IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

CRIMINAL CONFIRMATION CASE NO. 01 OF 2021

The State of Maharashtra
Through Police Station, Bhokar,
Taluka Bhokar, District Nanded. … Applicant

Versus

Baburao Ukandu Sangerao
@ Baburao Malegaonkar … Respondent

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Mr. R. V. Dasalkar, APP for State.
Ms. Rebecca Gonsalvez a/w Ms. Shreya Rastogi & Ms. Pratiksha Basarkar i/by Mr. Vishal A. Bagdiya, Advocate for the Respondent.

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WITH
CRIMINAL APPEAL NO. 280 OF 2021
WITH
CRIMINAL APPLICATION NO. 2382 OF 2021
WITH
CRIMINAL APPLICATION NO. 2746 OF 2021
WITH
CRIMINAL APPLICATION NO. 2701 OF 2022

Baburao Ukhandu Sangerao @
Baburao Malegaonkar
Age – 36 years, Occu- Labour,
R/o. Divshi (bk), Taluka - Bhokar,
District Nanded. … Appellant
[Accused]

Versus

1. The State of Maharashtra
Through Police Station, Bhokar,
Taluka Bhokar, District - Nanded.

2. Madhav s/o Gajraj Surod,
Age – 36 Years, Occu- Agriculture,
R/o. Divshi (Bk), Taluka - Bhokar,
District Nanded.
[Original informant-father of deceased] … Respondents

.....

Ms. Rebecca Gonsalvez a/w Ms. Shreya Rastogi & Ms. Pratiksha Basarkar i/by Mr. Vishal A. Bagdiya, Advocate for the Appellant.

Mr. R. V. Dasalkar, APP for Respondent No.1-State.
Mr. R. M. Deshmukh, Advocate for Respondent No.2 [appointed]

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CORAM : SMT. VIBHA KANKANWADI AND
ABHAY S. WAGHWASE, JJ.

Reserved on : 11/08/2023
Pronounced on : 15/09/2023

JUDGMENT [ABHAY S. WAGHWASE, J.] :

1. Vide instant proceedings, on one hand, State is seeking confirmation of death sentence awarded by Additional Sessions Judge and Special Judge [under Protection of Children from Sexual Offences Act, 2012], Bhokar dated 22.03.2021 and 23.03.2021 in Special [POCSO] Case No. 06 of 2021; whereas, on the other hand, convict is also assailing the same judgment on its legality, maintainability and sustainability. Resultantly, both proceedings are taken up and decided by way of common judgment.

CASE OF PROSECUTION IN TRIAL COURT IS AS UNDER:

2. Afternoon of 20.01.2021 turned out to be the darkest of all times and also the last for the little soul born to PW1 and PW10. Unmindful of the outrageous and perverse intentions of her so-called

"uncle", she innocently took a last run to be in his company. According to prosecution, this is a classic illustration of how blatant and patent breach of trust can be committed by a person who is like a guardian to child. Accused has victimized a girl child, who, on seeing him arrive, ran towards him only to be ravished at his hands in the very vicinity, where her parents were labouring, probably to give their blood and flesh a bright future. Unfortunately, all their hopes and joys were dashed and shattered within few hours that late afternoon.

3. Story of prosecution as is unfolded from the FIR is that, PW1 informant-father and PW10 mother alongwith grandmother of the victim went for their daily agricultural activities in their own field. Accused-appellant was engaged a year back by PW1 for herding buffaloes on yearly basis. As such, accused was well acquainted with informant, his family members including the victim, who was reported to be barely six years of age. On fateful day after mid-day meals at home, when informant and his wife PW10, were about to return to resume their agricultural work, the victim insisted to join them and finally they yielded to her demand and took her along with them and on the way, informant also purchased snacks (kurkure) and they all reached the field.

4. According to prosecution, around 2.15 p.m. or so, as usual, accused untied the buffaloes to take them for grazing on the pastures. Seeing accused arrive, victim ran towards him after greeting him and was in his company and well within the sight of informant-father and her mother i.e. on a trench (*bandh*) of the field. After a short while, when buffaloes were seen entering the field, informant gave calls to his servant i.e. accused, but neither he nor the victim were seen at the spot where she was seen sitting and chatting with accused. Consequently, search activity was undertaken. The informant updated PW2 Sk. Imamsab @ Gulab and PW3 Madhav Karewad, who were in the square of the said village and all three went in search of both, the child as well as the accused. During twilight time, in the river bed they came across footwear and frock of the child and at a short distance, on further search, they came across the ghastly scene. They noticed naked dead body of the child with several injuries and bite marks all over the body. On further search, according to prosecution, in the very vicinity, at a short distance from the dead body, accused was also spotted in naked condition and on being questioned, he confessed raping and murdering the child. The Bit Jamadar and other Constables, who had also reached there, took accused in custody and thereafter, informant PW1 set law into motion.

5. In the above backdrop, PW15 P.I. Vikas Patil [IO], who was entrusted with the investigation, undertook the same and after completing it and on gathering sufficient evidence, he chargesheeted accused.

Learned trial Judge, who was seized with the matter, framed and explained charge and on its denial, permitted the prosecution to adduce evidence. On completion of recording of evidence, parties were allowed to advance arguments and after appreciating and analyzing the evidence on behalf of prosecution, learned trial Judge accepted the case of prosecution as proved and thereby held accused guilty for offence punishable under Sections 302, 363, 376(A), 376(2)(j)(m), 376-AB, 377 of the Indian Penal Code [IPC] and Sections 4, 6, 8, 10 and 12 of the Protection of Children from Sexual Offences Act, 2012 [POCSO Act]. The learned trial Judge further came to a specific finding that the case fell in the **"rarest of the rare"** category and thereby awarded **death sentence**.

Now before us, by way of instant proceedings bearing Confirmation Case No.1 of 2021, the State is seeking confirmation of the same. At the same time, the accused is also questioning the maintainability, sustainability and legality of the judgment as well as the sentence awarded, by preferring appeal bearing Criminal Appeal No. 280 of 2021.

6. Heard both sides extensively. The sum an substance of their submissions are as under.

SUBMISSIONS

ON BEHALF OF STATE

7. In support of confirmation, learned APP appraised us about the facts of prosecution case in trial court. According to him, deceased victim, daughter of PW1 informant and PW10 mother, was barely six years of age. That, accused was employed as a servant to take care of the live stock of informant. That, as such, he was well acquainted with the deceased and, it is pointed out that, she even addressed him as "*kaka"* [uncle]. However, according to learned APP, her such trust and faith was shattered by accused, who lured her to the remote place and to satisfy his lust, he not only raped and sodomized her cruelly, but even mercilessly strangulated her to death.

8. Learned APP pointed out that the innocent child was kidnapped and taken while she was sitting alone enjoying her snacks. He emphatically submitted that deceased was seen in the company of accused by her own parents and they, even in their wildest dreams, had not imagined that, accused would take disadvantage and take their child to ravish her to satisfy his lust. He pointed out that the

nature and number of injuries clearly demonstrate that in the most inhuman and cruel manner, sexual assault was inflicted on the child and it is so evident from the evidence of autopsy doctor PW5 Dr. Kalaskar. He further emphasized that there were as many as 47 independent injuries including bite marks all over the body as well as private parts and thus, it is his submission that, rape and murder is outrageously wicked.

9. He invited our attention and took us through the evidence of PW1 and PW10 and would submit that, the unfortunate parents have deposed about their child accompanying them from home to the field. That, she was made to sit on a trench and in the afternoon session of the work, accused was seen arriving at the spot and he was further seen by both parents interacting with the child. He was only person in the company of their child and she was resultantly last seen with him. He pointed out that when it was realized that she was missing, extensive search was undertaken which revealed that at a shorter distance, on the bed of river, accused had committed sexual act followed by murder. Dead body of the child was found lying in naked condition and not only her belongings but even the belongings of very accused were lying there confirming his involvement. That, accused was also apprehended from the same spot, that too in naked

condition, and so, according to learned APP, what more is required to hold accused responsible.

10. Learned APP further submitted that there is confession by accused to independent witnesses like PW2 Sk. Gulab, PW3 Madhav Karewad and PW12 PC Namdev Shirole, who have also stepped in the witness box to testify to that extent. Their such evidence to that extent has remained steadfast. Thus, it is his submission that, there is not only overwhelming evidence, but the evidence is also of sterling quality. He further pointed out that apart from confessional statement, accused was also found to have suffered injury marks. Physical evidence, which was seized from the crime scene, was seized, sealed and got analyzed. DNA samples were also gathered and subjected to analysis. Therefore, apart from clinching evidence of parents and independent witnesses, it is his submission that, there is forensic evidence pin-pointing involvement of accused. Even forensic expert is made to step into the witness box. That, he had narrated the procedure undertaken by him and elaborated his positive findings. Learned APP hastened to add that though there are minor irregularities in the procedure of analysis, it is his submission that, such lapses will not erode or render forensic evidence inadmissible in its entirety.

Consequently, it is his submission that there is legally acceptable and clear evidence about accused to be the only perpetrator of the heinous crime.

11. Learned APP further took us through the judgment under challenge and would submit that learned trial Judge, after correctly appreciating the evidence, before awarding capital punishment, has noted both, aggravating and mitigating circumstances, and after analyzing the same, finding aggravating circumstances to be outweighing mitigating circumstances, death sentence has been rightly awarded. According to him, it is in consonance with the sentencing policy and settled legal position. That, learned trial Judge has assigned sound reasons as to why, according to him, the case fell in the rarest of rare category.

12. Thus, according to learned APP, the Judgment being sound and based on settled legal principles, which is in consonance with the evidence on record, which unflinchingly point finger to the accused regarding his involvement, the sentence of death so awarded by learned trial Judge deserves to be confirmed.

13. Learned APP took recourse to and relied on the judgments in ***Omprakash S/o. Gayaram Nirmalkar v. The State of Maharashtra*** ; 2016 ALL MR (Cri) 3337 on the point of admissibility of scientific expert's evidence, ***Raju Jagdish Paswan v. State of Maharashtra*** ; (2019) 16 SCC 380 on the point of commuting death sentence without remission, ***Ajay Kumar Ghoshal & Ors. v. State of Bihar and Anr.*** ; (2017) 12 SCC 699 on the point of permissibility of *de novo* trial only when appellate court is satisfied that it has occasion on miscarriage of justice, ***Bachan Singh v. State of Punjab*** ; MANU/SC/0055/1982, (1982) 3 SCC 24, ***Machhi Singh & Ors. v. State of Punjab*** ; MANU/SC/0211 /1983, AIR 1983 SC 957, ***Dhananjoy Chatterjee v. State of West Bengal*** ; MANU/SC/ 0626/1994, ***Khushwinder Singh v. State of Punjab*** ; MANU/SC/0318/ 2019 on the point of rarest of the rare case and ***The State of Maharashtra v. Ramkirat Munilal Goud*** ; [Confirmation Case No.1/2019 (Bombay High Court)] on confirmation of death sentence.

ON BEHALF OF THE APPELLANT-ACCUSED

14. Before questioning the legality and maintainability of the impugned judgment, learned counsel for accused raised a fundamental objection i.e. whether in the case in hand there was at

all a fair investigation and even a fair trial. She pointed out that apparently to secure conviction, an open and shut case has been projected. She pointed out that it is the allegation of prosecution that accused was apprehended from the spot, that too in naked condition and only such circumstance seems to have prevailed over the opinion of learned trial Judge. She pointed out that infact there is no independent evidence, except testimony of PW1 and PW10 regarding seeing deceased to be in the company of accused. According to her, the entire case of prosecution is rested only on extra-judicial confession, which, according to her, is in presence of police and therefore, apparently hit by Sections 25 and 26 of the Indian Evidence Act. She strenuously submitted that law is fairly settled that evidence in the form of extra-judicial confession is inherently weak in nature. On the point of presence of police at the time of alleged confession, she invited our attention to the evidence of PW2 Sk. Gulab, PW3 Madhav Karewad and PW12 PC Namdev Shirole. She further added that it is also evident from the very case of prosecution witnesses, including IO, that a huge mob had gathered near the scene of occurrence and it is succumbing to their pressure, accused was apprehended and even looked up on as a real culprit before facing trial. She would further strenuously submit that no independent efforts were made by investigating machinery to investigate as to

whether apprehended accused was really involved or not. According to her, the manner of investigation clearly suggests that there is utter disregard to the acknowledged procedure for investigation and infact it is unfair one, merely with intention to show the case as solved. In support of unfair investigation, she pressed into service ruling in the case of ***Ankush Maruti Shinde and others v. State of Maharashtra*** ; (2019) 15 SCC 470 and ***State of Uttar Pradesh v. Wasif Haider and others***; (2019) 2 SCC 303.

On the point of lapses in investigation, she has sought reliance on ***Ganesh Bhavan Patel v. State of Maharashtra*** ; (1978) 4 SCC 371, ***State of Gujarat v. Kishanbhai and others*** ; (2014) 5 SCC 108, ***Reena Hazarika v. State of Assam*** ; (2019) 13 SCC 289, ***Kanhai Mishra Alias Kanhaiya Misar v. State of Bihar*** : (2001) 3 SCC 451, ***Parminder Kaur alias P.P. Kaur Alias Soni v. State of Punjab*** ; (2020) 8 SCC 811 and ***Jaikam Khan v. State of Uttar Pradesh*** ; 2021 SCC OnLine SC 1256.

15. On the point of fair trial, she advanced submissions that here, trial was also conducted in undue haste and hurry. She pointed out that record of the trial court clearly suggests that unfortunately, the Bar members of concerned court had resolved not to defend the accused and so legal aid was given to him. That, resultantly, there

was no quality representation of accused. She invited our attention to the *roznama* and would submit that even no sufficient time was granted to the defence counsel to properly represent accused. She was very vociferous in submitting that even insufficient time was granted to answer the crucial aspect of sentencing. On this point, she seeks reliance on the case of ***Mohd. Mannan Alias Abdul Manan v. State of Bihar*** ; (2020) 2 SCC (Cri.) 382. She would submit that, learned trial Judge concluded the finding and granted only one day to reflect upon sentencing. Resultantly, it is her submission that, here is a case wherein, apart from unfair and motivated investigation, there is denial of fair trial also.

16. She next submitted that though prosecution claims to have apprehended accused from the spot, according to her, there is no ocular account or direct evidence in that regard and therefore, case of prosecution is rested on circumstantial evidence. She reiterated the settled legal position and essential requirements, as regards to manner of appreciation of a case based on circumstantial evidence and the cardinal principles to be borne in mind while appreciating such a case. She invited our attention to the five circumstances pressed into service by prosecution during the trial, i.e. (1) Last seen together; (2) Extra-judicial confession; (3) Accused apprehended

while in naked condition; (4) Seizure of articles including clothes and (5) DNA analysis report.

17. Elaborating on above circumstances, i.e. on the point of last seen together, it is her submission that there is no witness seeing accused talking with the victim or they both leaving together. According to her, informant father is silent to that extent and even PW10 mother has improvised her version to that extent and omission to that extent is also got proved through IO. Thus, according to her, there is no iota of evidence regarding so called talks between victim and accused that afternoon near the field. She would point out that it has come in the very evidence of IO and even in the cross-examination of prosecution witnesses that, in the vicinity of spot or adjoining to it, there were other agricultural fields and several persons were working therein. That, the vicinity, in which there being a river, was frequented by several persons which too is admitted by the IO and so she strenuously submitted that possibility of someone else to be involved also cannot be ruled out. She pointed out that persons working in the vicinity of the spot are also surprisingly not examined, who could have been the best and independent witnesses. She invited our attention to the testimony of PW1 and PW10 and submitted that father has admitted that the girl use to visit the field

alone and even go back home alone. Therefore, there are several possibilities about deceased to be going missing. Learned counsel pointed that there is material omission in the testimony of PW10 mother about victim giving call to the accused and running towards him. Thus, according to her, the only evidence, that too of parents, by no means can be applied in favour of circumstance of last seen together.

It is further submitted that, admittedly dead body was found at such a spot which is a public place and was open and free for access to one and all. Therefore, in absence of cogent evidence on the point of accused to be only person in the company of deceased, it is her submission that said theory cannot be pressed into service or applied, which, according to her, is unfortunately done by prosecution in this case and even is accepted by learned trial Judge without getting satisfied.

Pointing to the evidence of PW2 Sk. Gulab and PW3 Madhav Karewad, it is submitted that their evidence also is of no avail on the point of last seen together as they had not seen accused and deceased to be in each other's company at any point of time. The following features, according to learned counsel, would indicate that appellant was never seen going in the company of victim.

Firstly, *PW1 informant not uttering about deceased to be in the company of accused to PW2 Sk. Gulab, PW3 Madhav Karewad, PW12 PC Namdev Shirole or PW15 IO and rather his name is finding place directly in the FIR, which too is registered after almost 7 to 8 hours of the victim going missing.*

Secondly, *missing not registered inspite of visit of grandfather of the victim at 5.30 p.m. to police station.*

Thirdly, *no search made of the victim at her house or even at the house of accused and PW1 informant directly going in search in village Divshi and village Nighwa.*

Fourthly, *exact distance between the spot where deceased was allegedly sitting and the alleged scene of occurrence is not established or demonstrated and even the spot where allegedly accused was spotted away from the dead body is also not established.*

For above reasons, she would submit that with such quality of evidence, it is apparent that implication of accused is merely on suspicion which never takes place of a proof. Learned counsel also narrated the settled legal position on the point of last seen together and would submit that here, there is apparently a gap of over four hours between so called last seen and deceased being found dead and resultantly, it is her submission that, said theory cannot be taken

recourse to, to implicate accused. On this point, she sought reliance on ***State of Goa v. Sanjay Thakran and another*** ; (2007) 3 SCC 755 and ***Anjan Kumar Sarma and others v. State of Assam*** ; (2017) 14 SCC 359.

18. On the circumstance of extra-judicial confession, it is her submission that at the outset, the said confession is inadmissible being hit by provisions under Sections 25 and 26 of the Indian Evidence Act. She strenuously submitted that it is settled position that an extra-judicial confession is a very weak type of evidence and can never be applied to fasten guilt. She pointed out that prosecution witnesses are marking presence of police personnel and as such, so called extra-judicial confession being made to police, is rendered insignificant. She pointed out that for the best reasons known to prosecution, said police personnel are not examined by prosecution and this amounts to withholding important witness and even adverse inference needs to be drawn against the prosecution. According to her, there was no reason for appellant-accused to confess to PW2 Sk. Gulab or PW3 Madhav Karewad, who were almost strangers to him. She would strenuously submit that in presence of huge gathering and angry mob, who was admittedly about to lynch accused and had infact also given thrashing to him considering the injury marks on his person, by no

stretch of imagination so called confession could be said to be voluntary one. On this count, she seeks reliance on the ruling of ***Param Hans Yadav and Sadanand Tripathi v. State of Bihar and others*** ; (1987) 2 SCC 197, para 8. While concluding on this circumstance, she urged that even otherwise, extra-judicial confession being most weak type of evidence, according to her, the same ought not to have been readily accepted by the learned trial Judge.

19. Criticizing the third circumstance about accused to be found on the spot in naked condition, she would submit that except story of prosecution witnesses, who are otherwise unworthy of credence, there is no contemporaneous evidence about accused found to be in naked condition. She would question as to if accused was apprehended in such condition and if his clothes were found lying on the spot, in what condition he was taken to police station? According to her, it was expected of the investigating machinery to draw a distinct panchanama at the very spot itself about accused to be in such condition. She pointed out that, infact there is none in that regard. According to her, if it was so, then why this aspect is missed even in the inquest panchanama. She further questioned that when several persons were involved in so-called search and when prosecution claims about apprehending accused in such condition,

then, why other villagers or independent witnesses are not examined by prosecution to fortify their such case.

Learned counsel would submit that apart from above, even there are serious lapses on the part of investigating machinery in not forwarding accused for medical examination the same evening inspite of it being mandatory. She pointed out that surprisingly, after three days of arrest, accused was shown to be produced for medical examination. According to her, whatever injuries were noticed on the person of accused, are also quite possible on account of thrashing given by angry mob. She brought to our notice General Diary Entry No. 30 of 2021 noted at 7.33 p.m. wherein there is reference of accused being forwarded to Rural Hospital on 20.01.2021 on account of suffering injuries as a result of beating by the mob and for issuing opinion to that extent. She would accuse prosecution for deliberately suppressing medical examination report dated 20.01.2021 inspite of availability of General Diary Entry. According to her, only report of alleged medical examination dated 23.01.2021, which too is silent about age of injuries on the person of accused, is placed on record. She has condemned and questioned the prosecution on this count by submitting that even the so called doctor, who examined accused on 20.01.2021 is withheld by prosecution. Concluding on above

circumstance, she submits that, apart from suppressing best evidence, prosecution has failed to prove beyond reasonable doubt that appellant was found in naked condition and was so apprehended. She reiterated that there is no iota of evidence in support of such accusation.

20. While attacking the circumstance of recovery and discovery, she pointed out that even going by the timeline stated by prosecution, there is apparently 17 hours delay in causing seizure. She pointed out that around 6.30 p.m. or so, spot was alleged to be visited by prosecution witnesses including police personnel, but even no immediate spot panchanama was drawn, rather it was drawn on the next day and, according to her, there is no evidence to show that for the entire night and half of the next day, the spot was cordoned and secured to preserve the physical evidence. She pointed out that the above precaution has not been taken inspite of prosecution claiming to have deployed adequate police force. To buttress the above submissions, she would invite our attention to the report of Regional Forensic Science Laboratory [RFSL], Nanded dated 21.01.2021 regarding spot to be not secured. At this juncture, it is also her submission that when the exercise of panchanama was going on, there was presence of forensic personnel, but they are not made to

gather or collect physical evidence. According to her, when the very crime scene is not shown to be protected, possibility of tampering and contamination of evidence cannot be ruled out.

She next emphasized that here, there is no link evidence or custody evidence to rely on the so called seizure. She pointed out that where, when and in which condition the so called seizure was kept has not been demonstrated by prosecution. According to her, malkhana/*muddemal* register about safe custody of the seizure, not being produced, there is a valid question about very safe custody evidence. She pointed out that apart from above, there is delay in dispatching seizure, further rendering the case of prosecution doubtful. On this aspect, learned counsel seeks reliance on ***Dhal Singh Dewangan v. State of Chhattisgarh*** ; (2016) 16 SCC 701 and ***The State of Maharashtra v. Krushna s/o Ramrao Ridde and another*** ; 2017 ; SCC OnLine Bombay 7670.

On the point of chain of custody, she seeks reliance on ***State of Rajasthan v. Gurmail Singh*** ; (2005) 3 SCC 59, ***State of Uttar Pradesh v. Mohd. Iqram and another*** ; (2011) 8 SCC 80, ***Anter Singh v. State of Rajasthan*** ; (2004) 10 SCC 657 and ***Santa Singh v. State of Punjab*** ; AIR 1956 SC 526.

21. In the last limb of her argument, while attacking the circumstance of DNA evidence, she vociferously submitted that here, very chain of custody of DNA sample is apparently compromised. She took us through the evidence of PW16 Sitakant Palaskar, Assistant Chemical Analyzer, RFSL [CA], more particularly his cross-examination, and would submit that apart from faulty procedure being adopted by PW16 CA, who was not at all an expert in DNA, it is pointed out that it has come on record from his testimony that required precautions of safe custody, sampling, analysis have not been scrupulously adhered to. That, expert has admitted about possibility of mixing of samples. According to her, the control samples of both, accused and deceased, are apparently compromised thereby rendering the very analysis unworthy of credence. She submits that, prepared blood stains are analyzed but there is no evidence as to who prepared it and apart from there being deviations and infractions in the manner of analysis, in what condition the samples were preserved has also not been satisfied by the prosecution. She questioned as to what was the need of carrying out analysis twice. Thus, according to her, the solitary piece of evidence in the from of DNA analysis is also not free from doubt and resultantly, even if report is said to be positive, it is her forceful submission that, in view of crucial admissions given by PW16 CA, the report is rendered valueless and according to her, it is

unfit for consideration. On the aspect of evidentiary value of DNA and the procedure of analysis, she has sought reliance on the judgment of ***Prakash Nishad v. State of Maharashtra*** ; MANU/SC/0613/2023, AIR 2023 C 2938 and ***Rahul v. State of Delhi*** ; (2023) 1 SCC 83

22. On the point of sentencing, it is her submission that this was not at all a fit case for awarding death sentence. That learned trial Judge has failed to appreciate the settled legal position on the point of capital punishment. On this point, she seeks reliance on the case of ***Bachan Singh v. State of Punjab*** ; (1980) 2 SCC 684, ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*** ; (2009) 6 SCC 498, ***Sangeet and another v. State of Haryana*** ; (2013) 2 SCC 452, ***Manoj and others v. State of Madhya Pradesh*** ; 2022 SCC OnLine 677/(2023) 2 SCC 353, ***Mannan Alias Abdul Manan*** (supra), ***Accused 'X' v. State of Maharashtra*** ; (2019) 7 SCC 1 and ***Rajendra Pralhadrao Wasnik v. State of Maharashtra*** ; (2019) 12 SCC 460.

23. By referring the judgment in ***Manoj*** (supra), she would submit that, learned trial Judge has failed to consider the mitigating circumstances and there is complete failure to take into consideration even the criminal test mandated by law. That, no efforts are done by State in the trial court to put before the trial court, material regarding

background of accused. She submits that, prosecution has not shown that possibility of reformation has been completely ruled out.

24. Criticizing the impugned judgment, she would submit that apart from not adhering to the principles enunciated in the case of ***Bachan Singh***, learned trial court erred by merely relying on the aspect of society's cry for justice, which according to her, was unwarranted. To buttress such contention, she seeks reliance on the case of ***Bachan Singh*** (supra) and ***Santosh Bariyar*** (supra).

25. While summing up, she submitted that if at all this Court still finds appellant guilty of the charge, then, according to her, at the most sentence of life imprisonment could be imposed. Referring to the psychological assessment report, affidavits of mother and brother of accused, conduct certificate from Yerwada prison, social investigation report and the observations and conclusions therein, she submits that there is every possibility of reformation of accused as there are no criminal antecedents whatsoever. According to her, learned trial Judge has not considered the young age and poor socio-economic background of the accused, which, according to her, is also a crucial aspect while considering sentencing. In support of her such submissions, she seeks reliance on the case of ***Bachan Singh*** (supra),

Veerendra v. State of Madhya Pradesh ; 2020 SCC OnLine SC 622, ***Irappa Siddappa Murgannavar v. State of Karnataka*** ; (2020) 2 SCC 801, ***Pappu v. State of Uttar Pradesh*** ; 2022 SCC OnLine 176, ***Rajendra Pralhadrao Wasnik*** (supra) and ***Manoj*** (supra).

EVIDENCE ON BEHALF OF PROSECUTION

26. Case of prosecution seems to be rested on in all 16 witnesses. That apart, there is reliance on numerous documents like FIR, inquest panchanama, spot panchanama, postmortem report, CA analysis report, DNA analysis report etc.

The sum and substance of the prosecution witnesses is as under:

PW1 Informant-father of victim, deposed about he to be an agriculturist and owning a land adjacent to a village beside Sudha river. He deposed about accused being in his service on yearly basis for maintaining his cattle and working hours of accused being from 7.00 a.m. to 10.00 a.m. and 2.00 p.m. to 6.00 p.m. Regarding incident he deposed that, on 20.01.2021 he along with his wife and mother had been to the field and at about 1.30 p.m., they returned home for meals. While returning back to the field, victim insisted to join them and was accordingly taken with them and on the way he purchased snacks [kurkure] for the victim. On

reaching the field, victim was asked to sit on the *bandh* of their field with pocket of kurkure, and they all got engaged in the field work. This witness further deposed that after some time accused came on the field and victim stared talking with him. Accused being their servant and also well acquainted with the victim, this witness states that, they did not pay any heed. However, when after some time buffaloes entered into the crops, so he called accused but neither he nor the victim were found and so, while searching them, this witness states that, he came to the village and informed PW2 Sk. Gulab and PW3 Madhav Karewad and they all started searching in the river bed where they found chappal of victim and later, the naked dead body of the victim lying in grass having bleeding injuries on her private parts. According to this witness, black pant and white shirt of accused was found near the dead body. According to this witness, PW2 Sk. Gulab and PW3 Madhav Karewad informed him that accused was found in naked condition. [A note is taken about demeanor of this witness that he became emotional and sat in the witness box weeping.] This witness further deposed that, when PW2 Sk. Gulab, PW3 Madhav Karewad and others caught hold the accused, he confessed his guilt and the police personnel, who had also joined the search, took custody of the accused. This witness has identified the report lodged by him Exhibit 14, FIR Exhibit 15 and his statement under Section 164 of the Code of Criminal Procedure [Cr.P.C.] at Exhibit 17.

PW2 Shaikh Imamsab @ Gulab, a villager, deposed about having acquaintance with informant as well as accused. Regarding

incident, he deposed that on 20.01.2021, at about 3.30 p.m., when he was at the square of the village, informant asked him as to whether his daughter was seen by him. One and half hour thereafter, on hearing noise from bus stand side, he reached there and joined the informant, one Chetan and PW3 Madhav Karewad in the search. According to him, at that time, Bit Jamadar Singanwad, PW12 PC Shirole and another PC Mudhol had also came there and they all started search in the bed of Sudha river where, they saw footwear and frock of victim and on further search, they found the dead body of victim in naked condition with injuries and bite marks and blood oozing from the private part of the victim. According to him, a black pant, white shirt, underwear, baniyan and black shoe was found near the dead body. This witness further deposed that on further search, they found accused hiding in grass and he was naked. On being caught hold by the gathering, this witness claims to have questioned what he was doing there and accused allegedly confessed of committing rape and murder and concealing himself out of fear of public. He too stated that, thereafter bit Jamadar, other constables and public reached there. Protection was given to the accused and he was taken to police station. Witness claims that his statement was recorded under Section 164 of Cr.P.C.

PW3 Madhav Karewad claims that he is a resident of Kandli and he had come for refreshment near bus stand. He deposed that around 3.00 pm, PW1 approached to inquire about seeing victim. He denied having seen her, but deposed he joining in

searching along with PW2 Sk. Gulab and one Chaitanya. He stated that Singanwad also joined in the search. While searching towards the bed of river, they came across chappal and frock and on further search, they saw victim lying in naked condition in the high grass with bleeding injuries. A black pant, white shirt and undergarments were lying there and they continued the search and that time they saw one person who was naked and was caught. The person gave his name a Baburao and further stated that he raped and murdered the girl and therefore, out of fear he was concealing himself.

PW4 Dr. Anant Chavan is the doctor who examined appellant-accused on 23.01.2021. He claims to have noticed minor abrasions over right and left thigh and back. He stated that he collected samples and issued opinion about potency. According to him, there were no injuries on the private part of accused. He identified report issued by him at Exhibit 25.

PW5 Dr. Nitin Kalaskar is the autopsy doctor who conducted PM along with two other doctors. He narrated about the external and internal injuries and he identified PM report Exhibit 29.

PW6 Balaji Ingle is the official of Grampanchayat who issued birth certificate of victim Exhibit 33.

PW7 Ravi Deshmukh is a photographer whose services were requisitioned for snapping photographs and he testified about developing ten photographs and issuing certificate Exhibit

35. He also spoke about photographs being stored in pen-drive and same being seized vide panchanama Exhibit 36.

PW8 Mandakini Sabanwar, pancha to inquest panchanama, stated that she and another pancha Giri [PW9] acted as pancha to the panchanama of dead body. She narrated condition of the body and identified inquest panchanama Exhibit 43.

PW9 Giri Rawlod is the other pancha who spoke about being pancha to spot panchanama Exhibit 45 and he identified 11 articles seized from the spot.

PW10 mother of victim at Exhibit 45 gave evidence that incident took place on 20.01.2021. That, around 10.00 a.m. she and her husband had been to agriculture field and they worked up to 1.30 pm. and then returned home for meals. According to her after meals when she, her husband, mother in law and sister in law were about to return to the field, victim also came to the field as she was insisting to come and crying and therefore her husband purchased snacks for her and they all reached the field. She stated that while they were working, victim was seated on the trench eating snacks. At About 2.00 to 2.30 p.m., accused came to the *akhada* and untied the cattle. She deposed that her daughter ran towards accused calling his name and at that time, accused and victim together went talking. According to her, they did not take any suspicion because accused was just like their family member. She stated that after some time, cattle entered the *jawar* crop and so her husband drove them and gave call to accused and victim but both were not found. Her husband

took search at different places and while taking search, some persons found frock and chappal of victim on the river bed. On further search, naked body of the victim was found and accused was also found near the spot in naked condition. She stated that she came to know about murder after raping her daughter. She also identified Articles 5 [frock] and 9 [chappal/footwear] of deceased and Articles 1 [black pant] and 2 [white shirt] which were on the person of deceased that day.

PW11 Sayyed Juned Patel is pancha to seizure of pendrive from photographer. He identified panchanama Exhibit 36.

PW12 Namdev Shirole, Police Constable posted at Bhokar Police Station gave evidence about receiving information about the occurrence at 06.00 p.m. on 20.01.2021 and they proceeding to the spot, meeting informant, PW2 Sk. Gulab and PW3 Madhav Karewad and coming across cloths of deceased, her dead body in naked condition and clothes of accused as well as accused apprehended from the said vicinity.

PW13 Sanjay Jondhale, Police Constable and **PW14** Rekha Metkar, Homeguard, have acted as carriers of *muddemal* to CA.

PW15 Vikas Patil, Police Inspector is the Investigating Officer who narrated all steps taken by him during investigation till filing of chargesheet.

PW16 Sitakant Palaskar, Assistant Chemical Analyzer, Regional Forensic Science Laboratory is the analyzer who conducted DNA analysis and issued reports Exhibits 79 to 90.

Apart from oral account, in trial court, prosecution has placed on record multiple documents such as FIR, various panchanamas, medical and CA reports etc.

DISCUSSION AND ANALYSIS

27. Here, since we are called upon to deal with both, the legality and sustainability of the conviction as well as the quantum of punishment, we wish to first take up the appeal and if the offence as alleged is found to be proved, then only shift to ascertain whether capital punishment awarded is at all justified.

28. At the threshold, we wish to address the principal criticism raised by learned counsel for accused that in this case, there is **firstly**, unfair and motivated investigation and **secondly**, there is unfair trial.

29. In respect of objection about unfair and motivated investigation, we have gone through the entire chargesheet. In our considered opinion, the peculiar facts of this case are that accused is taken in custody on being found in the vicinity of very scene of

occurrence in unusual condition. There is no material or proof to suggest that accused was arrested from some other place. No suggestion to that effect was put either to IO and other witnesses in their cross or to the accused in his statement under Section 313 of Cr.P.C.. Before interrogation, it seems that there is confessional statement on his behalf and taking clue from the same, investigating machinery seems to have navigated the process of collection of evidence. It has not been demonstrated to us that any go-by has been given to the procedure contemplated under law. Where there has been deviation in following procedural law or there is non compliance of due procedure of law is not pinpointed to us. It has not been shown to us that investigation is designedly defective or any deliberate act or omission on the part of IO which would adversely affect the case of prosecution. There is no doubt that IO is under statutory obligation to conduct fair and unbiased investigation. There is also no doubt that he is completely responsible for the methodology adopted for completing the investigation and even the fate of the investigation. But as stated above, what were the particular lapses on the part of PW15 IO, which led to unfair investigation, is not demonstrated to us. In cross, no pin-pointed questions to that effect were put to the IO. Resultantly, mere accusation that accused is made a suspect as a result of public annoyance and pressure is without base and is itself

not a good ground to hold that there is unfair, motivated or designedly defective investigation, more particularly when such objection is raised for the first time in appeal. Hence, we find no merit in the above objection.

30. No doubt every person has constitutional right of fair trial, but equally the concept of speedy trial, which is very much ingrained in the Constitutional ethos enshrined in the Constitution, is also right of an accused person. The same is recognized in the criminal jurisprudence and administration of criminal justice. Fundamentally it is to be borne in mind that it is fairly settled principle that, justice must not only be done but must also shown to have been done. It has been judicially acknowledged that fair trial includes fair investigation as envisaged by Articles 14 and 21 of the Constitution of India. The Constitutional philosophy of speedy trial does not mean circumventing procedural laws but it includes taking up all steps prescribed in Cr.P.C. as well as Police Manual. It is not only in the interest of the society at large, but even in the very interest of accused, who is also a focal point in the justice dispensation system.

In umpteen judgments the concept of fair trial and fair investigation has been thoroughly dealt since decades, including the landmark case of ***Sidhartha Vashisht @ Manu Sharma v. State [NCT***

of Delhi] ; (2010) 6 SCC 1, ***Dayal Singh and others v. State of Uttaranchal*** ; (2012) 8 SCC 263.

31. In the light of above objections, we have taken survey of the timeline since framing of charge till pronouncement of judgment. In our opinion, the above objection holds no substance. It is revealed from the Chargesheet that occurrence is of 20.01.2021. Accused is apprehended on the same day. One month thereafter, i.e. on 22.02.2021, charge seems to have been framed and list of witnesses was tendered by prosecution and case stood adjourned to 01.03.2021 for evidence and since then, trial has been conducted periodically. In the light of availability of both sides, procedure of recording evidence was undertaken and finally prosecution seems to have tendered evidence closure pursis on 16.03.2021. Thereafter, incriminating material seems to have been brought to the notice of accused as required under Section 313 of Cr.P.C., thereby giving him an opportunity to answer the same which also seems to have been done in the presence of accused as well as his counsel. Record shows that on hearing both sides, learned trial Judge has authored the judgment on 22.03.2021 and on said day, has held accused guilty of the charges and learned trial Judge has taken pause to hear the accused on the point of quantum of sentence and matter resultantly was adjourned

and kept next day i.e. on 23.03.2021. Record shows that on 23.03.2021, hearing on the point of sentence was taken and thereafter sentence was pronounced.

32. In the light of above discussion, at each stage procedure as contemplated in law for conducting trial seems to have been adhered to. Evidence suggests that the council representing accused, to the best of his ability, has tried to defend his client by cross-examining each of the prosecution witnesses at considerable length. It has not been brought to our notice that there was no opportunity or insufficient time accorded to the defence.

33. Concern of the learned counsel for accused is that, there was no sufficient time to reflect on the quantum of sentence and in quick succession judgment has been passed.

34. We are not ready to accept above arguments. A complete day was given to answer on the point of quantum of sentence. It is not a case that on the same day, accused was made to answer on the question of sentence and the judgment followed. The judgment carries submissions as to why no leniency is required to be extended to the accused.

Resultantly, there is no merit in the objection as regards to unfair investigation and unfair trial.

35. Now let us advert to the merits of the case. Before re-appreciating and re-analyzing the evidence to ascertain whether judgment of trial court is legally maintainable and sustainable, we wish to get ourselves satisfied, more particularly in the light of nature of charge of murder, as to whether death of the victim is established to be homicidal one. Though there is no serious dispute during appeal to the mode and manner of death, we wish to dwell on this issue.

36. **PW5 Dr. Nitin Kalaskar** seems to be the medico legal expert whose services were procured for conducting autopsy and his evidence is at Exhibit 26. Autopsy seems to have been done by this witness along with two more doctors. On external examination of the dead body, they seem to have reached to a finding that there were 47 external injuries and 9 injuries to external genitals, which are as follows:

External injuries in Column No. 17 are as follows.

1. Contusion present on forehead on right side 0.5 cm x lateral to mid-line of size 2 x 0.8 c.m red in colour.

2. Teeth contusion (bite mark) present on right cheek with two cresentic half circle horizontally placed meeting with each

other at both lateral ends with central pale area in between two teeth lines of maximum diameter of 0.5 cm upper half circle 6 teeth bite marks present adjacent to each other, lower half circle 5 teeth marks present, size of total injury 3.7 c.m x 3.5 c.m blue in colour.

3. Teeth contusion (bite mark) present over right cheek intermingling with lateral end of injury no.2, two semicircular bite marks obliquely placed meeting with each other at superior and inferior end, having 4 teeth marks intermingling with lateral end of injury no.2, total size of bite mark 3.5 c.m x 3 cm, blue in colour.

4. Abraded contusion present on right side of mandible mid part of size 2 c.m. x 0.5 c.m., red in colour.

5. Abrasion present over right cheek, 2 c.m. anterior to tragus of right ear of size 1 x 0.5 c.m., red in colour.

6. Contusion present over upper lip, right side of size 1 cm x 1 cm, blue in colour.

7. Laceration present over upper lip, just above mucosal line on left side, of size 0.5 cm x 0.3 cm. x muscle deep.

8. Contusion present over mucosal surface of upper lip on midline over frenulum of size 1 cm x 1 cm, blue in colour.

9. Contusion present over upper lip mucosal surface near left angle of mouth 0.5 cm x 0.5 cm , blue in colour.

10. Mucosal lacerations present on mucosal surface of lower lip right side 0.5 cm x 0.3 cm x submucosal tissue deep.

11. Teeth contusion (bite mark) present over left cheek obliquely placed with two cresecentric semicircular mark meeting with each other at superior lateral and inferior medial end, 6 teeth bite mark present at upper semicircular margins, pale area of size 1.3 cm present in between two margins, total size of injury 3.7 cm x 3.5 cm, blue in colour.

12. Abraded contusion present over left malar region, blue in colour of size 1 cm x 1 cm.

13. Contusion present over chin 1 cm x 1 cm bluish red in colour.

14. Contusion present on right side of neck anterolateral aspect 2 cm below lower border of right mandible of size 0.5 cm x 1 cm, blue in colour.

15. Contusion present on, just 1 cm below injuries no. 14 of size 2 cm x 1 cm and another contusion present below above mentioned, IInd contusion of size 1 x 0.5 cm, both blue in colour.

16. Contusion present on left anterolateral aspect of neck 3.5 cm below left angle of madible 1.5 cm x 0.5 cm, blue in colour.

17. Contusion present on front of right shoulder, obliquely placed of size 3 cm x 0.5 cm, red in colour.

18. Contused abrasion on right upper lateral quadrant of right mammary region 1 cm x 0.5 cm, red in colour.

19. Teeth contusion (bite mark) present on right mammary region near nipple on right upper lateral quadrant with two semicircular margins meeting with each other at medial and lateral end, 4 teeth bite marks present on superior bite margins, pale area of max 1.5 cm present between two bite mark margins, injury blue in colour.

20. Abrasion present over left mammary region, medial side of nipple of size 2 cm x 0.5 cm, red in colour.

21. Abrasion present over right arm, lateral aspect, mid part 8 cm below, right lip of right shoulder 0.2 x 0.2 cm red in colour.

22. Contusion present over, anterior aspect of right cubital fossa, 1.5 c.m x 1.5 cm red in colour.

23. Lacerated wound present over dorsum of right hand over kuncle of right ring finger of size 2 cm x 1.7 cm x muscle tendon deep with tendon lacerations of size 0.5 cm x 0.2 cm x muscle deep present over lateral inferior margin, with irregular margins of laceration due to nibbing present over margins.

24. Contused abrasion present over dorsum of 1st interphalangeal joint of right index finger of size 0.5 x 0.5 cm, red in colour.

25. Lacerated wound present on posterior aspect of left arm, mid part, 11 cm below tip of left shoulder 1.4 cm x 1 cm x subcutameus tissue deep, margins abrated red in colour.

26. Contused abrasion present over back of left arm, mid part, 0.5 cm lateral to injury No. 22 of size 0.5 x 0.3 cm, blue in colour.

27. Contused abrasion present over back of left arm lower part 3 cm above left elbow joint of size 1 cm x 0.5 cm, red in colour.

28. Contused abrasion present over back of left arm, 1 cm below injury no.25, size 1 cm x 0.5 cm, red in colour.

29. lacerated wound having nibbling and teeth marking on margin present on dorsum of left forearm, midpart 5 cm below left elbow joint of size 3.7 cm x 3 cm x muscle deep underlying muscle exposed skin, and subcutauous tissue over injury absent.

30. Lacerated wound present over posteriomedial aspect of left forearm upper part 3.5 cm below left elbow joint of size 2.2 cm x 1.6 cm x muscle deep.

31. Lacerated wound having nibbling and teeth marking on margin present on dorsum of left forearm 1.5 cm above left wrist joint of size, 2.5 cm x 1.8 cm x muscle deep.

32. Abrasion present over lateral aspect of left index finger at metacarpophalangeal joint 1.5 cm x 1 cm, red in colour.

33. Contusion present over abdomen, right side iufravmbilical region 5 cm x 3 cm, red in colour.

34. Contused abrasion present over pubic region right side 2.5 cm x 0.5 cm, red in colour.

35. Abrasion present over pubic region left side 1 x 0.5 cm red in colour.

36. Contusion present over right thigh anteromedial aspect 5 cm below right inguinal fold 1.5 cm x 1 cm, red in colour.

37. Linear abrasion horizontally present on right thigh anterior aspect, mid part, 11 cm below right anterior superior iliac spine, 2. 5 cm x length, red in colour.

38. Contusion present on front of right knee superior part 1 cm x 1 cm of size red in colour.

39. Contused abrasion present on right knee inferior part 1 cm x 0.5 cm, red in colour.

40. Contusion present over front of right leg 6 cm x below right knee joint of size 1 cm x 1 cm in, red in colour.

41. Contusion present over right leg in mid part medial aspect 9 cm below right knee joint of size 1.2 cm x 1 cm red in colour.

42. Linear abrasion present over left thigh, on lower part, on posterior lateral aspect, obliquely placed, situated 15 cm below left hip joint of size 7 cm x 0.2 cm, red in colour.

43. Contusion present over left leg anteriorly, in upper part, situated 5.5 cm below left knee joint of size 1 x 1 cm, red in colour.

44. Lacerated wound over left thigh posterior aspect, oval shaped situated 3 cm above popliteal foosa of size 2. 8 cm x 1.9 cm with margins abraded.

45. Linear abrasion present over left scapular region on medial border obliquely placed of size 1.6 cm x 0.2 cm, red in colour.

46. Abrasion present over, posterior aspect of left ear pinna on mastoid 1 x 1 cm, red in colour.

47. Contused abrasion present over posterior aspect of right ear pinna on mastoid, 0.5 x 0.5 cm, red in colour.

Injuries to external genitals No. 1 to 9

1. Purging of fecal matter present from anus, blood present in anus and vagina.

2. Laceration present over posterior wall at 6 0'clock position of anus of size 2 cm x 1 cm x muscle deep, multiple tear and laceration present all over anal sphincter, mucocutaneous junction of anus and mucosa of anal canal, mucosa of anal canal lacerated, external and sphincter dilated and patulous and lacerated red in colour.

3. 2nd degree perineal tear (lacerations) present at 5, 6 and 7 o'clock position of size 2.5 cm x 1.8 cm x muscle deep with inward triangle directions having apex inward and base outwards, red in colour.

4. Lacerated contusion present over vaginal introitus and vaginal wall anteriorly at 6 and 11 o'clock position of size 2.5 cm x 1 cm x muscle deep, red in colour with swelling present in surrounding tissue.

5. Contusion present over left anterolateral wall of vaginal introitus and vaginal wall of size 3 cm x 2.5 cm, red in colour.

6. Contusion present over medial surface of both labia majora and over both labia minora, red in colour, swelling present.

7. Multiple fresh hymenal tears with redness inflammation and oedema present all over hymen.

8. Contusion present over left posteriolateral wall of vagina extending up to posterior fornix, red in colour, oedema present.

9. Lacerations present over left lateral wall of vagina and vaginal introitus of size of 2 cm x 0.5 cm x muscle deep, red in colour.

37. In the opinion of autopsy surgeon, all these injuries are ante-mortem. The team of doctors has opined that probable cause of death is **"due to smothering and throttling with evidence of forceful, aggravated, penetrative [vaginal and anal] sexual assault."**

38. We have gone through the cross. Doctor has flatly denied that the injuries so noticed are possible on account of assault by a able bodied young person between the age group of 20 to 21 years. He admitted that the assailant may suffer injury to his male organ. He further admitted that multiple injuries as noted on the dead body of victim are possible by more than one person. He has denied the bite marks to be due to aquatic animals. So much is the only cross. Taking overall nature, number and sites of injuries, here, death is not only shown to be unnatural but definitely homicidal one.

39. Having found on re-appreciation that death of the victim is both, due to forceful sexual assault and murderous assault, we are to see whether, as claimed by prosecution, accused is the perpetrator of the crime.

Admittedly, there is no direct evidence and case is based on circumstantial evidence. In such situation, it is a fairly settled law that when a case is based on circumstantial evidence, the inference of guilt would be justified only if all incriminating facts and circumstances are found to be incompatible with the innocence of the accused. There are numerous rulings on above aspect since the case of ***Hanumant Govind Nirgudkar and another v. State of M.P.*** ; AIR 1952 SC 343,

Shivaji Sahebrao Bobade v. State of Maharashtra ; AIR 1973 SC 2622, ***Sharad B. Sarda v. State of Maharashtra*** ; AIR 1984 SC 1622 and ***Padala Veera Reddy v. State of Andhra Pradesh*** ; 1989 (Suppl.2) SCC 706. The ratio of above rulings is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. The circumstances should not only be complete, but further they should be proved to be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. Recently, in the case of ***Pritinder Singh alias Lovely v. State of Punjab [2023 SCC OnLine 811]***, the conditions which are required to be fulfilled for returning guilt in a case based on circumstantial evidence are given in paragraph no.16, which could be summarized as under :

> *"…… (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 [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Cri LJ 1783] where the observations were*

made : [SCC para 19, p. 807 : SCC (Cri) p. 1047]

"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.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

Apart from above essentials, it is also to be borne in mind that there are cardinal principles for proper administration of criminal justice. A few relevant could be reproduced as under:

1. The accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him guilty of offence with which he is charged.

2. If two views are possible on the basis of evidence produced in the case, one indicating to the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted.

3. Where the court entertains reasonable doubt regarding the guilt of the accused, the benefit of such doubt should go in favour of the accused.

4. The court must not reject the evidence of the prosecution taking it as false, untrustworthy or unreliable on the ground or on the basis of conjectures and surmises.

5. The case of the prosecution must be judged as a whole having regard to the totality of the evidence.

6. In appreciating the evidence the approach of the court must be integrated and not truncated or isolated. In other words, the impact of evidence in totality on the prosecution case or innocence of accused has to be kept in mind in coming to the conclusion as to the guilt or innocence of the accused.

7. In reaching to the conclusion about the guilt of the accused, the court has to appreciate, analyze and assess the evidence placed before it by yardstick of probabilities, it's intrinsic and animus of witnesses.

8. The court has to keep in mind that the accused 'must be' and not merely 'may be' of guilty of an offence. The mainly distance between 'must be' and 'may be' is long and divides vague conjectures from sure conclusions.

9. Suspicion, however grave it may be, cannot take the place of legal proof.

10. The court must ensure that miscarriage of justice is avoided and if the facts and circumstances of a case so demand, the benefit of doubt must be given to the accused. However, the Court must borne in mind that the reasons of doubt should not be trivial or merely a probable. It must be fair doubt i.e. based upon the reasons and common sense.

40. Keeping in mind the above legal requirements, we undertake the exercise of ascertaining whether the circumstances relied by prosecution are compatible only and only with the guilt of accused thereby ruling out his innocence. The circumstances which are pressed into service are as under:

(1) Last seen together
(2) Extra-judicial confession
(3) Accused apprehended while in naked condition
(4) Seizure of articles including clothes
(5) DNA analysis report

First circumstance : Last seen together:

41. Again before touching the merits, we wish to give brief account regarding the settled legal position on the doctrine/theory of last seen together as propounded by Hon'ble Apex Court time and again. It is held that "last seen theory comes into play, only where the **time gap** between the **point of time** when accused and deceased were seen last alive and when deceased is **found dead** is **so small** that possibility of anyone other than accused being the author of crime becomes impossible. In absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to the conclusion in those cases and the few cases that can be named and referred are ***State of U.P. v. Satish,*** (2005) 3 SCC 114 and ***Shyamlal Ghosh v. State of West Bengal***, (2012) 7 SCC 646.

42. Similarly, law is also squarely settled that while invoking circumstance of last seen together, it is equally necessary for

prosecution to establish, time since death. Such proposition is propounded in landmark cases of ***Niranjan Panja v. State of West Bengal*** ; (2010) 6 SCC 525 and ***Shyamlal Ghosh*** (supra).

43. Resultantly, it is essential for prosecution to establish that time gap between accused and deceased last seen together and deceased found dead is minimal or so small that possibility of third person to be involved can be easily ruled out.

44. Here, case of prosecution is that accused was in employment of informant. On that day as a part of his duty, accused had come to the field for carrying buffaloes for grazing in the same vicinity where informant and his wife were involved in agricultural activities. According to prosecution, victim had accompanied her parents and was sitting on the "*bandh*" [trench]. Accused came there and was seen with the victim child. Shortly thereafter, both of them had disappeared and finally, dead body of the victim was spotted and found on the bank of river and at short distance, in the same vicinity, accused was apprehended. Hence, the above circumstance of last seen together.

45. The principal attack of learned counsel for accused is that there is no convincing evidence on the point of last seen, very informant himself is silent about accused last seen in the company of his daughter, no missing filed, no search made in other fields, evidence of PW1 informant and his wife PW10 is not consistent and lastly, the proximity of time and place to be too huge, that it is unsafe to apply said theory of last seen together.

46. In the light of above cases advanced by each of the side, we have visited evidence of PW1 informant father and PW10 mother. On minute scrutiny, we have noticed that on that day, after labouring for the first half of the day, they both went for mid-day meal to their home and around 2.00 to 2.30 p.m., on insistence of victim to join them to the field, she had accompanied them to the field. PW1 father had purchased snacks for her and both parents speak about their child sitting on the *bandh* [trench] enjoying the snacks. Informant in his substantive evidence has stated that while they were doing their field work, after some time, accused came there and victim was seen talking to him. He stated that he being their servant, no heed was paid as their daughter used to talk to him regularly. When some buffaloes entered the field, after herding them, he claims to have stood up on the *bandh* but did not find both, his daughter as well as

accused. Therefore they both were searched during which he met PW2 Sk. Gulab and PW3 Madhav Karewad and they too joined in the search.

PW10-mother of the victim is also found to be lending support to her husband by stating that on that day they had been to the field, worked up to 1.30 p.m., returned home for meals and while they were about to return back to the field, their victim daughter insisted to join them and was accordingly taken to the field and made to sit on the *bandh* for eating snacks purchased by her husband. She stated that around 2.00 to 2.30 p.m. accused came to the *akhada* in the field and untied the cattle. That time, victim daughter ran towards him calling him by name. She further stated that daughter and accused went together talking. No suspicion was raised as accused was considered as a family member. That after some time, cattle entered the crop and so her husband drove them and gave call to accused as well as victim but both were not found and therefore were searched for.

47. According to learned counsel for accused, PW1 father is silent about seeing accused and victim going together and that evidence of PW10 mother is contradiction amounting to omission as she had not stated in her statement about accused and victim both going talking.

48. In our opinion, evidence of PW1 and PW10 is credible and has a ring of truth. They both are parents of the victim who was brought by them. They both are consistent about daughter sitting on the *bandh* eating snacks. They both are consistent on the point of arrival of accused at the field. They both are also consistent about victim talking with accused. No doubt there is omission in the evidence of mother but, in our opinion, it is not material one. What is of significance is company of accused with victim. Theory of last seen together does not contemplate conversation. This theory comes into play when accused and victim are in each other's company and that is, in our opinion, the essence of this doctrine. Parents are the best witnesses in this case. They unequivocally speak about accused coming to take the cattle for grazing, which was his job, and both parents, as stated above, are lending support to each other about victim and accused seen together at the field *bandh*. While parents were engrossed in agricultural activity, victim had disappeared. Accused has not denied his employment or nature of job. No other plea has been advanced by him to deny his visit to the field that day. Consequently, with above material on record, there is no hesitation to hold that while victim was at the field, accused had not only come there, but was spotted in the company of victim and thereafter both of them had disappeared. PW1 and PW10 are very categorical about

PW1 giving calls to accused but his daughter and accused were found to be missing.

49. In view of testimony of PW1 and PW10, it has emerged that around 2.30 onwards, accused had reached the spot. Dead body was traced in the vicinity of the bank of river which is said to be at a shorter distance from the field. Belongings and dead body of the victim are spotted around twilight time. Taking into account the marshy place, normally no villager would go there without reason. Accused was spotted at such spot i.e in the same vicinity where dead body was found, that too in naked condition. All this has happened in a span of two to three hours. Therefore, we too are convinced that evidence on record clearly suggests that accused was the last seen person in the company of deceased. Hence, we accept the above circumstance as proved.

Second circumstance : Extra-judicial Confession :

50. According to prosecution, the moment accused was spotted by PW2 Sk. Gulab and PW3 Madhav Karewad, he gave voluntary confession on his own admitting rape followed by murder. On the other hand, so called extra-judicial confession is questioned by

learned counsel for accused primarily on two grounds, **firstly**, it is a very weak type of evidence, being hit by Sections 25 and 26 of the Indian Evidence Act, and so it cannot be relied and **secondly**, when evidence shows that Jamadar Singanwad slapped accused, the essence of voluntariness vanishes and on both counts, it is her submission that, extra-judicial confession goes out of consideration.

51. Before touching the evidence in the case in hand on the circumstance of extra-judicial confession, we deem it fit to give a brief account of settled legal position on evidentiary value of extra-judicial confession.

It is true that law is settled that an extra-judicial confession is a weak type of evidence, **however**, it is equally a settled position that, if said extra-judicial confession is **corroborated by other convincing evidence**, then it can not only be taken into consideration, but also can be acted upon. The essential conditions for acceptance of confession are that it should be voluntary and secondly, truthful and inspiring confidence and it should be ruled out that it is a product of inducement, threat or pressure. There are various and numerous legal pronouncements wherein extra-judicial confessions are accepted for deciding the guilt of accused.

52. It would be useful to refer to the ruling of ***Sahadevan and Another v. State of Tamil Nadu*** ; (2012) 6 SCC 403, wherein following principles are enunciated :

"16. Upon proper analysis of above referred judgments of this Court, it would be appropriate to state the principles which would make a extrajudicial confession an admissible piece of evidence, capable of forming basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of the cases where prosecution heavily relies on extrajudicial confession alleged to have been made by the accused :

(I) The extrajudicial confession is a weak evidence by itself. It has to be examined by the Court with greater care and caution.

(II) It should be made voluntarily and should be truthful.

(III) It should inspire confidence.

(IV) An extrajudicial confession attains greater credibility and evidentiary value if it is supported by chain of cogent circumstances and it is further corroborated by other prosecution evidence.

(V) An extrajudicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent probabilities.

(VI) Such statement initially has to be proved like any other fact and in accordance with law."

53. Likewise, very recently the Hon'ble Apex Court in the case of ***Ramanand @ Nandlal Bharti v. The State of UP*** ; 2022 SCC Online 1396, has again very lucidly, succinctly and elaborately dealt with the scope and evidentiary value of extra-judicial confession.

54. Similarly, the Hon'ble Apex Court in ***Madan Gopal Kakkad v. Naval Dubey*** ; (1992) 3 SCC 204, by referring to the previous judgment in the case of ***Piara Singh v. State of Punjab*** ; (1977) 4 SCC 452, held that "*law does not require that the evidence of an extrajudicial confession should in all cases be corroborated. The rule of prudence does not require that each and every circumstance mentioned in confession must be separately and independently corroborated*".

55. Even in the cases of ***Thimma and Thimma Raj v. State of Mysore*** ; (1970) 2 SCC 105 : 1970 SCC (Cri) 320, ***Mulk Raj v. State of U.P.*** ; AIR 1959 SC 902 : 1959 Cri LJ 1219, ***Sivakumar v. State*** ; (2006) 1 SCC 714 : (2006) 1 SCC (Cri) 470 [SCC paras 40 and 41 : AIR paras 41 and 42), ***Shiva Karam Payaswami Tewari v. State of Maharashtra*** ; (2009) 11 SCC 262 : (2009) 3 SCC (Cri) 1320 and ***Mohd. Azad v. State of W.B.*** ; (2008) 15 SCC 449 : (2009) 3 SCC (Cri) 1082, it is held that *"there is no absolute rule that an extra-*

judicial confession can never be the basis of conviction, although ordinarily an extra-judicial confession should be corroborated by some other material".

56. The first limb of the arguments raised before us is answered and dealt in the above settled legal position. As stated above, here, extra-judicial confession is not the sole circumstance. In view of settled position, if the extra-judicial confession inspires confidence, the same can be resorted to.

57. Now let us deal with the second limb, i.e. alleged pressure exhorted by Jamadar Singanwad by slapping accused and as such, the essence of voluntariness does not remain.

58. In the light of above objection, we have meticulously gone through the evidence of PW2 Sk. Gulab. It is noticed that he deposed in the following way :

> *"....Thereafter we all started search of the person whose clothes were found on the spot. While searching, we* ***three*** *have seen back of hip of a person. When we rushed to that person, then we found accused was in naked condition. We caught hold of accused and accused tried to escape from our clutches and tried to run away. Thereafter I asked*

accused what he was doing there. He told me that he has committed rape on the victim and committed murder of the victim and he concealed himself there due to fear of beating of public."

It is after such deposition, this witness has further stated that ;

"Thereafter Shinganwad saheb and other constable as well as public rushed to the spot and that time we had given protection to the accused."

59. The above sequence emerging from the testimony of PW2 Sk. Gulab, clearly indicates that prior to arrival of Singanwad, a police personnel and others, an extra-judicial confession has been given to PW2 Sk. Gulab, who was accompanied by PW3 Madhav Karewad and one Chaitanya. On meticulous examination of evidence of PW12 PC Shirole, it is noticed that even he seems to have reached subsequent to accused being caught by PW2 Sk. Gulab and PW3 Madhav Karewad, before whom there was extra-judicial confession.

60. Taking such material into consideration and account, it cannot be said, as is put forth before us, that extra-judicial confession was given in presence of police official and as such, is automatically hit by the provisions of Indian Evidence Act. At that point of time, in presence of PW2 Sk. Gulab and PW3 Madhav Karewad, there was no

slapping to accused. Therefore, his confession is apparently voluntary one. No doubt Singanwad is not examined by prosecution, however, in the light of above nature of evidence, it cannot be for sure said that extra-judicial confession was made under duress, pressure and it to be involuntary. Even otherwise, taking into account the settled legal position discussed above, here, extra-judicial confession is not the sole evidence. Prosecution has come with other evidence also. For said reasons, we find no force in the submission that so called extra-judicial confession cannot at all be considered and taken aid by prosecution.

Third Circumstance- Accused apprehended while in naked condition:

61. Learned counsel for accused would strenuously submit that case of prosecution is about apprehending accused from the spot while he was in naked condition. She would question as to how then accused was taken in custody bare bodied and taken to police station and in what form and condition. According to her there is no contemporaneous evidence as no distinct panchanama of accused to be found in such condition is drawn by police machinery. She also points out that evidence of prosecution is silent about the exact distance between the body and the spot where the accused was said to be found.

62. No doubt, here, evidence of prosecution, though is about spotting accused hiding in the grass in naked condition, there is no contemporaneous evidence to that extent. However, it needs to be noted that not only accused is identified by PW1 and PW10 in the Court, but even his clothes seized from the spot are identified by PW1 and PW10 i.e. parents. As stated above, they both have seen their daughter in the company of accused that afternoon. They are the best witnesses and they have duly identified both accused as well as clothes seized from the spot. PW2 Sk. Gulab and PW3 Madhav Karewad, who are independent witnesses, too have categorically stated about search activity being undertaken and during the same, accused to be found hiding in the grass in naked condition. These two persons had no axe to grind against accused and therefore, why would they at all falsely implicate him. Even it needs to be noted that defence has not availed the opportunity to cross-examine above witnesses for rendering their such version doubtful. On aspect of naked condition, there is literally no cross. Consequently, mere failure on the part of investigating machinery to bring on record in what form and in what condition accused was apprehended and no distinct panchanama to that extent being drawn and no evidence about he to be taken in such condition to police station, itself will not be sufficient

to cast doubt on the point of arrest of accused which is not seriously disputed during the trial.

63. It is equally true that the distance between the dead body of victim and spot where accused was found hiding has not been measured even by approximation, but he is found in the same vicinity i.e. on the bank of the river. Therefore, merely not measuring the distance on the next day is itself not sufficient to cast doubt on the prosecution version. Priority seems to have been given by IO to get inquest drawn on the same night and he has send the body for postmortem and thereafter, spot is drawn on the next day, it being night time. Taking into account the peculiar location of spot i.e. marshy place, it may not be possible on the next day to gauge or measure exact distance. However, the core issue is not the distance, rather it is the occurrence and presence of accused in the very vicinity that would count and the same is got confirmed through one of the parents and independent witnesses.

64. As regards the objection of delay of 6.5 hours in lodging FIR, it also cannot be said to be fatal because FIR is registered at Bhokar Police Station, which is away from village Divshi, at around 01.00 a.m. Prior to it, there is complaint on behalf of PW1 father.

Resultantly, within few hours, FIR has been registered. Taking the location of the spot, the enormity of the crime and huge crowd gathering there, a few hours' delay is bound to occur. Further, here we have noticed that there is no pointed query or suggestion to the IO as to why delay had occurred in recording FIR or recording statements of witnesses so as to hold that there is delayed FIR. Therefore, even said objection does not sustain.

65. To sum up on this circumstance, taking into consideration the prosecution evidence, more particularly that of PW2 Sk. Gulab and PW3 Madhav Karewad, case of prosecution about accused found in naked condition in the vicinity of scene of occurrence deserves to be accepted. Sight of the fact cannot be lost that clothes of accused were found lying near the dead body of the victim. Such tell-tale circumstances at the scene of occurrence lend credence to the case of prosecution about accused apprehended in naked condition. Hence, this circumstance also deserves to be accepted as proved.

Fourth circumstance- Seizure of articles including clothes of accused:

66. Such circumstance is criticized before us by submitting that alleged occurrence has taken place in the late afternoon or early evening of 20.01.2021. Seizure is caused from the spot, which was

admittedly open and free for access to any one for the entire night. That, there is delay of almost 17 hrs. in causing seizure and no spot panchanama has been drawn on 20.01.2021 itself. Learned counsel invited our attention to the entries noted in General Diary at Sr. Nos. 27 and 29. She would strenuously submit that crime scene was not protected to prevent tampering or contamination.

67. We have pondered over the above submissions and in the backdrop of such objection, we have minutely scrutinized the prosecution evidence on this count. It is emerging that in the twilight of 20.01.2021, dead body and accused were found at the scene of occurrence. Inquest panchanama seems to have been drawn during 08.00 p.m. to 09.00 p.m. It is to be borne in mind that the spot is on the bank or river bed which is outside the village and as such, is a no man's land. PW15 IO in para 1 of his examination-in-chief has deposed that after dispatching the dead body to the Government Hospital for postmortem, crime scene was preserved by appointing police personnel on the spot. No doubt, as pointed out by learned counsel for accused, who was the police personnel who was posted at the spot has not been clarified by the IO. However, merely on such count, evidence of IO cannot be doubted. IO seems to have visited the spot on the next day morning and caused seizure, sealed it and

deposited it in *malkhana*. Taking into consideration factors like the location of the spot, absence of source of light, it being a night time, decision might have been taken to draw spot panchanama on the next day. He has already deposed about intimating proposed panchas on the evening of 20.01.2021 to remain present at the spot. Therefore, taking into account such circumstances, the so called time spent for drawing spot panchanama and causing signature cannot be said to be delayed one or even fatal to the prosecution.

68. As regards the objection about no evidence to link the clothes and articles of accused is concerned, also we do not find any force in the same. The best witnesses to identify the articles are informant PW1 and his wife PW10, who had employed accused for maintaining their live stock. These two witnesses have identified the clothes to be of the accused and have also given description of the same. It is pertinent to note that the wallet allegedly seized from the crime scene was said to be carrying photographs of none other than mother and brother of the accused. Such personal articles belonging to accused are seized from the spot and the same is sufficient to connect the accused. According to IO, at the time of spot panchanama as many as 11 articles were seized, including clothes of accused, and the same were seized and sealed and deposited with malkhana by drawing

muddemal receipt. Consequently, the above circumstance also deserves to be taken into account for completing the chain of circumstances.

Fifth circumstance- DNA analysis report

69. Prosecution has come with a case that samples of accused as well as deceased for DNA analysis were gathered and sent to forensic laboratory. Laboratory has conveyed that samples matched and as such, culpability of accused is also proved through scientific evidence.

70. Per contra, learned counsel for accused has strongly objected to the reliability and veracity of the forensic evidence. Her main contention is that in the case in hand, there are various reasons to discard DNA analysis report. At the beginning, she took efforts to explain to us in brief, as to what is meant by DNA, how samples for DNA are required to be collected, the precautions that are necessary for its collection and the standard operating procedure for preserving the samples till the same are put to analysis. She also tried to explain the mechanism and steps expected to be taken by a DNA analyzer. She appraised us at length about the steps which are required to be adopted by analyzer for analyzing the samples. Then she would

inform us that forensic DNA analysis involves a process of comparison of DNA profiles in control sample of known person with unknown DNA profile found in the DNA sample allegedly seized from the crime scene.

71. She emphasized that for accepting analyzer's report, it is essential at the outset for the prosecution to demonstrate that the chain of custody of the samples of both, accused and victim, has remained uncompromised. According to her, if it is shown that the DNA evidence is unreliable and if there is issue about chain of custody, the reports issued are rendered unreliable and are consequently liable to be discarded. To buttress such submission, she invited our attention to the judgment of the Hon'ble Apex Court in the case of ***Prakash Nishad v. State of Maharashtra*** (supra) and she seeks reliance more particularly on the paragraphs 35 to 38, 50, 51, 54, 59 to 63 and 66.

72. She was very emphatic and assertive in submitting that in this case the very chain of custody or link evidence has been totally compromised. According to her, even when samples were alleged to be seized on 21.01.2021, there is no convincing evidence about the same to be in safe custody till the samples were received by the analyzer in sealed manner. She invited our attention to the evidence

of carriers and IO and would submit that there is unexplained delay in dispatching samples and even there is no evidence that samples were protected and prevented from being tampered or contaminated.

73. It is further strenuously submitted that even the procedure of analysis adopted by PW16 Assistant Chemical Analyzer [CA] is in utter disregard to the prescribed protocol. On such count, she took us through the evidence of PW16 CA and sought reliance on the answers given by him while facing cross. She added that this witness has given very crucial admissions about samples being run twice for matching, which according to her is a deviation from standard procedure and there is no explanation for the same. She vehemently pointed out that apart from mixing of samples, there is failure to undertake genotyping and quantitation and no measures are taken to ensure contamination and statistical analysis is also not done which are the essential features of DNA analyzing process. She pointed out that PW16 CA has candidly admitted that here, random occurrence ratio is not calculated.

74. Consequently, it is her submission that entire exercise of DNA analysis comes under shadow of doubt and is therefore, required to be discarded in its entirety. In support of her above contentions, she

has sought reliance on numerous judgments, including ***State of H.P. v. Jai Lal and others*** ; (1999) 7 SCC 280, ***Ramesh Candra Agrawal v. Regency Hospital Limited and others*** ; (2009) 9 SCC 709, ***Manoj*** (supra), ***Pidathala Satyam Babu v. The State of Adhra Pradesh*** ; 2017 SCC OnLine Hyd 95 and ***Premjibhai Bachubhai Khasiya v. State of Gujarat & another*** ; 2009 SCC OnLine Guj 12076.

75. On carefully scanning the evidence of PW16 CA, no doubt, there is merit and substance in above argument as there seem to be certain deviations and lapses on his part while carrying out the analysis. It is to be borne in mind that DNA is an evolving science. Though it is a complicated process, off- late, emphasis is laid on keeping reliance on forensic analysis. Amendments are carried out in the Code of Criminal Procedure on the basis of recommendations of the Law Commission for inclusion of forensic evidence. In the case of ***Dharam Deo Yadav v. State of Uttar Pradesh*** ; (2014) 5 SCC 509, the Hon'ble Apex Court, after discussing as to what is DNA, has observed as under:

> *"… The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on*

circumstantial evidence. More that half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be vaild and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory."

76. Very recently in the case of ***Manoj*** (supra), while dealing with DNA profiling methodology, an article published by the Central Forensic Science Laboratory, Kolkata [DNA profiling in Justice Delivery System, Central Forensic Science Laboratory, Directorate of Forensic Science, Kolkata (2007)], was considered and discussed in which there is comment on **COLLECTION AND PRESERVATION OF EVIDENCE**, which reads as under:

"If DNA evidence is not properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility in a court of law. Because extremely small samples of DNA can be used as evidence, greater attention to contamination issues is necessary while locating, collecting and preserving. DNA evidence can be contaminated when DNA from another source gets mixed with DNA relevant to the case. This can happen when someone sneezes or coughs over the evidence or touches his/her mouth, nose or other part of

the face and then touches areas that may contain the DNA to be tested. The exhibits having biological specimen, which can establish link among the victim(s), suspect(s), scene of crime for solving the case should be identified, preserved, packed and sent for DNA profiling."

In the same judgment, increasing importance of DNA evidence is appreciated by referring to various rulings like ***Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh*** ; (2009) 14 SCC 607, ***Krishan Kumar Malik v. State of Haryana*** ; (2011) 7 SCC 130, ***Surendra Koli v. State of Uttar Pradesh*** ; (2011) 4 SCC 80 and ***Mukesh v. State for NCT of Delhi*** ; (2017) 6 SCC 1.

Again in para 144 of the same judgment of ***Manoj*** (supra), by referring recent decision in ***Pattu Rajan v. State of Tamil Nadu*** ; (2019) 4 SCC 771, para 33 is reproduced wherein it has been observed as under:

"33. Like all other opinion evidence, the probative value accorded to DNA evidence also varies from case to case, depending on facts and circumstances and the weight accorded to other evidence on record, whether contrary or corroborative. This is all the more important to remember, given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing day, thereby making it more

> *and more reliable, we have not yet reached a juncture where it may be said to be infallible.* ***Thus, it cannot be said that the absence of DNA evidence would lead to an adverse inference against a party, especially in the presence of other cogent and reliable evidence on record in favour of such party.****"* [Emphasis laid]

Further, in para 145 of ***Manoj*** (supra), what has been observed is reproduced as under :

> *"145. This court, therefore, has relied on DNA reports, in the past, where the guilt of an accused was sought to be established. Notably, the reliance, was to* ***corroborate****. This court highlighted the need to ensure quality in the testing and eliminate the possibility of contamination of evidence; it is also held that* ***being an opinion, the probative value of such evidence has to vary from case to case.'***

77. The above ratio regarding value of DNA evidence as culled out in ***Pattu Rajan*** (supra) and ***Manoj*** (supra) has also been taken into consideration in the very recent judgment in ***Prakash Nishad*** (supra).

78. In the light of above settled legal proposition and on examining the DNA evidence on this circumstance, we are in complete agreement with the learned counsel for accused that firstly, investigating machinery initially seems to have dispatched samples to

RFSL Nanded and subsequently to RFSL Aurangabad. However, it seems that for want of proper expertise, samples were further required to be dispatched to Aurangabad and as such, time was spent. Resultantly, merely on such count, it cannot be inferred that there is contamination or tampering with the samples, more particularly in absence of any cogent and concrete evidence in that regard. We also do agree that, PW16 CA has, while analyzing, deviated to some extent from the required protocol. The manner in which he has answered in the cross, also there is force in the submission of learned counsel for the accused that the requisite protocol and standard operating procedure has not been scrupulously followed. He has also admitted that samples were run on two occasions. Therefore, though DNA analysis report are reported to be positive, there are reasons to hold that DNA analysis / profiling in the case in hand is not completely free from doubt.

79. However, we wish to emphasize and reiterate that here, DNA evidence is **not the sole evidence**. As stated above, in view of the law discussed in aforesaid cases, namely, ***Dharam Deo Yadav v. State of UP*** ; (2014) 5 SCC 509 and ***Manoj*** (supra), DNA evidence is mere corroborative piece of evidence and opinion evidence. Moreover, here, it is not the solitary piece of evidence as there are other

compatible circumstances also.

80. On critical re-appreciation and reanalysis, this Court is of the firm opinion that prosecution has infact succeeded in cogently and firmly establishing circumstances which are compatible with the guilt of the accused. He is demonstrated to be the last person in the company of deceased victim. He was apprehended from the very vicinity of spot where dead body was lying in bare bodied condition. There is extra-judicial confession which is found to be voluntary and under no pressure whatsoever. There is medical evidence of both, rape, sodomy and strangulation. There is seizure of clothes as well as belongings of accused and therefore, in our opinion, there is infact overwhelming evidence on record about involvement of accused alone.

Resultantly, even if we keep aside DNA evidence, there are circumstances which are firmly and cogently proved and established as regards to complicity of accused regarding initially removing the child from the lawful custody of her parents and thereby committing offence punishable under Section 363 of IPC. Before being done to death by strangulation, medical evidence, as discussed in foregoing paragraphs 36 to 38, clearly suggests that he had raped, sodomized

and thereby committed penetrative as well as aggravated penetrative sexual assault, including unnatural sex. Overall there is evidence suggesting sexual harrasment thereby attracting Sections 302, 376-A, 376(2)(j)(m), 376-AB and 377 of IPC as well as there is commission of offence under provisions of Sections 4, 6, 8, 10 and 12 of the POCSO Act, 2012.

Therefore, we too like trial court, hold that the offence with which accused is indicted, are firmly and cogently proved to hold him guilty for said offences.

SUBMISSIONS ON SENTENCE

81. Now, it is to be seen whether the above offence falls in "rarest of the rare" category, so as to attract death penalty and whether learned trial Judge was justified in awarding the same.

82. On the above aspect, learned APP reiterated the case of prosecution and would strenuously submit that accused has brutally ravished the girl of barely six years age and the bestiality is writ large from the nature and number of injuries on the deceased. He again took us through the postmortem findings and would submit that the manner in which the crime was committed, leaves no manner of

doubt that the trust reposed by the little child on accused, who was in the very employment of her father, has been breached to satisfy his own lust. He pointed out that the accused was of such perverse nature that, he has victimized a girl of tender age to satisfy his own sexual urge and for achieving the same, he had inflicted as many as 50 injuries. According to learned APP, letting him at large would endanger the society and he could become a menace to the society. Therefore, according to learned APP, case definitely false in the category of rarest of the rare one and accused deserves a befitting sentence which is not less than capital punishment. According to him, learned trial Judge has taken into account the entire facets of the prosecution case and has considered both mitigating and aggravating circumstances involved in the case and only thereafter, finding it to be a case of extreme culpability and extremely grave, death has been rightly awarded holding it to be a rarest of the rare case.

83. Refuting the above submissions, learned counsel for accused would submit that even if this Court accepts the case of prosecution as proved, even then it cannot be said to be rarest of the rare case. She attacked the findings of the learned trial court on this count by submitting that learned trial court has not at all considered the mitigating circumstances and settled law in correct perspective and

that learned trial court's opinion is rather swayed only on the basis of aggravated circumstances. She pointed out that infact, here is the case based on circumstantial evidence and that too, on an extra-judicial confessional statement and there is no other clinching evidence. Referring to the case of ***Bachan Singh*** (supra), she would strenuously submit that it is apparent that learned trial court has failed to embark on an inquiry as to whether there was any possibility of reformation and rehabilitation of the accused and further learned trial court failed to test whether the alternate option of life imprisonment was at all foreclosed.

84. Pointing out to the questions raised in ***Machhi Singh*** (supra), which are required to be answered to test as to whether the case falls in the rarest of rare case i.e. what is really uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for only and only death sentence; and secondly, whether the circumstances of the crime are of such nature that there is no other alternative but to impose only and only death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of offender, she strenuously submits that the same has not been considered, dealt and even answered by learned trial court in its judgment.

85. She questions as to whether really trial court has undertaken the exercise of applying the crime test, criminal test and proportionality test. According to her, even learned trial Judge seems to have not adhered to the guidelines on sentencing laid down in various legal pronouncements. According to her, these guidelines are mandatory in nature but does not seem to have been borne in mind while sentencing the accused.

86. Learned counsel took us through the various reports and documents collected during pendency of appeal in view of directions in *Manoj* (supra) i.e. psychological report issued by Psychiatrist Dr. Kaustubh Joag, affidavits of mother and brother of accused, conduct certificate issued by Yerwada Central Prison and the Social Investigating Report. She laid much emphasis on the psychological report on the point of intellectual capacity and would point out that it is grossly deficit. According to her, since childhood, his socio adaptive skills were at the lowest ebb. According to her, coupled with his poor socio-economic background, he had an old aged mother as well as a visually impaired brother to take care of. She hastened to add that even accused had no criminal antecedents and he was barely of 35 years age at the time of incidence. All such factors, according to her, have not been considered by learned trial Judge and so, it is her

submission that, the same are required to be dealt and accepted by this Court for commuting the sentence to imprisonment for life.

DISCUSSION AND SUMMATION ON SENTENCE

87. The issue of capital punishment has long being debated and vexed the courts. Though constitutionality of death sentence was very much under challenge in the case of ***Jagmohan Singh v. State of U.P.*** ; (1973) 1 SCC 20, on the ground that it violated a persons right to life under Article 21 of the Constitution, the five-Judges Bench of the Apex Court has affirmed its constitutionality, holding that it did not violate any Article of the Constitution of India.

88. Since the landmark case of ***Bachan Singh*** (supra), the doctrine of rarest of rare case came to be evolved, accepted and still holds the field. Within less than a decade, again view taken in ***Bachan Singh*** was reaffirmed, also by three-Judges Bench in the case of ***Machhi Singh*** thereby reiterating that death penalty can only be awarded in the “rarest of the rare case”. Resultantly, both ***Bachan Singh*** and ***Macchi Singh*** have served as a torch bearer for deciding whether a case falls in the category of “rarest of the rare”.

89. However, going by the precedents, it is also emerging that in the case of ***Santosh Bariyar*** (supra), the Apex Court clarified and entrenched the view taken in ***Bachan Singh*** but further observed and held that death penalty is an **exception** and life imprisonment is a **rule**.

90. Very recently, there is a further shift from dissuasive theory or theory of deterrence to theory of reformation. Of late, such views are reflected in various pronouncements including yet another recent case of ***Manoj*** (supra), wherein all the precedents on death sentence have been extensively and exhaustively dealt in para 190 onwards of the judgment. Law settled in several landmark cases like ***Bachan Singh*** (supra), ***Machhi Singh*** (supra), ***Swami Shraddananda (2) @ Mural Manohar Mishra v. State of Karnataka*** ; (2008) 13 SCC 767, ***Santosh Bariyar*** (supra), ***Deepak Rai v. State of Bihar*** ; (2013) 10 SCC 421 and ***Rajendra Pralhadrao Wasnik*** (supra), is dealt and discussed to demonstrate that there is a shift in the approach towards death penalty in our country.

91. In the view regarding two step process discussed in the case of ***Santosh Bariyar*** (supra), which is also reiterated and reaffirmed in ***Manoj*** (supra), it is expected of a court that, firstly, aggravating and mitigating circumstances should be carved and identified and in the

second step, the court is also expected to consider whether the alternative of life imprisonment was unquestionably completely foreclosed.

92. Likewise, again in the above judgment of ***Manoj*** (supra), the view adopted in ***Rajendra Wasnik*** (supra), which also takes into account the principles laid down in ***Bachan Singh***, the test of "probability and not improbability, possibility and impossibility of reformation and rehabilitation" as a mandate of Section 354(3) of Cr.P.C. is also found to be endorsed.

93. The above discussion clearly shows that off-late, a very holistic view is expected to be adopted by court while implementing sentencing policy. Court is expected to get itself satisfied after drawing a balance sheet of mitigating and aggravating circumstances that the case is of extreme culpability and that there is no possibility whatsoever regarding reformation and rehabilitation of accused. Such pragmatic view is expected to be taken in the backdrop of reformative theory.

94. We wish to note that learned counsel for accused has burdened us with numerous judgments on the aspects like requirements of

sentence hearing, non-consideration of mitigating circumstances, incorrect reliance on society's cry for justice, failure on the part of courts in considering socio-economic background of criminal, his antecedents, age, probability of reformation, family dependency, emotional and mental disturbances, mental defect and intellectual disability etc., of which there is no dispute as it is a settled legal position and therefore, to make this judgment as concise as possible, we refrain from naming them or reproducing the ratio laid down therein.

95. On taking audit of reasoning of the trial court on the point of sentencing, what is conspicuous is that, there is absolutely no discussion on the Criminal test. We reiterate that even the mandate laid down in Section 354(3) of Cr.P.C. also is lost sight of by the learned trial Judge. We wish to reproduce the said provision, which is as under:

> "354(3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, **in the case of sentence of death, special reasons for such sentence**." [emphasis laid]

96. In the judgment of **Bachan Singh** para 164, the Hon'ble Apex Court held as under :

> "164. …… (a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart form that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence."

97. Even in the case of ***Alluddin Mian and others Sharif Mian and another v. State of Bihar*** **;** (1989) 3 SCC 5, it has been observed in para 9 as under :

> *"9. … When the law casts a duty on the judge to state reasons it follows that he is under a legal obligation to explain his choice of the sentence. It may seem trite to say so, but the existence of the "special reasons clause" in the above provision implies that the court can in fit cases impose the extreme penalty of death which negatives the contention that there never can be a valid reason to visit an offender with the death penalty, no matter how cruel, gruesome or shocking the crime may be… While rejecting the demand of the protagonist of the reformatory theory for the abolition of the death penalty the legislature in its wisdom thought that the "special reasons clause" should be a sufficient safeguard against arbitrary imposition of the*

extreme penalty. Where a sentence of severity is imposed, it is imperative that the judge should indicate the basis upon which he considers a sentence of that magnitude justified. Unless there are special reasons, special to the facts of the particular case, which can be catalogued as justifying a severe punishment, the judge would not award the death sentence. It may be stated that if a judge finds that he is unable to explain with reasonable accuracy the basis for selecting the higher of the two sentences, his choice should fall on the lower sentence. In all such cases the law casts an obligation on the judge to make his choice after carefully examining the pros and cons of each case. It must at once be conceded that offenders of some particularly grossly brutal crimes which send tremors in the community have to be firmly dealt with to protect the community from the perpetrators of such crimes. Where the incidence of a certain crime is rapidly growing and is assuming menacing proportions, for example, acid pouring or bride burning, it may be necessary for the courts to award exemplary punishments to protect the community and to deter others from committing such crimes. Since the legislature in its wisdom thought that in some rare cases it may still be necessary to impose the extreme punishment of death to deter others and to protect the society and in a given case the country, it left the choice of sentence to the judiciary with the rider that the judge may visit the convict with the extreme punishment ***provided there exist special reasons for so doing****. …"* *[emphasis laid]*

98. Further, in the case of ***Swami Shraddananda*** (supra), ***Shashi Nayar v. Union of India and others*** ; (1992) 1 SCC 96**,** ***Sandesh alias Sainath Kailash Abhang v. State of Maharashtra*** ; (2013) 2 SCC 479**,** the necessity of assigning special reasons clause has been insisted upon.

99. The phrase "special reasons clause" has been elaborated in the case of ***Shashi Nayar*** (supra) as under:

> "Special reasons clause" means reasons, specific to the fact of a particular case, which can be catalogued as justifying a severe punishment and unless such reasons are not recorded, death sentence must not be awarded."

This requirement is clarified by stating that Section 354(3) is a sufficient safeguard against the arbitrary imposition of the extreme penalty and unless the nature of crime and the circumstances of the offender reveal that the sentence of life imprisonment would be wholly inadequate, the Courts should ordinarily impose a lesser punishment.

100. In the case of ***Sandesh*** (supra), it has been observed as under:

"21. … it is not only the crime and its various facets which are the foundation for formation of special reason as contemplated under Section 354(3) Cr.P.C. for imposing death penalty, but it is also the criminal, his background, the manner in which the crime was committed and his mental condition at the relevant time, the motive of the offence and brutality with which crime was committed are also to be examined. The doctrine of rehabilitation and the doctrine of prudence are the other two guiding principles for proper exercise of judicial discretion."

101. Again in the recent case of ***Sundar v. State by Inspector of Police*** ; MANU/SC/0282/2023, the Hon'ble Apex Court, referring to the case of ***Bachan Singh***, more particularly the observations in para 151, 152 and 163, thereby reiterated the importance of sentencing hearing and we find it fruitful to reproduce the observations which are as under :

"151. Section 354(3) of the Code of Criminal Procedure, 1973, marks a significant shift in the legislative policy underlying the Code of 1898, as in force immediately before April 1, 1974, according to which both the alternative sentences of death or imprisonment for life provided for murder and for certain other capital offences under the Penal Code, were normal sentences. Now according to this changed legislative policy which is patent on the face of Section 354(3), the normal punishment for murder and six

other capital offences under the Penal Code, is imprisonment for life (or imprisonment for a term of years) and death penalty is an exception.

152. In the context, we may also notice Section 235(2) of the Code of 1973, because it makes not only explicit, what according to the decision in Jagmohan's case was implicit in the scheme of the Code, ***but also bifurcates the trial by providing for two hearings, one at the pre-conviction stage and another at the pre-sentence stage.***

163. […] Now, Section 235(2) provides for bifurcated trial and specifically gives the Accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined *in Section 354(3) a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code,* ***the Court should not confine its consideration "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal.****"* [emphasis supplied]

102. Emphasis on separate sentence hearing to the accused after recording conviction has been reiterated in the case of ***Anguswami v. State of Tamil Nadu*** ; 1989 (3) SCC 33, ***Malkiat Singh V. State of Punjab*** ; 1991 (4) SCC 341 and ***Dattaraya v. State of Maharashtra*** ; 2020 (14) SCC 290.

103. The above discussed material thereby throws enough light on the mandatory requirements provided in Section 235(2) of Cr.P.C. thereby casting duty on the court to afford opportunity to the accused to present his case on the point of sentence and Section 354(3) casts a corresponding duty on the court to assign special reasons and extra-ordinary circumstances which impels the court to award sentence of death.

104. On taking survey of the impugned judgment, we have noticed that learned trial court has taken up the issue of sentence since para 63 of the judgment onwards. Law laid down in ***Bachan Singh*** and ***Machhi Singh*** is discussed in para nos. 67 and 68. Thereafter, by taking recourse to judgment of this Court at Principal Seat, i.e. in ***Chandrakant Vasant Ayare's*** case [2015 ALL MR (Cri.) 3497], on the point of Section 354(3) of Cr.P.C., learned trial Judge carved out aggravating circumstances and mitigating circumstances in para nos.

71 and 72. Several judgments on the quantum of sentence and confirmation of death sentence are also discussed in the para 74 of the judgment. In para 75, opinion is expressed about society's cry for justice and about not only keeping the rights of accused in mind, but also to keep the rights of victim and the society and again several judgments are taken recourse to and finally, in para 76, after reiterating the circumstances relied by the prosecution, learned trial Judge has held that there is no defence of accused except denial and there is no explanation from the accused about the injuries appearing on his body as well as his presence on the spot. It is further held that "*while considering the sympathy of the accused that he is the only earning member of the family, his mother is old aged widow, I have also to see what disaster has fallen on the family of victim when their small beloved child of five years is brutally murdered after committing aggravated penetrative sexual assault*". Opining that considering the gravity and seriousness of the offence, court is not inclined to take a lenient view, on the strength of precedents spelt out on death sentence in para 74 and 75 of the judgment, the case is held has falling under "rarest of the rare" category.

105. From above material reflected in the judgment, we have noticed that, what primarily seems to have weighed and prevailed on

learned trial Judge is mere enormity, brutality and gravity of the offence. Entire mitigating circumstances are not taken into account as desired, more particularly the above aspects pertaining to the background of the accused and the circumstances in which the incident had taken place, which are equally important and have a bearing on sentencing. Reasons for ruling out reformation or its probability are not apparently touched, dealt and discussed in the judgment. The crucial question as to why the case falls in the "rarest of the rare" category is also not properly reasoned out. There is also no discussion as to why alternative punishment of imprisonment for life is completely foreclosed. Elaborate reasons for choosing death sentence over imprisonment for life are not at all reflected in the judgment of the learned trial Judge. For such reasons, we are constrained to take a re-look at the opinion reached at by learned trial court on the point of sentence.

106. As stated above, recently there is a shift in the perception of sentencing. The principle of "death penalty to be an **exception** and life imprisonment to be a **rule**" dealt since ***Bachan Singh's*** case is often resorted to in deserving cases. We wish to even highlight that the mandate regarding collection and consideration of psychological assessment report, affidavits of relatives, behavioral conduct report

from jail, socio-economic condition etc., does not seem to have been followed and resultantly, there does not seem to be any discussion on the same in the impugned judgment.

107. In the case of ***Mukesh v. State (NCT of Delhi)*** ; (2017) 6 SCC 1, it is clarified that there is statutory duty on Court to quote special reasons and to afford an effective hearing on the sentence to the accused. It is expected of the Court to hear on the question of sentence to know (i) age of the accused; (ii) background of the accused; (iii) prior criminal antecedents, if any; (iv) possibility of reformation, if any; and (v) such other relevant factors. That, the court while awarding sentence has to take into consideration various factors having a bearing on the question of sentence.

In above judgment, referring to the case of ***Dagdu v. State of Maharashtra*** ; (1977) 3 SCC 68, it has been held that the appellate court can either send back the case to the Sessions Court for complying with Section 235(2) Cr.P.C., so as to enable the accused to adduce material; **or, in order to avoid delay, the appellate court may by itself give an opportunity to the parties in terms of Section 235(2) Cr.P.C.** to produce the materials they wish to adduce, instead of sending the matter back to the trial court for hearing on sentence.

108. Likewise, in the judgment of ***Deepak Rai*** (supra), it has been stated that, if for any reason trial judge omits to assign or record extra-ordinary circumstances warranting death sentence, or if learned trial court fails to assign elaborate reasons, and the accused makes a grievance of it before the higher court, it would be open to that court to remedy the same by elaborating upon the said reasons.

109. It is in above backdrop, to remedy the above, our learned predecessors have taken care to call for requisite information and reports pertaining to accused by passing order on 19.12.2022. Resultantly, this Court is now equipped with (a) psychological assessment report, (b) behavioral conduct report/certificate from jail and (c) socio-economic report.

110. Here, the affidavits of mother and brother of accused, dated 25.07.2021 and 19.09.2021 respectively, are also before us, where they both have narrated about the harsh and hard childhood of the accused, his mental disability and poor social condition, responsibilities of accused towards them and the hardships he faced to cope up the same. Material to that extent is reproduced in the affidavits.

111. Further, in compliance with the directions of order dated 19.12.2022, the following reports are placed before us;

(a) Psychological Assessment Reports:

In report dated 23.12.2022 issued by Dr. Kaustubh Joag, Consultant Psychiatrist, Trimiti Clinic Pune, it has been concluded as follows:

> *"Clinically, he does not have any mental illness. However, considering the difficulties in his childhood that include the early demise of his father, poor social and economic status, lack of academic stimulus or any guidance or mentorship, he appears to have* ***mild to moderate intellectual disability. Intellectual disability is a lifelong condition with onset during the developmental period, which includes childhood.*** *I had stated this in my preliminary opinion and the same has been confirmed by Ms. Shrenika Hatarote's report. He has adapted to his current prison environment, which means structured guidance in the form of a fixed daily routine, some teaching / mentorship in learning new things, support / conversations* ***with fellow prisoners, will help him function better in society.***
>
> *Considering the nature of his disability, including deficits in adaptive behaviour, difficult childhood with low socio-economic condition, attendant vulnerabilities, and lack of support to learn and cope with deficits in his behaviour, any punishment that is imposed on Mr. Baburao should account*

for his disability, and the ***difficulties he faced due to his disadvantaged life circumstances, which further hindered his ability to cope with his life circumstances.****"*

[emphasis laid]

Likewise, in the report issued by Ms. Shrenika Hatarote, Consultant Clinical Psychologist, she has concluded as under:

History, test findings and behavioural observations show that Mr. Baburao has Intellectual Disability with moderate deficits in intellectual functioning *per the PRI score obtained and mild deficits per the BKT score. (Intellectual Disability is defined by the DSM 5 as "****a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains****". ……*

The findings of VABS II sows low socio adaptive skills in the area of communication, daily living and socialisation. Indicating he may have difficulty in day-to-day communications, interpersonal relationships and ability to take responsibilities as an adult."

With such findings, she has recommended that **"since there is no medication available for intellectual disability, the treatment plan should emphasize on rehabilitation and providing support for psycho-education and occupational training"**.

(b) Conduct Certificate

In the conduct certificate dated 06.02.2023 issued by the Senior Jailor, Judicial Section-I, Yerwada Central Prison, Pune, it is certified that, ***"However, conduct & behaviour is satisfactory with other inmates and prison staff".***

(c) Social Investigation Report

Though social investigation report is put on record by learned counsel for accused, it is their independent exercise, i.e. it is not an exercise undertaken upon any directions of this Court. Still, in the interest of fairness we visited the same and we found that accused has lived a life of extreme deprivations since childhood. His childhood was under extreme adversities like loss of father, abuse of mother, no education, inadequate nutrition, hard childhood labour, lack of care and attention.

112. Taking above material into consideration, coupled with the fact that conclusion of learned trial court is on incomplete assessment of legal requirements and more importantly, without consideration of alternative sentence of imprisonment for life to be ruled out in to-to, we are of the opinion that the conclusion reached at by learned trial Judge, being not based on sound and special reasons, which infact are

found to be not assigned at all, necessitates our intervention on the point of sentence. We are not convinced that this is a case which falls within the "rarest of the rare" category, though accused has victimized a tender sole for satisfying his lust by inflicting multiple grievous sexual assault and further throttled her to death and in inhuman manner. Though this is one of the most unfortunate and grave offence, but equally not a crime which gravitates only and only death penalty by holding it to be falling in the "rarest of the rare" category.

113. Now the question is that, if he is to suffer imprisonment for life, which might be interpreted as 14 years, or it should be more or even for a fixed term, and that too with the rider of dis-entitlement for remission.

114. In the case of ***Bachan Singh***, there is discussion on sentencing discretion conferred on the courts. Adding a note of caution that it should not be untrammelled or unguided, the discretion is expected to be exercised judiciously, in accordance with well recognized principles, which are getting crystallized by various judicial pronouncements, after balancing all aggravating and mitigating circumstances. It has been further observed as under:

> *"What is the relative weight to be given to the aggravating and mitigating factors depends on the facts and circumstances of the case. More often than not, the aggravating and mitigating factors are so intertwined that it is difficult to give a separate treatment to each of them. A planned murder involving extreme brutality or exceptional depravity and the murder of any member of the armed forces or police force or a public servant were a few circumstances which were categorized as aggravating. The age of the accused, possibility of reformation and rehabilitation of the accused, probability that the accused would not indulge in a criminal act in future, the extreme mental or emotional disturbance due to which the offence was committed, the duress or domination of another person under which the accused committed the offence and the mental unsoundness or incapacity were listed as some of the mitigating circumstances. Every relevant circumstance relating to the crime as well as the criminal has to be considered before imposing a sentence of death under Section 302 IPC."*

115. Bearing the above guiding principles in mind, we wish to highlight that this is a case no doubt of a minor aged 6 years being first raped, sodomized and then done to death. There is no further doubt that the murder is also in a brutal manner. However, it is also to be borne in mind that it was not a case of planned act. Finding the child sitting alone that day, he seems to have taken her to the remote

place. His background shows that his wife has left his company and at the time of incidence, he was of 35 years of age and admittedly had no criminal record till then. Prosecution did not show that he has a propensity or natural inclination to further commit such offences again and thereby expose the society to danger or threat. On the contrary, his post-conviction behaviour inside the prison, which has been brought on record, has kept the hopes of reformation alive.

116. Here, there is a brutal sexual assault on a minor of 6 years age. After satisfying his lust, he has strangulated her. Therefore, gravity of the offence is also definitely enormous. There is apparent betrayal of trust reposed by the small child who addressed him as her "uncle". For said reason, he is not entitled or fit to be enlarged on completion of 14 years itself, and so he is liable to be incarcerated for a non-remittable fixed term.

For adopting above view, we have leaned on ***Swamy Shraddanand (2)*** ; (2008) 13 SCC 767, ***Neel Kumar v. State of Haryana*** ; (2012) 5 SCC 766, ***Raju Jagdish Paswan v. State of Maharashtra*** ; (2019) 16 SCC 380 and ***Tattu Lodhi alias Pancham Lodhi v. State of M.P.*** ; (2016) 9 SCC 675.

Again falling back on the factual aspects narrated above, we are of the view that sentence of fixed term of 25 years should subserve the purpose of justice and is proportionate to the offence committed by him.

117. We are aware of the legal position regarding mandatory grant of compensation to the victims of crime. Law to this extent is aptly dealt by the Hon'ble Apex Court ***Ankush Shivaji Gaikwad v. State of Maharashtra*** ; (2013) 6 SCC 770 wherein the ambit and scope of Section 357 Cr.P.C. has been lucidly and succinctly dealt. In the present case, the peculiar feature which is emanating from the available record is that accused was in the very employment of informant, that too on a yearly contract basis. Therefore, he obviously has no sufficient means to pay compensation if at all directed. Therefore, we are not in a position to direct compensation to be paid by him. Rather, from the impugned judgment passed by learned trial court, it seems that by virtue of clause [13] of the operative part, learned trial court directed District Legal Services Authority [DSLA] for determining and payment of compensation to the parents of victim as per rule, which obviously is the order taking recourse to Section 357-A of Cr.P.C.. We are equally conscious of the fact that monetary compensation would not heal the permanent scar and

wound inflicted over the parents for the unfortunate loss of their girl child, however, we wish to add that DLSA, Nanded to get the process of grant of compensation expedited.

118. Before parting, we wish to acknowledge the painstaking efforts taken by Ms. Rebecca Gonsalvez, learned counsel for accused, for extending valuable assistance to this court during the appeal, more particularly on the aspect of DNA evidence. We record our appreciation for the proficiency she has acquired, more specifically in the field of forensic science and manner of appreciation of DNA evidence with legal lenses. She has gained considerable mastery over this upcoming specialized field and in our opinion, definitely the same goes to a greater extent in assisting courts of law for arriving to a just decision.

ORDER

I. Confirmation Case No. 1 of 2021 is hereby dismissed.

II. Criminal Appeal No. 280 of 2021 is partly allowed.

III. The Judgment and order passed by learned Additional Sessions Judge/Special Judge, Bhokar dated 22.03.2021/23.03.2021 in Special [POCSO] Case No. 06 of 2021, to the extent of awarding **death sentence** to the convict Baburao Ukandu Sangerao @ Baburao Malegaonkar, **is hereby set aside**.

IV. The sentence awarded by learned trial Judge vide clauses [02], [03], [04] and [05] of the operative part of the impugned order dated 23.03.2021 is hereby commuted and modified as under:

[02] Accused Baburao Ukandu Sangerao @ Baburao Malegaonkar is hereby convicted under section 235(2) of Cr.P.C. for the offence punishable under sections 302 and 363 of IPC. As the offence under Section 302 of IPC is major offence, he is sentenced to **suffer non-remittable sentence for a fixed term of 25 years** for committing brutal murder of victim.

[03] Accused Baburao Ukandu Sangerao @ Baburao Malegaonkar is hereby convicted under section 235(2) of Cr.P.C. for the offence punishable under section 376-A of IPC for committing rape and inflicting injury which causes death and he is sentenced to **suffer non-remittable sentence for a fixed term of 25 years**.

[04] Accused Baburao Ukandu Sangerao @ Baburao Malegaonkar is hereby convicted under section 235(2) of Cr.P.C. for the offence punishable under sections 376(2)(j)(m), 376-AB and 377 of IPC. As the offence under section 376-AB of IPC is major offence, he is sentenced to **suffer non-remittable sentence for a fixed term of 25 years** for committing rape on minor victim.

[05] Accused Baburao Ukandu Sangerao @ Baburao Malegaonkar is hereby convicted under section 235(2) of Cr.P.C. for the offence punishable under sections 4, 6, 8, 10 and 12 of the POCSO Act. As the offence under section 6 of the POCSO Act is aggravated and major offence, he is sentenced **to suffer non-remittable sentence for a fixed term of 25 years**.

V. All the above substantive sentences shall run concurrently.

VI. We make it clear that the impugned judgment and order so far as disposal of muddemal and compensation to the parents of victim is concerned, there is no change in the same.

VII. We expect the District Legal Services Authority, Nanded to get the process of grant of compensation under Section 357-A of Cr.P.C. expedited

VIII. In view of disposal of appeal, all pending applications also stand disposed of.

IX. The Registrar (Judicial) to make further compliance and to see that a copy of this judgment is received by the accused in jail free of cost and even inform the learned trial court accordingly.

[ABHAY S. WAGHWASE, J.] [SMT. VIBHA KANKANWADI, J.]

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