

(2003) 02 BOM CK 0007

In the Bombay High Court

Case No : Confirmation Case No. 1 of 2002 with Criminal Appeal No. 625 of 2002 alongwith Criminal Appeal No. 625 of 2002 with Confirmation Case No. 1 of 2002

The State of Maharashtra

APPELLANT

Vs

Amit @ Ammu Gandhi

RESPONDENT

Date of Decision : 04-02-2003

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 164, 354, 413, 454
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 299, 302, 354, 376, 402
Terrorist and Disruptive Activities (Prevention) Act, 1987 — Section 22

Citation : (2003) 2 ALD(Cri) 56 : (2003) BomCR(Cri) 1242 : (2003) 105 BOMLR 7

Hon'ble Judges : S.T. Kharche, J;D.D. Sinha, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

D.D. Sinha, J.—Heard Mrs. Bharti Dangre, learned Additional Public Prosecutor for the appellant-State of Maharashtra and Mr. M.R. Daga, learned Counsel for the respondent in Confirmation Case No. 1 of 2002. as well as Mr. M.R. Daga, learned Counsel for the appellant and Mrs. Bharti Dangre, learned Additional Public Prosecutor for the respondent - State of Maharashtra in Criminal Appeal No. 625 of 2002.

2. The Confirmation Case No. 1 of 2002 as well as Criminal Appeal No. 625 of 2002 filed by the appellant raises common questions of law and fact and, therefore, they were heard together and disposed by this common judgment.

3. The circumstances, which have given rise to the prosecution of the accused Amit alias Ammu Gajanan Gandhi, in nutshell, are as follows :-

Dilip Ramdas Vaidya (P.W. 5) along with his wife Chitra Dilip Vaidya (P.W. 10) and

two children were residing in Nandanwan locality of Nagpur, The deceased Pratiksha was eleven years of age at the time of her death, and was the youngest child in the family. Pratikshit was fifteen years of age and is the elder brother of deceased Pratiksha. Both the children were taking education in schools. The deceased was studying in VIth Standard in Shishu Dnyan Mandir, Nagpur. The accused is also a resident of the same locality, and occasionally used to visit the family of the deceased, since both families were knowing each other. Dilip Vaidya, the father of the deceased, was employed as a Peon in the Regional Research Centre, Nagpur, and Gajanan Gandhi, the father of the accused, was his colleague.

4. On the morning of 28th March 2001 Dilip Vaidya (P.W. 5) dropped his daughter Pratiksha to her school at about 7.30 a.m. The school hours were till 12.30 p.m., and, therefore, the deceased Pratiksha normally used to return home from her school between 12.30 p.m., to 1.45 p.m.. On 28.3.2001, she did not return home till 4.00 p.m., and, therefore, her mother informed her father Dilip Vaidya (P.W. 5) on phone about their daughter having not returned home till that time. On receiving the information, Dilip Vaidya rushed to his house and after collecting the information from his wife, immediately went in search of his daughter Pratiksha and tried his best to locate her. However, in spite of his best efforts, he could not trace his daughter Pratiksha and, therefore, on the same day he lodged a report about missing of his daughter with Sakkardara Police Station. The Police Station Officer conveyed the said information to all the Police Stations in the district. On 29.3.2001, in the evening hours. Dilip Vaidya (P.W. 5) got information from the police that a body of a girl aged about 10/11 years is found in the deserted place near forest area. Koradi Police asked Dilip Vaidya (P.W. 5) to accompany them to the spot where he identified that the dead body of the girl was that of his daughter Pratiksha. Since there were injuries noticed on the person of the deceased, it was evident that her death was neither natural, nor it was accidental and, therefore, an offence punishable u/s 402 of the Indian Penal Code came to be registered against an unknown person. During the course of investigation, it was transpired from the material collected that the deceased was also subjected to sexual intercourse before her death and, therefore, a charge u/s 476 of the Indian Penal Code was also added. Another aspect of the prosecution case is that Gunwanta Balkrishna Khakhe (P.W. 1) and Ajay Santoshrao Thakre (P.W. 11) had seen the deceased alongwith the accused Amit in the remote area near Koradi Temple on 28.3.2001 at about 2.30-3.00 p.m., The prosecution witnesses accosted them and enquired about their names and addresses and relationship with each other and advised them not to move around in such a remote and deserted area and further advised them to proceed to Koradi temple where their parents were expected to arrive, as informed to these witnesses by the accused.

5. It is the case of the prosecution that on the next day, i.e. on 29th March, 2001, when Gunwanta (P.W. 1) took his cattle for grazing in the same forest area and when he went inside the dilapidated and deserted house located in that area,

in order to drive away the cattle from that place, he was shocked to see a dead body lying in one of the rooms. He noticed the school uniform on the person of the deceased and undergarments were lying by the side of the dead body of the deceased and injuries were also seen on her person. Gunwanta (P.W. 1) and Ajay (P.W. 11), therefore, rushed to the Police Outpost to inform the police about the dead body of a female child lying in the deserted area. Police Immediately accompanied them and went to the spot. Two female Panchas were called and the inquest Panchanama was drawn. Gunwanta (P.W. 1) lodged a report about the incident which is at Exh. 28. Police Inspector Balasaheb Mahadevrao Deolkar (P.W. 19) of Koradi Police Station took charge of the investigation. Panchanama of the spot was drawn. Sample of blood-stained earth from the spot was seized and Panchanama was drawn. Underwear was also seized. It was transpired in the course of investigation that the deceased was seen with the accused on the previous day i.e. on 28.3.2001, by witnesses Gunwanta (P.W. 1) and Ajay (P.W. 11) in the Reserved Forest area of Koradi, and the dead body of the girl was found with injuries on her person, including that on her private parts. Post-mortem Notes reveal that there was a fracture of thyroid cartilage caused by strangulation, and there were injuries on the private part of the deceased indicating a case of forcible rape and, therefore, a charge u/s 476 of the Indian Penal Code was added against the accused. During the course of investigation, there is a recovery of text books, note books, compass boxes of the deceased and all these articles were identified by the mother of the deceased Chitra Vaidya (P.W. 10). Since the description of the accused was disclosed by Gunwanta (P.W. 1) to the Investigation Officer, the accused was arrested by Police Inspector Deolkar (P.W. 19). Incriminating articles were seized at the instance of the accused u/s 27 of the Evidence Act. Statements of the witnesses of the locality who had seen the accused burning the school bag and its belongings on the Nehru Playground were also recorded. Opinions of the Chemical Analyser on various aspects were also obtained and after completion of investigation, a charge-sheet came to be presented before the Criminal Court.

6. The charges under Sections 302, 376 of the Indian Penal Code came to be framed against the accused and were read over and explained to the accused, to which he pleaded not guilty, raising a defence of total denial and of a false implication by the prosecution at the hands of the victim's family, and claimed to be tried. The prosecution in all examined 19 witnesses in order to establish and prove the charges of rape and murder against the accused, However, the accused himself did not adduce any evidence in his defence.

7. Mr. Daga, learned Counsel for the appellant-accused, contended that the evidence of the prosecution does not prove the prosecution case either for an offence punishable u/s 402, or Section 376 of the Indian Penal Code, against the appellant and, therefore, the appellant is entitled for acquittal. In order to support the above referred contention, learned Counsel for the appellant assailed the finding of conviction recorded by the Trial Court on the following grounds :-

8. It is contended by Mr. Daga that the prosecution in the instant case failed to establish the exact time of death of the deceased. It is submitted that medical evidence as well as other evidence brought on record by the prosecution is totally silent in this regard and, therefore, time of death has not been established and proved by the prosecution. It is contended that in absence thereof, it is not possible to infer that the death of the deceased occurred between 28.3.2001 and 29.3.2001, It is contended that there is no evidence to show what had happened from 3.00 p.m. on 28.3.2001 till 3.00 p.m. on 29.3.2001 when the dead body of the deceased was alleged to have been found. It is contended that in absence of any evidence in this regard, it is highly unsafe to connect the accused with the crime in question.

9. Mr. Daga further argued that Gunwant (P.W. 1) is a resident of Dhanegaon, which is about 10 kilometers from the spot of incident and, therefore, it is not possible for him to bring his cattle for grazing near the spot of occurrence. It is also unnatural that Ajay (P.W. 11) met Gunwant (P.W. 1) on both the days, i.e. on 28.3.2001 and 29.3.2001 and both of them are alleged to have seen the accused and the deceased on 28.3.2001 at about 3.00 p.m. as well as dead body of the deceased on 29.3.2001. It is contended that both these witnesses are chance witnesses and their testimonies, therefore, cannot be relied on, particularly because coincidence of meeting of both these witnesses on these two days being unnatural, creates a doubt about their testimonies and these witnesses are, therefore, got up witnesses and cannot be relied on. It is contended that these are the only two witnesses examined by the prosecution on the point of deceased last seen alive with the accused on 28.3.2001" and if their evidence is suspicious, it needs to be excluded from consideration. Thus, there is no evidence to connect the accused with the crime in question. It is contended that the Trial Court has given undue weightage to this aspect of "last seen". However, the evidence of these two witnesses becomes doubtful for the above referred reasons and ought not to have been relied by the learned Trial Court and the same cannot be believed. Mr. Daga contended that even if it is presumed for the sake of arguments that the deceased was last seen alive with the accused on 28.3.2001, that does not either connect the accused with the crime in question, nor an inference can be drawn that the accused is the author of the crime. It is contended that the circumstances of "last seen together" does not, by itself, necessarily lead to the inference that it was the accused who committed the crime and there must be something more to establish the nexus between the accused and the crime. It is further contended that merely because the dead body of the deceased was found near the place where deceased was last seen with the accused though may create a suspicion about involvement of the accused for want of appropriate explanation by the accused in this regard, however, that suspicion cannot take place of legal proof and unless and until there are other corroborative circumstances on record, this circumstance in that sense is not incriminating. In order to support the contention, reliance is placed on the judgment of the Apex Court in Mohibur Rahman and Another Vs. State of

Assam,

10. Mr. Daga, learned Counsel for the appellant, vehemently argued that the discovery made by the accused and seizure of articles of the deceased from Roshan Ramesh Rao Hiwarekar (P.W. 13) does not support the prosecution. It is contended that Roshan (P.W. 13) has not supported the prosecution and, therefore, the Public Prosecutor was required to cross-examine this witness. However, the material extracted in the cross-examination of this witness by the State is also of no use, since the articles seized from him were not shown to him before the Court for identification and, therefore, the evidence of this witness is of no consequence to the prosecution and the prosecution failed to prove that the articles, which were seized from this witness, were that of the deceased girl.

11. Mr. Daga further states that Ramji Gopiram Sahu (P.W. 4) examined by the prosecution to prove the Panchanama (Exh. 39) in respect of articles seized from Roshan (P.W. 13) has also turned hostile and, therefore, the Seizure Panchanama in respect of articles, such as text book, ball pen, pencil, compass box loses its authenticity and cannot be relied on. It is further contended that similar is the case in respect of discovery alleged to have been made by the accused u/s 27 of the Evidence Act. It is submitted that in the statement of the accused (Exh. 35), the accused has disclosed that he had thrown the school bag of the deceased beyond the wall at the central place and the bag sank in water. Though search was carried out pursuant to the disclosure made by the accused at that place, however, nothing was found and, therefore, on 31.3.2001, the accused again made a statement reiterating his earlier Memorandum of Discovery, dated 30.3.2001, and stated that he had burnt the school bag in the wire compound which is in the wall compound of the office of Corporation situated near his house. The said statement is at Exh. 37. It is contended that though pursuant to the statement some burnt ashes of the school bag were recovered at the instance of the accused as well as a plastic scale, iron hooks of the bag were also recovered, however, Purushottam Manohar Sahu (P.W. 3), who is examined by the prosecution to prove Exhs. 35, 36, 37, 38 and 39, has turned hostile and did not support the prosecution and, therefore, the evidence in this regard does not either support the prosecution or corroborates the material particulars of the prosecution case.

12. Mr. Daga, learned Counsel, further contended that the post-mortem was conducted on the dead body of the deceased on 30.3.2001 by Dr. A.A. Mukherjee and in the said Post-Mortem Examination Report, the doctor has given description of the injuries suffered by the deceased in Column No. 15 of the said report and as per the description given by the doctor, injury Nos. 1, 2, 3 and 4 were the fresh injuries, which indicate, that these injuries may have been caused to the deceased within a period of six to seven hours prior to the time of post-mortem examination. It is contended that on the basis of this aspect, it is not possible to hold that these injuries must have been caused to the deceased between 3.00 p.m., on 28.3.2001 and 3.00 p.m. on 29.3.2001, as alleged by the

prosecution and, therefore, the prosecution failed to connect the accused with the crime in question and falsifies the claim of the prosecution that the murder of deceased was committed about forty-eight hours prior to the post-mortem examination. It is further contended that the doctor has not given the age of the injuries and in absence thereof, it will be highly unsafe to hold that the deceased died due to injuries caused to her between 3.00 p.m., on 28.3.2001 and 3.00 p.m. on 29.3.2001. It is contended that the prosecution failed to prove all these vital aspects in order to fix the time of death and, therefore, the accused cannot be held responsible merely on the aspect of last seen.

13. Mr. Daga, learned Counsel for the appellant, also criticized the evidence of identification parade conducted by the prosecution. The learned Counsel contended that there is a material discrepancy in the evidence of Gunwanta (P.W. 1) as well as Ajay (P.W. 11) and Ramesh Ramchandra Sukhdev (P.W. 9), Executive Magistrate, and Panch Witness - Bhimrao Shyamrao Wagh (P.W. 8) in regard to the date on which the identification parade had taken place and, therefore, the evidence of identification parade held on 17.4.2001 by the Executive Magistrate - Ramesh (P.W. 9) is doubtful and it is further not clear as to whether Gunwanta (P.W. 1) and Ajay (P.W. 11) had really identified the accused on 17.4.2001 in the Test Identification Parade as alleged by the prosecution. The learned Counsel, therefore, contended that this discrepancy affects the evidence of the prosecution,

14. Mr. Daga, learned Counsel, further contended that it has come in the evidence of Investigating Officer Deolkar (P.W. 19) that a wide publicity was given to the incident in question in the newspapers and the photograph of the accused was also published. It is, therefore, contended that since the photograph of the accused was published in the newspapers, the identification parade loses its evidentiary value and cannot be relied on. In order to support his contention, reliance is placed on the judgments of the Apex Court in Ravindra @ Ravi Bansi Gohar Vs. The State of Maharashtra and Others, and Vijayan @ Rajan Vs. State of Kerala,

15. Mr. Daga, learned Counsel for the appellant, further contended that there are no spermatozoa or stains of semen found on the clothes of the deceased or the accused. Similarly, no injuries are found on the private part of the accused and, therefore, as far as charge u/s 476 of the Indian Penal Code is concerned, there is nothing on record to show that the accused had committed a forcible sexual intercourse with the deceased. Mr. Daga, therefore, contended that the entire prosecution case is based on the so called circumstance of the deceased last seen alive with the accused on 28.3.2001 by Gunwanta (P.W. 1) and Ajay (P.W. 11), and even if it is presumed for the sake of argument that the prosecution though proved this fact of last seen, conviction for the offence u/s 402 of the Indian Penal Code or for a rape u/s 476 of the Indian Penal Code cannot be awarded since the prosecution failed to complete the requisite chain in order to hold the accused guilty for the offences charged. In order to substantiate this

contention, reliance is placed on the judgments of the Apex Court in Joseph s/o Kooveli Poulo v. State of Kerala 2000 (2) Crimes 230 (SC) : (2000) 3 L.R.I. 547 and Mohibur Rahman and Another Vs. State of Assam,

16. Mr. Daga, learned Counsel, further contended that in a case of circumstantial evidence, the circumstances on which the prosecution relied must be consistent with the sole hypothesis of guilt of the accused and the judgment must show that the finding of guilt has been reached after a proper and careful evaluation of circumstances in order to determine whether they are not compatible with any other reasonable hypothesis except guilt of the accused. In order to substantiate this contention, reliance is placed on the judgments of the Apex Court in Shankarlal Gyarasilal Dixit Vs. State of Maharashtra, ; Sharad Birdhichand Sarda Vs. State of Maharashtra, and Kanhai Mishra @ Kanhaiya Misar Vs. State of Bihar, Mr. Daga, therefore, contended that the prosecution has failed to prove the prosecution case against the accused for the offences of murder and rape and, therefore, the finding of conviction recorded by the Trial Court for these offences is unsustainable in law.

17. Mr. Daga, learned Counsel, alternatively contended that if this Court holds the accused guilty for the offences of murder and rape, then the punishment of death awarded by the Trial Court cannot be sustained, since the present case is not of the rarest of rare kind and as per the ratio laid down in the case of Bachan Singh Vs. State of Punjab, the number of mitigating circumstances are much more than the aggravating circumstances and, therefore, the accused, at the most, can be convicted for imprisonment for life. In order to show that the case in hand is not of the rarest of rare kind, reliance is also placed on the judgments of the Supreme Court in Machhi Singh and Others Vs. State of Punjab, Ronny @ Ronald James Alwaris Etc. Vs. State Of Maharashtra, , Mohd. Aslam Vs. State of Maharashtra, .

18. Mrs. D.H. Dangre, learned Additional Public Prosecutor, on the other hand, vehemently argued that the prosecution has, in fact, brought on record all the relevant and material circumstances which not only connect the accused with the crime in question, but proved the case against the accused beyond all reasonable doubts for the offences charged. Learned A.P.P., further contended that the present case is of the rarest of rare kind and, therefore, the Trial Court is justified in awarding death penalty to the accused.

19. Learned Additional Public Prosecutor contended that in the instant case deceased Pratiksha, at the relevant time, was eleven years of age and was the resident of Mire Layout of Nandanwan locality in Nagpur City. She was studying in VIth Standard in Shishu Dnyan Mandir, Nandanwan, Nagpur. It is contended that on 28th March, 2001, her father Dilip Ramdas Vaidya (P.W. 5) dropped her in the school around 7.30 a.m., and the deceased normally used to return home around 12.00 noon after the school hours are over. It is contended that this fact has been proved by Dilip Vaidya (P.W. 5) in his evidence. It is further contended that at about 4.00 p.m. on the same day, he received a telephonic call from his

wife Mrs. Chitra Dilip Vaidya (P.W. 10), who informed him that their daughter deceased Pratiksha did not return home. Dilip Vaidya, therefore, went home. He and his wife immediately thereafter went in search of their daughter Pratiksha. They could not trace her. They went to her school and made enquiry with the class teacher. However, they could not trace Pratiksha till evening and, therefore, Dilip Vaidya lodged a report with Sakkardara Police Station about missing of his daughter. It is contended that on 29th March, 2001, Police came and informed Dilip Vaidya (P.W. 5) that one dead body of a girl was found in Koradi and he was asked to accompany them for the purpose of identifying the dead body of the girl. The spot where the dead body was found was behind Koradi Temple and the body of the girl was lying in the deserted house. Dilip (P.W. 5) identified the dead body that of his own daughter. The Additional Public Prosecutor contended that the evidence of Dilip (P.W. 5) shows that the deceased Pratiksha went to the school in the morning and did not return home and, therefore, he lodged a report (Exh. 78) with Sakkardara Police Station about missing of his daughter. This is the first circumstance which shows that the deceased went to the school and did not return home after the school hours.

20. The Additional Public Prosecutor further contended that the important evidence is that of Gunwant (P.W. 1) and Ajay (P.W. 11), who have last seen (he deceased alive with the accused on 28.3.2001. It is contended that evidence of these two witnesses shows that Gunwant (P.W. 1) is the owner of a dairy and was having livestock which consisted of cows and buffaloes. Gunwant had taken his cattle for grazing in the forest behind Devi Temple and at the relevant time his friend Ajay Thakre (P.W. 11) had accompanied him. These people had seen one deserted house in the forest area known as "Phutki Building" and his cattle were grazing near and around the said deserted house. Both these witnesses found a dead body of a girl lying in one of the rooms who had a school uniform on her person and of about 10 to 11 years of age. Both these witnesses thereafter went to Koradi Police Station and lodged an oral report (Exh. 28), which was signed by Gunwant (P.W. 1). It is contended that in the said report it has been specifically stated that the girl, whose dead body was found on the spot, was seen by them on 28.3.2001 under the tree in the forest in Gaimukh pasture area along with one boy aged about 20 years with her school bag. It is also stated in the said report that the boy had a black complexion and there was a blackish scar of an injury on the upper portion of the left cheek near the eye of the said boy. The boy had put on a Jeans full pant and a "T" shirt on his person and he had a bicycle which looked like that of a Ranger-make. The report further reveals that both these witnesses asked the said boy his name, to which he told them that his name was "Gandhi". The boy also informed them the name of the girl who was with him as "Vaidya" and told these witnesses that she was his sister, and also informed that as her family members were going to come to Devi Mandir, he had brought her directly from the school. The oral report (Exh. 28) further reveals that both these witnesses brought the accused and the deceased at about 2.30-3.00 o'clock upto the road and asked them to go.

21. The Additional Public Prosecutor further contended that the evidence of Pratikshit Dilip Vaidya (P.W. 6) reveals that the accused Amit came to his house in the afternoon on the fateful day and enquired about his sister, i.e. deceased Pratiksha. This witness has identified the accused in the dock. The accused also has not disputed this aspect in his examination u/s 413 of the Criminal Procedure Code, which can be seen from the answer given by the accused to Question No. 20. Similarly, the accused has also not disputed the fact that he was on visiting terms with the family of the deceased. The circumstances of accused visiting the house of the deceased proved by Pratikshit (P.W. 6) is the second circumstance in the chain of circumstances which goes to show that the accused was trying to contact the deceased on the fateful day.

22. The Additional Public Prosecutor contended that the evidence of both these witnesses is consistent in respect of the fact that both of them have last seen the deceased alive with the accused on 28.3.2001 at about 2.30-3.00 p.m., in the forest behind the Mandir where there is a deserted house located and on 29.3.2001 around 2.00 p.m., they have seen the dead body of the same girl in the deserted house. The report (Exh. 28) is lodged by Gunwant (P.W. 1) immediately in the Koradi Police Station and all these material particulars are mentioned in the said report. It is, therefore, contended that in the instant case the circumstance of "last seen" is not only second in the chain of circumstances, but the evidence of Gunwant (P.W. 1) and Ajay (P.W. 11) virtually unfolds various material factors of the prosecution case such as identity of the accused, name of the accused, identity of the girl, name of the girl, the obvious ill-intention of the accused who had brought the girl from the school in a deserted place which is 8-10 kilometers away. It is, therefore, submitted that the evidence of Gunwant (P.W. 1) and Ajay (P.W. 11) need not be seen only from the point of view of evidence on circumstance of "last seen" and it needs to be considered in its right perspective, which proves many other links in the chain of circumstances proved by the prosecution.

23. The Additional Public Prosecutor further contended that the fact of accused taking the deceased to a remote and deserted place demonstrates the motive of the accused. It is contended by Additional Public Prosecutor that the place where deceased and accused were last seen together by Gunwant (P.W. 1) and Ajay (P.W. 11) is a place which is isolated, deserted and lonely and, therefore, the accused cannot be said to have any other motive, but to take undue advantage of the defenceless lonely child. It is, therefore, contended that in the present case the prosecution has succeeded in demonstrating the fact of motive of committing the crime in question by the accused.

24. The Additional Public Prosecutor further contended that in the instant case the important circumstance proved by the prosecution in order to establish the identity of the accused is the Identification Parade conducted by Rameshchandra Sukhdev (PW. 9), the Executive Magistrate. Gunwant (P.W. 1) and Ajay (P.W. 11) identified the accused in the Identification Parade in the presence of a panch

witness Bhimrao Shyamrao Wagh (P.W. 8). It is contended that this is a very important piece of evidence and a relevant circumstance. Similarly, the discrepancy in the evidence of these witnesses in respect of the date of holding of identification parade is not a material discrepancy. It is further contended that merely because the Investigating Officer has stated in his evidence that the photograph of the accused was published in the newspapers, does not affect the evidentiary value of the identification parade. In order to substantiate this contention, reliance is placed on the judgment in *Sajeevan and Vs. Kerala State*, It is further contended that the witnesses have identified the accused in the Court which is a substantive evidence and is a corroborative circumstance. In order to substantiate this contention, reliance is placed on the Judgments of the Apex Court in *Umar Abdul Sakoor Sorathia Vs. Intelligence Officer, Narcotic Control Bureau*, The Additional Public Prosecutor also contended that even non-holding of identification parade is not fatal to the proscription and to support this contention reliance is placed on the judgment of the Apex Court in *Harbajan Singh Vs. State of Jammu and Kashmir*,

25. The Additional Public Prosecutor further contended that in the instant case the Post-Mortem Examination Report of the deceased Pratiksha, dated 30.3.2001 (Exh. 57), shows external injuries as mentioned in Column 15, which are thus :-

Exhibit 58 is the requisition sent by Police Sub-Inspector. Police Station, Koradi, to the L.M.J., Mayo Hospital, Nagpur, for getting an opinion as to whether rape was committed on the deceased or not. Exhibit 59 is the opinion expressed by the doctor In this regard which shows that the possibility of commission of rape on the deceased girl cannot be ruled out and the deceased was capable of undergoing a sexual intercourse and on account of rape, she sustained injuries on her private part including rupture of hymen. Similarly, Exh. 60 is the requisition again sent by the Police Officer to the L.M.J., Mayo Hospital for seeking an opinion of the doctor In respect of the fact that the stone, which was seized from the spot of occurrence and the Injury on the head of the girl as mentioned in the Post-Mortem Report, can be caused by such a stone. The doctor, vide Exh. 61, has opined that the injuries over the head (Injury Nos. (2) and (3) in Column No. 17) are possible with such type of stones. It is contended that the defence has admitted these documents. It is contended that these circumstances establish beyond all reasonable doubts that the girl was sexually assaulted by the accused before committing her murder.

26. The Additional Public Prosecutor further contended that. Dr. A.A. Mukherjee, Lecturer in Forensic Medicine and Toxicology, who has performed autopsy on the dead body of the deceased, in Column 6 of the Post-Mortem Examination Report (Exh. 57), has made following observations :-

In column 7, after giving description of the apparels/school uniform found on the dead body of the deceased, the doctor noticed that there are dried blood stains over the skirt and under frock at places. In Column 13, the doctor pointed out that eyes were open and protruding out, Cornea Hazy. Pupils were dilated. Hand

was partially open. Tongue was found clenched in between teeth. Blood was oozing out from nostrils.

27. The Additional Public Prosecutor further contended that injuries found on the private part as well as wounds found on other parts of the body were ante-mortem and described in Columns 15 and 16 of the Postmortem Report. It is contended that from the above referred injuries, it is evident that as many as six injuries of a grave nature were found on the external genitals. Hymen was found torn and surface wound No. 1 described in Column No. 17 indicates ligature well fitted with ligature mark around the neck horizontal and completely encircling the neck at the level of thyroid cartilage with ligature mark reddish brown, hard, irregularly grooved. It is contended that the internal Injuries in Column No. 20 indicating injuries under scalp corresponding with external injuries 2 to 5 and while describing the conditions of thorax in the column of additional remarks, following observation is made by the doctor :-

Evidence of extroverting and infiltration of blood present in soft tissue and muscles of neck corresponding to ligature mark.

The Additional Public Prosecutor further contended that in Column No. 23, a positive opinion has been given by the doctor that the cause of death was on account of injuries described in Column No. 17 of the Note and these injuries in ordinary course of nature were sufficient to cause death of the victim. The opinion as regards the cause of death has been given as "Strangulation".

28. The Additional Public Prosecutor also contended that the nature and character of injuries found on the victim are also established by the description given in the Inquest Panchanama (Exh, 33). It is, therefore, contended that if the nature and character of the external and internal injuries pointed out by Dr. Mukherjee in the Post-Mortem Examination Report (Exh. 57) are considered, then there remains no doubt about the victim having died on account of strangulation and, therefore, the death of the deceased is homicidal as defined u/s 299 of the Indian Penal Code.

29. The Additional Public Prosecutor argued that though there are no marks of injuries noticed on the person of the accused, that is no ground to brush aside the valuable medical evidence coming in the form of above referred Exhs. 57, 58, 59 and 61. It is further contended that absence of semen in vaginal swab also does not lead to the conclusion that there is no rape committed. In order to substantiate this aspect, reliance is placed on the Judgment of the Apex Court in State of T.N. Vs. Suresh and Another, . It is contended that the above referred documents and circumstances undoubtedly prove the fact that the death of the deceased girl is homicidal and the positive opinion given by the doctor and admitted by the defence further establishes that the victim was raped before she was murdered and this is one of the important circumstances proved by the prosecution.

30. It is contended that the legality and correctness of the C.A. reports (Exhs. 51

to 56) has not. at all been disputed by the defence. As per C.A. Report (Exh. 51), the nail clippings of the deceased were found stained with blood. Similarly, C.A. report (Exh. 54) reveals that Exh. 1-Earth, Exh. 3-Half Manila, Exh. 4 Baby frock, Exh. 5-frock, Exh. 6-Handkerchief were found stained with human blood. Similarly C.A. Report (Exh. 55) reveals that the stone Exh. 1 was stained with human blood. It is contended that these findings further lend corroboration to the medical evidence on record and prove that the death of the deceased is homicidal.

31. The Additional Public Prosecutor further contended that another incriminating circumstance is that of discovery of incriminating articles at the instance of the accused u/s 27 of the Evidence Act. The evidence on the point of discovery is limited to the point of accused leading the police and Panchas to the spot, i.e. Nehru Playground in Sakkardara area and pointing out the place where he burnt the bag and its contents which came to be seized under memorandum and seizure panchanama vide Exhs. 35, 36, 38 and 39. The articles like a ball pen, sharpener, pencil, text book, pair of boxes, shoes, compass box were also produced by the accused. Those are Articles 2, 12 and 13. The Panch witness examined on this point is Purushottam Manohar Sahu (P.W. 3). However, he did not support the prosecution and turned hostile. Therefore, the only testimony, which corroborates these aspects, is that of Balasaheb Mahadevrao Deolkar (P.W. 19), i. e. the Investigating Officer. It is contended that the Investigating Officer states in his evidence that the accused while in custody made a statement in presence of Panchas that he would produce the school bag of the deceased from Koradi Tank. Accordingly, police and the Panchas went to Koradi Tank; but nothing could be fished out from the tank and Panchanamas to that effect were made which are at Exhs. 35 and 36. A further statement was made on the next day by the accused while in custody of police leading the police to the spot where the school bag and its contents were burnt by him and accordingly his memorandum (Exh. 38) was prepared and then he led the police and Panchas to the spot, i. e. Nehru Playground in Sakkardara area, and pointed out the burnt ashes, which came to be seized along with the half burnt piece of buckle of the bag, ballpen, pencil etc. It is contended that Chitra (P. W, 10), the mother of the deceased, identified the articles as belonging to the deceased. It is, therefore, contended that the criticism levied by the learned Counsel for the defence in this regard is unjustified and cannot be sustained and this again is a circumstance which is an additional link in the other circumstances already unfolded by the prosecution. The Additional Public Prosecutor, therefore, contended that the cumulative effect of all these connecting circumstances amounts to connecting the various links which would complete the requisite chain and lead to irresistible conclusion that the accused is the only person who has committed the murder of the deceased and before committing the heinous crime of murder, he had sexually assaulted the deceased to satisfy his lust and without caring for the human life and in order to save his own skin, he committed brutal, barbaric murder of the deceased by strangulating her to death. It is contended that the

prosecution has succeeded in completing the requisites chain and the only hypothesis establishes the guilt of the accused for the offences punishable under Sections 302 as well as 376 of the Indian Penal Code. In order to substantiate this contention, reliance is placed on the following cases :-

- (a) Mujeeb and Another Vs. State of Kerala,
- (b) Mohan Lal Pangasa Vs. The State of U.P.,
- (c) Umedbhai Jadavbhai Vs. The State of Gujarat,
- (d) Shankarlal Gyarsilal Dixit Vs. State of Maharashtra,
- (e) Laxman Naik Vs. State of Orissa,

32. On the point of sentence, Ms. Dangre, Additional Public Prosecutor, contended that the present case of rape and murder of a tender girl is a case which falls in the rarest of the rare category and, therefore, the Trial Court was justified in imposing the capital punishment. In order to support the contention, reliance is placed on the judgments of the Supreme Court in Kamta Tiwari Vs. State of M.P., and Machhi Singh and Others Vs. State of Punjab, . It is further contended that while imposing capital punishment even as per the parameters provided in the Judgments of Bachan Singh Vs. State of Punjab, and Machhi Singh and Others Vs. State of Punjab, a balance sheet of aggravating and mitigating circumstances has to be drawn and after evaluating the pros and cons - vis-a-vis this balance-sheet, the extreme punishment needs to be imposed on the accused in case the aggravating factors outweigh the mitigating circumstances. It is contended that in the instant case, there are hardly any mitigating circumstances and, therefore, the punishment of extreme penalty awarded by the Trial Court is just and proper. It is contended that Section 354(3), of the Criminal Procedure Code - special reasons for death factors Lehna Vs. State of Haryana, . Sentence - principle of "suspect" proportionately explained. Jagmohan Singh Vs. The State of U.P., , Ram Deo Chauhan @ Raj Nath Chauhan Vs. State of Assam, .

33. It is contended that merely because the accused is young cannot be the mitigating circumstance and that by itself does not call for a lesser sentence when the crime is heinous and barbaric Ram Deo Chauhan @ Raj Nath Vs. State of Assam, and Suresh and Another Vs. State of U.P.,

34. Rape and murder of four years" old girl prosecution case based on circumstantial evidence, circumstance of last seen - recovery of dead body evidence of test identification sufficient to convict. The case is one of rarest of rare kind. State of Maharashtra Vs. Suresh, Rarest of the rare - incriminating circumstances leading only to hypothesis of guilt of accused and unreasonably exclude every possibility of innocence Ram Deo Chauhan @ Raj Nath Chauhan Vs. State of Assam, . Rarest of the rare - calculated cold blooded murder of seven-year-old girl by her own uncle after committing rape. Laxman Naik Vs. State of Orissa, Rape and murder of a helpless and defenceless school girl of

eighteen years by security guard-penalty of death imposed by Sessions Court and High Court confirmed. Dhananjay Chatterjee alias Dhana Vs. State of W.B., Surja Ram Vs. State of Rajasthan, and Smt. Paniben Vs. State of Gujarat, . Age of the accused cannot be a mitigating circumstance Narayan Chetanram Chaudhary and Another Vs. State of Maharashtra, ; Ramdeo Chauhan alias Rajnath Chauhan and Anr. v. State of Assam,³; Amrutlal Someshwar Joshi Vs. State of Maharashtra,

35. We have given our anxious thought to the various legal and factual contentions canvassed before us by the respective counsel and with a deep sense of concern, closely and meticulously scrutinised the evidence adduced by the prosecution as well as law laid down by the Apex Court.

36. It is, no doubt, true that when a prosecution case is based on circumstantial evidence, it is obvious that there is nobody available to tell the happening of the incident, and the Courts are left to consider and decide the author of the crime on the basis of various circumstances brought on record and proved by the prosecution. It is a well settled principle in law that the prosecution has to unfold various relevant material circumstances and complete the requisite chain and the only hypothesis on the circumstances proved by the prosecution by completing the chain must result in irresistible conclusion that the accused is the perpetrator of the crime. It is, no doubt, true that each circumstance is an independent connecting link in the chain of circumstances unfolded by the prosecution. However, the importance and effect of each individual circumstance would depend upon the facts and circumstances of each case. We are well aware, as well as by now law is well settled by a series of decisions of the Apex Court in respect of standard of proof required to convict a person on a circumstantial evidence. The ultimate situation emerging from the various decisions of the Apex Court cited by Mr. Daga, learned Counsel for the appellant-accused and Mrs. Dangre, learned Additional Public Prosecutor, is that the circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be so complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which conclusion of guilt is to be drawn have not only to be fully established, but also that all the circumstances so established should be of a conclusive nature and consistent with the hypothesis of guilt of the accused and should not be capable of being explained by any other hypothesis, except the guilt of the accused and all the circumstances cumulatively taken together should lead to the only irresistible conclusion that the accused alone is the perpetrator of the crime,

37. Having regard to these principles, it will be appropriate for us to consider and examine the various circumstances brought on record and proved the guilt of the accused and whether these circumstances cumulatively taken together lead us to the only irresistible conclusion that the accused alone is the perpetrator of the crime.

38. In the instant case, in order to prove the charges of rape and murder against the accused, the prosecution has examined in all nineteen prosecution witnesses, out of whom Dilip Vaidya (P.W. 5) (father of the deceased) and Pratikshit (P.W. 6) (brother of the deceased) are examined by the prosecution to prove the fact that on 28.3.2001 the deceased was dropped to the school by Dilip Vaidya (P.W. 5) at about 7.30 a.m. Pratikshit (P.W. 6) proves the fact that the accused visited his house at about 11.30 a. m., and enquired about the deceased. The evidence of these two witnesses is important from the point of view that the deceased Pratiksha left her house at 7.30 a.m., on that day and did not return home,

39. Dilip Ramdas Vaidya (P.W. 5) in his examination-in-chief has stated that on 28.3.2001, he as usual dropped his daughter in the school around 7.30 a.m. His daughter used to return home around 12.00 noon after the school hours. He left for his office around 11.30 a.m. At 4.00 p.m., he received a phone call from his wife Chitra (P.W. 10), who informed him that their daughter did not return home from the school and he was asked to come home as early as possible. He stated in his examination-in-chief that deceased Pratiksha was his daughter and at the relevant time she was eleven years of age and studying in VIth Standard in Shishu Dnyan Mandir School, Nagpur. This witness further stated in his examination-in-chief that he rushed back home after seeking permission from his superior officer and thereafter he and his wife went in search of their daughter. They went to her school, made enquiries with the class teacher. However, they could not trace their daughter and, therefore, on 28.3.2001 in the evening Dilip (P.W. 5) went to Sakkardara Police Station and lodged a report (Exh. 78). The said report of missing was recorded by Kalyansingh Mangalsingh Rajput (P.W. 15), who was working as Police Sub-Inspector in Sakkardara Police Station. The evidence of Dilip (P.W. 5) further discloses that in the evening of 29.3.2001, police came to his house and informed him about a dead body of a girl being found in Koradi and he was asked to accompany them to identify the dead body. This witness and one Girish Joshi went along with police to the spot which was behind Devi temple at Koradi. The police took him to a deserted house where he saw the dead body of the girl and identified that the dead body was that of his daughter. The evidence of Dilip (P.W. 5) further discloses that while he was on way to Koradi from Nagpur in the police jeep, he heard information on wireless being relayed about the name of the girl being Vaidya and that of the boy Gandhi. Police enquired with him in the jeep as to whether he happened to (sic) this Gandhi. This witness told the police that one of his colleagues in his office is Mr. Gandhi. Police further asked him as to whether his colleague, namely Gandhi, was having any children. To that this witness told them that Mr. Gandhi was having two sons. This witness has further deposed that his family and the family of the accused were on visiting terms.

40. The defence has conducted a very cryptic cross-examination of this witness and the ocular testimony of this witness is not at all affected. The evidence of Dilip (P.W. 5) clearly establishes that the deceased was in the school from 7.30 a.m., onwards and there was no occasion for the family members of the

deceased to suspect that their daughter was either abducted or missing till the school hours were over, and deceased Pratiksha did not return home for quite some time even after the school hours are over. The testimony of this witness further proves that the family members of this witness were on visiting terms with the family members of the accused, which further reveals that the accused was not an unknown person and was a person very much known to the deceased and the accused was in a dominant position to persuade the deceased to accompany him because of his age and relationship with the deceased.

41. The testimony of Pratikshit Dilip Vaidya (P.W. 6) (brother of deceased) reveals that he is a boy of fifteen years of age and at the relevant time was studying in Xth Standard in Keshavnagar Madhyamik Vidyalaya. This witness has categorically deposed in his examination-in-chief that "Ammu Dada" (the accused being elder to this witness, he used to call him "Ammu Dada", i.e. elder brother) came to his house around 11.30 a.m., and made enquiry about his sister (deceased). The accused initially asked for a glass of water, enquired about parents of this witness and again enquired about the sister of this witness, i.e. the deceased. It has come in the testimony of this witness that he told the accused that his sister would return from the school in a short while. The accused thereafter left the house. This witness has identified the accused who was present in the Court. It is pertinent to note that the defence declined to cross-examine this witness and, therefore, the evidence of this witness has gone unchallenged. The testimony of this witness establishes the fact that on 28.3.2001 at about 11.30 a.m., the accused visited the house of the deceased in order to find out whether she had returned home from the school. This part of the prosecution evidence demonstrates that the accused wanted to know whether the deceased had returned home from the school and when he came to know that deceased did not come home, he immediately left the house of this witness. The conduct of the accused, in the circumstances, shows the concern of the accused to find out whether the deceased was still in the school. It is further evident from the testimony of this witness that the accused was in search of the deceased and wanted to know the whereabouts of the deceased girl. We are aware that this circumstance on its own does not necessarily lead to the conclusion that the accused had a sinister design. However, the conduct of the accused does prove that on 28.3.2001, the accused was in search of the girl and wanted to know the whereabouts of the girl at about 11.30 a.m. The evidence of this witness also proves that deceased Pratiksha did not return home from the school after school hours.

42. The prosecution has examined Gunwant Balkrishna Khakhe (P.W. 1) and Ajay Santoshrao Thakre (P.W. 11) on the point of not only "the deceased last seen with the accused on 28.3.2001 at about 3.00 p.m." but also in order to prove so many other relevant factors and circumstances of the prosecution case and, therefore, it is necessary for us to closely scrutinise this important piece of evidence adduced by the prosecution.

43. Gunwant (P.W. 1) in his testimony has deposed that he runs a dairy and had herd of cows and buffaloes. He used to take them for grazing. On 29th March, 2001 at about 2,00 p.m., he had taken his cattle for grazing in the forest area behind Devi Temple in Gaimukh area. His friend Ajay Thakre (P.W. 11) had accompanied him at the relevant time. It has come in the evidence of this witness that there was a deserted house located in the forest area known as "Phutki Building" and his cattle were grazing near and around the said deserted house. The testimony of this witness further discloses that he and his friend Ajay (P.W. 11) proceeded towards the house and when they went near that house, they found a dead body of a girl of 10 to 11 years of age lying in one of the rooms, who had a school uniform on her person. The testimony of this witness Gunwant (P.W. 1) further reveals that this witness and Ajay (P.W. 11) rushed to the Police Outpost near Devi Mandir Chowk and informed the Police about, having found a dead body of a girl in a deserted house. This witness and Ajay (P.W. 11) returned to the deserted house along with police and all of them saw the dead body. This witness thereafter went to Koradi Police Station and lodged an oral report (Exh. 28) on 29.3.2001. The ocular testimony of this witness completely corroborates the contents of oral report (Exh. 28) lodged by this witness. It has come in the evidence of this witness Gunwant (P.W. 1) that he was stated in the oral report, having seen the deceased girl along with one boy on the previous day in the forest near Gaimukh and he had asked the names of the boy as well as girl, to which he was told by the boy that his name was "Amit Gandhi" and the name of the girl was "Vaidya", and she was his paternal cousin. The accused also told Gunwant (P.W. 1) that the parents of the girl as well as his own parents were supposed to come to the temple and. therefore, he had brought the deceased Pratiksha on his bicycle. The testimony of this witness further reveals that he advised the accused as well as the deceased not to stay in that area and to proceed towards temple. The evidence of this witness further reveals that the accused and the deceased told him that they would go to the temple and wait for their parents. The cross-examination of this witness Gunwant (P.W. 1), in fact, reaffirms the story put forth by this witness in his examination-in-chief. It has come in the cross-examination of this witness that the conversation between Gunwant (P.W. 1) as well as Ajay (P.W. 11) and accused and the deceased lasted for fifteen minutes and then these witnesses reached them upto the road. This important admission in the cross-examination completely establishes and proves the fact that on 28.3.2001 at about 2.30 to 3.00. p.m., the deceased was not only last seen alive with the accused, but there was a conversation between them and these witnesses, which further lends authenticity to the fact that these witnesses had an occasion to see the accused from a very close quarter and. therefore, Gunwant (P.W. 1) could give description of the accused, including the identification mark in his report (Exh. 28), and also proves the fact that the accused told these witnesses his name as well as the name of the girl.

44. Gunwant (P.W. 1) further deposed before the Court that he had given

description of the boy who was having dark complexion with a scar near the left eye. He was having a crew cut and was having one Ranger bicycle with him. He further stated that the girl, who accompanied him, was the same whose dead body was seen by this witness as well as Ajay (P.W. 11) on the next day. He has also stated that he can identify the boy who had given his name as "Amit Gandhi" and was with the deceased. This witness has identified the accused before the Court who is the same person he had seen on the relevant day with the deceased. This witness has also identified the Article Nos. 9 and 10, i.e. the pant and shirt worn by the accused at the relevant time as well as Article Nos. 3 and 5, i.e. the school uniform and its top worn by the deceased. Gunwant (P.W. 1) has stated in his evidence that after three months he was again called by the Executive Magistrate in Central Jail, Nagpur, to identify the accused from amongst the dummies and he had identified the accused in the parade. There were about eight to ten dummies. He has proved the memorandum (Exh. 30).

45. It will be appropriate to consider the evidence of Ajay (P.W. 11), who is also examined on the point of "deceased last seen with the accused" and also demonstrates other vital factors and many other circumstances are emerging from his testimony.

46. Ajay (P.W. 11) deposed before the Court that Gunwant (P.W. 1) is his friend. Ajay though is a native of village Beenamod Dhanegaon and since the year 2001 he was residing at village Koradi. On 28th March, 2001, he had gone to meet his friend Gunwant and was with him. In the afternoon he along with Gunwant (P.W. 1) went to graze his cattle in the forest area. He and his friend, i.e. Gunwant, noticed one boy and a girl sitting in the bushes. This witness identified the accused present before the Court to be the same boy. The girl was aged about 8/10 years and had a school uniform on her person as well as a school bag. They were having one Ranger Bicycle with them. He identified the bicycle (Art. No. 26) before the Court.

47. The testimony of Ajay (P.W. 11) further reveals that he and Gunwant (P.W. 1) asked the accused and the deceased as to what they were doing in that place? They told these witnesses that their parents are coming to temple and they are waiting for their arrival. The boy gave his name as "Gandhi" and the girl gave her name as "Vaidya". The boy told that the girl is his sister. This witness asked them to leave that place and brought them upto the road. The boy and the girl then went away. Ajay (P. W. 11) further deposed in his testimony before the Court that on the second day around 3.00 p.m., when his friend Gunwant (P.W. 1) went to bring his cattle, he found a dead body of a girl in the deserted house. Gunwant (P.W. 1) told this witness about it and thereafter both of them went to Police Chowky. Thereafter all these persons went to the spot again with police and informed the police that the girl, whose dead body was found, was seen alive with one boy on the previous day. They went to Police Station for lodging a report and Gunwant (P.W. 1) lodged the report of the incident. This witness has stated that on the next day he was called for identification in the Central Jail,

Nagpur and he was asked to identify the accused from amongst ten dummies. This witness identified the accused. A memorandum in this regard is at Exh. 30, which is proved by this witness. The cross-examination of this witness is extremely cryptic and innocuous. The evidence of this witness has virtually gone unchallenged. The only thing, which is brought in the cross-examination by the defence, is that distance between Dhanegaon and Gaimukh is ten kilometers. The testimonies of both these witnesses (P.Ws. 1 and 11) establish that on 28.3.2001, these witnesses have seen and met a boy of about twenty years of age along with a girl often to eleven years of age in the secluded and remote area of forest known as "Gaimukh Pasture". The name of the boy was "Gandhi" and that of the girl was "Vaidya". The boy was of a black complexion having blackish scar of an injury on the upper portion of left cheek near the eye and they have found the dead body of the same girl in the vicinity of the said area on 29.3.2001. Both these witnesses identified the boy in the identification parade as well as in the Court as the same boy whom they had seen on 28.3.2001 with the deceased Pratiksha. The testimonies of these witnesses, therefore, cannot be restricted and appreciated only from the point of view of circumstance of deceased last seen alive with the accused", but will have to be considered and appreciated from the point of view of various other factors and links which emerge from testimonies of these witnesses which systematically and step by step provide and establish quite a few other circumstances, cumulative effect of which has a positive bearing in completing the requisite chain to be established by the prosecution.

48. The circumstance of "deceased last seen with the accused" is, no doubt, an important circumstance and in the normal set of facts, it may not be able to establish more than the fact that the deceased was last seen alive with the accused. However, this circumstance of "last seen" needs to be considered in the context of the facts and circumstances brought on record and proved by the prosecution in each case and the evidentiary value and the effect thereof would differ from case to case and, therefore, It is difficult to generalise the proposition of law in this regard and to establish a common yardstick to evaluate the evidentiary value of this circumstance of "ast seen". In a given case, the circumstance of "last seen" with the accused" may convey and establish much more than the fact that the deceased was merely last seen with the accused before death. The appreciation of this piece of evidence depends upon various factors, such as the place where deceased was last seen alive together with the accused, circumstances in which the deceased was seen, the situation and location where the deceased was last seen and the surrounding circumstances which were prevalent at such time. Similarly, the place where the dead body of the deceased was found and the place where the deceased was last seen with the accused also has a positive bearing in unfolding the material particulars of the prosecution case. It must be borne in mind that the above referred each individual factor has many dimensions and is capable of conveying a different and a separate message. It is, therefore, unsafe to hold that the circumstance of

deceased last seen with the accused" conveys only a restrictive meaning that the deceased was merely last seen alive with the accused.

49. It must be borne in mind that in a given set of circumstances, this circumstance is capable of virtually unfolding many vital links which would prove many material particulars of the prosecution case. It is, therefore, necessary to appreciate this aspect of the prosecution case from these points of views and then it will be proper and possible to come to a definite conclusion, to what extent this circumstance proves and connects the accused with the crime in question,

50. In order to propagate this proposition in a more eloquent manner, we feel it necessary to give a hypothetical example in this regard. Suppose the accused and the deceased who are known to each other, are the residents of the same locality and the deceased was last seen alive with the accused in the same locality and the dead body was found after a couple of days in a place which is at a distance of about 8 to 10 kms. away from the place where deceased was last seen together with the accused. In a situation like this, the fact of deceased last seen together with the accused" may not convey more than the fact that the deceased was last seen together with the accused, which is rather normal and not unusual, since both of them were residents of the same locality and were knowing each other. Similarly, it does not travel further to create a situation which would show that the accused had an oblique motive or had a sinister design in his mind. Similarly, finding of a dead body of the deceased about ten kilometers away from the place of last seen also does not necessarily" show that the accused had something to do with the crime unless there are other corroborative circumstances brought and proved by the prosecution to establish an independent nexus between the accused and the crime.

51. However, in the instant case, the circumstance of deceased last seen alive with the accused", in view of the factors referred to hereinabove, virtually corroborates many material particulars of the prosecution case and is capable of providing many links in the chain of circumstances. The evidence of two witnesses, namely Gunwant (P.W. 1) and Ajay (P.W. 11) reveals that the deceased was a female child of eleven years of age and a resident of Mire Layout, Nagpur. The accused is also a resident of the same locality. Families of deceased and accused were known to each other and as per the evidence of Dilip Vaidya (P.W. 5) (father of the deceased), the deceased was dropped in her school at about 7.30 a.m., on 28.3.2001. The deceased thereafter for the first and last time was seen alive with the accused at about 2.30 p.m., at a place which is admittedly eight to ten kilometers away from the place of their residences. It was a deserted and isolated place with no other human being around. The innocent girl of eleven years of age was not even aware about the distance and there is absolutely no reason for her to be there with the accused. There was no occasion for the deceased to go to such a remote place on her own without any rhyme or reason. Looking to the age of the deceased, it is impossible even to imagine that

she must have gone on her own to the place where she was last seen alive with the accused. There is absolutely no reason whatsoever for her to be there unless the accused, taking advantage of her trust in him and the confidence she had reposed in him, persuaded her to accompany him and brought her to that remote and deserted place,

52. There are quite a few relevant questions which are raised in the mind of the Court and the logical as well as rationale answers to these questions would help the judicial mind to decide the intention, motive and the purpose of the accused for taking the minor innocent child to the place which was deserted and remote where they were last seen together by Gunwant (P.W. 1) and Ajay (P.W. 11). The question is :-

(a) Whether an innocent girl on ten years of age studying in VIth Standard, on her own without permission of her parents would like to go to a place which is deserted and ten kilometers away from her school and residence?

The answer, undoubtedly, must be in negative, for the simple reason that the place where she was last seen with the accused is not either a recreation park or a wonderland for children or a garden meant for young children. On the contrary, it was a remote and a deserted place where no child would ever like to visit.

53. Similarly, another question, which arises in a situation like this, is whether the girl of ten or eleven years of age is capable of visualising or apprehending the motive, intention or a mental mind set of a person who is elder to her and whom she considers to be her brother when such a person persuades her to accompany her to such a place? The answer again must be emphatically "no", since the innocent mind of an innocent child in that age cannot think of these aspects and, therefore, they fall prey easily to such methods adopted by unscrupulous people in the society.

54. There is a positive answer as to why the accused in the present case, if he had no intention to take undue advantage of the innocent girl, would without any rhyme or reason, take a girl of that age away from the custody of her parents to such a remote and secluded place where there is nothing either for sight-seeing or for amusement. The definite plan and a positive object to be achieved by the accused is not only evident, but the intention and purpose of the accused in taking the deceased to such a remote place is also capable of proving the fact of his sinister design and diabolic purpose.

55. The various material particulars unfolded in the testimonies of Gunwant (P.W. 1) and Ajay (P.W. 11) provide various links to persuade a judicial mind to hold that the accused right from the beginning had a definite intention and a positive purpose to take advantage of a young defenceless child and the conduct of the accused as disclosed in the evidence of the prosecution of taking systematic steps in order to fulfil his sinister design in persuading a young child to accompany him clearly proves the motive of the accused to commit the crime in question. The testimonies of Gunwant (P.W. 1) and Ajay (P.W. 11) reveal that

when they had seen the accused and the deceased together in a deserted and remote place, where no other human being was in sight, they were surprised to see them in such a place, particularly because of the tender age of the girl. The said reaction of these two witnesses is very normal because there is virtually no reason for the accused and the deceased to be at such a place, except the fact that the accused with a sinister design and with an intention to commit crime brought her at such a place.

56. In the instant case, the deceased was last seen alive with the accused at about 2,30 p.m., on 28.3.2001 by Gunwant (P.W. 1) and Ajay (P.W. 11) and the dead body of the deceased Pratiksha was found by these witnesses at about 3.45 p.m. on the very next day, i.e. on 29.3.2001. There are few factors which need to be considered, such as the dead body of the deceased was found within the vicinity of the place where the deceased was last seen alive with the accused. The deceased being a girl of tender age, was last seen in the custody of the accused on 28.3.2001 and thereafter only her dead body was found on 29.3.2001. When the deceased was in the custody of the accused till late in the afternoon on 28.3.2001 and both the deceased and the accused were seen by Gunwant (P.W. 1) and Ajay (P.W. 11) at a remote place eight to ten kilometers away from their place of residences, it is a legitimate expectation that the accused needs to give a reasonable explanation as to how and at what point of time, the deceased left his company and where did she go. It is, no doubt, true that the prosecution has to stand on its own legs and cannot derive any advantage from the omissions of the defence. However, the legitimate expectation from the accused in this regard is not only valid, but the same is decisive for deciding the culpability of crime. In the instant case, there is absolutely no explanation given by the accused in this regard which again is a relevant circumstance in the chain of circumstances. We find the conduct of the accused keeping mum till the time he is arrested on the next day, inconsistent with the fact of innocence.

57. In the instant case, the place, situation, location where the deceased girl was last seen with the accused by Gunwant (P.W. 1) and Ajay (P.W. 11), in our considered view, are the factors which not only unfold many material particulars of the prosecution case, but also prove and establish various links which demonstrates complicity of the accused with the crime in question,

58. Ramesh (P.W. 9), Executive Magistrate in his evidence, categorically stated that the identification parade was held by him on 17th April, 2001 in Central Jail, Nagpur, and Gunwant (P.W. 1) and Ajay (P.W. 11) were called to identify the accused from amongst the dummies and they identified the accused. There is nothing in the cross-examination brought out by the defence in order to affect the ocular testimony of this witness. Similarly, Bhimrao Shyamrao Wagh (P.W. 8) is a panch witness who was called by the Executive Magistrate-Ramesh (P.W. 9) on 17th April, 2001 in the Central Jail and in his presence Executive Magistrate Ramesh (P.W. 9) asked Gunwant (P.W. 1) and Ajay (P.W. 11) to identify the

accused from amongst five to six boys standing in a row. The evidence of this witness reveals that both these witnesses identified the accused in the identification parade. The evidence of these two witnesses, i.e. Bhimrao (P.W. 8) and Ramesh (P.W. 9) clearly proves that the identification parade was, in fact, held on 17th April, 2001 in the Central Jail, Nagpur, and both these witnesses identified the accused. The discrepancy in respect of date and time in the evidence of Gunwant (P.W. 1) and Ajay (P.W. 11), in our view, is not a material discrepancy and it does not affect the ocular testimonies of Bhimrao (P.W. 8) and Ramesh (P.W. 9), Executive Magistrate, and also does not vitally affect the testimonies of Gunwant (P.W. 1) and Ajay (P.W. 11).

In the instant case, even if there would not have been any identification parade, Gunwant (P.W. 1) in his First Information Report (Exh. 28) had given the description of the accused and also the name of the accused. Gunwant (P.W. 1) and Ajay (P.W. 11) had identified the accused before the Court which is a sufficient and is a substantive piece of evidence. However, in the instant case, the fact that both these witnesses had identified the accused in the identification parade establishes the identity of the accused, last seen with the deceased at the relevant time. It is well settled that omissions in the police statement by itself would not necessarily render testimony of a witness unreliable. V/hen the version given by the witness in the Court is different in material particulars from that disclosed in his earlier statements, in such a situation only the credibility of the testimony of such witness is affected. Minor contradictions are bound to appear in the statement of a truthful witness as memory sometimes plays false and the sense of observations differs from person to person. In a given situation, even if there is a contradiction in the statement of a witness on any minor point, that is no ground to reject the whole testimony of such a witness. Keeping in view this legal aspect of the matter, the discrepancy in the testimonies of Gunwant (P.W. 1) and Ajay (P.W. 11) in respect of date of holding of the identification parade is not a material discrepancy in order to affect the credibility of their testimonies, particularly when there is a substantive evidence of Bhimrao (P.W. 8) and Ramesh (P.W. 9) which clearly establishes the fact of holding of identification parade on 17.4.2001. The contention of Mr. Daga, learned Counsel for the accused, in this regard, is, therefore, misconceived and cannot be accepted.

59. Similarly, another contention, canvassed by Mr. Daga, learned Counsel for the appellant, is that Gunwant (P.W. 1) was the resident of Dhanegaon and the place where the deceased was last seen with the accused is ten kilometers away and, therefore, it was not possible for Gunwant (P.W. 1) to bring his cattle for grazing to such a distance as well as it is unnatural that Ajay (P.W. 11) met Gunwant (P.W. 1) on both these days. This contention of learned Counsel for the appellant is also misconceived and cannot be accepted. The evidence of Ajay (P.W. 11) would show that though he was a native of village Panchgaon, he started residing in village Koradi since the year 2001, as his father was serving in Maharashtra State Electricity Board. The place where the deceased was last seen with the accused is not far from village Koradi. Similarly, Gunwant (P.W. 1) in his

testimony has categorically deposed that he used to take his cattle for grazing in the forest area near Gaimukh. There is nothing unnatural or suspicious in this regard. Both these witnesses are friends and residents of nearby villages and, therefore, there is nothing unnatural about their being together on 28.3.2001 as well as 29.3.2001. The contention, therefore, needs to be rejected. So far as the distance of ten kilometers is concerned, it is a common knowledge that cattle grazers take their cattle wherever they find grass and water for grazing their cattle and, therefore, the contention in this regard canvassed by Mr. Daga is also of no consequence.

60. The cumulative effect of the testimonies of Gunwant (P.W. 1) and Ajay (P.W. 11) results in proving the fact of deceased last seen together with the accused, the ill-intention and a sinister design entertained by the accused with a motive of committing crime by bringing a helpless and defenseless innocent girl of ten years of age to a secluded and remote place and by taking advantage of his dominance and trust reposed in him by the girl on the pretext that their parents would also follow them and come to Koradi temple at a later point of time. Similarly, the accused was identified by Gunwant (P.W. 1) and Ajay (P.W. 11) in the identification parade, is another circumstance in the chain of circumstances proved by the prosecution.

61. It is pertinent to note that these two witnesses, namely Gunwant (P.W. 1) and Ajay (P.W. 11), are innocent villagers and one of them being a cattle grazer and used to graze his cattle near about the spot of occurrence, their presence at the scene of offence is most natural and, therefore, in that sense of the term, they cannot be called as chance witnesses. At the same time, we cannot ignore that there is absolutely no reason, whatsoever, for these witnesses to falsely implicate a boy of twenty years of age who is a resident of Nagpur and with whom they had no connection or reason. It is pertinent to note that the oral report (Exh. 28), which is lodged by Gunwant (P.W. 1) almost immediately after finding of the dead body on 29.3.2001 in Koradi Police Station in which Gunwant (P.W. 1) has not only disclosed the identity of the accused, but also mentioned the names of the accused as well as deceased. The ocular testimony of this witness completely corroborates the contents of Exh. 28 and, therefore, the criticism levied by Mr. Daga, learned Counsel for the accused, that these are the chance and got up witnesses is totally unjustified and cannot be accepted.

62. It is, no doubt, true that the Investigating Officer Mr. Deolkar (P.W. 19) in his evidence made a passing reference that the incident was given publicity in the newspapers and the photograph of the accused was also published and, therefore, Mr. Daga, learned Counsel for the appellant-accused, contended that the identification parade on the backdrop of this fact is valueless and does not carry any evidentiary value. The proposition canvassed by Mr. Daga cannot be accepted in view of the ratio laid down by the Apex Court in case of Umar Abdul Sakoor Sorathia Vs. Intelligence Officer, Narcotic Control Bureau, . Their Lordships of the Apex Court in Para 11 of the said judgment has held thus"

11. It was contended that identification by photo is inadmissible in evidence and, therefore, the same cannot be used. No legal provision has been brought to our notice which inhibits the admissibility of such evidence. However, learned Counsel invited our attention to the observations of the constitution bench in *Kartar Singh v. State of Punjab* which struck down Section 22 of the Terrorist and Disruptive Activities (Prevention) Act, 1987. By that provision the evidence of a witness regarding identification of a proclaimed offender in a terrorist case on the basis of the photograph was given the same value as the evidence of a test identification parade. This Court observed in that context :

If the evidence regarding the identification on the basis of a photograph is to be held to have the same value as the evidence of a test identification parade, we feel that gross injustice to the detriment of the persons suspected may result. Therefore, we are inclined to strike down this provision and accordingly we strike down Section 22 of the Act.

Similarly in Para 12 of the Judgment, the Hon"ble Judges of the Apex Court have further observed thus :-

12. In the present case prosecution does not say that they would rest with the identification made by Mr. Makhathswa when the photograph was shown to him. Prosecution has to examine him as a witness in the Court and he has to identify the accused in the Court. Then alone it would become substantive evidence. But: that does not mean that at this stage the Court is disabled from considering the prospect of such a witness correctly identifying the appellant during trial. In so considering the Court can take into account the fact that during investigation the photograph of the appellant was shown to the witness and he identified that person as the one whom he saw at the relevant time....

The ratio laid down by the Apex Court in *Umar Abdul Sakoor Sarathia's* case (supra) makes it evident that merely because the witness had an occasion to see the photograph of the accused before identification parade is held, does not render his evidence of identification inadmissible in evidence, particularly because the prosecution has to examine him as a witness in the Court and he has to identify the accused in the Court. In view of the above referred ratio laid down by the Apex Court, the contention of Mr. Daga, learned Counsel for the appellant, is misconceived and cannot be accepted. Even otherwise, in the instant case, there is no evidence on record to show that Gunwant (P.W. 1) and Ajay (P.W. 11), the illiterate cattle grazers, had an occasion to see newspapers in which photographs of the accused were published. In order to consider this proposition of law, the ratio of the Apex Court in *George and Others Vs. State of Kerala and Another*, is also relevant as well as useful. Their Lordships of the Apex Court in para 25 of its Judgment has observed thus :-

25. That brings us to the question whether the ground canvassed by the Trial Court for rejection of her evidence regarding identification of the appellants, whom she, admittedly, did not know from before, as the assailants are improper

or not. So far as the first ground is concerned law is well settled that identification of an accused in Court is the substantive evidence of the person identifying and his earlier identification in a T.I. parade corroborates the same. In other words, want of evidence of earlier identification in a T.I. parade does not affect the admissibility of the evidence of identification in Court.

The ratio laid down by the Apex Court in this judgment goes a step further and holds that identification of the accused in the Court is a substantive evidence and the evidentiary value in case where there is no evidence of earlier identification of the accused in the T.I. parade, does not affect the admissibility of the evidence of identification in the Court. In view of this legal proposition propagated by the Apex Court, the present case stands on a better footing. In the present case Gunwant (P.W. 1) and Ajay (P.W. 11) not only identified the accused in the identification parade, but both of them have identified the accused in the Court which, in fact, is the substantive piece of evidence. In the slight of these principles of law laid down by the Apex Court in this regard, the circumstance of identification of the accused by these witnesses stands fully established and is an additional link in the chain of circumstances. The reliance placed by Mr. Daga, learned Counsel for the appellant accused on the ratio laid down by the Apex Court in *Vijayan @ Rajan Vs. State of Kerala*, does not, in our view, support the contention canvassed by Mr. Daga. which is evident from the observations of Their Lordships in para 6 of the judgment, which reads thus :-

...Since the accused Vijayan was not known to P.W. 3 and the Test Identification Parade having been discarded, the substantive evidence of identification in the Court after so many years cannot be relied upon. Though Mr. Ramchandran, learned Senior Counsel appearing for the State initially had urged that the evidence of P.W. 3 so far as she identified accused Vijayan in the Court can be accepted even discarding the Test Identification Parade but ultimately could not support the said contention with any authority. As a matter of prudence it is highly unsafe to accept the identification of accused in Court many years after the occurrence when the Test Identification Parade made shortly after the occurrence has not been accepted....

The above referred observations of the Apex Court in no uncertain terms convey that identification in the Court, no doubt, is a substantive piece of evidence. However, the same was disbelieved by Their Lordships of the Apex Court in the above referred case on the ground that identification of accused in the Court many years after the occurrence when the Test Identification Parade, which was held shortly after the occurrence, has not. been accepted. However, in the instant case, at the cost of reiteration, we must state that the accused was identified by the witnesses in the Identification Parade as well as in the Court and, therefore, there is a substantive evidence of identification in the present case which corroborates the identification of the accused by these witnesses in the identification parade. The contention of Mr. Daga in this regard is, therefore, misconceived and devoid of substance.

63. As far as the aspect of publication of a photograph of the accused in the newspapers is concerned, the ratio laid down by the Division Bench of the Kerala High Court in *Sajeevan and Vs. Kerala State*, is squarely applicable and concludes the proposition in this regard. The Hon'ble Judges of the Kerala High Court in Para 11 of the Judgment has observed thus :-

11. If the idea of conducting a test identification parade is to test the ability of a witness to identify a particular person, then photograph of the suspect should not be shown to him in advance. Otherwise the parade becomes only a farce. But that is different from the Press publishing photos of the accused in newspapers. It is not the work of the investigating agency, but the exercise of journalistic calibre. Investigating agency has, normally, no control over such journalistic adventures. Hence such publication cannot be prevented by the police in a society where freedom of press is guaranteed. It has become very usual that in sensational criminal cases newspapers would display enthusiasm to publish photos of different facets including photos of the accused. It is not necessary that witnesses should see such photos in the newspapers. Even if a witness happens to see the photo of a particular accused in a newspaper we are not inclined to sideline his evidence regarding identification on that score alone. It must be remembered that Kerala is a State where there is proliferation of newspapers. How can a witness be made responsible if newspapers publish the photographs of the accused? If we are to lay down a proposition that identification evidence of a witness is liable to be thrown overboard in cases where newspapers published the photo of the accused, a good number of witnesses in Kerala would be exposed to the peril of being disbelieved on account of the journalistic adventure and high density of print media in this State. Of course, it is open to the Court to decide whether a witnesses evidence regarding identification was really influenced by such publication.

Similarly, the observations in para 12 of the Judgment are also useful and relevant in this regard which are as follows :-

12. A Division Bench of this Court (U.L. Bhat, J. (as he then was) and Balakrishnan, J.) in *Appu v. State* (1990) 1 Ker. L.T. 15 observed that "at any rate, the mere fact that a witness might have accidentally seen photographs of accused in newspapers, particularly in the absence of evidence regarding captions or descriptions given in newspapers, cannot lead to rejection of identification of accused made by witnesses.

In view of the ratio laid down in case of *Sajeevan and etc., etc. v. Kerala State* (supra), it is evident that unless there is an overwhelming evidence on record to show that the witness's evidence regarding identification was materially influenced by such publication, it is not proper to brush aside the evidence of identification from the legal consideration merely because photograph of the accused was published in the newspaper. In the instant case, there is absolutely nothing on record to show that what kind of news in respect of the incident in question was published and in which newspaper along with the photograph of the

accused. There is also nothing on record to show that the newspaper in which the photograph of the accused was published had a wide circulation, particularly in the area where Gunwant (P.W. 1) and Ajay (P.W. 11), at the relevant time, resided. Similarly, there is no evidence to show that these two witnesses had an occasion to see the photograph of the accused in the newspapers. The only solitary reference in this regard is made by the Investigating Officer Deolkar (P.W. 19) in his cross-examination. In the circumstances, we have no hesitation to reach the conclusion that there is no evidence, whatsoever, on record to show that the evidence of prosecution witnesses-Gunwant (P.W. 1) and Ajay (P.W. 11) regarding identification was really influenced by such publication. In the circumstances, the contention canvassed by the learned Counsel in this regard, in our view, is misconceived and is rejected.

64. The evidence of the prosecution shows that the accused was arrested on 29.3.2001 at about 2340 hours at Koradi Police Station vide Arrest Panchanama (Exh. 18). The accused was sent for medical examination and he was examined on 30.3.2001 and the report in this regard is at Exh. 21). On the arrest of the accused, House Search Panchanama was recorded which is at Exh. 23. The clothes of the accused and one bicycle were taken into custody. The Spot Panchanama was conducted at 7.10 o'clock on 30.3.2001 which is at Exh. 32. The Panch, who has proved this exhibit, is Prosecution Witness No. 2 - Dilip Daulatrao Raut. On the spot, an underwear of the deceased was found, and also one lime stone bearing blood stains was taken into custody from the spot. On the arrest of the accused on 29.3.2001, a Memorandum of Discovery u/s 27 of the Evidence Act was recorded on 30.3.2001 at about 1610 hours. The said Memorandum of Discovery is at Exh. 35. The relevant admissible recitals in the said Memorandum reveal that the accused volunteered to discover the school bag which he had hidden in the canal of the tank. It further reveals that he threw the said bag beyond the wall at its central place where water falls down in the canal from the tank of hot water and the accused was ready to discover the article. There are two prosecution witnesses examined by the prosecution in this regard. They are Purushottam Manohar Sahu (P.W. 3) and Ramji Gopiram Sahu (P.W. 4). In pursuance of the said Memorandum of Statement of Discovery, a search was carried out for the school bag at the place disclosed by the accused; but no bag was found there. The said Discovery Panchanama, dated 30.3.2001, is at Exh. 36 and is signed by two Panch Witnesses, namely Purushottam M. Sahu (P.W. 3) and Ramji G. Sahu (P.W. 4).

65. The prosecution evidence further reveals that on 30th March, 2001, the accused gave another Memorandum of Statement of Discovery (Exh. 37) in presence of Purushottam (P.W. 3) and Ramji (P.W. 4) and retracted the earlier statement made on 30.3.2001 and stated that he had burnt the school bag in the wire compound which is within the wall compound of the office of Corporation situated near his house. He also stated that while burning the said school bag, one Shailesh Gajananrao Gabhane (P.W. 18) was present there. He further stated that one Roshan Hiwarekar (P.W. 13) came there and that the accused took out

two books and two compass boxes from the said school bag and gave the same to Roshan (P.W. 13). The accused expressed to show the place where he had burnt the school bag. In pursuance of Memorandum of Discovery, Discovery Panchanama was recorded by visiting the spot shown by the accused. The Discovery Panchanama is at Exh. 38. The evidence of the prosecution reveals that on the said spot a partly burnt plastic scale and the iron hooks which were stitched to the school bag were seen lying in the ashes at the said place. Vide the said Panchanama, following articles were recovered :-

(a) Four hooks of the school bag. Out of them two were press hooks and two were fixing hooks. "HIT Boy" is written on one of the hooks.

(b) One partly burnt piece of a plastic scale.

(c) One half broke chalk - partly burnt.

(d) Lead of Pencil,

(e) Ashes of the cloth of the school bag and ashes of books.

(f) One match box of "Chavi" brand.

The seizure Memo, dated 31.3.2001, reveals seizure of two books and two compass boxes with its contents from Roshan Hiwarekar (P.W. 13). The Seizure Memo, dated 31.3.2001, in respect of articles seized from Roshan (P.W. 13) is at Exh. 39. The following articles were seized from Roshan (P.W. 13) :-

(i) Marathi Bal Bharti Book of Standard-VIth on which name of the deceased "Pratiksha Vaidya" is written.

(ii) One Bal Bharti Vikas Vyavsaymala of Standard - VIth. On the said book, the name of the deceased "Pratiksha Dilip Vaidya, Shishu Gyan Mandir Standard Sixth" is written.

(iii) One black coloured mobile compass box.

(iv) One sky blue coloured plastic compass box containing one ball pen, one pink coloured ball pen, one yellow coloured sharpener and one violet coloured sharpener.

66. The said Seizure Memo is signed by Purushottam (P.W. 3) and Ramji (P.W. 4). The said articles, i.e. hooks of the school bag, two books, two compass boxes, burnt scale were identified by mother of the deceased, i.e. Chitra (P.W. 10) vide Memorandum of Identification, dated 9.5.2001 (Exh. 48). The said Identification Parade was held by the Executive Magistrate, Nagpur. The said books and compass boxes were recovered from Roshan (P.W. 13) and were identified by Chitra (P.W. 10). The hooks were also identified by this witness.

67. As far as the evidence of Purushottam (P.W. 3) is concerned, he has supported the memorandum and seizure at Exhs. 35 and 36 and also supported the case of the prosecution vide Exhs. 37 and 38. However, the said witness has

not supported Exh. 39, i.e. Seizure memo in respect of seizure of articles from Roshan (P.W. 13). Ramji (P.W. 4), however, did not support the Seizure Memo regarding seizure of articles from Roshan (P.W. 13) vide Exh. 39. The match box recovered vide Seizure Memo (Exh. 38) was identified by Sachin Sudhakar Shaniware (P.W. 7).

68. The case of the prosecution about recovery of books from Roshan (P.W. 13) is supported by Pravin Ambadas Gaikwad (P.W. 12), Shailesh (P.W. 18) and by Roshan (P.W. 13). It is, however, true that though Roshan (P.W. 13) deviated from his earlier statement before the Court, however, in the cross-examination, he has admitted that on the relevant day, he saw Ammu Gandhi and one Bunty and Chuha burning the books, and Chuha gave him two compass boxes and books and when he enquired from Ammu Gandhi and Chuha as to whose books were they, Chuha told him that they were of a sister. Though prosecution sought permission to cross-examine Roshan (P.W. 13), the material, which is brought by the prosecution in the cross-examination of this witness is consistent with his earlier version and, therefore, that can be relied on and the whole testimony of Roshan (P.W. 13) cannot be discarded on the ground that this witness did not support the prosecution before the Court. This witness is declared hostile to the prosecution. The statement of this witness u/s 164 of the Criminal Procedure Code was also recorded. The same is at Exh. 65. In the said statement, this witness has stated that Shailesh had handed him over two compass boxes and a book. Similarly, Pravin (P.W. 12) in his statement. u/s 164 of the Criminal Procedure Code, stated that he had seen Ammu Gandhi burning the school bag and threatened him that he should leave the place immediately or he will beat him. Pravin (P.W. 12) in his evidence before the Court has stated that when his ball went across the ground, he saw Ammu Gandhi burning something. He has stated that he was accompanied by another boy, namely Shailesh alias Chuha. He further deposed that he asked Ammu what he was burning? On that he was told by him to leave. Similarly, in the evidence of Shailesh alias Chuha (P.W. 18), it has come on record that Shailesh took two books and two compass boxes from the accused who was setting the bag on fire and handed it over to Roshan. The witness Shailesh (P.W. 18) had identified the books and articles from the compass boxes. The statement of Shailesh (P.W. 18) was also recorded by Executive Magistrate u/s 164 of the Criminal Procedure Code.

69. From the Seizure Memorandum (Exh. 39), Discovery Panchanama (Exh. 38), Memorandum of Identification of seized property (Exh. 48) and from collective reading of testimonies of Pratikshit (P.W. 6), Chitra (P.W. 10), Roshan (P.W. 13) and Shailesh (P.W. 18) as well as Pravin (P.W. 12). it is established that the accused, in order to destroy the incriminating evidence, burnt the school bag in the premises of Municipal Corporation Zone No. 5. Nagpur, and when he was burning the said school bag, Roshan (P.W. 13) reached there, Shailesh (P.W. 18), who was also present there, took two books and two compass boxes from the school bag and gave the same to Roshan and they were recovered vide Seizure Memo (Exh. 39). The books recovered from Roshan bear the name of deceased

"Pratiksha Vaidya". The compass boxes and the contents therein have been identified by Chitra (P.W. 10). In view of the above referred evidence of the prosecution, the contention canvassed by Mr. Daga, learned Counsel for the appellant-accused, in this regard cannot be accepted and the same is, therefore, rejected.

70. In the instant case, prosecution evidence reveals that on 29.3.2001 between 1810 hours to 1910 hours. Inquest Panchanama was conducted. The Inquest Panchanama discloses the abdomen of the deceased to be swollen and starting of decomposition process as well as emission of a foul smell. The Inquest panchanama mentions about bleeding injuries on the forehead and the back side of the head as well as various abrasions. The Inquest Panchanama is at Exh. 33. The Panch witness, who has proved the same is Dilip Raut (P.W. 2). After the Inquest Panchanama was conducted on the dead body of the deceased, the same was sent for post-mortem examination vide Exh. 82, a requisition to the Civil Surgeon for postmortem. The post-mortem was conducted and the report was submitted by the doctor vide Exh. 57. In Column 15 - titled "Injuries to external genitals" of the Post-mortem Examination Report, the following injuries are described :-

(1) Contused abrasion present over both labia majora at the vaginal osifice. Medical aspect of size 1 cm. x 1/2 cm., each, Reddish brown in colour, fresh.

(2) contusion present, upper 1/2 of both labia majora of size 2 cm x 1 cm each x portion torn x blue in colour with swelling of both lips of labia majora. more on right side. Fresh.

(3) Contused abrasion over both labia majora, middle 1/3rd, Medical aspect of size 1 cm x 1/2 cm. in continuation with injury No. (1) reddish blue in colour fresh.

(4) Contusion present on anterior vaginal wall of size 1 cm. x 1/2 cm. with swelling of vaginal x illegible x present reddish blue in colour, fresh.

(5) Hymen torn at 7 o'clock position with bruises in its Morgus, reddish blue in colour fresh.

(6) Teer of the posterior commissural present in midline at 6 o'clock position with bruises in its morgus, reddish blue in colour, fresh with presence of dried blood stains along the position in Midline. Purging of toecap present.

71. The prosecution evidence further reveals that a query was raised vide Exh. 58 to the L.M.J., Mayo Hospital, Nagpur, seeking an opinion of the doctor on the following points :-

(a) Whether the rape was committed on the deceased girl?

(b) Whether the deceased girl is capable to undergo sexual intercourse?

(c) On account of rape, whether she has sustained injuries on her private parts

or whether hymen appears to be ruptured?

The Medical Officer vide Exh. 59 expressed his opinion to the above queries as below :-

(a) Possibility cannot be ruled.

(b) Yes.

(c) Yes.

Similarly, it will be relevant and useful to refer and consider the passage from Chapter -XIV of Modi's Textbook of Medical Jurisprudence and Toxicology (Nineteenth Edition). The signs of virginity have been described in this Chapter by the author and the relevant passage reads thus :-

Genitals. - The labia majora are usually thick, firm, elastic and well-rounded, and lie in contact with each other so as to cover completely the vulva. The labia minora are soft, small and rose-coloured, and the clitoris is small. The vestibule, a triangular area lying between labia minora with the clitoris as the apex and the anterior margin of the hymen as the base is narrow. The posterior commissural and the fourchette are intact and crescent, shaped. They are rarely destroyed by sexual intercourse but are not infrequently lacerated in attempts at sexual intercourse on children.

It is also observed in the same Chapter which reads thus :-

The hymen is a thin or firm fold of mucous membrane situated at the orifice of the vagina. It is generally annular with a central opening which may be round or elongated. It is usually semilunar or crescent with the opening anteriorly. Its free margin is sometimes fabricated having numerous notches which may be mistaken for artificial tears, but these natural notches are usually symmetrical, occur anteriorly, and, as a rule, do not extend to the vaginal wall. The mucous membrane over the notches is also intact. On the other hand, tears caused by sexual intercourse or by introduction of any foreign body are usually situated posteriorly at one or both sides or in the median line, and usually extend to the point of attachment of the hymen at the edge of the vagina.

Similarly, it is further observed in the same Chapter by the author which reads thus :-

The hymen is situated more deeply in children than in nubile girls, and so it more often escapes injury in an attempted rape on children.

Normally the hymen is ruptured by the first act of coitus....

Another relevant passage in the Modi's Medical Jurisprudence and Toxicology (Twenty-second Edition) is useful for the purpose. It is mentioned that bruising and laceration of the external genitals may be present with redness, tender swelling and inflammation. In nubile virgins, the hymen, as a result of complete sexual intercourse, is usually lacerated, having one or more radiate tears, (more

so in posterior half) the edges of which are red, swollen and painful, and bleed on touching if examined within a day or two after the act.

Fourchette and posterior commissural are not usually injured in cases of rape but they may be torn, if violence used is great. The extent of injury to the hymen depends on the degree of disproportion between the genital organs of both the parties and the violence used on the female. In small children, the hymen is not usually ruptured, but may become red and congested along with the inflammation and bruising of the labia. If considerable violence is used, there is often laceration of fourchette and perinaeum. On these guiding principles if the injuries sustained by the deceased are considered, coupled with the opinion of the doctor, it can be concluded that the deceased was raped before she was murdered by the culprit. In the instant case, another important aspect which cannot be lost sight of, is that the accused has admitted post-mortem Report (Exh. 57), doctor's opinion about victim having been physically and sexually assaulted (Exh. 59) and, therefore, the opinion of the doctor about the deceased physically and sexually assaulted before death is not at all either controverted or challenged by the defence. Similarly, as many as six injuries of a grave nature are found on the external genital as well as hymen was found to be torn. The injuries detected and mentioned in the Post-mortem Report by the doctor are also not controverted or challenged by the defence and, therefore, the medical evidence produced by the prosecution is fully admitted by the defence. It is, however, true that the prosecution has to stand on its own legs in order to prove each and every circumstance on its own. Keeping this aspect in mind, we have appreciated the medical evidence in view of the evidence on record as well as certain guiding, principles mentioned in Modi's Medical Jurisprudence and Toxicology and it is only thereafter we have reached the conclusion that in the instant case prosecution was able to prove that the deceased was raped before her murder was committed by the culprit.

72. The post-mortem examination is conducted by Dr. A.A. Mukherjee, Lecturer in Forensic Medicine and Toxicology, Indira Gandhi Medical College, Nagpur, and the Post-mortem Examination Report is at Exh. 57. In column 17 of the Post-mortem Examination Report (Exh. 57), the following injuries, which were noticed on the person of the deceased, are described :-

(1) Ligature well fitted with ligature mark around neck. Ligature mark around neck, Horizontal and completely encircling the neck, at the level of thyroid cartilage of length - 28 cms. Maximum breadth - 2 cm. Ligature mark reddish brown, Hard, Irregularly grooved and x illegible x like. Upper and lower Margus engaged.

(2) Lacerated wound present, back of head, Right occipital region, 4 cms. x 1 cm. x Bone deep. Fresh.

(3) Lacerated wound, Right side of forehead in right frontal region, 1 cm x 1 cm. x bone deep Fresh.

(4) Contused abrasion, right thigh, lower 1/3rd, anteromedial. aspect of size 1 cm. x 1.2 cm. reddish brown in colour, fresh.

(5) Four lateral abrasion, Medial aspect of left thigh, lower 1/3rd, of size 3 1/2 cm. x 1/2 cm. 2 cm. x 1/2 cm., 1 cm. x 1/2 cm., 1 cm. x 1/2 cm., separated by x illegible x each, Reddish brown in colour, fresh.

(6) Contused abrasion, lateral malicious of both legs of size 2 cm. x 1 cm. each, reddish brown in colour, fresh.

(7) Multiple minute contused abrasions, dorsum of left hand, of size ranging from 0.3 cm. x 0.3 cm. to 0.5 cm. x 0.5 cm. each, reddish brown in colour, fresh.

Similarly, a requisition was sent to Mayo Hospital, Nagpur, vide Exh. 60 seeking an opinion whether the injury on the back side of the head of the deceased could be caused with the seized stone and vide Exh. 61a positive opinion was expressed by the L.M.J. From the injuries mentioned in column 17 of the Post-mortem Report, the injury at serial No. (1) indicates a ligature well fitted with ligature mark around neck, horizontal and completely encircling the neck, at the level of thyroid cartilage with ligature mark reddish brown, hard, irregularly grooved. The internal injuries given in column 20 describe injuries under the scalp corresponding with the external injuries 2 to 5 and while describing the thorax in the column of "Additional Remarks", following observation is made :-

Evidence of extra vation and infiltration of blood present in soft tissues and muscles of neck corresponding to ligature mark.

In column 23, a positive opinion has been given by the doctor about the cause of death and the same is on account of injuries described in column 17 of the Post-mortem Notes and these injuries in ordinary course of nature were sufficient to cause death of the victim. It is opinion that the cause of death was due to "Strangulation".

73. In Section 3 of Chapter 2 of H.W.V. Cox's Medical Jurisprudence and Toxicology (Sixth Edition) 1990 by Dr. Bernard Knight, Para 7 describes Strangulation and its Features, which have been taken into consideration by the Trial Court in order to reach the conclusion that the victim died on account of strangulation and, therefore, the Trial Court further concluded that it is a homicidal death as defined u/s 299 of the Indian Penal Code. We have also gone through the said passages. Certain relevant passages in paras 7 and 9 are reproduced below :-

7. Pressure on the neck or strangulation.- Strangulation is again a term which is not exact in itself, as there are several types of strangulation, mainly manual strangulation (sometimes called "throttling") and strangulation by a ligature (sometimes called "garrotting"). Though both these are similar, there are certain differences which are reflected in the pathological findings.

Strangulation is not by any means the same thing as asphyxia : in fact, a better

name would be "pressure on the neck", which is used as an alternative description by many pathologists. In fact, inspection of a series of cases shows that approximately half the victims show classical asphyxial signs, whereas the other half show none and in many instances, death has been far too rapid to be due to an asphyxial process alone. Indeed, even amongst those cases where asphyxial changes are indisputably present, death may well have occurred more rapidly than pure asphyxia would suggest, due to a mixed causation being present. This will be discussed further below.

External appearances in strangulation by ligature naturally vary greatly accordingly to the type of object used (see fig. 33). Ligatures may be formed of all manner of things, from chains to cords, from ropes to leather straps and from bamboo canes to towels.

9. Manual Strangulation.- Most of the foregoing description applies equally to manual strangulation as to strangulation by a ligature, but there are certain important variations.

The external appearances are vital. In place of the ligature mark described earlier, the neck will almost invariably show abrasions and bruises caused by the fingers of the assailant and again sometimes of the victim, where attempts at removing the compression have been made. (See Fig. 36).

When the throat is gripped by a hand, the typical type of skin lesion is a small disc-shaped bruise and finger-nail scratches. The classical bruises are of the size of a small coin, but naturally can be of any size or shape, especially where several bruises lie adjacent or overlies each other. They are most commonly seen in manual strangulation under the angles of the jaw on either side where the maximum pressure is exerted. However, due to movements of the hands around the neck and to the movement caused by the frequent struggles of the victim, the bruising can spread anywhere in the region between manubrium and chin, extending back to beneath the ears. However, the common sites are under the angles of the jaw and on the lateral sides of the larynx

74. The nature of injuries found on the body of the deceased and the description thereof is mentioned in Inquest Panchanama (Exh. 33), in the circumstances, therefore, if the nature and character of external and internal injuries shown and described In Exh. 57 are considered with reference to the features of strangulation mentioned in above referred paragraphs of the book by the learned author, then a decision can be reached that the deceased died due to strangulation and, therefore, it can be held that the death is a homicidal death.

75. It is, no doubt, true that there are no injuries on the person of the accused. However, this circumstance ipso facto does not lead us to hold that the act of intercourse or rape is ruled out. It must be borne in mind that this aspect depends upon various factors, such as condition of the ground or place where forcible sexual intercourse is committed, where victim is a grown-up, well-built woman, who is capable of effectively resisting the aggression of the culprit,

where the accused is in a dominant position and is a strong-built person compared to victim etc. If the rape is committed on a well-built woman capable of resisting the aggression of the culprit and on a rough surface, the culprit virtually requires sufficient force to penetrate his private part, in a situation like this, there is a possibility of receiving injuries by the culprit on his person. However, in the instant case, the victim was innocent, helpless girl of a tender age and it can be visualised that a girl of that age just cannot exercise any resistance in order to prevent rape on her. As against that, the accused in the present case is a well-built young man of nineteen years of age and was in a dominant position to prevent any resistance from the tender girl and in a situation like this, inference cannot be drawn that absence of injuries on the person of the accused rules out the fact of forcible sexual intercourse and, therefore, the contention canvassed by Mr. Daga in this regard is rejected.

76. In the instant case, much capital has been made by Mr. Daga, learned Counsel for the accused, in respect of the fact that prosecution did not produce any evidence to show the time of death. This aspect needs to be considered in view of the following facts and circumstances : -

Column 11 in the Post-Mortem Report (Exh. 57) shows absence of rigor mortis. As per Modi's Medical Jurisprudence, rigor mortis occurs within one or two hours after death, maintained for twelve hours, developed in twelve hours and passes off twelve hours. The shortest period of rigor mortis can be three hours and longest can be forty hours. Similarly, the muscular tissues of the body after death pass through three stages, which are (1) Primary Relaxation or Flaccidity, (2) Cadaveric Rigidity or Rigor Mortis, and (3) Secondary Relaxation. It is observed by the author that the point which determines time of death is warmth, or cooling of body, absence of presence of cadaveric rigidity or rigor mortis of progress of the composition. In Modi's Medical Jurisprudence and Toxicology (Twenty-first Edition), on page 170 the author has observed that Cadaveric Changes do take place in the muscular tissues after death. Those are categorized as follows:-

- (1) Primary Relaxation or Flaccidity;
- (2) Cadaveric Rigidity or Rigor Mortis;
- (3) Secondary Relaxation.

In the same Chapter, it is observed that the rigor mortis first appears in the involuntary muscles, and then in the voluntary. In the heart it appears, as a rule, within an hour after death, and may be mistaken for hypertrophy, and Its relaxation or dilatation, atrophy or degeneration. The left chambers are affected more than the right. Post-mortem delivery may occur owing to contraction of the uterine muscular fibres. Similarly, it is observed that in the voluntary muscles rigor mortis follows a definite course. It first occurs in the muscles of the eyelids, next in the muscles of the back of the neck and lower jaw, then in those of the front of the neck, face, chest and upper extremities, and lastly extends

downwards to the muscles of the abdomen and lower extremities. Last to be affected are the small muscles of the fingers and toes. It passes off in the same sequence. However, according to H.A. Shapiro this progress of rigor mortis from proximal to distal areas is apparent only, it actually starts in all muscles simultaneously but one can distinguish the early developing and fully established stage, which gives an indication of the time factor. In order to conclude the issue in this regard, the following observations in Modi's Medical Jurisprudence are relevant :-

In temperate regions, rigor mortis usually lasts for two to three days. In Northern India, the usual duration of rigor mortis is twenty-four to forty-eight hours in winter and eighteen to thirty six hours in summer.

In the instant case, the region being temperate, rigor mortis lasts for about two to three days. If we apply this analogy, then at the time of postmortem examination, which was conducted on 30.3.2001 and begun at 11.40 a.m., the doctor did not find rigor mortis. That means the time of death must have been on 28.3.2001 between 3.00 p.m. and 4.00 p.m., since the rigor mortis in a temperate region lasts for two days. This is not the case, therefore, where time of death cannot be ascertained on the basis of these recognised guidelines, merely because the same is not given in the Postmortem Report. In our considered view, this is not the circumstance which affects the material particulars of the prosecution case in the crime in question.

77. According to the prosecution, death of the deceased has taken place between 2.30 p.m. and 4.00 p.m. on 28.3.2001 and, therefore, the Post mortem Report showing absence of rigor mortis, the decomposition of body, presence of post-mortem blisters over the body fixes the approximate time of death as forty to forty-four hours before post-mortem. In the instant case, post mortem was conducted on 30.3.2001 and is started at 11.40 a.m. and as per the above established guiding principles the death has occurred around the same time between 2.30 p.m. and 4.00 p.m. on 28.3.2001 and, therefore, non-mentioning of time of death or age of injury in the Postmortem Report is not at all fatal to the prosecution. In the instant case, the prosecution has established the fact of deceased last seen alive with the accused at about 2.30-3.00 p.m., on 28.3.2001 very close to the place where dead body of the deceased was found. Through evidence of Gunwant (P.W. 1) and Ajay (P.W. 11), this fact is also corroborated vide Exh. 28, i.e. oral report lodged by Gunwant (P.W. 1). Thus, the time of death further establishes the link and nexus between the accused and the crime in question.

78. In the instant case, legality and correctness of the Chemical Analyser's reports (Exhs. 51 to 56) has not at all been disputed by the defence. As per C.A. Report (Exh. 51), the nail clippings of the deceased were found stained with blood. C.A. Report (Exh. 54) reveals that Exh. 1-Earth, Exh. 3 - Half manila, Exh. 4 - Under frock, Exh. 5 - frock, Exh. 6-Handkerchief were found stained with human blood. Similarly. C.A. Report (Exh. 55) reveals that the stone-Exh. 1 was

stained with human blood. These factors do corroborate the material particulars of the prosecution case and cannot be ignored altogether from the arena of consideration.

79. Mr. Daga, learned Counsel for the appellant-accused contended that in the instant case the charge has not properly been framed by the Trial Court, which does not mention the material particulars of the prosecution case and, therefore, it caused material prejudice to the accused and it has resulted in miscarriage of justice which vitiates the criminal trial. We have considered this argument and also perused the Charge (Exh. 7). The overall reading of the charge gives entire idea that the offence in question has been committed between 28.3.2001 and 29.3.2001 at 1500 hours, i.e. 3.00 p.m. and deceased Pratiksha, who was, at the relevant time, eleven years of age, was raped and murdered. In our view, no material prejudice was caused to the accused in this regard and in any case the criminal trial on this count cannot be vitiated. It is, however, true that the Additional Sessions Judge ought to have been little more vigilant while describing the date and time of the occurrence. However, this is merely an irregularity and is not the illegality of such a magnitude which renders the entire trial invalid, nor, in our view, it caused a material prejudice to the accused in this regard. The contention canvassed by the learned Counsel is, therefore, misconceived and devoid of substance.

80. Another contention, which is canvassed by Mr. Daga, learned Counsel for the appellant - accused, is that in so far as the injuries shown and described in column 15 of the Post-mortem Report are concerned, the doctor has mentioned that each one of them is a fresh injury and, therefore, this does not correspond with the time of death as alleged by the prosecution. This aspect has to be understood in view of the other surrounding factors and the contents of the Post-mortem Report: For example, column 18 of the Post-Mortem Report reads thus :-

As against column (a), the doctor was expected only to mention whether the injuries are ante-mortem or not. However, the doctor has mentioned thus :-

Yes, Ante-mortem fresh.

There is no need for the doctor to give the condition of the injury when he is only expected to give the nature of the injury - whether ante-mortem or post-mortem. It appears that everywhere in the Post-mortem Report, the doctor has, whether required or not, mentioned the word "Fresh" at the bottom of each injury shown and described and, therefore, in our view, it does not have any specific bearing in respect of holding the age of the injury. Even otherwise, since the Post-mortem Report is admitted by the defence, it is not open for the defence to criticize the recitals in the Post-mortem Report and in absence of a specific opinion of the doctor, it will not be safe to infer certain aspects of the matter and brush aside the theory of the prosecution in this regard. The contention of the learned Counsel, therefore, on this count also must fail.

81. The situation, which emerges after careful re-appreciation of evidence as well

as taking into consideration the rival contentions canvassed by the respective counsel, is that the prosecution succeeded in proving the following facts and circumstances :-

(a) On 28th March, 2001, deceased Pratiksha was dropped to her school by her father Dilip (P.W. 5).

(b) In the normal set of circumstances, she was supposed to return home by mid-afternoon.

(c) The accused visited the house of the deceased at about 11.30 a.m. and enquired with Pratikshit (P.W. 6) (brother of the deceased) regarding the whereabouts of the deceased.

(d) The accused and deceased were seen near the deserted house in the forest area at Koradi by Gunwant (P.W. 1) and Ajay (P.W. 11).

(e) The deceased was in her school uniform and was carrying a bag which shows that the deceased had gone there straightway after the school hours. The boy accompanying her was wearing a "T" shirt and a full pant and was carrying a ranger bicycle (Article No. 26).

(f) On 28.3.2001, Gunwant (P.W. 1), who was running a dairy and had livestock, had taken his cattle for grazing in the pasture area which is near Koradi Temple. Ajay (P.W. 11), the friend of Gunwant (P.W. 1), was also with him on 28.3.2001 and had also seen the deceased along with the accused near the deserted house in the forest area at about 2.30 p.m.

(g) These witnesses made enquiries with the accused and deceased about their presence at such a deserted and lonely place and also asked their names. The accused gave his name as "Gandhi" while that of the girl as "Vaidya" and also told these witnesses that the deceased was his cousin. The accused also told these witnesses that their parents are visiting the temple and they were waiting for their arrival.

(h) Gunwant (P.W. 1) on 29.3.2001 took his cattle for grazing to the same place i.e. near the deserted house. He went to the deserted house and found the dead body of the girl which he had seen alive with the accused on the previous day.

(i) Gunwant (P.W. 1) immediately rushed to the Police Outpost in the village and informed about the incident and returned to the spot along with police personnel. Gunwant (P.W.1) thereafter immediately lodged report (Exh. 28), which reveals that the girl, whose dead body was found, is the same girl, whom he and Ajay (P.W. 11) had seen along with the accused on the previous day, i.e. on 28.3.2001 at about 2.30 p.m. - 3.00 p.m.

(j) He has also given the description of the accused as well as the details of conversation which had taken place between these witnesses and the accused as well as deceased Pratiksha on 28.3.2001.

(k) The Panchanama of Spot {Exh. 32) shows that the dead body of the girl was found very close to the place where deceased was last seen alive with the accused by Gunwant (P.W. 1) and Ajay (P.W. 11).

(l) The Inquest Panchanama reveals the injuries found on the person of the deceased. Both these documents, i.e. Exhs. 32 and 33, are proved by Dilip Raut (P.W. 2).

(m) The Post-mortem Examination was conducted by Dr. A.A. Mukherjee on 30.3.2001 and it began at 11.40 a.m. and in Column No. 11 the doctor has mentioned "Rigor Mortis absent" and described the injuries to genitals in column No. 15, and surface wounds and injuries, their nature, position, dimension and direction in column No. 17 and opined that the injury No. 1 individually was sufficient in ordinary course of nature to cause death and the cause of death is strangulation.

(n) The contents of this document are admitted by the defence.

(o) Similarly, Exh. 58 is a requisition to the L.M.J., Mayo Hospital, Nagpur, whereby an opinion of doctor was sought in respect of fact of rape etc. and Exh. 59 is the opinion of the doctor which shows that the deceased girl was capable of undergoing sexual intercourse and on account of rape she sustained injuries on her private part and the hymen was ruptured.

(p) The contents of these documents are also admitted by the defence.

(q) Similarly, from the Seizure Memorandum (Exh. 39) and Discovery Panchanama (Exh. 38) as well as Memorandum of Identification of seized property (Exh. 48) and from the collective reading of testimonies of Chitra (P.W. 10), Roshan (P.W. 13), Shailesh (P.W. 18) and Pravin (P.W. 12), the circumstances of burning of the school bag of the deceased in the premises of Municipal Corporation Zone No. 5, Nagpur, Roshan (P.W. 13) reached there at the relevant time, Shailesh (P.W. 18), who was also present, took two books and two compass boxes from the school bag and gave the same to Roshan (P.W. 13) and the same were recovered vide Seizure Memo (Exh. 39). The books recovered from Roshan (P.W. 13) bear the name of the deceased "Pratiksha Vaidya". The compass boxes and the contents therein have been identified by Chitra (P.W. 10).

(r) On the basis of injuries on the person of the deceased, coupled with the guiding parameters in Modi's Medical Jurisprudence, the fact of deceased being subjected to rape before her murder is established.

(s) Similarly, the injuries found on the person of the deceased, particularly shown and described in column 17, coupled with the guiding principles in this regard given in Modi's Medical Jurisprudence, further establish the fact of homicidal death of the deceased and finally the prosecution is also able to prove the identity of the person, i.e. the accused, with whom the deceased was last seen alive on 28.3.2001 at about 2,30 p.m. - 3.00 p.m. in the forest near the deserted house.

(t) The identification parade was held and it is proved by Ramesh (P.W. 9), in which Gunwant (P.W. 1) and Ajay (P.W. 11) identified the accused and the contents thereof are proved by Panch witness Bhimrao (P.W. 8).

(u) The above referred facts and circumstances are corroborated by the evidence of Mr. Deolkar (P.W. 19), the Investigating Officer.

82. That the circumstances brought on record by the prosecution from which inference of guilt is to be drawn are fully established by unimpeachable evidence beyond the shadow of doubt and circumstances are of determinative tendency, unerringly pointing out towards guilt of the accused and when are considered collectively incapable of explaining any reasonable hypothesis save that of guilt of the accused. Similarly, in our considered view, the circumstances proved and relied upon by the prosecution for conviction of the accused are fully established and the chain of evidence furnished by these circumstances is so complete that it does not leave any reasonable ground for a conclusion consistent with the innocence of the accused. The circumstances from which conclusion of guilt is drawn have been fully established and all these circumstances are of a conclusive nature and consistent with hypothesis of the guilt of the accused, and all these circumstances taken together lead to only irresistible conclusion that the accused alone is the perpetrator of the crime of rape and murder.

83. It is now the duty of the Court to find out and give punishment, which must commensurate with the crime committed by the accused. In order to decide this factor, we have taken into consideration the ratio laid down in the various judgments of the Apex Court and guiding principle it provides in arriving at a conclusion in regard to grant of sentence, which may be just, proper, adequate, permissible and sustainable in law. Similarly, we have to consider the various theories and guiding principles propagated by the various judgments of the Apex Court and High Courts cited by the respective Counsel for the parties and after going through all these authorities, in our considered view, the situation which emerges for our consideration is summarised in the following paragraphs and within the framework of these parameters we need to decide whether the offence committed by the accused is that of rarest of the rare kind, which calls for extreme punishment.

84. While swinging the pendulum of sentencing justice an overwhelm of subjective considerations, modern penal theories, behavioural emphasis or social antecedents "judicial hubris or human rights perspectives, criminological literacy or fanatical reverence for outworn social philosophers buried in the debris of time except as parts of history" are some of the major forces which count heavily". But simultaneously it should be the duty of the Court to see that as far as practicable judicial subjectivism do not creep into the decisions and thereby make them uncertain and subject to conjectures and surmises.

85. The Court should adopt a legal, logical and criminological method and must make an in-depth study of the causes and motivation of the crime and the inner

and outer conditions prevailing in and around the accused, which have led to the upsurge of crime. The weapon used, the manner in which murder is carried out, the injuries inflicted upon the accused must impress the mind of the Judge while awarding sentence.

86. It must be, however, plainly admitted that whereas there is so much of hue and cry for judicial discretion and streamlining the sentencing procedure, we must not lose sight of the fact that the said discretion is always unknown, It is different in different men and it depends upon constitution, temper and passion. But this does not mean, however, that the said discretion can be used arbitrarily or at any rate can be said to be untrammelled and unguided. The need for canalising the discretion has been immensely realised in *Bachan Singh Vs. State of Punjab*, wherein it was observed that the discretion is exercised judicially in accordance with well recognised principles crystallized by judicial decision, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3). It undoubtedly recognises certain principles on the basis of which it has to be exercised, but within the four corners of these principles, the discretion is an absolute one.

87. There has been a considerable shift in sentencing since Independence. Whereas the former rule was to sentence to death a person convicted for murder and to award to lesser sentence for reasons to be recorded in writing, the 1955 amendment removing the requirement had left the Courts equally free to award either sentence. After 1973, life imprisonment for murder has become the rule and capital sentence the exception to be awarded only after giving "special reasons" u/s 454(3) of the Code of Criminal Procedure, 1973 and now the "rarest of rare" principle. However, death sentence is constitutionally valid since it is awarded according to procedure established by law as has been held in *Jagmohan Singh Vs. The State of U.P.*,

88. Though there is no doubt. Judges are entitled to project their own views in the decisions, but it is the bounden duty of the Court to impose a proper punishment depending upon the degree of culpability and the desirability to impose such punishment. It is only in very grave cases where it is a crime against the society and the brutality of the crime shocks the judicial conscience that the Court has the power as well as duty to impose death sentence. *Rajendra Prasad Vs. State of Uttar Pradesh*, . Where the crime is cruel and inhuman, a death sentence may be called for. *Ediga Anamma Vs. State of Andhra Pradesh*, and *Bishan Dass Vs. State of Punjab*, . Death punishment may also be awarded in cases where the murderous operation of a criminal jeopardizes social security in a persistent, planned and perilous fashion, then his enjoyment of fundamental rights may be rightly annihilated.

89. If society does not survive, individual existence comes to naught. So, one test for impost of death sentence is to find out whether the murderer offers such a traumatic threat to the survival of social order and is a violator of social justice whose extinction becomes necessary for society's survival.

90. Death punishment should also be allowed where a person commits diabolical, cold-blooded and pre-planned murder of an innocent individual or any such other brutal murder of heinous or depraved character which shocks the conscience of the Court or where the nature of the murder is horrendous, barbarous, atrocious or where the murder is diabolically conceived and cruelly executed against the helpless and hapless victim by dangerous deviants of incorrigible disposition, he should be awarded death penalty.

91. The "rarest of rare" principle laid down in Bachan Singh's case has been supplied with a guideline in Machhi Singh's case. A five points formula was evolved to identify the rarest of rare cases. The five factors are :

But there may be cases which may not have been foreseen by the Courts and, therefore, there may have been no guidelines issued. In such cases if the Judge is satisfied that the good of the society is served by a stiff sentence, or when he thinks that it is deserved, he implements his views in spite of there being no firm guidance in law and has autocratic licence to render his decision within the framework of law.

92. The objective of death sentence is to be found in making the evil doer an example and warning to all who are like minded with him. Out of the various theories of punishment, the two, i.e. the Retributive and the Deterrent provide justification for death punishment. Retributive theory emphasises retention of death punishment for horrendous crimes and it creates an awe and fear not only in the mind of the wrong doer alone, but in the mind of others also and deters them from committing crimes.

93. It is no doubt true that the guidelines issued in Bachan Singh and Machhi Singh's case make the position of Section 302 of the Penal Code much akin to that as it was proposed in the Indian Penal Code (Amendment) Bill, 1972 passed by the Rajya Sabha in 1978. Death penalty is to be imposed only in the "rarest of rare" cases. The guidelines do not, however, formulate rigid standards in an area in which the Legislature so variety treads. Since death sentence is to be imposed in the "rarest of rare cases", the area for imprisonment for life is also very wide. Where the offender suffers from socio-economic psychic or penal compulsions insufficient to attract a legal exception or to down grade the crime into a lesser one, judicial commutation is permissible. Similarly, other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty.

94. Death penalty may be desirable when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti social or abhorrent nature of the crime, such as for instance :

- manner of commission of murder when the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

- motive for commission of murder - when the murder is committed for a motive, which evinces total depravity and meanness, for example, cold blooded murder is committed with a deliberate design in order to satisfy his sinister design and where the murderer is in a dominating position or in a position of trust or a murder is committed in the course for betrayal of the trust reposed in him by the deceased.

- magnitude of crime - when the crime is enormous in proportion.

- personality of victim of murder - when the victim of murder is an innocent child who could not have or has not provided even an excuse, muchless a provocation, for murder, a helpless girl/woman or when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust.

95. Guidelines indicated in Bachan Singh's case, which are acted upon, are that death sentence would be warranted if the murder is diabolically conceived and cruelly executed, having regard to the weapon used and the manner in which it is committed, the horrendous features of the crime and hapless, helpless state of the victim and also where the murder has been committed after previous planning and involves extreme brutality.

96. It is no doubt true that there has been a considerable shift in the sentencing pattern after the amendment as well as decisions in Bachan Singh's and Machhi Singh's cases. However, the Courts are not absolved of their duty of exercising judicial conscience as to whether the extreme penalty should be awarded or only life sentence. There are certain broad principles, which emerge from the judicial decisions rendered by the Apex Court in Bachan Singh's and Machhi Singh's cases. In the case of a murder on the spur of the moment and actuated by anger, jealousy, pride or sense of honour, imposition of lesser penalty of imprisonment of life may be justified. On the contrary, any murder that has been planned before hand and has been committed with cruelty or for a sordid purpose and without the least trace of any spirit of fair play to the victim, should necessarily be punished with extreme sentence.

97. The propositions, which emerge from Bachan Singh's case, were also taken into account by the Apex Court in Machhi Singh's case, which in nutshell, are that, extreme penalty of death need not be inflicted except in the gravest cases of extreme culpability and there cannot be any definite yardstick to measure this aspect of the situation and it is always open for the Court to consider this aspect on the basis of facts and circumstances of each case and in view of certain parameters provided in the decisions rendered by the Apex Court.

98. If a person is so cruel in his approach and blood thirsty, the fact that he is within prison or without makes no bones about killing others for no justifiable cause would be a person immensely dangerous to the society and it will not be in the interest of society to award lesser punishment of imprisonment of life in such cases. We cannot lose sight of the fact that even if psychoanalysts are of the opinion that such person is redeemable in the reasonable run of time the fact

remains that during such time possibility of more lives being lost at his hands cannot be ruled out. Similarly, the Court must consider that if the murderer has no care for human life and kills a human being irrespective of his age and gender for virtually no rhyme or reason or no apparent cause or only to save his skin, the society cannot experiment with correctional strategy. For, when he comes out of jail, there is no reasonable certainty that he will not repeat the same crime. In such situation, murderer deserves to be executed under law as it stands.

99. It is a well settled proposition that 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. *Machhi Singh and Others Vs. State of Punjab*, .

100. Though there is a shift in the legislative intent in the recent past, however, we cannot turn the nelson's eye to the fact that the Parliament in its wisdom thought it best and safe to retain imposition of this gravest punishment in graver cases of murder to the judicial discretion of the Courts, though the same is required to be exercised judiciously in accordance with well recognised principles emerged from the judicial decisions along with contours of legislative policy towards the signposts enacted in Section 454(3) of the Code of Criminal Procedure in *Bachan Singh Vs. State of Punjab*,

101. It is also significant to note that special reasons necessary for imposing death penalty should relate not to the crime alone, but to the criminal. (The crime may be shocking and yet the criminal may not deserve death penalty. On the other hand, crime may be less shocking than other murders and yet the callous criminal, i.e. of raping and murdering and that he is beyond rehabilitation within a reasonable period may deserve the terminal sentence).

102. Pre-planned, calculated, cold blooded murder has always been regarded as one of the aggravating killings.

A sentence or pattern of sentence which fails to take due account of gravity of offence can seriously undermine respect for law. It is the duty of the Court to impose a proper punishment depending upon degree of criminality and desirability to impose such punishment as a measure of social necessity as a means of deterring other potential offenders. Failure to impose a death sentence in such grave cases where it is a crime against the society particularly in cases of murders committed with extreme brutality will bring to naught the sentence of death provided by Section 302 of the Penal Code.

103. While considering the question of sentence to be imposed for the offence of murder u/s 402 of the Penal Code, the Courts must have regard for all the relevant circumstances relating to the crime as well as the criminal. If the Court finds but. not otherwise that the offence is of exceptionally depraved and heinous character and constitutes on account of design and the manner of its execution, a source of grave danger to the society at large, the Court may impose the death

sentence. [Bachan Singh's case).

104. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence : in the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing otherwise if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by killing a member of the community, which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. Machhi Singh and Others Vs. State of Punjab,

105. In the foregoing paragraphs, we have discussed virtually the entire law laid down by the various decisions of the Supreme Court related to the factors, circumstances, situations vis-a-vis doctrine of "rarest of the rare", including the changing pattern of the Legislative intent. On the backdrop of these guiding legal principles as well as theories propounded by the scholars and considered by the Apex Court, we have to evaluate the present crime committed by the accused and decide whether the same falls within the ambit of the doctrine of the "rarest of the rare".

106. In the instant case, the accused had persuaded the innocent girl of tender age to accompany him to a place, which was remote, deserted and in the forest. The conduct of the accused in no uncertain terms demonstrates sinister motive, which evinces total depravity and meanness. The accused knew that the innocent girl could not provide any resistance since she is totally helpless and the accused was in a position of domination. Taking advantage of such helpless and defenceless girl, the accused has committed two horrendous, barbarous and atrocious crimes, which are diabolical in nature and shock the judicial conscience. Those are : rape on girl of a tender age of eleven years and after satisfying his lust, murder of such innocent, helpless and defenceless child. Both these offences will have to be judged individually and collectively on the backdrop of the above referred factors in order to decide whether each one of them individually and collectively is a crime, which can be categorised as rarest, of the rare,

107. We cannot turn nelson's eye to the fact that during the recent years, unfortunately crimes against women are on increase. Amongst all the crimes against woman, rape is most heinous and inhuman act of sexual aggression and violence against a helpless woman. It not only amounts to a brutal attack on integrity and dignity of a woman, but also unjustifiably disregards her legitimate control over her body. Invariably it shatters the foundation of life of the rape victim. It also impairs her capacity for personal relationship and alters her behaviour and values and reduces a woman to a state of living corpse.

108. The Preamble to the Constitution of India assures, among other things, "dignity of the individual". Article 21 of the Constitution guarantees the right to life and personal liberty to individuals and mandates the State not to, except according to procedure established by law, deprive a person of his right. Its unquestionable stand that right to life is something more than a mere animal existence and it includes right to live with human dignity and non-consensual sexual assault on a woman goes against the acknowledged basic tenets of Article 21 and violates her right to live with dignity. In *Shri Bodhisattwa Gautam Vs. Miss Subhra Chakraborty*, the Supreme Court has observed thus :

Rape is thus not only a crime against the person of a woman (victim), it is crime against the entire society. Rape is, therefore, the most hated crime. It is a crime against basic human rights and is also violative of the victim's most cherished of the fundamental rights, namely, the right to life contained in Article 21. To many feminists and psychiatrists, rape is less a sexual offence than an act of aggression aimed at degrading and humiliating women.

109. On the backdrop of these factors, in our considered view, the act of rape is as brutal and cruel as well as diabolical in nature, which shocks the judicial conscience and the conscience of the society even more when it is committed on a helpless, defenceless and innocent girl of tender age. In the instant case, the deceased was only eleven years of age, totally helpless and completely defenceless, incapable of even remotely visualizing that the person in whom i.e. accused, she had trust and whom she considered to be her elder brother, had such cruel sinister intention to commit a crime of rape on her. This crime, in our opinion, shall have a direct adverse impact on the society and shall impair the very foundation on the basis of which human relationship and trust is based.

110. In the instant case, the injuries found on the private part of the child would demonstrate that the act of rape is diabolically conceived and cruelly executed by the accused on a totally helpless and defenceless child. The crime of rape committed by the accused individually, in our considered view, provides realistic foundation to bring subsequent act of murder committed by the accused within the ambit of rarest of the rare case. The concept of "rarest of the rare" cannot be confused with the analogy that the crime becomes rarest of the rare only when it seldom committed and in the exceptional circumstances. We do not want to reiterate the factors, which would render crime as rarest of the rare as already mentioned hereinbefore. However, the real and factual test to determine whether

the crime falls within the ambit of rarest of the rare case must necessarily depend upon the factors referred hereinabove coupled with the parameters provided by the decisions of the Hon'ble Apex Court, such as in the cases of Bachan Singh and Macchi Singh.

111. In the instant case, the act of rape and murder is a pre-planned and pre-meditated crime committed by the accused with extreme cruelty and for sordid purpose and without the least trace of any spirit of fair play and without giving any chance to the victim. Similarly, the offence committed by the accused is diabolically conceived and cruelly executed, which demonstrates extreme brutality and of course it shocks conscience not only of the Court, but also of the Society. The other important and serious factor, which needs deeper thought and genuine concern is the kind of mind-set the accused has. The evidence on record clearly shows that after committing brutal, barbaric and extremely cruel crime of rape on a child of eleven years of age, by destroying the very fibre of basic trust reposed in him by the deceased girl, the accused did not stop there. The further horrendous, barbarous and atrocious crime of killing the innocent girl by a most barbarous method of strangulation demonstrates that the accused had no concern whatsoever for the human life and is totally insensitive towards spirit of life and is least bothered and concerned in taking away the life of an innocent child. This dangerous and perverted behaviour of the accused provides realistic foundation to the judicial mind to conclude that the existence of person like accused with the kind of mind set he has is hazardous and dangerous to the society and calls for extreme punishment. Any leniency in this regard, in our view, would expose the members of the society, who can be next victims of the accused.

112. It is no doubt true that in the normal set of circumstances it is more or less an accepted position that as far as possible extreme punishment need not be awarded unless there are exceptional circumstances and the crime committed by the accused falls within rarest of the rare category. In our considered view, for the reasons stated hereinabove, the crime committed by the accused is of exceptional nature and comes within the rarest of the rare category. However, we have also given our anxious thought to the other aspect of lesser punishment and whether same can be awarded and chance can be given to accused for reformation and rehabilitation.

113. When we consider the aspect of lesser punishment, in our country, there are no recognised known reformatory Institutions and Centres for prisoners undergoing sentence in Jail for the crimes they have committed. Similarly, there is no statistical data available in this regard to show as to whether criminals who were convicted for the serious crime like rape and murder and were awarded lesser punishment of life imprisonment were reformed during the course of their stay in the prison and became normal human beings. In the absence of this factual data, it will be hazardous to award lesser punishment to the accused for the crime, which comes within the category of rarest of the rare only on the basis

of wishful thinking that the criminal will be transformed or reformed in due course of time and the same, in our opinion, would be totally unjust and improper. We have already observed that it is the bounden duty of the Court to impose a proper and adequate punishment depending upon degree of culpability and desirability to impose such punishment.

114. Another circumstances, which also requires consideration is whether young age of the accused is a mitigating circumstance, which calls for lesser punishment. In para (13) of the Judgment in the case of Ram Deo Chauhan @ Raj Nath Chauhan Vs. State of Assam, . Their Lordships of the Supreme Court after taking into consideration the law laid down in Bachan Singh Vs. State of Punjab, . Balwant Singh Vs. State of Punjab, and Maghar Singh Vs. State of Punjab, have observed thus :

It is true that in a civilised society, a tooth for tooth and a nail for nail or death for death is not the rule, but it is equally true that when a man becomes a beast and menace to the society, he can be deprived of his life according to the procedure established by law, as Constitution itself has recognised the death sentence as a permissible punishment for which sufficient constitutional provision for an appeal, reprieve and the like have been provided under the law. It is true that life sentence is the rule and death sentence is an exception. We are satisfied that the present case is exceptional case, which warrants the awarding of maximum penalty under the law to the accused/appellant. The crime committed by the appellant is not only shocking, but it has also jeopardized the society. The awarding of lesser sentence only on the ground of appellant being a youth at the time of occurrence cannot be considered as a mitigating circumstances in view of our findings that the murders committed by him were most cruel, heinous and dastardly. We have no doubt that present case is the rarest of the rare requiring maximum penalty imposable under law.

115 The above referred finding recorded by the Apex Court after considering the law laid down by the Apex Court in various cases mentioned hereinabove clearly mandates that if the crime committed is not only shocking, but also jeopardizes the society and when the man becomes beast and is menace to the society, he can be deprived of his life according to the procedure established by law even if he is a youth at the time of occurrence and this cannot be treated as a mitigating circumstance since the crime committed by him is the most cruel and heinous.

116. There is another angle, which needs consideration in the light of above referred proposition laid down by the Apex Court. While deciding the culpability of crime, it is number of person killed or murdered by the accused cannot alone be the circumstance to decide whether crime is brutal, cold blooded and diabolical and, therefore, it is rarest of the rare one. It depends upon whether the crime committed is not only horrendous but also diabolical and atrocious and the Courts have to go further and find out whether same is diabolically conceived and cruelly executed against the helpless victim by a dangerous deviant of incorrigible disposition and if such crime is committed by a youth, then in that

case looking to the degree of culpability, the case would fall within the rarest of the rare category and calls for extreme punishment. The contention canvassed by Shri Daga, learned Counsel for the accused, in this regard cannot be accepted and is rejected.

117. In the instant case, the five points formula, which was evolved to identify the rarest of the rare case referred to hereinabove needs to be considered on the facts and circumstances of the present case.

The first and foremost circumstance is the manner in which crime is committed. We have already answered this question and, therefore, we will not reiterate the entire finding recorded by us in this regard. However, we will summarise our finding in this regard in the following words :

The crime of rape committed by the accused is pre-planned, cold blooded, horrendous, diabolically conceived and cruelly executed against the helpless victim and, therefore is committed with extreme brutality. - Motive - we will summarise the finding already recorded in this regard by us hereinabove. The accused in the present case, had no other intention or motive to take an innocent tender child to a remote and deserted place admittedly about 8-9 kms. away from her residence, but to satisfy his lust and to do away with the female child after satisfying his lust. The motive apparently shows total depravity and virtually no sensitivity.

- Anti social nature of crime - The crime committed by the accused does not only shock the judicial mind, but also the mind of the society. It, in our opinion, destroys the basic fibre of trust amongst members of the society and, therefore, the crime in question is not only against the individual, but a crime against the entire society.

Magnitude of the crime - The present crime is a combination of two individual cruel, barbaric and atrocious crimes. One is rape on a helpless child and second is the murder of a girl of tender age in a very cruel manner. The ambit of crime committed by the accused is so enormous that lesser punishment shall not only amount to miscarriage of justice, but shall also change the public perception in the criminal justice system.

Personality of the victim - In the instant case, the victim is a child of tender age, totally innocent and completely helpless and was completely incapable of giving resistance to the aggression of the accused and was unable to protect herself.

118. On the backdrop of these factors, the case in hand undoubtedly comes within the category of rarest of the rare cases and calls for capital punishment,

119. Lastly, while considering the reference made by the Additional Sessions Judge for confirmation of the capital punishment as well as appeal of the accused, the appellate Court should keep in mind certain parameters if it wants to interfere with the findings recorded by the Trial Court. Those are :

If we are called upon to try this case, we have no doubt that we would have imposed, if we are satisfied of the truth of the prosecution evidence, the death sentence. In the present case, the learned Additional Sessions Judge having exercised the discretion which undisputedly is vested in him and awarded death sentence, the Appellate Court could not be justified in interfering with exercise of that discretion unless it is found that exercise of discretion is perverse. In the instant case, on meaningful deliberation and proper consideration of the evidence of prosecution, the finding recorded by the Trial Court of the death sentence, in our considered view, is appropriate and commensurate with the degree of culpability of crime committed by the accused.

120. In the instant case, it has come in the evidence of P.W. 15 P.S.I. Kalyansingh Rajput that present accused is also prosecuted for the offence of theft and criminal case in this regard is pending. It is, however, true that while judging nature of the crime in question, the earlier prosecution of the accused is not of much help to the prosecution. However, it may provide some inkling about behavioural mind-set of the accused and show that the accused does have a tendency to commit crime.

121. It is also necessary for the Court to take into consideration the mitigating factors arising in the present case and to evaluate the same as against the aggravating factors in view of legal parameters emerging from the judgment of the Supreme Court in Bachan Singh Vs. State of Punjab,

122. The evidence of prosecution reveals that the present offence has not been committed by the accused under the influence of extreme mental or emotional disturbance. On the other hand, the prosecution evidence reveals that the accused had systematically planned the procedure for commission of offence and with that sinister design in mind taken the girl of tender age to the remote and secluded place, which was 8-9 kms. away from the place of her residence. The choice of place where the offence is committed also reflects meticulous co-ordination of thinking process of accused in order to see that nobody should be around to help the victim when accused would commit the offence in question.

123. As far as age of the accused is concerned, we have already considered this issue and recorded our finding in this regard.

124. Similarly evidence on record does not show that the accused acted under duress or domination. On the other hand, prosecution evidence reveals that entire plan and sinister design in the outcome of sinister mind of the accused and in order to achieve the perverted motive, the accused had taken the girl to the spot, which was deserted and lonely and committed heinous crime of rape and murder. Similarly, there is nothing on record to show that the accused had any mental ailment which had impaired his capacity to appreciate the criminality of his conduct. On the other hand, the crime of rape and murder is not only horrendous and barbarous, but the same is cruelly executed against the helpless victim by the dangerous deviant of incorrigible disposition. In the light of these

circumstances, there is hardly any scope to come to the conclusion that there are hardly any mitigating factors in the present case. Therefore, after proper evaluation in this regard, in our considered view, crime in question is of the rarest of the rare kind, which calls for extreme punishment.

125. Another relevant factor, which Court cannot ignore while considering the quantum of punishment, is whether the accused would be a persistent threat to the society after his release from prison in case of lesser punishment and would be dangerous to the society. Man, who is a social being, finds his life and its goals satisfied, in society. Apart from society, man cannot find it convenient or possible, to live well or fulfill his goals. Being an essential thread in the fabric of society, he finds his own interests linked up with those of the society of which he forms part. This is a complex issue and it is not easy to conclude one way or the other in this regard. However, certain broad guiding principles enable the Court to anticipate certain eventualities with reasonable certainty on the basis of behavioural pattern as well as criminal mind-set of the accused. In the instant case, there is evidence to show that the accused has tendency to indulge in criminal activities. The accused has already committed a crime of theft before committing the barbaric and brutal crime in question. The act of rape committed by the accused on the Innocent young child with the pre-planned sinister design reveals dominant criminal mentality and demonstrates a perverted behavioural pattern of mind. The crime of murder committed by the accused after satisfying his lust in no uncertain terms demonstrates criminality of the highest order, insensitivity towards human life and complete barbarism. The factor of compassion is totally absent in the accused. The manner in which the crime is committed and executed demonstrates total disregard for the rule of law and further shows that the accused does not have any fear for law. We after due deliberation in this regard with reasonable certainty, are of the view that the accused will be a persistent threat to the society after he is released from prison and members of the society shall not be safe and secure in the presence of the accused and, therefore, situation and circumstances call for extreme punishment.

For the detailed and exhaustive reasons enumerated by us in the foregoing paragraphs, the reference made by learned Second Additional Sessions Judge, Nagpur, is allowed, and the death sentence awarded is hereby confirmed, and the Criminal Appeal filed by the accused is dismissed.