
(2014) 07 BOM CK 0309

In the Bombay High Court

Case No : Confirmation Case No. 8 of 2013 in Sessions Case No. 87 of 2012 and Criminal Appeal No. 80 of 2014

The State of Maharashtra

APPELLANT

Vs

Babasaheb Maruti Kamble

RESPONDENT

Date of Decision : 10-07-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235, 235(2), 309, 309(2), 313
Evidence Act, 1872 — Section 106, 114
Penal Code, 1860 (IPC) — Section 302, 342, 376(2)(f)

Citation : (2014) 07 BOM CK 0309

Hon'ble Judges : V.K. Tahilramani, J;A.S. Gadkari, J

Bench : Division Bench

Advocate : P.P. Shinde, A.P.P, Advocates for the Appellant; Abhaykumar Apte, Advocates for the Respondent

Judgement

V.K. Tahilramani, J.—The Confirmation Case No. 8 of 2013 arises out of the Reference made by the learned Additional Sessions Judge, Dindoshi in Sessions Case No. 87 of 2012 for confirmation of the death sentence awarded to the accused Babsaheb Maruti Kamble. By judgment and order dated 27.9.2013 in Sessions Case No. 87 of 2012, the learned Sessions Judge convicted the accused for the offence punishable under Section 302 of IPC and sentenced him to capital punishment of death. By the very same judgment and order, the learned Sessions Judge also convicted the accused under Sections 376(2)(f) and 342 of IPC. For the offence under Section 376(2)(f) of IPC, the accused was sentenced to life imprisonment and for the offence under Section 342 of IPC, the accused was sentenced to suffer simple imprisonment for two months. As the sentence of death was imposed on the accused, the learned Sessions Judge made a reference to this Court for confirmation of death sentence. The accused being aggrieved by the very same judgment and order, preferred Criminal Appeal No. 80 of 2014 and as both the Confirmation Case and the Appeal are directed against the very same judgment and order, both these matters were heard and

decided together.

2. The prosecution case, briefly stated, is as under:-

(i) The victim girl was the daughter of PW-1 Sharda. Sharda was residing at Teen-dongri, Kranti Nagar, Goregaon (W), Mumbai along with her husband and children including the victim girl. The victim girl was about 7 years old at the time of the incident. The appellant was residing in Room No. 149 which is adjacent to the house of Sharda, hence, he was known to Sharda and her family. The appellant was residing alone in his house.

(ii) The incident occurred on 28.10.2011. On that day, it was festival of "Bhaubij". Sharda was giving food to her children. At that time, the accused called the victim girl i.e. the younger daughter of Sharda and asked her to bring chili and coriander. He insisted that he wanted to have his food and therefore, he required chili and coriander. Hence, Sharda sent her daughter i.e. victim girl with him. As her daughter did not return home for about 30 to 40 minutes therefore, Sharda went to the house of the accused in search of her daughter. She saw that the accused was standing in the door-way and he was obstructing her way. Sharda enquired with the accused about her daughter and asked him where he had sent her daughter. The accused replied that he had not sent her daughter anywhere and he was not aware of whereabouts of her daughter. Thereafter, Sharda and her elder daughter Sneha went in search of the victim girl in the vicinity of Kranti Nagar but they could not find her till 6.00 p.m. Sharda then called her husband who was working in a Sweet-shop at Dombivli as a labourer and informed him that the accused had called their daughter and thereafter their daughter had not returned home. Her husband asked Sharda to go again to the house of the accused and search for their daughter in his house. Thereafter, Sharda along with her daughter Sneha again went to the house of the accused. When they went to the house of the accused, they saw a pair of slippers near the door in the house of the accused. Sharda identified the said slippers as that of her daughter i.e. the victim girl. Sharda then bent down to see. At that time, she saw small hand of her daughter underneath the bed and only fingers could be seen by her. She found her daughter was underneath the bed. She pulled her daughter and saw that she was in naked condition. There were injuries on her person. Her eyes and face were blackened. Blood was oozing out from her private part. Sharda and her daughter shouted for help. Other residents gathered there. Neighbouring persons like Monika Kamble, Rohini, Rashmi etc. gathered there. People who gathered there, assaulted the accused and caught him. Sharda with the help of neighbours, took her daughter i.e. victim girl to Siddharth Hospital. In the hospital, the Medical Officer examined the victim girl and declared her dead. Goregaon Police Station was informed about the said incident through police control room that one small girl was raped and the accused was caught by the residents. PW-22 Police Inspector Kasbe informed his superiors and on making entry in the station diary, he proceeded towards the spot i.e. Room No. 149 at Kranti Nagar, Goregaon (W). When Police Inspector Kasbe

reached the spot, he found the victim girl was already taken to Siddharth Hospital. Hence, he proceeded to Siddharth Hospital. He made enquiry with the complainant Sharda. Sharda narrated the incident to him. Police Inspector Kasbe recorded statement of Sharda in the hospital and on telephone informed the police station to register an offence against the accused. The said F.I.R. was registered. Thereafter, investigation commenced. Dead body of victim girl was referred to Cooper Hospital for post-mortem examination. PW-12 Dr. Gajare performed the post-mortem on the dead body of the victim girl. Dr. Gajare found that the deceased victim girl was forcibly subjected to sexual intercourse and cause of death was "head injury with compression of neck". After completion of investigation, the charge sheet came to be filed.

3. Charge came to be framed against the accused under Sections 302, 376(2)(f) and 342 of IPC. The accused pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. His further defence is that someone else raped and murdered the victim girl and placed her body under his bed. After going through the evidence adduced in this case, the learned Sessions Judge convicted and sentenced the accused as stated in paragraph 1 above.

4. We have heard the learned Advocate for the accused and the learned A.P.P. for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for both sides, the judgment and order delivered by the learned Sessions Judge and the evidence on record, for the reasons stated below, we are of the opinion that the prosecution has proved its case beyond reasonable doubt and the appellant has committed offence punishable under Sections 302, 376(2)(f) and 342 of IPC.

5. It is the prosecution case that accused committed murder of the victim girl. In such case, it would be necessary to see whether the death is homicidal in nature. The dead body of the victim girl was sent to PW-12 Dr. Gajare for postmortem. Dr. Gajare conducted post-mortem on the dead body of the victim girl on 29.10.2011 from 10.00 a.m. to 12.30 p.m. On external examination, he found the girl to be about seven years old and he noticed that the body was naked. Dried blood stains were seen at nose and mouth, over right wrist laterally, on thighs and vagina externally, on right leg anteriorly and on buttocks region. He also observed post-mortem lividity over back and buttocks region, face was swollen, eyes were blackened and eyelids were swollen. On external examination of genitals, Dr. Gajare found the hymen completely torn, margins contused lacerated hemorrhagic swollen red colour, both vaginal walls lacerated contused tears seen at posterior fornix central aspect, margins lacerated contused hemorrhagic contused 8 cm x 1 cm x 1 cm. Dr. Gajare also noticed external injuries on external parts of the body as under:

(A) FACE:

(1) Contusion seen over left orbital region, over area 8 x 6 cm. reddish with

eyelids swollen;

(2) Contusion size of 1 x 1 with abrasion 0.5 x 0.5 cm. reddish seen over left cheek.

(3) Contusion with 3 cm. diameter seen over left angle of mandible reddish (muscle deep).

(4) nail mark 0.1 cm x 0.8 cm. seen over nose reddish;

(5) right eyelids swollen reddish with periorbital edema;

(6) Nail marks two in number 1.5 cm. apart from each other seen over right cheek, linear, reddish 0.1 x 1 cm.

(B) NECK:

(1) Abrasion seen over 1 x 0.5 cm. oblique, 0.2 cm. below right angle of mandible over right neck reddish;

(2) Faint ligature mark seen on right side neck 4 x 0.5 cm. horizontal reddish;

(3) Abrasions two in number over left side of neck 1 cm. apart from each other of size 1 x 0.5 cm. (lateral one), 0.5 x 0.5 cm. (medial) reddish;

(4) Linear abrasion over left side of neck vertical 0.5 x 0.5 cm. reddish;

(5) Abrasion 1 x 0.5 cm. over left side of neck posteriorly reddish.

(C) CHEST WALL REGION:

(1) Nail marks three in number on left chest, wall supramammary region seen over 1 x 0.5 cm. crescent shape reddish;

(2) Linear nail marks two in number over left lateral side of chest over mid-axillary line region seen over 1 x 1 cm. crescent shape, reddish;

(3) Nail marks 4 in number over right supramammary region crescent shape, red coloured varying from size 0.5 x 1-1.5 cm. x 1 cm.

(4) Nail marks seen over 1 x 0.5 cm crescent red colour centre of chest;

(D) LIPS: Abrasion over upper lips, mucosal surface dark red in colour, on left side seen over 2.5 cm x 0.5 cm on right side-seen over 1.5 cm x 0.5 cm.

(E) BACK: abrasion 2 in number seen over 1.5 cm x 0.5 cm x 2 cm apart from each other over left lower back region reddish.

(F) UPPER LIMBS:

(1) abrasion 1 x 1 cm reddish seen over right elbow.

(2) abrasion 0.5 cm x 0.5 cm reddish seen over right wrist dorsum at 5th metacarpal region.

(3) abrasion.2 x.2 cm seen over tip of right little finger ventrally reddish.

(G) LOWER LIMBS-RIGHT:

(1) abrasion 1.5 cm x 1 cm seen over right knee internally reddish.

(2) linear abrasion 9 x.5 cm seen over right shin, reddish

(3) (iii) abrasion 0.5 cm x.5 cm seen over right ankle posteriorly reddish.

LEFT:

(1) abrasion 3 in number 1 x.5 cm seen over left thigh and anterior laterally reddish.

(2) contusion seen over 1 x 1 cm. reddish two in number and 3 cm."

According to Dr. Gajare, all the injuries were ante-mortem injuries. During internal examination, Dr. Gajare found following injuries:

(1) Patachiales (seen small dots) on right temporalis muscles with contusion seen over 2 x 1 cm red coloured.

(2) Contusion seen over frontal region centrally red colour 4 x 4 cm.

(3) Contusion with haematoma on left fronto temporal region red coloured over area 8 x 5 cm.

(4) Contusion seen over left parietal prominence region 1.5 cm x 5 cm red colour.

Meninges intact, brain subarachnoid haemorrhage on right lobe superolateral aspect over area 15 x 8 cm red coloured seen.

On dissection of neck:

(1) Skin and subcutaneous tissues under ligature are thin, dry, hard to touch and parchment like.

(2) Contusion seen on left side of neck, surrounding submandibular gland with hemorrhages with gland area seen over 4 x 3 cm.

(3) Contusion red coloured on left clavicle region seen 1 x.5 cm

(4) Contusion on posterior wall of right side of larynx 2 x 2 cm red colour with congestion with laryngeal mucosa seen.

According to Dr. Gajare, the death may have occurred within 4 to 6 hours from her last meal and her death may have occurred within 20 to 24 hours before post mortem examination.

On observing the organs of generation, Dr. Gajare found external orifice of cervix contused. In his opinion, due to the penetration said part gets contused. During examination, Dr. Gajare collected blood for grouping, vaginal swab for CA and DNA testing. According to Dr. Gajare, cause of death of girl is "head injury with

compression of neck." During his examination he observed that deceased was subjected to forcible sexual intercourse. According to Dr. Gajare, the act of sexual intercourse may have taken place within 24 hours as injuries were fresh. Dr. Gajare has further stated that death is possible in ordinary course of nature if young girl is ravished by adult person due to the said injuries. According to Dr. Gajare, it is not correct that hymen can be torn if a girl falls down from bicycle and sustains injury. Dr. Gajare has stated that hymen can tear but the injuries mentioned by him, are not possible.

6. Dr. Gajare observed that death may have occurred 20 to 24 hours before the post mortem examination. The post-mortem examination was completed at about 12.30 p.m. on 29.10.2011. This means that the death must have occurred any time from 12.30 p.m. to 4.30 p.m. on 28.10.2011 which is totally consistent with the prosecution case. According to the prosecution, the victim girl was taken away by the accused at about 3.00 p.m. on 28.10.2011 and she was found dead at 6.00 p.m.

7. Dr. Gajare gave clear opinion that the victim girl was forcibly raped based on the examination of the dead body of the victim girl wherein he found her hymen was completely torn, margins contused lacerated hemorrhagic swollen red colour and both vaginal walls were lacerated contused, tears seen at posterior, fornix central aspect, margins lacerated contused hemorrhagic contused 8 cm x 1 cm x 1 cm and according to Dr. Gajare, the death was "due to head injury with compression of neck." The injuries as seen on the dead body of the victim girl which were noticed by PW-12 Dr. Gajare, the cause of death "head injury with compression of neck" and the circumstances in which the dead body was found lying under the bed in the house of the accused leave no manner of doubt that the death was homicidal in nature. It may be stated that the accused has not disputed that the death is homicidal in nature. His contention is someone else raped and murdered the girl and placed her body under his bed. In order to evaluate whether the accused is responsible for the rape on the victim girl and her death, we would have to evaluate the evidence which is circumstantial in nature.

8. In order to prove its case, the prosecution has relied on the following incriminating circumstances, which according to the prosecution prove the guilt of the accused beyond reasonable doubt:

(1) That the accused asked mother of the victim girl to send her daughter to buy chili and coriander for him. Accordingly, PW-1 Sharda sent her daughter. Thereafter the victim girl did not return home;

(2) PW-4 Dharmendra, PW-5 Shrikant, PW-15 Survarna and PW-21 Radheshyam had seen the accused talking with the victim girl at about 3.00 p.m. and taking her to his house i.e. the victim girl was "last seen" in the company of the accused by these witnesses;

(3) Conduct of the accused when the mother of the victim girl went to his house

to enquire about the victim girl, the accused replied that he had not sent her daughter anywhere and that he was not aware about the whereabouts of the victim girl. At that time, the accused was standing in his door-way in front of Sharda in such a way so as to obstruct entry of Sharda the mother of victim girl in the house of the accused;

(4) Dead body of the victim girl was found in the house of the accused under the bed on which he was lying down;

(5) Medical evidence shows that the girl was forcibly raped and thereafter her death was caused by causing injuries to her head and by throttling her neck;

(6) Motive;

(7) Finding of slippers and clothes of the victim girl in the house of the accused;

(8) The DNA report (Exh. 47) shows that DNA of semen detected in the vaginal smear of the victim girl matched with the DNA of the accused;

(9) Seizure of blood stained Chadar from the house of the accused;

(10) DNA of the blood stains on the chadar found in the house of the accused matched with the DNA of the deceased;

(11) The accused has not offered any plausible explanation about the presence of the dead body of the victim girl in his house or about other incriminating circumstances.

9. PW-1 Sharda is the witness who has deposed about the first circumstance i.e. the accused called the victim girl i.e. the younger daughter of Sharda and asked her to bring chili and coriander. Sharda has stated that the accused insisted that he wanted to have his food and therefore, he required chili and coriander. Hence, Sharda sent her daughter i.e. victim girl with him. As her daughter did not return home for about 30 to 40 minutes therefore, Sharda went to the house of the accused in search of her daughter. She saw that the accused was standing in the door-way and he was obstructing her way. Sharda enquired with the accused about her daughter and asked him where he had sent her daughter. The accused replied that he had not sent her daughter anywhere and he was not aware of whereabouts of her daughter. Thereafter, Sharda and her elder daughter Sneha went in search of the victim girl in the vicinity of Kranti Nagar but they could not find her till 6.00 p.m. Sharda then called her husband who was working in a Sweet-shop at Dombivli as a labourer and informed him that the accused had called victim girl and thereafter the victim girl had not returned home. Her husband asked Sharda to again go to the house of the accused and search for the victim girl in his house. Thereafter, Sharda along with her daughter Sneha again went to the house of the accused. When they went in the house of the accused, they saw a pair of slippers near the door in the house of the accused. Sharda identified the said slippers as that of her daughter i.e. the victim girl. Sharda then bent down to see. At that time, she saw small hand of her daughter

underneath the bed and only fingers could be seen by her. She found her daughter was underneath the bed. She pulled her daughter and saw that she was in naked condition. There were injuries on her person. Her eyes and face were blackened. Blood was oozing out from the private part of her daughter. Sharda and her daughter shouted for help. Other residents gathered there. Neighbouring persons like Monika Kamble, Rohini, Rashmi etc. gathered there. People who gathered there, assaulted the accused and caught him. Sharda with the help of neighbours, took her daughter i.e. victim girl to Siddharth Hospital. In the hospital, the Medical Officer examined the victim girl and declared her dead.

10. Meanwhile, Goregaon Police Station was informed about the said incident through police control room that one small girl was raped and the accused was caught by the residents. PW-22 Police Inspector Kasbe informed his superiors and on making entry in the station diary, he proceeded towards the spot i.e. Room No. 149, Rahivasi Sangh at Kranti Nagar, Goregaon (W). When Police Inspector Kasbe reached the spot, he found the victim girl was already taken to Siddharth Hospital. Hence, he proceeded to Siddharth Hospital. There he made enquiry with the complainant Sharda. Sharda narrated the incident to him. Police Inspector Kasbe recorded statement of Sharda in the hospital and on telephone informed the police station to register an offence against the accused. The said F.I.R. was registered. Sharda narrated all the facts to him as has also been stated by her before the Court.

11. Thus, the evidence of PW-1 Sharda shows that on the date of incident, the accused called her younger daughter i.e. victim girl and asked her to bring chili and coriander. Thereafter, dead body of her daughter was seen lying underneath the bed in the house of the accused.

12. Mr. Apte submitted that Sharda has stated that there was no communication between her and the accused prior to the incident. Prior to the incident, her daughter i.e. victim girl had never visited the house of the accused. He submitted that in such case, it is not possible for Sharda to send her daughter on the request of the accused. As far as this contention is concerned, it is pertinent to note that accused is the next door neighbour of Sharda. Sharda has specifically stated that there was no dispute between her family and the accused. Looking to this fact and looking to the fact that he was next door neighbour of Sharda, we do not find the conduct of Sharda improbable in sending her daughter on the request of the accused.

13. The next circumstance is that PW-4 Dharmendra, PW-5 Shrikant, PW-15 Survarna and PW-21 Radheshyam had seen the accused talking with the victim girl at about 3.00 p.m. and taking her to his house i.e. the victim girl was "last seen" in the company of the accused by these witnesses. PW-4 Dharmendra, PW-5 Shrikant, PW-15 Survarna and PW-21 Radheshyam have stated in their evidence that they had seen the accused on 28.10.2011 at 3.00 p.m. talking to the victim girl and taking her to his house. Thereafter the dead body of the victim girl was found in the house of the accused. PW-4 Dharmendra has stated

that he knew the accused as the accused was residing opposite his house. He also knew the family of the deceased as they were residing adjacent to the house of the accused. PW-4 Dharmendra has stated that at the time of the incident, his daughter was five years old. The incident occurred on 28.10.2011. On that day it was "Bhaubij". He was at home as he had a holiday. He saw his daughter and the victim girl were playing together in front of his house. At that time, he saw the accused came near the victim girl and the accused whispered in the ear of the victim girl and took her along with him towards his house. This witness has identified the accused before the Court. At about 6.00 p.m. to 6.15 p.m. PW-4 Dharmendra heard shouts from the house of the accused and when he went near the house of the accused, he saw many persons had gathered there and the victim girl was found in naked condition in the house of the accused with injuries all over her body and blood was oozing out from her private part.

14. PW-5 Shrikant has stated that Kranti Nagar is situated near his house. He had to proceed from the road which was passing through Kranti Nagar, hence, he knew the accused who was residing in Kranti Nagar since last 20 years. The character of the accused was not good. He used to tease women and do eve-teasing. PW-5 Shrikant has stated that he knew the family of the victim girl as they were residing near the house of the accused. On 28.10.2011 Shrikant was at home as there was "Bhaubij" festival. He has stated that on that day, at about 3.00 p.m. he was proceeding along with his friend Radheshyam (PW-21) to Premnagar. At that time, he saw the accused was talking with the victim girl in front of the house of the accused. The accused then took the victim girl in his house. The evidence of this witness further shows that he was at a distance of about 4 to 5 feet away from the victim girl when he saw the accused and the victim girl talking. On account of this fact and on account of the fact that the accused was known to this witness since last 20 years, there was no question of mistaken identity of the accused.

15. The next witness on the point of "last seen" of the victim girl in the company of the accused is PW-15 Suvarna. PW-15 Suvarna has stated that she was residing in Shivtekdi area. She has stated that Shivtekdi and Kranti Nagar are adjacent to one another. She was acquainted with the persons residing in Kranti Nagar because her friend PW-20 Rashmi was residing in Kranti Nagar. Due to this, PW-15 Suvarna knew the victim girl and her family. She also knew the accused since her child-hood. PW-15 Suvarna has stated that on 28.10.2011 at about 3.00 p.m. to 3.15 p.m. she went to the house of her friend Rashmi (PW-20). At that time, she saw the accused taking the victim girl into his house. At about 6.00 p.m. to 6.15 p.m. she heard noise of people, therefore, she went near the house of the accused. She saw that people had gathered there, they were assaulting the accused. She came to know that the accused had committed rape and murder of the victim girl and kept her dead body underneath the bed in his house. PW-15 Suvarna has identified the accused before the Court.

16. Mr. Apte has submitted that PW-15 Suvarna has stated that on 28.10.2011

she went to the house of Rashmi to offer her Diwali sweets. He has submitted that, however, PW-20 Rashmi has not stated anything about Suvarna visiting her house on that day. PW-20 Rashmi in her examination-in-chief has stated that her friend Suvarna had come to her house along with Diwali sweets. She came at about 3.00 p.m. Mr. Apte pointed out that this averment of Rashmi in her examination-in-chief is an omission which is clear from the cross-examination of Rashmi. In this connection it is interesting to note that it has been elicited in the cross-examination of Rashmi that her friend was at her house for half an hour. As this averment has been elicited in the cross-examination, it can safely be held that Suvarna had been to the house of Rashmi at about 3.00 p.m. Even assuming that Rashmi had not stated about Suvarna coming to her house, the evidence of Suvarna has not been shaken during her cross-examination and hence, we find that we can safely rely on the same.

17. The last witness on the point of victim girl being "last seen" in the company of the accused is PW-21 Radheshyam. This witness was also residing in Teen-Dongri. He has stated that road is passing between Teen-Dongri and Kranti Nagar and he knew the accused as he was residing at Kranti Nagar. He also knew the victim girl and her family as they were residing in Kranti Nagar since long. PW-21 Radheshyam has stated that the conduct of the accused was not good towards the society. Radheshyam has further stated that there was festival of "Bhaubij" He was at home due to "Bhaubij" festival. On that day, his friend Shrikant (PW-5) came to his house and asked him to come along with him to Premnagar. At about 3.00 p.m. they left the house to proceed to Premnagar. When they were proceeding towards Premnagar, they saw the accused was talking with the victim girl and then the accused took her to his house. He has identified the accused before the Court. At about 6.00 p.m. when he was returning from Premnagar, he saw crowd at Kranti Nagar. During enquiry, he came to know that the victim girl was raped and murdered by the accused and her dead body was concealed in his house.

18. Mr. Apte submitted that the evidence of PW-4 Dharmendra, PW-5 Shrikant, PW-15 Suvarna and PW-21 Radhyesham cannot be relied upon because PW-1 Sharda has stated that the accused came to her and asked her to send her daughter to buy chili and coriander for him. He submitted that however, PW-4 Dharmendra has stated that on 28.10.2011 his daughter and the victim girl were playing in front of his house and at that time, the accused whispered something in the ear of the victim girl and took her to his house. It is pertinent to note that Dharmendra was residing opposite the house of the accused and Sharda was residing next to the house of the accused. When the accused came to the house of Sharda with request that she should send her younger daughter to bring chili and coriander for him, Sharda sent her daughter with him. As the daughter of PW-4 Dharmendra was playing outside the house of the accused, the victim girl must have started playing with her till the accused brought money to buy chili and coriander. Thereafter the accused had taken the victim girl into his house. Thus, we find no discrepancy between the evidence of PW-4 Dharmendra and the

evidence of PW-1 Sharda so as to render their evidence unreliable. Other three witnesses on the point of "last seen" i.e. PW-5 Shrikant, PW-15 Suvarna and PW-21 Radheshyam had seen the accused when he was talking to the victim girl and taking the victim girl into his house i.e. they had seen the accused taking the victim girl at a little later point in time than PW-4 Dharmendra had seen the victim girl playing outside the house of the accused with his daughter. Thus we find no such discrepancy in the evidence of the prosecution witnesses so as to prove fatal to the prosecution case.

19. Thereafter Mr. Apte argued that the evidence of PW-1 Sharda cannot be believed because, no chili or coriander were found in the house of the accused during the spot panchnama. First of all in the spot panchnama, it is not expected that there will be mention about the vegetables found in the house of the accused. In any event, it does not appear that the victim girl had already purchased chili and coriander. As stated earlier, the house of the accused is situated next to the house of the victim girl and the house of PW-4 Dharmendra is situated in front of the house of the accused. Thus, it appears that the victim girl saw the daughter of PW-4 Dharmendra playing in front of her house which is also in front of the house of the accused, hence, the victim girl also being a small child, started playing with her till the accused brought money to bring chili and coriander. It is at this juncture, that the accused whispered something in her ear and took her into his house. Thus, there was no question of finding any chili and coriander in the house of the accused.

20. Thereafter, Mr. Apte submitted that the daughter of PW-4 Dharmendra has not been examined which weakens the prosecution case. It is seen that PW-4 Dharmendra has already been examined on this point. The daughter of Dharmendra was barely five years old. It is the quality of evidence which matters and not the quantity of evidence. If one witness has been examined on the point and his evidence is found to be reliable and believable, we do not see any necessity for the prosecution to examine any other witness on the same point. Thus, we find no merit in this contention.

21. Thus, the evidence of PW-4 Dharmendra, PW-5 Shrikant, PW-15 Suvarna and PW-21 Radheshyam shows that the deceased was "last seen" in the company of the accused. At that time, the accused was talking to her and then he took her to his house on 28.10.2011 at 3.00 p.m. Thereafter the dead body of the victim girl was found at about 6.00 p.m. in the house of the accused. In such case, the provisions of Section 106 of the Evidence Act would be attracted. In such case, the accused has to explain how the victim girl died. In this connection, we may refer to Section 106 of the Evidence Act. Section 106 of the Evidence Act provides that "when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him". In several recent decisions, the Supreme Court has held that the principle which underlies Section 106 of the Evidence Act can be applied in the context of the "last seen theory" when certain facts are especially within the knowledge of a person. In the decision in the case

of State of Rajasthan Vs. Kashi Ram, , the Supreme Court has observed that "if the accused fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against the accused. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to adduce any explanation as an additional link which completes the chain".

22. It is important to note that in his statement under Section 313 of Code of Criminal Procedure, the accused has not given any explanation whatsoever for any of the circumstances brought on record by the prosecution against him. This, as stated earlier, provides an additional link which completes the chain of circumstances. The Supreme Court in the case of Neel Kumar @ Anil Kumar Vs. The State of Haryana, has observed that "silence on the part of the accused is a very strong incriminating circumstance against him."

23. The learned A.P.P. has relied upon the decision of this Court in case of Shri Wilfred Rozario Fernandes Vs. The State of Maharashtra, wherein it is observed as under:

"False answers given by the accused as against chain of tell of tale circumstances established by the prosecution, in his statement recorded under Section 313 of Cr.P.C. furnished additional link against the accused.

The provisions of Section 106 of the Evidence Act itself are unambiguous and categorical in laying down the proposition that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is "last seen" with the deceased, he must offer an explanation as to how and when he parted company of the deceased. He must furnish an explanation when blood is detected on his clothes, which must appear to the Court as probable and satisfactory. If the accused adduced a reasonable explanation, he must be held to have discharged his burden. If he fails to offer an explanation in respect of facts by keeping mum when questioned regarding fact within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. Thus, in a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself furnishes an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution but it lays down the rule of appreciation of evidence to the effect that when an accused does not throw any light upon facts which are especially within his knowledge and explanation if given could not support any theory or hypothesis compatible with his innocence,

the Court can consider his failure to adduce any reasonable explanation, as an additional link which can complete the chain."

24. On the aspect of "last seen" the learned A.P.P. also placed reliance on the decision of the Supreme Court in the case of State of West Bengal Vs. Mir Mohammad Omar and Others etc., wherein it is observed in paragraph nos. 36 to 38 as under:

"36. In this context, we may profitably utilize the legal principle embodied in Section 106 of the Evidence Act which reads as follows: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

37. The Section is not intended to relieve the prosecution of its burden to prove the guilt of the accused beyond reasonable doubt. But the section would apply to cases where the prosecution has succeeded in proving facts from which a reasonable inference can be drawn regarding the existence of certain other facts, unless the accused by virtue of his special knowledge regarding such facts, failed to offer any explanation which might drive the court to draw a different inference.

38. Vivian Bose, J., had observed that Section 106 of the Evidence Act is designed to meet certain exceptional cases in which it would be impossible for the prosecution to establish certain facts which are particularly within the knowledge of the accused. In Shambu Nath Mehra Vs. The State of Ajmer, , the learned Judge has stated the legal principle thus:

"This lays down the general rule that in a criminal case the burden of proof is on the prosecution and Section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience.

The word "especially" stresses that, it means facts that are pre-eminently or exceptionally within his knowledge."

25. In Ramreddy Rajeshkhanna Reddy and Another Vs. State of Andhra Pradesh, , the Supreme Court has observed thus:

"27. The last seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible."

26. So also in the case of Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, the Supreme Court has observed that " "last seen theory" comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and the deceased is found dead is so small that possibility of any person other than the accused being author of the crime

becomes impossible."

27. In the present case, the prosecution has proved that on 28.10.2011 at about 3.00 p.m. the accused was seen taking the victim girl to his house. Thereafter, dead body of the victim girl was found in his house at 6.00 p.m. The fact that the accused was seen taking the victim girl to his house at about 3.00 p.m. on 28.10.2011 and the proximity of time within which the dead body of the victim girl was found in his house, is enough to draw an inference that the accused is responsible for the injuries on the victim girl and her death.

28. Thereafter, the next circumstance is the conduct of the accused when the mother of the victim girl went to his house to enquire about the victim girl. The accused told Sharda that he had not sent her daughter anywhere and that he was not aware about the whereabouts of the victim girl. At that time, the accused was standing in his door-way in front of Sharda in such a way so as to obstruct entry of Sharda the mother of victim girl, into the house of the accused. PW-1 Sharda is the mother of the victim girl. She has stated that on the date of the incident in the afternoon the accused asked Sharda to send her younger daughter to bring chili and coriander. Sharda sent her daughter with the accused. Thereafter as her daughter did not return home for 30 to 40 minutes, Sharda went to the house of the accused, at that time, the accused stood in the door-way of his house in such a manner so as to obstruct her entry into his house. Sharda asked the accused about whereabouts of her daughter and asked the accused where he has sent her daughter, whereupon, the accused told her that he did not know whereabouts of her daughter and he has not sent her daughter anywhere. This conduct of the accused of standing in his doorway in such a manner as to obstruct Sharda's entry into his house also speaks volumes about his mens rea.

29. The next circumstance is that the dead body of the victim girl was found in the house of the accused. The evidence of witnesses shows that the dead body of the victim girl was found in the house of the accused with several injuries on her person including her private part. Witnesses on this point are PW-1 Sharda, PW-4 Dharmendra and PW-20 Rashmi. They all have deposed on the point of finding of dead body of victim girl in the house of the accused with several injuries on her person. The witnesses PW-1 Sharda, PW-4 Dharmendra and PW-20 Rashmi have stated that the accused had taken the daughter of Sharda with him. The evidence of Sharda shows that when her daughter did not return home, she searched for her daughter till about 6.00 p.m. Then she informed her husband that the accused had called their daughter and her daughter did not return home. Her husband asked her to go again to the house of the accused and to search in his house. Thereafter, Sharda along with her daughter Sneha went to the house of the accused. When she went to the house of the accused, she saw him lying on his bed. She saw a small pair of slippers which were those of her daughter i.e. victim girl lying near the door of the house of the accused. She then bent down to see and she found that her daughter was underneath the bed.

There were injuries on the person of her daughter i.e. victim girl. Her eyes and face were blackened and blood was oozing from her private part. Sharda then shouted for help. Thereupon her neighbours gathered at the spot. The people gathered there, assaulted the accused and caught him. PW-4 Dharmendra has stated that on 28.10.2011 at about 3.00 p.m. he had seen the accused taking the victim girl to his house. At about 6.00 p.m. to 6.15 p.m. he heard shouts from the house of the accused. When he went near the house of the accused, he saw that many persons had gathered. Dharmendra saw the victim girl in naked condition in the house of the accused. Blood was oozing out from her private part. She had sustained injuries all over her body.

30. PW-20 Rashmi who was residing near the house of the accused, has stated that on 28.10.2011 she saw that people had gathered near the house of the accused. She then went in the house of the accused. She saw that the victim girl was lying in naked and injured condition in the house of the accused. The accused was then assaulted by the people who had gathered there. Thus, through the evidence of PW-1, PW-4 and PW-20, the prosecution has established that the dead body of the victim girl was found at 6.00 p.m. in the house of the accused with injuries on the dead body as well as on her private part.

31. The incident occurred in Room No. 149 in which the accused was residing and the fact that the accused was owner of the room is established by Article 13 which is electricity bill which was found in the room of the accused during the spot panchnama and which shows that the room stands in the name of the accused. The room consists of a single room of 10 feet x 12 feet. The evidence of PW-22 Kasbe also shows that the room was in the exclusive possession of the accused.

32. Mr. Apte tried to submit that the evidence of PW-1 Sharda shows that the son of the accused was also residing with him. However, it is noticed that PW-1 Sharda has specifically stated in her examination-in-chief that nobody was residing in the house of the accused. No doubt, in her cross-examination, it is found that the accused was residing with his son. However, the evidence on record does not show that the son of the accused was in the house of the accused on the date of the incident. None of the witnesses who were residing in front of the house of the accused or near the house of the accused, have stated that the son of the accused was residing in his house. In any event, as stated earlier, there is no material to show that on the date of the incident or at the relevant time, the son of the accused was in the house of the accused.

33. The next circumstance is that the girl was forcibly raped and thereafter her death was caused by the accused by causing injuries to her head and by throttling her neck. The prosecution case that the accused raped the victim girl and caused her injuries including serious head injury and also compressed her neck, is borne out by the medical evidence. PW-12 Dr. Gajare has deposed on this aspect. We have already reproduced in paragraph 5 above in this judgment the external and internal injuries which were noticed by Dr. Gajare. The medical

evidence clearly shows that the victim girl was forcibly raped and thereafter her death was caused by causing a serious head injury and throttling the neck. Dr. Gajare has specifically stated as far as genitals of the victim girl are concerned, the hymen was completely torn, margins contused lacerated hemorrhagic swollen, red colour, both vaginal walls lacerated contused, tears seen at posterior fornix central aspect, margins lacerated contused hemorrhagic contused 8 cm x 1 cm x 1 cm.

34. According to Dr. Gajare, this injury is caused due to forcible sexual intercourse. The act of sexual intercourse had taken place within 24 hours as the injuries were found to be fresh. This is totally consistent with the prosecution case.

35. The next circumstance is the "motive" for the accused to commit the crime. The motive of the accused in the present case has been proved by the prosecution i.e. it was to satisfy the unbridled lust of the accused and thereafter to ensure that the innocent girl does not implicate him, he has murdered the child of about 6 and half years of age. Therefore, the prosecution has proved the motive for the accused to commit the crime.

36. The next circumstance is articles of the victim girl were found in the house of the accused. PW-1 Sharda has stated that after searching for her daughter till 6.00 p.m. as she could not find her, hence, she called her husband and informed him that the accused had called their daughter and thereafter their daughter did not return home. Her husband then asked her to go to the house of the accused again and search for their daughter in the house of the accused. Hence, Sharda again went to the house of the accused at 6.00 p.m. On going inside, she saw that accused was lying on the bed in his house. Sharda found a small pair of slippers near the door of the house of the accused. She identified the slippers as that of her daughter i.e. victim girl. She then bent down and saw her daughter under the bed of the accused. This evidence of PW-1 Sharda shows that the articles of the victim girl (deceased) were found in the house of the accused.

37. The learned A.P.P. submitted that besides the slippers, T-Shirt, shorts and underwear of the victim girl were also found in the house of the accused. PW-1 Sharda has identified the clothes as belonging to her daughter. She submitted that this would be an additional incriminating circumstance against the accused. On the other hand, Mr. Apte submitted that at about 6.00 p.m. when Sharda saw dead body of the victim girl in the house of the accused, she shouted for help whereupon, the neighbours gathered and they assaulted the accused. Thereafter, the police came and took the accused in their custody. He pointed out that the spot panchnama (Exh. 12) was carried out at 9.10 p.m. He submitted that there is no evidence to show that for about three hours, the room was locked or any Guard was deployed at the place i.e. at the door of the house of the accused. He submitted that in such case, the possibility of planting articles in the house of the accused, cannot be ruled out.

38. As far as the above contention is concerned, it has come on record that PW-22 P.I. Kasbe has stated that at about 6.20 p.m. he received message from police control room that small girl was murdered at Teen-Dongari and accused was caught by the residents in Teen-Dongari. He then proceeded along with the police staff to the spot of the incident. The said spot of the incident was room No. 149 in Kranti Nagar. On reaching the spot, he came to know that the victim girl was removed to Siddharth Hospital by the mother of the victim girl and other residents. Hence, he proceeded to Siddharth Hospital. It is inconceivable that when the Officer of the rank of Police Inspector i.e. PW-22 Kasbe reached the spot, he would not make any efforts to secure the scene of the offence. His evidence clearly shows that he proceeded to the spot along with his staff hence, he must have deployed somebody at the spot or room and he must have secured it in some manner. In any event, what was found in the room were the slippers, T-shirt, shorts and underwear of the victim girl. The only two persons who would be interested in planting articles are either PW-1 Sharda or PW-22 Investigating Officer Kasbe. The articles were found in the spot panchnama conducted at 9.10 p.m. The evidence of PW-1 Sharda shows that at about 6.00 p.m. when she saw her daughter in an injured condition in the house of the accused, she shouted for help, whereupon, people gathered on the spot and assaulted the accused and caught him. She rushed to the hospital along with her daughter where her daughter was declared dead. Thus, the evidence of PW-1 Sharda shows that immediately on seeing her daughter in an injured condition, she had rushed her to the hospital. Thus, there was no time for PW-1 Sharda to plant any articles in the house of the accused. Moreover, Sharda would be in a state of shock and grief and she has immediately taken her daughter to the hospital and was with her daughter till her daughter was declared dead by the Doctor. Thereafter her FIR was recorded in the hospital itself. In the FIR she has stated about seeing her daughter's slippers in the house of the accused. As stated earlier the articles were found during the spot panchnama at 9.10 p.m. in such case there was no time or opportunity for Sharda to plant any articles.

39. As far as the Investigating Officer PW-22 Kasbe is concerned, his evidence shows that he immediately rushed to the spot on being informed through wireless message from the police control room. On reaching the spot, he came to know that the victim girl was removed to Siddharth Hospital by her mother. Hence, he immediately went to Siddharth hospital. In the hospital he met the mother of the victim girl and made enquiry with her. He then recorded her statement/FIR in the hospital as per her narration. Thus, it is seen that when Investigating Officer PW-22 Kasbe reached the spot, neither the complainant nor the victim girl were at the spot and hence at that stage, he had no chance of collecting clothes of the victim girl and immediately planting them in the house of the accused. Thereafter the Investigating Officer was held up in the hospital where he recorded F.I.R. of the mother of the victim girl. Thus, it is seen that till the time that the spot panchnama was carried out, there was no opportunity either for the mother of the victim girl or for the Investigating Officer to plant

any articles of the victim girl in the house of the accused. In any event, the evidence of mother of the victim girl clearly shows that the slippers of her daughter were found in the house of the accused and which has also been stated by her in the FIR. The fact of slippers of the victim girl being found in the house of the accused, is a highly incriminating circumstance against the accused.

40. The evidence of PW-1 Sharda the mother of the victim girl that the slippers of the victim girl were seen in the house of the accused when Sharda went to his house at 6.00 p.m. is unshaken. There is no suggestion put to PW-1 Sharda that the slippers of the victim girl were not seen by her in the house of the accused. Thus, even if the finding of the clothes of the deceased in the house of the accused is excluded from consideration, the evidence of PW-1 Sharda about seeing slippers of the deceased in the house of the accused, is a strong incriminating circumstance against the accused.

41. The next circumstance against the accused is that the blood stained chadar was seized from the house of the accused. This chadar was seized during the spot panchnama Exh. 12 and PW-2 Panch Witness Anil has deposed on this aspect. PW-2 Anil was the pancha to the spot panchnama Exh. 12. He has stated about finding of blood stained bed sheet in the house of the accused. He has stated that the said bed sheet/chadar (Art. 2) was seized in his presence and the said Chadar came to be sealed in his presence. This Chadar was sent for DNA analysis. The report which is at Exh. 47 shows that the blood found on the Chadar matched with DNA of the victim girl. Thus, finding of Chadar with blood stains of the victim girl in the house of the accused is a strong incriminating circumstance against the accused.

42. In relation to the seizure of blood stained Chadar, Mr. Apte raised the same contention as was raised in relation to the clothes of the deceased found in the house of the accused i.e. it must be planted. The said contention has already been dealt by us in paragraphs 37 to 39 above.

43. The next circumstance is that the Semen detected in the vaginal smear of the victim girl tallied with that of the accused. PW-12 Dr. Gajare conducted the post mortem on the dead body of the victim girl. Dr. Gajare has stated that during the post mortem examination, he collected blood for grouping, vaginal swab for CA and DNA analysis. This vaginal swab along with other articles were sent for analysis. The accused was also sent for medical examination. PW-14 Dr. Kharat examined the accused. During the examination, he also collected samples from the accused. He also found during the examination that the accused is not impotent. The sample of blood of the accused was also sent for DNA analysis. As per Report Exh. 47, DNA profile of accused and DNA profile of semen detected on vaginal smear of victim tallied with each other.

44. Mr. Apte submitted that though PW-12 Dr. Gajare has stated that he has taken nail clippings of the victim girl and PW-14 Dr. Kharat has stated that he has taken nail clippings from the accused and both these nail clippings were sent

for analysis, nothing was found in the nail clippings. This according to him falsifies the prosecution case. As far as the accused is concerned, he was sent for medical examination on the next day i.e. on 29.10.2011, hence, it was not expected that on the next day also, his nail clippings would contain some incriminating material. Mr. Apte submitted further that as far as the victim girl is concerned, she would have definitely put up resistance, in such case, her nail clippings would show the DNA of the accused. In support of this contention that the victim girl resisted the accused, he placed reliance on the opinion of PW-12 Dr. Gajare who conducted the post mortem on the victim girl, wherein he has stated that the injuries on the victim girl are possible due to struggle. He also placed reliance on the evidence of PW-14 Dr. Kharat who has stated that the injuries found on the person of the accused could be due to resistance by minor girl. As far as the injuries to the accused are concerned, it is the categorical case of the prosecution case that the accused was beaten up by the persons in the neighbourhood and on account of this, it was possible that the accused received all the injuries mentioned by PW-14 Dr. Kharat in his evidence. The victim girl was just seven years old at the time of the incident whereas the accused was well built and nourished as seen from the evidence of PW-14 Dr. Kharat. The victim girl was a small, innocent and helpless girl and it would not have been possible for her to put up much resistance on account of which injuries could have been caused to the accused. It is to be noted that it is not as if nothing was found in the nails of the victim girl. The C.A. Report Exh. 47 shows that something was found in the nail clippings of the victim girl, but however, it did not have interpretable DNA profile. Thus, it cannot be said that nothing was found in the nail clippings of the victim girl.

45. Mr. Apte pointed out that when the accused was arrested blood stains were found on his pant. He submitted that the evidence of PW-1 Sharda shows that when she went to the house of the accused, the accused was wearing a towel and in such case, it cannot be believed that the pant of the accused was stained with blood as he was not wearing a pant when he was seen by the witnesses. As far as this aspect is concerned, it is seen that immediately when Sharda and the neighbours entered into the house of the accused and beat him up, at that time, he was wearing a towel. Police also reached the spot and took him in the custody. Obviously, the accused would not be taken to the police station wearing only a towel and he would be given an opportunity to wear clothes. It has come on record through the evidence of PW-1 Sharda as well as other witnesses that Sharda raised shouts for help and people gathered on the spot and they assaulted the accused and caught him. It appears that during this assault, the accused sustained injuries and therefore, there were blood stains on his pant. This is further borne out by the evidence of PW-14 Dr. Kharat who examined the accused on 29.10.2011. He found fresh injuries i.e. caused within 12 hours on the accused. Even otherwise, we are not inclined to take this circumstance into consideration that at the time of the arrest, blood stains of the accused were found on his pant, hence, we need not dwell on this aspect any further.

46. Thereafter, Mr. Apte argued that the evidence of PW-12 Dr. Gajare shows that the death may have occurred within 4 to 6 hours from her last meal. He submitted that there is no evidence to show when the victim girl had her last meal. The incident has occurred in the afternoon after 3.00 p.m., it is not expected that the victim girl remained on an empty stomach since morning. She was just seven years old. Obviously the mother of the girl would have given her some food since morning including breakfast, which would be more or less at 9 to 10 a.m. Just because prosecution could not bring on record at what time the victim girl last had food, it would not affect the prosecution case.

47. Mr. Apte further submitted that the evidence of PW-12 Dr. Gajare shows that the victim girl had sustained serious injuries on her head. She had several contusions on the frontal region and left fronto temporal region and left parietal prominence region of the head. Hemorrhage was seen on the right lobe of the head which was 15 x 8 cm. He submitted that the prosecution has not furnished any explanation for these injuries. As far as this aspect is concerned, the victim girl was in the custody of the accused. She was in his house when the incident occurred. Hence, it was not possible for the prosecution to furnish any explanation for the injuries except to state that it was the accused who caused these injuries. How the girl sustained injuries when she was in the custody of the accused, is for the accused to explain.

48. The Supreme Court in the case of State of West Bengal Vs. Mir Mohammad Omar and Others etc., has observed thus:

"31. The pristine rule that the burden of proof is on the prosecution to prove the guilt of the accused should not be taken as fossilized doctrine as though it admits no process of intelligent reasoning. The doctrine of presumption is not alien to the above rule, nor would it impair the temper of the rule. On the other hand, if the traditional rule relating to burden of proof of the prosecution is allowed to be wrapped in pedantic coverage, the offenders in serious offences would be the major beneficiaries and the society would be the casualty.

32. In this case, when the prosecution succeeded in establishing the afore-narrated circumstances, the Court has to presume the existence of certain facts. Presumption is a course recognised by the law for the court to rely on in conditions such as this.

33. Presumption of fact is an inference as to the existence of one fact from the existence of some other facts, unless the truth of such inference is disproved. Presumption of fact is a rule in law of evidence that a fact otherwise doubtful may be inferred from certain other proved facts. When inferring the existence of a fact from other set of proved facts, the Court exercises a process of reasoning and reaches a logical conclusion as the most probable position. The above principle has gained legislative recognition in India when Section 114 is incorporated in the Evidence Act. It empowers the court to presume the existence of any fact which it thinks likely to have happened. In that process the

Court shall have regard to the common course of natural events, human conduct etc. in relation to the facts of the case."

49. When it is proved to the satisfaction of the Court that the accused took the victim girl with him to his house and thereafter dead body of the victim girl was found in his house with serious injuries on her body and on her private part and looking to the other facts and circumstances, the permitted reasoning process would enable the Court to draw the presumption that the accused has raped and murdered the victim girl. Such inference can be disrupted if the accused tells the Court what else happened to the victim girl. In the present case, no plausible explanation has been given by the accused.

50. The last circumstance against the accused is that there is no explanation by the accused of any of the incriminating circumstances. The evidence of PW-4 Dharmendra, PW-5 Shrikant, PW-15 Suvarna and PW-20 Rashmi shows that the deceased was last seen alive in company of the accused. In such case, the accused has to explain how the victim girl died. He has not furnished any explanation. This aspect has been dealt by us in paragraphs 21 to 24 of this judgment. It is important to note that in his statement under Section 313 of Code of Criminal Procedure, the accused has not given any explanation whatsoever for any of the circumstances brought on record by the prosecution against him. This, as stated earlier, provides an additional link which completes the chain of circumstances.

51. From the evidence of Dr. Gajare and other evidence on record including the DNA reports, it is proved beyond reasonable doubt by the prosecution that the accused committed rape on the victim girl who was below 12 years of age and thereby committed an offence under Section 376(2)(f) of IPC.

52. In view of the evidence on record, there can be no doubt that the victim girl was seven years old. PW-1 Sharda who was mother of the victim girl has stated that birth date of the victim girl is 5.2.2005. PW-8 Patil who was the Principal of the School in which the victim girl was studying, has also stated that as per the school record, the date of birth of the victim girl is 5.2.2005. The school record Exh. 36 shows that the date of birth of the victim girl is 5.2.2005. In addition to the above evidence, the prosecution has examined PW-9 Ms. Yadav who was Gramsevika working in Grampanchayat Kondiye, Taluka Lanja, District Ratnagiri. She has stated that as per the Gram Panchayat record daughter was born to Sharda Shantaram Ziman and Shantaram Sadu Ziman. She has stated the name of the child which is the name of the victim girl which we do not wish to reproduce here. PW-9 Ms. Yadav has specifically stated that the date of birth of the victim girl as per the Gram panchayat record is 5.2.2005. The incident took place on 28.10.2011. Thus, on the date of the incident, the victim girl was 6 years 8 months and 26 days old, hence, offence under Section 376(2)(f) of IPC is clearly made out.

53. There is no eye witness in the present case and the case depends only upon

circumstantial evidence. When the entire case rests on circumstantial evidence, great care must be taken in evaluating the circumstantial evidence to ensure that the circumstances on which the prosecution relies are wholly consistent with the sole hypothesis of guilt of the accused. When a case rests on circumstantial evidence, such evidence must satisfy oft quoted tests viz.:- (1) circumstances from which the inference of guilt is sought to be drawn, must be cogently and firmly established; (2) those circumstances should unerringly point out towards the guilt of the accused; (3) the circumstances taken cumulatively should form a chain so complete so that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; (4) the circumstantial evidence in order to sustain conviction, must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence, should not only be consistent with the guilt of the accused but should also be inconsistent with his innocence.

54. The legal principles with regard to the circumstantial evidence in criminal cases have been explained by the Supreme Court time and again. One of the cases in a long line of cases being *Pawan Vs. State of Uttaranchal*, . In this case, the Supreme Court has reiterated the principles in an earlier decision of the Supreme Court in the case of *Shankarlal Gyarasilal Dixit Vs. State of Maharashtra*, . In the said case, the Supreme Court observed as under:

"..... It is not to be expected that in every case depending on circumstantial evidence, the whole of the law governing the cases of circumstantial evidence should be set out in the judgment. Legal principles are not magic incantations and their importance lies more in their application to a given set of facts than in their recital in the judgment. The simple expectation is that the judgment must show that the finding of guilt, if any, has been reached after a proper and careful evaluation of circumstances in order to determine whether they are compatible with any other reasonable hypothesis."

It needs to be emphasized that while evaluating the circumstantial evidence, which of course has to be done carefully, the circumstances must be of such a nature as to be capable of supporting the exclusive hypothesis that the accused is guilty of the crime of which he is charged and the circumstances so shown by the prosecution are compatible with no other reasonable hypothesis. Keeping these principles in mind, we have evaluated the evidence.

55. Where the entire case hinges on circumstantial evidence, great care must be taken while evaluating the circumstantial evidence which we have taken in the present case. We have discussed the 11 circumstances against the accused which the prosecution has proved to the hilt.

As against all the incriminating circumstances proved by the prosecution, there is no plausible explanation given by the accused as to why all these witnesses are deposing falsely against him. Keeping in mind, the legal principles in relation to the circumstantial evidence, we are of the opinion that the circumstances taken

cumulatively form a chain which is so complete that it leads to the conclusion that within all human probability, the crime was committed by the accused and none else.

56. At this stage, Mr. Apte submitted that the learned Sessions Judge passed the order of conviction and sentenced the appellant to death on the same day. He submitted that this is clearly illegal and hence, the death sentence cannot be maintained. In order to support his contention, he has placed reliance on the decision of the Supreme Court in the case of Allauddin Mian and Others Vs. State of Bihar, . In the said case, order of conviction was recorded by the trial Court on 31.3.1987 and on the same day, the decision imposing the death penalty on the two accused was pronounced. Mr. Apte relied on the observations in the decision which are as under:-

"We think as a general rule the Trial Courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

57. Thereafter, reliance was placed by Mr. Apte on the decision of the Supreme Court in the case of Malkiat Singh and Others Vs. State of Punjab, . In the said decision, reliance was placed on the earlier decision in the case of Allauddin Mian (supra) and it was held that the sentence awarded on the same day of finding of guilt is not in accordance with law. That would normally have the effect of remanding the case to the trial Court for reconsideration. Relying on these observations, Mr. Apte submitted that the matter be remanded back to the trial Court for hearing on the point of sentence.

58. Thereafter, Mr. Apte relied on the decision of the Supreme Court in the case of Rameshbhai Chandubhai Rathod Vs. State of Gujarat, . In the said case, the trial Court returned a finding of guilt of the accused on 18.5.2005 and on that day itself, heard the accused on the point of sentence and imposed death sentence on that very day. The Supreme Court observed that was not the purpose of Section 235(2) of the Code. Mr. Apte pointed out that while rendering the said decision, reliance was also placed on the earlier decisions of the Supreme Court in the case of Allauddin Mian (supra) and Muniappan Vs. State of Tamil Nadu, .

59. On the other hand, learned APP stated that it is not necessary for the trial Court to adjourn the matter and the judgment of conviction and sentence awarding the death penalty can be imposed on the same day. Useful reference can be made to the decision of the Supreme Court in the case of Ram Deo Chauhan @ Raj Nath Vs. State of Assam, . The said decision is of the bench of three Judges of the Supreme Court. In the case of Ramdeo Chauhan (supra), same question arose which has arisen in the facts of the present case which is seen from paragraph 24 of the said decision. Paragraph 24 reads as under:-

"24. Learned counsel for the petitioner again made a futile attempt to challenge

the verdict of the trial court under the cloak of technicalities and submitted that as the sentence and conviction were recorded on the same day, the judgment of the trial court was against the law. In support of his contentions, he relied upon the judgments of this Court in *Muniappan Vs. State of Tamil Nadu*, *Malkiat Singh and Others Vs. State of Punjab*, and *State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others*, .

In the case of *Ramdeo Chauhan* (supra), the decisions in the case of *Muniappan* (supra) and *Malkiat Singh* (supra) were considered wherein it was observed that the sentence awarded on the same day of finding of guilt was not in accordance with law. The Supreme Court in the case of *Ramdeo Chauhan* observed that in the case of *Muniappan* (supra) and *Malkiat Singh* (supra), the amendment made in Section 309 of Code of Criminal Procedure was not taken note of. By Criminal Procedure Code Amendment Act 1978, a proviso was added to sub-section (2) of Section 309 of the Code of Criminal Procedure to the effect that:

"Provided also that no adjournment shall be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him."

60. In *Ramdeo Chauhan* after making a reference to Section 309(2), it was held that the mandate of the legislature is clear and unambiguous that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed on him. In *Ramdeo Chauhan*'s decision, reference was made to the observations in *Sukhdev Singh* (supra) in relation to the third proviso to Section 309(2) which are as under:-

"This proviso must be read in the context of the general policy of expeditious inquiry and trial manifested by the main part of section. That section emphasizes that an inquiry or trial once it has begun should proceed from day to day till the evidence of all the witnesses in attendance has been recorded so that they may not be unnecessarily vexed. The underlying object is to discourage frequent adjournment. But that does not mean that the proviso precludes the court from adjourning the matter even where the interest of justice so demand. The proviso may not entitle an accused to an adjournment but it does not prohibit or preclude the court from granting one in such serious cases of life and death to satisfy the requirement of justice as enshrined in Section 235(2) of the Code"

After taking note of the observations in *Sukhdev Singh* (supra) in *Ramdeo Chauhan*'s case, it was observed that if the Court proposes to award death sentence, the Court need not adjourn the case but it has discretion to adjourn the case in the interest of justice as held in *Sukhdev Singh*'s case. From paragraph 31 of *Ramdeo Chauhan* (supra), it becomes clear that the sentence cannot be altered on the reasoning that the trial Court did not adjourn the proceedings before pronouncing the death sentence.

61. We would also like to refer to the decision of the Supreme Court in the case

of State of Maharashtra Vs. Sukhdeo Singh and another Vs. State of Maharashtra Through C.B.I. Vs. Sukhdev Singh alias Sukha and others, wherein again reference was made to third proviso to Section 309(2) of the Code of Criminal Procedure and it was observed that the accused is not entitled to an adjournment but the Court is not precluded from adjourning the case in the interest of justice.

62. Reference may also be made to the decision of the Supreme Court in the case of Gurdev Singh and Another Vs. State of Punjab, . In the case of Gurdev Singh, it was contended on behalf of the accused that the trial Court had pronounced the judgment on the same day on which the conviction was passed, hence relying on the observations in the earlier decisions of the Supreme Court in the cases of Muniappan (supra) and Allauddin Mian (supra), it was urged that the obligation of the trial Court under Section 235(2) of the Code of Criminal Procedure was not properly discharged as the trial Court did not adjourn the hearing of the case for sentencing after the order of conviction was pronounced. Keeping the contention raised in mind, the Supreme Court observed that the contention is entirely misplaced and as pointed out in Ramdeo Chauhan (supra), both the aforesaid judgments were delivered without considering the third proviso to Section 309(2) of the Code of Criminal Procedure, 1973.

63. In the case of Gurdev Singh (supra), after reproducing third proviso to Section 309(2) Cr.P.C., reliance was placed on Ramdeo Chauhan (supra) and it was observed as under:-

14. It was held that the mandate of the legislature is clear that no adjournment can be granted for the purpose only of enabling the accused person to show cause against the sentence proposed to be imposed upon him. Nonetheless, the Court can in appropriate cases grant adjournment for the aforesaid purpose, if the proposed sentence is a sentence of death. From the material on record, it does not appear that any request was made to the learned Sessions Judge for adjournment. In the circumstances, we see no substance in the contention that the sentence imposed was vitiated for non-compliance with Section 235(2) of the Code of Criminal Procedure, 1973.

In the case of Gurdev Singh (supra), it was specifically held that the law laid down in the case of Allauddin Mian (supra) and Muniappan (supra) is not good law in view of third proviso which was added by way of amendment to Section 309(2) Cr.P.C. It is seen that the judgments in the case of Munippan (supra) and Malkiat Singh (supra) were considered by the Supreme Court in Ramdeo Chauhan (supra) and they have been held to be not good law as proviso to Sec. 309 Cr.P.C. was not considered.

64. On the above issue, learned APP placed reliance on the decision of the Supreme Court in the case of Dagdu and Others Vs. State of Maharashtra, . This is a decision by the bench of 3 Judges of the Supreme Court. In this case, it was urged on behalf of the accused who was sentenced to death that the accused was not heard on the question of sentence and therefore, the sentence of death

is not according to law. It was urged that the appeal should be remanded to the Court which sentenced them to death. It was observed by the Supreme Court that the imperative language of sub-section (2) to Section 235 leaves no room for doubt that after recording the finding of guilt and the order of conviction, the Court is under an obligation to hear the accused on the question of sentence. In the present case, there is no dispute that the accused Babasaheb Kamble has been heard on the point of sentence. Not only the counsel for the accused made submissions on the point of sentence but the accused himself made submissions on the point of sentence which were considered by the trial Court. Thus, there is no dispute that the accused was indeed heard on the point of sentence. The only dispute is that the matter was not adjourned to another date for pronouncing the sentence of death and it was adjourned to 2.45 p.m. to hear the accused on sentence. It was further held in the case of Dagdu (supra) that the failure on the part of the Court, which convicts an accused, to hear him on the question of sentence does not necessarily entail a remand in order to afford to the accused an opportunity to be heard on the question of sentence. The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence.

65. In view of the decision in the case of Dagdu (supra), we find that it is not necessary to remand the matter and this Court itself can also give the accused an opportunity to place before it any additional material in relation to sentence. Here we may make useful reference to a recent decision of the Supreme Court by the bench of 3 Judges in the case of Deepak Rai Vs. State of Bihar, wherein it was observed in paragraph 53 as under:-

"We must now briefly advert to the sentencing procedure prescribed by law. Under Section 235(2) of the Code, the Court on convicting an accused must unquestionably afford an opportunity to the accused to present his case on the question of sentence and under Section 354(3) record the extraordinary circumstances which warrant imposition of death sentence keeping in view the entire facts of the case and the submissions of the accused. In doing so if, for any reason, it omits to do so or does not assign elaborate reasons and the accused makes a grievance of it before the higher court, it would be open to that Court to remedy the same by elaborating upon the said reasons. Even when the reasons recorded by the Courts below do not conform to the statutory mandate or the judicially evolved principles, if this Court, should reach the conclusion that harsher sentence of death requires to be imposed, could supplement them so as to justify the imposition of such sentence instead of remanding the matter to Courts below for reconsideration on the question of sentence."

Thus, in the case of Dagdu (supra) as well as in the case of Deepak Rai which are both decisions by the Bench of three Judges of the Supreme Court, it is held that if the trial Court fails to give a proper opportunity to the accused to present his

case in relation to sentence, then Appellate Court can hear the accused on the point of sentence. Thus, in this view of the matter, we do not find it necessary to remand this case for hearing on the point of sentence and we propose to call upon the accused to state what he wishes to add in relation to sentence.

66. On careful scrutiny of the entire evidence on record, we are of the opinion that the offence under Sections 302, 376(2)(f) and 342 of IPC is made out against the accused. This leads us to the all important question i.e. whether the death sentence should be confirmed.

67. At this stage, we informed the accused that the conviction is being confirmed and asked him to submit on the point of sentence and the matter is being adjourned to the next day i.e. 10th July, 2014 for hearing the accused on the point of sentence.

10th JULY, 2014:

68. The accused is heard on the point of quantum of sentence. He has stated that he was driving rickshaw in the night and during day time, he used to sleep in the house. On the day of the incident, he was sleeping in his house and while he was sleeping someone placed the dead body of the girl under his bed. On the specific question from the Court about the sentence, he has stated that he has not committed the offence and he did not want to add anything more.

69. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material that leads to determination of the sentence.

70. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished.

71. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentence is determined largely by other considerations. Sometimes, a

sentence is awarded so that a would be wrongdoer is deterred from committing a similar crime that is the deterrent theory is put into practice. Sometimes, the sentence is awarded looking to the desirability of keeping the accused out of circulation that is the preventive theory is put into practice. Sometimes, the reformatory theory is employed and at other times, the retributive theory and where the damage can be measured in terms of money, the compensatory theory is also sometimes applied.

72. The learned A.P.P. submitted that looking to the facts of this case, it is a fit case to confirm the death sentence. She submitted that the fact that the accused had brutally raped and injured an innocent, helpless and defenseless girl of barely seven years of age and thereafter murdered her, calls for the death penalty. She placed reliance on the decisions of the Supreme Court where in similar cases death sentence was confirmed. They are as under:

- (1) Laxman Naik Vs. State of Orissa,
- (2) Kamta Tiwari Vs. State of M.P.,
- (3) State of U.P. Vs. Satish,
- (4) Shivaji @ Dadya Shankar Alhat Vs. The State of Maharashtra,

In addition, the learned A.P.P. placed reliance on a decision of this Court dated 25th March, 2014 in Confirmation Case No. 6 of 2013 (The State of Maharashtra Vs. Dattatraya @ Datta Ambo Rokade).

73. On the point of death sentence, the learned APP placed reliance on the decision of the Supreme Court in the case of Laxman Naik (supra). In the said case, the accused had committed rape on a seven years old girl and thereafter murdered her. While upholding the death sentence, the Supreme Court observed thus:-

"27. The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant must have believed in his bona fide and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the pre-planned unholy designs of the appellant. The victim was totally a helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfill his lust. It appears that the appellant had pre-planned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act.

"28. The evidence of Dr. Pushp Lata, PW 12, who conducted the postmortem over the dead body of the victim goes to show that she had several external and internal injuries on her person including a serious injury in her private parts

showing the brutality with which she was subjected to while committing rape on her. The victim of the age of Nitma could not have ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare case attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code".

The learned APP submitted that in the present case, the appellant was the immediate next door neighbour of the victim girl as such he was like an uncle to her. Learned A.P.P. submitted that in the present case also the accused in a preplanned and calculated manner executed the offence after luring the victim girl to his house under a false pretext. Learned A.P.P. contended that the facts in Laxman Naik (supra) and the present case are identical, hence, the accused deserves to be given the death sentence.

74. In the case of Kamta Tiwari (supra), the accused kidnapped a young girl of 7 years, he committed rape on her and strangled her to death. The Supreme Court observed as under:

"7. That brings us to the question whether the sentence of death imposed upon the appellant by the trial Court for his conviction under 302 IPC and confirmed by the High Court should be maintained or not.....

..... When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crime."

The learned APP submitted that the facts in the present case are also similar to Kamta Tiwari (supra), hence, sentence of death should be confirmed.

75. The learned APP further placed reliance on the decision in the case of Satish (supra). She pointed out that in the said case, the accused had committed rape on a minor girl of about six years of age and thereafter committed murder of the girl. While confirming the death sentence, the Supreme Court observed that the case falls in the rarest of rare category and death sentence awarded by the trial

Court was appropriate.

76. The learned APP pointed out that in the case of Shivaji @ Dadya Alhat (supra), the accused had committed rape and murder of a young girl aged 9 years. The Supreme Court held that the case falls within rarest of rare category and awarded the death sentence.

77. There are other decisions of the Supreme Court wherein the accused raped and murdered, the victim girl and the death sentence was confirmed. They are as under:

- (1) Jumman Khan Vs. State of U.P.,
- (2) Dhananjay Chatterjee alias Dhana Vs. State of W.B.,
- (3) Molai and Another Vs. State of Madhya Pradesh,
- (4) Md. Mannan @ Abdul Mannan Vs. State of Bihar,
- (5) Raju Paswan Vs. State of Maharashtra (2013) All M.R. (Cri.)1431
- (6) Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra,

78. In the decision in the case of Jumman Khan Vs. State of U.P., , the Supreme Court confirmed the death penalty on the basis of the brutality of the crime. In the said case, the accused had committed rape and murder of a child of 6 years.

79. In the case of Dhananjay Chatterjee (supra). The accused had committed rape and murder of a girl in the society where he was working as a security guard. The Supreme Court observed that cold-blooded brutal murder after committing rape on a young girl by security guard calls for death sentence as it falls in rarest of rare category.

80. In the case of Molai (supra), the Supreme Court awarded the death sentence to the accused for committing rape and murder of a 16 years old girl.

81. In the decision in the case of Commandent 20 BK. ITB Police Vs. Sanjay Binjola, , the accused who was 43 years old had committed rape on a child aged 7 years. The Supreme Court confirmed the death penalty in view of the gruesome manner in which an innocent child was raped. The Supreme Court observed that such cruelty towards a young child was appalling and the accused had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Observing thus, the death penalty was confirmed.

82. In the case of Raju Paswan (supra), the death sentence was awarded as the accused had committed rape and murder of a 9 years old girl. In the said case, based on the circumstance of last seen and the fact that the accused showed the dead body of the deceased, the conviction was confirmed and the Supreme Court also confirmed the death sentence.

83. In the case of Rajendra Wasnik (supra), the accused aged 31 years committed rape on a three year old minor girl and thereafter committed her murder. In the said case, the death sentence was confirmed.

84. In the decision in the case of Rajendra Wasnik (supra), after considering the earlier decisions relating to the sentencing policy in cases of death sentence, it was observed that the Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts. It was also so observed in the landmark decision by the Constitution bench of the Supreme Court in the case of Bachan Singh Vs. State of Punjab, . In the case of Bachan Singh (supra), the Supreme Court observed that death sentence ought to be given in the rarest of rare case and only after drawing a balance sheet of aggravating and mitigating circumstances.

85. In reply, Mr. Apte submitted that this case cannot be said to be a case which would fall in rarest of rare category wherein the sentence of death can be awarded or confirmed. He placed reliance on five decisions of the Supreme Court wherein, according to him, in similar cases, the Supreme Court and this Court commuted death sentence to life imprisonment. The decisions are as under:

- (1) Mohd. Chaman Vs. State (N.C.T. of Delhi),
- (2) Ramnaresh and Others Vs. State of Chhattisgarh,
- (3) Neel Kumar @ Anil Kumar Vs. The State of Haryana,
- (4) Ram Deo Prasad Vs. State of Bihar,
- (5) Birju Vs. State of M.P.,

86. Mr. Apte pointed out in the first decision in the case of Mohd. Chaman (supra), the victim who was one and half year old was raped and thereafter murdered by the accused, yet the death sentence was commuted to life imprisonment. Thereafter, reliance was placed by Mr. Apte on the decision in the case of Ramnaresh (supra) wherein the victim a married lady was raped and murdered. Mr. Apte pointed out that in the said case the death sentence was commuted to life.

87. The third decision on which Mr. Apte placed reliance is in the case of Neel Kumar (supra). Mr. Apte submitted that in the said case, a four year girl was raped and then murdered and in the said case, the Supreme Court commuted death sentence to 30 years imprisonment.

88. Thereafter reliance was placed by Mr. Apte on the decision in the case of Ram Deo Prasad (supra) wherein a girl aged four years was raped. Thereafter the girl died. Reliance was placed by Mr. Apte on the fact that in the said case also, the death sentence was commuted to life.

89. Reliance was also placed by Mr. Apte on the decision in the case of Birju (supra) wherein the accused was convicted under Section 302 of IPC and sentence was commuted from death to life, despite the fact that the accused had antecedents. As far as this case is concerned, it is seen that it is not under Section 376(2)(f) but only under Section 302 of IPC and not under Section 376(2)(f) read with Section 302 of IPC, hence, it would not be applicable to the facts of the present case.

90. As far as the first decision i.e. in the case of Mohd. Chaman (supra) is concerned, it is seen that though a small child had been raped the injuries caused by the accused to the deceased were not extensive. The injuries as seen from paragraph 4 of the judgment are as under:

"External

1. Teeth bite marks in the form of two linear, semi-linear marks with intermittently placed abrasions. These marks are 3.5 cm. long, placed 2.5 cm. apart from their concavity facing each other over Rt. Cheek near Rt. Angle of mouth.

2. Abrasion 1.7 x 0.6 cms. over chin

3. One oval bruise having width of about 6 mm. with central pale area with dimensions 4.5 x 4 cm. and another same bruise of same width overlapping lower point of previous one having dimensions about 5 x 4 cm. Both are present over Rt. side of abdomen at upper part.

4. Oval bruise about 6.5 mm. Diameter a central pale area c dimensions 5.5 cm x 4.5 cm. c two small abrasion marks at periphery each about 3 mm. Size at 4 & 5 O'clock position.

5. Small abrasions with bruising in the vaginal wall at 4, 5 and 6 O'clock positions. Hymen is partially torn admitting two fingers, small tear present over posterior fornix. Small blood clots present over injured parts in the vagina."

In addition to the above injuries there was laceration to liver. These were the only injuries sustained by the victim in the case of Mohd. Chaman (supra) whereas injuries sustained by the victim girl in the present case are 25 in number. They are all over the body. The accused had also caused serious injuries to the victim girl on the head and thereafter caused her death due to causing injury to the head as well as by throttling her neck. Injuries to the victim girl in the present case compared with the injuries in the case of Mohd. Chaman (supra), are much more in number. In the case of Mohd. Chaman (supra) the sentence was commuted based on the facts of the case. The facts in the present case are much more gruesome. The brutality to which the present victim was subjected is much more.

91. Moreover in case of Mohd. Chaman, the Supreme Court observed that we find it difficult to hold that the appellant is such a dangerous person that to spare

his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence, even after according maximum weightage to the mitigating circumstances in favour of the offender. It is pertinent to note that the accused in the case of Mohd. Chaman (*supra*) was 30 years old whereas the accused in the present case is about 52 years old. 52 years is not an age at which a person can be easily reformed. Moreover, the evidence of several witnesses in the present case shows that the accused indulged in activities of anti-social nature. This can be seen from the evidence of PW-5 Shrikant. PW-5 Shrikant has stated that the accused is not of a good character and he used to tease women and do eve-teasing. Thus, the evidence of PW-5 Shrikant shows that the accused was predisposed towards anti-social acts in relation to women. He had been harassing women and subjecting them to unwelcome behaviour. The evidence of PW-21 Radheshyam shows that the conduct of the accused was not good towards the society. Thereafter, the evidence of PW-21 Radheshyam shows that the conduct of the accused was not good prior to the incident also. The evidence of PW-20 Rashmi shows that previously also the conduct of the accused was not good and on one occasion he had set Shiv Mandir on fire. Thus the history of the accused shows that he used to subject women to unwelcome behavior. Earlier it was grown up girls/woman who were subject to unwelcome behaviour from the accused, they were capable of putting up resistance if physically attacked but thereafter the accused has chosen a victim who was unable to put up any resistance to his unwelcome advances. Thus, looking to the past history of the accused and the age of the accused, it does not appear that there is any possibility of reformation. We have also observed the demeanour of the accused in the Court and we find that it does not exhibit any remorse.

92. In the second case on which reliance was placed by Mr. Apte i.e. Ramnaresh (*supra*), it is seen that the victim was married lady and not a young girl of tender age like the one in the present case. Moreover, the Supreme Court was impressed by the fact that the accused therein could not be termed as a social menace which is seen from paragraph 39 of the judgment. However, this is not the situation in the present case. In the present case, we have already stated above that the evidence shows that the accused was a menace to society and especially women. Moreover, the age of the accused in the case of Ramnaresh (*supra*) was between 25 to 30 years whereas the age of the accused in the present case is 52 years and in our opinion, such person cannot be easily reformed especially in view of the history of the accused in the present case, hence, decision in the case of Ramnaresh (*supra*) would be of no avail to the accused.

93. The third decision on which reliance was placed by Mr. Apte was in the case of Neel Kumar (*supra*). It was submitted that the victim was 4 years old girl and rape was committed on her, yet the Supreme Court set aside the death sentence and instead gave 30 years of imprisonment. On perusal of the injuries to the victim in the case of Neel Kumar (*supra*), we find that the injuries are reflected in

paragraphs 6 and 9. In paragraph 6 it is reflected as under:

"The post-mortem report suggested the following injuries on her body:

Lacerated wound present in vagina extending from anus to urethral opening admitting four fingers of size 6 x 4 cms. Underlying muscles and ligaments were exposed and anus was also torned and on dissection uterus was perforated in the abdomen."

However, in the present case there are 25 injuries on the body of the deceased. There is serious injury on the head and private parts. Injuries to the victim in the present case are far more in number than the injuries to the victim in the case of Neel Kumar (supra). Moreover, looking to the anti-social behaviour of the accused in the present case and his previous history, it cannot be said that he is a person who can easily reform.

94. The next decision on which Mr. Apte placed reliance is in the case of Ram Deo Prasad (supra). It was pointed out that in the said case, the victim who was raped was four years old, however, in the said case, the accused did not actually murder the victim as has been done in the present case by throttling the victim girl and causing her head injury. In the case of Ram Deo Prasad, the accused had only raped a minor girl and thereafter he was carrying the victim girl, however, when he saw the villagers coming after him, he threw the child in the wheat field and ran away. Thereafter the child was taken to the hospital and the child died on the next day which is seen from paragraph 29 of the judgment wherein it is reflected that "they brought the child to the Sadar Hospital, Siwan, where she passed away the following morning." Thus, it is seen that the accused in the case of Ram Deo Prasad did not actually immediately cause the death of the child by strangulating her or banging her head against some hard object or in any other manner but the child died next day due to the injuries caused to the child. Thus, in the case of Ram Deo Prasad (supra) there was no immediate overt act on the part of the accused which caused the death of the victim girl in the said case. Therefore, it cannot be said that the facts in the case of Ram Deo Prasad (supra) are similar to the facts in the present case.

95. Another major reason why the death sentence was commuted in the case of Ram Deo Prasad is that there were deficiencies in investigation and serious lapses in conducting the trial especially at the stage of recording the statement of the accused under Section 313 Cr.P.C. These facts can be seen from paras 40 and 41 of the decision in the case of Ram Deo Prasad.

96. Lastly the decision on which reliance was placed by Mr. Apte is in the case of Birju (supra). It is seen that the said case is only under Section 302 of IPC whereas the present case is under Section 302 along with Section 376(2)(f) of IPC. Moreover, it is seen that in the decision in Birju (supra) the accused went to Babulal and demanded Rs. 100/- for consuming liquor. Babulal did not give money, whereupon the accused abused Babulal and took out a pistol and fired shot which hit right temporal area of the infant that Babulal was carrying. Thus,

the facts in this decision would not apply to the facts in the present case.

97. We would like to refer to the decision of this Court dated 25.3.2014 in the case of *The State of Maharashtra Vs. Dattatraya @ Dattu Ambo Rokade* (Confirmation Case No. 6 of 2013). In the said case, the victim was an innocent child of five years of age and the accused was a middle aged married man of 53 years of age. The crime was committed in an extremely brutal, inhuman, grotesque, diabolical, revolting and dastardly manner and was such as to arouse intense and extreme indignation of the society. The accused had acted in a totally cruel and beastly manner, therefore, this Court confirmed the death sentence passed against the said accused. The decision in the case of *Dattatraya Rokade*, would certainly apply to the facts in the present case.

98. In *Bachan Singh Vs. State of Punjab*, and *Machhi Singh and Others Vs. State of Punjab*, the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category for awarding death sentence were indicated.

In *Machhi Singh's* case (supra) it was observed:

"The following questions may be asked and answered as a test to determine the "rarest of the rare" case in which death sentence can be inflicted:

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
- (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

The following guidelines which emerge from *Bachan Singh* case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38):

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".
- (iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
- (iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full

weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

In rarest of rare cases when collective conscience of the community is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) 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.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course of betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position or a public figure generally loved and respected by the community.

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so".

99. It is seen that the present case certainly falls in a category no. (1) i.e. 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 society. It is seen that the accused was immediate neighbor of the victim girl. In such case, he was almost like a family member to the victim girl. Yet, instead of protecting her, he has ravished her in a brutal manner. The present case also falls under the category no. (5) i.e. "when the victim of murder is an innocent child."

100. In the case of Rajendra Wasnik (supra), the accused a married person aged 31 years committed rape on three years old minor girl and thereafter committed

her murder. The Supreme Court after considering its earlier decisions relating to death sentence, stated inter alia four aggravating circumstances which are as under:

"(1) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(2) When murder is committed for a motive which evidences total depravity and meanness.

(3) When there is a cold blooded murder without provocation.

(4) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society."

The present case in hand falls in all the four categories above in such case, we are of the opinion that it is a fit case to confirm the death sentence.

101. In the case of Rajendra Wasnik (supra), the Supreme Court observed that the Court has to examine the conduct of the accused prior to and at the time of the incident as well as after commission of the crime. Similar observations have been made in B.A. Umesh Vs. Regr. Gen. High Court of Karnataka, . In the present case, if the conduct of the accused prior to the incident is taken into consideration, it shows that he has tendency of indulging in harassing women by act of eve-teasing.

102. Looking to the age of the victim girl in the present case, the extensive injuries sustained by her, it can be said that the crime committed is undoubtedly serious and heinous and the conduct of the accused is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. This raises the question whether the case can be classified as of a "rarest of rare case" category justifying the severe punishment of death.

103. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment. Showing undue sympathy and imposing inadequate sentence would do more harm to the justice system and undermine the public confidence in the efficacy of law and society would not long endure under serious threats. If the courts did not protect the injured, the injured would then resort to private vengeance. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was

executed or committed and the circumstances of the offender.

104. The object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society have the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

105. In the present case, the aggravating circumstances are as under:-

(1) The victim girl was a helpless, innocent child of less than seven years when the accused brutally and inhumanly raped her and caused her death in a violent manner.

(2) The act was committed outrageously and involving inhuman treatment and untold torture and agony to the victim.

(3) The murder is for a motive which evidences total depravity and meanness.

(4) There was no enmity with the family of the victim girl.

(5) No provocation was given by the victim.

(6) The crime is committed so brutally that it pricks and shocks not only the judicial conscience but even the conscience of the society.

As far as mitigating circumstances are concerned, though we have searched minutely, we did not find any mitigating circumstance. The accused is neither too young nor too old. It is also to be kept in mind that the Supreme Court in many decisions has stated that the age of the accused by itself cannot be the only factor which can be taken into consideration while considering the overall facts of the case. Moreover, it is not the case of the accused that anyone is dependent on him. Thus considering the aggravating circumstances and mitigating circumstances. We find that there are only aggravating circumstances and no mitigating circumstances.

106. In recent years, the rising crime rate particularly violent crimes against women and girls of tender age has made the criminal sentencing by the courts a subject of concern. The case of Nirbhaya in Delhi and cases of rape on minors which we read every day in the newspapers is a glaring example of how violent crimes against women and minor girls are increasing day by day. Would the society not expect the accused who has committed rape on a tender girl of 7 years in an extremely brutal, barbaric and inhuman manner and caused her death for no fault of hers, to be hanged? Would the society not expect, the holders of the judicial powers to award proportionate sentence to the accused who had no respect for human values and treated a young girl of 7 years in most brutal, cruel and inhuman manner? He not only committed rape on a young minor girl but also caused serious injuries to her head and thereafter throttled

her. Would the society not expect such depraved act to be dealt with in a stern manner? We also cannot ignore the recent amendments in the Indian Penal Code on account of huge public hue and cry that arose on account of dastardly act in the heinous and gruesome rape and murder of Nirbhaya. The amendment as a matter of fact echo's the sentiments of the society at large. The sentiment of the society is glaringly explicit, that such heinous crime on helpless women are required to be dealt with an iron hand.

107. The Supreme Court in the case of State of Punjab Vs. Ramdev Singh, has observed thus:

"The Courts are, therefore, expected to deal with cases of sexual crime against women with utmost sensitivity. Such cases need to be dealt with sternly and severely."

108. Justice is Supreme and justice ought to be beneficial for the society so that the society is placed in a better-off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to subserve the basic requirement of the society. It is a requirement of the society and the law must respond by being adaptable, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. In the present day society, such crime is now considered a social problem and by reason therefore a tremendous change even conceptually is being seen in the legal horizon so far as the punishment is concerned. Looking to the new enactments like PCFSO Act i.e. Protection of Children from Sexual Offences Act and amendment to Indian Penal Code in relation to rape which have taken place keeping in mind the rising graph of sexual offences and especially of sexual offences against children and public outcry in relation to the same, the sentencing policy also now needs to be shaped keeping all these aspects in mind. We are of the view that confirming the death penalty in the present case takes into consideration all the four theories of punishment which can come into play in such cases. It satisfies the deterrent theory of punishment as it would deter would be wrong doers from committing similar crimes. It satisfies the preventive theory as it would physically prevent the present accused from harassing women in future and committing similar crimes in future. It satisfies the retributive theory as the accused is sufficiently punished for his crimes as well as society feels that justice is done. As far as the last theory is concerned that is reformatory theory, the history and the age of the accused is such that he cannot be given benefit of this theory. Moreover, the remorseless demeanour which the accused exhibited in the Court also shows that there is no possibility of reformation.

109. Not only is the victim an innocent child who had not even seen seven summers and the accused a middle aged married man of about 52 years of age but the crime is committed in an extremely brutal, inhuman, grotesque, diabolical, revolting and dastardly manner and is such as to arouse intense and extreme indignation of the society. The accused has acted in a totally beastly

manner. It can hardly be even imagined what torture and suffering the minor child must have faced during the course of commission of this crime. Her private parts were torn and badly lacerated. It shows the extent of brutal sexual urge of the accused which targeted a minor child, who still had to see the world. The pain and agony the accused must have caused to the deceased minor girl is beyond imagination and is the limit of viciousness. We have, therefore, no hesitation to hold that the case would surely fall in the "rarest of rare" category wherein the death sentence is required to be confirmed. The motivation of the accused, the vulnerability of the victim girl, the barbaric and inhuman nature of the crime and the execution thereof persuade us to hold that this is a "rarest of rare" case where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes and to prevent the accused from committing such acts for all times to come but also to give emphatic expression to society's abhorrence of such crime. Examining the case on the touchstone of the above decisions and balancing the aggravating and mitigating circumstances, we are of the opinion that the case can be appropriately called one of the rarest of rare cases deserving the death penalty. We are satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which we have minutely examined and found none. There can be no doubt that the offence committed by the accused deserves severe condemnation and is a heinous crime and on looking to the cumulative facts and circumstances of the case, we are of the opinion that the case falls in rarest of rare category, hence, we confirm the sentence of death.

110. Before we part with the judgment, we must place on record our appreciation for the valuable assistance rendered by Mr. Abhaykumar Apte. We appreciate sincere and dedicated efforts by Mr. Apte who was appointed by the High Court Legal Services Committee to appear on behalf of the accused. Legal fee to be paid to Mr. Abhaykumar Apte in this matter by the High Court Legal Services Committee is quantified at Rs. 20,000/-.

111. In the result, having regard to the totality of the circumstances, we pass the following order:-

ORDER

(i) The conviction and sentence of death imposed under Section 302 of Indian Penal Code on the accused Babasaheb Maruti Kamble is confirmed.

(ii) The conviction and sentence under Sections 376(2)(f) and 342 of Indian Penal Code is maintained.

(iii) Thus, the reference is answered accordingly.

(iv) Appeal is dismissed.

(v) Office to furnish copy of this judgment and order free of costs to the accused who is in jail through the concerned Prison authorities.