IN THE HIGH COURT OF ORISSA, CUTTACK

DSREF No.04 of 2019

From judgment and order dated 18.09.2019/19.09.2019 passed by the 3rd Additional Sessions Judge -cum- Presiding Officer, Children's Court, Cuttack in Special G.R. Case No.44 of 2018.

State of Odisha

-Versus-

Mohammed Mustak ..... Condemned Prisoner/ Accused

For State of Odisha: - Mr. Janmejaya Katikia
Addl. Govt. Advocate

For Condemned Prisoner/Accused: - Mr. Ramanikanta Pattanaik
Mr. Bikash Chandra Parija
Advocate

CRLA No.817 of 2019

Mohammed Mustak ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Mr. Ramanikanta Pattanaik
Mr. Bikash Chandra Parija
Advocate

For Respondent: - Mr. Janmejaya Katikia
Addl. Govt. Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

AND

THE HONOURABLE MR. JUSTICE R.K. PATTANAIK

Date of Hearing: 19.04.2024 Date of Judgment: 06.05.2024

By the Bench: The reference under section 366 of the Code of Criminal Procedure, 1973 has been submitted to this Court by the learned 3rd Additional Sessions Judge -cum- Presiding Officer, Children's Court, Cuttack (hereinafter 'the trial Court') in Special G.R. Case No.44 of 2018 for confirmation of death sentence imposed on Mohammad Mustak (hereinafter 'the appellant') by the judgment and order dated 18.09.2019/19.09.2019 and accordingly, DSREF No.04 of 2019 has been instituted. CRLA No.817 of 2019 has been filed by the appellant challenging the self-same judgment and order of conviction passed by the learned trial Court.

The appellant faced trial in the trial Court for commission of offences under sections 363/364/376AB/302 of the Indian Penal Code (hereinafter 'the IPC') read with section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that on 21.04.2018

evening at about 6.30 to 7.00 p.m. in village Jagannathpur under Salipur police station, he kidnapped the minor granddaughter of the informant (hereinafter the 'deceased'), aged about six years from the lawful guardianship of her parents in order that she might be murdered and that he committed rape on the deceased on the verandah of Jagannathpur Nodal U.P. School (hereinafter 'the school') and also committed her murder.

The learned trial Court vide impugned judgment and order dated 18.09.2019/19.09.2019 though acquitted the appellant of the charge under section 364 of the I.P.C., but found him guilty for the offences punishable under sections 363/ 376AB/302 of the I.P.C. read with section 6 of the POCSO Act and awarded him death sentence for the offence under section 302 of the I.P.C. so also for the offence under section 376AB of the I.P.C. and sentenced him to undergo R.I. for a period of seven years and to pay a fine of Rs.20,000/- (rupees twenty thousand), in default, to undergo further R.I. for one year for the offence under section 363 of the I.P.C., however no separate sentence was awarded for the offence under section 6 of the POCSO Act in view of the section 42 of the said Act. The sentences awarded to the appellant were directed to run concurrently.

Since both the DSREF and the criminal appeal arise out of the same judgment, with the consent of learned counsel for both the parties, those were heard analogously and are disposed of by this common judgment.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter F.I.R.) (Ext.7) lodged by P.W.4 Masud Ahmed, is that on 21.04.2018, while he had been to read Namaz in the evening, there was a power cut in his village Jagannathpur. After reading the Namaz, he returned home and found that his deceased granddaughter was not there in the house for which he asked his daughter-in-law about the deceased, to which the daughter-in-law replied that the deceased might be wandering nearby. The daughter-in-law of P.W.4 herself went to search for the deceased but could not locate her and accordingly, she informed P.W.4. In order to find out the deceased, P.W.4 searched here and there and also informed the neighbours about the non-availability of the deceased for which the neighbours also joined him to trace out the deceased but they could not get her. At that time, three young boys came on a motor cycle and informed P.W.4 that the deceased was lying in a naked condition on the school veranda

with bleeding injuries. Getting such information, the villagers rushed to the school and shifted the deceased to the Salipur Hospital and then the deceased was referred to S.C.B. Medical College & Hospital, Cuttack (hereafter 'S.C.B.M.C.H, Cuttack') for treatment. P.W.4 suspected that after committing sexual assault on the deceased, someone had left her in the injured condition.

By the time P.W.4 arrived at the spot, the deceased had already been shifted to the hospital. P.W.4 then came to Salipur police station with P.W.11 Sayed Nayan Faique. P.W.11 scribed the F.I.R. as per the narration of P.W.4 which was read over and explained to P.W.4 by P.W.11 and on the written report, P.W.4 put his signature and accordingly, the F.I.R. was lodged before the Inspector in-charge of Salipur police station, namely, Debendra Kumar Mallick (P.W.23), who registered Salipur P.S. Case No.81 dated 21.04.2018 under sections 376(2)(i)(m)/307 of I.P.C. and section 6 of POCSO Act against unknown person and he himself took up the investigation of the case.

During the course of investigation, P.W.23 examined the witnesses and visited the spot at 10.25 p.m. which was the verandah of the school along with his staff. Since it was pitch dark at the spot, he engaged two police officials to guard the

spot till the arrival of the scientific team and sniffer dog. He also examined some of the witnesses including P.W.7 Rina @ Premalata Ojha and came to know that the deceased was last seen in the company of the appellant while purchasing chocolates from her shop. He examined some more witnesses and also intimated the I.I.C. of Mangalabag police station to attend the treatment of the deceased at S.C.B.M.C.H, Cuttack. On 22.04.2018, he came to the spot village and searched for the appellant and got the information that the appellant was proceeding towards Kajihat and accordingly, he apprehended the appellant at Kajihat Bazar and brought him to the police station. He made requisition to the Superintendent of Police for engagement of scientific team. The Scientific Officials arrived at the spot along with sniffer dog and took photographs. The Scientific Officer collected exhibits from the spot and prepared spot visit report vide Ext.33. The exhibits were sealed and handed over to the I.O. (P.W.23) for sending the same to the Director, S.F.S.L. for chemical examination. P.W.23 seized all those exhibits as per seizure list Ext.14. He visited the grocery shop of P.W.7 and she produced one plastic jar containing some meethi malai chocolates and another plastic jar containing Cadbury Perk chocolates from which chocolates were sold to the

appellant on the date of occurrence as per seizure list Ext.13. P.W.23 also seized some other articles as per seizure list Ext.14. He visited the S.C.B.M.C.H, Cuttack and when he came to know the condition of the deceased has become critical, he made a prayer to the Sub-Collector for deputing an Executive Magistrate for recording dying declaration of the deceased. The blue colour half pant of the deceased suspected to be containing blood stain and two meethi malai chocolates which were found in the left side pant pocket of the victim were seized by P.W.23 on production by the doctor as per seizure list Ext.20. Since the condition of the deceased was not stable, her dying declaration could not be recorded. The appellant was arrested on 22.04.2018 at 6.00 p.m. observing formalities of the arrest, his pair of chappals was seized as per seizure list Ext.42 and the seized articles were kept in P.S. malkhana of Salipur police station. The appellant was sent on 23.03.2018 to the Department of F.M.T., S.C.B.M.C.H, Cuttack through escort party for his medical examination and P.W.23 seized the shirt of the appellant having blood stain on it on being produced by the doctor as per seizure list Ext.21. The biological samples of the appellant collected by the doctor which were produced by the escort party along with the wearing apparels of the appellant were seized as per seizure

list Ext.18 which was kept in P.S. malkhana and on 23.04.2018, the appellant was forwarded to the Court. On 24.04.2018, the biological samples of the deceased collected by the doctor were seized by P.W.23 as per seizure list Ext.19 which was also kept in P.S. malkhana. Prayer was made by the I.O. (P.W.23) to the Court for recording the statements of P.W.5 Sk. Jiaul Haque, P.W.7 Premalata Ojha @ Reena and P.W.13 Gulzar Ahmed under section 164 of Cr.P.C. and accordingly, the same was recorded on 26.04.2018. The I.O. also made a prayer to the Court for sanction of victim compensation to the family of the deceased. On 27.04.2018 prayer was made to send the exhibits to S.F.S.L. for chemical examination and accordingly, the learned J.M.F.C., Salipur forwarded the exhibits to S.F.S.L., Bhubaneswar through constables. The I.O. also made a prayer to the Court for getting the D.N.A. profiling, which was allowed. The injury reports of the deceased and the appellant were collected and the same were submitted to the Court. On 29.04.2018, the I.O. received information from the I.I.C., Mangalabag police station that the deceased expired while undergoing treatment and one U.D. case has already been instituted at Mangalabag police station and step has been taken for conducting inquest and post mortem over the dead body of the deceased. The I.O. intimated to the

Court about the death of the deceased and also made a prayer to convert the case to one under sections 376(2)(i)(n)/302 of the I.P.C. read with section 6 of the POCSO Act on 30.04.2018. On the prayer of the I.O., the statement of P.W.18 Sk. Afzal Jama was recorded on 01.05.2018. On 02.05.2018, the I.O. made a query to the Executive Engineer, CESU to ascertain the power failure time in the village Jagannathpur on the date of occurrence in the evening hours and received the reply that the load shedding time was in between in 6.20 p.m. to 7.21 p.m. on 21.04.2018 as per the written instruction given vide Ext.49. The U.D. case record from I.I.C. Mangalabag police station along with some material objects were seized by the I.O. (P.W.23) on 04.05.2018. The bed head ticket of the deceased was also seized from the record keeper of the S.C.B.M.C.H, Cuttack as per seizure list Ext.29. The appellant was brought on remand on 05.05.2018 and he was interrogated and the statement was recorded and the appellant led the police party to different places in connection with the commission of offences and accordingly, the I.O. prepared a map of spots vide Ext.52. The I.O. received the report from S.F.S.L. He also seized a camera, memory card and some photographs as per seizure list Ext.34 and handed over the same in the zima of Scientific Officer.

On completion of investigation, P.W.23 submitted charge sheet dated 10.05.2018 under sections 363/376AB/302 of the I.P.C. and section 6 of the POCSO Act against the appellant before the learned trial Court on 11.05.2018 and accordingly, the learned trial Court took cognizance of offences under sections 363/376AB/302 of the I.P.C. and section 6 of the POCSO Act.

Framing of Charge:

3. The learned trial Court framed charges as aforesaid against the appellant on 23.05.2018 and since the appellant refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute him and establish his guilt.

Prosecution Witnesses, Exhibits & Material Objects:

4. During the course of trial, in order to prove its case, the prosecution has examined as many as twenty three witnesses.

P.W.1 Dr. Amarendra Nayak was working as Associate Professor, Department of F.M. & T. attached to S.C.B.M.C.H, Cuttack, who conducted post mortem over the dead body of the deceased on 29.04.2018 and proved his report vide Ext.1.

P.W.2 Dr. Shreeja Jajodia was working as Medical Officer attached to Salipur C.H.C., who treated the deceased at the first instance on 21.04.2018 and referred her to S.C.B.M.C.H, Cuttack. She proved her report marked as Ext.2.

P.W.3 Dr. Rajanikanta Swain was the Associate Professor, Department of F.M. & T. attached to S.C.B.M.C.H, Cuttack, who examined the appellant on police requisition on 23.04.2018 and proved his report as per Ext.3.

P.W.4 Masud Ahmed is the grandfather of the deceased and also the informant in the case. He supported the prosecution case and proved the F.I.R. marked as Ext.7.

P.W.5 Sk. Ziaul Haque is a co-villager of both the appellant and the deceased. He stated to have seen the deceased playing with her elder brother Gullu (P.W.13) in the evening hours on the date of occurrence and the presence of the appellant in the vicinity.

P.W.6 Dr. Jyotish Chandra Choudhury was the Associate Professor, Department of F.M. & T. attached to S.C.B.M.C.H, Cuttack and he examined the deceased as per the direction of the Professor & H.O.D. of Pediatric Department of

S.C.B.M.C.H, Cuttack on 22.04.2018 and proved his report Ext.9. He also proved the query report vide Ext.11/1.

P.W.7 Premalata Ojha @ Reena was an Asha Karmi and she was having a grocery shop at village Jagannathpur. She stated about the appellant coming with the deceased to her shop in the evening hours on the date of occurrence, purchased chocolates and then proceeded towards the school with the deceased. She is also a witness to the seizure of two plastic containers containing chocolates as per seizure list marked as Ext.13.

P.W.8 Ajit Kumar Ojha @ Babuni @ Ajaya is one of the co-villagers who searched for the deceased and ultimately found the deceased lying on the school veranda in a naked condition with bleeding injury. He further stated that they called the people who were present near the school gate and also they proceeded near the house of the deceased and informed about the incident.

P.W.9 Sk. Aslam and P.W.10 Sk. Azimul Haque, who are the co-villagers of both the appellant and the deceased, are the post-occurrence witnesses. They both took the deceased to Salipur Hospital on the moped of P.W.10, where the doctor after

giving an injection, referred her to S.C.B.M.C.H, Cuttack. P.W.10 stated that while they were near his house, P.W.8 and two boys came and informed them that the child was lying on the school verandah.

P.W.11 Sayed Nayan Faique is a co-villager of both the appellant and the deceased, who accompanied P.W.4 to the police station and scribed the F.I.R. marked as Ext.7. He stated that hearing that someone had killed the deceased and thrown her at the school verandah, he proceeded to village Jagannathpur on his motorcycle and saw a gathering in the village and on enquiry, came to know that the deceased had been shifted to Salipur hospital and he came to Salipur hospital and on the way, he picked up P.W.4 and proceeded to Salipur P.H.C. He is also a witness to the seizure as per seizure list vide Ext.14.

P.W.12 Ifte Khan Ahemed @ Soni is the father of the deceased and also the son of the informant (P.W.4). He stated that on the date of occurrence, he was at Hyderabad and on getting information from villagers about the incident, he came to his village and then he came to S.C.B.M.C.H, Cuttack where the deceased was under treatment. He is also a witness to the inquest over the dead body of the deceased marked as Ext.15.

P.W.13 Gulzar Ahemad, who is the elder brother of the deceased, stated about that the deceased was last seen in the company of the appellant. He further stated he along with the deceased was playing near the car parked at canal embankment and watching news in the mobile phone of Babulu (P.W.5). He also stated that the appellant took the deceased towards the school.

P.W.14 Nimai Charan Mohapatra was working as A.S.I. of Police of Salipur police station, who accompanied the scientific team to the spot of occurrence and he is also a witness to the report of the dog master as per Ext.17, seizure of Cadbury Perk chocolate and meethi malai chocolate, the biological samples of the appellant and the victim as per seizure lists marked as Ext.14, Ext.18 and Ext.19 respectively.

P.W.15 Sayed Rajat Alli is the uncle of the victim and also a witness to the seizure of one blue colour panty of the victim and two nos. of chocolates and blue-red colour striped T-shirt with a chain at the Pediatric Department of S.C.B.M.C.H, Cuttack as per seizure list marked as Ext.20 and Ext.21 respectively.

P.W.16 Parth Sarathi Behera was the Dog Master, who had taken the sniffer dog to the spot of occurrence for detection of the crime and proved his report marked as Ext.17.

P.W.17 Anupama Biswal was the Anganwadi Karmi at Jagannathpur, who proved the register maintained at the Anganwadi Centre where the deceased was prosecuting her studies and the date of birth of the deceased was mentioned as 02.05.2012 in such register and on the date of occurrence, the deceased was aged about five years and eleven months. She stated about the seizure of register vide seizure list Ext.23 and taking the same in zima as per zimanama Ext.24.

P.W.18 Sk. Afzal Jama is a witness to the last seen of the deceased with the appellant on 21.04.2018 in between 6.00 to 6.30 p.m. when he was present in his grocery shop. He stated that after about 45 minutes, the appellant returned alone and went inside his house in a disturbed condition and after some time, the mother of the deceased and other family members searched for the deceased as she was found missing and subsequently, the deceased was found on the school verandah with bleeding injuries and she was shifted to the hospital.

P.W.19 Gangadhar Saseni was the S.I. of Police attached to the Medical outpost, S.C.B.M.C.H, Cuttack. He took up inquiry of Mangalabag P.S. U.D. Case No.769 of 2018. He proved the command certificate vide Ext.26, dead body challan as per Ext.27, seizure of bed head ticket as per seizure list Ext.29, the sealed envelopes as per seizure list Ext.28 and other connected documents which were seized by the I.O. as per seizure list Ext.30.

P.W.20 Maheswar Mishra, who was the A.S.I. of police, Medical Outpost, S.C.B.M.C.H, Cuttack, is a witness to the seizure of bed head ticket of the deceased and two sealed packets as per seizure lists marked as Ext.29 and Ext.30 respectively.

P.W.21 Minar Behera, who was an Instructor, I.T.I., Salipur, is a witness to the confessional statement made by the appellant in the police station as per Ext.31. He is also a witness to the spot visit memorandum as per Ext.32.

P.W.22 Sandhyarani Bhuyan was the Scientific Officer, D.F.S.L., Cuttack and she was a member of the scientific team who visited the spot. She proved her report vide Ext.33. During the course of scientific examination, she prepared the

digital photographs of the scene and handed over the same to the I.O. which was seized as per seizure list Ext.34. She also took the zima of digital camera as per zimanama Ext.36.

P.W.23 Debendra Kumar Mallick was the Inspector in-charge of Salipur police station and he is the Investigating Officer of the case.

The prosecution exhibited fifty five documents. Ext.1 is the post mortem report, Ext.2 is the report of P.W.2, Ext.3 is the medical examination report of the appellant, Ext.4 is the police requisition in respect of the appellant, Ext.5 is the report of the blood bank and opinion report of P.W.3, Ext.6 is the report of the blood bank, Ext.7 is the F.I.R., Ext.8 is the 164 Cr.P.C. statement of P.W.5, Ext.9 is the medical examination report of the deceased, Ext.10 is the medical requisition of the deceased, Ext.11 is the requisition received by P.W.6 from the I.O., Ext.12 is the 164 Cr.P.C. statement of P.W.7, Ext.13 and Ext.14 are the seizure lists, Ext.15 is the inquest report, Ext.17 is the report prepared by P.W.16, Ext.18 is the seizure list of the biological samples of the appellant, Ext.19 is the seizure list of biological sample of the deceased, Ext.20 is the seizure list in respect of one blue colour panty of the deceased and two numbers of chocolates, Ext.21 is the seizure list in respect of blue red colour

striped T-shirt with a chain, Ext.22 is the report submitted by P.W.17 regarding the age of the deceased, Ext.23 is the seizure list in respect of the register maintained at the Anganwadi, Ext.24 is the zimanama of the Anganwadi register in favour of P.W.17, Ext.25 is the register in which the relevant entry of the victim, Ext.26 is the command certificate issued in favour of Manoj Kumar Swain, Ext.27 is the dead body challan, Ext.28 is the seizure list, Ext.29 is the seizure list of bed head ticket of the deceased, Ext.30 is the seizure list, Ext.31 is the statement sheet, Ext.32 is the memorandum, Ext.33 is the spot visit report, Ext.34 is the seizure list, Ext.35 is the certificate issued by P.W.22, Ext.36 is the zimanama, Ext.37 is the forwarding letter issued by S.O., D.F.S.L., Cuttack, Ext.38 is the seizure list in respect of photographs, Ext.39 is the crime details form, Ext.40 is the seizure list, Ext.41 is the letter issued to the Sub-Collector, Cuttack for recording the dying declaration, Ext.42 is the seizure list in respect of chappal of the appellant, Ext.43 is the intimation given to the appellant's family member regarding his arrest, Ext.44 is the command certificate issued in favour of S.I. Asit Ranjan Jena, Ext.45 is the prayer made for sending the exhibits to S.F.S.L. for chemical examination, Ext.46 is the forwarding report, Ext.47 is the command certificate, Ext.48 is the

acknowledgement receipt receiving the exhibits at S.F.S.L., Bhubaneswar, Ext.49 is the reply of CESU, Salipur Electrical Division to the query made by I.O., Ext.50 is the zimanama, Ext.51 is the seizure list in respect of sealed packet containing the photographs of the deceased, Ext.52 is the spot map, Ext.53 is the report of S.F.S.L., Ext.54 is the prayer of the I.O. sending the biological samples of the deceased to S.F.S.L. and Ext.55 is the report received from the S.F.S.L.

The prosecution also proved nine material objects. M.O.I is the upper part of wearing apparels akin to a 'T' shirt having a Zip liner on the neck portion, M.O.II is the sealed plastic container containing one Perk chocolate, M.O.III is the another sealed plastic jar containing meethi malai chocolate, M.O.IV is the SDHC card of 'Sandisk' make of 8 GB storage, M.O.V is the envelope from which the card was brought out, M.O.VI is the C.D. along with a forwarding letter issued by S.O., DFSL, Cuttack, M.O.VII is the pant of victim, M.O.VIII is the shirt of appellant and M.O.IX is the pant of the appellant.

Defence Plea:

5. The defence plea of the appellant is one of denial and it is pleaded that he has been falsely implicated in the case.

The defence has examined one witness. D.W.1 Laxmidhar Sathua Mohapatra is the Psychiatrist attached to Circle Jail, Choudwar who stated to have treated the appellant in the Mental Ward and prescribed medicines to him. He proved the medical papers and reports of the appellant relating to his depressive disorders.

The defence exhibited seven documents. Ext.A is the treatment papers of the appellant, Ext.B and Ext.C are the medical reports of the appellant proved by D.W.1, Ext.D, Ext.E, Ext.F and Ext.G are the certified copies of final forms in different cases.

Findings of the Trial Court:

6. The learned trial Court after analysing the oral as well as the documentary evidence on record and taking into account the evidence of P.W.17, the Anganwadi Karmi, her report (Ext.22) furnished to the I.O., Anganwadi Register (Ext.25) entry wherein the date of birth of the deceased was mentioned to be 02.05.2012 and further considering the age of her elder brother (P.W.13), who was of seven years, has been pleased to hold that the deceased was a girl below twelve years of age.

Learned trial Court emphasised on the answer given by the doctor (P.W.6) to the query made by the I.O. (P.W.23) vide Ext.11/1 and came to hold that the deceased was subjected to sexual assault attracting the penal provision under the POCSO Act.

Taking into account the evidence of the doctor (P.W.6), the report of the Scientific Officer vide Ext.53, the medical examination report of the appellant vide Ext.3, the Court came to hold that the irresistible conclusion is that the deceased, a girl below twelve years was subjected to 'rape' as defined under section 375 of I.P.C. and 'aggravated penetrative sexual assault' as defined under section 5(m) of the POCSO Act which is punishable under section 376AB and section 6 of the POCSO Act.

Learned trial Court further considered the evidence of the doctor (P.W.1) who conducted post mortem examination and the report (Ext.1) submitted by him and came to hold that the deceased died a homicidal death and that the opinion of the doctor regarding ante mortem injuries on the person of the deceased suggested so.

The learned trial Court observed that the case is based on circumstantial evidence and relied upon eight circumstances emerging from the records which are as follows:

(i) The deceased was playing in front of her house at about 6.30 to 7.30 p.m. on 21.04.2018 and there was power failure in the locality. P.W.5, P.W.13, the deceased and the appellant were present at that time at the relevant place;

(ii) Missing of the deceased from the place where she was playing;

(iii) The appellant was last seen with the deceased;

(iv) The deceased was found lying on the veranda of Jagannathpur Nodal U.P. School in an injured condition;

(v) Absence of the appellant from the occurrence village soon after the occurrence;

(vi) Finding of the chocolates from the pocket of the deceased;

(vii) Availability of blood on the shirt of the appellant (which he was putting on the relevant day) that matched with the blood group of the deceased;

(viii) Appellant pointed out the places to which he took the deceased to accomplish the crime.

So far as the circumstance no. **(i)** is concerned, the learned trial Court held that the fact that there was power failure in the occurrence locality has been well proved. Considering the evidence of P.W.5 and P.W.13, the reply given by the Executive Engineer vide Ext.49, it was held that at the relevant time there was a power failure and the deceased was playing in front of her house where a car was parked which belonged to the father of the deceased and that P.W.5, P.W.13, the deceased and the appellant were present at that time.

So far as the circumstance no. **(ii)** is concerned, taking into account the evidence of P.W.4, P.W.5, P.Ws. 8 to 11, P.W.13 and P.W.18, it was held that the deceased was found missing in the evening hours on the date of occurrence which has been proved by leading adequate evidence.

So far as the circumstance no. **(iii)** is concerned, taking into account the evidence of P.W.5, P.W.7, P.W.13 and P.W.18, it was held that their evidence is clinching, trustworthy and it inspires confidence of the Court and the circumstance has been proved by the prosecution beyond all reasonable doubt and since the appellant in his statement recorded under section 313 of Cr.P.C. has not explained the same, this lack of explanation by

the appellant was held to be a very strong circumstance against him.

So far as the circumstance no. **(iv)** is concerned, taking into account the evidence of P.W.8, P.W.9, P.W.10, P.W.18 so also the physical clue collected by the Scientific Officer (P.W.22) from the spot, it was held that their evidence has remained unimpeached as nothing has been brought out from their evidence to raise any doubt on their veracity.

So far as the circumstance no. **(v)** is concerned, taking into account the evidence of the I.O. (P.W.23) that the appellant was found missing from his house and absence of any material to prove the plea of alibi taken by the appellant in the accused statement under section 313 of Cr.P.C. that he had been to see the opera at Gangeswar, it was held that the appellant fled away from the occurrence village.

So far as the circumstance no. **(vi)** is concerned, taking into account the evidence of P.W.7, P.W.10, P.W.14 and the seizure list prepared by the I.O. vide Ext.20, it was held that chocolates were found from the pocket of the deceased.

So far as the circumstance no. **(vii)** is concerned, taking into account the S.F.S.L. report vide Ext.53 and the evidence of the I.O. (P.W.23), the seizure list of the wearing

apparels of the appellant vide Ext.18, it was held that the blood available on the shirt of the appellant which he was putting on the relevant day matched with the blood group of the deceased.

So far as the circumstance no. **(viii)** is concerned, the learned trial Court held that the appellant making confession before the police while in custody consequent upon which the places where the appellant took the deceased were discovered is not relevant under section 27 of the Evidence Act as by that time, the places were already known to the I.O. who had prepared the spot map in the crime detail form which came to be marked as Ext.39/2. However, it was held that in view of the knowledge of the appellant that those were the places where the deceased was playing, the shop from which the appellant purchased the chocolates and the school where the deceased was found in an injured condition, are admissible under section 8 of the Evidence Act as the conduct of the appellant.

Learned trial Court came to hold that the forensic evidence on record is available abundantly to come to a conclusion that the deceased was assaulted in the school and she was raped and was killed by the appellant. No importance was given to the evidence of D.W.1, the doctor of Circle Jail, Choudwar.

It was further held that all the proved circumstances provided a complete chain and no link was found missing and the Court came to the conclusion that the case against the appellant has been proved to the hilt and accordingly, the appellant was found guilty under sections 363/376AB/302 of the I.P.C. and section 6 of the POCSO Act, however it was held that the offence under section 364 of the I.P.C. could not be substantiated and accordingly, the appellant was acquitted of such charge.

Submission of Parties:

7. Mr. Ramanikanta Pattanaik, learned Senior Counsel being ably assisted by Mr. Bikash Chandra Parija, Advocate appearing for the appellant emphatically contended that the non-mention of name of the appellant as a suspect in the F.I.R. in the factual scenario of the case which was lodged two hours after the deceased was traced out in an injured condition on the school varandah, particularly when the last seen of the appellant with the deceased had come to the fore, is a damaging feature of the prosecution case. The conduct of P.W.7, who stated to have seen the appellant taking the deceased towards the school after purchasing chocolates for her, in not disclosing about the same before the family members of the deceased even after she came to the spot hearing commotion and saw the deceased being

shifted on a motor cycle with bleeding injury, creates a grave doubt about her veracity. Moreover P.W.7 is a stock witness of the Police Department and she has been cited as a witness in many other cases as admitted by her. He further argued that the evidence of P.W.18 to have seen the appellant taking the deceased in the evening hours on the date of occurrence by the side of the canal embankment and after sometime the appellant returning alone in a disturbed condition and going inside his house, should not be relied upon as he had not intimated the mother and grandfather (P.W.4) of the deceased about the last seen of the appellant with the deceased even though he was well-known to the family of the deceased so also P.W.4. Learned counsel further argued that though the learned trial Court relied upon the circumstance of the absence of the appellant from the occurrence village soon after the incident but except the evidence of the I.O. (P.W.23), there is no other clinching evidence in that respect. Though P.W.23 stated that he apprehended the appellant from Kajihat Bazaar but the appellant had stated in his accused statement to the question no.77 that he was not arrested at Kajihat Bazaar rather he was apprehended from his house and was taken to the police station. P.W.18 has stated that the appellant went inside his house in a

disturbed condition and thereafter no one had seen him leaving the village and no one had searched for the appellant in his house which would have been very natural, had anyone doubted about the involvement of the appellant in the crime committed and thus the absconding theory is not at all believable. It is further argued that the prosecution has miserably failed to prove that the shirt from which the blood stain was detected and found to be matched with the blood group of the deceased was worn by the appellant while he was in the company of the deceased. It is further argued that the investigation is perfunctory and no explanation has been offered by the prosecution as to why the F.I.R., which was stated to have been lodged on 21.04.2018 at 10.15 p.m., reached the Court of learned J.M.F.C., Salipur on 23.04.2018 when the Court was merely at a distance of 500 metres away from the police station. Learned counsel further argued that the I.O. admitted that while forwarding the appellant to the Court, he had already recorded the statements of twenty one witnesses which were very material to the case but he had sent only two sheets of 161 Cr.P.C. statements of the witness and the arrest memo to the Court at that time. In the forwarding report, there is no mention that who were the witnesses examined by him and what were their statements, which was

very much necessary in view of the provision under section 167 of Cr.P.C. to allow the prayer of the I.O. to remand the appellant to judicial custody and such conduct of the I.O. (P.W.23) pre-supposes that neither the F.I.R. was lodged when it was shown to have been lodged nor the statements were recorded when those were shown to have been recorded and it was all ante-dated. He further argued that three persons namely, Hedad Alli, Sania @ Sushant Kumar Das and Ajay @ Ajit Kumar Ojha (P.W.8) first noticed the deceased in a nude condition on the corridor of Jagannathpur U.P. School but the other two witnesses were not examined. Similarly though the I.O. (P.W.23) stated to have recorded the statement of the mother of the deceased, but she was not cited as a witness in the charge sheet nor examined during trial and thus, the prosecution deliberately withheld the vital witnesses from the witness box, for which adverse inference should be drawn against the prosecution. Learned counsel further argued that P.W.1, the Associate Professor in the Department of F.M.T., S.C.B.M.C.H., Cuttack, who conducted the post-mortem examination over the dead body of the deceased did not detect any external or internal injury in the genital of the deceased and he had also not explicitly mentioned in the post-mortem report (Ext.1) as to whether the death of the deceased

was homicidal or accidental. The doctor (P.W.6), who examined the deceased on 22.04.2018, has mentioned in his report (Ext.9) that hymen was intact and there was no inflammation or discharge or bleeding in the private part of the deceased and the vulvovaginal samples and anal samples, which were preserved and tested, did not reveal any physical clue of recent sexual intercourse. He also did not detect any physical clue of sexual offence over the wearing apparels of the deceased except mild redness at the inner side folds of labia minora, which though according to him on account of attempted sexual assault or sexual manipulation, but he has clarified in the cross-examination that his opinion was a 'possibility' and not a 'definite opinion' and the redness noticed could be caused by self-infliction due to itching and therefore, there is no conclusive evidence that rape has been committed on the deceased and that the appellant committed her murder as she died after eight days of the date of occurrence, and the doctor (P.W.1) has stated that he had not explicitly mentioned if the death was homicidal or accidental and therefore, it is a case where benefit of doubt should be extended in favour of the appellant and even otherwise since rape and murder has not been proved, it is not a fit case for imposing the extreme penalty of death. Learned

Senior Counsel for the appellant relied upon the decisions of the Hon'ble Supreme Court in the cases of **Sharad Birdhichand Sarda -Vrs.- State of Maharashtra reported in A.I.R. 1984 Supreme Court 1622, Bachan Singh -Vrs.- State of Punjab reported in (1980) 2 Supreme Court Cases 684, Machhi Singh & others -Vrs.- State of Punjab reported in A.I.R. 1983 Supreme Court 957**.

Mr. Janmejaya Katikia, learned Additional Government Advocate, on the other hand, supported the impugned judgment and argued that the last seen of the deceased in the company of the appellant in the evening hours on the date of occurrence when there was darkness on account of power cut, just prior to she was found in an injured condition on the school verandah, is a very clinching evidence which has not been explained by the appellant. Learned counsel further argued that the chemical examination report marked as Ext.53, which carries summary and conclusion of D.N.A. test indicates that the blood stains of the victim were found on the wearing apparels of the appellant and no explanation has come from the appellant as required under section 106 of the Evidence Act. It was argued that the appellant has taken plea of alibi being present at Gangeswar Yatra and also that he has been falsely

implicated on account of property dispute, due to political rivalry and even the jail doctor was examined to show that he was suffering from psychiatric disorder, however, no such plea has been clearly established. It is argued that the absconding of the appellant from the village since the night of occurrence, where her family members were residing, is another relevant feature, which reflects the conduct and the same is admissible under section 8 of the Evidence Act. Learned counsel submitted that the evidence of the doctor (P.W.6) coupled with his query report (Ext.11/1) clearly establishes the charge under section 376AB I.P.C. against the appellant. It is further argued that the doctor (P.W.1), who conducted the post-mortem examination over the dead body of the deceased, stated that he noticed several external injuries on the person of the deceased and two injuries, i.e. injury nos. (v) & (vii) along with corresponding internal injuries to brain were fatal to cause death in ordinary course of nature and the death was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury and therefore, when the appellant inflicted such injuries during commission of sexual offence, which ultimately proved fatal and the deceased remained in coma for eight days and ultimately died, the

definition of 'murder' as mentioned under section 300 of I.P.C. is squarely attracted. It is argued that the learned trial Court has rightly held the appellant guilty and since it is a rarest of rare case, imposed death sentence. He has relied upon the decisions of the Hon'ble Supreme Court in the cases of **Bhajan Singh @ Harbhajan Singh and Ors. -Vrs.- State of Haryana reported in (2011) 7 Supreme Court Cases 421, State of Uttar Pradesh -Vrs.- Satish reported in (2005) 3 Supreme Court Cases 114** and **Vasanta Sampat Dupare -Vrs.- State of Maharashtra reported in (2017) 6 Supreme Court Cases 631**.

Principle for appreciating the circumstantial evidence:

8. There is no dispute that the case is based on circumstantial evidence. Firstly, we proceed to discuss the law on the appreciation of circumstantial evidence.

A Constitution Bench of the Hon'ble Supreme Court in the case of **M.G. Agarwal -Vrs.- State of Maharashtra reported in A.I.R. 1963 Supreme Court 200** has observed as under:

> ".....It is a well established rule in criminal jurisprudence that circumstantial evidence can be reasonably made the basis of an accused

person's conviction if it is of such a character that it is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. If the circumstances proved in the case are consistent either with the innocence of the accused or with his guilt, then the accused is entitled to the benefit of doubt. There is no doubt or dispute about this position. But in applying this principle, it is necessary to distinguish between facts which may be called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to the proof of basic or primary facts, the Court has to judge the evidence in the ordinary way, and in the appreciation of evidence in respect of the proof of these basic or primary facts there is no scope for the application of the doctrine of benefit of doubt. The Court considers the evidence and decides whether that evidence proves a particular fact or not. When it is held that a certain fact is proved, the question arises whether that fact leads to the inference of guilt of the accused person or not, and in dealing with this aspect of the problem, the doctrine of benefit of doubt would apply and an inference of guilt can be drawn only if the proved fact is wholly inconsistent with the innocence of the accused and is consistent only with his guilt. It is in the light of this legal position that the

evidence in the present case has to be appreciated."

Five golden principles which has been named as 'Panchsheel' curled out by the Hon'ble Supreme Court in the case of **Sharad Birdhichand Sarda** (supra) which must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence are as follows:-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established;

(ii) 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;

(iii) the circumstances should be of a conclusive nature and tendency;

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

(v) 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.

In the case of **Mohd. Arif -Vrs.- State (NCT of Delhi) reported in (2011) 13 Supreme Court Cases 621**, it is held as follows:-

> "190. There can be no dispute that in a case entirely dependent on the circumstantial evidence, the responsibility of the prosecution is more as compared to the case where the ocular testimony or the direct evidence, as the case may be, is available. The Court, before relying on the circumstantial evidence and convicting the accused thereby has to satisfy itself completely that there is no other inference consistent with the innocence of the accused possible nor is there any plausible explanation. The Court must, therefore, make up its mind about the inferences to be drawn from each proved circumstance and should also consider the cumulative effect thereof. In doing this, the Court has to satisfy its conscience that it is not proceeding on the imaginary inferences or its prejudices and that there could be no other inference possible excepting the guilt on the part of the Accused.
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> 191....At times, there may be only a few circumstances available to reach a conclusion of

> the guilt on the part of the accused and at times, even if there are large numbers of circumstances proved, they may not be enough to reach the conclusion of guilt on the part of the accused. It is the quality of each individual circumstance that is material and that would essentially depend upon the quality of evidence. Fanciful imagination in such cases has no place. Clear and irrefutable logic would be an essential factor in arriving at the verdict of guilt on the basis of the proven circumstances."

Analysis of evidence on each circumstance:

9. Keeping in view the principles laid down, we will now proceed to examine the circumstances chalked out by the learned trial Court and see whether the findings arrived at were legally justified.

9.1. **First Circumstance**:

The first circumstance relied upon by the learned trial Court is that the deceased was playing in front of her house at about 6.30 to 7.30 p.m. on 21.04.2018 and there was a power failure in the locality at that time and P.W.5, P.W.13 and the appellant were present at that place.

To find out as to whether there was power failure in the locality at the time of occurrence, the learned trial Court has

relied upon Ext.49 i.e. the reply of the Executive Engineer, CESU, Salipur Electrical Division to the query made by the I.O. (P.W.23) that there was load shedding in village Jagannathpur on the date of occurrence i.e. 21.04.2018 in the evening hours from 6.20 p.m. to 7.21 p.m.

The I.O. (P.W.23) has stated that he made a query to the Executive Engineer, CESU to ascertain about power failure in village Jagannathpur on the date of occurrence in the evening and received a reply that the area Lineman had taken a shut down from 6.20 p.m. to 7.21 p.m. on 21.04.2018 which occasioned a power failure in village Jagannathpur. He proved the reply which was marked as Ext.49. The extract of the register maintained in CESU office dealing with the load shedding duration has been marked as Ext.49/2. The witnesses like P.W.4, P.W.5, P.W.7 and P.W.8 have also stated about power failure at the locality of the occurrence in the evening hours, which has not been challenged by the defence in any manner. Thus, we are of the view that the learned trial Court rightly held that there was a power failure in the locality at the time of occurrence.

The learned trial Court further relied upon the evidence of P.W.5 and P.W.13 and came to the conclusion that the evidence of both these witnesses clearly showed that at the

relevant time, the victim was playing in front of her house where a car was parked and P.W.5, P.W.13, the deceased and the appellant were present at that time.

P.W.5 Sk. Ziaul Haque has stated that on 21.04.2018 during the evening hours, while he was watching news in his mobile phone by the road side by leaning against an Ambassador car, the deceased, her elder brother Gullu (P.W.13) were playing and the appellant was wandering nearby. He further stated that when he received a call in his mobile phone and went inside the house, at that time near the Ambassador car, the deceased, P.W.13 and the appellant were present. He further stated that when he heard *hullah* (commotion), he came to know that the deceased was missing and subsequently he heard that the deceased was lying on the school veranda in an unconscious condition sustaining bleeding injuries. He stated in the cross-examination that he watched news in the mobile phone from 6.15 p.m. to 6.20 p.m. i.e. for five minutes and it was a summer day and at that time there was a power failure and about half an hour after reaching his house, he heard about missing of the deceased and after hearing about the missing of the deceased, he did not disclose to have seen the appellant in the company of the deceased and P.W.13 to the informant (P.W.4).

The learned counsel for the appellant Mr. Pattanaik contended that the conduct of P.W.5 in not disclosing before P.W.4, the informant and the family members of the deceased to have seen the deceased in the company of the appellant and also with P.W.13 even after knowing that the deceased was missing, is a highly suspicious feature as it was expected of him to communicate the same to the family members of the deceased. The learned counsel for the State, on the other hand, argued that P.W.5 might not have suspected the appellant's role in connection with the missing of the deceased merely because he was in the vicinity where the deceased was playing with her elder brother (P.W.13) when he himself left for his house on receiving a call on his mobile phone.

Adverting to the contentions raised by the learned counsel for both the parties, we are of the humble view that the evidence of P.W.5 cannot be doubted or disbelieved merely because he did not choose to disclose before the family members of the deceased the fact that he had seen the appellant near the deceased while she was playing with P.W.13 even after coming to know about the missing of the deceased. The appellant was a co-villager and he was a family man having wife and children and there was nothing on record that the appellant had any

criminal antecedents in the past or he was a licentious person and therefore, not to raise any suspicion against the appellant in connection with the missing of the deceased was very natural on the part of P.W.5. Though suggestion has been given to P.W.5 that his father wanted to purchase a piece of land which the father of the appellant purchased at a higher price for which his family bore grudge against the family of the appellant, P.W.5 has outrightly denied such suggestion. Nothing further has been elicited in the cross-examination to disbelieve the evidence of P.W.5 and thus, his evidence on the first circumstance has remained consistent and unshaken.

P.W.13 is a child witness, who was aged about seven years when he deposed in Court and he was the elder brother of the deceased. The learned trial Court put some formal questions to him about his name, name of his school, class in which he was studying, what he had taken in the breakfast on that day, who was standing by his side in the Courtroom on that day etc. in order to ascertain whether he was competent to testify and after noting down the questions and the respective answers thereto, the learned trial Court was of the view that the witness understood the questions put to him and gave rational answers and therefore, he was held to be a competent witness. No

challenge has been made to the competency of P.W.13 to depose by the learned counsel for the appellant. In the case of **P. Ramesh -Vrs.- State reported in (2019) 20 Supreme Court Cases 593**, the Hon'ble Supreme Court held as follows:-

> "16. In order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it

can be taken that she/he is a competent witness to be examined."

After going through the evidence of P.W.13 and the manner in which he withstood the long gruelling cross-examination and gave minute details of the incident clearly indicates that he had attained a measure of mature understanding and there is no infirmity in his understanding of the facts perceived and his ability to narrate the same correctly. Thus, we are of the view that the learned trial Court has rightly held P.W.13 to be a competent witness.

P.W.13 has stated that he along with his sister (the deceased) was playing near the car and P.W.5 was watching news in his mobile phone. When P.W.5 received a phone call and left the place, he asked the deceased to return home but the deceased stated that she would come later and asked him to go home. He further stated that the appellant was present near the vehicle at that time. Though he stated in the examination-in-chief that the appellant took the deceased towards the school and the deceased did not return home, but in the cross-examination, he has admitted not to have stated so before the Magistrate. P.W.13 has stated in the cross-examination that people were passing through the spot while they were playing

near the vehicle. This witness like P.W.5 has stated about the presence of the appellant near the car parked at the canal embankment where the victim was playing and his evidence inspires confidence.

Thus, the learned trial Court on the basis of the evidence of P.W.5 and P.W.13 has rightly held that the first circumstance regarding the presence of the appellant at the canal embankment where the deceased was playing on the date of occurrence in the evening hours when there was a power failure in the locality, has been proved by the prosecution.

9.2. **Second Circumstance**:

The second circumstance that has been relied upon by the learned trial Court is the missing of the deceased from the place where she was playing.

The learned trial Court has relied upon the evidence of P.W.4, P.W.5, P.W.7, P.W.8, P.W.9, P.W.10, P.W.11, P.W.13 and P.W.18 and came to hold that this circumstance has been proved by leading adequate evidence.

P.W.4, the informant has stated in his examination-in-chief that on 21.04.2018 during the evening hours, he had been to read Namaz in Masjid and came home at about 6.17/6.18 p.m. and at that time, there was a power failure and

he enquired the whereabouts of the deceased from his daughter-in-law i.e. the mother of the deceased, but she did not find the deceased in the house and asked him to search for her outside and he searched for the deceased in the neighbourhood houses but failed to get her. In the cross-examination, P.W.4 has stated that his daughter-in-law told him that the deceased might be near the canal side and by saying so, she herself went in search of the deceased and after sometime, she returned and told him (P.W.4) that she could not find the deceased and accordingly, he went to search for the deceased. P.W.4 further stated that he went to the canal side and searched for the deceased in three to four houses situated nearby the canal side but could not get the deceased for which he returned home.

P.W.7 has also stated that while she was in her shop, the basti people came to her looking for the deceased and enquired about her.

P.W.8 has stated that on the date of occurrence at about 7.30 to 8.00 p.m. while he along with one Sania and one Hedad was sitting in the village school field, he heard that a girl of their village was missing since power failure.

P.W.9, P.W.10, P.W.11, P.W.13 and P.W.18 have also stated about the missing of the girl child in the evening

hours on the date of occurrence and nothing has been brought out in the cross-examination of these witnesses by the defence to disbelieve this part of the evidence.

Therefore, the learned trial Court has rightly held that the second circumstance has been proved by the prosecution by leading adequate evidence.

9.3. **Third Circumstance**:

The third circumstance relied upon by the learned trial Court is that the appellant was last seen with the deceased.

The learned trial Court has relied upon the evidence of four witnesses i.e. P.W.5, P.W.7, P.W.13 and P.W.18.

P.W.5 has stated that on 21.04.2018 during the evening hours, while he was watching news in his mobile phone by the roadside by leaning against an Ambassador car, the deceased along with her elder brother Gullu (P.W.13) were playing and the appellant was wandering nearby and when he went inside the house on receipt of a call in his mobile phone, the appellant was found present with the deceased and P.W.13 near the Ambassador car. As already discussed under circumstance no.(i), nothing has been elicited in the cross-examination to disbelieve the evidence of P.W.5 and his evidence has remained consistent and unshaken.

P.W.13, the elder brother of the deceased has also stated about the presence of the appellant while he was playing with the deceased near the car parked at the canal embankment and further stated that P.W.5 was also watching news in his mobile phone and when P.W.5 left the place, he asked the deceased to return back home but the deceased told him that she would come later and asked him to go home and he further stated that when he departed from that place, the deceased and the appellant were present at that place. As already discussed under circumstance no.(i), the evidence of P.W.13 inspires confidence.

Two other important witnesses examined by the prosecution for proving the last seen of the appellant with the deceased are P.W.7 and P.W.18.

P.W.7 has stated that she was an Asha Karmi and she was having a grocery shop in the village Jagannathpur and on 21.04.2018 in the evening hours, while she was present in her shop, there was a power cut and she had kept emergency light in her shop. The appellant came to her shop at that time with the deceased and asked for chocolates of Rs.10/- and accordingly, she gave one Perk chocolate and five numbers of meethi malai chocolates which cost Rs.1/- each to the appellant

and accordingly, the appellant paid her Rs.10/- towards the cost of the chocolates. She further stated that the appellant removed the wrapper of one of the Rs.1/- chocolates and gave the same to the deceased and on suspicion, when she asked the appellant as to how he had come to her shop with the deceased, the appellant told her that he had brought her as she was crying and then the appellant proceeded towards the school along with the deceased. She further stated that after some time, the basti people came to her looking for the deceased and enquired about her to whom she stated that the appellant had come to her shop with the deceased and then proceeded towards the school with her. She further stated that a little later, she heard a commotion and came out of the house and saw the people running here and there and she asked the people as to what had happened and came to know from them that a child was lying at the school with bleeding injury for which she proceeded towards the place where there was commotion and she saw the deceased, who had sustained bleeding injury, being taken on a motor cycle.

The learned counsel for the appellant challenging the evidence of P.W.7 argued that not only she is a stock witness as she had deposed in other cases but also her statement that she had not visited the house of the deceased to intimate about the

fact that was within her knowledge concerning the victim and the appellant creates a grave doubt about her veracity. It was further argued that if according to P.W.7, she had disclosed before the basti people about the appellant coming to her shop with the deceased for purchasing chocolates and then proceeded towards the school with her, it would have spread like wild fire and immediately come to the knowledge of the family members of the deceased including P.W.4 and in such a scenario, P.W.4 would not have missed naming the appellant as a suspect in the F.I.R. which was lodged at Salipur police station on that night at about 22.15 hours against unknown persons.

Learned counsel for the State, on the other hand, submitted that since P.W.7 has specifically stated not to have met P.W.4, the informant on the date of occurrence nor the family members of the deceased on that day, it might not be within the knowledge of P.W.4 before he lodged the F.I.R. that the appellant took the deceased to the grocery shop of P.W.7, purchased chocolates and gave it to the deceased and then took her towards the school and therefore, non-mentioning the name of the appellant as a suspect in the F.I.R. cannot be a ground to disbelieve the evidence of P.W.7.

P.W.18 Sk. Afzal Jama has stated that he had seen the deceased on 21.04.2018 in between 6.00 to 6.30 p.m. while the appellant was taking her towards Kamar Sahi by the side of canal embankment and he was then present in his grocery shop. He further stated that after about forty five minutes, the appellant returned alone and went inside his house and he was seen in a disturbed condition. He further stated that after some time, the mother of the deceased and other family members searched for the deceased as she was found missing and subsequently, the deceased was found in the school verandah with bleeding injuries for which she was taken to the hospital. He stated to have narrated the occurrence before the police so also before the Magistrate at Salipur Court.

Learned counsel for the appellant argued that P.W.18 has stated that after coming to know from the discussion of the co-villagers that P.W.4 so also the mother of the deceased were searching for her, he had not intimated them what he knew and therefore, his non-disclosure regarding the appellant's role immediately creates suspicion about the truthfulness of his version and there was every possibility on his part to make such statement at a belated stage when the police arrived at the

scene of occurrence suspecting the appellant's involvement in the crime in question.

Learned counsel for the State, on the other hand, argued that suggestion has been given to P.W.18 that his family had enmity with the family of the appellant and that he was deposing falsehood to put the appellant in trouble and that he had been tutored to falsely depose against the appellant to which he has denied. Learned counsel for the State further argued that the I.O. arrived in the occurrence village on the night of the date of incident at 10.45 p.m., visited the spot, took steps for guarding the spot as it was pitch dark and also examined some witnesses. P.W.7 was examined in that night itself and P.W.18 on the next day i.e. on 22.04.2018. Therefore, there is no delayed disclosure of these two witnesses before the police. The learned counsel further argued that the knowledge of P.W.7 and P.W.18 about the occurrence cannot be disbelieved merely because the F.I.R. is lodged against unknown person. It is his argument that F.I.R. is not an encyclopaedia which must disclose all facts and details relating to the offence so also the name of the accused and therefore, non-mention of the name of the appellant in it cannot be a ground to disbelieve the prosecution case.

Adverting to the contentions raised by the learned counsel for the respective parties relating to the evidence of P.W.7 and P.W.18, we are of the view that when the appellant was not only a co-villager of the deceased but also a married person having children and there was nothing on record that he had got any criminal antecedents or he was a licentious person, merely because the deceased accompanied him to the shop of P.W.7 where the appellant purchased chocolates for her or she was seen going with him towards the school could not have raised any suspicion in the minds of these two witnesses regarding his involvement in the crime in question. It was a power cut time in the village and a summer season. Most of the people must have been out of their house or on the canal embankment to get some cool air and it would have hardly raised any suspicion when the deceased was seen in the company of the appellant. Even if P.W.7 has disclosed before some of the co-villagers, who were searching for the deceased, that she had seen the appellant going towards the school with the victim after purchasing chocolates, that might not have raised suspicion against the conduct of the appellant in their minds. There is no material on record that anyone disclosed before the informant (P.W.4) that the deceased had

accompanied the appellant to the shop of P.W.7 where the appellant purchased some chocolates for her and gave it to her and then the deceased accompanied the appellant towards the school and that after some time, the appellant returned alone and he was seen disturbed. The materials on record rather indicate that the moment the deceased was found lying in an injured condition on the school verandah, she was immediately shifted to Salipur Hospital and P.W.4, upon coming to know about the same, rushed to the spot but since he found that by that time, the deceased had already been shifted to Salipur Hospital, he came to the police station and lodged the F.I.R., which was scribed by P.W.11. Therefore, there was hardly any time on the part of P.W.4 to ascertain the appellant's role in the crime and therefore, non-mentioning of the name of the appellant as a suspect cannot be a ground to discard the evidence of P.W.7 and P.W.18. There is also no such delay on the part of the Investigating Officer (P.W.23) in recording the statements of these two material witnesses. In the case of **Ganesh Bhavan Patel and others -Vrs.- State of Maharashtra reported in A.I.R. 1979 Supreme Court 135**, it is held that normally in a case where the commission of crime is alleged to have been seen by witnesses who are easily available,

a prudent investigator would give to the examination of such witnesses precedence over the evidence of other witnesses. It was further held that when there was an inordinate delay in recording the statements of material witnesses, it would inevitably lead to the conclusion that the prosecution story was conceived and construed after a good deal of deliberation and delay in a shady setting, highly redolent of doubt and suspicion. Mere delay in examination of witnesses cannot in all cases be termed to be fatal so far as prosecution is concerned.

Delay in recording statements of the witnesses by the I.O. can occur due to various reasons and can have several explanations. It is for the Court to assess the explanation and if satisfied, accept the statement of the witness. In the case in hand, we find that there is hardly any delay in recording the statements of the material witnesses like these four witnesses i.e. P.W.5, P.W.7, P.W.13 and P.W.18 by the I.O. (P.W.23). As already stated, P.W.7 was examined on the date of occurrence after the spot visit was made by the I.O. in that night itself. Even P.W.5 Sk. Ziaul Haque was also in that night. Since it was already late in the night, the other two witnesses i.e. P.W.13 Gulzar Ahmed and P.W.18 Sk. Afzal Jama were examined on the next day i.e. 22.04.2018. Merely because P.W.5 did not disclose

what was within his knowledge before P.W.4 prior to giving statement before the I.O. or P.W.7 did not visit the house of the deceased to intimate about the fact within her knowledge concerning the deceased and the appellant or P.W.18 did not intimate the mother or P.W.4 what he knew cannot be a ground to disbelieve the evidence of these witnesses, particularly in view of the short time within which they gave their statements before the police. Nothing has been asked to P.W.13 by the defence whether anyone asked him about his knowledge of the occurrence or he disclosed before his family members voluntarily. Therefore, it cannot be said that the witnesses remained silent for a long time even after having knowledge about a gravely incriminating circumstance against the appellant.

Delay in sending F.I.R. to the Court of learned J.M.F.C., Salipur, non-sending of important statements like P.W.7 and P.W.18 recorded to the Court while forwarding the appellant are argued to be fatal to the prosecution case. It is argued that neither the F.I.R. was lodged when it was shown to have been lodged or the statements were recorded when those were shown to have been recorded and it was all ante-dated.

Adverting to the contentions, it appears that the F.I.R. was lodged in Salipur police station on 21.04.2018 at

10.15 p.m. The General Diary Reference Entry No.03 dated 22.04.2018 has been made on 22.04.2018 at 11.15 a.m. which was a Sunday. The Court of learned J.M.F.C., Salipur situates at a distance of 500 metres away from the police station. The F.I.R. reached the Court on 23.04.2018 and placed before Magistrate. Similarly, the I.O. admitted to have recorded the statements of twenty one witnesses which were very material to the case by the time the appellant was forwarded to the Court, however, he sent only two sheets of 161 Cr.P.C. statements of the witness and the arrest memo to the Court at that time.

It seems from the materials on record that after the receipt of F.I.R. on 21.04.2018 night, the I.O. was busy in investigation, examining the witnesses, visiting the spot, engaging police officials to guard the spot, intimating the I.I.C. of Mangalabag police station to attend the treatment of the deceased at S.C.B.M.C.H, Cuttack, searching for the appellant, apprehending the appellant at Kajihat Bazar, sending requisition to the Superintendent of Police for engagement of scientific team, seizing the exhibits collected by Scientific Officers, seizing different articles, visiting the S.C.B.M.C.H, Cuttack coming to know about the critical condition of the deceased, making prayer to the Sub-Collector for deputing an Executive Magistrate for

recording dying declaration of the deceased, arresting the appellant after observing formalities of the arrest and taking steps for keeping the seized articles in P.S. malkhana etc.

In the case of **Sarwan Singh and Ors. -Vrs.- State of Punjab reported in (1976) 4 Supreme Court Cases 369**, it was held that mere delay in dispatch of the F.I.R. is not a circumstance which can throw out the prosecution case in its entirety. In the case of **Pala Singh -Vrs.- State of Punjab reported in (1972) 2 Supreme Court Cases 640,** it is held that where the F.I.R. was actually recorded without delay and the investigation started on the basis of that F.I.R. and there is no other infirmity brought to the notice, then, however improper or objectionable the delayed receipt of the report by the Magistrate concerned, it cannot by itself justify the conclusion that investigation was tainted and the prosecution insupportable. In the case of **Ravi Kumar -Vrs.- State of Punjab reported in (2005) 9 Supreme Court Cases 315**, it is held that sending the copy of the special report to the Magistrate as required under section 157 of the Cr.P.C. is the only external check on the working of the police agency, imposed by law which is required to be strictly followed. The delay in sending the copy of the F.I.R. may by itself not render the whole of the case of the prosecution

as doubtful, but shall put the Court on guard to find out as to whether the version as stated in the Court was the same version as earlier reported in the F.I.R. or was the result of deliberations involving some other persons who were actually not involved in the commission of the crime. Immediate sending of the report mentioned in section 157 Cr.P.C. is the mandate of law. Delay wherever found is required to be explained by the prosecution. If the delay is reasonably explained, no adverse inference can be drawn but failure to explain the delay would require the Court to minutely examine the prosecution version for ensuring itself as to whether any innocent person has been implicated in the crime or not. In the case of **Bhajan Singh @ Harbhajan Singh** (supra), it is held that it is not that as if every delay in sending the report to the Magistrate would necessarily lead to the inference that the F.I.R. has not been lodged at the time stated or has been ante-timed or ante-dated or investigation is not fair and forthright. Every such delay is not fatal unless prejudice to the accused is shown. The expression 'forthwith' mentioned therein does not mean that the prosecution is required to explain delay of every hour in sending the F.I.R. to the Magistrate. However, unexplained inordinate delay in sending the copy of F.I.R. to the Magistrate may affect the prosecution case

adversely. An adverse inference may be drawn against the prosecution when there are circumstances from which an inference can be drawn that there were chances of manipulation in the F.I.R. by falsely roping in the accused persons after due deliberations. Delay provides legitimate basis for suspicion of the F.I.R., as it affords sufficient time to the prosecution to introduce improvements and embellishments. Thus, a delay in dispatch of the F.I.R. by itself is not a circumstance which can throw out the prosecution's case in its entirety, particularly when the prosecution furnishes a cogent explanation for the delay in dispatch of the report or prosecution case itself is proved by leading unimpeachable evidence. It is further held that the defence did not put any question on the delay either in lodging the F.I.R. or in sending the copy of the F.I.R. to the Magistrate while cross-examining the Investigating Officer providing him an opportunity to explain the delay, if any and therefore, the Hon'ble Court did not give any importance to the submission.

We are of the view that in the factual scenario, there is no delay either in lodging the F.I.R. or in sending the copy of the F.I.R. to the Magistrate. It may be pertinent to point out that defence did not put any question on these issues while cross-examining the I.O. (P.W.23), providing him an opportunity to

explain the delay, if any. Thus, we do not find any force in the submission made by the learned counsel for the appellant in this regard.

Section 167 of Cr.P.C. mandates that when any person is arrested and detained in police custody and the investigation cannot be completed within the period of twenty-four hours from the time of arrest and detention of person in custody, and the accusation or the information against such person appears to be well founded, then the officer in-charge of the police station or the police officer making investigation, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary at the time of forwarding the accused to the Magistrate. This provision has a salutary purpose inasmuch as the Magistrate has to verify the same to see whether there is any cogent and prima facie material to detain the person in custody. Rule 164 of Odisha Police Rules provides that a carbon copy of the case diary relating to each day's investigation along with copies of the statements that might have been recorded under section 161 of Cr.P.C. shall be dispatched to the Circle Inspector on the following day. It is incumbent upon the Magistrate before making an order or remand to examine the copies of the case diary submitted under section 167 of Cr.P.C.

In the case in hand, if according to the I.O. (P.W.23), statements of as many as twenty one witnesses which were material to the case were recorded by the time the appellant was forwarded to the Court, it was incumbent on the part of the I.O. to send such statements along with the forwarding report and the arrest memo etc. but the I.O. has only sent two sheets of 161 Cr.P.C. statement of the witness and not the rest. The defence has put specific questions to the I.O. in this regard and suggested that he did not mention the names of material witnesses whom he stated to have already examined in the forwarding report of the appellant as he had not examined such witnesses nor had recorded their statements under section 161 of Cr.P.C. except the one which he had sent along with the forwarding report till the appellant was forwarded to the Court and that the witnesses were set up subsequently and that he manipulated the statements in order to suit the prosecution at a belated stage.

Fairness in the investigation into crime is an integral facet of rule of law and one of the essential features of the criminal justice delivery system. Mere delay in sending the statements of the witnesses already recorded to the Court while forwarding the accused would not make their evidence unacceptable unless something glaring is brought to the notice of

the Court or proved otherwise that such statements were non-existent and subsequently created and ante-dated. Law is well settled that deficiencies in investigation by way of omissions and lapses on the part of the investigating agency cannot in themselves justify a total rejection of the prosecution case **(Ref: Sheo Shankar Singh -Vrs.- State of Jharkhand : (2011) 49 Orissa Criminal Reports (SC) 485)**. In the case of **Ram Bihari Yadav -Vrs.- State of Bihar and others reported in A.I.R. 1998 S.C. 1850**, it is held that if primacy is given to a designed or negligent investigation, to the omissions or lapses created as a result of faulty investigation, the faith and confidence of the people would be shaken not only in the law enforcing agency, but also in the administration of justice. In the case of **State of West Bengal -Vrs.- Mir Mohammad Omar and others reported in (2000) 8 Supreme Court Cases 382**, it is held that it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal Courts should not be wasted in picking out the lapses in investigation or by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice

becomes the victim. Efforts should be made by Courts to see that criminal justice is salvaged despite such defects in investigation.

We are of the view that non-sending of all the statements recorded while forwarding the appellant to the Court cannot be a ground to disbelieve the evidence of the witnesses examined to prove the last seen of the appellant with the deceased even though it was a lapse or omission on the part of the I.O. (P.W.23) who seems to have remained busy in the investigation of a sensational case like this.

The submission made that P.W.7 is a stock witness for police department is to be addressed here. P.W.7 has stated that on previous occasions, she deposed in other cases apart from giving statements before Magistrate. The I.O. (P.W.23) has denied the suggestion given by the defence that P.W.7 was a stock witness for the police and that she had been used to connect the link to circumstantial evidence. There is nothing on record in what type of cases she deposed earlier and whether as a prosecution witness or not. It is no doubt the duty of police to free the processes of investigation and prosecution from the contamination of concoction through the expediency of stockpiling of stock witnesses. The word 'stock' means something

which is stored or kept in for future use as per availability. Stock witness is a person who remains at the back and call of the police and comes in front as per the directions of the police. Such kinds of witnesses are generally prosecution-favoured witnesses and therefore, they are highly disfavoured by the Judges and ordinarily the Courts use to make possible attempts to sustain the prosecution case on other pieces of evidence excluding stock witness evidence. When the evidence of P.W.7 is clinching, trustworthy and reliable and it has not been shattered in the cross-examination, the same cannot discarded on the ground of 'stock witness' without any specific material to that effect.

In our humble view, the learned trial Court has rightly held that the evidence of four witnesses P.W.5, P.W.7, P.W.13 and P.W.18 are clinching, trustworthy and it inspires confidence and further held that the third circumstance i.e. the last seen of the deceased in the company of the appellant has been proved by the prosecution beyond all reasonable doubt.

Needless to say that the last seen evidence which has been adduced by the four witnesses have been put to the appellant in his statement recorded under section 313 of Cr.P.C.

at question nos.6, 14, 15, 60 and 63, but he has not offered any explanation to the same.

While answering to question no.6, which was put in connection with the evidence of P.W.5 regarding last seen, the appellant has stated that he had been to witness Gangeswar Yatra. Law is well settled that plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed (**Ref.: Dudh Nath Pandey -Vrs.- State of U.P. : (1981) 2 Supreme Court Cases 166**). It is incumbent upon the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the Court would be slow to believe any counter evidence to the effect that he was elsewhere when the occurrence happened, but if the evidence adduced by the accused is of such a quality and of such a standard that the Court may entertain some reasonable doubts regarding his

presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. The burden on the accused in such circumstances is rather heavy and strict proof is required for establishing the plea of alibi. (**Ref.: Binay Kumar Singh -Vrs.- State of Bihar : (1997) 1 Supreme Court Cases 283**)

In the case in hand, except taking a plea while answering to question no.6 that he had been to watch Gangeswar Yatra, nothing has been proved from the side of the appellant to substantiate such plea. No witness including his own family members have been examined to say that the appellant had been to watch Gangeswar Yatra. Even the witnesses, who stated about the presence of the appellant in the village in the evening hours of the date of occurrence, have also not been suggested that the appellant was not present in the village at that time and he had been to watch Gangeswar Yatra. Therefore, the learned trial Court has rightly not placed any reliance on this defence plea.

The examination of an accused under section 313 of Cr.P.C. is not a mere formality. The questions put and the answers given are of great use. The accused is to be given opportunity to explain each and every circumstance appearing in

evidence against him. It is obligatory on the part of the accused, while being examined under section 313 of Cr.P.C., to furnish explanation with respect to the incriminating circumstances associated with him and the Court must take note of such explanation. Law is also well settled that when an incriminating fact has not been put to the accused under section 313 of Cr.P.C., the said circumstance cannot be used against the accused. In the case of **Pattu Rajan -Vrs.- State of Tamil Nadu reported in (2019) 4 Supreme Court Cases 771**, it has been held that when the prosecution has proved the circumstance relating to last seen evidence beyond reasonable doubt, no explanation, much less any plausible explanation, has come from the accused in the statement recorded under section 313 of Cr.P.C. The burden had shifted onto the accused to explain such circumstance as to when they left the company of the deceased and such non-explanation by the accused provides an additional link in the chain of circumstances.

Therefore, we are of the view that the appellant has failed to establish the plea of alibi. The learned trial Court has rightly held that the third circumstance i.e. the appellant was last seen with the deceased on the date of occurrence in the evening hours before a short time when the deceased was found in an

injured condition on the school verandah, has been proved by the prosecution.

9.4. **Fourth Circumstance**:

So far as circumstance no.(iv) noted down by the learned trial Court on the basis of fact emerged from the prosecution case is that the deceased was found lying on the verandah of Jagannathpur Nodal U.P. School in an injured condition.

Reliance has been placed by the learned trial Court on the evidence of P.W.5, P.W.7, P.W.8, P.W.9, P.W.10, P.W.18 and the evidence of the Scientific Officer (P.W.22).

P.W.5 has stated that he heard that the deceased was lying on the school verandah in an unconscious condition sustaining bleeding injuries, but he has not stated to have visited the school verandah after hearing the same. Therefore, the evidence of P.W.5 is no way helpful for the prosecution so far as this circumstance is concerned.

P.W.7 has stated that hearing commotion that a child was lying at the school with bleeding injury, she proceeded towards the place where there was commotion and saw the deceased with bleeding injury being taken on a motorcycle. In the cross-examination, she has stated that the distance between

the gate of the school in question was about 100 meters from her shop and there were three houses situated in between the school gate and her shop. She further stated that there was no boundary wall of the school in question and anyone can enter the school premises from any side.

P.W.8 has stated that on 21.04.2018 in the evening hours, he along with Sania and Hedad was sitting in the village school field and he heard that a girl of his village was missing since the power failure and while searching, Raquib asked him to search for the victim near the school and he along with Sania and Hedad went inside the school premises and took the assistance of torch light available in the mobile phone of Sania for the search and saw the deceased was lying on the school verandah naked with bleeding injury. They called the people being present near the school gate and some residents of Samal Sahi also came to the spot. In the cross-examination, he has stated that the field where they were sitting was adjacent to the school and due to electricity failure and heat, people were roaming outside their house. Nothing has been brought out in the cross-examination to disbelieve his evidence to have noticed the deceased lying in a nude condition on the school verandah.

P.W.9 has stated that when three boys informed him that a child was lying near the school, he along with Azim (P.W.10) came to the spot on a Luna moped and at the spot, they found some other persons had gathered and the child was lying on the verandah of the school with bleeding injury. P.W.10 picked up the child from the verandah and gave her to him and holding the child, he sat on the Luna and being driven by P.W.10, he came to Salipur Hospital. In the cross-examination, he has stated that he received information about missing of the deceased at 7.00 p.m. and he along with his co-villagers looked for the deceased from 7.00 p.m. to 8.00 p.m. There was gathering of co-villagers and movement by them here and there with the spreading of news of missing of the deceased.

P.W.10 has corroborated the evidence of P.W.9 and stated that he along with P.W.9 entered the gate first followed by others with the torch light in the mobile phones and found the deceased lying on the verandah of the school in a serious condition and she was also found naked. A Mithi Chocolate was lying nearby and there was blood coming out from the nose and other parts of the body of the deceased and then he along with P.W.9 shifted the deceased in his moped to Salipur Hospital.

Nothing has been brought out in the cross-examination to disbelieve his evidence.

P.W.18 has stated that the deceased was found on the school verandah with bleeding injury and she was taken to the hospital. In the cross-examination, he has stated to have heard that the deceased was lying on the school verandah after about forty-five minutes of the completion of the Namaz. He has not stated to have visited the school and noticed the deceased there. Therefore, the evidence of P.W.18 is not much helpful for proving the circumstance.

The Scientific Officer (P.W.22) has stated that when she visited the spot on 22.04.2018, she noticed blood stain on the verandah of the Jagannathpur Nodal U.P. School, Salipur near the southern side wall in front of Bapuji Kakshya and she also noticed one Cadbury Perk Extra Chocolate lying on the cemented floor in front of Bapuji Kakshya at a distance of two feet from the southern side wall of the school towards the north. One Meethi Malai Kulfipop chocolate was noticed at some distance from the Perk Chocolate on the cemented floor. He also seized Green Colour Sprite Plastic Bottle containing some liquid noticed at a distance from the iron door of Bapuji Kakshya

towards west. She took photographs of scene of crime and prepared rough sketch map of the spot.

The learned counsel for the appellant argued that though it is the prosecution case that three persons were sitting on the school field outside the school i.e. P.W.8, one Sania and one Hedad, but the other two witnesses were not examined. Such submission is not acceptable as it is the settled principle of law of evidence that it is not the quantity, but the quality of evidence that has to be taken into consideration by the Court for determining the guilt or innocence of the accused. If the testimony of a sole witness is confidence-inspiring and beyond suspicion, the same can be acted upon by the Court.

In view of the evidence adduced by P.W.7, P.W.8, P.W.9, P.W.10 and the Scientific Officer (P.W.22), we are of the view that the learned trial Court has rightly come to the conclusion that the fourth circumstance i.e. the deceased was found lying on the verandah of the school in an injured condition has been proved by the prosecution by the required standard of proof.

9.5. **Fifth Circumstance**:

The learned trial Court has formulated this circumstance to be the absence of the appellant from the occurrence village soon after the occurrence.

The relevant witness on this point is the I.O. (P.W.23) who has stated that on 21/22.04.2018 while he was present at the spot village at midnight, he searched for the suspect, but did not find him and at about 5.00 a.m. on 22.04.2018, he received information from his source that the suspect (appellant) was proceeding towards Kajihat and accordingly, he proceeded to Kajihat and found him near Kajihat Bazar and apprehended the appellant and brought him to the police station and kept him under guard for his interrogation.

In the cross-examination, the I.O. (P.W.23) has stated that he had gone to the house of the appellant on the night of occurrence and when he asked the whereabouts of the appellant to his brother, he could not able to say anything. He stated not to have examined any other members of the family of the appellant to ascertain about the presence of the appellant in the occurrence village on the very night though he remained in the occurrence village for about seven hours on that day. He further stated that he did not know the appellant earlier and

caught him in Kajihat and his investigation did not reveal as to who identified the appellant to him. He further stated that he simply asked the name of the appellant at Kajihat and rest of the interrogation was made at the police station.

The appellant has taken a stand while answering to question no.6 in the accused statement relating to the evidence of P.W.5 regarding his presence in the occurrence village in the evening hours on 21.04.2018 that he had been to watch Gangeswar Yatra, whereas while answering to question no.77 relating to the evidence of the I.O. (P.W.23) regarding his apprehension at Kajihat Bazar that he was in his house when police took him to the police station. According to the I.O. (P.W.23), the apprehension time of the appellant was on 22.04.2018 early morning at 5 O' clock at Kajihat Bazar. If according to the appellant, he had been to watch Gangeswar Yatra on 21.04.2018 in the evening hours then it is not clear when he returned back to his house so that he was arrested in the early morning on 22.04.2018 as per the defence plea. No one has stated that the appellant was apprehended from his house. Even the family members of the appellant have not been examined by the defence to depose in that respect. As already discussed under circumstance no. (iii), the appellant has failed to

establish the plea of alibi. The said circumstance of absconding from the village immediately after the offence was committed, is admissible as relevant 'conduct' under section 8 of the Indian Evidence Act. Absconding by itself may not be a positive circumstance consistent only with the hypothesis of guilt of the accused because it is not unknown that even innocent person may run away for fear of being falsely involved in a criminal case and arrested by the police, but coupled with the other circumstances, the absconding of the accused assumes importance and significance.

Thus the fifth circumstance i.e. the absence of the appellant from the occurrence village soon after the occurrence has been rightly held to have been proved by the prosecution by the learned trial Court.

9.6. **Sixth Circumstance**:

According to the learned trial Court, the sixth circumstance against the appellant is the finding of the chocolates from the pocket of the deceased.

The learned trial Court, while analyzing this circumstance, has relied upon the evidence of P.W.7, P.W.10, P.W.14, P.W.15 and the I.O. (P.W.23).

P.W.7 has stated that the appellant came with the deceased to her shop on 21.04.2018 in the evening hours when there was power cut and she was having an emergency light in the shop and the appellant purchased chocolates of Rs.10/- and removed the wrapper of one of the chocolates and gave it to the deceased. She also stated about the seizure of Perk chocolate and meethi malai chocolates along with plastic containers from her shop by the police as per seizure list Ext.13. In the cross-examination, she stated that she used to purchase chocolates from the sales representatives. She has denied the suggestion given by the defence counsel that she was not having any grocery shop in which she was selling chocolates.

P.W.10 has stated that when he noticed the deceased lying naked in an injured condition on the school verandah, he found a meethi chocolate was lying nearby. It has been confronted to P.W.10 and proved through the I.O. (P.W.23) that he had not stated before police in his 161 Cr.P.C. statement that meethi chocolate was lying near the spot. Mere omission of stating to have found a meethi chocolate lying near the spot cannot be said to be an improvement worthy of disbelieving his statement. If the I.O. tells to record every minute details about the occurrence what the witness knows but records what

according to him are relevant for the case, the same cannot be a ground to disbelieve the testimony of the witness or to conclude that it was a case of perfunctory investigation. Only such omissions which amount to contradiction in material particulars can be used to discredit the testimony of the witness. Minor contradictions are bound to appear in the statements of even truthful witness. Omissions in the earlier statement of a witness if found to be in trivial details, cannot be a ground to raise doubt about his credibility. As such minor omission would not cause any dent in the testimony of P.W.10.

P.W.14 who was the A.S.I. of Salipur Police Station stated that on 22.04.2018 at about 8.00 a.m., he had accompanied the I.O. (P.W.23) to village Jagannathpur and reached there at about 8.30 a.m. and found the spot was on guard by one A.S.I. and one Havildar and scientific team reached at the spot and took photographs and the sniffer dog took the smell of blood and chocolate and it was left to proceed and they followed it and the dog proceeded after crossing the canal and entered into the house of the appellant and again returned to the spot. The dog master (P.W.16) prepared the report (Ext.17). He further stated that the Scientific Officer handed over the materials collected to P.W.23 in his presence which were seized

as per seizure list Ext.14. Ext.14 indicates about the seizure of chocolates. The witness has denied the suggestion given by the learned defence counsel that he had given his signature on Ext.14 at the instance of P.W.23 without having any knowledge about the seizure therein.

P.W.15 stated that on 22.04.2018 the police seized one blue colour panty of the deceased and two numbers of chocolates being produced by the Medical Officer which were seized as per seizure list Ext.20. He has denied the suggestion given by the learned defence counsel that being the paternal uncle of the deceased, he had later given his signature on Ext.20.

P.W.23, the I.O. has stated that on 22.04.2018 at about 1.45 p.m., he seized and sealed one blue colour half pant of the deceased suspected to contain blood stain, two numbers of meethi malai chocolates which were there in the pant pocket of the victim on production of Dr. Sourabh Kumar Upadhya and he prepared the seizure list vide Ext.20. As already stated P.W.15 has also stated about such seizure. Nothing has been brought out in the cross-examination for doubting such seizure.

In our humble view, the learned trial Court has rightly held the sixth circumstance i.e. finding of the chocolates

from the pocket of the deceased to have been proved by the prosecution.

9.7. **Seventh Circumstance**:

The seventh circumstance available on record according to the learned trial Court is the availability of the blood on the shirt of the appellant which he was putting on the relevant day that matched with the blood group of the deceased.

The learned trial Court has taken into account the report of the S.F.S.L., Bhubaneswar vide Ext.53, the seizure list Ext.18 relating to the seizure of wearing apparels of the appellant and the evidence of the doctor (P.W.3) for appreciating this particular circumstance.

The I.O. (P.W.23) has stated that on 22.04.2018 at 5.00 a.m. on receipt of information that the appellant was proceeding towards Kajihat, he proceeded there and apprehended the appellant near Kajihat Bazar, brought him to the police station and kept him under guard for interrogation. After the appellant was interrogated, he was arrested on 22.04.2018 at 6.00 p.m. observing formalities of arrest and on 23.04.2018, the appellant was sent to Department of F.M. & T., S.C.B. Medical College and Hospital, Cuttack for his medical examination.

P.W.3, the Asst. Professor of Department of F.M. & T., S.C.B. Medical College and Hospital, Cuttack who examined the appellant on 23.04.2018 on police requisition, stated that on examination of the wearing apparels, the appellant was found to be wearing, inter alia, yellow colour full shirt with tag i.e. 'Jam Jam XL' with reddish brown colour stains above the pocket on left anterior and right lower part of the anterior aspects and after examination, the clothings were handed over to the accompanying escort party in a parcel under seal and label.

The I.O. (P.W.23) has further stated that the escort party returned to the police station with the appellant after his medical examination and produced, inter alia, one sealed packet containing wearing apparels of the appellant including yellow colour full shirt collected and sealed by the Medical Officer at the time of examination of the appellant, which was seized as per seizure list Ext.18. He further stated that he kept the seized mal items in P.S. malkhana separately.

The I.O. (P.W.23) seized the biological samples of the deceased on 24.04.2018 on being produced by S.I. of police Asit Jena from S.C.B. Medical College and Hospital, Cuttack where the victim was undergoing treatment which was seized as per seizure list Ext.19.

The I.O. (P.W.23) has stated that on 27.04.2018, he made a prayer to the Court for sending the exhibits to S.F.S.L., Rasulgarh, Bhubaneswar for chemical examination and report. The exhibits were sent to the S.F.S.L. with the forwarding report of J.M.F.C., Salipur.

The D.N.A test report indicates that the human female D.N.A. profiles generated from Ext.O2-X (cut portion of blood stain from the full shirt of the appellant) and O2-Y (cut portion of blood stain from full shirt of the appellant) matched with female D.N.A. profile generated from Ext.N i.e. the sample blood of deceased on FTA card.

The attention of the appellant has been drawn to this part of evidence in his accused statement in question nos.129, 131 and 132, but the appellant pleaded his ignorance.

In the case of **Mukesh and another -Vrs.- State (NCT of Delhi) and others reported in (2017) 6 Supreme Court Cases 1**, it is held that D.N.A. technology as a part of forensic science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. D.N.A. evidence is being increasingly relied upon by Courts. After the amendment in Cr.P.C. by the insertion of

section 53-A by Act 25 of 2005, D.N.A. profiling has now become a part of the statutory scheme. Section 53-A of Cr.P.C. relates to the examination of a person accused of rape by a medical practitioner. Section 164-A of Cr.P.C. inserted by Act 25 of 2005 indicates that for medical examination of the victim of rape, the description of material taken from the person of the woman for D.N.A. profiling is a must. It is further held that D.N.A. 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 D.N.A. test report is to be accepted.

The learned counsel for the appellant argued that P.W.5, P.W.7 and P.W.18 who have stated to have seen the appellant in the company of the deceased have not stated whether that particular shirt which was sent for chemical examination was worn by the appellant and therefore, finding of blood stain of the deceased on such shirt is immaterial.

We are not at all impressed by such submission. Since it was evening time and there was power cut in the locality, it would not have been possible on the part of the aforesaid three witnesses to identify the shirt that the appellant

was wearing. However, the appellant was apprehended on the early morning on 22.04.2018 which was within twelve hours of the occurrence. The appellant has not taken any plea that the I.O. gave him some other shirt to wear before sending him for medical examination. Thus, the very shirt which the appellant was wearing at the time of his apprehension was collected by the doctor (P.W.3) and kept in a packet under seal and label and handed over to the escort party which was subsequently seized by the I.O. and sent for chemical examination.

The learned trial Court has rightly held that the seventh circumstance i.e. availability of the blood on the shirt of the appellant which he was putting on the relevant day that matched with the blood group of the deceased, has been proved satisfactorily by the prosecution

9.8. **Eighth circumstance**:

The eighth circumstance according to the learned trial Court, is that while in police custody, the appellant after confessing his guilt showed some places voluntarily where he had taken the deceased to accomplish the crime.

According to the I.O. (P.W.23), on 23.4.2018 he forwarded the appellant to the Court. He has stated that on 05.05.2018 at 02.10 p.m., he brought the appellant on remand

from the judicial custody on a prayer being allowed by the Court and interrogated him in presence of the witnesses and recorded his statement vide Ext.31. The appellant disclosed that he would show the places where he had taken the deceased and then led the police and the witnesses to the spot where the deceased was playing and then to the shop of Rina Ojha (P.W.7) and then led to the verandah of spot school. The I.O. (P.W.23) prepared a memorandum of the discovery of the fact which is the places shown by the appellant and the same is marked as Ext.32. P.W.21 Minar Behera who is a witness to Ext.32 has corroborated the evidence of P.W.23.

The learned trial Court while discussing this evidence, came to hold that the showing of places by the appellant to the I.O. is no way relevant under section 27 of the Evidence Act as those places had already been discovered and the I.O. had prepared spot map in crime detail form which is marked as Ext.39/2, however it is admissible under section 8 of the Evidence Act as the conduct of the appellant which showed that the appellant was aware of the places where the crime was committed by him.

Section 27 of the Evidence Act is an exception to the general rule that a statement made before the police is not

admissible in evidence is not in doubt. However, vide section 27 of the Evidence Act, only so much of the statement of an accused is admissible in evidence as distinctly leads to the discovery of a fact. Therefore, once the fact has been discovered, section 27 of the Evidence Act cannot again be made use of to 're-discover' the discovered fact. It would be a total misuse, even abuse of the provisions of section 27 of the Evidence Act. [Ref: **Sukhvinder Singh and Ors. -Vrs.- State of Punjab : (1994) 5 Supreme Court Cases 152**]

The discovery of the fact resulting in recovery of a physical object exhibits knowledge or mental awareness of the person accused of the offence as to the existence of the physical object at the particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of the accused as to its existence. To this extent, therefore, factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto. In the case of **Mohmed Inayatullah -Vrs.- State of Maharashtra reported in (1976) 1 Supreme Court Cases 828**, elucidating on section 27 of the Evidence Act, it has been held that the first condition imposed and necessary for bringing the section into operation is the

discovery of a fact which should be a relevant fact in consequence of information received from a person accused of an offence. The second is that the discovery of such a fact must be deposed to. *A fact already known to the police will fall foul and not meet this condition*. The third is that at the time of receipt of the information, the accused must be in police custody. Lastly, it is only so much of information which relates distinctly to the fact thereby discovered resulting in recovery of a physical object which is admissible. Rest of the information is to be excluded. The word 'distinctly' is used to limit and define the scope of the information and means 'directly', 'indubitably', 'strictly' or 'unmistakably'. Only that part of the information which is clear, immediate and a proximate cause of discovery is admissible. It has been further held that section 27 of the Evidence Act pertains to information that distinctly relates to the discovery of a 'fact' that was previously unknown, as opposed to fact already disclosed or known. [Ref: **Perumal Raja -Vrs.- State, Rep. by Inspector of Police : A.I.R. 2024 S.C. 460**].

In the case of **A.N. Venkatesh and Ors. -Vrs.- State of Karnataka reported in (2005) 7 Supreme Court Cases 714**, it is held that by virtue of section 8 of the Evidence Act, the conduct of the accused person is relevant, if such

conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simplicitor, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under section 8 of Evidence Act irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of section 27 or not as held in **Prakash Chand -Vrs.- State : 1979 Criminal Law Journal 329**. Even if it is held that the disclosure statement made by the accused-appellants is not admissible under section 27 of the Evidence Act, still it is relevant under section 8. The Hon'ble Court held that the evidence of the investigating officer and the spot mazahar witnesses that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under section 8 as the conduct of the accused.

In the Indian Parliament attack case that took place on 13th December 2001 i.e. **State (N.C.T. of Delhi) -Vrs.- Navjot Sandhu and Ors. reported in (2005) 11 Supreme Court Cases 600**, it is held that Afzal led the police to the shop of P.W.40 and identified the proprietor which fact is relevant and

admissible under section 8 of the Evidence Act. It is further held that about the purchase of silver powder, P.W.76 recorded in Ext.42/1 that Afzal disclosed having purchased the silver powder from the shop of P.W.42. It may be stated that on the packets of silver powder (Ext.P/51), the name and address 'Tolaram & Sons, 141, Tilak Bazar' was written. Thus, the name and address of the shop was already known to the police. Therefore, section 27 cannot be pressed into service. However, the conduct of Afzal in pointing out the shop and its proprietor (P.W.42) would be relevant under section 8 of the Evidence Act.

In the accused statement, question nos.143, 144, 145 and 146 were put to the appellant regarding the evidence adduced by P.W.21 and P.W.23 in respect of his pointing out different places and preparation of memorandum vide Ext.32, but he has simply stated it to be false. Even if the places were known to the police, but when the appellant was taken on remand by police and he showed those places, his conduct becomes relevant under section 8 of the Evidence Act, as a conduct to be relevant under section 8 need not be contemporaneous, it may be antecedent or subsequent to the fact in issue or relevant fact. Under section 8, only the conduct of the accused is admissible and relevant for which he has no

reasonable explanation. The explanation of any conduct on the part of the appellant must come from him and the Court would not imagine, an explanation which an accused himself had not chosen to give. The appellant was required to explain as to from which source, he came to know about those places particularly when he was not available in the locality after the crime was detected.

Therefore, the learned trial Court was justified in holding that the eighth circumstance i.e. conduct of the appellant in showing some places voluntarily where he had taken the deceased after confessing his guilt is admissible under section 8 of the Evidence Act which shows that the appellant was aware of the places where the crime was committed.

Circumstances summed up:

10. We may now usefully summarise the facts and factors established by the prosecution beyond doubt on record which are as follows:

i) that the deceased was playing on the canal embankment of his village in the evening hours on the date of occurrence with his brother when there was power cut and the appellant was present nearby;

ii) that after the brother of the deceased left her and came to his house, at that time also the appellant was nearby and thereafter the deceased was found missing;

iii) that the appellant had taken the deceased with him in the evening hours on the date of occurrence during the power cut time to the shop of P.W.7 and purchased chocolates for her;

iv) that the appellant was last seen with the deceased going towards the school;

v) that the deceased was found lying in an injured condition on the school verandah within a short time of such last seen from where she was shifted to the hospital;

vi) that the Scientific Officer found blood stain on the school verandah and also noticed chocolates lying there;

vii) that the appellant was found absent from the village after the occurrence and he was apprehended by the I.O. at Kajihat Bazar next day on the early morning;

viii) that some chocolates were found from the pocket of the deceased by the Medical Officer;

ix) that the blood stain found on the shirt of the appellant matched with the blood group of the deceased;

x) that the appellant on being taken on remand after confessing his guilt showed some places connected with the crime to the I.O. voluntarily.

We are of the view that all these ten circumstances cumulatively taken together form a complete chain that lead to the only irresistible conclusion that it is the appellant who had perpetrated the crime.

Discussion on various charges:

11. Now, we are to discuss whether material evidence brought on record by the prosecution is sufficient to substantiate various charges framed against the appellant.

11.1. **Charge under section 302 of I.P.C.**:

The death of the deceased was homicidal is disputed by the learned counsel for the appellant in view of the absence of specific finding of the doctor (P.W.1) in the post mortem report (Ext.1). According to the learned counsel for the appellant, the deceased died after eight days of the occurrence and the doctor has stated that he had not explicitly mentioned in his report if the death was homicidal or accidental.

Learned counsel for the State on the other hand argued that the doctor (P.W.1) has stated that he noticed several external injuries on the person of the deceased and two

of the injuries, i.e. injury nos. (v) & (vii) along with corresponding internal injuries to brain were fatal to cause death in ordinary course of nature and the death was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury and therefore, when the appellant inflicted such injuries during commission of sexual offence, which ultimately proved fatal and the deceased remained in coma for eight days and ultimately died, the definition of 'murder' as mentioned under section 300 of I.P.C. is squarely attracted.

The doctor (P.W.1) has stated that on 29.4.2018 he along with doctor Prabin Kumar Pradhan conducted post-mortem examination over the dead body of the deceased and found the following external injuries:-

i. A scratch abrasion of size 1 cm x 0.5 cm on left scapular region with scab formation;

ii. An abrasion with scab of size 0.25 cm on the left index finger knuckle;

iii. Imprint abrasion with regular interrupted pattern of width 3 cm starting from a point 4 cm below right mastoid tip on the right lateral neck, extending obliquely downwards and to the front of neck upto 2 cm left to mid-line on thyroid prominence.

From 2 cm prior to the left end of this mark, there starts another such mark from thyroid prominence passing obliquely upward and backward towards the left lateral neck upto 4 cm below the left ear root. After a discontinuous gap of 3 cm, the mark is again evident within the hair line in the same disposition for a length of 5 cm towards occiput. The mark shows brownish black scab formation;

iv. Another similar imprint abrasion along the lower border of right lower jaw of size 3.5 cm x 0.3 cm;

v. Laceration of size 1 cm x 0.5 cm x soft tissue depth and surrounding abraded contusion with dry clotted blood base under the chin, 1cm left to mid line;

vi. Contused both lips of mouth on its inner aspects looking bluish in colour, with bruised gum tissues against the central incisor teeth;

vii. Bluish black looking contusion on mid forehead in patches. There is black eye on both sides, more evident on the right than the left;

viii. There are three small bluish black looking bruises on the shin of right leg.

On dissection, the doctor found that the scalp was contused on both frontal region and right parietal eminence. The skull was intact. The brain surface was deeply congested, with multiple streak hemorrhages into pons and mid-brain part of the brain. There were punctate intracerebral haemorrhages present in the corpus callosum, both temporal lobe base and both frontal lobe bases. Internal neck structures were intact. The hyoid bone, thyroid cartilages, strap mussels of neck were intact. The lungs were intact, congested and deeply edematous. Few segments of lower lobe of lungs on both sides were pale, pinkish. The internal genital organs like uterus are small, infantile, intact and the vaginal canal was intact. The external genitalia revealed no abnormality or injuries. The hymen was deep sheeted and was fleshy in type. No injury of any form could be appreciated on the genitalia.

The doctor gave the following opinion:-

i. The above detailed injuries were of antemortem in nature. The injury no.(iii) & (iv) are imprints of some metallic/hard object (mimicking the zip of garments) caused during struggle, pressure, dragging or holding the garment. The external injury nos.(i), (ii), (v), (vii) & (viii) are due to hard and blunt force

trauma. The injury no.(vi) can be due to medical intervention like intubation or trauma;

ii. Injury nos.(v) & (vii) along with corresponding internal injuries to brain are fatal to cause death in ordinary course of nature;

iii. Death is due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury;

iv. The time since death at the time of PM examination was within 0-6 hours;

In the cross-examination, he stated that there was no visible fingerprint over any part of the body of the deceased and hyoid bone and thyroid cartilage of the deceased were intact and that the internal neck structure of the deceased was also intact. The doctor has further stated that the cause of death as per his examination was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury. He further stated that hypoxic brain injury results in brief deprivation of brain from the supply of blood and indirectly oxygen. He admitted not to have mentioned in his report whether the death of the deceased was homicidal or accidental.

Since in view of the findings recorded on the circumstantial evidence, the appellant can be said to be

responsible for causing the injuries as noticed on the deceased by the doctor (P.W.1) as per his post mortem report (Ext.1) which resulted in the death of the deceased, we are to find out whether the ingredients of 'murder' as defined under section 300 of the I.P.C. are satisfied or not.

Section 299 of the I.P.C. states, inter alia, that whoever causes death by doing an act with the intention of causing such bodily injury as is likely to cause death, can be said to have committed the offence of 'culpable homicide'. Clause thirdly of section 300 of I.P.C. states that culpable homicide is murder, if the act by which the death is caused is done with the intention of causing such bodily injury to any person and bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. All 'murder' is 'culpable homicide' but not vice versa. 'Culpable homicide' is genus and 'murder' its species. 'Culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. The words 'bodily injury…..sufficient in the ordinary course of nature to cause death' as appears in clause thirdly of section 300 of I.P.C. mean that death will be the most probable result of the injury having regard to the ordinary course of nature. For cases to fall within clause 'thirdly', it is not necessary that the offender

intended to cause death, so long as death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. In order to bring a case under clause 'thirdly' of section 300 of I.P.C., firstly, it must be established by the prosecution that a bodily injury was present; secondly, the nature of the injury must be proved which is purely objective investigation; thirdly, it must be proved that there was an intention to inflict that particular injury. Once these three elements are proved to be present, then it is to be proved that injury of the type was sufficient to cause death in the ordinary course of nature and this part of enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Even if the intention of the accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence should be murder. Illustration (c) appended to section 300 of I.P.C. clearly brings out this point. (Ref: **State of Andhra Pradesh -Vrs.- Rayavarapu Punnayya and others: A.I.R. 1977 S.C. 45**)

Since the appellant is responsible in causing various bodily injuries noticed on the person of the deceased and according to P.W.1, out of such injuries, injury nos.(v) and (vii)

along with corresponding internal injuries to brain were fatal to cause death in the ordinary course of nature and death was due to coma as a result of blunt trauma injury to head and corresponding brain injury coupled with effects of hypoxic brain injury, in view of site and effect of injuries, it is sufficient to draw an inference that the appellant intended to cause such bodily injuries as was sufficient to cause death and thus, we are of the view that clause 'thirdly' of section 300 of I.P.C. is satisfied and the act of the appellant comes within 'murder' and therefore, the learned trial Court is quite justified in holding the appellant guilty under section 302 of the I.P.C., as such finding of fact is based on evidence available on record which is neither perverse nor contrary to record.

11.2. **Charge under sections 376-AB of I.P.C. and section 6 of POCSO Act**:

376-AB of I.P.C. prescribes punishment for rape on a woman under twelve years of age. 'Rape' has been defined under section 375 of I.P.C. and it is stated that a man is said to commit 'rape' if he-

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

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

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

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.

In the Explanation 1 to section 375 of I.P.C., it is stated that for the purposes of this section, 'vagina' shall also include labia majora.

Section 6 of the POCSO Act deals with punishment for 'aggravated penetrative sexual assault', which is defined under section 5 of the POCSO Act. Section 5(m) of the POCSO Act states that whoever commits 'penetrative sexual assault' on a child below twelve years is said to commit aggravated penetrative sexual assault. 'Penetrative sexual assault' has been defined in section 3 of the POCSO Act which is similar to clauses (a) (b) (c) and (d) of section 375 of I.P.C.

At this stage, it would be appropriate to discuss about the age of the deceased at the time of occurrence as the same has got link with both the offences.

P.W.17 Arnapurna Biswal was the Anganwadi worker at village Jagannathpur who has stated that the deceased was studying in the Anganwadi and on the basis of the letter issued by Salipur police, she submitted the information vide Ext.22 basing on the entry made in the Anganwadi register (Ext.25) that the date of birth of the deceased was 02.05.2012 and as such by 21.04.2018, she was aged about five years and eleven months. She proved the relevant register which she had taken in zima after it was seized by the I.O. under seizure list Ext.23. In the cross-examination, she has stated to be working in the Anganwadi of Jagannathpur since 2002. She denied the suggestion that Exts.22 to 25 were all manufactured for the purpose of the case. The elder brother of the deceased has been examined as P.W.13 who was aged about seven years and his age has not been challenged by the defence. Therefore, the learned trial Court has rightly come to the conclusion that the deceased was below twelve years of age at the time of occurrence.

P.W.8 has stated that the deceased was lying on the school verandah naked with bleeding injury.

P.W.9 who shifted the deceased lying on the school verandah with bleeding injury to Salipur hospital with P.W.10 has not stated that the deceased was in a naked condition.

P.W.10 who shifted the deceased with P.W.9 from the school verandah in a serious condition has stated that the deceased was lying naked.

P.W.2, the doctor of Salipur C.H.C. referred the deceased to S.C.B.M.C.H., Cuttack as her condition was found to be critical.

P.W.6, the Associate Professor who examined the deceased on 22.04.2018 has stated that on examination of the private parts, he found mild redness at the inner side of the folds of labia minora, more so towards the upper half. All other structures in the private part were found to be intact without any discharge or bleeding. He has further stated that no physical clue of alleged sexual offence could be detected over the wearing apparels of the deceased and no injuries could be seen on the private parts of the deceased except mild redness which was seen at the inner aspect of the inner labial folds close to the vaginal opening. He has further stated that the vulvovaginal

samples and anal samples which were preserved and tested at State Bacteriological and Pathological Laboratory, Cuttack did not reveal any physical clue of recent sexual intercourse, however, from the genital findings, it was opined that an attempt of sexual act or manipulation could not be denied. He further stated that on 03.05.2018, vide letter no.957(2) dated 02.05.2018 of Salipur police station, the I.I.C. placed a query and he gave his opinion that the redness that was detected at the inner side of the folds of labia minora of the deceased could be possible if an erect male organ/finger/any other object was pushed or thrust over the private parts or external genitalia of the deceased. The redness was also possible if the labial folds were forcibly stretched or roughly handled or roughly manipulated during an attempted sexual assault. In the cross-examination, P.W.6 however stated that in his report Ext.9, he has mentioned that the hymen was intact and there was no inflammation or discharge or bleeding and that sub-column under (g) regarding admissibility of finger was left blank and in column (h), he has mentioned that the hymen was intact and hence the vaginal canal could not be examined. He further stated that no injuries could be seen on the private part of the deceased except mild redness at the inner aspect of the inner labial folds close to the

vaginal opening. He admits that his opinion that 'an attempted sexual assault or sexual manipulation cannot be denied' was a possibility and not a definite opinion. He further stated that in absence of any other sign and symptoms or injury apart from redness found in the inner folds of the private part, the possibility of penetration is ruled out but attempt cannot be denied. He further stated that as the redness was noticed towards the upper part of the labial folds, the same being caused by self-infliction due to itching could not be denied.

P.W.1, the doctor who conducted post-mortem examination on 29.04.2018 has stated that the internal genital organs like uterus were intact and the vaginal canal was intact. The external genitalia revealed no abnormality or injuries. The hymen was deep-seated and was fleshy in type and no injury of any form could be seen on the genitalia. He has further stated that minor superficial genital injury like redness in the genitalia might not be found if examined after a gap of few days. In the cross-examination, he has stated that on examination and dissection of the body, he did not detect any external or internal injury in the genital of the deceased and he had examined the vaginal canal of the deceased and it was found intact.

Ext.53 is the report of S.F.S.L. which consisted of ten pages wherein after examining the blue colour half pant of the deceased which was wrapped in a paper in sealed condition and marked as Ext.J, it was opined that vaginal secretion stain could be detected in the exhibit marked as J. So far as other exhibits are concerned, neither blood and semen stains nor semen vaginal secretion or saliva stain could be detected.

Thus, except mild redness at the inner side fold of labia minora towards the upper half, no other injuries were noticed on the private part of the deceased to suggest that the act committed by the appellant would come as enumerated under clauses (a) (b) (c) and (d) of section 375 of I.P.C. At this stage, it is felt proper to quote the query made by the I.O (P.W.23) to P.W.6, the doctor which is as follows:-

> "It is opined that, the labia minora shows mild redness. Considering the age of the deceased/victim who was six years old at the time of alleged sexual assault, please opine that whether such redness in the labia minora is possible if the perpetrator pushes/thrusts his penis or any other object over the private part/genitalia of the victim girl despite her resistance".

On such query, P.W.6 has opined as follows:-

> "On perusal of the documents relating to the case, I am of the opinion that, the redness that was detected at the inner side of the folds of labia minora of the victim child, can be possible if an erect male organ/finger/any other object is pushed or thrust over the private part or external genitalia of the girl or if the labial folds are forcibly stretched or roughly handled or manipulated during an attempted sexual assault".

According to P.W.6, this opinion is a possibility and not a definite opinion and that redness as noticed towards the upper part of the labial folds of the deceased could be caused by self-infliction due to itching.

In the case of **State of Haryana -Vrs.- Bhagirath and others reported in (1999) 5 Supreme Court Cases 96**, it is held that the opinion given by a medical witness need not be the last word on the subject. Such opinion shall be tested by the Court. If the opinion is bereft of logic or objectivity, Court is not obliged to go by that opinion. After all, opinion is what is formed in the mind of a person regarding a fact situation. If the opinion was given by a doctor is not consistent with the probability, the Court has no liability to go by that opinion merely because it is

said by the doctor. In the case of **Mayur Panabhai Shah -Vrs.- State of Gujarat reported in (1982) 2 Supreme Court Cases 396**, it is held that even where a doctor has deposed in Court, his evidence has to be appreciated like the evidence of any other witness and there is no irrebuttable presumption that a doctor is always a witness of truth.

In view of the foregoing discussion, when there is no other material available on record including circumstances to satisfy the ingredients of 'rape' or 'aggravated penetrative sexual assault' committed on the deceased, it would be too risky to convict the appellant either under section 376-AB of the I.P.C. or under section 6 of the POCSO Act. However, the manner in which the deceased was found in a nude condition on the school verandah after being taken there by the appellant, we are of the view that the ingredients of offence under section 354 of I.P.C. i.e. assault or use of criminal force with intent to outrage the modesty of the deceased is squarely made out. In the case of **State of Punjab -Vrs.- Major Singh reported in A.I.R. 1967 S.C. 63**, it is held that the essence of a woman's modesty is her sex. Young or old, intelligent or imbecile, awake or sleeping, the woman possesses modesty capable of being outraged. The culpable intention of the accused is the crux of the matter. The

reaction of the woman is very relevant, but its absence is not always decisive, as for example, when the accused with a corrupt mind stealthily touches the flesh of a sleeping woman. She may be an idiot, she may be under the spell of anaesthesia, she may be sleeping, she may be unable to appreciate the significance of the act, nevertheless, the offender is punishable under the section. It is further held that a female of tender age stands somewhat on a different footing. Her body is immature and her sexual powers are dormant. Nevertheless from her very birth, she possesses the modesty which is the attribute of her sex.

In the case of **Tarkeshwar Sahu -Vrs.- State of Bihar reported in (2006) 8 Supreme Court Cases 560**, it is held that the accused was charged with sections 376/511 I.P.C. only. In absence of charge under any other section, the question arose whether the accused should be acquitted; or whether he should be convicted for committing any other offence pertaining to forcibly outraging the modesty of a girl. The Court invoked section 222 of the Code of Criminal Procedure, which provides that in a case where the accused is charged with a major offence and the ingredients of the major offence are missing and ingredients of minor offence are made out then he may be

convicted for the minor offence even though he was not charged with it.

Accordingly, the conviction of the appellant under section 376-AB of the I.P.C. and section 6 of the POCSO Act, is hereby set aside, instead he is found guilty under section 354 of I.P.C.

11.3. **Charge under section 363 of I.P.C.**:

Section 363 of I.P.C. prescribes punishment for kidnapping, which includes kidnapping from lawful guardianship, which is defined under section 361 of I.P.C.

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words "takes or entices any minor.....out of the keeping of the lawful guardian of such minor" in section 361, are significant. The use of the word "keeping" in the context connotes the idea of charge, protection, maintenance and control; further the guardian's charge and control appears to be compatible with the independence of action

and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section, the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section. (Ref: **Parkash -Vrs.- State of Haryana : (2004) 1 Supreme Court Cases 339**)

In view of the evidence adduced by P.W.7 that the appellant purchased chocolates for the deceased from her shop and went towards the school with the deceased so also the evidence of P.W.18 that on the date of occurrence, the appellant was found taking the deceased towards Kamar Sahi by the side of canal embankment and that the age of the deceased at the time of occurrence which was six years and since the consent of the family members was not taken, we are of the view that the appellant lured the deceased by giving chocolates and took her out of the lawful guardianship and therefore, the learned trial

Court has rightly held the appellant guilty under section 363 of the I.P.C.

11.4. **Conclusion**:

In view of the foregoing discussions, we are of the view that the prosecution has failed to establish the charges under section 376-AB of I.P.C. so also section 6 of the POCSO Act and accordingly the appellant is acquitted of such charges, however he is found guilty under section 354 of I.P.C. The conviction of the appellant under section 302 of I.P.C. and section 363 of I.P.C. stands confirmed.

Sentence:

12. Now, we are to discuss what sentence is required to be imposed on the appellant for the offences under sections 302, 354 and 363 of I.P.C. Sentencing has always been a vexed question as part of the principle of proportionality. The punishment should not be disproportionately great is a corollary of just deserts and it is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

12.1. **Sentence for the offence under section 302 of I.P.C.**:

The learned trial Court has awarded death sentence to the appellant for committing the offence under section 302 of I.P.C. holding that abject monstrosity of the crime indubitably renders its categorization as rarest of rare case. It was held that a six year old child who relished little pleasures like chocolates, would have hardly even imagined that the said joy would snatch her first basic right i.e. right to live. The little childish brain of her was not trained to doubt people, especially those who happened to be known to her. It was her innocence that led her to establish a trust which here was perniciously breached. The child who would have once dreaded her teacher's punishment was bludgeoned to death, in a merciless and demoniacal way. Both the devilish conjuring of the crime and callous execution are an anathema to a society that boasts upon civility and a culture that preaches love and compassion. The learned here would comport that it is not only the family but the society at large which is the trustee of a child. Such abhorrent acts not only has egregiously violated a child's trust and innocence but also has dehumanized society's conscience. The commission of such bestiality sans any apparent compunction is a rarity and thus any laxity in punishment would only be a travesty of justice. The pall

of trepidation that has been cast can only be mitigated through a sentence which would be rarest of rare as horrendous was the crime.

Submission was made by the learned counsel for the appellant that the appellant is a young man and he has got no criminal antecedent and nothing adverse is reported against him during detention period and he hails from a poor background and he is a married person having children and moreover, the case is based on circumstantial evidence and therefore, death sentence is not justified and it may be commuted to life imprisonment.

The learned counsel for the State, on the other hand, argued that the offence was committed against a girl child aged about six years though the appellant was himself a married person and having children. The appellant was known to the deceased for which the deceased reposed confidence on him and accompanied him to the shop of P.W.7 where he purchased chocolates for the deceased and then took her and committed the crime in a most horrendous, devilish and barbaric manner and therefore, the death penalty is quite justified.

Chapter XVIII of Cr.P.C. deals with trial before a Court of Session. Sub-section (2) of section 235 of Cr.P.C. which comes within such chapter states that if the accused is

convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence and then pass sentence on him according to law. Chapter XXVII of Cr.P.C. deals with the judgment. Sub-section (3) of section 354 which comes within such chapter states that 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, the special reasons for such sentence. The provision of section 354(3) of Cr.P.C. must be read conjointly with section 235(2) of Cr.P.C. Special reasons can only be validly recorded if an effective opportunity of hearing contemplated under section 235(2) of Cr.P.C. is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence. Except in 'rarest of rare cases' and for 'special reasons', death sentence cannot be imposed as an alternative option to the imposition of life sentence.

In the case of **Satish** (supra), it is held that the principle of proportion between crime and punishment is a principle of just deserts that serves as the foundation of every

criminal sentence that is justifiable. The relevant paragraphs are reproduced below:-

> "29. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just deserts as the basis of punishment and create cases of apparent injustice that are serious and widespread.
>
> 30. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in

> fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences."

In the case of **Vasanta Sampat Dupare** (supra), it is held as follows:-

> "20. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts."

In the oft-quoted decision of **Bachan Singh** (supra) and **Machhi Singh** (supra), the Hon'ble Supreme Court held that

life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be inadequate punishment having regard to the relevant circumstances of the crime. 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. The law laid down in **Bachan Singh** (supra) requires meeting the standard of 'rarest of rare' for award of the death penalty which requires the Courts to conclude that the convict is not fit for any kind of reformatory and rehabilitation scheme.

In the case of **Santosh Kumar Satishbhushan Bariyar -Vrs.- State of Maharashtra reported in (2009) 6 Supreme Court Cases 498**, it is held that life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the rarest of rare doctrine, the Court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the Court

focuses on the circumstances relating to the criminal, along with other circumstances.

In the case of **Mofil Khan and Ors. -Vrs.- The State of Jharkhand reported in (2021) 20 Supreme Court Cases 162**, it is held that the possibility of reformation and rehabilitation of the convict is an important factor which has to be taken into account as a mitigating circumstance before sentencing him to death. There is a bounden duty cast on the Courts to elicit information of all the relevant factors and consider those regarding the possibility of reformation, even if the accused remains silent.

During course of argument, we enquired specifically from the learned State Counsel as to whether there is any criminal antecedent against the appellant, whether there is anything adverse against the conduct of the appellant during his detention in jail custody, to which he answered in negative. It is not disputed that the appellant is a married person and having children. No material has been produced before us by the learned State counsel that there is no possibility of reformation and rehabilitation. *'Every saint has a past and every sinner has a future'* - strikes a note of reformatory potential even in the most ghastly crime. Human endeavour should be to hate the sin and

not the sinner. There is still life in life sentence and only death in death sentence. Therefore, we are not inclined to impose death sentence for the offence under section 302 of I.P.C. particularly when we have acquitted the appellant of the charges under section 376-AB of I.P.C. so also section 6 of the POCSO Act.

Accordingly, while confirming the conviction of the appellant under section 302 of I.P.C., we commute the death sentence imposed on the appellant to life imprisonment with a rider that he shall undergo minimum sentence of twenty years and if any application for remission is moved on his behalf, the same shall be considered on its own merits only after he has undergone actual sentence of twenty years. If no remission is granted, it goes without saying that as laid down by the Hon'ble Supreme Court in the case of **Gopal Vinayak Godse -Vrs.- State of Maharashtra reported in A.I.R. 1961 S.C. 600**, the sentence of imprisonment for life shall mean till the remainder of his life.

12.2. **Sentence for the offence under section 354 of I.P.C.**:

So far as the offence under section 354 of I.P.C. is concerned, taking into account the age of the deceased which was about six years at the time of occurrence, the manner in which she was found on the school verandah in a nude condition

with injuries, we impose the maximum sentence of five years provided for such offence on the appellant and also direct him to pay a fine of Rs.10,000/- (rupees ten thousand), in default, to undergo further R.I. for six month for such offence.

12.3. **Sentence for the offence under section 363 of I.P.C.**:

The sentence awarded by the learned trial Court for the offence under section 363 of I.P.C. i.e. to undergo R.I. for a period of seven years and to pay a fine of Rs.20,000/- (rupees twenty thousand), in default, to undergo further R.I. for one year, stands confirmed.

All the substantive sentences awarded to the appellant are directed to run concurrently. In case of realization of fine amount, the same shall be disbursed to the parents of the deceased.

Victim Compensation:

13. The learned trial Court has observed in the judgment that for the purpose of the provision under section 357-A of Cr.P.C., the matter be referred to the District Legal Services Authority, Cuttack for consideration of awarding compensation to the victim and accordingly sent the extract of the order to the District Legal Services Authority, Cuttack for information. State of Odisha in exercise of powers conferred by the provisions of

section 357-A of Cr.P.C. has formulated Odisha Victim Compensation Scheme, 2017. If the compensation amount has not yet been disbursed to the parents of the victim, the District Legal Services Authority, Cuttack shall take immediate steps to pay the appropriate compensation within four weeks from today.

14. Accordingly, Death Sentence Reference is answered in negative. Criminal appeal is allowed in part.

Before parting with the case, we would like to put on record our deep appreciation to Mr. Ramanikanta Pattanaik and Mr. Bikash Chandra Parija, learned counsel for the appellant for the preparation and presentation of the case and assisting the Court in arriving at the decision above mentioned. This Court also appreciates the extremely valuable assistance provided by Mr. Janmejaya Katikia, learned Addl. Govt. Advocate.

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S.K. Sahoo, J.

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R.K. Pattanaik, J.

Orissa High Court, Cuttack
The 6th May 2024/M.K.Rout/RKMishra/Sipun