2020 INSC 624

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.763-764 OF 2016

SHATRUGHNA BABAN MESHRAM …Appellant

VERSUS

STATE OF MAHARASHTRA …Respondent

J U D G M E N T

Uday Umesh Lalit, J.

1. These appeals by Special Leave challenge the common judgment and order dated 12.10.2015 passed by the High Court[1] in Criminal Appeal No.321 of 2015 and Criminal Confirmation Case No.1 of 2015 affirming the judgment and order dated 14.08.2015 passed by the Trial Court[2] in Special Case (POCSO Act[3]) No.11 of 2013 and confirming the Death Sentence awarded to the Appellant on two counts i.e. under Section 302 of the Indian Penal Code (IPC, for short) and under Section 376A of IPC.

[1] The High Court of Judicature at Bombay, Nagpur Bench, Nagpur.
[2] The Additional Sessions Judge, Yavatmal
[3] The Protection of Children from Sexual Offences Act, 2012.

2. The victim in the present case was a girl of two and half years of age and the First Information Report was lodged at 09.25 p.m. on 11.02.2013 by her father with Parwa Police Station, Yavatmal as under:-

> "By coming to the Police Station, I lodge an oral report that since one year I am residing with my family at Zatala. I have two daughters and one son. The victim, aged 2 years is my daughter No.-2. I reside in the neighbourhood of my father-in-law.
>
> This day 11.02.13, as there was a programme of Mahaprasad in Duttatraya Temple in the village I had gone there for taking meals at about 7.00 p.m. After taking meals I returned home at about 7.30 p.m. At that time I did not see my daughter Miss XXX[4] at home. Therefore, I asked my father-in-law as to where was my daughter. On it, he told me, "Shatrughna Baban Meshram, aged 21 years, resident of Zatala has taken away your daughter XXX[4] from me saying that he would reach her to you". But Shatrughna did not bring my daughter to me. So I searched my daughter in the village. I saw my daughter XXX[4] and Shatrughna Meshram lying in the new, under construction, building of Anganwadi. There was no pant on the person of my daughter. It was lying beside. Her face was bitten and private parts were swollen. I came out with my daughter. In the meantime, Baban Sambhaji Meshram, aged 50 years also came there. He took Shatrughna to his house. I along with father-in-law and Vitthal Ghodam took my daughter in an auto from the village to Dr. Jaffar Siddiqui from Kurli. The doctor examined her and declared her dead. So we returned home.
>
> Shatrughna Meshram took my daughter XXX[4] in the building of Anganwadi, committed rape on her inhumanly in solitude, bit her on face and lips and committed her murder."

3. As stated in the FIR, the victim was taken to PW6 Dr. Md. Jaffar Siddiqui for medical attention but she was already dead and there were

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[4] The identity of the victim is not being disclosed

marks of bites on her body. After registration of crime, the inquest (Exh.15) was conducted which recorded, *"– Black and bluish coloured (contusion) marks are visible on both the cheeks and an injury is visible on the left cheek. Similarly, both the lips are bitten. An injury measuring 2 Cms. X 3 Cms. X 1 Cms. is visible on the chin"*. It also recorded that there were bite marks on the chest and stomach of the victim apart from signs of forcible sexual assault.

4. Soon after the registration of crime, PW13 A.P.I. Pankaj Vanjari (Police Station In-charge) caused arrest of the Appellant *vide* Exh.23 and conducted spot panchnama. At the spot, full pant of the victim, pieces of flesh and chappals of an adult male were found.

5. The Appellant was taken to PW7 Dr. Ulhas Digambar Lingawar for medical examination who found that:-

> "There was injury of abrasion on tip of the glans penis. The injury size was 5mm X 3mm. That injury was caused within 24 hours. The accused was found capable for sexual intercourse."

In response to queries by the Investigating Officer said witness had stated in his opinion Exh 46:-

> "(1) Yes, sign of sexual intercourse within 24 Hrs., was present.
>
> (2) Yes, injury mentioned in certificate can be possible, due to sexual intercourse."

6. The Post Mortem on the body of the victim was conducted on 12.02.2013 by a Board of five medical professionals and the Report (Exh. 53) noted:-

> "Evidence of perineal tear with merging of vaginal and anal orifice, details mentioned under column No.17 & 21. Dried blood and faecal stains over genital and perineal region."

Following injuries were found on the person of the victim: -

"1. Multiple abrasions over right zygomatic region of sizes ranging from 0.5 cm x 0.5 cm. to 0.3 cm x 0.2 cm, reddish.

2. Abrasion over left upper eye-lid of size 0.5 cm x 0.5 cm, reddish.

3. Abrasion over right cheek of size 4 cm x 4 cm, reddish.

4. Abrasion over left cheek of size 8.5 cm x 7 cm, reddish.

5. Evidence of missing both upper and lower lips exposing labial fat with clean cut margins seen periorally without blood infiltration (post mortem in nature).

6. Lacerated wound over chin, midline of size 3 cm x 3 cm muscle deep with tissue missing, margins irregular and blood infiltrated, reddish.

7. Bite mark over and around right nipple over a region of size 5 cm x 5 cm, margins contused, reddish.

8. Bite mark over and around left nipple over a region of size 3 cm x 3 cm, margins contused, reddish.

9 Bite mark over abdomen, 1 cm right at the level of umbilicus over a region of size 4 cm x 3.5 cm, margins contused, reddish.

10. Bite mark over abdomen in the midline, 5 cm below the umbilicus, over a region of size 3 cm x 3 cm, margins contused, reddish.

11. Bite mark over public region in the midline, 9cm below umbilicus, over a region of size 4 cm x 3.5 cm, margins contused, reddish.

12. Bite mark over lateral aspect of right shoulder, over a region of size 5 cm x 3 cm, margins contused, reddish.

13. Bite mark over right buttock, over a region of size 3 cm x 3 cm, margins contused, reddish.

14. Bite mark over right buttock, over a region of size 3 cm x 3 cm, margins contused, reddish, separated from injury No.13 by 1.5 cm.

15. Bite mark over right buttock, over a region of size 3 cm x 2.5 cm, margins contused, reddish separated from injury No.14 by 1 cm.

16. Bite mark over left buttock, over a region of size 3.7 cm x 3 cm, margins contused, reddish.

17. Multiple lacerations over vaginal and anal region merging vaginal and anal orifice (perineal tear at 3, 6 and 9 O'clock positions), margins irregular, blood infiltrated, reddish.

18. Abrasion over left knee joint region, on anterior aspect, of size 1 cm x 0.5 cm, reddish.

Note: 1. Injuries No.1, 2, 3, 4 & 18 are caused by hard and rough surface.

2. Injury No.5 is caused by sharp edged object.

3. Injury No.6 is caused by nibbling by teeth (nibbling by bite).

4. Injury No.7 to 16 are caused by human bite.

5. Injury No.17 is caused by forceful sexual assault."

Under the heading "Internal Injuries" the corresponding observations in Column No.21 were:-

"Evidence of tear in the posterior vaginal wall with merging of vaginal and anal canal (perineal tear). Surface ragged, margins irregular, blood infiltrated and reddish, extending and tearing (perforating) the rectum, corresponding to injury No.17 under column no.17."

On the effect of the injuries and the cause of death, the Report stated: -

"(a)	Whether the ante-mortem injuries found on the dead body were sufficient in the ordinary course of nature to cause death.	: Yes
(b)	If yes, which of the injuries were individually sufficient in the ordinary course of nature of cause death.	Injury No.17 under column No.17 with its corresponding internal injuries mentioned under column No.21 with its consequences.
(c)	Which of the injuries collectively are sufficient in the ordinary course of nature to cause death.	
Opinion as to the cause of death :		"Shock and haemorrhage following perineal tear With multiple injuries".

7. The clothes of the victim as well as that of the Appellant were sent for chemical analysis and the Report (Exh.69) was as under:-

"

Description of Parcel/s

-- Six sealed parcels, seals intact and as per copy sent.

Description of articles contained in Parcels

1. Jersey Wrapped in paper labelled – A1
2. Full Pant Wrapped in paper labelled – B1
3. Full Shirt Wrapped in paper labelled – B2
4. Knicker Wrapped in paper labelled – B3
5. Full Pant (Small) Wrapped in paper labelled – C1
6. Earth Wrapped in paper labelled – C2

RESULTS OF ANALYSIS.

-- Exhibit No.1 has few blood stains ranging from 0.1 to 4 cm in diameter on upper portion.

-- Exhibit 2 has moderate number of blood stains, ranging from 0.1 to 2 cm in diameter mostly on front portion.

-- Exhibit No.5 has moderate number of blood stains, ranging from 0.1 to 2 cm in diameter on middle and lower portion.

-- No blood is detected on exhibits No.3,4 and 6.

-- No semen is detected on exhibits No. 1, 2 3, 4 and 5.

-- Blood detected on exhibits No.1, 2 and 5 is human."

Exhibits 1 and 5 referred to in the Report were clothes of the victim while Exhibits 2, 3 and 4 were that of the Appellant.

7.1 The relevant material including swabs taken from the body of the victim, the clothes and blood samples were subjected to D.N.A. analysis and the Report (Exh.54) stated:-

"Opinion: 1) The DNA profiles obtained from blood detected on ex.1 Jersey of deceased, ex.2 Full pant of accused, ex.5 full pant of deceased in Bn-677/13, ex.2 Vaginal swab, ex.3 Vaginal smear slide, ex.4 Cervical swab, ex.5 Cervical smear slide, ex.6 Anal swab, ex.7 Anal smear slide, ex.8 Skin and tissue, ex.12 Swab from bite site in Bn-678/13 are identical and from one and the same source of female origin and matched with the maternal and paternal alleles present in ex.9 Blood of deceased xxx in Bn-678/13."

8. The Appellant was tried by the Trial Court in Special Case (POCSO Act) No.11 of 2013 for having committed offences punishable under Sections 376(1)(2)(f)(m), 376A, 302 of IPC and under Section 6 of the

POCSO Act. The Prosecution examined 13 witnesses and produced the relevant material in support of its case.

8.1 PW1, the father of the victim proved the First Information Report and also stated about the examination of the victim by PW6 Dr. Md. Jafar. PW2, the grandfather of the victim narrated how the Appellant had taken the victim along with him. It was stated:-

> "He told me that father of the victim had come from work and he told him to bring the victim. I told him that the victim's father was yet to come and told him not to take the victim with him. But he did not listen me and took away the victim. Thereafter myself and my wife went to the house of complainant and asked him whether the victim was brought to him by accused and he told me that the victim was not brought to him. Therefore myself, complainant and Shrawan took search of the victim. We went towards water tank. One Vikas Masram on inquiry told that he saw the accused with the victim going towards Anganwadi. Therefore, we went towards Anganwadi. At that time the construction of Anganwadi was incomplete and we saw that the victim and accused both were lying in the premises of Anganwadi. Jins pant of the victim was lying aside and T Shirt was on her person. We saw that she had sustained bite wounds on her lips, chicks, chest and hips. There was bleeding from her private part."

8.2 PW6 Dr. Md. Jaffar stated that when the victim was brought before him, she was already dead and had found wounds and bites on her body. PW7 Dr. Ulhas Digambar Lingawar, deposed about medical examination of the Appellant and opinion Exh.46.

8.3 PW10 Dr. Sachin Janbaji Gadge, Assistant Professor, Department of Forensic Medicine, Vasantrao Naik Government Medical College,

Yavatmal proved the Post Mortem Report and stated about injury No.5 as under: -

> "7. Injury No.5 can be caused by sharp edged teeth. No fracture on external examination or palpation. All injuries are ante-mortem and fresh. Except, injury No.5 under column No.17 (post-mortem)."

The nature of injury No.17 and the steps taken after the post mortem were indicated thus:-

> "12. Injury No.17 under column No.17 with its corresponding internal injury mentioned under column No.21 with its consequences is sufficient to cause death in ordinary course of nature. Accordingly, the viscera was preserved. Vaginal, cervical and anal swabs kept for semen analysis. Swabs from bite site and control site kept for detection of saliva and comparison. Blood soaked gauzed piece kept for D.N.A. Analysis and comparison. Skin and tissue kept for D.N.A. Analysis. Hairs kept for comparison, if any. Blood soaked gauzed piece kept for blood group. Nail clippings kept for detection of foreign blood group. Skin and tissues kept for histopathological examination.
>
> 13. Above mentioned material packed, sealed, labled and handed over to N.P.C. Ganesh, B.No.215 of P.S. Parwa. The receipt of P.C. Ganesh is on Ex.31 on the reverse of Ex.35. It bears signature of Dr. R.R. Khetre on the top of Ex.35 with endorsement. I know his signature. The endorsement is at Ex.52.
>
> 14. My opinion as to cause of death is shock and haemorrhage following perineal tear with multiple injuries. There was forceful sexual assault on the child. The injury No.17 was caused by forceful insertion of penis. The post-mortem report bears my signature along with signatures of Doctors as named above. Contents are correct. It is at Ex.53."

In the cross-examination, the witness accepted that it was not mentioned in the Post Mortem Report that injury No.5 was caused by sharp edged teeth. The relevant part of the cross-examination was as under:-

> "It is true that the column no.17 note no.2 in respect of injury no.5 it is not mentioned that the injury is caused by sharp edged teeth. Witness volunteers that we had sent the sample for D.N.A. test. It is true that I had not specifically opined in P.M. report that injury No.5 of column no.17 was caused by sharp edged teeth. It is not true that the injury by teeth bite cannot produce clean cut margin."

8.4 Chandrakant Narayan Bijapwar, a grocery shop owner was examined as PW9. He stated that at about 7.00 p.m. on 11.02.2013 the Accused had come to his shop and had purchased Parle Biscuits and Laxminarayan Chiwada but he could not remember who was with the Accused at that time. The witness was, therefore, declared hostile.

8.5 The Investigating Officer A.P.I. Pankaj Vanjari was examined as PW13 and deposed to the steps undertaken during investigation. He deposed:-

> "On 20-2-2013 I had sent the letter to J.M.F.C. Ghatanji for recording the statements u/s 164 of Cr.P.C. of the grandfather and Vikas Masram. The letter bears my signature. It is at Exh.81. Accordingly I received Exh.17."

Exhibit 17 is the statement of the grandfather of the victim under Section 164 of the Code[5]. However, the record is not clear whether Vikas Meshram was examined under Section 164, and, if not, the reason for such

[5] The Code of Criminal Procedure, 1973

non-examination. In cross-examination of this witness, a suggestion made to him was replied as under:-

> "P.W.1 had stated that people beat the accused by fist and kick blows. It is mentioned in his statement:"

8.6 Vikas Meshram was not examined in the trial as a witness. Similarly, Baban Sambhaji Meshram, the father of the Appellant (referred to in the FIR); and Shrawan and Meshram (referred to in the deposition of PW2) were not examined as witnesses.

9. In the examination of the Appellant under Section 313 of the Code, when the evidence of PW7 Dr. Ulhas Digambar Lingawar was put to him, the Appellant stated that the evidence was false. Similar was his response, when the evidence that the blood of the victim was found on his full pant, was put to him. His explanation to Question No.61 was:-

> "Q.61 : Do you want to explain as to why prosecution witnesses are deposing against you?
>
> Ans. : When I had gone to the house of deceased girl, her parents had a talk regarding the giving of human sacrifice of the deceased to find out the hidden treasure and after hearing it when I told them that if they do such act then I will lodge the report against them but they had lodged the false report against me and deposed falsely."

10. The Trial Court found that the following circumstances established the guilt of the Appellant.

"(i) The first circumstance is that the accused took away the deceased victim child from the lap of P.W.2, father-in-law of the complainant i.e. victim's father by saying that the father of the deceased victim told him to bring the deceased victim to him.

(ii) The second circumstance is that the deceased victim child was in the custody of the accused since the time he took her away from P.W.2.

(iii) The third circumstance is that the deceased victim child was found lying isolated place where the construction of Anganwadi building was in progress and the accused was also found lying on the same spot near the deceased victim child.

(iv) The fourth circumstance is that as per report Exh. 44 issued by P.W.7 Dr. Lingawar, the injury of abrasion on tip of glance of penis was found on examination of the accused and he opined that the sign of sexual intercourse within 24 hours was present and it is due to sexual intercourse.

(v) The fifth circumstance is that the pant of deceased victim child, pair of chappal of accused, pieces of flesh were seized from the spot of incident as per Exh.20.

(vi) The sixth circumstance is that the pant, shirt and knicker with the stains of semen of the accused were seized as per seizure panchanama Exh.26.

(vii)The seventh circumstance is that as per C.A. report Exh. 54 the blood present over the full pant of the accused was found to be of the deceased victim child and it shows the perfect matching with the blood of the deceased victim.

(viii)The eighth circumstance is that as per postmortem report Exh.53 and opinion of Dr. Gadge who had conducted autopsy on the dead body of victim child, the injury No.17 was caused by forceful insertion of the penis as there was forceful sexual assault on the deceased victim child and the death of victim child was caused due to perineal tear and multiple injuries and the injuries were caused due to nibbling by teeth and bite marks were found over the parts of the body of deceased victim child. Even the pieces of flesh were also found on the spot of incident which shows the brutality in commission of crime."

10.1 Finding the Appellant guilty of the offences with which he was charged, the Trial Court in its judgment dated 14.8.2015, stated:-

> "40. After declaring the accused guilty for the offences punishable under Section 376(1)(2)(f)(i)(m) of Indian Penal Code, under Section 376-A of Indian Penal Code, under Section 302 of Indian Penal Code, and under Section 6 of Protection of Children from Sexual Offences Act, I take a pause to hear the accused on the point of sentence."

10.2 Thereafter, on the same day, the Trial Court recorded:-

> "42. The learned Public Prosecutor has submitted that the deceased victim was helpless child aged two years and the accused is related to her. The accused had committed rape and murder after taking away the victim child from her grandfather and as per the injuries described in P.M. report by P.W.10 Dr. Gadge, the accused had committed inhuman act because the victim child had sustained injury of perineal tear and injuries of bite marks and even the lips were removed and as per the injury No.17 the injury of perineal tear was caused by forceful sexual assault on the deceased victim child by the accused. Therefore, there are aggravating circumstances and the crime was well planned. It is further submitted that there is no chance of reformation of the accused. The learned Public Prosecutor has further submitted that the case falls under the category of 'rarest of rare case' for awarding death sentence. In support of his submission he has placed reliance on the observations made by the Hon'ble Apex Court in the case of Vasanta Sampat Dupare vs. State of Maharashtra, reported in 2015 Cri. L.J. 774[6], in which the Hon'ble Apex Court has observed that,
>
> > "The gullibility and vulnerability of the four years girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not

[6] 2015 Cr. L.J. 774 : (2015) 1 SCC 253

> only depraved and debased, but can have a menacing effect on the society".
>
> It is also held by the Hon'ble Apex Court in the cited ruling that,
>
> "A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anthema to the social balance. It meets the test of rarest of rare case and therefore, death sentence is affirmed."

43. The learned Public Prosecutor has further submitted that the prosecution case as per the ruling cited supra in which the death sentence was awarded was also based on circumstantial evidence and it was considered in the category of rarest of rare cases.

44. Having regard to the facts and circumstances and evidence on record, I am inclined to accept the argument advanced by the learned Public Prosecutor because in the facts of the ruling cited supra [Wakkar and another vs. State of U.P.[7]] by the learned defence counsel, there were two accused and it was not possible to discern and arrive at any definite conclusion as to the role played by each of the accused. Here in the present case there is only one accused who committed rape and murder of the helpless and innocent child aged two years, therefore, ruling [Vasanta Dupare vs. State of Maharashtra[6]] is applicable to the present case.

45. It is necessary to mention that brutality in committing rape on the deceased victim child aged two years and taking away the life of deceased victim child is required to be taken into consideration for coming to the conclusion that the case is rarest of rare one warranting imposition of death sentence.

46. The deceased victim female child aged two years only was innocent and helpless child. Having regard to the facts and circumstances of the crime and considering the relevant

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[7] (2011) 3 SCC 306

> factors, sentence of life imprisonment appears to be inadequate punishment and I am of the opinion that this is the case which falls in the category of rarest or rare cases warranting the imposition of death sentence for the offence punishable under Section 376-A of Indian Penal Code and for offence punishable under Section 302 of Indian Penal Code."

10.3 The Trial Court thus, by its order passed on the same day awarded Death Sentence to the Appellant on two counts, i.e. under Section 302 of IPC and under Section 376-A of IPC; Rigorous Imprisonment for life under two counts, i.e. Section 376(1)(2)(f), (i) and (m) of IPC and under Section 6 of POCSO Act. The Death Sentence was subject to confirmation by the High Court.

11. The matter concerning confirmation of Death Sentence and the substantive appeal by the Appellant against his conviction were dealt with together and by its judgment and order presently under appeal, the conviction and sentence passed by the Trial Court were affirmed by the High Court. It was observed by the High Court:

> "37. By applying yardstick set by the Apex Court in the case of Bachan Singh v. State of Punjab[8] and Machhi Singh and others v. State of Punjab[9] (cited supra) and the observations of this Court in the matter of Rakesh Kamble if the present matter is considered, in our opinion, in the guideline of aggravating circumstances, there is a mention of clause (b) which deal with the murder which involves exceptional depravity. In the light of the clause, if the present matter is seen, the record reveals that the victim is a child of two and half years of age. The victim was

[8] (1980) 2 SCC 684
[9] (1983) 3 SCC 470

subjected to a forceful sexual exploitation. The medical evidence shows that the death is caused due to the forceful intercourse. In our opinion, the present case also covers clause (a) of "aggravating circumstances" wherein it is referred that if a murder is committed after previous planning and involves extreme brutality. In the present matter, a child was taken from the custody of the grandfather and in spite of his resistance, a child was subjected to sexual violence and then was done to death. In our opinion, the act of the appellant/accused falls in clauses (a) and (b) of the "aggravating circumstances". We would also take into consideration the mitigating circumstances referred to in the judgment of the Apex Court in the case of Bachan Singh v. State of Punjab (cited supra). In our opinion, the only mitigating circumstance on which the appellant/accused seeks benefit of clause (2) i.e. the accused is a young boy. Even though the said mitigating circumstance of being of young age is available to the appellant/accused while balancing the aggravating and mitigating factors, we are of the opinion that the said mitigating circumstance would not be of any help to the appellant/accused.

… … …

41. In the present case also, the accused is the maternal uncle of the victim child. The Apex Court recently in the matter of Purushottam Dashrath Borate and another v. State of Maharashtra[10] (cited supra), wherein the victim deceased who was serving in a private company and was subjected to rape and murder at the hands of the security guard and was awarded death sentence on consideration of the submission that the appellant/accused is a person of young age, observed that such compassionate grounds are present in most of the cases and are not relevant for interference in awarding death sentence. The Apex Court further observed that the principle that when the offence is gruesome and was committed in a calculated and diabolical manner, the age of the accused may not be a relevant factor.

> "15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals.

[10] (2015) 6 SCC 652

> Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

The Apex Court also made it clear that lack of criminal antecedents also cannot be considered as mitigating circumstances, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

42. The Apex Court in the matter of Vasanta Sampat Dupare v. State of Maharashtra[6] (cited supra), wherein the victim was a girl of four years of age and the appellant/accused, a neighbour luring the victim for giving her chocolate, raped her and done her to death by hit of stones. The Apex Court on the backdrop of the medical evidence, namely the victim was subjected to forceful sexual intercourse, the deceased was last seen with the accused and the immediate lodgement of report by the father of the girl, lending credence to the prosecution case, observed thus:

> "60. In the case at hand, as we find, not only was the rape committed in a brutal manner, but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.
>
> 61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. The learned Counsel for the appellant pointing out the mitigating

circumstances would submit that the appellant is in his mid-fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. The learned Counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had a number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.

62. As we perceive, this case deserves to fall in the category of the rarest of rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven makes a four years minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of the rarest of the rare case and we unhesitatingly so hold."

With this view, the High Court upheld the conviction and sentence as recorded by the Trial Court and confirmed the Death Sentence.

12. As the Death Sentence and life imprisonment have been awarded on two counts each, the statutory changes that the concerned provisions of the IPC and POCSO Act have undergone may briefly be adverted to:-

A. Before 03.02.2013, the relevant portions of Sections 375, 376 and 376A of IPC were as under:-

> "**375.** Rape.–A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six folloing descriptions:-
>
> Firstly. Against her will.
>
> Secondy.- Without her consent.
>
> Thirdly.- …..
>
> Fourthly.- …..
>
> Fifthly.- …..
>
> Sixthly.- With or without her consent, when she is under sixteen years of age.
>
> Explanation …..
>
> "**376.** Punishment for rape-(1) Whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may for life or for a term which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever,-

(a) …..

(b) …..

(c) …..

(d) …..

(e) …..

(f) commits rape on a woman when she is under twelve years of age; or

(g) …..

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1.- …..

Explanation 2.- …..

Explanation 3.- …..

"**376A.** Intercourse by a man with his wife during separation.-whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with imprisonment of either description for a term which may extend to two years and shall also be liable to fine"

B. On 03.02.2013, the Criminal Law (Amendment) Ordinance, 2013 (No.3 of 2013), hereinafter referred to as the Ordinance was promulgated by the President of India. Section 8 of the Ordinance *inter alia* substituted Sections 375, 376 and 376A of IPC; the relevant text of the substituted provisions being:-

> "**375.** A person is said to commit "sexual assault" if that person-
>
> (a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of another person or makes the person to do so with him or any other person; or
>
> (b) …..
>
> (c) …..
>
> (d) …..
>
> (e) touches the vagina, penis, anus or breast of the person or makes the person touch the vagina, penis, anus or breast of that person or any other person,
>
> except where such penetration or touching is carried out for proper hygienic or medical purposes under the circumstances falling under any of the following seven descriptions:-
>
> First-Against the other person's will.
>
> Secondly.- Without the other person's consent.
>
> Thirdly.- …..
>
> Fourthly.- …..
>
> Fifthly.-…..
>
> Sixthly.-With or without the other person's consent, when such other person is under eighteen years of age.
>
> Seventhly.-…..
>
> Explanation 1 …..

Explanation 2 …..

Explanation 3 …..

Exception. …..

376. (1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

(2) whoever,-

(a) …..

(i) …..

(ii) …..

(iii) …..

(b) …..

(c) …..

(d) …..

(e) …..

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards, the person assaulted, commits sexual assault on such person; or

(g) …..

(h) commits sexual assault on a person when such person is under eighteen years of age; or

(i) …..

(j) …..

(k) …..

(l) while committing sexual assault causes grievous bodily harm or maims or disfigures or endangers the life of a person; or

(m) …..

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life, and shall also be liable to fine.

Explanation 1.- …..

Explanation 2.- …..

376A. Whoever, commits an offence punishable under sub-section (1) of sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the person or cause the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death."

C) The Criminal Law (Amendment) Act, 2013 (No.13 of 2013), hereinafter referred to as the Amendment Act received the assent of the President and was published on 02.04.2013 but was given retrospective effect from 03.02.2013. Section 9 of the Amendment Act *inter alia* substituted Sections 375, 376 and 376A of IPC as under:-

"**375.** 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) …..

(c) …..

(d) …..

under the circumstances falling under any of the following seven descriptions: -

First.- Against her will.

Secondly.- Without her consent.

Thirdly.- …..

Fourthly.-…..

Fifthly. …..

Sixthly.-With or without her consent, when she is under eighteen years of age.

Seventhly.- …..

Explanation 1……

Explanation 2……
Exception 1……

Exception 2…..

376. (1) Whoever, except in the cases provided for in sub-section (2), commits rape, shall be punished with rigorous imprisonment of either description for a term which shall not be less than seven years, but which may extend to imprisonment for life, and shall also be liable to fine.

(2) Whoever,-

(a) …..

(b) …..

(c) …..

(d) …..

(e) …..

(f) being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman; or

(g) …..

(h) …..

(i) commits rape on a woman when she is under sixteen years of age; or

(j) …..

(k) …..

(l) …..

(m) while committing rape causes grievous bodily harm or maims or disfigures or endangers the life of a woman; or

(n) …..

shall be punished with rigorous imprisonment for a term which shall not be less than ten years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine.

Explanation.- …..

376A. Whoever, commits an offence punishable under sub-section (1) or sub-section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death."

While repealing the Ordinance, Section 30 of the Amendment Act states as under:-

"**30.** (1) The Criminal Law (Amendment) Ordinance, 2013 is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Indian Penal Code, the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872, as amended by the said Ordinance, shall be deemed

> to have been done or taken under the corresponding provisions of those Acts, as amended by this Act."

D. The Criminal Law (Amendment) Act, 2018 (Act 22 of 2018) which came into effect from 21.04.2018, deleted clause (i) of Section 376(2) of IPC and added sub-section (3) after Section 376(2) as well as inserted Section 376AB as under:

> "**376** … … …
>
> (3) Whoever, commits rape on a woman under sixteen years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:
>
> … … …
>
> "**376AB**- Punishment for rape on woman under twelve years of age**-** Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:
>
> … … …"

Since the offence in the instant case was committed well before 21.04.2018, we are not called upon to consider the effect of Act 22 of 2018 but the provisions are noted for the sake of completeness.

E. Sections 5 and 6 of the POCSO Act, at the time when the offence was committed in the instant case, provided: -

"**5**: Aggravated penetrative sexual assault-

a) …..
b) …..
c) …..
d) ……
e) …..
f) …..
g) …..
h) ….
i) …..
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 (b) 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;

(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;

k) …..
l) …..
m) Whoever commits penetrative sexual assault on a child below twelve years; or
n) …..
o) …..
p) …..
q) …..
r) …..
s) …..
t) …..
u) …..

> "**6.** Punishment for aggravated penetrative sexual assault. – Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

By virtue of the Protection of Children from Sexual Offences (Amendment) Act, 2019 (Act 25 of 2019) which came into effect on 16.08.2019, sub-Clause (iv) was inserted in Clause (j) of Section 5 as under:-

> "(iv) causes death of the child; or"

Further, Section 6 was substituted as under:-

> "**6.** Punishment for aggravated penetrative sexual assault.-
>
> (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.
>
> (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

13. If the abovementioned provisions of IPC are considered in three compartments, that is to say,

(A) The situation obtaining before 03.02.2013

(B) The situation in existence during 03.02.2013 to 02.04.2013 and,

(C) The situation obtaining after 02.04.2013:

following features emerge: -

(i) The offence under Section 375, as is clear from the definition of relevant provision in compartment (A), could be committed against a woman. The situation was sought to be changed and made gender neutral in compartment (B). However, the earlier position now stands restored as a result of provisions in compartment (C)

(ii) Before 03.02.2013 the sentence for an offence under Section 376(1) could not be less than seven years but the maximum sentence could be life imprisonment; and for an offence under Section 376(2) the minimum sentence could not be less than ten years while the maximum sentence could be imprisonment for life. Section 376A dealt with cases where a man committed non-consensual sexual intercourse with his wife in certain situations.

(iii) As a result of the Ordinance, the sentences for offences under Sections 376(1) and 376(2) were retained in the same fashion. However, a new provision in the form of Section 376A was incorporated under which, if while committing an offence punishable under sub-

section (1) or sub-section (2) of Section 376, a person *"inflicts an injury which causes the death"* of the victim, the accused could be punished with rigorous imprisonment for a term *"which shall not be less than 20 years but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life or with death"*. Thus, for the first time, Death Sentence could be imposed if a fatal injury was caused during the commission of offence under sub-section (1) or (2) of Section 376.

(iv) Though the provisions of the Amendment Act restored the original non gender-neutral position vis-à-vis the victim, it made certain changes in sub-section (2) of Section 376. Now, the punishment for the offence could be rigorous imprisonment for not less than ten years which could extend to imprisonment for life, "*which shall mean imprisonment for the remainder of that person's natural life"*. It was, thus, statutorily made clear that the imprisonment for life would mean till the last breath of that person's natural life.

(V) Similarly, by virtue of the Amendment Act, for the offence under Section 376A, the punishment could not be less than 20 years which may extend to imprisonment for life *which shall mean imprisonment for the remainder of that person's natural life, or with death.*

14. In the instant case, the offence was committed on 11.02.2013 when the provisions of the Ordinance were in force. However, the Amendment Act having been given retrospective effect from 03.02.2013, the question arises whether imposition of life sentence for the offence under Section 376(2) could "mean imprisonment for the remainder of that person's natural life".

In the present case, since the victim was about two and half years of age at the time of incident and since it was the Ordinance which was holding the field, going by the provisions of the Ordinance, Clauses (f), (h) and (l) of Section 376(2) would get attracted. The comparable provisions of Section 376(2) as amended by the Amendment Act would be, Clauses (f), (i) and (m) respectively. As the substantive penal provisions under the Clauses (f), (h) and (l) as inserted by the Ordinance and Clauses (f), (i) and (m) as inserted by the Amendment Act are identical, no difficulty on that count is presented. But the sentence prescribed by Section 376(2) as

amended by the Amendment Act, has now, for the first time provided that the imprisonment for life "shall mean imprisonment for the remainder of that person's natural life". This provision comes with retrospective effect and in a situation where such prescription was not available on the statute when the offence was committed, the question arises whether such ex-post facto prescription would be consistent with the provisions of sub-Article (1) of Article 20 of the Constitution.

15. An imposition of life sentence simpliciter does not put any restraints on the power of the executive to grant remission and commutation in exercise of its statutory power, subject of course to Section 433A of the Code. But, a statutory prescription that it "shall mean the remainder of that person's life" will certainly restrain the executive from exercising any such statutory power and to that extent the concerned provision definitely prescribes a higher punishment ex-post facto. In the process, the protection afforded by Article 20(1) of the Constitution would stand negated. We must, therefore, declare that the punishment under Section 376(2) of the IPC in the present case cannot come with stipulation that the life imprisonment "shall mean the remainder of that person's life". Similar prescription in Section 6 of the POCSO Act, which came by way of amendment in 2019, would not be applicable and the governing provision for punishment for the offence

under the POCSO Act must be taken to be the pre-amendment position as noted hereinabove.

16. However, in so far as the situation covered by Section 376A of IPC as amended by the Amendment Act is concerned, substantively identical situation was dealt with by Section 376A as amended by the Ordinance and the prescription of sentence in Section 376A by the Amendment Act is identical to that prescribed by Section 376A as amended by the Ordinance. Section 376A as amended by the Ordinance being gender neutral so far as victim was concerned, naturally covered cases where a victim was a woman. Thus, the ex-post facto effect given to Section 376A by the Amendment Act from the day the Ordinance was promulgated, would not in way be inconsistent with the provisions of sub-Article (1) of Article 20 of the Constitution.

17. Having considered the legal provisions involved in the matter, we now turn to the submissions advanced by the learned counsel.

17.1 Ms. Sonia Mathur, learned Senior Advocate for the Appellant submitted: -

A) While noting eight circumstances against the Appellant, certain circumstances were ignored by the Courts below, namely:-

(i) Both the lips of the victim showed clean cut margins indicating that the injuries were suffered by a weapon and not by a human bite. Further, odontology report was not furnished to substantiate the theory that the injuries could be by a human bite and by the Appellant.

(ii) The vaginal, cervical, and anal swabs were sent for forensic examination but none of these could be associated with the Appellant.

These important facets pointing towards innocence of the Appellant were completely disregarded.

B) Each of the circumstances found against the Appellant, was then dealt with as under :-

(i) PWs 1 and 2 were not independent witnesses to prove the first circumstance that the victim was taken away by the Appellant. There were discrepancies in the statements of PWs 1 and 2. On the other hand witnesses such as Shravan, Vitthal Ghodam and Vikas Meshram were not examined at all. Even the wife of PW2 whose presence was referred to in the statement of PW2 under Section 164 of the Code, was not examined.

(ii) The fact that the victim was always in the custody of the Appellant since the time she was taken away from PW2, was not proved. PW9 was examined to establish this circumstance but did not support the prosecution. Moreover, Vikas Meshram who allegedly saw the victim with the Appellant was also not examined.

(iii) The spot where the victim was found lying was not an isolated place but was in the middle of the village surrounded by houses. No independent witness was examined to corroborate the version of PWs 1 and 2. Independent witnesses like Shravan, Vitthal Ghodam and Vikas Meshram were not examined. The initial noting in the form of GD entry 40/13 (which was referred to in the FIR) mentioned that the Appellant took away the victim to the jungle and killed her.

(iv) The Appellant was examined at the time of arrest but the medical evidence in that behalf was not placed on record. However, the prosecution chose to rely on the medical evidence through the opinion of PW7 Dr. Lingawar.

(v) The spot panchnama was done at 8:30 a.m. next day i.e. more than eight hours after the arrest of the Appellant. The chappals

found at the spot were not sent for any examination, nor was any evidence led to show that they belonged to the Appellant. Though, the pieces of flesh seized from the spot were sent for forensic examination, there was nothing on record to show that the flesh was of a human being and of the victim.

(vi) The FSL report did not find any semen on any of the articles sent for examination and the finding rendered by the Courts below in so far as 6th circumstance was thus erroneous.

(vii) There were discrepancies in the chain of custody of the clothes referred to in the 7th circumstance. At the time of his arrest no blood was noticed on the clothes of the Appellant. PW13, the Investigating officer accepted that he "did not find any suspicious thing" with the Appellant. Even when the Appellant was examined by PW7 Dr. Ulhas Digambar Lingawar, no blood was detected. The seizure report also did not disclose any presence of blood spots on the clothes of the Appellant. The trousers of the Appellant were in police custody from 12.02.2013 till 14.02.2013 and no malkhana record or witnesses were produced.

It would, therefore, be highly unlikely that "moderate number of blood stains ranging from 0.1 to 2cm mostly on front

portion" found in the FSL report could have been missed out at the earlier stages. The evidence would therefore be unworthy of reliance.

Further, there was a requisition for videography of the post mortem and yet no video-graphs were placed on record, in the absence of which the material sent for DNA examination could not be relied upon.

(viii) The record certainly indicated that the victim was sexually assaulted but the eighth circumstance did not by itself establish that the Appellant was the author of crime.

C) The facts on record did not conclusively establish the guilt of the Appellant. Since the case was based on circumstantial evidence, going by the principles laid down by this Court, the case was not established at all.

17.2 While dealing with the question of sentence Ms. Mathur, learned Senior Advocate submitted: -

I) The sentence of death having been passed on the same day when the conviction order was pronounced, there was non-compliance of Section 235(2) of the Code and as laid down by this Court in

Allauddin Mian v. State of Bihar[11], Malkiat Singh and others v. State of Punjab[12] and ***Ajay Pandit v. State of Maharashtra[13]***, the infraction on that count was sufficient to consider commutation of the sentence of death to that of life imprisonment.

II) The instant case being based on circumstantial evidence, as held by this Court in ***Bishnu Prasad Sinha v. State of Assam[14], Sebastian @ Chevithiyan v. State of Kerala[15], Purna Chandra Kusal v. State of Orissa[16]*** and ***Kalu Khan v. State of Rajasthan[17]***, no death sentence be awarded and the appropriate punishment could be life sentence.

III) Relying on the decisions of this Court in ***Ashok Debabarma @ Achak Debbarma*** v. ***State of Tripura[18], Sudam v. State of Maharashtra[19]***and ***Ravishankar alias Baba Vishwakarma vs. State of Madhya Pradesh[20],*** it was submitted that even if the circumstances on record were sufficient to record conviction against the Appellant, there were gaps in the evidence and the benefit of "residual doubt" ought to be extended in favour of the Appellant.

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11 (1989) 3 SCC 5 para 10
12 (1991) 4 SCC 341 para 18
13 (2012) 8 SCC 43 para 47
14 (2007) 11 SCC 467 para 55
15 (2010) 1 SCC 58 para 17
16 (2011) 15 SCC 352 para 7
17 (2015) 16 SCC 492 paras 16, 23 and 31
18 (2014) 4 SCC 747
19 (2019) 9 SCC 388
20 (2019) 9 SCC 689

IV) In terms of law laid down by this Court in ***Rajesh Kumar v. State through Government of NCT of Delhi***[21]***,*** the burden was on the prosecution to rule out the possibility of reformation of the Appellant and that as held in ***Mohinder Singh v. State of Punjab***[22]***,*** the exclusion of possibility of reformation could only be on the basis of evidence led by the prosecution.

V) The Appellant completed Bachelors Preparatory programme (BPP) from Indira Gandhi National Open University in 2017 while in prison and is presently pursuing Bachelors Degree course in Arts.

VI) The Appellant was about 21 years of age at the time of incident and as held by this Court in ***Bachan Singh v. State of Punjab***[8]***, Rameshbhai Chandubhai Rathod (2) v. State of Gujarat***[23]***, Amit v. State of U.P.***[24] and ***Sunil v. State of M.P.***[25]***,*** the young age of the Appellant at the time of incident is a factor in his favour.

VII) The socio-economic condition of the Appellant showed that he was a labourer and belonged to Scheduled Tribes which again would be a factor in his favour as held by this Court in ***Sunil Damodar Gaikwad v. State of Maharashtra***[26]***.***

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21 (2011) 13 SCC 706 paras 72 to 74
22 (2013) 3 SCC 294, paras 22, 23
23 (2011) 2 SCC 764 paras 8 and 10
24 (2012) 4 SCC 107 para 22
25 (2017) 4 SCC 393 para 12
26 (2014) 1 SCC 129 para 20

VIII) The family of the Appellant being in touch with the him, there is a strong probability of rehabilitation as observed by this Court in ***Mohinder Singh v. State of Punjab***[22]***.***

IX) Further, as there were no criminal antecedents as has been ruled by this Court in ***Surendra Pal Shivbalak Pal v. State of Gujarat***[27]***, Mahesh Dhanaji Shinde v. State of Maharashtra.***[28]***, Santosh Kumar Singh v. State of M.P.***[29] and ***Shyam Singh @ Bhima v. State of Madhya Pradesh***[30]***,*** due weightage ought to be given in favour of the Appellant.

17.3 Mr. Sushil Karanjkar, learned Advocate for the State submitted that all the aforesaid eight circumstances were individually established beyond any doubt and they collectively formed a clear and consistent chain ruling out every other hypothesis except the guilt of the Appellant. It was submitted that as held by this Court in ***B. A. Umesh vs. Registrar General, High Court of Karnataka***[31] and subsequent cases, the mere fact that the death sentence was pronounced on the same day when the conviction was recorded, by itself would not be sufficient to commute the death sentence to life imprisonment; and that the Appellant had sufficient opportunity to

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27 (2005) 3 SCC 127 para 13
28 (2014) 4 SCC 292 paras 38 and 39
29 (2014) 12 SCC 650 para 30
30 (2017) 11 SCC 265 paras 6 and 8
31 (2017) 4 SCC 124

advance submissions on the issue of sentence which opportunity was availed of. He also submitted that the circumstances having been established beyond any shadow of doubt there was no room for any "residual doubt". In his submission, the factors that the crime in the instant case was gruesome and diabolical, where two and a half year old girl was subjected to sexual assault and the manner in which it was committed, were by themselves weighty and sufficient to tilt the balance against the Appellant and that as laid down by this Court in ***Vasanta Sampat Dupare v. State of Maharashtra[6],*** in review arising therefrom (in ***Vasanta Sampat Dupare v. State of Maharashtra[32]),*** and in ***Mukesh and Another v. State (NCT of Delhi) and Others[33],*** the extreme depravity and the barbaric manner in which the crime was committed would clearly outweigh any mitigating circumstance advanced on behalf of the Appellant.

18. We shall first consider the evidence on record to see whether the guilt of the Appellant is conclusively established on the strength of the material on record; and whether the circumstances on record form a clear and consistent chain to rule out every other hypothesis except the guilt of the Appellant. The law on the point is clear from the following observations of this Court in ***Sharad Birdhichand Sarda vs. State of Maharashtra[34],***

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[32] (2017) 6 SCC 631
[33] (2017) 6 SCC 1
[34] (1984) 4 SCC 116

"**153.** A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in *Shivaji Sahabrao Bobade* v. *State of Maharashtra*[35] where the observations were made:

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

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

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

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

(*5*) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

These principles have since then been followed consistently.

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35 (1973) 2 SCC 793

18.1 According to the prosecution, on the day in question at about 7:30 p.m. when the victim was with her grandfather, on the pretext that the father of the victim had asked the Appellant to bring the victim, the Appellant, who was maternal uncle of the victim, took her away. This part of the evidence is conclusively established through the testimony of PW2, the grandfather. This version finds mention in the FIR which was recorded within few hours of the incident and in the statement of PW2 recorded under Section 164 of the Code. There is nothing on record to doubt the veracity of said version. It is true that some other witnesses were not examined by the prosecution but the strength of the testimony of PW2 does not get diminished on any count nor can it be said that his testimony loses its weight because the witness was the grandfather of the victim. The version coming through this witness is cogent, consistent and also figured in prompt reporting of the FIR. We have, therefore, no hesitation in accepting that the first circumstance as noted by the Trial Court stands conclusively established.

18.2 As deposed by PWs 1 and 2, the Appellant was found by the side of the victim at the spot i.e. in the premises of Anganwadi. The victim was having various injuries whereafter she was taken for medical attention. Soon after the incident, the Appellant was also medically examined and Report Exbt. 46 showed injury on his body. Even if PW9 had turned hostile

and some other witnesses were not examined, the fact that the victim was always in the custody of Appellant till she was found at the spot alongside the Appellant is quite clear. The proximity in terms of time and the promptitude in reporting are crucial factors and the evidence in that behalf is completely trustworthy. Thus, in our view, the second and third circumstances are also fully established.

18.3 Soon after his arrest, the Appellant was produced for medical examination before PW 7 Dr. Ulhas Digambar Lingawar, who found injury on private parts of the Appellant. The approximate time of said injury as given in the opinion Exh.46 is consistent with the case of prosecution. The submission however is that the Appellant was also examined by another medical professional and that report was not placed on record. The reference to the medical examination of the Appellant in terms of Section 53A of the Code was not to any other medical professional but to PW 7 Dr. Lingawar. No explanation, not even a suggestion came from the Appellant how there could be an injury on his body as noticed in Report Exh.46. Thus, the 4th circumstance also stands fully established.

18.4 While considering the 5th circumstance, it must be stated that as per record, the chappals were not proved to be that of the Appellant and the pieces of flesh found at the spot of incident were also not proved to be that

of a human being. To that extent, 5th circumstance was not proved at all. However, the fact that the pant of the victim was found at the spot of incident is well established on record, and the 5th circumstance must be taken to be proved only with respect to the recovery of the pant of the victim.

18.5 There is nothing on record to show that the stains of semen found on clothing referred to in 6th circumstance, were medically proved to be that of, or could be associated with the Appellant. The 6th circumstance cannot therefore be taken to be pointing against the Appellant.

18.6 In terms of Chemical Analyser's Report Ext.54, the blood found on the trousers of the Appellant was that of the victim. This fact is completely established. The submission however, is:-

(a) Nothing suspicious was found by PW13 the Investigating Officer with the Appellant at the time of his arrest; and

(b) PW7 Dr. Lingawar had not noticed any blood stains on the trousers of the Appellant at the time of his medical examination;

(c) No *malkhana* report or evidence was produced on record to state that the articles remained in proper custody and in sealed condition.

The answer given by the Investigating Officer cannot be stretched to say that there were no blood stains on his trousers at the time of arrest. The medical opinion was obtained to consider whether there were any injuries on the private parts of the Appellant and whether he was capable of having sexual intercourse. The facts on record show that the articles were sent for FSL examination at the earliest.

The Appellant was represented by a counsel of standing in the Trial Court. The theory that the blood spots on the trousers of the Appellant were subsequently planted was not even developed in the cross examination of the concerned witnesses.

Given the quick succession of steps in investigation, including the medical examination and seizure of the clothes of the Appellant, we do not find any infirmity. We, therefore, accept that the 7th circumstance stands fully established.

18.7 It is a matter of record that as per Post-Mortem report and medical opinion, there was forceful sexual assault on the victim and her death was caused due to injury No.17 which was in the nature of multiple lacerations over vaginal and anal region; and merging of vaginal and anal orifices.

The 8th circumstance must therefore be taken to be proved fully except to the extent that said circumstance makes reference to pieces of flesh found at the spot of incident.

19. Do the circumstances established on record satisfy the requirements spelt out in the decision of this Court in ***Sharad Birdhichand Sarda***[34] is the next question for consideration.

The established circumstances show:-

a) The victim was in the custody of the Appellant, from the time she was taken from her grandfather till she was found lying in the premises of Anganwadi; where the Appellant was also found lying next to her.

b) The victim, who was hale and hearty when she was taken by the Appellant, had number of injuries on her body when she was found next to the Appellant.

c) The injuries on the body of the victim show that she was abused and sexually exploited.

d) The sexual assault was so forceful that the victim, a two-and-a-half-year-old girl suffered, among other injuries, Injury No.17.

e) Injury No.17, as described above, was so severe that there was merging of vaginal and anal orifices.

f) The victim died because of Injury No.17.

g) The Appellant had an injury on his private parts corresponding to the period when the victim was in his custody.

h) The Appellant was found to be capable of having sexual intercourse.

i) The trousers of the Appellant had blood stains, the DNA profiles of which, matched with that of the blood of the victim.

These circumstances at serial numbers a) to i) stand proved beyond any doubt and by themselves constitute a conclusive and consistent chain excluding every other hypothesis except the guilt of the Appellant.

20. We must at this stage deal with the submission of Ms. Mathur, learned Senior Advocate about non-consideration of certain circumstances by the Courts below.

It is true that the injuries on the lips of the victim showed that the margins were clean cut and given the nature of evidence in that behalf, it cannot be said with certainty that those injuries could be taken to be the result of human bites. But the other injuries on the body of the victim were definitely by human bites and as such the absence of clarity with regard to the injuries on the lips does not render the case of the prosecution doubtful in any manner.

Again, the absence of association of vaginal, cervical and anal swabs with the Appellant does not in any way diminish the strength of evidence against the Appellant.

21. The circumstances proved on record are not only conclusive in nature but completely support the case of the prosecution and are consistent with only one hypothesis and that is the guilt of the Appellant. They form a chain, so complete, consistent and clear, that no room for doubt or ground arises pointing towards innocence of the Appellant. It is, therefore, established beyond any shadow of doubt that the Appellant committed the acts of rape and sexual assault upon the victim and that injury no.17 was the cause of death of the victim.

22. The Appellant is thus guilty of having committed offences punishable under clauses (f), (i) and (m) of sub-section (2) of Section 376 of IPC; and also, under clauses (j) and (m) of Section 5 read with Section 6 of the POCSO Act, (as it stood before it was amended by Act 25 of 2019). Since according to medical opinion, the death was because of injury No.17, the Appellant is also guilty of having committed offence punishable under Section 376A of IPC.

23. The injuries suffered by the victim were directly as a result of sexual assault inflicted upon her. But the medical evidence does not disclose that either before or after the commission of sexual assault, any other injury was consciously caused with the intention to extinguish the life of the victim. Injury No.17 which was the cause of death was suffered by the victim during

the course of commission of sexual assault upon her. The questions that arise, therefore, are whether such an act on part of the Appellant comes within the parameters of Sections 299 and 300 of IPC and whether he is guilty of having committed culpable homicide amounting to murder.

24. According to clause fourthly under Section 300 of IPC, the offence may come under the category of culpable homicide amounting to murder "if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid".

The interplay between clauses of Sections 299 and 300 of the IPC was considered by this Court in ***State of Andhra Pradesh vs. Rayavarapu Punnayya and Another***[36] as under:-

> **"11.** The principal question that falls to be considered in this appeal is, whether the offence disclosed by the facts and circumstances established by the prosecution against the respondent, is "murder" or "culpable homicide" not amounting to murder.
>
> **12.** In the scheme of the Penal Code, "culpable homicide" is genus and "murder" its specie. All "murder" is "culpable homicide" but not vice-versa. Speaking generally, "culpable homicide" *sans* "special characteristics of murder", is "culpable homicide not amounting to murder". For the purpose of fixing punishment, proportionate to the gravity of this generic offence, the Code practically recognises three degrees of culpable homicide. The *first* is, what may be called, "culpable homicide of the first degree".

[36] (1976) 4 SCC 382

This is the greatest form of culpable homicide, which is defined in Section 300 as "murder". The *second* may be termed as "culpable homicide of the second degree". This is punishable under the first part of Section 304. Then, there is "culpable homicide of the third degree". This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second part of Section 304.

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. Clause (*b*) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of *causing* the *bodily injury* coupled with the offender's *knowledge* of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (*b*) appended to Section 300.

Section 299	***Section 300***
A person commits culpable homicide if the act by which the death is caused is done —	*Subject to certain exceptions* culpable homicide is murder if the act by which the death is caused is done —
INTENTION	

(*a*)With the intention of causing death; or	(1) With the intention of causing death; or
(*b*) With the intention of causing such bodily injury as is *likely* to cause death; or	(2) With the intention of causing such bodily injury as the *offender knows to be likely* to cause the death *of the person to whom* the harm is caused; or
	(3) With the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death; or
KNOWLEDGE	
(*c*)With the knowledge that the act is *likely* to cause death	(4) With the knowledge that the act is so *imminently dangerous that it must in all probability cause death* or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

15. Clause (*b*) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given *knowing* that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that *particular* person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the corresponding clause (*b*) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury *likely* to cause death and a bodily injury *sufficient in the ordinary course* of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (*b*) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (*b*) of Section 299 conveys the sense of "probable" as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant* v. *State of Kerala*[37] is an apt illustration of this point.

18. In *Virsa Singh* v. *State of Punjab*[38] Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):

> "The prosecution must prove the following facts before it can bring a case under Section 300, 'thirdly'. First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to

[37] AIR 1966 SC 1874
[38] AIR 1958 SC 465

> cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in *Virsa Singh case*[38] of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be "murder". Illustration (*c*) appended to Section 300 clearly brings out this point.

20. Clause (*c*) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is "murder" or "culpable homicide not amounting to murder", on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of "murder" contained in Section 300. If the answer to this question is in the negative the offence would be "culpable homicide not amounting to murder", punishable under the *first* or the *second* part of Section 304, depending, respectively, on

> whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder", punishable under the first part of Section 304, of the Penal Code.
>
> **22.** The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stages."

25. We may now consider the cases where the death may not have been intended but clause fourthly of Section 300 of IPC was applied to hold the accused guilty of offence of culpable homicide amounting to murder.

A) In ***State of Madhya Pradesh vs. Ram Prasad***[39], a woman was set afire by the accused after pouring kerosene oil on her. A bench of three Judges of this Court dealt with the matter as under:-

> "The question then arises, what was the offence which Ram Prasad can be said to have committed? The offence of causing injury by burning is a broad spectrum which runs from s. 324 causing simple injury by burning through s. 326 namely, causing grievous injury by burning to the two major offences, namely, culpable homicide not amounting to murder and even murder itself. The Sessions Judge chose the lowest end of the spectrum which is surprising enough, because the burns were so extensive that they were certainly grievous by all account. The High Court placed the offence a little higher, namely, culpable homicide not amounting to murder. We think that the matter goes a little further than this. As death has been caused the question has to be considered in the light of homicide to determine whether the action of Ram Prasad falls within culpable homicide not amounting to murder or the higher offence of murder itself.

[39] (1968) 2 SCR 522

Here we see that death has actually been caused by the criminal act; in other words, there has been homicide and since it is not accidental or suicidal death, responsibility for the homicide, in the absence of any exceptions or extenuating circumstances, must be borne by the person who caused it. The High Court has apparently stopped short by holding that this was a case of culpable homicide not amounting to murder. The question is whether the offence falls in any of the clauses of s. 300 Indian Penal Code. In this connection it is difficult to say that Ram Prasad intended causing the death of Mst. Rajji although it might well be the truth. That he set fire to her clothes after pouring kerosene oil is a patent fact and therefore the matter has to be viewed not only with regard to the *firstly* of s. 300, but all the other clauses also. We do not wish to consider the second and the third clauses, because the question then would arise what was the extent of the injury which Ram Prasad intended to cause or knew would be caused to Mst. Rajji. That would be a matter of speculation. In our opinion, this matter can be disposed of with reference to clause *fourthly* of s. 300. That clause reads as follows :-

> ". . . . .culpable homicide is murder. . . . . if the person committing the act knows that is so imminently dangerous that it must in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk or causing death or such injury as aforesaid."

It is obvious that there was no excuse for Ram Prasad to have taken the risk of causing the death or such bodily injury as was likely to cause death. The question therefore arises whether Ram Prasad knew that his act was so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, so as to bring the matter within the clause. Although clause *fourthly* is usually invoked in those cases where there is no intention to cause the death of any particular person (as the illustration shows) the clause may on its terms be used in those cases where there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death. In the present case, Ram Prasad poured kerosene upon the clothes of Mst. Rajji and set fire to those clothes. It is obvious that such fire spreads rapidly and burns extensively. No special knowledge is needed to know that one may cause death by burning if he sets fire to the clothes of a person. Therefore,

> it is obvious that Ram Prasad must have known that he was running the risk of causing the death of Rajji or such bodily injury as was likely to cause her death. As he had no excuse for incurring that risk, the offence must be taken to fall within 4*thly* of s. 300, Indian Penal Code. In other words, his offence was culpable homicide amounting to murder even if he did not intend causing the death of Mst. Rajji. He committed an act so imminently dangerous that it was in all probability likely to cause death or to result in an injury that was likely to cause death. We are accordingly of the opinion that the High Court and the Sessions Judge were both wrong in holding that the offence did not fall within murder."
>
> (Emphasis supplied)

B) In a similar fact situation, another bench of three Judges of this Court, in ***Santosh S/o Shankar Pawar vs. State of Maharashtra***[40] observed,

> **"13.** Even assuming that the accused had no intention to cause the death of the deceased, the act of the accused falls under clause Fourthly of Section 300 IPC that is the act of causing injury so imminently dangerous where it will in all probability cause death. Any person of average intelligence would have the knowledge that pouring of kerosene and setting her on fire by throwing a lighted matchstick is so imminently dangerous that in all probability such an act would cause injuries causing death."

C) The principle in ***Santosh***[40] was adopted in ***Suraj Jagannath Jadhav vs. State of Maharashtra***[41].

D) In ***State of Haryana vs. Krishan and Another***[42], where 36 persons had died after consuming spurious liquor, this Court set aside the

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40 (2015) 7 SCC 641
41 (2020) 2 SCC 693
42 (2017) 8 SCC 204

acquittal ordered by the High Court and restored the order of conviction under Section 302 IPC passed by the trial Court. It was observed:-

> "**33.** Insofar as argument predicated on Section 120-B IPC is concerned, even if we proceed on the basis that charge of conspiracy is not proved, it would be suffice to observe that adequate evidence is produced showing the culpability of the respondents, individually. Once it is shown that the spurious liquor was sold from the local vends belonging to the respondents coupled with the fact that after this tragedy struck, the respondents even tried to destroy remaining bottles clearly establishes that the respondents had full knowledge of the fact that the bottles contain substance methyl and also had full knowledge about the disastrous consequences thereof which would bring their case within the four corners of Section 300 Fourthly. The respondents cannot be treated as mere cat's paw and naive. They have exploited the resilient nature of bucolic and rustic villagers."

26. We may now consider some of the decisions of this Court in which deaths had occurred because of injuries sustained by the victims during sexual assault on them.

26.1 In ***State of Orissa vs. Dibakar Naik and Others***[43], a bench of two Judges of this Court dealt with a case where a lady of 23 years of age was gang raped and lost her life. The concerned accused were convicted *inter alia* under Sections 376 and 302 read with Section 34 of IPC by the trial Court. However, their conviction and sentence were set aside by the High Court. The appeals preferred by the State were partly allowed and while

[43] (2002) 5 SCC 323

convicting four accused under Sections 376 and 304 II IPC, it was observed by this Court:-

> **"23.** However, the nature of the injuries inflicted upon the person of the deceased indicate that the accused persons had not intended to cause her death. Dr Indramani Jena (PW 21) who conducted the post-mortem over the dead body of Chhabirani had found the following injuries:
>
> > "(*1*) One swelling 1" diameter irregularly circular over right mastoid process.
> >
> > (*2*) One swelling (which was black in colour) on the upper half of right breast 2" in diameter irregular circular.
> >
> > (*3*) On dissection I found the following:
> >
> > The swelling in right mastoid area had underlying haematoma. There was fracture of right fourth rib under Injury 2. Right-side chest was filled with blood of about one litre. The right lung was displaced and was injured in anterior surface by fractured rib. Heart chamber was empty, that is, there was no blood.
> >
> > (*4*) Stomach was empty.
> >
> > (*5*) There were two ecchymosis of ¼" in diameter each on posterior vaginal wall. The injuries were in 5 o'clock and 7 o'clock positions.
> >
> > (*6*) On examination of the vaginal smear I found dead spermatozoa and epithelial cells.
> >
> > (*7*) By the time of my examination, there was process of decomposition. Skin denudation had started. Tongue was protruded and bitten. There was bleeding from right angle of mouth and both ears. Abdomen was protruded due to foul gases. Death was within 48 hours of the PM examination."
>
> He has opined that all injuries were ante-mortem. Death was due to injuries causing internal haemorrhage. There were signs of forcible sexual intercourse. It was a case of violent type of intercourse. The injuries found were not in

normal course of sexual intercourse. Any violent assault even without rape could cause Injuries 1 and 2 and the corresponding internal injuries. Injury 2 with corresponding internal injury was sufficient to cause the death.

24. Whoever causes death by doing an act with the intention of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely, by such act, to cause death, is responsible for the commission of the offence of culpable homicide. Culpable homicide is murder if the act by which the death is caused is done with the intention of causing death and is not covered by any of the exceptions of Section 300 of the Indian Penal Code. As already noticed, in this case there is no evidence to show that the aforesaid accused persons proved to have been involved in the occurrence, had intended to cause the offence of murder within the meaning of Section 300 as punishable under Section 302 of the Indian Penal Code. However, on proof of the commission of offence of gang rape found to have been committed in a violent manner, they are assumed to be having the knowledge that by their action it was likely that the deceased would have died. The aforesaid accused are, therefore, guilty of the offence, punishable under Part II of Section 304 of the Indian Penal Code. While acquitting the other respondents we hold Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baba Tanti (A-7) and Madha Tanti @ Madhabananda Parmanik (A-11) guilty for the commission of offences punishable under Section 304 Part II read with Section 34 of the Indian Penal Code besides the commission of offence punishable under Section 376 read with Section 34 of the Indian Penal Code. The conviction and sentence awarded by the trial court to Birabar Mania (A-5), Babaji Mania (A-6), Bhira Behera @ Baba Tanti (A-7) and Madha Tanti @ Madhabananda Parmanik (A-11) under Section 376 of the Indian Penal Code is upheld. On proof of the offence punishable under Section 304 Part II read with Section 34 IPC, the aforesaid accused persons are sentenced to undergo rigorous imprisonment for 10 years. Both the sentences shall run concurrently".

(Emphasis supplied)

Though it was found that the offence of gang rape was committed in a violent manner and that the offenders must be having the knowledge that

it was likely that by their action the victim would die, the accused were not convicted of the offence of culpable homicide amounting to murder.

26.2 Similarly, in ***State, Govt of NCT of Delhi vs. Sunil and Another***[44], a girl of 4 years of age was raped by two accused and she lost her life as a result of injuries sustained during sexual assault. A bench of two Judges of this Court observed:-

> **"23.** Thus on consideration of the entire evidence in this case we have no doubt that the trial court had come to the correct conclusion that the two respondents were the rapists who subjected Anuradha to such savage ravishment. The Division Bench of the High Court has grossly erred in interfering with such a correct conclusion made by the trial court as the reasons adopted by the High Court for such interference are very tenuous. Nonetheless, it is difficult to enter upon a finding that the respondents are equally guilty of murder of Anuradha. In the opinion of PW 1 doctor the child died "due to intracranial damage consequent upon surface force impact to the head". The said opinion was made with reference to the subdural haematoma which resulted in subarachnoid haemorrhage. Such a consequence happened during the course of the violent ravishment committed by either both or by one of the rapists without possibly having any intention or even knowledge that their action would produce any such injury. Even so, the rapists cannot disclaim knowledge that the acts done by them on a little infant of such a tender age were likely to cause its death. Hence they cannot escape conviction from the offence of culpable homicide not amounting to murder.
>
> **24.** In the result, we set aside the impugned judgment of the High Court. We restore the conviction passed by the trial court under Sections 376 and 377 read with Section 34 IPC. The trial court awarded the maximum sentence to the respondents under the said counts i.e. imprisonment for life. The fact-situation in this case does not justify any reduction of that sentence. We also convict the respondents under Section 304 Part II, read with Section 34 IPC though it is

[44] (2001) 1 SCC 652

> unnecessary to award any sentence thereunder in view of the sentence of imprisonment for life awarded to the respondents under the other two counts."

26.3 In ***Amrit Singh vs. State of Punjab***[45], a girl of 7-8 years died as a result of excessive bleeding from her private parts because of sexual assault on her. The accused was found guilty of offences under Sections 302 and 376 and was awarded death sentence. A bench of two Judges of this Court observed:-

> "**21.** The opinion of the learned trial Judge as also the High Court that the appellant being aged about 31 years and not suffering from any disease, was in a dominating position and might have got her mouth gagged cannot be held to be irrelevant. Some marks of violence not only on the neck but also on her mouth were found. Submission of Mr Agarwal, however, that the appellant might not have an intention to kill the deceased, thus, may have some force. The death occurred not as a result of strangulation but because of excessive bleeding. The deceased had bleed half a litre of blood. Dr. Reshamchand Singh, PW 1 did not state that injury on the neck could have contributed to her death. The death occurred, therefore, as a consequence of and not because of any specific overt act on the part of the appellant."

This Court commuted the sentence to life imprisonment.

26.4 A bench of two Judges of this Court relied upon the decision in ***State of Orissa v. Dibakar Naik***[43] and affirmed the conviction and sentence under Sections 376 and 304 II IPC in ***State of AP v. T. Prasanna Kumar***[46].

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45 (2006) 12 SCC 79

46 (2003) 1 ACR 627 (SC) = JT 2002 (7) SC 635

26.5 On the other hand, in following four cases, two Judge benches of this Court affirmed the conviction and sentence under Sections 302 and 376 IPC where the victims, aged between 1½ to 8 years had lost their lives as a result of injuries sustained during sexual assault on them.

i) ***Mohd. Chaman vs. State (NCT of Delhi)***[47]
Age of the Victim : 1½ years

ii) ***Ramesh Harijan vs. State of Uttar Pradesh***[48]
Age of the Victim : 5-6 years

iii) ***Ram Deo Prasad vs. State of Bihar***[49]
Age of the Victim : 4 years

iv) ***Ramesh vs. State through Inspector of Police***[50]
Age of the Victim : 8 years

However, there is no discussion on the point in these cases.

26.6 Recently, a three Judge bench of this Court in ***Dattatraya Ambo Rokade vs. The State of Maharashtra***[51] had an occasion to consider where a girl of 5 years was subjected to sexual assault. She died as a result of injuries 1 to 5 suffered during the course of sexual assault on her. The conviction of the accused *inter alia* under Sections 302, 376(2)(f) of IPC

47 (2001) 2 SCC 28
48 (2012) 5 SCC 777
49 (2013) 7 SCC 725
50 (2014) 9 SCC 392
51 (2019) 13 SCALE 187

and under the provisions of POCSO Act was affirmed by this Court and it was observed:-

> "**125**. As a mature man, over fifty years of age, the Accused-Appellant should have known that the rape of a five year old child by an adult was dangerous and could lead to such injuries, as was in all probability likely to cause death."

27. The guiding principles were summed up in ***State of Madhya Pradesh*** v. ***Ram Prasad***[39] to the effect that even if there be no intention to cause death, "if there is such callousness towards the result and the risk taken is such that it may be stated that the person knows that the act is likely to cause death or such bodily injury as is likely to cause death" clause fourthly of Section 300 IPC will get attracted and that the offender must be taken to have known that he was running the risk of causing the death or such bodily injury as was likely to cause the death of the victim. Same principle is discernible from the decision of this Court in ***Dattatraya Ambo Rokade*** v. ***State of Maharashtra***[51]**.**

28. Considering the age of the victim in the present case, the accused must have known the consequence that his sexual assault on a child of 2 ½ years would cause death or such bodily injury as was likely to cause her death. The instant matter thus comes within the parameters of clause fourthly to Section 300 IPC and the question posed at the beginning of the discussion on this issue must be answered against the Appellant. The

Appellant is therefore guilty of having committed the offence of culpable homicide amounting to murder.

29. It must be observed at this stage that the decisions of this Court referred to in paragraphs 26.1, 26.2 and 26.4 hereinabove failed to consider the effect of clause fourthly to Section 300 IPC.

30. Before we turn to the submissions on sentence advanced by Ms. Mathur, learned Senior Advocate, it needs to be noted that about 67 cases were dealt with by this Court in last 40 years since the decision of this Court in ***Bachan Singh***[8], where i) the alleged offences were under Sections 376 and 302 IPC; and ii) the ages of the victims were 16 years or below. The Cases are:-

S. No	**Judgement Reported at Cause Title**	**Bench Strength**	**Age of the Victim**	**Cause of Death of the Victim Accused Convicted under Sections**	**Whether Death Sentence Imposed?**	**Sentence lesser than Death Sentence**
1.	(1981) 3 SCC 324 Kuljeet Singh @ Ranga v. Union of India	3 Judges	16 years	Injury to Neck with Kirpan S.302 r/w S.34 IPC Ss. 363, 365, 366 and 376 r/w S. 34 IPC	Yes	
2.	(1991) 1 SCC 752 Jumman Khan v. State of U.P.	2 Judges	6 years	Strangulation Ss. 302, 376 IPC	Yes	
3.	(1994) 3 SCC 381 Laxman Naik v. State of Orissa	2 Judges	7 years	Asphyxia by throttling Ss. 376, 302 IPC	Yes	
4.	(1996) 6 SCC 250 Kamta Tiwari v. State of M.P.	2 Judges	7 years	Strangulation Ss. 363, 376, 302 and 201 IPC	Yes	
5.	(1997) 1 SCC 272 State of A.P. v. Gangula Satya Murthy	2 Judges	16 years	Throttling Ss.302, 376 IPC		Life

6.	(1999) 4 SCC 108 Kumudi Lal v. State of U.P.	2 Judges	14 years	Strangulation Ss.376, 302 IPC S. 3(ii)(v) of the SC&ST Act, 1989		Life
7.	(1999) 6 SCC 60 Akhtar vs. State of U.P.	2 Judges	Age not specified	Asphyxia Ss. 302, 376 IPC		Life
8.	(1999) 9 SCC 581 Molai v. State of M.P.	3 Judges	16 years	Strangulation Ss. 376(2)(g), 302/34 and 201 IPC	Yes	
9.	(2000) 1 SCC 471 State of Maharashtra v. Suresh	2 Judges	4 years	Smothering Ss.302,376 IPC		Life
10.	(2001) 1 SCC 652 State, Govt. of NCT of Delhi v. Sunil	2 Judges	4 years	Intracranial damage consequent to surface force impact to the head, subdural haematoma causing subarachnoid haemorrhage Ss. 376 and 377 r/w S.34, S. 304 Part II r/w S. 34 IPC		Life
11.	(2001) 2 SCC 28 Mohd. Chaman v. State (NCT of Delhi)	2 Judges	1 ½ years	Haemorrhagic shock consequent to liver injury inflicted in the process of committing rape Ss. 302 and 376 IPC		Life
12.	(2001) 9 SCC 50 Raju v. State of Haryana	2 Judges	11 years	Shock and haemorrhage as a result of injuries (Blows by brick to the head and mouth) Ss. 302, 376, 363 IPC		Life
13.	(2001) 9 SCC 615 Bantu v. State of M.P.	2 Judges	6 years	Pressing nose and mouth and obstructing breath Ss. 302, 376 IPC		Life
14.	(2002) 1 SCC 622 State of Maharashtra v. Bharat Fakira Dhiwar	2 Judges	3 years	Massive cerebral haemorrhage resulting from the head injury Ss. 302, 376, 201 IPC		Life
15.	(2002) 1 SCC 731 Ganesh Lal v. State of Rajasthan	2 Judges	11 years	Throttling Ss. 376(2)(f), 302 and 404 IPC		Life
16.	JT 2002 (7) SC 635 State of A.P. v. T. Prasanna Kumar	2 Judges	16 years	Suffocation Ss. 304(Part II)/376 IPC		10 years RI
17.	(2003) 10 SCC 185 Subramani v. State	3 Judges	14 years	Strangulation Ss. 302, 376 IPC		Life
18.	(2003) 8 SCC 93 Amit v. State of Maharashtra	2 Judges	11-12 years	Strangulation Ss. 302, 376 IPC		Life

19.	(2004) 10 SCC 616 State of U.P. v. Devendra Singh	2 Judges	10 years	Throttling Ss. 302, 376 and 201 IPC		Life
20.	2005 (3) SCC 131 State of Maharashtra v. Mansingh	2 Judges	--	-- Ss. 302, 376, 201 IPC		Life
21.	(2005) 3 SCC 114 State of U.P. v. Satish	2 Judges	Less than 6 years	Smothering Ss. 302, 363, 366, 376(2)(f), 201 IPC	Yes	
22.	(2005) 3 SCC 127 Surendra Pal Shivbalakpal v. State of Gujarat	2 Judges	Minor	Asphyxia Ss. 363, 376 and 302 IPC		Life
23.	(2006) 9 SCC 278 State of U.P. v. Desh Raj	2 Judges	10 years	Strangulation Ss. 302, 376 IPC		Life
24.	(2006) 12 SCC 79 Amrit Singh v. State of Punjab	2 Judges	7/8 years	Bleeding from vulva as a result of rape Ss. 376 and 302 IPC		Life
25.	(2007) 11 SCC 467 Bishnu Prasad Sinha v. State of Assam	2 Judges	7/8 years	Asphyxia resulting from inhalation of semisolid watery substances Ss. 376(2)(g), 302 and 201 r/w S. 34 IPC		Life
26.	(2008) 7 SCC 561 Accused "X" v. State of Maharashtra	3 Judges	5 years 10 years	Strangulation Ss. 363, 376, 302 and 201 IPC	Yes	Refer to 26A.
26 A.	(2019) 7 SCC 1 Accused "X" v. State of Maharashtra	3 Judges	5 years 10 years	Strangulation Ss. 363, 376, 302 and 201 IPC		Commuted to Life Sentence
27.	(2008) 11 SCC 113 Bantu v. State of U.P.	2 Judges	5 years	Shock and haemorrhage as a result of injuries due to insertion of the wooden stick into the vagina Ss. 364, 376 and 302 IPC	Yes	
28.	(2008) 15 SCC 269 Shivaji @ Dadya Shankar Alhat v. State of Maharashtra	2 Judges	9 years	Strangulation Ss. 302, 376(2)(f) IPC	Yes	
29.	(2009) 15 SCC 259 Pawan v. State of Uttaranchal	3 Judges	6 years	Strangulation Ss. 302/34, Ss. 376, 377, Ss. 201/34 IPC		Life
30.	(2010) 1 SCC 58 Sebastian v. State of Kerala	2 Judges	2 years	Combined effects of drowning and blunt injuries sustained around nose and mouth		Life

				Ss. 302, 364, 369, 376(2)(f), 392, 449 IPC		
31.	(2010) 2 SCC 583 Aftab Ahmad Anasari v. State of Uttaranchal	2 Judges	5 years	Strangulation Ss. 302, 376, 201 IPC		Life
32.	(2011) 2 SCC 764 Rameshbhai Chandubhai Rathod (2) v. State of Gujarat	3 Judges	Class IV student – aged 10 years	Neurogenic shock because of sexual intercourse and multiple injuries. Ss. 363, 366, 376, 302, 397 IPC		Life
33.	(2011) 5 SCC 317 Mohd. Mannan v. State of Bihar	2 Judges	7 years	Asphyxia and haemorrhage as a result of strangulation Ss. 366, 376, 201, 302 IPC	Yes	Refer to 33A.
33 A.	(2019) 16 SCC 584 Mohd. Mannan v. State of Bihar	3 Judges	7 years	Asphyxia and haemorrhage as a result of strangulation Ss. 366, 376, 201, 302 IPC		Commuted to Life Sentence
34.	(2011) 4 SCC 80 Surendra Koli v. State of U.P.	2 Judges	Many Children	Cooked, body parts consumed Ss. 302, 364, 376 IPC	Yes	
35.	(2011) 15 SCC 352 Purna Chandra Kusal v. State of Orissa	2 Judges	5 years	Asphyxia Ss. 302, 376 IPC		Life
36.	(2011) 12 SCC 56 Haresh Mohandas Rajput v. State of Maharashtra	2 Judges	10 years	Strangulation Ss. 302, 376 IPC		Life
37.	(2012) 4 SCC 107 Amit v. State of U.P.	2 Judges	3 years	Been hit on her head and her left side of the face, strangulated, unnatural offence and rape was committed on her Ss. 364, 376, 377, 302 and 201 IPC		Life
38.	(2013) 9 SCC 795 Chhote Lal v. State of M.P.	2 Judges	10 years	-- Ss. 376(2) and 302		Life
39.	(2012) 5 SCC 766 Neel Kumar v. State of Haryana	2 Judges	4 years	Asphyxia because of throttling Ss. 302/376(2)(f) and 201		Life
40.	(2012) 5 SCC 777 Ramesh Harijan v. State of U.P.	2 Judges	5-6 years	Shock and haemorrhage as a result of ante-mortem vaginal injuries. Ss. 302, 376		Life
41.	(2012) 4 SCC 37 Rajendra Pralhadrao Wasnik v. State of Maharashtra	2 Judges	3 years	Cause of death was rape and asphyxia Ss. 376(2)(f), 377 and 302 IPC	Yes	Refer to 41A.

41 A.	(2019) 12 SCC 460 Rajendra Pralhadrao Wasnik v. State of Maharashtra	2 Judges	3 years	Cause of death was rape and asphyxia Ss. 376(2)(f), 377 and 302 IPC		Commuted to Life Sentence
42.	(2012) 7 SCC 699 Kashinath Mondal v. State of W.B.	2 Judges	Not given	Death caused by rape, strangulation Ss. 376 and 302 IPC		Life
43.	(2012) 9 SCC 742 State of U.P. v. Munesh	2 Judges	11 years	Asphyxia due to strangulation and also due to pre-mordial injuries Ss. 302, 376 IPC		Life
44.	(2013) 5 SCC 546 Shankar Kisanrao Khade v. State of Maharashtra	2 Judges	11 years	Asphyxia due to strangulation Ss. 302, 376, 366-A and 363 r/w S.34 IPC		Life
45.	(2013) 7 SCC 725 Ram Deo Prasad v. State of Bihar	2 Judges	4 years	Excessive haemorrhage leading to shock from ante-mortem injuries around genitalia and private parts by some sexual offences Ss. 376, 302 IPC		Life
46.	(2013) 10 SCC 721 State of Rajasthan v. Jamil Khan	2 Judges	Below 5 years	Asphyxia due to strangulation Ss. 302, 376, 201 IPC		Life
47.	(2014) 5 SCC 353 Rajkumar v. State of Madhya Pradesh	2 Judges	14 years	Asphyxia as a result of strangulation Ss. 302, 376, 450 IPC		Life
48.	(2014) 9 SCC 392 Ramesh v. State	2 Judges	8 years	Neurogenic shock due to rape Ss. 376, 302, 201 IPC		Life
49.	(2014) 12 SCC 274 Selvam v. State	3 Judges	9 years	Injury on the head (from a cot) Ss. 302, 376, 379 and 201 IPC		Life
50.	(2015) 2 SCC 783 Duryodhan Rout v. State of Orissa	2 Judges	10 years	Throttling Ss. 376, 302 and 201 IPC		Life
51.	(2015) 1 SCC 253 Vasanta Sampat Dupare v. State of Maharashtra	3 Judges	4 years	Cause of death was head injury, associated with the injury on the genital region	Yes Also refer to 51A.	

				Ss. 302, 376(2)(f), 363, 367, 201 IPC		
51 A.	(2017) 6 SCC 631 Vasanta Sampat Dupare v. State of Maharashtra	3 Judges	4 years	Cause of death was head injury, associated with the injury on the genital region Ss. 302, 376(2)(f), 363, 367, 201 IPC	Confirms Death Penalty	
52.	(2015) 2 SCC 775 Darga Ram v. State of Rajasthan	2 Judges	7 years	Homicidal death on account of injury on head Ss. 376, 302 IPC		Convicted but Sentence set aside (Juvenile)
53.	(2015) 16 SCC 492 Kalu Khan v. State of Rajasthan	3 Judges	4 years	Extensive injuries at neck and other vital parts of the body Ss. 363, 364, 376(2)(f), 302, 201 IPC		Life
54.	(2016) 3 SCC 19 State of Assam v. Ramen Dowarah	2 Judges	Not Estd. (Young)	Burn injuries Ss. 376, 302, 454 IPC		Life
55.	(2016) 9 SCC 325 Kadamanian v. State	2 Judges	Not mention ed	Face crushed with stones (Corresponding injuries on head) Ss. 302, 376, 404, 201 IPC		Life
56.	(2016) 9 SCC 675 Tattu Lodhi v. State of Madhya Pradesh	3 Judges	7 years	Asphyxia from choking out the throat by strangulation of the neck Ss. 302,364,363, 376(2)(f)/511 & 201 IPC		Life
57.	(2017) 4 SCC 393 Sunil v. State of Madhya Pradesh	3 Judges	4 years	Strangulation/Asphyxia Ss. 302, 363, 367, 376(2)(f) IPC		Life
58.	(2019) 8 SCC 371 Sachin Kumar Singhraha v. State of Madhya Pradesh	3 Judges	5 years	Ante-mortem drowning Ss. 376-A, 302 and 201 Part II IPC Ss.5 (i) and 5(m) r/w S.6 of POCSO Act		Life
59.	(2019) 13 SCC 640 Babasaheb Maruti Kamble v. State of Maharashtra	3 Judges	Not mention ed	Head injury with compression of neck Ss. 302, 376(2)(f), 342 IPC		Life
60.	(2019) 16 SCC 380 Raju Jagdish Paswan v. State of Maharashtra	3 Judges	9 years	Drowning Ss. 302, 376(2)(f) and 201 IPC		Life
61.	(2019) 16 SCC 278	3 Judges	8 years	-- Ss. 302, 363, 366 and 376(2)(i) IPC		Life

	Nand Kishore v. State of Madhya Pradesh					
62.	(2019) 4 SCC 210 Vijay Raikwar v. State of M.P.	3 Judges	7 ½ years	Asphyxia due to throttling Ss. 376(2)(f), 201 IPC Ss.5(i), 5(m) and 5(r) r/w S.6 POCSO Act		Life
63.	(2019) 8 SCC 382 Parsuram v. State of M.P.	3 Judges	Minor	Asphyxia as a result of strangulation Ss. 302, 376		Life
64.	2019 (13) SCALE 187 Dattatraya v. State of Maharashtra	3 Judges	5 years	Asphyxia due to smothering, associated with head injuries and sexual assault Ss. 302, 376(2)(f), 377 IPC r/w Ss. 3, 4 and 5 POCSO		Life
65.	(2019) 7 SCC 716 Manoharan v. State	3 Judges	10 years	Drowning Ss. 376(2)(f) & 376(2)(g), 302, 201 IPC	Yes Also refer to 65A.	
65 A.	2019 (14) SCALE 800 Manoharan v. State	3 Judges	10 years	Drowning Ss. 376(2)(f) & 376(2)(g), 302, 201 IPC	Confirms Death Penalty	
66.	(2019) 9 SCC 622 Ravi S/o Ashok Ghumare v. State of Maharashtra	3 Judges	2 years	Throttling Ss. 302, 363, 376, 377 IPC	Yes	
67.	(2019) 9 SCC 689 Ravishankar v. State of M.P.	3 Judges	13 years	Throttling Ss. 363, 366, 376(2)(i), 376(2)(n), 376(2)(j), 376(2)(m), 376-A, 302 and 201 IPC		Yes

Out of these 67 cases, this Court affirmed the award of death sentence to the accused in 15 cases. In three (at Sr. Nos. 26A, 33A and 41A) out of said 15 cases, the death sentence was commuted to life sentence by this Court in Review Petitions. Out of remaining 12 cases, in two cases (where Review Petitions were heard in open Court in terms of law laid down in ***Mohd. Arif alias Ashfaq vs. Registrar, Supreme Court of India***[52]***)***

[52] (2014) 9 SCC 737

namely in cases at Sr. Nos. 51A and 65A, the death sentence was confirmed by this Court and the Review Petitions were dismissed. Thus, as on date, the death sentence stands confirmed in 12 out of 67 cases where the principal offences allegedly committed were under Sections 376 and 302 IPC and where the victims were aged about 16 years or below.

Out of these 67 cases, at least in 51 cases the victims were aged below 12 years. In 12 out of those 51 cases, the death sentence was initially awarded. However, in 3 cases (at Sr. Nos. 26A, 33A and 41A) the death sentence was commuted to life sentence in Review.

In 2 out of aforesaid 67 cases (at Sr. Nos. 58 and 67), the offences were committed on 23.02.2015 and 22.05.2015 respectively i.e., after the Amendment Act received the assent of the President and was published on 02.04.2013 (but given retrospective effect from 03.02.2013). The conviction was also under Section 376A of IPC and the evidence showed specific acts such as drowning the victim or throttling her. In the first case, the age of the victim was 5 years while in the second case the victim was aged 13 years. In the first case the sentence imposed by this Court was 25 years of imprisonment without remission while in the second, the life sentence for the remainder of the life of the accused, was imposed.

31. We now turn to the first submission advanced by Ms. Mathur, learned Senior Advocate on the issue of sentence. Section 235 (2) of the

Code mandates that the accused must be heard on sentence. In the instant case the order of sentence was made on the same day the order of conviction was pronounced. In ***Santa Singh v. State of Punjab***[53] the accused was convicted and sentenced to death by one single judgment and thus a bench of two judges of this Court found that there was infraction of Section 235 (2) of the Code. The sentence of death was therefore set aside and the matter was remanded to the Sessions Court. Whether, for non-compliance of Section 235 (2) of the Code, the matter be remanded in the light of the decision in ***Santa Singh v. State of Punjab***[53] was thereafter considered by a bench of three judges of this Court in ***Dagdu v. State of Maharashtra***[54]. Chandrachud, CJ. who delivered the leading judgment, observed: -

> **"79.** But we are unable to read the judgment in *Santa Singh* as laying down that the failure on the part of the Court, which convicts an accused, to hear him on the question of sentence must necessarily entail a remand to that Court in order to afford to the accused an opportunity to be heard on the question us sentence. The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the

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53 (1976) 4 SCC 190
54 (1977) 3 SCC 68

> accused sufficient time to produce the necessary data and to make his contentions on the question of sentence. That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court."

Goswami, J., authored a concurring opinion, the relevant part of which was quoted in ***B. A. Umesh v. High Court of Karnataka***[31].

32. In ***Allauddin Mian v. State of Bihar***[11], the order of sentence was passed on the same day the order of conviction was pronounced and a bench of two judges of this Court commuted the sentence of death to life imprisonment. In ***Malkiat Singh v. Stat of Punjab***[12], a bench of three judges of this Court did not deem it appropriate to remand the matter for hearing the accused on sentence after six years and commuted the sentence of death to life imprisonment. In ***Ajay Pandit v. State of Maharashtra***[13], a bench of two judges of this Court found that the opportunity afforded to the accused in terms of Section 235 (2) of the Code was purely mechanical and no genuine efforts were made to elicit any information either from the accused or from the prosecution as to whether any circumstances existed which might influence the High Court to avoid award of death sentence.

33. In ***B. A. Umesh v. High Court of Karnataka***[31], a bench of three judges of this Court considered the decisions on the point including the

question whether the matter was required to be remanded to hear the accused on sentence. Paragraphs 11 to 13 of the decision were as under :-

> **"11.** In *Dagdu* v. *State of Maharashtra*[54] Goswami, J. observes as under:
>
> > "*90.* I would particularly emphasise that there is no mandatory direction for remanding any case in *Santa Singh* v. *State of Punjab*[53] nor is remand the inevitable recipe of Section 235(2), Code of Criminal Procedure, 1973. Whenever an appeal court finds that the mandate of Section 235(2) CrPC for a hearing on sentence had not been complied with, it, at once, becomes the duty of the appeal court to offer to the accused an adequate opportunity to produce before it whatever materials he chooses in whatever reasonable way possible. Courts should avoid laws' delay and necessarily inconsequential remands when the accused can secure full benefit of Section 235(2) CrPC even in the appeal court, in the High Court or even in this Court. We have unanimously adopted this very course in these appeals."
>
> **12.** In another three-Judge Bench case in *Tarlok Singh* v. *State of Punjab*[55], at para 4, Krishna Iyer, J. writes:
>
> > "*4.* In *Santa Singh* v. *State of Punjab*[53] this Court considering Section 235(2) CrPC held that the hearing contemplated by that sub-section is not confined merely to hearing oral submissions but extends to giving an opportunity to the prosecution and the accused to place before the court facts and materials relating to the various factors bearing on the question of sentence and, if they are contested by either side, then to produce evidence for the purpose of establishing the same. Of course, in that particular case this Court sent the case back to the Sessions Court for complying with Section 235(2) CrPC. It may well be that in many cases sending the case back to the Sessions Court may lead to more expense, delay

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55 (1977) 3 SCC 218

> and prejudice to the cause of justice. In such cases, it may be more appropriate for the appellate court to give an opportunity to the parties in terms of Section 235(2) to produce the materials they wish to adduce instead of going through the exercise of sending the case back to the trial court. This may, in many cases, save time and help produce prompt justice."

> **13.** In *Deepak Rai* v. *State of Bihar*[56], yet another three-Judge Bench case, Dattu, J. observes in para 54 as under:
>
> > "*54.* Herein, it is not the case of the appellants that the opportunity to be heard on the question of sentence separately as provisioned for under Section 235(2) of the Code was not provided by the courts below. Further, the trial court has recorded and discussed the submissions made by the appellants and the prosecution on the said question and thereafter, rejected the possibility of awarding a punishment less harsh than the death penalty. However, the High Court while confirming the sentence has recorded[57] reasons though encapsulated. The High Court has noticed the motive of the appellants being non-withdrawal of the case by the informant and the ghastly manner of commission of crime whereby six innocent persons as young as 3-year old were charred to death and concluded that the incident shocks the conscience of the entire society and thus deserves nothing lesser but death penalty." "

34. Subsequently, the issue was again considered in ***Vasanta Sampat Dupare v. State of Maharashtra***[32] and after referring to the decisions of this Court including those rendered in ***Allauddin Mian v. State of Bihar***[11],

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56 (2013) 10 SCC 421

57 State of Bihar v. Deepak Rai, 2010 SCC OnLine Pat 949

Malkiat Singh v. State of Punjab[12] and ***B. A. Umesh v. High Court of Karnataka***[31], a bench of three judges of this Court observed : -

> "**16.** This Court then relied on the principle laid down in *Dagdu* v. *State of Maharashtra*[54] which was followed subsequently by another Bench of three learned Judges in *Tarlok Singh* v. *State of Punjab*[55]. In the circumstances, merely because no separate date was given for hearing on sentence, we cannot find the entire exercise to be flawed or vitiated. Since we had allowed the petitioner to place the relevant material on record in the light of the principles laid down in *Dagdu* v. *State of Maharashtra*[54] we will proceed to consider the material so placed on record and weigh these factors and the aggravating circumstances as found by the Court in the judgment under review."

Recently, in ***Manoj Suryavanshi vs. State of Chhattisgarh***[58], a bench of three Judges of this Court, after considering the relevant decisions on the point, concluded:-

> "**27.2.** Thus, there is no absolute proposition of law that in no case there can be conviction and sentence on the same day. There is no absolute proposition of law laid down by this Court in any of the decisions that if the sentence is awarded on the very same day on which the conviction was recorded, the sentencing would be vitiated."

Thus, merely on account of infraction of Section 235 (2) of the Code, the death sentence ought not to be commuted to life imprisonment. In any case we have afforded adequate and sufficient opportunity to the Appellant

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58 (2020) 4 SCC 451

to place all the relevant materials on record in the light of principle laid down in ***Dagdu v. State of Maharashtra***[54]***.***

35. Before we deal with the second submission on sentence, it must be observed that as laid down by this Court in ***Sharad Birdhichand Sarda v. State of Maharashtra***[34], a case based on circumstantial evidence has to face strict scrutiny. Every circumstance from which conclusion of guilt is to be drawn must be fully established; the circumstances should be conclusive in nature and tendency; they must form a chain of evidence so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused; and such chain of circumstances must be consistent only with the hypothesis of the guilt of the accused and must exclude every possible hypothesis except the one sought to be proved by the prosecution. The decision in ***Sharad Birdhichand Sarda v. State of Maharashtra***[34] had noted the consistent view on the point including the decision of this Court in ***Hanumant v. State of Madhya Pradesh***[59] in which a bench of three judges of this Court had ruled:-

> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be

[59] (1952) SCR 1091

> proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

Secondly, on the issue as to what should be the approach in the matter of sentence, a bench of three judges of this Court in ***Vadivelu Thevar v. State of Madras***[60] stated:-

> "Lastly, it was urged that assuming that the court was inclined to act upon the testimony of the first witness and to record a conviction for murder as against the first appellant, the court should not impose the extreme penalty of law and in the state of the record as it is, the lesser punishment provided by law should be deemed to meet the ends of justice. We cannot accede to this line of argument. The first question which the court has to consider in a case like this, is whether the accused has been proved, to the satisfaction of the court, to have committed the crime. If the court is convinced about the truth of the prosecution story, conviction has to follow. The question of sentence has to be determined, not with reference to the volume or character of the evidence adduced by the prosecution in support of the prosecution case, but with reference to the fact whether there are any extenuating circumstances which can be said to mitigate the enormity of the crime. If the court is satisfied that there are such mitigating circumstances, only then, it would be justified in imposing the lesser of the two sentences provided by law. In other words, the nature of the proof has nothing to with the character of the punishment. The nature of the proof can only bear upon the question of conviction - whether or not the accused has been proved to be guilty. If the court comes to the conclusion that the guilt has been brought home to the accused, and conviction follows, the process of proof is at an end. The question as to what punishment should be imposed is for the court to decide in all the circumstances of the case with particular reference to any extenuating circumstances. But the nature of proof, as we have indicated, has nothing to do with the question of punishment. In this case, there are no such extenuating circumstances which can be legitimately urged in support of the view that the lesser penalty under s. 302 of the Indian Penal Code, should meet the ends of justice. It

[60] (1957) SCR 981 – This was, however, not a case of death sentence.

> was a cold-blooded murder. The accused came for the second time, determined to see that their victim did not possibly escape the assassins' hands."
>
> (Emphasis added)

It was laid down that the question of sentence must be determined not with reference to the volume or character of the evidence on record but with reference to the circumstances which mitigate the enormity of the crime and that the nature of proof can have bearing upon the question of sentence and not with the question of punishment.

36. We may now consider some of the cases where death penalty was imposed when conviction was based on circumstantial evidence.

(i) ***Jumman Khan vs. State of U.P. and Another***[61]***;*** while dismissing Writ Petition of a death convict this Court noted in para 4 the earlier order passed by a bench of two judges confirming the death sentence.

> "**4.** Feeling aggrieved by the judgment of the High Court, the petitioner filed S.L.P. (Criminal) No. 558 of 1986. This Court by its order dated March 20, 1986 dismissed the SLP observing thus:
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> > "Although the conviction of the petitioner under Section 302 of the Indian Penal Code, 1860 rests on circumstantial evidence, the circumstantial evidence against the petitioner leads to no other inference except that of his guilt and excludes every hypothesis of his innocence. Apart from the circumstances brought out by the prosecution, each one of which has been

[61] (1991) 1 SCC 752

proved, there is no extra-judicial confession which lends support to the prosecution case that the child had been raped by the petitioner and thereafter strangulated to death.

Failure to impose a death sentence in such grave cases where it is a crime against the society — particularly in cases of murders committed with extreme brutality — will bring to naught the sentence of death provided by Section 302 of the Indian Penal Code. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust, is nothing but death as a measure of social necessity and also as a means of deterring other potential offenders. The sentence of death is confirmed."

(ii) ***Amrutlal Someshwar Joshi vs. State of Maharashtra (I)***[62] :-

"19. Learned counsel for the appellant further submitted that the case rests on the circumstantial evidence and the quality of the evidence adduced is not of that high order and therefore it is not safe to impose death sentence. In this context he relied on a judgment of this Court in *Shankar* v. *State of T.N.*[63] We have gone through that judgment and it is only indicated there that the quality of evidence also would be a factor to be taken into consideration. The circumstantial evidence in this case cannot at all be said to be qualitatively inferior in any manner. It is well-settled that if there is clinching and reliable circumstantial evidence, then that would be the best evidence to be safely relied upon. As observed in *Bachan Singh* v. *State of Punjab*[8], there may be many circumstances justifying the passing of the lighter sentence as there are countervailing circumstances of aggravation warranting imposition of

62 (1994) 6 SCC 186
63 (1994) 4 SCC 478

death sentence. In *Machhi Singh* v. *State of Punjab*[9], a Bench of three Judges of this Court having noted the principles laid down in *Bachan Singh case*[8] regarding the formula of "rarest of rare cases" for imposing death sentence, observed that the guidelines indicated in *Bachan Singh case*[8] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. It was further observed as under: (SCC p. 489, para 40)

> "If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

Likewise in *Allauddin Mian* v. *State of Bihar*[11], the same view has been reiterated thus: (SCC p. 22, para 12)

> "However, in order that the sentences may be properly graded to fit the degree of gravity of each case, it is necessary that the maximum sentence prescribed by law should, as observed in *Bachan Singh case*[8], be reserved for the 'rarest of rare' cases which are of an exceptional nature. Sentences of severity are imposed to reflect the seriousness of the crime, to promote respect for the law, to provide just punishment for the offence, to afford adequate deterrent to criminal conduct and to protect the community from further similar conduct. It serves a three-fold purpose (*i*) punitive (*ii*) deterrent and (*iii*) protective. That is why this Court in *Bachan Singh case*[8] observed that when the question of choice of sentence is under consideration the Court must not only look to the crime and the victim but also the circumstances of the criminal and the impact of the crime on the community. Unless the nature of the crime and the circumstances of the offender reveal that the criminal is a menace to the society and the sentence of life imprisonment would be altogether inadequate, the court should ordinarily impose the lesser punishment and not the extreme punishment of

> death which should be reserved for exceptional cases only."
>
> Bearing these principles in mind and after having given our anxious consideration, we are of the firm opinion in view of the above circumstances that the case of the appellant comes within the category of "rarest of rare cases" and the two courts below have rightly awarded the death sentence."
>
> (Emphasis supplied)

(iii) ***Kamta Tiwari vs. State of M.P.***[64]

(iv) ***Molai and Another vs. State of M.P.***[65]

(v) ***Shivaji alias Dadya Shankar Alhat vs. State of Maharashtra***[66]*;* while affirming the conviction and sentence of death for offences under Sections 376 and 302 IPC it was observed:-

> "**27.** The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death sentences are awarded for rape and murder and the like, there is practically no scope for having an eyewitness. They are not committed in the public view. But the very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect. The plea of the learned amicus curiae that the conviction is based on circumstantial evidence and,

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64 (1996) 6 SCC 250
65 (1999) 9 SCC 581
66 (2008) 15 SCC 269

therefore, the death sentence should not be awarded is clearly unsustainable."

(emphasis supplied)

vi) ***Vasanta Sampat Dupare v. State of Maharashtra***[6]

"**38.** On a critical analysis of the evidence on record, we are convinced that the circumstances that have been clearly established are: that the appellant was seen in the courtyard where the minor girl and other children were playing; that the appellant was seen taking the deceased on his bicycle; that he had gone to the grocery shop owned by PW 6 to buy Minto fresh chocolate along with her; that the accused had told PW 2 that the child was the daughter of his friend and he was going to "Tekdi-Wadi" along with the girl; that the appellant had led to the discovery of the dead body of the deceased, the place where he had washed his clothes and at his instance the stones smeared with blood were recovered; that the medical report clearly indicates about the injuries sustained by the deceased on her body; that the injuries sustained on the private parts have been stated by the doctor to have been caused by forcible sexual intercourse; that the stones that were seized were smeared with blood and the medical evidence corroborates the fact that injuries could have been caused by battering with stones; that the chemical analysis report shows that the blood group on the stones matches with the blood group found on the clothes of the appellant; that the appellant has not offered any explanation with regard to the recovery made at his instance; and that nothing has been stated in his examination under Section 313 CrPC that there was any justifiable reason to implicate him in the crime in question. Thus, we find that each of the incriminating circumstances has been clearly established and the chain of circumstances are conclusive in nature to exclude any kind of hypothesis, but the one proposed to be proved, and lead to a definite conclusion that the crime was committed by the accused. Therefore, we have no hesitation in affirming the judgment of conviction rendered by the learned trial Judge and affirmed by the High Court."

(Emphasis supplied)

vii) **Manoharan v. State**[67]

"23. ….. The entire chain of events has been made out and despite this being a case of circumstantial evidence,

[67] (2019) 7 SCC 716

> the prosecution has clearly proved its case beyond reasonable doubt. The courts below are right in convicting the appellant of rape and murder."
>
> (Emphasis supplied)

The decisions at Sl. Nos.(iv), (vi) and (vii) were by benches of three Judges and dealt with cases where the convictions were *inter* alia under Sections 302, 376 IPC and the victims were aged 16 years or below; while the others were by benches of two Judges.

37. However, there is a definite line of cases, where thoughts have been expressed that in cases of conviction based on circumstantial evidence, the death sentence should not normally be imposed. Some such cases are:-

(i) ***Aloke Nath Dutta v. State of West Bengal***[68]:-

> "**81.** There is no eyewitness to the occurrence. Nobody has noticed any suspicious conduct on the part of the appellants indicating their role in committing murder or disposing of the dead body. While dealing with a case of grave nature like the present one, there is always a danger that conjectures and suspicion may take the place of legal truth. This Court has laid down guidelines from time to time in regard to a finding of guilt solely on the basis of circumstantial evidence in a number of cases. …. …."

(ii) ***Bishnu Prasad Sinha v. State of Assam***[14]:-

> "**55.** The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded.

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[68] (2007) 12 SCC 230

> Moreover, Appellant 1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt."
>
> (Emphasis supplied)

(iii) ***Swamy Shraddananda (2) v. State of Karnataka***[69]

While considering the decision of this Court in ***Bachan Singh***[8], it was observed:-

> "**36.** Arguing against standardisation of cases for the purpose of death sentence the Court observed that even within a single category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. The Court further observed that standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity.
>
> … … …
>
> "**48.** That is not the end of the matter. Coupled with the deficiency of the criminal justice system is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh*[8] laid down the principle of the rarest of rare cases. *Machhi Singh*[9] for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh*[9] categories were followed uniformly and consistently.
>
> **49.** In *Aloke Nath Dutta* v. *State of W.B.*[68] Sinha, J. gave some very good illustrations from a number of recent decisions in which on similar facts this Court took contrary views on giving death penalty to the convict. He finally observed that "courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar" and further "it is evident that different Benches had taken different view in the matter". Katju, J. in his order passed in this appeal said that he did not agree

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69 (2008) 13 SCC 767

> with the decision in *Aloke Nath Dutta*[68] in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju, J. may be right that there cannot be an absolute rule excluding death sentence in all cases of circumstantial evidence (though in *Aloke Nath Dutta*[68] it is said "normally" and not as an absolute rule). But there is no denying the illustrations cited by Sinha, J. which are a matter of fact."
>
> (emphasis supplied)

(iv) ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra***[70]

Relying upon the testimony of an approver, the sentence of death was awarded. The decision of this Court in ***Mohan and ors. vs. State of Tamil Nadu***[71] was distinguished thus:-

> "**161.** Mr Adsure has placed strong reliance on a decision of this Court in *Mohan* v. *State of T.N.*[71] to contend that the manner in which the murder was committed itself points out that all the accused deserved death penalty. In our opinion the facts of that case are clearly distinguishable from the present one. That case involved the murder of a minor. It clearly is not applicable to the present case. Moreover, the Court in that case too recognised that proper and due regard must be given to the mitigating circumstances in every case."

After considering the mitigating circumstances it was observed:-

> "**167.** The entire prosecution case hinges on the evidence of the approver. For the purpose of imposing death penalty, that factor may have to be kept in mind.

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[70] (2009) 6 SCC 498

[71] (1998) 5 SCC 336 – case of kidnapping of a minor boy of 10 years for ransom and murder. Award of death sentence to appellants Mohan and Gopi was affirmed by this Court.

We will assume that in *Swamy Shraddananda (2)*[69], this Court did not lay down a firm law that in a case involving circumstantial evidence, imposition of death penalty would not be permissible. But, even in relation thereto the question which would arise would be whether in arriving at a conclusion some surmises, some hypothesis would be necessary in regard to the manner in which the offence was committed as contradistinguished from a case where the manner of occurrence had no role to play. Even where sentence of death is to be imposed on the basis of the circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case.

168. We must, however, add that in a case of this nature where the entire prosecution case revolves round the statement of an approver or is dependent upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose, at the stage of sentencing evaluation of evidence would not be permissible, the courts not only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view the evidences which have been brought on record on behalf of the parties and in particular the accused for imposition of a lesser punishment. A statement of approver in regard to the manner in which crime has been committed vis-à-vis the role played by the accused, on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine."

(emphasis supplied)

(v) ***Purna Chandra Kusal v. State of Orissa***[16]

"7. We are, however, of the opinion that the death sentence in the present case was not called for. The appellant was a labourer living in a basti alongside the railway line and was, at the time of the incident, about 30 years of age. We also see that the entire evidence is circumstantial in nature. Concededly, there is no inflexible rule that a death sentence cannot be awarded

in a case resting on circumstantial evidence but courts are as a matter of prudence, hesitant in awarding this sentence, in such a situation. It is true that the crime was indeed a heinous one as the victim was only five years of age and the daughter of PW 5 who was a neighbour of the appellant. On a cumulative assessment of the facts, we are of the opinion that the death sentence should be commuted into one for life."

(Emphasis supplied)

(vi) ***Neel Kumar v. The State of Haryana***[72]

(vii) ***Sushil Sharma vs. State (NCT of Delhi)***[73]

(viii) ***Mahesh Dhanaji Shinde vs. State of Maharashtra***[74]

(ix) ***Kalu Khan v. State of Rajasthan***[17]

"**24.** In respect of award of death sentence in cases where sole basis for conviction is circumstantial evidence, this Court in *Swamy Shraddananda* v. *State of Karnataka*[75], has acknowledged that such cases have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. This Court cautioned that convictions based on "seemingly conclusive circumstantial evidence" should not be presumed as foolproof incidences and the fact that the same are based on circumstantial evidence must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Further, this Court observed that any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the "culpability calculus", must attract negative attention while deciding maximum penalty for murder.

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72 (2012) 5 SCC 766
73 (2014) 4 SCC 317
74 (2014) 4 SCC 292
75 (2007) 12 SCC 288 para 87

25. This Court noticed certain decisions under the American death penalty jurisprudence as follows: (*Swamy Shraddananda case* [75], SCC pp. 320-21, paras 88-90)

> "*88*. One of the older cases in this league dates back to 1874, *Merritt* v. *State*[76], where the Supreme Court of Georgia described the applicable law in Georgia as follows:
>
> > 'By the Penal Code of this State the punishment of murder shall be death, except when the conviction is founded solely on circumstantial testimony. When the conviction is had solely on circumstantial testimony, then it is discretionary with the Presiding Judge to impose the death penalty or to sentence the defendant to imprisonment in the penitentiary for life, unless the jury … shall recommend that the defendant be imprisoned in the penitentiary for life; in that case the Presiding Judge has no discretion, but is bound to commute the punishment from death to imprisonment for life in the penitentiary.'
>
> *89*. Later case of *Jackson* v. *State*[77], Ala at pp. 29-30 followed the aforementioned case. [Also see S.M. Phillipps, *Famous Cases of Circumstantial Evidence with an Introduction on the Theory of Presumptive Proof*, 50-52 (1875).]
>
> *90*. In *United States* v. *Quinones*[78], F Supp 2d at p. 267 the Court remarked:

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[76] (1874) 52 Gs 82
[77] 74 Ala 26 (1883)
[78] 205 F Supp. 2d 256 (SDNY 2002)

> 'Many States that allow the death penalty permit a conviction based solely on circumstantial evidence only if such evidence excludes to a moral certainty every other reasonable inference except guilt.'"

26. In *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra*[70], all the accused persons including the appellant were unemployed young men in search of employment. In execution of a plan proposed by the appellant and accepted by them, they kidnapped their friend with the motive of procuring ransom from his family but later murdered him and after cutting his body into pieces disposed of the same at different places. One of the accused persons turned approver and the prosecution case was based entirely on his evidence. The trial court awarded death sentence to the appellant. The High Court confirmed the death sentence. In appeal, this Court observed that punishment cannot be determined on grounds of proportionality alone. This Court observed that though there was nothing to show that the appellant could not be reformed and rehabilitated and the manner and method of disposal of the dead body of the deceased reflected most foul and despicable case of murder, mere mode of disposal of the dead body may not by itself be made the ground for inclusion of a case in the rarest of rare category for the purpose of imposition of death sentence. Other factors require to be considered along with the aforesaid. This Court was of the view that the fact that the prosecution case rested on the evidence of the approver, will have to be kept in mind. Further, that where the death sentence is to be imposed on the basis of circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case. It was further observed that the discretion given to the court in such cases assumes onerous importance and its exercise becomes extremely difficult because of the irrevocable character of death penalty. Where two views ordinarily could be taken, imposition of death sentence would not be

appropriate. In the circumstances, the death sentence was converted to life imprisonment.

… … …

30. In *Mahesh Dhanaji Shinde* v. *State of Maharashtra*[74], the conviction of the appellant-accused was upheld keeping in view that the circumstantial evidence pointed only in the direction of their guilt given that the modus operandi of the crime, homicidal death, identity of 9 of 10 victims, last seen theory and other incriminating circumstances were proved. However, the Court has thought it fit to commute the sentence of death to imprisonment for life considering the age, socio-economic conditions, custodial behaviour of the appellant-accused persons and that the case was entirely based on circumstantial evidence……

31. In the instant case, admittedly the entire web of evidence is circumstantial. The appellant-accused's culpability rests on various independent evidence, such as, him being "last seen" with the deceased before she went missing; the extra-judicial confession of his co-accused before PW 1 and the village members; corroborative testimonies of the said village members to the extra-judicial confession and recovery of the deceased's body; coupled with the medical evidence which when joined together paint him in the blood of the deceased. While the said evidence proves the guilt of the appellant-accused and makes this a fit case for conviction, it does not sufficiently convince the judicial mind to entirely foreclose the option of a sentence lesser than the death penalty. Even though there are no missing links in the chain, the evidence also does not sufficiently provide any direct indicia whereby irrefutable conclusions can be drawn with regard to the nexus between "the crime" and "the criminal". Undoubtedly, the aggravating circumstances reflected through the nature of the crime and young age of the victim make the crime socially abhorrent and demand harsh punishment. However, there exist the circumstances such as there being no criminal antecedents of the appellant-accused and the entire case having been rested on circumstantial evidence including the extra-judicial confession of a

co-accused. These factors impregnate the balance of circumstances and introduce uncertainty in the "culpability calculus" and thus, persuade us that death penalty is not an inescapable conclusion in the instant case. We are inclined to conclude that in the present scenario an alternate to the death penalty, that is, imprisonment for life would be appropriate punishment in the present circumstances.

32. In our considered view, in the impugned judgment and order, the High Court has rightly noticed that life and death are acts of the divine and the divine's authority has been delegated to the human courts of law to be only exercised in exceptional circumstances with utmost caution. Further, that the first and foremost effort of the Court should be to continue the life till its natural end and the delegated divine authority should be exercised only after arriving at a conclusion that no other punishment but for death will serve the ends of justice. We have critically appreciated the entire evidence in its minutest detail and are of the considered opinion that the present case does not warrant award of the extreme sentence of death to the appellant-accused and the sentence of life imprisonment would be adequate and meet the ends of justice. We are of the opinion that the four main objectives which the State intends to achieve, namely, deterrence, prevention, retribution and reformation can be achieved by sentencing the appellant-accused for life."

(emphasis supplied)

(x) Nand Kishore v. State of Madhya Pradesh[79]

"**15.** The learned counsel appearing for the State has placed reliance on the judgment of this Court in *Mukesh* v. *State (NCT of Delhi)*[33] [known as *Nirbhaya case*] in support of her case and submitted that applying the ratio laid down in the aforesaid judgment, the case falls in the "rarest of rare" cases attracting death penalty. With reference to abovesaid arguments of the learned counsel for the State, it is to be

[79] (2019) 16 SCC 278

noticed that the case of *Mukesh*[33] is distinguishable on the facts from the case on hand. It is to be noticed that *Mukesh*[33] is a case of gang rape and murder of the victim and an attempt to murder of the male victim. It was the specific case of the prosecution that the crimes were carried out pursuant to a conspiracy and the accused were convicted under Section 120-B IPC apart from other offences. Further, as a fact, it was found in the aforesaid case that the accused Mukesh had been involved in other criminal activity on the same night. Further, it is also to be noticed that in the aforesaid case, there was a dying declaration, eyewitness to the incident, etc. So far as the present case is concerned, it solely rests on circumstantial evidence. It is the specific case of the appellant that he was denied the proper legal assistance in the matter and he is a manhole worker. The appellant was aged about 50 years. Further, in this case there is no finding recorded by the courts below to the effect that there is no possibility of reformation of the appellant. We are of the view that the reasons assigned by the trial court as confirmed by the High Court, do not constitute special reasons within the meaning of Section 354(3) CrPC to impose death penalty on the accused."

(emphasis supplied)

(xi) ***Md. Mannan v. State of Bihar***[80]

"**57.** In this case, the conviction of the petitioner is based on circumstantial evidence and the alleged extra-judicial confession made by the petitioner to the police in course of investigation, on the basis of which certain recoveries were made. There is no forensic evidence against the petitioner. It would, in our view, be unsafe to uphold the imposition of death sentence on the petitioner.

… … …

79. In this case, an eight-year-old innocent girl fell prey to the carnal desire and lust of the petitioner. It is not known whether there was any premeditation on the part of the petitioner to murder the victim. The circumstances in which he murdered the victim are also not known. The conviction is based on circumstantial evidence and extra-judicial confession made by the petitioner to the police in course of investigation. There can be no doubt that the crime is abhorrent, but it is doubtful as to whether the crime

[80] (2019) 16 SCC 584

> committed by the petitioner can be termed as "rarest of the rare".
>
> (emphasis supplied)

(xii) ***Dileep Bankar v. State of M.P.***[81]

> "We are not inclined to interfere with the conviction part. However, with respect to sentence, in the facts and circumstances of the case, we are inclined to set aside the capital sentence. It was stated by learned Counsel for the Appellant that the Appellant has become the victim of his own past and there is only circumstantial evidence against him. We deem it proper to impose the sentence of total 25 years of imprisonment. However, death sentence is set aside."
>
> (emphasis supplied)

Out of these 12 cases, cases at Sl. Nos. *(iii), (vii), (viii), (ix), (x), (xi)* and *(xii)* were decided by benches of three Judges of this Court, while the others were decided by benches of two Judges.

38. An important case for study is the decision of this Court in ***Rameshbhai Chandubhai Rathod vs. State of Gujarat***[82], in which the accused was found guilty of offences punishable under Sections 363, 366, 376, 397 and 302 IPC. The victim was a student of 4th standard. The accused was awarded death sentence. The case was based on the circumstantial evidence and Pasayat, J. observed:-

> **"30.** The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court

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81 MANU/SC/1125/2019

82 (2009) 5 SCC 740

> in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death sentence is awarded for rape and murder and the like, there is practically no scope for having an eyewitness. They are not committed in the public view. By the very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect. The plea of learned counsel for the appellant that the conviction is based on circumstantial evidence and, therefore, the death sentence should not be awarded is clearly unsustainable."
>
> (Emphasis supplied)

Having found the appellant guilty of the concerned offences, Pasayat, J. affirmed the award of death sentence.

Ganguly, J. agreed with Pasayat, J. on the issue of conviction but on the question of sentence he was of the view that the proper sentence was imprisonment for life. Ganguly, J. found that the reliance by the High Court on the decision in ***Dhananjoy Chatterjee vs. State of W.B.***[83], was incorrect. It was stated:-

> **"64.** There are vital differences in the facts of the two cases. In the present case, there is no allegation that the appellant ever misbehaved with the deceased. In *Dhananjoy*[83], prior to the date of crime, there were many occasions when the victim had been teased by Dhananjoy on her way to and back from her school. The latest being on 2-3-1990, three days prior to her death, when Dhananjoy had asked the deceased to accompany him to watch a movie. To that the deceased

[83] (1994) 2 SCC 220

> protested and had told her mother about it. Then her father had consulted some neighbours and thereafter, filed a written complaint to the security agency which had hired Dhananjoy and deployed in their apartment. The agency had arranged for Dhananjoy to be transferred to another apartment. Thus there was a motive and a sense of revenge in the mind of Dhananjoy in committing the crime against the deceased.

After considering various cases, Ganguly, J. observed:-

> **"117.** Keeping these principles in mind, I find that in the instant case the appellant is a young man and his age was 28 years old as per the version in the charge-sheet. He is married and has two daughters. He has no criminal antecedents, at least none has been brought on record. His behaviour in general was not objectionable and certainly not with the deceased girl prior to the incident. The unfortunate incident is possibly the first crime committed by the appellant. He is not otherwise a criminal. Such a person is not a threat to the society. His entire life is ahead of him.
>
> … … …
>
> **120.** I agree with His Lordship that the appellant has to be convicted on other charges. However, his conviction does not automatically lead to his death sentence. In my humble opinion instead of death sentence a sentence of rigorous imprisonment for life will serve the ends of justice. With the aforesaid modification of the sentence the appeal is dismissed to the extent indicated above."

The matter was, therefore, referred to a bench of three Judges [***Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat***[23]] which did not, in terms, disagree with the view taken by Pasayat, J. nor was there any observation to the contrary on the issue of appreciation of a case based

on circumstantial evidence in capital punishment matters. But the bench adopted the view taken by Ganguly, J. and stated as under:-

> **"9.** Both the Hon'ble Judges have relied extensively on *Dhananjoy Chatterjee case*[83]. In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so.
>
> **10.** We are, therefore, of the opinion that in the light of the findings recorded by Ganguly, J. it would not be proper to maintain the death sentence on the appellant. At the same time the gravity of the offence, the behaviour of the appellant and the fear and concern such incidents generate in ordered society, cannot be ignored. We, therefore, feel that a *via media* ought to be adopted in the light of the judgments of this Court in *Ramraj* v. *State of Chhattisgarh*[84] and *Mulla* v. *State of U.P.*[85] In these two cases, this Court has held that the term "imprisonment for life" which is found in Section 302 IPC, would mean imprisonment for the natural life of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure."

39. It is also required be noted here that there was disagreement between two Judges who heard ***Swamy Sharaddananda vs. State of Karnataka***[75].

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84 (2010) 1 SCC 573
85 (2010) 3 SCC 508

Sinha, J. was of the view that the accused be given life sentence while Katju, J. affirmed the award of death sentence. The matter was therefore referred to a bench of three Judges whose decision is reported as ***Swamy Shraddananda (2)***[69] which found the observations of Katju, J. that "there cannot be an absolute rule excluding death sentence in all cases of circumstantial evidence" to be correct. The bench however formulated a special category of sentence in paragraphs 91 to 93 of its decision.

However, the subsequent decision in ***Kalu Khan***[17] quoted with approval paragraphs 88 to 90 from the opinion of Sinha, J when the matter was heard by two Judges of this Court in ***Swamy Shraddananda***[75].

40. These cases discussed in preceding paragraphs show that though it is accepted that the observations in ***Swamy Shraddananda (2)***[69] did not lay down any firm principle that in a case involving circumstantial evidence, imposition of death penalty would not be permissible, a definite line of thought that where the sentence of death is to be imposed on the basis of circumstantial evidence, the circumstantial evidence must be such which leads to an exceptional case was accepted by a bench of three Judges of this Court in ***Kalu Khan***[17]**.** As a matter of fact, it accepted the caution expressed by Sinha J. in ***Swamy Shraddananda vs. State of Karnataka***[75] and the conclusions in ***Santosh Kumar Satishbhushan Bariyar***[70] to restate the principles with clarity in its decision.

41. It can therefore be summed up :-

a) it is not as if imposition of death penalty is impermissible to be awarded in circumstantial evidence cases; and

b) if the circumstantial evidence is of an unimpeachable character in establishing the guilt of the accused and leads to an exceptional case or the evidence sufficiently convinces the judicial mind that the option of a sentence lesser than death penalty is foreclosed, the death penalty can be imposed.

42. It must therefore be held that merely because the instant case is based on circumstantial evidence there is no reason to commute the death sentence. However, the matter must be considered in the light of the aforestated principles and see whether the circumstantial evidence is of unimpeachable character and the option of a lesser sentence is foreclosed.

43. Before we deal with the matter from the perspective as stated above, we must consider the submission advanced by Ms. Mathur, learned Senior Advocate with regard to “residual doubt” as said submission also touches upon the character of evidence.

44. The theory of "residual doubt" was noted for the first time by a bench of two judges of this Court in ***Ashok Debbarma Alias Achak Debbarma vs. State of Tripura***[18]. The discussion in paragraphs 30 to 34 under the caption "residual doubt" was as under:-

> "**30.** An accused has a profound right not to be convicted of an offence which is not established by the evidential standard of proof "beyond reasonable doubt". This Court in *Krishnan* v. *State*[86], held that the
>
> > "doubts would be called reasonable if they are free from a zest for abstract speculation. Law cannot afford any favourite other than truth. To constitute reasonable doubt, it must be free from an overemotional response. Doubts must be actual and substantial doubts as to the guilt of the accused persons arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case".
>
> In *Ramakant Rai* v. *Madan Rai*[87], the above principle has been reiterated.
>
> **31.** In *Commonwealth* v. *Webster*[88] at p. 320, Massachusetts Court, as early as in 1850, has explained the expression "reasonable doubt" as follows:
>
> > "Reasonable doubt … is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition

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86 (2003) 7 SCC 56 : 2003 SCC (Cri) 1577
87 (2003) 12 SCC 395 : 2004 SCC (Cri) Supp 445
88 (1850) 5 Cush 295 : 52 Am Dec 711 (Mass Sup Ct)

> that they cannot say they feel an abiding conviction."

In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the courts are convinced of the accused persons' guilt beyond reasonable doubt. For instance, in the instant case, it was pointed out that, according to the prosecution, 30-35 persons armed with weapons such as firearms, *dao*, *lathi*, etc., set fire to the houses of the villagers and opened fire which resulted in the death of 15 persons, but only eleven persons were charge-sheeted and, out of which, charges were framed only against five accused persons. Even out of those five persons, three were acquitted, leaving the appellant and another, who is absconding. The court, in such circumstances, could have entertained a "residual doubt" as to whether the appellant alone had committed the entire crime, which is a mitigating circumstance to be taken note of by the court, at least when the court is considering the question whether the case falls under the rarest of the rare category.

32. "Residual doubt" is a mitigating circumstance, sometimes used and urged before the jury in the United States and, generally, not found favour by the various courts in the United States. In *Franklin* v. *Lynaugh*[89], while dealing with the death sentence, the Court held as follows:

> "The petitioner also contends that the sentencing procedures followed in his case prevented the jury from considering, in mitigation of sentence, any 'residual doubts' it might have had about his guilt. The petitioner uses the phrase 'residual doubts' to refer to doubts that may have lingered in the minds of jurors who were convinced of his guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt. *Brief for Petitioner 14.* The plurality and dissent reject the petitioner's 'residual doubt' claim because they conclude that the special verdict questions did not prevent the jury from giving mitigating effect to its 'residual doubts' about the petitioner's guilt. See ante at *Franklin*, US p. 175; post at

[89] 101 L Ed 2d 155 : 487 US 164 (1988)

> *Franklin*, US p. 189. This conclusion is open to question, however. Although the jury was permitted to consider evidence presented at the guilt phase in the course of answering the special verdict questions, the jury was specifically instructed to decide whether the evidence supported affirmative answers to the special questions 'beyond a *reasonable* doubt'. *App. 15 (emphasis added).* Because of this instruction, the jury might not have thought that, in sentencing the petitioner, it was free to demand proof of his guilt beyond *all* doubt."

33. In *California* v. *Brown*[90] and other cases, the US courts took the view, "residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty". The petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

34. We also, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt, but not with "absolute certainty". But, in between "reasonable doubt" and "absolute certainty", a decision-maker's mind may wander, possibly in a given case he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single-handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other group of persons numbering around 35. All the element test as well as the residual doubt test, in a given case, may favour the accused, as a mitigating factor."

(Emphasis supplied)

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[90] 93 L Ed 2d 934 : 479 US 538 (1987)

45. The decision of this Court in ***Ashok Debbarma***[18] was relied upon in following decisions by benches of three judges of this Court:-

(A) In ***Sudam alias Rahul Kniram Jadhav*** v. ***State of Maharashtra***[19] the appellant was convicted of having caused the death of five persons; i.e. the lady who was living with him as his wife, two children from her previous marriage and two children from the appellant. The death sentence awarded to him was confirmed by this Court. However, in review petition, the sentence was commuted to "imprisonment for the remainder of his life sans any right to remission". The discussion was as under:

> **"19.1.** At this juncture, it must be noted that though it may be a relevant consideration in sentencing that the evidence in a given case is circumstantial in nature, there is no bar on the award of the death sentence in cases based upon such evidence (see *Swamy Shraddananda* v. *State of Karnataka*[75] and *Ramesh* v. *State of Rajasthan*[91]).
>
> **19.2.** In such a situation, it is up to the Court to determine whether the accused may be sentenced to death upon the strength of circumstantial evidence, given the peculiar facts and circumstances of each case, while assessing all the relevant aggravating circumstances of the crime, such as its brutality, enormity and premeditated nature, and mitigating circumstances of the accused, such as his socio-economic background, age, extreme emotional disturbance at the time of commission of the offence, and so on.
>
> **19.3.** In this regard, it would also be pertinent to refer to the discussion in *Ashok Debbarma* v. *State of Tripura*[86], where this Court elaborated upon the concept of "residual doubt" which simply means that in spite of being convinced of the guilt of the accused beyond reasonable doubt, the Court may harbour lingering or residual doubts in its mind

[91] (2011) 3 SCC 685

regarding such guilt. This Court noted that the existence of residual doubt was a ground sometimes urged before American courts as a mitigating circumstance with respect to imposing the death sentence, and noted as follows:

> "*33.* In *California* v. *Brown*[90] and other cases, the US courts took the view, *"residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty"*. The petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.
>
> *34.* We also, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt, but not with "absolute certainty". *But, in between "reasonable doubt" and "absolute certainty", a decision-maker's mind may wander, possibly in a given case he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single-handedly*, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other group of persons numbering around 35. All the element test as well as *the residual doubt test, in a given case, may favour the accused, as a mitigating factor*."

19.4. While the concept of "residual doubt" has undoubtedly not been given much attention in Indian capital sentencing jurisprudence, the fact remains that this Court has on several occasions held the quality of evidence to a higher standard for passing the irrevocable sentence of death than that which governs conviction, that is to say, it has found it unsafe to award the death penalty for convictions based on the nature of the circumstantial

evidence on record. In fact, this question was given some attention in a recent decision by this Bench, in *Mohd. Mannan* v. *State of Bihar*[80], where we found it unsafe to affirm the death penalty awarded to the accused in light of the nature of the evidence on record, though the conviction had been affirmed on the basis of circumstantial evidence.

… … …

"21. Evidently, even the fact that the evidence was circumstantial in nature did not weigh very heavily on the Court's mind, let alone the strength and nature of the circumstantial evidence. Be that as it may, we find that the material on record is sufficient to convince the Court of the petitioner's guilt beyond reasonable doubt; however, the nature of the circumstantial evidence in this case amounts to a mitigating circumstance significant enough to tilt the balance of aggravating and mitigating circumstances in the petitioner's favour, keeping in mind the doctrine of prudence. Moreover, it is also possible that the incorrect observations pertaining to Anita's facial injuries further led the Court to conclude in favour of imposing the death sentence on the petitioner. Thus, we are of the considered opinion that there was a reasonable probability that this Court would have set aside the sentence of death in appeal, since the only surviving evidence against the petitioner herein pertains to his motive to commit the crime, the circumstance of "last seen" and a solitary extra-judicial confession. In other words, it cannot be said that the punishment of life imprisonment is unquestionably foreclosed in the instant case, in spite of the gravity and barbarity of the offence.

22. We are thus compelled to conclude that the award of the death penalty in the instant case, based on the evidence on record, cannot be upheld.

23. At the same time, we conclude that a sentence of life imprisonment simpliciter would be inadequate in the instant case, given the gruesome nature of the offence, and the menace posed to society at large by the petitioner, as evinced by the conduct of the petitioner in jail. As per the report submitted in pursuance of the order of this Court dated 31-10-2018, it has been brought on record that the conduct of the petitioner in jail has been unsatisfactory, and that he gets aggressive and indulges in illegal activities in prison, intentionally abusing prisoners and prison staff and provoking fights with other prisoners. Two FIRs have also

> been registered against the petitioner for abusing and threatening the Superintendent of the Nagpur Central Prison.
>
> **23.1.** As this Court has already held in a catena of decisions, by way of a via media between life imprisonment simpliciter and the death sentence, it may be appropriate to impose a restriction on the petitioner's right to remission of the sentence of life imprisonment, which usually works out to 14 years in prison upon remission. We may fruitfully refer to the decisions in *Swamy Shraddananda (2)* v. *State of Karnataka*[69] and *Union of India* v. *V. Sriharan*[92], in this regard. We therefore direct that the petitioner shall remain in prison for the remainder of his life."
>
> (Emphasis supplied)

(B) In ***Ravishankar alias Baba Vishwakarma v. State of Madhya Pradesh***[20]**,** the appellant was convicted under Sections 376, 302 and 376A of IPC and also under the provisions of POCSO Act for having raped and caused the murder by throttling of a 13 years old girl. The death sentence awarded by the trial court was confirmed by the High Court but in appeal the death sentence was substituted by this Court with imprisonment for life with a direction that "no remission to be granted and that the appellant shall remain in prison for rest of his life". The relevant passages from the decision are:-

> **"57.** Such imposition of a higher standard of proof for purposes of death sentencing over and above "beyond reasonable doubt" necessary for criminal conviction is similar to the "residual doubt" metric adopted by this Court in *Ashok Debbarma* v. *State of Tripura*[18] wherein it was noted that: (SCC p. 763, para 31)

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[92] (2016) 7 SCC 1 : (2016) 2 SCC Cri 695

> "*31.* … In our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the courts are convinced of the accused persons' guilt beyond reasonable doubt."

58. *Ashok Debbarma*[18] drew a distinction between a "residual doubt", which is any remaining or lingering doubt about the defendant's guilt which might remain at the sentencing stage despite satisfaction of the "beyond a reasonable doubt" standard during conviction, and reasonable doubts which as defined in *Krishnan* v. *State*[86] are "actual and substantive, and not merely imaginary, trivial or merely possible". These "residual doubts" although not relevant for conviction, would tilt towards mitigating circumstance to be taken note of whilst considering whether the case falls under the "rarest of rare" category.

59. This theory is also recognised in other jurisdictions like the United States, where some State courts like the Supreme Court of Tennessee in *State* v. *McKinney*[93] have explained that residual doubt of guilt is a valid non-statutory mitigating circumstance during the sentencing stage and have allowed for new evidence during sentencing proceedings related to defendant's character, background history, physical condition, etc.

60. The above-cited principles have been minutely observed by us, taking into consideration the peculiar facts and circumstances of the case in hand. At the outset, we would highlight that the High Court while confirming death has observed that the girl was found bleeding due to forcible sexual intercourse, which fact, however, is not supported by medical evidence. However, such erroneous finding has no impact on conviction under Section 376-A IPC for a bare perusal of the section shows that only the factum of death of the victim during the offence of rape is required, and such death need not be with any guilty intention or be a natural consequence of the act of rape only. It is worded broadly enough to include death by any act committed by the accused if done contemporaneously with the crime of rape.

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[93] 74 SW 3d 291

Any other interpretation would defeat the object of ensuring safety of women and would perpetuate the earlier loophole of the rapists claiming lack of intention to cause death to seek a reduced charge under Section 304 IPC as noted in the *Report of the Committee on Amendments to Criminal Law*, headed by Justice J.S. Verma, former Chief Justice of India:

> "22. While we believe that enhanced penalties in a substantial number of sexual assault cases can be adjudged on the basis of the law laid down in the aforesaid cases, certain situations warrant a specific treatment. We believe that where the offence of sexual assault, particularly "gang rapes", is accompanied by such brutality and violence that it leads to death or a persistent vegetative state (or "PVS" in medical terminology), punishment must be severe — with the minimum punishment being life imprisonment. While we appreciate the argument that where such offences result in death, the case may also be tried under Section 302 IPC as a "rarest of the rare" case, we must acknowledge that many such cases may actually fall within the ambit of Section 304 (Part II) since the "intention to kill" may often not be established. In the case of violence resulting in persistent vegetative state is concerned, we are reminded of the moving story of Aruna Shanbaug, the young nurse who was brutally raped and lived the rest of her life (i.e. almost 36 years) in a persistent vegetative state.
>
> 23. In our opinion, such situations must be treated differently because the concerted effort to rape and to inflict violence may disclose an intention deserving an enhanced punishment. We have therefore recommended that a specific provision, namely, Section 376(3) should be inserted in the Indian Penal Code to deal with the offence of "rape followed by death or resulting in a persistent vegetative state"."

61. In the present case, there are some residual doubts in our mind. A crucial witness for constructing the last seen theory, PW 5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other. Two other witnesses, PW 6 and PW 7 had seen the appellant feeding biscuits to the deceased one year before the incident

and their long delay in reporting the same fails to inspire confidence. The mother of the deceased has deposed that the wife and daughter of the appellant came to her house and demanded the return of the money which she had borrowed from them but failed to mention that she suspected the appellant of committing the crime initially. Ligature marks on the neck evidencing throttling were noted by PW 20 and PW 12 and in the post-mortem report, but find no mention in the panchnama prepared by the police. Viscera samples sent for chemical testing were spoilt and hence remained unexamined. Although nails' scrapings of the accused were collected, no report has been produced to show that DNA of the deceased was present. Another initial suspect, Baba alias Ashok Kaurav absconded during investigation, hence, gave rise to the possibility of involvement of more than one person. All these factors of course have no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal.

62. We are cognizant of the fact that use of such "residual doubt" as a mitigating factor would effectively raise the standard of proof for imposing the death sentence, the benefit of which would be availed of not by the innocent only. However, it would be a misconception to make a cost-benefit comparison between cost to society owing to acquittal of one guilty versus loss of life of a perceived innocent. This is because the alternative to death does not necessarily imply setting the convict free.

63. As noted by the United States Supreme Court in *Herrera* v. *Collins*[94], "it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible". However, death being irrevocable, there lies a greater degree of responsibility on the court for an in-depth scrutiny of the entire material on record. Still further, qualitatively, the penalty imposed by awarding death is much different than in incarceration, both for the convict and for the State. Hence, a corresponding distinction in requisite standards of proof by taking note of "residual doubt" during sentencing would not be unwarranted.

64. We are thus of the considered view that the present case falls short of the "rarest of rare" cases where the death sentence alone deserves to be awarded to the appellant. It appears to us in the light of all the cumulative circumstances that the cause of justice will be effectively served by

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94 (1993) SCC OnLine US SC 10 : 122 L Ed 2d 203

> invoking the concept of special sentencing theory as evolved by this Court in *Swamy Shraddananda (2)*[69] and approved in *Sriharan case*[92]."

46. Since reference was made in the aforestated decisions of this Court to certain decisions of US Supreme Court, we may now consider those decisions and some other decisions of US Supreme Court on the point and whether the theory of "residual doubt" has found acceptance in the decisions of US Supreme Court.

A] ***California vs. Brown***[90]

(a) The relevant facts noted in the opinion of the Court delivered by Chief Justice Rehnquist were:-

> "Respondent Albert Brown was found guilty by a jury of forcible rape and first-degree murder in the death of 15-year-old Susan J. At the penalty phase, the State presented evidence that respondent had raped another young girl some years prior to his attack on Susan J. Respondent presented the testimony of several family members, who recounted respondent's peaceful nature and expressed disbelief that respondent was capable of such a brutal crime. Respondent also presented the testimony of a psychiatrist, who stated that Brown killed his victim because of his shame and fear over sexual dysfunction. Brown himself testified, stating that he was ashamed of his prior criminal conduct and asking for mercy from the jury."

While instructing the jury to consider the aggravating and mitigating circumstances and to weigh them in determining the appropriate penalty, the trial Court had cautioned the jury-

> "that it "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling."

The instruction so issued was found to have violated the Eighth and Fourteenth Amendments by the Supreme Court of California which decision was reversed by US Supreme Court as under: -

> "We hold that the instruction challenged in this case does not violate the provisions of the Eighth and Fourteenth Amendments to the United States Constitution. The judgment of the Supreme Court of California is therefore reversed, and the cause is remanded for further proceedings not inconsistent with this opinion."

(b) Justice O'Connor authored a concurring opinion and stated:-

> "Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence, I agree with the Court that an instruction informing the jury that they "must not be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" does not by itself violate the Eighth and Fourteenth Amendments to the United States Constitution. At the same time, the jury instructions – taken as a whole – must clearly inform the jury that they are to consider any relevant mitigating evidence about a defendant's background and character, or about the circumstances of the crime."

(c) Justice Brennan (with whom Justice Marshall and Justice Stevens joined) dissented and observed:-

> "The prosecutor in this case thus interpreted the antisympathy instruction to require that the jury ignore the defendant's evidence on the mitigating factors of his character and upbringing. A similar construction has been placed on the instruction in several other cases."

(d) Justice Blackmun (with whom Justice Marshall joined) also dissented and stated: -

> "The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure. …….
>
> ….In my view, we adhere so strongly to our belief that sentencers should have the opportunity to spare a capital defendant's life on account of compassion for the individual because, recognizing that the capital sentencing decision must be made in the context of "contemporary values," Gregg v. Georgia, 428 U.S., at 181, 96 S.Ct., at 2928 (opinion of Stewart, POWELL, and STEVENS, JJ.), we see in the sentencer's expression of mercy a distinctive feature of our society that we deeply value."

Thus, the entire discussion was confined to the validity of the instruction given to the Jury and the issue of "residual doubt" never arose for consideration.

B] ***Franklin*** v. ***Lynaugh***[89]

The jury had found Franklin guilty of capital murder. At the conclusion of penalty hearing, the trial court submitted two "Special Issues" to the jury, instructing the jury that if they determined the answer to both these questions to be "Yes," Franklin would be sentenced to death. The issues were:

> "Do you find from the evidence beyond a reasonable doubt that the conduct of the Defendant, Donal Gene Franklin, that caused the death of Mary Margaret Moran, was

> committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Donald Gene Franklin, would commit criminal acts of violence that would constitute a continuing threat to society."

Franklin however requested for jury instructions as follows:-

> "you are instructed that any evidence which, in your opinion, mitigates against the imposition of the Death, Penalty, including any aspect of the Defendant's character or record, and any of the circumstances of the commission of the offense …. may be sufficient to cause you to have a reasonable doubt as to whether or not the true answer of any of the Special Issues is "Yes"; and in the event such evidence does cause you to have such a reasonable doubt, you should answer the Issue "No""

The request of Franklin was rejected and the jury answered both special issues in affirmative whereafter the trial Court imposed death sentence. In Federal habeas action filed by Franklin, the submission was recorded:-

> "Petitioner first suggests that the jury may, in its penalty deliberations, have harbored "residual doubts" about three issues considered in the guilt phase of his trial: first, petitioner's identity as the murderer; second, the extent to which petitioner's actions (as opposed to medical mistreatment) actually caused the victim's death; and third, the extent to which petitioner's actions were intended to result in the victim's death."

(a) The decision of the Court was delivered by Justice White and the question was formulated as under:-

> "In this case, we are called on to determine if the Eighth Amendment required a Texas trial court to give certain jury instructions, relating to the consideration of mitigating evidence, that petitioner had requested in the sentencing phase of his capital trial"

Rejecting the challenge it was observed:-

> "At the outset, we note that this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation.
>
> … … …
>
> Our edict that, in a capital case, " 'the sentencer . . . may not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense,' " *Eddings v. Oklahoma*, 455 U.S. 104, 110, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982) (quoting *Lockett*, 438 U.S., at 604, 98 S.Ct., at 2964), in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. Such lingering doubts are not over any aspect of petitioner's "character," "record," or a "circumstance of the offense." This Court's prior decisions, as we understand them, fail to recognize a constitutional right to have such doubts considered as a mitigating factor."

b) Justice O'Connor (with whom Justice Blackmun joined) authored a concurring judgement and the submission of Franklin was noted as under:-

> "Petitioner also contends that the sentencing procedures followed in his case prevented the jury from considering, in mitigation of sentence, any "residual doubt[s]" it might have had about his guilt. Petitioner uses the phrase "residual doubts" to refer to doubts that may have lingered in the minds of jurors who were convinced of his guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt. Brief for Petitioner 14. The plurality and dissent reject petitioner's "residual doubt" claim because they conclude

> that the special verdict questions did not prevent the jury from giving mitigating effect to its "residual doubts" about petitioner's guilt. See *ante* at 2328: *post,* at 2335. This conclusion is open to question, however. Although the jury was permitted to consider evidence presented at the guilt phase in the course of answering the special verdict questions, the jury was specifically instructed to decide whether the evidence supported affirmative answers to the special questions "beyond a *reasonable* doubt." App. 15 (emphasis added). Because of this instruction, the jury might not have thought that, in sentencing the petitioner, it was free to demand proof of his guilt beyond *all* doubt."

Justice O'Connor rejected the submission and observed: -

> "In my view, petitioner's "residual doubt" claim fails, not because the Texas scheme allowed for consideration of "residual doubt" by the sentencing body, but rather because the Eighth Amendment does not require it. Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt. We have recognized that some States have adopted capital sentencing procedures that permit defendants in some cases to enjoy the benefit of doubts that linger from the guilt phase of the trial, see *Lockhart v. McCree*, 476 U.S. 162, 181, 106 S.Ct. 1758, 1769, 90 L.Ed.2d 137 (1986), but we have never indicated that the Eighth Amendment requires States to adopt such procedures. To the contrary, as the plurality points out, we have approved capital sentencing procedures that preclude consideration by the sentencing body of "residual doubts" about guilt. See *ante*, at 2327, n. 6[95].

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[95] The footnote reads thus:-

"Finding a constitutional right to rely on a guilt-phase jury's "residual doubts" about innocence when the defense presents its mitigating case in the penalty phase is arguably inconsistent with the common practice of allowing penalty-only trials on remand of cases where a death sentence-but not the underlying conviction-is struck down on appeal. See, e.g. Scott v. State, 310 Md. 277, 301, 529 A.2d 340, 352 (1987); Stringer v. State, 492 A.2d 928, 946 (Miss.1986); Whalen v. State, 492 A.2d 552, 569 (Del.1985). Cf. Lockhart v. McCree, 476 U.S., at 205, 106 S.Ct., at 1781 (MARSHALL, J. dissenting).

In fact, this Court has, on several previous occasions, suggested such a method of proceeding on remand, See, e.g. , Hitchcock v. Dugger, 481 U.S. 393, 399, 107 S.Ct. 1821, 1824, 95 L.Ed.2d 347 (1987). Moreover, petitioner himself, in suggesting the appropriate relief in this case, asked only that he be "resentenced in a proceeding that

> Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. See *California v. Brown*, 479 U.S., at 541, 107 S.Ct., at 839; *id.*, at 544, 107 S.Ct., at 840 (O'CONNOR, J., concurring); *Eddings*, 455 U.S., at 110, 112, 102 S.Ct., at 874, 875; *id.*, at 117, 102 S.Ct., at 878 (O'CONNOR, J., concurring); *Lockett*, 438 U.S., at 605, 98 S.Ct., at 2965. "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.
>
> (Emphasis supplied)

During the course of her judgment, Justice O'Connor also made following observations: -

> "In my view, the principle underlying *Lockett*[96], *Eddings*[97], and *Hitchcock*[98] is that punishment should be directly related to the personal culpability of the criminal defendant.
>
> "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants

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comports with requirements of Lockett" – not that he be retried in full so as to have the benefit of any potential guilt-phase "residual doubts." See Brief for petitioner 21.

In sum, we are quite doubtful that such "penalty-only" trials are violative of a defendant's Eighth Amendment rights. Yet such is the logical conclusion of petitioner's claim of a constitutional right to argue "residual doubts" to a capital sentencing jury."

96 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)

97 455 U.S. 104, 102 S.Ct. 869. 71 L.Ed.2d 1 (1982)

98 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987)

> who have no such excuse…. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *California v. Brown,* 479 U.S.538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'CONNOR, J., concurring) (emphasis in original)
>
> In light of this principle it is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.
>
> Under the sentencing procedure followed in this case the jury could express its views about the appropriate punishment only by answering the special verdict questions regarding the deliberations of the murder and the defendant's future dangerousness. To the extent that the mitigating evidence introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence by returning a negative answer to that question. If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its "reasoned moral responds" to that evidence."
>
> … … …
>
> Noting in *Lockett* or *Eddings* requires that the sentencing authority be permitted to give effect to evidence beyond the extent to which it is relevant to the defendant's character or background or the circumstances of the offense."

(c) The dissenting opinion authored by Justice Stevens (joined by Justice Brennan and Justice Marshall) stated: -

> "In requiring that the discretion of the sentencer in capital sentencing be guided, we have never suggested that the sentencer's discretion could be guided by blinding it to

> relevant evidence. The hallmark of a sentencing scheme that sufficiently guides and directs the sentencer is the presence of procedures that "require the jury to consider the circumstances of the crime and the criminal before it recommends sentence." *Id.,* at 197, 96 S.Ct., at 2936. The requirement that the State not bar the sentencer from considering any mitigating aspect of the offense or the offender only furthers the goal of focusing the sentencer's attention on the defendant and the particular circumstances of the crime."

C] Herrera Vs. Collins[94]

The syllabus prepared by the Reporter of Decisions summed up the facts as under :-

> "On the basis of proof which included two eyewitness identifications, numerous pieces of circumstantial evidence, and petitioner Herrera's handwritten letter impliedly admitting his guilt, Herrera was convicted of the capital murder of Police Officer Carrisalez and sentenced to death in January 1982. After pleading guilty, in July 1982, to the related capital murder of Officer Rucker, Herrera unsuccessfully challenged the Carrisalez conviction on direct appeal and in two collateral proceedings in the Texas state courts, and in a federal habeas petition. Ten years after his conviction, he urged in second federal habeas proceeding that newly discovered evidence demonstrated that he was "actually innocent" of the murders of Carrisalez and Rucker, and that the Eighth Amendment's prohibition against cruel and unusual punishment and the Fourteenth Amendment's due process guarantee therefore forbid his execution. He supported this claim with affidavits tending to show that his now-dead brother had committed the murders. The District Court, *inter alia*, granted his request for a stay of execution so that he could present his actual innocence claim and the supporting affidavits in state court. In vacating the stay, the Court of Appeals held that the claim was not cognizable on federal habeas absent, an accompanying federal constitutional violation."

Rejecting federal habeas petition preferred by Herrera, Chief Justice Rehnquist delivered the opinion of the Court and stated: -

> "… … In capital cases, we have required additional protections because of the nature of the penalty at stake. See, e.g., *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980) (jury must be given option of convicting the defendant of a lesser offense). All of these constitutional safeguards, of course, make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant. But we have also observed that " due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." *Patterson v. New York*, 432 U.S. 197, 208, 97 S.Ct. 2319, 2326, 53 L.Ed.2d 281 (1977). To conclude otherwise would all but paralyze our system for enforcement of the criminal law.
>
> … … …
>
> Petitioner asserts that this case is different because he has been sentenced to death. But we have "refused to hold that the fact that a death sentence has been imposed requires a different standard of review on federal habeas corpus." *Murray v. Giarratano*, 492 U.S. 1, 9, 109 S.Ct. 2765, 2770, 106 L.Ed.2d 1 91989) (plurality opinion). We have, of course, held that the Eighth Amendment requires increased reliability of the process by which capital punishment may be imposed. See, e.g., *McKoy v. North Carolina*, 494 U.S.433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990) (unanimity requirement impermissibly limits jurors' consideration of mitigating evidence); *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (jury must be allowed to consider all of a capital defendant's mitigating character evidence); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978|) (plurality opinion) (same). But petitioner's claim does not fit well into the doctrine of these cases, since, as we have pointed out, it is far from clear that a second trial 10 years after the first trial would produce a more reliable result.
>
> Perhaps mindful of this, petitioner urges not that he necessarily receive a new trial, but that his death sentence simply be vacated if a federal habeas court deems that a satisfactory showing of "actual innocence" has been made. Tr. Of Oral Arg. 19-20. But such a result is scarcely logical; petitioner's claim is not that some error was made in

> imposing a capital sentence upon him, but that a fundamental error was made in finding him guilty of the underlying murder in the first place. It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison.
>
> … … …
>
> Executive clemency has provided "fail safe" in our criminal justice system. K. Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact that our judicial system, like the human beings who administer it, is fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence……"

Justice O'Connor (joined by Justice Kennedy) delivered a concurring opinion. Justice Scalia (joined by Justice Thomas) also rendered a concurring opinion. Another concurring opinion was rendered by Justice White, while Justice Blackmun (joined by Justice Stevens and Justice Souter) dissented.

D] **Oregon vs. Guzek**[99]

The syllabus prepared by the Reporter of Decisions stated the facts as under :-

> "At the guilt phase of respondent Guzek's capital murder trial, his mother was one of two witnesses who testified that he had been with her on the night the crime was committed. He was convicted and sentenced to death. Twice, the Oregon Supreme Court vacated the sentence and ordered new sentencing proceedings, but each time Guzek was again sentenced to death. Upon vacating his sentence for a third time, the State Supreme Court held that the Eighth and Fourteenth Amendments provide Guzek a federal

[99] 546 US 517 (2006)

> constitutional right to introduce live alibi testimony from his mother at the upcoming resentencing proceeding. After this Court granted certiorari, Guzek filed a motion to dismiss the writ as improvidently granted."

The decision of the Oregon Supreme Court was reversed by US Supreme Court. The opinion of the Court was delivered by Justice Breyer with following observations:-

> "**4.** As our discussion in Part II, *supra,* makes clear, the federal question before us is a narrow one. Do the Eighth and Fourteenth Amendments grant Guzek a constitutional right to present evidence of the kind he seeks to introduce, namely, *new* evidence that shows he was not present at the scene of the crime. That evidence is *inconsistent* with Guzek's prior conviction. It sheds no light on *the manner* in which he committed the crime for which he has been convicted. Nor is it evidence that Guzek contends was unavailable to him at the time of the original trial. And, to the extent it is evidence he introduced at that time, he is free to introduce it now, albeit in transcript form. Ore.Rev.Stat. § 138.012(2)(b) (2003). We can find nothing in the Eighth or Fourteenth Amendments that provides a capital defendant a right to introduce new evidence of this kind at sentencing.
>
> We cannot agree with the Oregon Supreme Court that our previous cases have found in the Eighth Amendment a constitutional right broad enough to encompass the evidence here at issue. In *Lockett v. Ohio, supra,* a plurality of this Court decided that a defendant convicted of acting in concert with others to rob and to kill could introduce at the sentencing stage evidence that she had played a minor role in the crime, indeed, that she had remained outside the shop (where the killing took place) at the time of the crime. A plurality of the Court wrote that,
>
> > "the Eighth and Fourteenth Amendments require that the sentencer ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and *any of the circumstances of the offense that the defendant proffers* as a basis for a sentence less than death." *Id.,* at 604, 98 S.Ct. 2954 (emphasis added and deleted).

> And in *Eddings v. Oklahoma,* 455 **U.S**. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, the Court majority adopted this statement. See also *McCleskey v. Kemp,* 481 **U.S**. 279, 306, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *Bell v. Ohio,* 438 **U.S**. 637, 642, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978) (plurality opinion).
>
> But the evidence at issue in these cases was traditional sentence-related evidence, evidence that tended to show *how,* not *whether,* the defendant committed the crime. Nor was the evidence directly inconsistent with the jury's finding of guilt."

Justice Scalia (joined by Justice Thomas) delivered a concurring opinion

E] ***Abdul Kabir vs. Quarterman***[100]

In this case, the theory of "residual doubt" did not come up for consideration. However in the judgement of the Court delivered by Justice Stevens, the opinion of Justice O'Connor in ***Franklin vs. Lynaugh***[89] was referred to as under:-

> "What makes *Franklin* significant, however, is the separate opinion of Justice O'Connor, and particularly those portions of her opinion expressing the views of five Justices, see *infra,* at 1668 – 1669, and n.15. After summarizing the cases that clarified *Jurek's* holding she worte:
>
> > "In my view, the principle underlying *Lockett, Eddings,* and Hitchcock is that punishment should be directly related to the personal culpability of the criminal defendant.
>
> "Evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are

[100] 550 US 233 (2007)

> attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse …. Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime.' *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring) (emphasis in original).
>
> "In light of this principle it is clear that a State may not constitutionally prevent the sentencing body from giving effect to the evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. *Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration.*
>
> "Under the sentencing procedure followed in this case the jury could express its views about the appropriate punishment only by answering the special verdict questions regarding the deliberateness of the murder and the defendant's future dangerousness. To the extent that the mitigating evidence introduced by petitioner was relevant to one of the special verdict questions, the jury was free to give effect to that evidence by returning a negative answer to that question. If, however, petitioner had introduced mitigating evidence about his background or character or the circumstances of the crime that was not relevant to the special verdict questions, or that had relevance to the defendant's moral culpability beyond the scope of the special verdict questions, the jury instructions would have provided the jury with no vehicle for expressing its 'reasoned moral response' to that evidence." 487 U.S. at 184-185, 108 S.Ct. 2320 (opinion concurring in Judgment) (emphasis added)."

47. We may also note the decision of the Supreme Court of Tennessee in ***State vs. Mckinney***[93], as it was referred to in the decision of this Court in ***Ravishankar alias Baba Vishwakarma vs. State of Madhya Pradesh***[20].

In that case, the Defence Counsel sought to refer to the evidence from the "Guilt Phase" of the trial during his closing argument in the sentencing phase of the trial. Whether the decision in not permitting him to do so was correct, was the issue.

The opinion of the Court observed: -

> "Residual doubt evidence," in general, may consist of proof admitted during the sentencing phase that indicates the defendant did not commit the offense, notwithstanding the jury's verdict following the guilt phase. ….."
>
> … … …
>
> "In contrast, the present case does not involve a resentencing procedure, nor does it involve a defendant's effort to introduce *evidence* of residual doubt. Instead, the defendant only sought to argue evidence that had already been admitted by the trial court and heard by the same jury in the guilt phase of the trial. ….."
>
> … … …
>
> "…..Moreover, given that this was *not* a resentencing hearing, the reality is that the sentencing jury had already heard the testimony underlying defense counsel's proposed argument and had reconciled it in favor of the State's theory of guilt and against the defendant's theory of innocence. ..."

It was concluded: -

> "….. (4) the trail court's refusal to allow defense counsel to refer to evidence from the guilt phase of the trial during his closing argument in the sentencing phase of the trial did not affect the jury's determination to the prejudice of the defendant and was harmless error. ….."

48. The principles that emerge from the decisions of U.S. Supreme Court are: -

(i) "….this Court has never held that a capital defendant has a constitutional right to an instruction telling the jury to revisit the question of his identity as the murderer as a basis for mitigation.…."

Justice White speaking for the Court in ***Franklin vs. Lynaugh***[89]**.**

(ii) "….Our edict that, in a capital case, " 'the sentencer . . . [may] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense,' ….. in no way mandates reconsideration by capital juries, in the sentencing phase, of their "residual doubts" over a defendant's guilt. ..."

Justice White speaking for the Court in ***Franklin vs. Lynaugh***[89]**.**

(iii) "…… Our cases do not support the proposition that a defendant who has been found to be guilty of a capital crime beyond a reasonable doubt has a constitutional right to reconsideration by the sentencing body of lingering doubts about his guilt….."

Justice O'Connor in concurring opinion in ***Franklin vs. Lynaugh***[89]

(iv) "… we have approved capital sentencing procedures that preclude consideration by the sentencing body of "residual doubts" about guilt. …"

Justice O'Connor in concurring opinion in ***Franklin vs. Lynaugh***[89]**.**

(v) "…..Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is not a mitigating circumstance. ….."

Justice O'Connor in concurring opinion in ***Franklin vs. Lynaugh***[89].

(vi) "… Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing. (Emphasis added)"

Justice O'Connor in concurring opinion in ***Franklin vs. Lynaugh***[89]**.**

(vii) "…In capital cases, we have required additional protections because of the nature of the penalty at stake. ….. (jury must be given option of convicting the defendant of a lesser offense). All of these constitutional safeguards, of course, make it more difficult for the State to rebut and finally overturn the presumption of innocence which attaches to every criminal defendant. But we have also observed that "due process does not require that every conceivable step be taken, at whatever cost, to eliminate the possibility of convicting an innocent person." ..... To conclude otherwise would all but paralyze our system for enforcement of the criminal law."

Chief Justice Rehnquist speaking for the Court in ***Herrera Vs. Collins***[94]**.**

(viii) "…..It would be a rather strange jurisprudence, in these circumstances, which held that under our Constitution he could not be executed, but that he could spend the rest of his life in prison. ….."

Chief Justice Rehnquist speaking for the Court in ***Herrera Vs. Collins***[94]**.**

(ix) "….. Do the Eighth and Fourteenth Amendments grant Guzek a constitutional right to present evidence of the kind he seeks to introduce, namely, *new* evidence that shows he was not present at the scene of the crime. That

evidence is *inconsistent* with Guzek's prior conviction. It sheds no light on *the manner* in which he committed the crime for which he has been convicted. ….."

Justice Breyer speaking for the Court in ***Oregon vs. Guzek***[99].

(x) "….. But the evidence at issue in these cases was traditional sentence-related evidence, evidence that tended to show *how,* not *whether,* the defendant committed the crime. Nor was the evidence directly inconsistent with the jury's finding of guilt. ….."

Justice Breyer speaking for the Court in ***Oregon vs. Guzek***[99].

(xi) "The sentencer's ability to respond with mercy towards a defendant has always struck me as a particularly valuable aspect of the capital sentencing procedure. ……."

The observations in the dissenting opinion of Justice Blackmun in ***California vs. Brown***[90]**.**

49. Following features from these decisions of U.S. Supreme Court are noteworthy: -

(A) As the decision in ***California vs. Brown***[90] discloses, the jury trial comprises of two phases. The first is called "Guilt Phase" where the question for determination is whether the offence as alleged has been proved by the prosecution which is akin to "conviction stage" in our jurisprudence; while the second phase is called "Penalty Phase" at which stage the question for consideration is about the appropriate penalty to be

awarded when the guilt is established which is similar to "sentence stage" in our jurisprudence.

In both the phases, the basic issues are to be dealt with by jurors who are drawn from cross sections of the society, while the function for such determination and consideration in our jurisprudence is entrusted to judicial officers adequately trained and appropriately equipped with practical experience. A jury is likely to be swayed by emotions or sentiments, which is why the caution was given to the jury by the trial court in ***California vs. Brown***[90]. But that element or possibility gets ruled out when an experienced judicial officer is entrusted with the requisite task.

(B) Secondly, there can be fresh sentencing procedure on as many as four occasions as the decision in ***Oregon vs. Guzek***[99] shows or the process of challenge may take considerable time as the decision in ***Herrera vs. Collins***[94] discloses. Naturally, there would be some time gap between two phases, possibly leading to a situation where the composition of the jury at the "Penalty Phase" may not be same as it was at the "Guilt Phase". Consequently, the attempts on part of the defence to highlight any area or aspect in the evidence which could be said to be doubtful in the hope that there could be a change in perception. This possibility again does not arise in our jurisprudence, as the same judicial officer who heard and decided the

matter at the conviction stage is to decide the matter at the sentence stage and without any undue lapse of time.

(C) At the "Penalty Phase", the Prosecutor and the Defence are allowed to lead evidence. Whether such leading of evidence may also include evidence touching upon the identity of the Accused or his role in the transaction or any matter concerning evidence leading to determination of his guilt were the issues in ***Oregon vs. Guzek***[99] and the portion extracted from that decision shows the approach adopted by US Supreme Court. In our jurisprudence, if there be any new evidence which may go to the root of the matter, leading of such evidence can be permitted at the appellate stage subject to fulfilment of governing principles.

These features are only illustrative to say that the theory of "residual doubt" that got developed was a result of peculiarity in the process adopted. Even then, what is material to note is that the theory has consistently been rejected by U.S. Supreme Court and as stated by Justice O'Connor: - "*Nothing in our cases mandated the imposition of this heightened burden of proof at capital sentencing*".

50. (A) In ***Ashok Debbarma***[18]**,** after noticing the decisions of US Supreme Court in ***California vs. Brown***[90] and in ***Franklin vs. Lynaugh***[89]**,**

it was observed that "residual doubt" as a mitigating circumstance did not find favour with various Courts in the United States.

On facts, it was however observed that the Court entertained "lingering doubt" as to "*whether the appellant alone could have executed the crime single-handedly, especially when the prosecution itself says that it was handiwork of a large group of people"*. Thus, the doubt that was entertained was not about the guilt of the accused simpliciter or about his involvement in the crime but whether the appellant *alone* could have committed the crime which resulted in the death of as many as 35 persons and such doubt weighed with the Court while commuting death sentence to imprisonment for life.

It must be stated here that what was paraphrased in paragraph 33 of the decision was the relevant portion from the opinion of Justice O'Connor in ***Franklin v. Lynaugh***[89] and not from the decision in ***California v. Brown***[90].

(B) In ***Sudam alias Rahul Kaniram Jadhav*** v. ***State of Maharashtra***[19], it was noted in paragraph 19.1 that there would be no bar on the award of death sentence in cases based on circumstantial evidence. Thereafter, the decision in ***Ashok Debbarma***[18] was considered and the Court observed that in several cases, "quality of evidence to a higher standard" was insisted upon for passing the irrevocable sentence of death

and reliance was placed on the decision in ***Mohd. Mannan vs. State of Bihar***[80]. The deduction in paragraph 21 rested *inter alia* on the aspect that "the nature of the circumstantial evidence in this case amounts to a circumstance significant enough to tilt the balance of aggravating and mitigating circumstances in the petitioner's favour".

(C) In ***Ravishankar***[20] it was observed that "imposition of a higher standard of proof for the purposes of death sentencing over and above beyond reasonable doubt necessary for criminal conviction is *similar* to the residual doubt metric adopted by this Court in ***Ashok Debbarma vs. State of Tripura***[18]…". In this case, as per paragraph 10 of the decision, blood samples of six suspects were sent for DNA analysis but only DNA profile from the blood of the appellant matched with that from the vaginal slide of the deceased. Additionally, reliance was placed by the prosecution on the testimony of PWs 5, 6 and 7, as set out in paragraphs 17 and 18. The reason why the version coming from PWs 5, 6 and 7 could not inspire complete confidence was dealt with in paragraph 61. It was further observed that another suspect Baba alias Ashok Kaurav having absconded during investigation, there was possibility of involvement of more than one person, giving rise to the same safety filter adopted in ***Ashok Debbarma***[18].

51. These cases thus show that the matters were considered from the standpoint of individual fact situation where, going by the higher or stricter

standard for imposition of death penalty, alternative to death sentence was found to be appropriate.

52. When it comes to cases based on circumstantial evidence in our jurisprudence, the standard that is adopted in terms of law laid down by this Court as noticed in ***Sharad Birdhichand Sarda***[34] and subsequent decisions is that the circumstances must not only be individually proved or established, but they must form a consistent chain, so conclusive as to rule out the possibility of any other hypothesis except the guilt of the accused. On the strength of these principles, the burden in such cases is already of a greater magnitude. Once that burden is discharged, it is implicit that any other hypothesis or the innocence of the accused, already stands ruled out when the matter is taken up at the stage of sentence after returning the finding of guilt. So, theoretically the concept or theory of *"residual doubt"* does not have any place in a case based on circumstantial evidence. As a matter of fact, the theory of residual doubt was never accepted by US Supreme Court as discussed earlier.

However, as summed up in ***Kalu Khan***[17], while dealing with cases based on circumstantial evidence, for imposition of a death sentence, higher or stricter standard must be insisted upon. The approach to be adopted in matters concerning capital punishment, therefore ought to be in conformity

with the principles culled out in paragraph 41 hereinabove and the instant matter must therefore be considered in the light of those principles.

53. If the present case is so considered, the discussion must broadly be classified under following two heads: -

(A) Whether the circumstantial evidence in the present case is of unimpeachable character in establishing the guilt of the Appellant or leads to an exceptional case.

(B) Whether the evidence on record is so strong and convincing that the option of a sentence lesser than a death penalty is foreclosed.

Going by the circumstances proved on record and, more particularly the facets detailed in paragraph 19 hereinabove as well as the law laid down by this Court in series of decisions, the circumstances on record rule out any hypothesis of innocence of the Appellant. The circumstances are clear, consistent and conclusive in nature and are of unimpeachable character in establishing the guilt of the Appellant. The evidence on record also depicts an exceptional case where two and half years old girl was subjected to sexual assault. The assault was accompanied by bites on the body of the victim. The rape was of such intensity that there was merging of vaginal and anal orifices of the victim. The age of the victim, the fact that the Appellant was a maternal uncle of the victim and the intensity of the assault make the present case an exceptional one.

However, if the case is considered against the second head, we do not find that the option of a sentence lesser than death penalty is completely foreclosed. It is true that the sexual assault was very severe and the conduct of the Appellant could be termed as perverse and barbaric. However, a definite pointer in favour of the Appellant is the fact that he did not consciously cause any injury with the intent to extinguish the life of the victim. Though all the injuries are attributable to him and it was injury No.17 which was the cause of death, his conviction under Section 302 IPC is not under any of the first three clauses of Section 300 IPC. In matters where the conviction is recorded with the aid of clause fourthly under Section 300 of IPC, it is very rare that the death sentence is awarded. In cases at Serial Nos. 10, 11, 16, 24, 40, 45 and 64 of the Chart tabulated in paragraph 30 hereinabove, where the victims were below 16 years of age and had died during the course of sexual assault on them, the maximum sentence awarded was life sentence. This aspect is of crucial importance while considering whether the option of a sentence lesser than death penalty is foreclosed or not.

54. We therefore, find that though the Appellant is guilty of the offence punishable under Section 302 IPC, since there was no requisite intent as would bring the case under any of the first three clauses of Section 300 IPC, the offence in the present case does not deserve death penalty.

55. The second count on which death sentence has been imposed is under Section 376A of IPC. As noted earlier, the offence was committed on 11.02.2013 and just few days before such commission, Section 376A was inserted in IPC by the Ordinance. As concluded by us in paragraph 16 hereinabove, the *ex-post facto* effect given to Section 376A inserted by the Amendment Act would not in any way be inconsistent with sub-Article (1) of Article 20 of the Constitution. The Appellant is thus definitely guilty of the offence punishable under Section 376A IPC. But the question remains whether punishment lesser than death sentence gets ruled out or not. As against Section 302 IPC while dealing with cases under Section 376A IPC, a wider spectrum is available for consideration by the Courts as to the punishment to be awarded. On the basis of the same aspects that weighed with us while considering the appropriate punishment for the offence under Section 302 IPC, in view of the fact that Section 376A IPC was brought on the statute book just few days before the commission of the offence, the Appellant does not deserve death penalty for said offence.

At the same time, considering the nature and enormity of the offence, it must be observed that the appropriate punishment for the offence under Section 376A IPC must be rigorous imprisonment for a term of 25 years.

56. In view of the aforestated conclusions drawn by us, it is not necessary to deal with the submissions IV, V, VI, VII, VIII and IX, advanced by Ms. Mathur, learned Senior Advocate in respect of the issue of sentence.

57. Consequently, while affirming the view taken by the Courts below in recording conviction of the Appellant for the offences punishable under Sections 302 IPC and 376A IPC, we commute the sentence to life imprisonment for the offence punishable under Section 302 IPC and to that of rigorous imprisonment for 25 years for the offence punishable under Section 376A IPC. The conviction and sentence recorded by the Courts below for the offences punishable under Section 376(1), (2)(f), (i) and (m) of IPC, and under Section 6 of the POCSO Act are affirmed.

58. These appeals are allowed to the aforesaid extent.

…….J.
(Uday Umesh Lalit)

…….J.
(Indu Malhotra)

…….J.
(Krishna Murari)

New Delhi;
November 02, 2020.