr. v The State of Gujarat and others**, (2004) 4 SCC 158 as under and conclude this judgment : -

“35. This Court has often emphasised that in a criminal case the fate of the proceedings cannot always be left entirely in the hands of the parties, crime being public wrong in breach and violation of public rights and duties, which affect the whole community as a community and are harmful to the society in general. The concept of fair trial entails familiar triangulation of interests of the accused, the victim and the society and it is the community that acts through the State and prosecuting agencies. Interests of society are not to be treated completely with disdain and as persona non grata. Courts have always been considered to have an over-riding duty to maintain public confidence in the administration of justice - often referred to as the duty to vindicate and uphold the 'majesty of the law'. Due administration of justice has always been viewed as a continuous process, not confined to determination of the particular case, protecting its ability to function as a Court of law in the future as in the case before it. If a criminal Court is to be an effective instrument in dispensing justice, the Presiding Judge must cease to be a spectator and a mere recording machine by becoming a participant in the trial evincing intelligence, active interest and elicit all relevant materials necessary for reaching the correct conclusion, to find out the truth, and administer justice with fairness and impartiality both to the parties and to the community it serves. Courts administering criminal justice cannot turn a blind eye to vexatious or oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible, except at the risk of undermining the fair name and standing of the judges as impartial and independent adjudicators.”

[Emphasis supplied]

[B. U. DEBADWAR]
JUDGE

[RAVINDRA V. GHUGE]
JUDGE