

**IN THE HIGH COURT OF CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE**

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

DEATH REFERENCE NO. 08 OF 2023

THE STATE OF WEST BENGAL **... APPELLANT**

Vs.

AJGAR ALI KHADIMUNSARI **... RESPONDENT**

With

CRIMINAL APPEAL (DB) NO. 22 OF 2025

AJGAR ALI KHADIMUNSARI **... APPELLANT**

Vs.

STATE OF WEST BENGAL **... RESPONDENT**

For the Appellant : Ms. Anusuya Sinha, Adv.
Ms. Trina Mitra, Adv.
Ms. Sudeshna Das, Adv.
Ms. Madhusree Banerjee, Adv.

For the State : Mr. Debasish Roy, Ld. P.P.
Mr. Rudradipta Nandy, Ld. A.P.P.
Mr. Debanshu Ghorai, Adv.

Hearing concluded on : 19.08.2025

Judgment on : 01.09.2025

MD. SHABBAR RASHIDI, J.:-

1. The Death Reference and the appeal have emanated out of the impugned judgment of conviction dated December 5, 2023 and the order of sentence dated December 6, 2023 passed by learned Additional Sessions Judge-cum-Special Judge under POCSO Act, Baruipur, South 24 Parganas, in Special Sessions Trial No. 06 of 2020 arising out of CIS Spl. No. 82 of 2019.

2. By the impugned judgment, the appellant was found guilty and convicted of the offence punishable under Sections 363/365 376AB/302/201 of the Indian Penal Code, 1860 and Section 6 of Prevention of Children from Sexual Offences Act (for short, 'POSCO Act').

3. By the impugned order of sentence, the appellant was sentenced to suffer rigorous imprisonment for 7 years with a fine of ₹5,000/- and in default of payment of fine, he was directed to undergo rigorous imprisonment for a further period of six months, for the offence punishable under Section 363 of the Indian Penal Code. The appellant was further sentenced to suffer rigorous imprisonment for 7 years with a fine of ₹5,000/- and in default of payment of fine, he was directed to undergo rigorous imprisonment for a further period of six months, for the offence punishable under Section 365 of the Indian Penal Code.

4. The appellant was further sentenced to suffer rigorous imprisonment for life which shall mean imprisonment for remainder of the convict's natural life and a fine of ₹1,00,000/- and in default of payment of fine, he was directed to undergo rigorous imprisonment for a further period of six months, for the offence punishable under Section 6 of the POCSO Act. The appellant was further sentenced to death for the offence punishable under Section 302 of the Indian Penal Code. The appellant was also sentenced to suffer rigorous imprisonment for 7 years with a fine of ₹5,000/- and in default of payment of fine, he was directed to undergo rigorous imprisonment for a further period of six months, for the offence punishable under Section 201 of the Indian Penal Code. The sentences were directed to run concurrent.

5. Learned advocate for the appellant submitted that the post mortem report does not specify the time of death. According to learned advocate there is huge time gap between the disappearance of the victim and recovery of dead body. The victim went missing from her house on July 15, 2019 whereas the dead body was recovered on July 21, 2019.

6. Learned advocate for the appellant also submitted that after the appellant was arrested on July 21, 2019, the dead body of the victim was recovered at the behest of the appellant on such date at 6.55 a.m. Besides the dead body, certain other articles were also recovered as

shown by the appellant and a seizure list, in this regard, was drawn up between 6.35 a.m. and 6.45 a.m. and thereafter the dead body was recovered at 6.55 a.m. as also such seizure list does not mention the recovery of dead body. According to learned advocate for the appellant, such sequence of events renders the case of the prosecution highly doubtful since the dead body is said to be recovered as shown by the appellant.

7. Learned advocate for the appellant further submitted that the case of the prosecution was rendered doubtful in as much as the First Information Report was forwarded to the court with unexplained delay. The FIR was lodged on July 15, 2019 at 11:25 p.m. whereas the same was forwarded to the court on July 20, 2019 after a delay of 5 days.

8. Learned advocate for the appellant further contended that the appellant is said to have made an alleged extra judicial confession before the doctor who examined him. Such statement is not admissible and cannot be relied upon as at the relevant point of time, the appellant was in the custody of police. In this context, learned advocate referred to the medical examination report of the appellant which showed certain injuries on his person. It is submitted that the appellant was subjected to third degree in order to extract the alleged extra judicial confession. In support of such contentions, learned advocate for the appellant cited the authority reported in **(2024) 9**

Supreme Court Cases 546 (Allarakha Habib Memon and Others Vs. State of Gujrat).

9. Learned advocate for the appellant further contended the written complaint did not mention the physical details of the victim or about the wearing apparel she was wearing when she went missing. The dead body was recovered in a highly decomposed state. In such circumstances, there is no explanation in the evidence led at the trial, as to how the witnesses could identify the victim. These circumstances, tell upon the identity of the dead body of the victim adversely. Learned advocate also submitted that the learned Trial Court granted permission for collection of blood samples of the parents of the victim for the purpose of DNA profiling. However, there is no evidence with regard to the outcome of such DNA profiling for the purpose of identification of the dead body to be that of the victim. On such score, it was argued that the identification of the recovered dead body to be that of the victim is not established beyond all reasonable doubts.

10. Learned advocate for the appellant further submitted that the subsequent investigating officer visited the place of occurrence and seized certain articles like earth, earthen grass, hair sample and burnt 'Bidi' in presence of forensic team on July 21, 2019. Such articles included the panty of the victim though; the panty was already seized on July 21, 2019. Moreover, the genetic profile found on the 'bidi' did

not match with that of the blood sample of the appellant. Besides that, the prosecution was not able to establish that the button recovered from the place of occurrence was detached button of the T-shirt of the appellant. Such facts throw the case of the prosecution highly doubtful.

11. Learned advocate for the appellant also submitted that the alleged place of occurrence was not within exclusive control of the appellant. It was open and frequented by many persons. Even the father of the victim i.e. PW3 had access to such place. The appellant has been implicated in this case as he was a worker at the said place of occurrence. According to learned advocate for the appellant, the opinion of the autopsy surgeon is inconclusive in so far as it relates to the fatal injuries. The autopsy surgeon has also not mentioned, in his report, of conclusive evidence to establish any sexual assault upon the victim. Therefore, it was argued that conviction of the appellant for the offence punishable under Section 6 of the POCSO Act is not sustainable.

12. It is also submitted by learned advocate for the appellant that there is considerable time gap between the elopement of the victim and the recovery of the dead body after 6 days. As such, the theory of last seen together cannot be pressed into service to connect the appellant with the offence. To such proposition, learned advocate for

the appellant relied upon **2024 SCC OnLine SC 3531 (Suresh Chandra Tiwari Vs. State of Uttarakhand)**.

13. Learned advocate for the appellant further submitted that although, the de facto complainant and his wife was reported by PW4 that the appellant had taken away the victim whereupon the written complaint was lodged but such fact was not specifically mentioned in such written complaint making the allegations doubtful.

14. On the other hand, learned Public Prosecutor submitted that the charges levelled against the appellant stood established with the help of convincing evidence. He submitted that the witnesses saw the appellant taking the victim away prior to the incident. The appellant was known to the victim from before and therefore, testimony of PW1, PW2 and PW4 cannot be discarded. The appellant failed to offer sufficient explanation in this regard and therefore, an adverse inference against the appellant necessarily follows. At the same time, it was argued on behalf of the State that the investigating officer was never called upon to explain the delay in sending the First Information Report. Had he been asked, he could have explained the delay. In any case, according to learned Public Prosecutor, delay in forwarding the FIR to the court was not fatal to the case of the prosecution.

15. Learned Public Prosecutor also submitted that the appellant made an extra-judicial confession before the doctor examining him and the dead body of the victim was recovered as shown by him. The

chain of circumstances, proved by the prosecution was compact enough to establish the guilt of the appellant. Learned Public Prosecutor stood by the impugned judgment of conviction. However, with reference to the reports regarding psychological evaluation and socio-economic assessment in respect of the appellant, learned Public Prosecutor did not avow that the appellant is beyond reform.

16. PW1 lodged a written complaint with Narendrapur Police Station on July 15, 2019. It was alleged in the said written complaint that the appellant, a resident of the locality where PW1 resided, often used to visit her house and buy food items for her two children. On July 15, 2019 at about 5.00 p.m. while PW1 was busy doing household works her two children were playing outside the house. At that time, the appellant took away the victim alluring her to buy food items for her which was noticed by her neighbours. Thereafter, PW1 and her neighbours searched for the victim but she could not be found. PW1 suspected that the victim was detained with some malicious intention.

17. On the basis of such written complaint, Narendrapur PS Case No. 931 of 2019 dated July 15, 2019, under Sections 363/365 of the Indian Penal Code, 1860 was started against the appellant. Upon recovery of the dead body of the victim, Sections 376AB/302/201 of the Indian Penal Code, Section 6 of POCSO Act and Section 3 of The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989 were added. The police took up investigation of the case and

on completion of such investigation submitted charge sheet in the case. Accordingly, on the basis of materials in the case diary, charges under Sections 363/365/376AB/302/201 of the Indian Penal Code and Section 6 of POCSO Act were framed against the appellant on January 20, 2020. Another accused was discharged from the case. The appellant pleaded not guilty to the charges and claimed to be tried.

18. In order to substantiate the charges levelled against the appellant, prosecution examined as many as 18 witnesses. In addition, the prosecution also proved several documentary as well as material evidences.

19. The de-facto complainant herself deposed as PW1. She stated that at the time of incident which happened 3 years prior to her deposition, she was working in her house. Her two children, the daughter aged 6 years and the son aged 3½ years were playing outside the house near the pathway. She also stated that the appellant took away her daughter. She was reported that the appellant took her daughter away, by her neighbour PW4. She conducted search of her daughter but she could not be found for which she lodged a written complaint at about 9.30 p.m. which she proved as Exhibit 1. She also proved her signature on the Formal First Information Report (Exhibit 2/1).

20. PW1 also stated in her deposition that on the date her daughter went missing, she searched for her near the project site and asked about her from the on duty staff at the site. She also found the appellant at the site and enquired from him if he had taken away the daughter of PW1 whereupon the appellant replied that she had gone back to her house. The on duty staff was asked to open the gate of the project but he refused. Thereafter, the appellant fled away and after that the gate was opened. Later, the appellant was arrested and confessed that he committed rape upon the daughter of PW1. She also recorded her statement before the Magistrate. She proved such statement as exhibit 3. PW1 identified the appellant in court. she also identified the pant of her daughter which was admitted in evidence and marked as Mat. Exhibit I. PW1 also produced birth certificate of her daughter. PW1 was cross examined on behalf of the appellant but nothing favourable appears to have been elicited.

21. The maternal grandmother of the victim deposed as PW2. She stated that the place from where the dead body of her granddaughter was recovered was full of shrubs and bushes. From such place, the wearing apparels of the victim, one shirt button and earth were seized by the police under a seizure list in presence of the appellant and herself along with other witnesses. She signed on the seizure list dated July 21, 2019 which she proved (exhibit 7/1). She identified the wearing apparels of the victim (Mat Ext. I) in court. She also proved

her signature on the inquest report (exhibit 8/1). PW2 identified the appellant in court. in her cross examination, PW2 denied a suggestion to the effect that the appellant was not present when police seized the wearing apparel, shirt button and controlled earth.

22. The father of the victim was examined as PW3. He stated that he used to work as Khalasi in a lorry carrying mud. When he left his house, on the date of incident, he saw his victim daughter in the house. Later, his wife rushed to her reporting that the victim was missing and was not found. Thereafter, PW3 and others searched for the victim. She was found about a week later in a decomposed condition. PW3 also stated that PW4 had seen the victim being taken by the appellant and reported the same to PW1. He identified the appellant in court. He received back the dead body of the victim after autopsy.

23. A neighbour of the victim deposed as PW4. She stated that on the date of incident at about 5:00 p.m., she was grazing her cow in the fields. She saw the appellant taking along the victim holding her hands by the left side of the fields where she was grazing her cattle. She reported such fact to the mother of the victim when the victim was not found. She further stated that she recorded her statement before learned Magistrate. She proved such statement (exhibit-10A). She identified the appellant in Court.

24. Another neighbour of the victim deposed as PW5. She stated that the victim and her parents used to reside as tenant in her adjoining house. She further stated that she saw the appellant caressing the victim inappropriately while her mother was busy with her mobile. She reported such facts to PW6 as well. PW5 also stated that she recorded her statement before learned Magistrate. She proved such statement. PW5 identified the appellant in Court.

25. PW6 is also a neighbour. She stated that about 3 years ago, PW5 reported her that the appellant was inappropriately touching the victim. She reported the matter to the mother of the victim who was watching mobile phone. She further stated that thereafter, she went inside her house and when she again came out, she saw the appellant taking away the victim in his lap. PW6 also recorded her statement before learned Magistrate which she proved (exhibit-12). PW6 also identified the appellant in Court.

26. The brother of PW1, a seizure list witness was examined as PW7. He identified the appellant in Court. He further stated that the appellant led the police into the compound of Kheyadaha project site. PW7 along with para people and the parents of the victim accompanied the police party. The dead body of the victim was recovered as shown by the appellant. Besides, a panty of the victim, one button and some earth was seized by police from the place of occurrence under a seizure list to which PW7 signed. He proved his

signature on such seizure list (exhibit-7/2). He also proved his signature on the inquest report (exhibit-8/2). PW7 also identified the recovered panty (Mat. Exhibit I).

27. A seizure list witness was examined as PW 8. She stated that on July 23, 2019, the police personnel, FSL team and the Executive Magistrate came to the place of occurrence i.e. inside the project and recovered certain articles namely hairs, mud, one panty, burnt 'Biri' etc. which were seized in presence of PW 8 and other witnesses on the spot. PW8 proved his signature on such seizure list (exhibit-9/1). He also identified the seized blue colour pant. He identified the appellant in Court.

28. An officer of the Forensic Science Laboratory deposed as PW 9. He stated that on July 23, 2019 he was posted as an Assistant Director (BIO) FSL, Kolkata. He stated that on the said date, he accompanied by the BDO Sonarpur Block and police personnel visited the wall enclosed land of Axis Distributor which was full of shrubs and bushes at Kheyadaha, Uttarpura. PW9 also stated that he collected some earth from the place of occurrence, some controlled earth, some hairs, some small hair collected from the place of occurrence, some earthen grass collected from the place of occurrence where the panty of the victim was recovered and one piece of burnt 'Biri' collected from the place of occurrence. He handed over the aforesaid articles to the police which were seized under a seizure list prepared at the spot in

his presence as well as in presence of other witnesses. PW9 proved his signature on such seizure list dated July 23, 2019 which was marked as Exhibit 9/2. He further stated that the aforesaid articles were collected from the place of occurrence for the purpose of forensic examination.

29. BDO, Sonarpur deposed as PW 10. She stated that on July 23, 2019, as per the directions of the SD0, he accompanied the FSL team to a wall enclosed land of Axis Distributor which was full of bushes and shrubs at Kheyadaha, Uttara para. He further stated that under the leadership of PW 9 he proceeded to such place where PW 9 collected certain articles like earth, controlled earth, hair, some small hair, some earthen grass and one piece of burnt 'Biri'. The aforesaid articles were seized by police under a seizure list. PW10 proved his signature on such seizure list prepared in his presence (exhibit-9/3).

30. PW11 is another seizure list witness. He stated that he knew the victim. He also identified the appellant in Court. He further stated that in presence of himself as well as other witnesses, the appellant accompanied the police to his house and discovered his wearing apparel i.e. one T-shirt, one Ganjee, one pant etc. which he handed over to the police. PW 11 also stated that one button of the T-shirt was torn. He identified the seized wearing apparels of the appellant in Court which were admitted in evidence as Mat. Ext. II. He also proved his signature on the seizure list (exhibit-10/1).

31. A school security guard was examined as PW12. He stated that he knew the victim. He also identified the appellant in Court. He further stated that on July 29, 2019 at about 12.30 p.m. the appellant led the police to his house and discovered his wearing apparel kept in a tin box lying in a 'Taktaposh' placed in the varandah besides his bedroom. The appellant handed over his wearing apparel i.e. two pants, one T-shirt and one ganjee along with the tin box containing it. PW12 identified the seized articles, Mat. Ext. II, in court. He also proved his signature on the seizure list (exhibit-10/2). He specifically stated that one button of the ganjee was torn.

32. A medical officer deposed as PW13. He stated that on July 21, 2019 at about 11.50 a.m., he medically examined the appellant on police requisition in connection with Narendrapur PS Case No. 931 of 2019 dated July 15, 2019. He further stated that at the time of examination, the appellant told PW13 that he took away and sexually assaulted the victim on July 15, 2019 at about 5:30/6:00 p.m. at Kheyadaha near a field full with bushes. He further confided that while committing sexual assault, the appellant suffered hurt at both of his knees. After the incident, he ran away and was arrested. PW13 further stated that on medical examination of the appellant he found abrasion on both his knees, small cut injury on his right knee and abrasion on his chest. However, PW13 did not find any foreign body from the private parts of the appellant. He collected urethral swab for

forensic examination and handed it over to the police. PW13 proved the medical examination report prepared in his pen and signature (exhibit-13).

33. The autopsy surgeon was examined as PW14. He stated that on July 22, 2019, he conducted post mortem examination over the dead body of the victim in connection with Narendrapur PS UD Case No 70 of 2019 dated July 21, 2019 corresponding to Narendrapur PS Case No. 931 of 2019 dated July 15, 2019. He further stated that he found multiple injuries on the dead body. He opined the bones of human female child aged 6-8 years with ante-mortem and homicidal injuries as mentioned in his post mortem report. He proved the post mortem report prepared by him as exhibit-11.

34. A professional photographer deposed as PW 15. He recorded videos of the place of occurrence as well as reconstruction of the scene of crime by the appellant, as per the request of the police and stored the same in a DVD which he made over to the police. He proved his signature on the seizure list (exhibit-15) as well as the DVD prepared by him (Mat. Exhibit III) supported by a certificate under Section 65B of the Indian Evidence Act (exhibit-29). The DVD was played in court.

35. The Junior Scientific Officer attached to Forensic Science Laboratory was examined as PW16. He stated that the FSL, Kolkata received certain articles from police for forensic examination, in connection with Narendrapur PS Case No. 931 of 2019 dated July 15,

2019. The examination was conducted between April 5, 2022 and May 25, 2022. On such examination, as stated by PW16, genetic profile recovered from Biri bud did not match with the genetic profile recovered from the blood sample of the appellant which gave rise to an opinion that the saliva stains found on the Biri bud was not that of the appellant. He also stated that since the exhibits received for examination were highly decomposed, no genetic profile could be developed from skull, humerus, hairs samples, tooth and mandible and therefore, could not be compared with the blood samples. However the Amelogenin marker indicated the human female origin. PW16 also stated that after examination, a report was prepared and such report with the remnants was sent to police. He proved the forensic examination report (exhibit 16).

36. The investigating officer of the case deposed as PW17. He stated that on July 15, 2019 a written complaint was received by the duty officer of Narendrapur police station. He endorsed the receipt of written complaint. PW17 proved such endorsement. On the basis of such written complaint Narendrapur PS Case No. 931 of 2019 dated July 15, 2019 under Section 363/365 of the Indian Penal Code was started. He also proved the Formal First Information Report. PW17 was endorsed with the investigation of the case. PW17 described the various steps taken by him during investigation. He arrested the accused and obtained police custody. He also recovered the dead body

and certain articles as shown by the appellant. He proved the seizure list dated July 21, 2019 and identified the seized articles. He also conducted inquest over the dead body and took steps for post mortem examination thereof and proved the dead body challan. He also visited the place of occurrence and recorded the statement of the witnesses under Section 161 of the Code of Criminal Procedure. Thereafter, he handed over the case diary to the Inspector-in-charge of Narendrapur police station.

37. The second investigating officer deposed as PW18. During his investigation, he accompanied the FSL team to the place of occurrence wherefrom the dead body was recovered and seized certain articles under a seizure list. He proved the seizure list (exhibit-9). The seized articles viz. earth, controlled earth, sample hairs and some small hairs and earthen grass from where the panty of the victim was recovered were duly sealed and labelled by PW18 and the same were sent FSL, Kolkata for forensic examination. He also recorded the statement of witnesses. He also interrogated the accused and recorded his statement on the basis of which he seized the wearing apparel of the appellant. PW18 proved such statement as exhibit-21.

38. PW18 also arranged for videography of the reconstruction of the scene of crime and seized the DVD prepared in the process with the requisite certificate and seized the same (exhibit-15). He also seized the wearing apparel of the appellant as per his leading statement. He

proved the seizure list (exhibit-10). PW18 also identified the seized wearing apparel of the appellant with a bag. (Mat. Ext. II series). PW18 also arranged for recording the statement of certain witnesses under Section 164 of the Code of Criminal Procedure and also collection of blood samples of the appellant as well as that of the parents of the victim. On completion of investigation, PW18 submitted charge sheet in the case against the appellant under Section 363/365/376AB/302/201 of the Indian Penal Code and Section 6 of the Prevention of Children from Sexual Offences Act, 2012. He identified the appellant in court.

39. Upon conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Code of Criminal Procedure where the appellant pleaded innocence and stated that the allegations against him were false. In such examination, he admitted that he handed over his wearing apparel to the police from his house and that he was capable of performing sexual intercourse. He however, declined to adduce any defence witness.

40. The appellant was charged with the offences punishable under Sections 363/365/376AB/302/201 of the Indian Penal Code and Section 6 of the Prevention of Children from Sexual Offences Act, 2012. According to the case set out by the prosecution, the appellant picked up the victim, a child of age 6 years, took him to some unknown place, subjected her to sexual assault and killed the child

victim. The dead body of the victim was recovered 6 days after she went missing, in a much putrefied condition. On such recovery, inquest was conducted on the dead body and later, post mortem examination was also conducted.

41. Although, the dead body was recovered in a highly decomposed condition but the autopsy surgeon, after conducting the post mortem examination, unambiguously opined the injuries found on the body were ante mortem and homicidal in nature. The autopsy surgeon, PW14 stated that he found multiple injuries on the dead body. He opined the bones of human female child aged 6-8 years with ante-mortem and homicidal injuries. The post mortem report prepared by PW14 was proved as exhibit-11. Taking into account the testimony of PW14 coupled with that of exhibit-11, it is quite established that the victim was murdered.

42. According to the case made out by the prosecution, the appellant was previously known to the victim. He had visiting terms at the house of the victim. PW1 has testified that the appellant used to offer food items to the victim. On the date of incident, when the victim went missing, PW4 saw the appellant taking the victim away, while she was grazing her cow. PW5 has also corroborated the statement of PW4. Not only that, PW4 and PW5 further avowed that on the date of incident she saw the appellant caressing the victim inappropriately. When the victim went missing and PW1 started searching for her, PW4 reported

PW1 that she had seen the appellant taking away the victim. Such fact of report by PW4 was described in the written complaint lodged by PW1 on the date of incident itself. We find no force in the submissions made on behalf of the appellant to the effect that the name of PW4 was not named in the written complaint so lodged. We are not unmindful of the fact that a First Information Report is not the encyclopaedia of facts to contain each and every detail. It is sufficient if it discloses the commission of an offence by some identified or unidentified person or persons.

43. The evidence on record also establishes that an FIR in respect of missing child was instantly lodged by PW1. Evidence of PW1 also disclosed that the appellant was found sitting at the gate of the construction site and PW1 enquired from him about the child. It is candid statement of PW1 that on her query, the appellant told her that the child had returned to her house. PW1 was not cross examined by the defence as to such statement reported against him. In that view of the facts, answer of the appellant to PW1 amounts to an admission on his part that the victim child was with him just prior to her elopement. It also transpired from the evidence of PW1 that so long the appellant remained at the construction site, the on duty staff refused to open the gate thereof. Thereafter, the appellant fled away from the spot and then the gate was opened by the concerned staff. Incidentally, the appellant was a worker at the construction site as well.

44. The appellant was arrested by police on July 21, 2019. He was taken on police remand and during remand period, at his instance and statement, the dead body along with certain other articles including the wearing apparel i.e. panty of the victim were recovered and seized. A button allegedly detached from the T-shirt of the appellant, which he was wearing at the time of incident, was also recovered. The panty was identified by PW1 i.e. the mother of the victim. Later on, such T-shirt was also recovered at the leading statement of the appellant in terms of Section 27 of the Indian Evidence Act. The relevant portion of the statement of the appellant was proved as exhibit 21. One of the buttons of such T-shirt was found missing. There appears no explanation on the part of the appellant as to the circumstances under which the button of his T-shirt came to be recovered from the place of occurrence.

45. The medical officer who examined the appellant on July 21, 2019 i.e. PW 13 stated in his deposition that the appellant was examined by him in presence of General Duty Assistant (GDE). It was further stated by PW 13 that at the time of examination, the appellant told him the history of the incident. According to PW 13, the appellant stated before him that he took the victim away and physically assaulted her on July 15, 2019 at 5:30/6:00 pm at Kheyadaha nearby field full of bushes. The appellant also confided in PW 13 to the effect that while having sexual intercourse with the victim, the appellant

sustained abrasion and cut injuries on both his knees. Thereafter, the appellant fled away and was arrested. Upon medical examination of the appellant, PW 13 found abrasion on both the knees of the appellant. He also found small cut injury on right knee and multiple abrasions on the chest. No defence witness was examined on behalf of the appellant during the trial. No explanation, whatsoever, has been advanced on behalf of the appellant to explain the injuries found on the person of the appellant.

46. In **Allarakha Habib Memon and Others** (supra) the Hon'ble Supreme Court laid down that;

“40. We find that these so-called confessions are ex facie inadmissible in evidence for the simple reason that the accused persons were presented at the hospital by the police officers after having been arrested in the present case. As such, the notings made by the Medical Officer, Dr Arvinbhai (PW 2) in the injury reports of Mohmedfaruk alias Palak and Amin alias Lalo would be clearly hit by Section 26 of the Evidence Act, 1872 (hereinafter being referred to as “the Evidence Act”). As a consequence, we are not inclined to accept the said admissions of the accused as incriminating pieces of evidence relevant under Section 21 of the Evidence Act. The circumstance regarding identification of place of incident at the instance of the accused is also inadmissible because the crime scene was already known to the police and no new fact was discovered in pursuance of the disclosure statements.”

47. In the case at hand, the appellant was produced by the police for his medical examination before PW 13 when he allegedly made an extra-judicial confession before such doctor. In humble compliance of the ratio laid down in **Allarakha Habib Memon and Others** (supra), if we do not rely upon the alleged extra-judicial confession made by the appellant before PW 13, even then the fact remains that the appellant has not been able to explain the injuries found by PW 13 on his knees and chest. In that view of the facts, since the appellant did not endeavour to give satisfactory explanation for the injuries found on his person upon his arrest, an adverse inference against him necessarily follows.

48. In **Suresh Chandra Tiwari And Another vs. State of Uttarakhand, reported in 2024 SCC OnLine SC 3531**, the Hon'ble Supreme Court held as follows:-

“26. The circumstance of deceased being last seen alive in the company of the deceased is a vital link in the chain of other circumstances but on its own strength it is insufficient to sustain conviction unless the time-gap between the deceased being last seen alive with the accused and recovery of dead body of the deceased is so small that possibility of any other person being the author of the crime is just about impossible. Where the time-gap is large, intervening circumstances including act by some third person cannot be ruled out. In such a case, adverse inference cannot be drawn against the accused merely because he has failed to prove as to when he parted company of the deceased.

27. In the instant case, PW-4 allegedly saw the deceased walking on a street with accused-appellant no. 1 on 2.2.1997, at about 4.30 PM, near Gadhera Degree College. PW-4 further stated that accused-appellant no. 2 was walking 50-55 paces behind them. No evidence was led by the prosecution to demonstrate that the place where the deceased was last seen alive with the accused was near the place from where deceased's body was recovered. Further, the time gap between 4.30 PM of 2.2.1997 and 8.30 AM of 3.2.1997 (i.e., when the dead body was recovered) is so large that third party hand in the crime cannot be ruled out. Otherwise also, if two or more persons are seen walking on a public street, either side by side, or behind one another, it is not such a circumstance from which it may be inferred with a degree of certainty that those were together or in company of each other. Quite often on a public path a person may happen to walk side by side a stranger for a considerable distance without even talking to him. Likewise, a person may exchange pleasantries with another person walking on the path, but that by itself is not sufficient to infer that the two are in company of each other. Importantly, the prosecution case is not that the deceased was picked up from his house by the accused-appellant(s). Had it been so, in absence of evidence as to when they parted company of each other, adverse inference against the accused might be permissible, if the other circumstances so warrant. But here there is no evidence of that kind. Therefore, taking into account (a) the place where the accused appellants and the deceased were allegedly seen together; and (b) lack of proximity of the time and place when the three were seen together with the time and place when, and from where, the body of the deceased was recovered, we are of the considered view that the last seen circumstance as canvassed by the prosecution is not of a definite tendency

unerringly pointing towards the guilt of the accused-appellants.”

49. In the instant case, the victim went missing on July 15, 2019 and her dead body was recovered on July 21, 2019. It was contended on behalf of the appellant that there was a time gap of about six days between the elopement of the victim and her recovery. Such time gap rendered the intervention of the theory of “last seen together” inapplicable in the facts and circumstances of the case. It was contended that the time gap was such that a third party intervention cannot be ruled out.

50. In ***Suresh Chandra Tiwari And Another*** (supra), the Hon’ble Supreme Court also laid down that in cases the deceased was picked up by the convict from his house, in absence of evidence as to when they parted company of each other, an adverse inference against the accused was permissible. In the present case, there are reliable evidence on record that the victim was picked up by the appellant from her house. No evidence was laid at the instance of the appellant as to when he parted company with the victim. On the contrary, PW 4 saw the appellant taking away the victim in his lap. Thereafter, when PW 1 started searching for the victim, she met with the appellant and the appellant, upon a query about the victim, replied that the victim had gone back to her house. Incidentally, PW 1 was the mother of the victim and she was on search for the victim till then the victim did not

return to her house for which PW 1 was on her search. No evidence is forthcoming to establish that the appellant parted with the victim.

51. The circumstances proved at the trial go to show that when the victim went missing, PW 1 set out in search of her. She went to the construction site of the project where the appellant was present. The appellant reported PW 1 that the victim had gone back to her house. Additionally, the evidence on record goes to show that PW 1 requested to open the gate of the project site but the concerned staff refused and it was opened when the appellant fled away from the spot. Although, it has been contended that the dead body of the victim was recovered as shown by the appellant on his leading statement. However, no statement in this regard recorded under Section 161 of the Code of Criminal Procedure has been proved at the trial. However, the evidence on record shows that the dead body of the victim was recovered from inside the project site. We have already held hereinbefore that the wearing apparels of the appellant were recovered and seized by police as per his leading statement in terms of Section 27 of the Indian Evidence Act. The wearing apparels included a 'T'-shirt, one of its buttons were detached. We have also found that the button of the 'T'-shirt of the appellant was recovered from the place of occurrence and the appellant has not been able to explain as to how the button of his 'T'-shirt was found from the place where the dead body was recovered.

52. In such circumstances and also taking into consideration that the victim suffered an unnatural death and that the fact that the victim was picked up by the appellant from near her house. The dead body of the victim was found from an abandoned place inside the project site where the appellant used to work. A button of the 'T'-shirt of the appellant was recovered from the place from where the dead body was found. The appellant also failed to explain the injuries found on his presence. The aforesaid circumstances lead to an inference that the appellant and appellant alone was responsible for causing death of the victim and of causing disappearance of the evidence of such crime.

53. PW 13, in his deposition, stated that no foreign body was detected around private parts of the appellant. Besides that urethral swab was taken and handed over to the police for forensic examination. The autopsy surgeon (PW 14) has also not stated anything about sexual assault upon the victim in his deposition or post mortem report. Undoubtedly, the appellant is the person who was seen taking away the victim when she went missing and subsequently, her decomposed dead body was recovered from a place frequented by the appellant and possibly, at his instance. Nevertheless, as noted hereinabove, the appellant has not been able to explain the injuries found on his knees and chest. In such view of the facts and circumstances, obtaining in the case, we find no infirmity with the conviction of the appellant for the offences punishable under Section

376AB of the Indian Penal Code and Section 6 of the Prevention of Children from Sexual Offences Act. We affirm the same.

54. So far as the quantum of punishment is concerned, specially imposing of death penalty upon the appellant, through its various pronouncements, the Hon'ble Supreme Court has laid down that death penalty should be resorted to in exceptional circumstances where the court awarding the sentence is able to return a finding that the case falls within the category of 'rarest of rare cases'. A punishment except death sentence would be insufficient and the possibility of reform of the convict stood foreclosed. In order to hold a case as 'rarest of rare case' the Hon'ble Supreme Court has ordained to evaluate the circumstances on the parameters of 'aggravating circumstances' and 'mitigating circumstances'. That apart, in a case of murder, it is to be conclusively evaluated that the offence was committed in a manner which can be termed as cold blooded. At the same time, age of the convict is also relevant factor to be considered for awarding such punishment. The Hon'ble Supreme Court has noted time and again that a convict, too young or too old, should not be awarded with death penalty. In the facts and circumstances of the case, we are not in a position to arrive at a definite finding that any punishment other than death penalty would be insufficient and possibility of such punishment is totally foreclosed.

55. In course of hearing of the present proceedings, we called for the State to submit psychological evaluation report as well as that in respect of socio-economic assessment of the convict. As per the psychological evaluation report a medical board in this regard opined that the appellant does not suffer from psychopathology and was assessed fit from psychological point of view. The social status report depicts that the appellant is 42 years of age. He comes from a village background. He used to reside with his parents, two brothers and a sister since childhood. No incident of violence has been reported against him. The appellant was married in 2004 but has no relation with his wife since 2017, when he was first detained in a criminal case. He has no child and his parents and sibling have also not kept any relation with the convict/appellant. The appellant studied up to class V and comes from a poor economic background. His father used to stitch beddings in a bedding shop as also on door to door basis. The appellant also used to work as day labourer. However, the family does not have any bad reputation in the society.

56. Although, the report indicates that the appellant is also an accused in a case under Sections 341/360/326 of the Indian Penal Code and 25/27 of Arms Act where he was released on bail. The same report also indicated that from an enquiry from the local people, they had no knowledge of any case against the appellant except the case in which he was convicted. The report also indicated that nothing

adverse was reported against the appellant from the correctional home he is incarcerated and his conduct inside the correctional home was good.

57. Therefore, taking into consideration the entire facts and circumstances of the case discussed hereinbefore, we are minded to commute the death sentence awarded to the appellants into one of life imprisonment. The sentence awarded to the appellants for the other offences, however, shall stand affirmed. Both the sentences shall run concurrently. The appellant is however, acquitted of the charges under Section 376AB of the Indian Penal Code, 1860 and Section 6 of the Prevention of Children from Sexual Offences Act, 2012.

58. Consequently, Death Reference No. 8 of 2023 along with the appeals being C.R.A. (DB) 22 of 2025, are disposed of.

59. A copy of this judgment along with the Trial Court records be remitted to the appropriate Trial Court forthwith. In view of the commutation of the death penalty of **Ajgar Ali Khadimunsari**, any warrant issued by the appropriate Court with regard thereto in respect of **Ajgar Ali Khadimunsari** stands modified in terms of this judgment and order. Department will inform the Correctional Home, where the appellant is lodged, as to this judgment and order. The Correctional Home will record the fact of commutation of death penalty to the sentence awarded by this judgment and order in respect of **Ajgar Ali Khadimunsari**, in their records.

60. Period of detention already undergone by the appellant shall be set off against the substantive punishments in terms of the provisions contained in Section 428 of the Code of Criminal Procedure.

61. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis upon compliance of all formalities.

[MD. SHABBAR RASHIDI, J.]

62. I agree.

[DEBANGSU BASAK, J.]