

Case No.53/2021 – State of Rajasthan Versus Suresh Kumar, FIR No.120/2021 registered at Police Station Narena, District Jaipur. Aggrieved by the judgment of conviction dated 04.02.2022 and the order of sentence dated 10.02.2022, accused – Suresh Kumar has preferred D.B. Criminal appeal No.48/2022. By the aforesaid judgment of conviction dated 04.02.2022, accused was convicted for offence under Sections 363, 302, 201 of IPC and Section 5(M)/6 of POCSO Act, in alternate Section 376(AB) of IPC and Section 84 of Juvenile Justice (Care & Protection of Children) Act, 2015 (hereinafter referred to as “the JJ Act, 2015”). For offence under Section 84 of JJ Act, 2015, he was sentenced for 7 years rigorous imprisonment and a fine of Rs.50,000/- and in default of payment of fine, to further undergo 1 year rigorous imprisonment. For offence under Section 201 IPC, he was sentenced for 7 years rigorous imprisonment and a fine of Rs.50,000/- and in default of payment of fine, to further undergo 1 year rigorous imprisonment. For offence under Section 5(M)/6 of POCSO Act, he was awarded death penalty. For offence under Section 302 IPC, he was awarded death penalty and a fine of Rs.2,00,000/- and in default of payment of fine, to further undergo 3 years rigorous imprisonment.

2. Succinctly stated the facts of the case are that on 12.08.2021, a missing person report (Exhibit-P1) was filed by the father of the missing girl, a child aged about four and a half years, to the effect that the child went missing from Aguna Mohalla, Azad Chauk between 8:45 PM to 9:00 PM. The dead body of the missing child was recovered from a pond on Bhawsa Kandevli Road. It was found that she was raped and drowned in the pond. The Police

sprung into action and on the basis of informer's feedback, arrested the present appellant from the village. During the investigation, skirt of the deceased was recovered at the instance of the accused appellant. Ashes of accused's clothes were recovered, his blood was obtained on the FTA Card and the same was sent for DNA analysis. From the report of the DNA, it was revealed that in vaginal & anal swab of the deceased as also in the skirt of the deceased, human semen was detected.

3. The Police after due investigation filed charge-sheet against the accused appellant. The accused denied the charges and sought trial. On behalf of the prosecution, as many as 41 witnesses were examined, 139 documents were exhibited and Article 1 to 9 were also exhibited. In defence, 13 documents were exhibited. Accused was examined under Section 313 Cr.P.C. He denied each and every fact, but no evidence was produced in defence. Learned trial Court after hearing the parties has convicted the accused for the offences stated hereinabove and has awarded death penalty to the accused. For confirmation of Death Sentence, Death Reference has been moved before this Court. Aggrieved by the judgment of conviction and sentence, accused has preferred a separate appeal.

4. It is contended by the counsel for the accused that as per Mohammad Saddik - complainant, he had submitted a written report (Exhibit-P1) at Police Station on 12.08.2021, on the basis of which FIR No. 120/21 was registered whereas, in the "Karyavahi Police" on the written report (Exhibit-P1) date 11.08.2021 is mentioned. It is contended that all the witnesses of Exhibit-P1 had deposed that it was produced on 12.08.2021,

hence, the written report (Exhibit-P1) has become doubtful as every witness has given varied timings regarding submission of the written report. It is also contended that as per the document (Exhibit-D12) submitted along with the charge-sheet by the Investigating Officer, the Police got first information regarding the missing daughter of the complainant at 10:49 AM on 12.08.2021. However, in FIR No.120/2021 (Exhibit-P2), which has been registered on the basis of written report (Exhibit-P1), the time of the said FIR has been mentioned as 11:28 AM.

5. It is further contended that prosecution witnesses have stated in their statements that name and photograph of the suspected accused was circulated in the social media, however, in the entire charge-sheet, the Investigating Officer has not submitted the photograph of the suspected accused. The prosecution witnesses, namely, Tara Chand, Jogendra Singh Rathore, Shrawan Singh, Kiran Pal, Hitesh Sharma and Dinesh Yadav have stated that photo of suspected accused was circulated and that the informant had sent the photo on mobile of Tara Chand and that Tara Chand had circulated the photo of the suspected accused to all the Officers. The photograph was also circulated in nearby rural areas, but the same was not produced in Court by prosecution.

6. It is contended that Tara Chand is a material prosecution witness, who after collecting information from his informer had inferred that Suresh was the accused, however, presence of Tara Chand becomes doubtful because witness Hitesh Sharma (PW-17) has stated in his cross-examination that Tara Chand (PW-18) was told to come to Kotputali after 5:30 PM on 12.08.2021, but Tara

Chand (PW-18) has stated in his examination-in-chief that on 12.08.2021 he reached the Police Station at around 8:30 PM and thereafter, he made contact with his informer, thus there are material contradictions in statements of Hitesh Sharma (PW-17) and Tara Chand (PW-18). Witness Hitesh Sharma had admitted in his cross-examination that Tara Chand before reaching the Police Station, Narena from Kotputali had already informed him about the suspected accused. SHO, Police Station, Narena, namely, Hanuman Sahay (PW-37) had stated in his cross-examination that Tara Chand met him on 12.08.2021 at around 2:00-3:00 PM. It is also contended that Raju Gurjar (PW-25) in his statement under Section 164 Cr.P.C. (Exhibit-P126) has stated that when they were returning to Village Kandevali, they stopped and Mali Ram went for easing himself and Suresh met them there. The said witness has given contradictory statements in Court wherein, he has stated that they stopped before Village Kandevali and Suresh came from the direction of Village Bhavasa. The statement with regard to Suresh coming from the direction of Village Bhavasa was also given by witness Dinesh (PW-29) in his court statement. Thus, it is contended that there are contradictions in statements of witnesses recorded under Section 164 Cr.P.C. and their court statements.

7. It is further contended that there are material contradictions in court statement and statement recorded under Section 164 Cr.P.C. (Exhibit-P125) of Madan Lal (PW-26). In his examination-in-chief, he stated that he saw 2 persons coming on motorcycle, he called them, one of the person (accused-Suresh) came and gave his I.D. Card when he was asked for the same. The witness

has also stated that Suresh was accompanied by another person, in regard to his presence on the above place, Suresh told the witness that he was there to protect his crops from animals. Madan Lal (PW-26) has admitted in his cross-examination that at the time of the month (August), crop was standing in the field and the owners of the field used to come to their fields to protect the crop from animals. In his statement under Section 164 Cr.P.C., Madan Lal (PW-26) had admitted that Suresh and other person went in the direction of their field.

8. It is further contended that witness Shrawan Singh (PW-28) in his statement under Section 164 Cr.P.C has stated that he & Kiran Pal caught hold of the suspect and handed him over to the C.I, but the name of the suspect was not mentioned in the said statement. However, in his court statement, he has mentioned that the person he caught was named Shyoraj. Witnesses Tara Chand (PW-18) and Mangal Singh (PW-39) have stated in their statements that the person who was caught hold of by the villagers was handed over to them, that no Officer prepared the site plan of the place from where Shyoraj was caught, that the statements of villagers were not recorded and that Investigating Officer did not visit the place. Similar facts are also mentioned by the Investigating Officer. Thus, there is material contradiction in the prosecution story, as on the one hand, witness Shrawan Singh has stated that he caught hold of person named Shyoraj and handed him over to C.I. whereas on the other hand, witnesses Tara Chand and Mangal Singh have narrated a different story.

9. It is contended that all the prosecution witnesses have stated that witnesses - Shrawan Singh and Kiran Pal caught hold of

Shyoraj at 12:00 in the noon, but the Investigating Officer has prepared the arrest memo of accused Suresh Kumar (Exhibit-P26) at 6:30 PM on 13.08.2021. Exhibit-P26 which is the arrest memo does not reveal the kind of clothes worn by the person arrested. It is mentioned in the arrest memo that search of accused was conducted by Constable – Shri Prem and in the said search except 'Parcha Poshudgi' no article was recovered, but only after 15 minutes of his arrest i.e. at 06:45 PM, recovery of underwear is shown vide Exhibit-P27. There is no information of the arrested accused pertaining to the said underwear under Section 27 of the Indian Evidence Act.

10. It is also contended that in the charge-sheet (Exhibit-P102), it has been mentioned that a crowd of 1000-1500 persons assembled in the hospital and started an agitation demanding arrest of the accused person and till the said arrest is made, they denied cremating the dead body. However, the prosecution witnesses in their statements have stated that they were not aware of the aforementioned fact. It is also evident from the statement of the complainant and the receipt of '*supurdgi*' of dead body (Exhibit-P5) that the family members of the deceased received the dead body on 13.08.2021. The complainant has also stated in his statement that when the Police had announced the arrest of the accused, they had already received the dead body, but at that time they were not informed about the name of the arrested accused. It is also contended on behalf of the accused appellant that present is a case wherein all the witnesses have stated that the Police circulated the photograph of the suspected accused with his name and after arrest of the accused and before

handing over the dead body, the Police had not publicly announced the name of the accused. It goes to show that the Police caught hold of Shyoraj and announced the arrest of Shyoraj, but subsequently, the Police falsely implicated the accused and let go of Shyoraj.

11. It is contended that Dr. Pradeep Kumar (PW-11) has admitted in his cross-examination that he has first seen the original FSL report only in the Court. The Investigating Officer has not given any explanation as to why he did not show the original FSL report to the doctor. Further, the Investigating Officer has also not stated that which FSL report was shown to the Medical Board. It is also contended that the FSL report, which was given to the Medical Board for its opinion is not available on the record with the charge-sheet. It is further contended that Dr. Monika Dadhich (PW-15) has admitted in her cross-examination that the body of the deceased after the postmortem was handed over to the family of the deceased and the receipt of the same is available on record. According to witness-Dr. Monika Dadhich (PW-15), dead body was handed over on 12.08.2021 but '*supurdgi*' dead body is dated 13.08.2021. As to where the dead body was and in what circumstances, it was kept between 12.08.2021 to 13.08.2021, is not explained. Dr. Monika Dadhich (PW-15) has also admitted in her cross-examination that she conducted the postmortem at around 10:00 AM, however, from Exhibit-P2 and D-12, it can be seen that before 10:00 AM, there was no information with regard to the missing child. In the above circumstance, it is not possible that Doctors conducted the postmortem of the deceased on 12.08.2021 at around 10:00 AM.

12. It is contended that Dr. Monika Dadhich (PW-15) has admitted in her cross-examination that samples taken during the postmortem were not sealed and as to which mark or seal was used to mark them, is not mentioned in postmortem report (Exhibit-P19). It is also contended that copies of letters prepared while taking separate samples have also not been produced with the charge-sheet. It is further contended that witnesses have admitted that the Forensic Team was not shown the dead body. The Investigating Officer has also not given any explanation with regard to the same and with regard to the facts that no site inspection was conducted by the Forensic Team. It is also contended that no document is available on record regarding constitution of the Medical Board or with regard to conducting the postmortem.

13. It is contended that as per the statement of Ramjan Bhutta (PW-30), Suresh got the petrol filled in the motorcycle from his petrol pump and with regard to the same, the Investigating Officer has also seized CCTV footage, but the statement of the person who filled the petrol was not recorded. The photographs from the CCTV footage have also not been submitted by the Investigating Officer along with the charge-sheet and an additional copy of pen drive containing the CCTV footage was not produced. It is also contended that witness - Ramjan Bhutta (PW-30) has admitted that he was not the person who filled the petrol and that he did not receive any letter pertaining to the CCTV footage, which was taken by the Investigating Officer.

14. It is further contended that the Investigating Officer has admitted that the accused gave information under Section 27 of

the Evidence Act about skirt of the deceased at 2:45 pm on 14.08.2021, however, the document Exhibit-P8, which is pertaining to recovery of skirt of deceased, was prepared on 15.08.2021 at 1:10 pm. It is also contended that the information under Section 27 of the Evidence Act was given on 14.08.2021 from 2:45 PM (Exhibit-P103) and thereafter, the Investigating Officer produced the accused in the Court for obtaining remand and the accused stayed there till the night. It is further contended that this means that on 14.08.2021 from 2:45 PM upto 06:00-07:00PM in the evening, accused was with the Investigating Officer, however, according to witness Doctor Harshit Baswal (PW-19), in Exhibit-P24 till 5:00 PM accused was undergoing medical examination, wherein his blood, semen, DNA samples were also taken. Thus, there is contradiction in the same. It is contended that the recovery memo prepared by the Investigating Officer is doubtful because in the arrest memo, there is no mention of the clothes, which the accused was wearing and there is no explanation as to the evidence against the accused based on which his arrest was made. Further, the skirt of the deceased was not identified by the parents of the deceased. The witnesses of the recovery memo of the skirt have varied opinions with regard to the colour of the skirt. It is also contended that no photographs of the recovery of the skirt were on record, even though the Investigating Officer has stated that photographs were taken.

15. It is contended that no blood stains or marks of any offence were found at the place pointed out by the accused as the place of crime (Exhibit-P10). It is also contended that the recovery of skirt at the instance of the accused (Exhibit-P8) is from an open place,

accessible to all and hence, the same cannot be used against the accused.

16. It is contended with regard to recovery of motorcycle from the shop of Nasir Qureshi that no photograph of recovery of the motorcycle is on record, no mechanical examination of said motorcycle was done and there is no written evidence of the said Nasir Qureshi available on record. It is also contended that during the recovery, according to the witnesses, photographer - Suraj Choudhary (PW-27) was present, however, photographs have not been produced. With regard to Guard - Madan Lal, his Aadhar Card, IMIE Number of his mobile, the version of the mobile and any document with regard to his appointment as Guard have not been produced. It is further contended that neither there are any independent witnesses to the site plan of the place where the accused was hiding nor any signature of the owner of the place was taken. It is also contended that there are no independent witnesses to the recovery memos prepared by the Investigating Officer. The Investigating Officer has neither prepared the site plan of the place in Village Lopadiya, from where recovery was made nor the site plan of the house of the accused's aunt. There is no evidence that as to who burnt the clothes of the accused, even though witness Tara Chand in his evidence has stated that accused changed his clothes. As to how the undergarments of the accused were recovered has not been explained. The ashes of the clothes was recovered but no site plan of the place of recovery has been made and there are no independent witnesses to the same. According to the Investigating Officer, on his way back to Aguna Mohalla Narena from the petrol pump, nobody saw the accused.

The photographs that have been produced were taken after the recovery and no article or evidence was recovered from the accused during the photography.

17. It is contended that before preparing the recreation chart, the Investigating Officer has already visited all such places and in this regard, the evidence is available on record. No evidence was collected with regard to the fact that Raju Gurjar, Dinesh, Maliram and Chetan went to Pithavas to repair the tractor trolley. In the evidence of Tara Chand (PW-18), it has come forth that the distance between Kandevali and Village Lopadiya is 38-42 kms., however, Tara Chand has stated in his statement that at 10:00-11:00 PM, he reached Village Kandevali and he remained there till 12:30 in the night. The said witness has also stated that during 11:00 PM-12:00 PM, he was present in Village Lopadiya. Both Tara Chand and Hitesh Sharma have admitted in their cross-examination that none of their informers witnessed the accused committing the crime.

18. It is contended that the Rojnamcha reports produced in the Court have not been produced with the charge-sheet. All the Rojnamcha reports were printed after the date of submission of the charge-sheet and they have not been attested by any Senior Officer. It is also contended that evidence of Malkhana Register (Exhibit-P75) is doubtful as while entering the articles in the Malkhana, there was no signature of the Malkhana Incharge. It is further contended that there are material contradictions in the testimony of witness Hanuman Sahai (PW-37), according to whom, he met Tara Chand on 12.08.2021 at 2:00-3:00 PM. It is also contended that witness Mehmooda Bano (PW-23) did not see

any person picking up the deceased. The witness has also not stated as to how far the deceased went from her house.

19. It is contended that statements of witnesses - Kishan Mali, Madan Lal, Raju Gurjar, Dinesh, Nasir Qureshi, Shrawan Singh etc. were recorded three days after the arrest of the accused. It is also contended that as per the prosecution story, if the photo, name and address of the accused were already circulated, then why the above-mentioned witnesses did not inform the Police on 13.08.2021 and 14.08.2021 that they had seen Suresh on 11.08.2021 and 12.08.2021. The Investigating Officer has not explained as to why the statements of these witnesses were taken after a delay of 3 days. Witness - Nasir Qureshi (PW-22) has stated in his evidence that on 12.08.2021, Suresh and his brother Sonu came at his shop on motorcycle and left the motorcycle for washing and at about 12:00-12:30 PM, Suresh and his father Mangi Lal came again to his shop with the motorcycle number plate and then left. The Investigating Officer did not record the statements of Sonu or Mangi Lal. According to the prosecution story, on 11.08.2021 at night, accused Suresh after changing his clothes absconded and did not return. So the question arises if the number plate was with him, then how the number plate was recovered from his house. It is also contended that if the accused was guilty, he would have absconded, but according to the prosecution story, the accused was at his house even at 10:00 PM, thereafter he was at his field. In the morning, he was present in the town of Narena, thereafter, he visited his aunt's house in Narena and later, his aunt's house in Lopadiya. It is further contended that the accused went to his relative's house after his

photo was circulated and did not abscond, which points towards his innocence.

20. Learned counsel for the accused has placed reliance on *Hakamddin @ Mamddin Versus State of Rajasthan through PP: 2015 (3) CJ (Cr.) (Raj.) 1372*, *Upendra Pradhan Versus State of Orissa: 2015 (3) CJ(Cr.)(SC) 933*, *R. Shaji Versus State of Kerala: (2013 (2) CJ(Cri.)(SC) 534*, *Shyam Lal Saha & Anr. Versus State of West Bengal: 2014 (3) CJ(Cri.)(SC) 969*, *Surjeet Singh @ Billu & Ors. Versus State of Rajasthan: 2016 (2) CJ(Cri.)(Raj.) 962*, *Anwar Ali & Anr. Versus The State of Himachal Pradesh: 2021 (1) CJ(Cri.)(SC) 59*, *Sheodan Singh & Anr. Versus The State of Rajasthan: 2010(1) CJ(Cr.)(Raj.) 325* and *Santi Bai Versus State of M.P.: 2010(2) CJ(Cri.)(SC) 449*.

21. With regard to death sentence, it is contended by the counsel for the accused that the case does not fall within the category of 'rarest of rare case'. Considering the fact that the accused was aged 25 years at the time of alleged offence, he has a daughter aged about 1 year and a wife, he should not be awarded death penalty.

22. Learned Additional Government Advocate and learned counsel for the complainant have supported the sentence of Death Penalty. It is contended that there are material evidences against the accused based on recoveries made pursuant to information given under Section 27 of the Evidence Act as well as the FSL report. It is also contended that the deceased was abducted, raped and thereafter, murdered and the same has been established by the prosecution witnesses. It is further contended that the argument of the defence that the date mentioned in

Exhibit-P1 is 11.08.2021, but in the same report, it is mentioned that the offence occurred about 12 hours prior, which explains that the offence occurred on 11.08.2021 and the report of the same, was given at the Police Station on 12.08.2021.

23. It is contended that it is not necessary to produce the photographs, which were taken during the investigation. It is also contended that Tara Chand (PW-18) was earlier posted at Police Station Narena and he was familiar with the nearby villages and that is why he was called to Narena Police Station by the Senior Officers. On information given by him to the Senior Officer, the accused was arrested and the same has been deposed by many witnesses. With regard to the contention of the counsel for the accused that there is contradiction in the testimony of Raju Gurjar (PW-25), counsel for the State has replied that the place, which Raju Gurjar has mentioned, is located near the border of Village Kandevali. The witness has stated in his statement under Section 164 Cr.P.C. that accused Suresh came from the village and this points to the fact that Raju and other witnesses were outside the Village Kandevali. It is further contended that witness Chetan in his statement under Section 164 Cr.P.C. (Exhibit-P128) has stated that the accused came from the direction of Village Bhavasa and was seen going in the direction of their village, thereafter he turned his motorcycle and came back near them. This means that when Suresh turned his motorcycle and came back near them, then he was coming from the direction of Village Kandevali. It is also contended that the statements of the witnesses under Section 164 Cr.P.C. were taken on 19.08.2021. There is no variation in the statement of witness - Madan Lal, who works as a Guard in DFCL

Railway Company and has clearly stated that during his duty, he saw the accused, whom he called and asked for his identification. He has stated that accused Suresh was visibly scared when he handed over his I.D. Card. The witness also took a photo of the accused's I.D. Card. Witness Shrawan Singh (PW-28) in his statement has stated that he and Kiran Pal caught hold of the accused. This witness had by mistake mentioned the name of Shyoraj in his statement, explanation of which, he has given by stating that Shyoraj is the son of accused Suresh's aunt, and that is why he got confused. He has clarified that the person whom he had caught hold of was Suresh and it was the same person whose photographs had come in the phone of Kiran Pal. According to this witness, he handed over accused Suresh. The said witness is a simple rustic villager.

24. It is contended that arrest memo (Exhibit-P26) mentions the appearance and characteristics of the accused. Exhibit-P27 makes it evident that accused Suresh admitted his crime and also submitted the undergarments that he was wearing when he committed the said crime. He was wearing the same undergarments when he was arrested, which had blood stains and the same were seized by the Investigating Officer without delay. It is also contended that the blood stains on the undergarment of the accused matches with the DNA of the deceased, which is evident from the FSL report. It is further contended that the information with regard to the arrest of the accused was not publicly announced because the same was necessary for his security.

25. It is contended that Dr. Monika Dhadhich (PW-15) has indicated the time of the postmortem in the postmortem report. It is also contended that the receipt of '*Supurdgi*' of dead body is not prepared by the doctor, but in fact, it was prepared by the Police. It is further contended that specimen seal (Exhibit-P138) was sent to FSL in marked and sealed condition vide Exhibit-P35 and P36.

26. It is contended that the counsel for the accused appellant did not object with regard to the fact that the accused was not given the copy of pen drive of CCTV footage and the said objection at the later stage is not maintainable. It is also contended that the objection of the accused that the skirt of the deceased was recovered after delay, even though the information under Section 27 of the Indian Evidence Act was received earlier and that the accused was taken in remand via video conferencing and the same was not indicated in the remand-sheet, is not correct as the Police had taken accused Suresh for medical to Dudu CHC, where the doctor conducted his medical and in the MLC report, the signatures of accused Suresh can be seen. It is contended by the state counsel that the information with regard to skirt was given on 14.08.2021 at 2:45 PM. Since the accused was taken for medical on 14.08.2021 after 2:45 PM, recovery could not be effected on that date and so the recovery was made on the next day.

27. It is contended that identification of the skirt by the family of the deceased is not necessary as the skirt was recovered on the basis of information given under Section 27 of the Evidence Act and the Investigating Officer had already inquired about the characteristic of the skirt from the parents of the deceased. It is

also contended that the sample taken from the skirt of the deceased and the sample taken from the undergarments of the accused are matching and the same cannot be doubted. With regard to the objection of the counsel for the accused that there is variance in the testimony of the villagers with regard to the colour of the skirt, it is contended that the variance is only pertaining to the language used by the villagers.

28. It is contended that it is not necessary to photograph the articles during recovery, when the witnesses to the recovery have affirmed the fact of recovery. It is also contended that merely because there were no independent witnesses to the recovery, the same does not make it doubtful. Further, as the place where the accused hid himself was the house of his relatives, therefore, their signatures were not taken, as they were interested witnesses.

29. It is contended that the accused burnt his clothes in order to get rid of the blood stains on them. Witness – Tara Chand was informed that Suresh changed his clothes and left and this leads to the inference that it was the appellant, who committed the offence. The act of the accused by which he burnt his clothes implicates him further. The presence of the accused in the vicinity is established by the shop of Kishan Mali, which is situated on the road of Aguna Mohalla. It is also contended that photographs (Exhibit-P41) make it evident that the photos, which were circulated, were of accused Suresh only. It is also contended that recreation chart was made at the behest of the accused. It is further contended that the fact that there were no witnesses, who had seen the persons going to Pithyavas for repair of the tractor trolley, does not affect the case of the prosecution negatively. It is

further contended that the statement of Tara Chand with regard to his presence in Lopadiya and Kandevali is not doubtful because the distance between the same can be covered in 25-30 minutes by car.

30. It is contended that looking to the gravity of the offence, Superintendent of Police, Jaipur Rural, gave direction to all the Officials and the Police Personnel at Dudu and Narena, Police Stations to contact all their informants in the district as well as outside the district and to help, investigate and identify the accused. In pursuance of the same, witness Jogendra Rathore (PW-14) came to Narena Police Station and completed his task by producing the accused in front of the Additional S.P., Dudu and made his statement and thereafter left for the Station at which he was posted. With regard to the Rojnamcha Report, the counsel for the State has contended that the Rojnamcha Report is lodged online and therefore, no alterations can be made to the same. It is also contended that Malkhana Incharge was responsible for safe custody of the articles in Malkhana and the same is indicated in the Malkhana Register.

31. It is contended that the motorcycle number plate that was recovered by the Police pursuant to information under Section 27 of the Evidence Act, was recovered from an iron box in the house of the accused. It is also contended that when Tara Chand and Mangal Singh came to the house of the accused's aunt in Village Lopadiya, then in the first instance, a boy came outside and replied on being asked with regard to the accused that Suresh left in the evening to meet his friend in Bhojpura. After this, Police came back and Tara Chand asked his informant to send the photo

on his mobile and he realized that the boy who came outside the house of accused's aunt in Village Lopadiya was the accused. Thus, it is clear that accused Suresh intentionally tried to hide his identity as he was guilty of committing a grave offence. The Police sent the photo of Suresh on different groups and thereafter, went to Village Lopadiya for further investigation and inquiry. Subsequently, the accused was caught by the villagers in the field. It is also contended that minor contradictions in the statements of the witnesses would not have adverse effect in the case of the prosecution. It is further contended that accused in his evidence under Section 313 Cr.P.C. has not explained as to why he would be falsely implicated. He has also not explained anything pertaining to the information given by him under Section 27 of the Evidence Act. Based on the information given under Section 27 of the Evidence Act, the Police has recovered skirt, motorcycle, number plate of the motorcycle at the behest of the accused.

32. It is also contended that the male DNA profile of the accused on FTA Card matched with the DNA profile obtained from skirt of the deceased, underwear of the accused, anal swab of the deceased, anal slide of the deceased and urethral meatus swab of accused. The female DNA obtained also matched with the skirt of the deceased recovered from accused, undergarment of the accused, vaginal swab and vaginal slide of the deceased, anal swab and slide of the deceased. It is also contended that the male DNA that was found on the vaginal swab and slide of the deceased matched with the blood found on the FTA card of the accused. It is further contended that the DNA of accused Suresh, who has committed the offence is matching with the DNA of the deceased

in the FSL report and the same is proved under Section 293 of Cr.P.C. Learned counsel appearing for the complainant has placed reliance on *Manoj Pratap Singh Versus The State of Rajasthan: (2022) 9 SCC 81*, *State of Rajasthan Versus Kalu Ram: 2014 (2) Cr.L.R. (Raj.) 760*, *Raju Manjhi Versus State of Bihar: 2018 R.J.R. (SC) 626* and *Manoj & Ors. Versus State of Madhya Pradesh: Criminal Appeal Nos.248-250 of 2015* decided by the Supreme Court on 20.05.2022.

33. Learned Additional Government Advocate has submitted that the trial Court has rightly recorded the conviction of the accused appellant as the chain of circumstances lead to his guilt. It is argued that the victim is a four and a half year old girl, who was brutally raped and murdered. There is evidence of vaginal and anal intercourse. The DNA of accused is matching with the DNA obtained from vaginal and anal swab of the deceased. Therefore, the trial Court has not committed any error in convicting the accused. It is also contended that since rape has been committed with a four and a half year old girl and she was drowned to death, the accused should be awarded death penalty and the penalty awarded by the trial Court should be confirmed and the Death Reference should be answered in positive.

34. We have considered the submissions and have carefully gone through the material on record.

35. This Court has to determine as to whether accused is the person who committed the alleged offence. For establishing the guilt of the accused, the prosecution has seized the underwear of the accused vide Exhibit-P27 on 13.08.2021, skirt of the deceased has been recovered at the instance of the accused vide Exhibit-P8,

site plan of which is Exhibit-P9. The accused gave information about the place where he burnt his clothes vide Exhibit-P107, on the basis of which, the burnt clothes of accused were seized vide seizure memo (Exhibit-P13). In addition, at the instance of the accused, number plate of his motorcycle was recovered vide Exhibit-P18. The I.D. of the accused was obtained by Madan Lal (PW-26), who saw the accused at night between 11:00 to 11:15 PM near the place of occurrence.

36. As far as the noting on 11.08.2021 on the missing person report submitted by the complainant is concerned, a perusal of the same clearly reveals that in the first line of the report, it is mentioned that on yesterday 11.08.2021, however, in the police proceedings, the date is mentioned as '11.08.2021', which as per the witness, was wrongly mentioned, as in the FIR, the date of lodging of FIR is mentioned as '12.08.2021'. A perusal of Exhibit-P2 reveals that in the report itself, it is mentioned that the child went missing between 8:45 - 9:20 PM on 11.08.2021. It is also mentioned that the complainant and his family members searched for the child for last more than 12 hours, meaning thereby that the complainant went to the police station on 12.08.2021, which is the date mentioned in Exhibit-P2. The objection with regard to mentioning of wrong date in the FIR, thus has no substance.

37. With regard to the evidence of Madan Lal (PW-26), it is contended that Madan Lal (PW-26) has admitted that at the time of the month when the incident occurred, crops were standing and that Suresh and the other person went in the direction of their fields. In this regard, it is noted that Madan Lal (PW-26) is an independent witness, who had seen the accused near the fields

and he took the photograph of the Aadhar Card of accused Suresh on his mobile, as he found him and the person accompanying him to be of dubious character. Merely from the fact that crops were standing in the field, it cannot be inferred that Suresh had gone to the fields for protecting the crops from animals. The presence of accused Suresh near the place of occurrence is thus established.

38. The other evidence, which has been adduced to establish the presence of the accused near the place of occurrence is the statements of Dinesh (PW-29) and Raju Gurjar (PW-25), who have stated that on 11.08.2021 at around 10:00 PM when they were returning to their Village Kandeveli on a tractor, at 10:00 PM they stopped the tractor as Mali Ram went to ease himself. At that time, Suresh came on a motorcycle from the direction of Village Bhavasa and after covering some distance, he turned his motorcycle and asked for '*bidi*' and when they refused, he started his motorcycle & went towards Narena. From the above statements also, presence of the accused is established near the place of occurrence.

39. Learned counsel for the accused has contended that there is variance in the statement of Raju Gurjar (PW-25) recorded under Section 164 Cr.P.C. and his court statement. In this regard, we may observe that there is no contradiction as in his statement under Section 164 Cr.P.C. also, he has stated that Suresh belonging to Village Kandevali, came there and asked for '*bidi*' and then left towards Narena. The statements of these witnesses (PW-25 & 29) establishes the presence of Suresh near the vicinity of the alleged place of occurrence.

40. Learned counsel for the accused has contended that Shrawan Singh (PW-28) initially named Shyoraj as the person, who was caught by the villagers. In this regard, it may be noted that this witness in his court statement has clearly stated that Shyoraj is son of aunt of Suresh and due to confusion, instead of Suresh, he had mentioned the name of Shyoraj. This witness has further clarified that Suresh was caught on the basis of the photograph, which was on mobile of Kiran Pal. This witness has also stated that the accused tried to flee from the fields and also tried to hide in the field but was caught by Kiran Pal. The witness has also stated that at the time when they caught the accused, he stated that he had committed a grave mistake and that he had committed rape with a young girl and that he had drowned the girl. All the above witnesses are independent witnesses and have no connection with the family of the deceased.

41. The other evidence, which is against the accused is recovery of skirt of the deceased, in pursuance to the information given by him under Section 27 of the Evidence Act (Exhibit-P103); recovery of ashes of the clothes worn by the accused at the time of commission of the offence on the basis of information given by him under Section 27 of the Evidence Act and; seizure of underwear worn by the accused at the time of his arrest vide Exhibit-P27. The recovered articles were sent for FSL, the report of which is Exhibit-P133. The skirt of the deceased, underwear of the accused, vaginal swab of the deceased, vaginal slide of deceased, anal swab of deceased and anal slide of deceased were found containing human semen. The DNA profile was obtained and the conclusion of the DNA report reads as under:-

CONCLUSION

On the basis of DNA analysis (enclosed allelic data Table-1 and 2), it is concluded that:

1. The male DNA profile obtained from exhibit no.13 (Blood sample of accused on FTA card) **is matching with** the DNA profiles obtained from exhibit no.1 (Skirt of deceased recovered from accused), 2 (Chadda/Underwear of accused), 6 (Anal swab of deceased), 7 (Anal slide of deceased), 8 (Urethral meatus swab of accused) and 9 (Slide of urethral meatus secretion of accused).

2. The female DNA profile obtained from exhibit no. 12 (Blood sample of deceased on FTA card) **is matching with** the DNA profiles obtained from exhibit no. 1 (Skirt of deceased recovered from accused), 2 (Chadda/ underwear of accused), 4 (Vaginal swab of deceased), 5 (Vaginal slide of deceased), 6 (Anal swab of deceased) and 7 (Anal slide of deceased) (Table-1).

3. The amplified alleles of male DNA profile obtained from exhibit no. 4 (Vaginal swab of deceased) and 5 (Vaginal slide of deceased) are matching with the male DNA profile obtained from exhibit no. 13 (Blood sample of accused on FTA card) (Table-2)."

42. A bare perusal of the DNA report reveals that female DNA profile obtained from the blood sample of the deceased was matching with the DNA profile obtained from the skirt of the deceased which was recovered from the accused, the underwear of the accused, vaginal swab of deceased, vaginal slide of deceased, anal swab of deceased and anal slide of deceased. The male DNA profile obtained from the blood sample of the accused was matching with the DNA profile obtained from the skirt of deceased recovered from accused, underwear of accused, anal swab of deceased, anal slide of deceased, urethral meatus swab of accused and slide of urethral meatus secretion of accused. Further, male DNA profile obtained from vaginal swab of deceased and vaginal slide of the deceased were found matching with male DNA profile obtained from blood sample of accused. Thus, the DNA

report conclusively points towards the commission of the offence of rape by the accused. Further, in the ashes of the clothes, which were recovered at the instance of the accused, traces of blood were detected during FSL examination.

43. Apex Court in **Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh (209) 14 SCC 607**, had explained as to what is DNA in the following manner:

“41. Submission of Mr Sachar that the report of DNA should not be relied upon, cannot be accepted. What is DNA? It means: “Deoxyribonucleic acid, which is found in the chromosomes of the cells of living beings is the blueprint of an individual. DNA decides the characteristics of the person such as the colour of the skin, type of hair, nails and so on. Using this genetic fingerprinting, identification of an individual is done like in the traditional method of identifying fingerprints of offenders. The identification is hundred per cent precise, experts opine.”

44. In **Santosh Kumar Singh v. State Through CBI (2010) 9 SCC 747**, which was a case of a young girl who was raped and murdered, the DNA reports were relied upon by the High Court which were approved by this Court and it was held that:

“71. We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram (supra). In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the

appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance.

45. In **Rajkumar v. State of Madhya Pradesh (2014) 5 SCC 353**, the Court was dealing with a case of rape and murder of a 14 year old girl. The DNA report established the presence of semen of the appellant in the vaginal swab of the prosecutrix. The conviction was recorded relying on the DNA report. In the said context, the following was stated:

“8. The deceased was 14 years of age and a student in VIth standard which was proved from the school register and the statement of her father Iknis Jojo (PW1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. So far as the analysis report of the material sent and the DNA report is concerned, it revealed that semen of the appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having appellant’s semen spots. The hair which were found near the place of occurrence were found to be that of the appellant.”

46. In the case of **Mukesh & Ors. Vs. State of NCT of Delhi & Ors. (2017) 6 SCC 1**, it was held that:-

“it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as

to tampering of samples, the DNA test report is to be accepted.”

47. Dr. Monika Dhadich (PW-15), who had seen the DNA report has stated before the Court that as per the DNA report, male DNA was matching with the DNA obtained from the skirt of deceased, underwear of accused, anal swab, anal slide, urethral meatus swab and slide of urethral meatus secretion of the deceased and that the only conclusion which can be drawn is that the accused has committed the offence of rape and sodomy. Both the Doctors (PW-11 and PW-15) have stated that the deceased died due to drowning and that while she was alive, she was drowned, as a result of which, she died due to suffocation. Thus, it is established that the accused after committing the gruesome offence of rape and sodomy, drowned the child, who was four and a half year old, as a result of which she died.

48. The contention of the counsel for the accused that the original FSL report was not placed before the Medical Board and that there is discrepancy as to when the dead body was handed over to the family has no relevance for deciding the guilt of the accused. The contention of the counsel for the appellant that missing person report was filed after the recovery of the dead body, also has no bearing on the case.

49. The Apex Court in *Sharad Birdhi Chand Sarda vs State Of Maharashtra*: **1984 AIR 1622**, has held that:

“(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 & Anr. v. State of Maharashtra](#) where the following observations were made:

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

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

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

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

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

50. This Court is now required to consider whether the circumstances against the accused form a complete chain to conclusively link the present accused with the crime. The circumstances against the accused are as follows:-

(a) The first circumstance against the accused is that independent witnesses namely Madan Lal (PW-26), Dinesh (PW-29) and Raju Gurjar (PW-25) have given evidence pertaining to presence of accused in the vicinity of the place of occurrence on the date of incident.

(b) The next circumstance against the accused is recovery of the skirt of the deceased at his instance vide Exhibit-P8. Further, the accused gave information about the place where he burnt his clothes (Exhibit-P107). From the FSL Report (Exhibit-P133), it is established that on the ashes of clothes of accused, traces of blood was found.

(c) The next circumstance against the accused is that he was apprehended by Shrawan Singh (PW-28) and one Kiran Pal on the basis of photo circulated by the police. According to the testimony of Shrawan Singh (PW-28), the accused attempted to flee. The witness has also stated that the accused confessed about committing the offence and also of having committed a grave mistake.

(d) The next circumstance against the accused is the forensic and DNA evidence as exhibited in FSL report (Exhibit-P133), which conclusively proves that accused Suresh Kumar committed the offence of rape with the deceased because male DNA profile of the accused has been found on the skirt of the deceased, recovered at the instance of the accused and on anal swab, anal slide, vaginal swab and vaginal slide of the deceased. The cause of death of the deceased was asphyxia due to drowning as mentioned in the PMR Report (Exhibit-P19).

51. This Court is of the considered view that all incriminating circumstances have been proved against the accused by cogent and reliable evidence and all these cumulatively form a complete chain of circumstances unerringly pointing towards the guilt of the accused and nothing else which are compatible with any other hypothesis except the one of the guilt of the accused.

52. Prosecution has been successful in bringing home guilt of the accused and the trial Court has rightly convicted the accused and we do not find any illegality in the impugned judgment of conviction and therefore, the same deserves to be upheld.

53. The next question, which requires consideration is as to whether death penalty awarded to the accused appellant by the trial Court vide impugned order of sentence dated 10.02.2022 is liable to be confirmed? For this purpose, we now proceed to examine the present case in light of the following cases where death penalty was awarded and the cases where death penalty has been converted into life imprisonment. In *Vasanta Sampat Dupare Versus State of Maharashtra*: **AIR 2017 SC 2530**, a minor girl of 4 years was raped and murdered. The Apex Court awarded death penalty and age as a mitigating circumstance was discarded. In *Pappu Versus The State of Uttar Pradesh*: **(2022) 10 SCC 321**, a 7 year old girl was raped and murdered, the Apex Court substituted death penalty with an imprisonment of 30 years. In *Veerendra Versus State of Madhya Pradesh*: **(2022) 10 SCC 668**, a minor girl aged 8 years was raped and murdered, the Apex Court substituted death penalty with an imprisonment of 30 years. In *State of Rajasthan Versus Sundar @ Surendra @ Santu*: D.B. Criminal Death Reference No. **4 of 2021** & one connected Appeal, decided by this Court on 02.02.2023, it was held as under:

“36 **Nirmal Singh v. State of Haryana, (1999) 3 SCC 670** was a case in which Dharampal had raped 'P' and was convicted for the offence. Pending an appeal the convict was granted bail. While on bail, Dharampal along with Nirmal Singh murdered five members of P's family. Death penalty was awarded to Dharampal and Nirmal Singh by the Trial Court and confirmed by the High Court. The Hon'ble Supreme Court converted the death sentence in the case of Nirmal Singh to imprisonment for life since he had no criminal antecedents; there was no possibility of his committing criminal acts of violence; he would not continue being a threat to society; and he was not the main perpetrator of the crime. It was held:

“There is nothing on record to suggest that Nirmal was having any past criminal antecedents or that there is a possibility that the accused would commit criminal acts of violence and would constitute a continuing threat to the society. The only aggravating circumstance is that he had come with his brother and had given 3 blows on deceased Krishna only after Dharampal chased Krishna and gave kulhari blows hitting on the neck while Krishna was running and on sustaining that blow, she fell down and then Dharampal gave two to three blows to Krishna and only thereafter Nirmal gave burchi blows on the said Krishna. It is no doubt true that the presence of Nirmal at the scene of the occurrence with a burchi in his hand had emboldened Dharampal to take the drastic action of causing murder of 5 persons of Tale's family as a result of which Tale's family was totally wiped off. But because of the fact that Nirmal has not assaulted any other person and assaulted Krishna only after Dharampal had given her 3 or 4 blows, the case of Nirmal cannot be said to be the rarest of rare case attracting the extreme penalty of death. While, therefore, we uphold his conviction under Section 302/34, we commute his sentence of death into imprisonment for life.”

37. Akhtar v. State of Uttar Pradesh, (1999) 6 SCC 60 was a case of rape and murder of a young girl. The sentence of death awarded to the accused was converted to one of life imprisonment since he took advantage of finding the victim alone in a lonely place and her murder was not premeditated. It was observed:

“But in the case in hand on examining the evidence of the three witnesses it appears to us that the accused-appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused-appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death.”

38. Raju Vs. State of Haryana (2001) 9 SCC 50 was a case in which the Hon'ble Apex Court took into account three factors for converting the death sentence of the accused to imprisonment for life for the rape and murder of an eleven year old child. Firstly, the murder was committed without any

premeditation (however, there is no mention about the rape being not premeditated); secondly, the absence of any criminal record of the accused; and thirdly, there being nothing to show that the accused could be a grave danger to society. This is what was said:

“The evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he gave two brick-blows which caused her death. There is nothing on record to indicate that the appellant was having any criminal record nor can he be said to be a grave danger to the society at large. In these circumstances, it would be difficult to hold that the case of the appellant would be rarest of rare case justifying imposition of death penalty.”

39. In **Bantu v. State of Madhya Pradesh, (2001) 9 SCC 615**, the Hon'ble Supreme Court converted the death sentence awarded to the accused to imprisonment for life. The accused was a 22 year old man who had raped and murdered a 6 year old child. It was acknowledged that the rape and murder was heinous, but the Apex Court took into account that the accused had no previous criminal record and that he would not be a grave danger to society at large. On this basis, the death penalty was converted to life imprisonment. This is what was said:

“In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is the rarest of the rare case where the accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence.”

40. **Rahul vs State of Maharashtra, (2005) 10 SCC 322** was a case of the rape and murder of a four and a half year old child by the accused. The death sentence awarded to him was converted by Hon'ble Apex Court to one of life imprisonment since the accused was a young man of 24 years when the incident occurred; apparently his behavior in custody was not uncomplimentary; he had no previous criminal record; and would not be a menace to society. It was held:

“We have considered all the relevant aspects of the case. It is true that the appellant committed a serious

crime in a very ghastly manner but the fact that he was aged 24 years at the time of the crime, has to be taken note of. Even though, the appellant had been in custody since 27-11-1999 we are not furnished with any report regarding the appellant either by any probationary officer or by the jail authorities. The appellant had no previous criminal record, and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the appellant and other circumstances, we do not think that the penalty of death be imposed on him."

41. The constitutional validity of death penalty was upheld by Hon'ble Apex Court in case of **Bachan Singh vs State of Punjab, (1980) 2 SCC 684**, but observed that the Court must do a balancing act between the aggravating and mitigating circumstances in a crime and due care must be paid to both crime and criminal while making a choice of punishment. It was also held by Hon'ble Supreme Court that for persons convicted in murder, life imprisonment is the rule and death sentence is exception. The guidelines that were laid down by the Supreme Court in Bachan Singh, while upholding the validity of Section 302 IPC (which authorizes imposition of penalty of death sentence), while concurring with the view expressed by it in earlier judgment in 'Tdiga Annamma Vs. State of Andra Pradesh, (1974) 4 SCC 443, are adhered to till date, are that (i) extreme penalty of death need not be inflicted except in gravest cases of extreme culpability, (ii) Before opting for the death penalty the circumstances of the 'offender' also required to be taken into consideration along with the circumstances of the 'crime' (iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstance of the crime and provided and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances, and (iv) a balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

42 The Hon'ble Supreme Court in **Machhi Singh vs State of Punjab, (1983) 3 SCC 470**, while following

its earlier dictum in Bachan Singh's case held that life imprisonment is the rule and death sentence is an exception. Apart from guidelines in Bachan Singh's case, the Supreme Court in Machhi Singh's case in paras 33 and 34 additionally observed that in making a choice between the death penalty and that of life imprisonment, the Court has also to take into consideration manner and motive of commission of murder. We reproduce paras 33 and 34 of the judgment of Supreme Court in Machhi Singh in extenso:-

"I. Manner of Commission of Murder:-

33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
(i) When the house of the victim is set aflame with the end in view to roast him alive in the house.
(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
(iii) When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for Commission of murder:-

34. When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland."

43. It is a settled proposition of law that death sentence must be imposed only when imprisonment for life appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime. A just balance has to be struck between the aggravating and mitigating circumstances before option is exercised to award death penalty. Imprisonment for life is the rule and death sentence is an exception. Death sentence is to be awarded in the 'rarest of the rare case' when the Court comes to the conclusion that other than death sentence, no other sentence would be appropriate."

54. Considering in light of the above pronouncements, when we draw a balance-sheet about the aggravating circumstances as against all the mitigating circumstances of this case, we find that the offence has been committed with a young girl aged about four and a half years. The victim was brutally raped and thereafter drowned to death. The mitigating circumstances in this case are:

(i) the age of the accused, as he was aged 23 years at the time of the alleged offence;

(ii) the accused appellant is having a girl child who was one year old at the time of the alleged incident and he also has a wife;

(iii) the accused is not having any criminal antecedents;

(iv) the murder was not pre-meditated and

(v) his behaviour in custody was not uncomplimentary and so, it cannot be said that he would be a menace to the society.

55. The Apex Court in *Bachan Singh* (supra) has held that life imprisonment is the Rule and Death Sentence is an exception. Considering the aggravating and mitigating circumstances of the present case and in the light of the law laid down by the Apex court, in our view, this case does not fall within the category of 'rarest of rare case' and therefore, we commute the death penalty to that of life imprisonment, which shall extend to the full natural life of the appellant but subject to any remission or commutation at the instance of the government for good and sufficient reasons.

56. Consequently, while upholding the conviction of the accused appellant for offences under Sections 363, 302, 201 of IPC, Section 5(M)/6 of POCSO Act, in alternate Section 376(AB) of IPC and Section 84 of JJ Act, 2015, we set aside the death sentence awarded to the appellant by the trial Court vide impugned order of

sentence dated 10.02.2022. Death Reference No.1/2022 sent by the trial Court stands declined and the appeal filed by the accused appellant i.e. D.B. Criminal Appeal No.48/2022 is partly allowed. The death penalty awarded for offence under Section 302 IPC and for offence under the POCSO Act is commuted to life imprisonment, which shall extend to the full natural life of the accused but subject to any remission or commutation at the instance of the government for good and sufficient reasons.

57. The record be returned to the trial Court forthwith.

58. A copy of this judgment be placed in each of the file.

(BHUWAN GOYAL),J

(PANKAJ BHANDARI),J

SUNIL SOLANKI /PS