

(2014) 03 BOM CK 0176

In the Bombay High Court

Case No : Criminal. Confirmation Case No. 6 of 2013 in Special Case No. 1 of 2013 and Criminal Appeal No. 1202 of 2013

The State of Maharashtra

APPELLANT

Vs

Dattatraya

RESPONDENT

Date of Decision : 25-03-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313, 43

Evidence Act, 1872 — Section 27

Penal Code, 1860 (IPC) — Section 201, 300, 302, 304, 324

Protection of Children from Sexual Offences Act, 2012 — Section 3, 4, 5, 5(h), 5(i)

Citation : (2014) ALLMR(Cri) 2078

Hon'ble Judges : V.L. Achliya, J; V.K. Tahilramani, J

Bench : Division Bench

Advocate : Usha V. Kejariwal, APP, Advocate for the Appellant; Abhay Kumar Apte, Advocate for the Respondent

Judgement

V.K. Tahilramani, J.—The Confirmation Case No. 6 of 2013 arises out of the Reference made by the learned Special Judge (PCFSO Act) Thane in Special Case No. 1 of 2013 for confirmation of the death sentence awarded to the accused Dattatraya @ Datta Ambo Rokade. By judgment and order dated 07.06.2013 in Special Case No. 1 of 2013, the learned Special Judge (PCFSO Act) Thane convicted the accused for the offence punishable u/s 302 of IPC and sentenced him to capital punishment of death. By the very same judgment and order, the accused was also convicted under Sections 376, 376(2)(f), 377, 363, 364, 367 and 201 of IPC. The accused was also convicted u/s 3 punishable u/s 4 and Section 5(h), (i), (k), (l) and (m) punishable u/s 6 of the Protection of Children from Sexual offences Act (in short, "PCFSO Act"). For the offence under Sections 376, 376(2)(f), 377 of IPC and offence u/s 3 punishable u/s 4 and offence u/s 5(h), (i), (k), (l) and (m) punishable u/s 6 of PCFSO Act, the accused was sentenced to suffer imprisonment for life. No separate sentence was awarded for the offences under Sections 363, 364, 367 and 201 of IPC. As sentence of death

was imposed on the accused, the learned Special Judge made a reference to this Court for confirmation of death sentence. The appellant-original accused being aggrieved by the very same judgment and order, preferred Criminal Appeal No. 1202 of 2013. As both the confirmation case and the appeal are directed against the very same judgment and order, hence, both these matters were heard together and decided together. The prosecution case, briefly stated, is as under:-

(i) The complainant PW 1 Datta Gavali and his wife PW 2 Kavita Gavali were residing along with their children i.e. son Mahesh aged about 9 years, daughter Manisha aged about 7 years and victim girl aged about 5 years in Room No. 3 at ground floor of Om Sai Building near office of Shivsena at Koprigaon Datta was working as a labourer and his wife Kavita was working as a maid servant. Datta used to leave the house to go to work at 09.00 a.m. and used to come back at 07.00 p.m. His wife Kavita used to leave the house at about 10.00 a.m. and used to come back at 12 noon and thereafter, she again went for work at about 2.00 p.m. and returned home at about 4.30/5.00 p.m. The children of Datta and Kavita used to stay at home. At the time of the incident, the accused and his family members were also residing in Om Sai Building. They were residing in Room No. 8 on the ground floor which was almost adjacent to the house of Datta. The accused was residing in that room along with his wife PW 18 Asha, sons Rupesh and PW 19 Mahendra, daughters Manisha and PW 20 Nisha and grandson Omkar. The accused was not doing any work and he was sitting idle at home since last four years. Omkar used to go to school from 12 noon to 6.00 p.m. All the other family members of the accused used to leave the house for attending their job and during the day, the accused alone used to remain present in his house.

(ii) On 22.01.2013, Kavita left her house at about 10.00 a.m. Before leaving the house, she cooked rice, dal and dish of sago. When she was leaving the house, her three children were present in the house i.e. Mahesh, Manisha and the victim girl. She returned back at about 12 noon and served food to Mahesh, Manisha and the victim girl. Thereafter, Kavita went to the house of her parents at Nerul. Kavita returned home at about 02.00 p.m. At that time, she did not see her youngest daughter aged about 5 years i.e. the victim girl. Kavita did not give much attention thinking that she might be playing near the house, Kavita left the house at 2.15 p.m. She received a call from one Avaghade Mama at about 4.30/5.00 p.m. Avaghade Mama told her that her youngest daughter was not present at home. Kavita inquired with said Mama about her other two children. Mama then gave mobile to Mahesh. Kavita spoke to Mahesh. At that time, Mahesh told her that the victim girl was not found since afternoon. Kavita then came home. She searched for her daughter at Koparigaon. Kavita then contacted her husband and parents on mobile. They came to the house. Thereafter, all of them searched for the victim girl in Koparigaon, Vashi and Sanpada, however, they could not trace the victim girl. Kavita along with her family members then went to APMC Police Station at about 9.30 p.m. and gave missing report (Exh. 11) to PW 22 PSI Borse. At that time, she gave description of her daughter and

her clothes i.e. orange colour shirt and black colour half pant. After lodging the missing report, they again made efforts to search for the girl but they could not trace the girl. They then returned home at about 2.30 a.m. When Datta and Kavita came in front of their house, they saw their daughter was lying naked in front of the door of their house with injuries on her person. They tried to move her but she did not make any movements. Datta then contacted the police from his mobile phone and told the police that their daughter was found but she was not making any movements. Datta and Kavita took their daughter to Navi Mumbai Municipal Corporation Hospital. The Doctor examined the girl and declared her dead. In the hospital, Datta and Kavita saw injuries on the body of their daughter. They saw that the vagina and anus were torn. PW 1 Datta lodged FIR (Exh. 9) on the basis of which CR No. 1-20 of 2013 was registered at APMC Police Station. (iii) PW 13 Dr. Jain conducted the postmortem on the dead body of the victim girl. He noticed injuries on the private part, anus, below eyelid and over upper lip. He collected blood for DNA mapping and grouping. He also collected vaginal and anal swab for detection of semen. According to Dr. Jain, the injuries were possible by repeated sexual acts and forceful penetration of penis in vagina and anus. Dr. Jain opined that the cause of death is asphyxia due to smothering associated with head injuries and sexual assault. Dr. Jain opined that all these injuries are sufficient to cause instant death in ordinary course of nature.

(iv) It is the case of the prosecution that in the afternoon of 22.01.2013, the accused took the victim girl in his house and committed rape, had unnatural sexual intercourse, caused her head injury and smothered her, as a cumulative result of which, she died.

(v) On the same night at about 2.00 a.m., the accused had gone outside the house. On 23.01.2013, the accused went to the house of his brother at Kamothe without informing his wife PW 18 Asha. On 24.01.2013 at about 07.30 p.m., the accused was in tension, therefore, his wife PW 18 Asha told him to go to their family doctor. On 24.01.2013 at about 7.30/8.00 p.m., PW 7 Nilima, the Family Doctor, examined the accused and found that the accused was under tension and his blood pressure was high. She noted the name of the accused in her diary that accused was examined by her on 24.01.2013.

(vi) PW 15 Gejage, Head Constable, made inquiry with the residents of Om Sai Building. At that time, he gave his mobile number to the residents including PW 19 Mahendra, the son of the accused. Gejage told that if any information is received, it should be communicated to him.

(vii) In the year 2004, the accused and his family members were residing at Village Dudhanoli. There the accused outraged the modesty of PW 6 Suvarna. When she was sitting for toilet, the accused pushed her and tried to catch hold of her. Because of the said incident, the accused was assaulted by villagers and the accused and his entire family had to permanently leave Village Dudhanoli.

(viii) The accused used to forcibly commit sexual intercourse with his wife PW 18

Asha without her consent 2-4 times in a week.

(ix) Considering the previous antecedents and conduct of the accused after the incident, PW 19 Mahendra, the son of the accused entertained suspicion against the accused. On 24.01.2013, PW 19 Mahendra contacted PW 15 Gejage, the Head Constable and told him that he entertained suspicion against the accused. Thereafter in the night of 24.01.2013, PW 15 Gejage, Head Constable and Senior P.I. Kambale took the accused to the office of Crime Branch for inquiry. On 25.01.2013, the accused was arrested and the clothes on his person i.e. blue coloured full pant, one Bermuda pant and one yellow colour shirt were seized under panchnama. The said panchnama is at Exh. 28.

(x) On 25.01.2013, PW 26 P.I. Bhong, the Investigating Officer, called team from Forensic Science Laboratory (in short, "F.S.L.") and the house of the accused was searched in presence of panchas, the Forensic Laboratory team including PW 27 More and PW 20 Nisha, the daughter of the accused. Three cushion covers of Sofa, one cloth for cleaning floor and one sari used as a bed-sheet all stained with blood were seized. On 25.01.2013, PW 8 Dr. Tambe examined the accused and found that the accused was in sound physical and mental condition and there was nothing to suggest that the accused was impotent.

(xi) On 26.01.2013, the accused gave memorandum statement Exh. 35 in presence of panchas on the basis of which blood stained white coloured plastic gunny bag, blood stained orange colour shirt and one black colour pant of the deceased were recovered from the debris near Om Sai Building. The parents of the victim girl identified her clothes i.e. orange colour shirt and black colour pant.

(xii) On 27.01.2013, PW 4 Vinod and PW 5 Sanjay approached the Investigating Officer PW 26 Bhong and stated that on 22.01.2013, they attended meeting in the office of PW 10 Parshuram. The office of Parshuram was situated at a distance of 15 feet from Om Sai Building. Vinod and Sanjay stated that after attending the meeting, they came out at about 4.30 p.m. and were standing in a parking shed. At that time, they saw one short old man holding one white colour bag coming from the staircase side and going in a lane. The man kept the bag in the lane which was in front of the said parking shed. PW 4 Vinod and PW 5 Sanjay identified the accused, as the same person who kept the bag (Article 23-A) in the lane, in a test identification parade conducted by PW 21 Ratnanjali, the Executive Magistrate. This very bag was recovered at the instance of the accused under panchnama Exh. 35 and Exh. 36. Both PW 4 Vinod and PW 5 Sanjay have identified the bag (Article 23A) as the same bag which was carried by the accused and kept in the lane.

(xiii) On 29.01.2013, the accused was produced before PW 16 Dr. Thakur, the Casualty Medical Officer in Navi Mumbai Municipal Corporation Hospital. She collected blood of the accused in two plastic containers in D.N.A. kit provided by Forensic Science Laboratory. She sealed the packet containing both the plastic containers and filled in identification form and attested the photograph of the

accused and obtained thumb impression of the accused on identification form (Exh. 42). The clothes of the accused, white plastic bag, clothes of the deceased, sealed bottle containing blood of the accused, semen, hair and nail were sent to Forensic Science Laboratory. The blood, hair, nail, vaginal swab and anal swab of the victim girl were also sent to Forensic Science Laboratory. PW 26 I.O. Bhong received C.A. reports from F.S.L. which showed that D.N.A. profile of blood detected on the plastic bag, orange shirt of the deceased and sari cum bed-sheet seized from the house of the accused is identical with D.N.A. profile of deceased victim girl. The C.A. reports also show that D.N.A. profile test of semen conducted on underwear/Bermuda of the accused, sari/bed-sheet, vaginal swab and anal swab of the victim girl and blood sample of the accused is identical and is matching with D.N.A. profile of the accused.

(xiv) During investigation, the I.O. PW 25 API Dighe collected birth certificate (Exh. 72) which shows that the date of birth of the victim girl is 17.08.2007. After completion of investigation, the charge sheet came to be filed against the accused. In due course, the case was committed to the Court of Sessions.

2. Charge came to be framed against the accused under Sections 363, 364, 367, 377, 302, 201 and 376 in the alternative 376(2)(f) of IPC. Charge was also framed under Sections 3 r/w Section 4 of PCFSO Act and Section 5(h)(i)(k) (l) & (m) read with Section 6 of the PCFSO Act. The accused pleaded not guilty to the said charge and claimed to be tried. His defence is that of total denial and false implication. After going through the evidence adduced in this case, the learned Special Judge convicted and sentenced the appellants as stated in paragraph 1 above.

3. We have heard the learned Advocate for the accused and the learned APP for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned Advocates for the parties, the judgment delivered by the learned Special Judge and the evidence on record, for the reasons stated below, we are of the opinion that prosecution has proved its case beyond reasonable doubt and the appellant has committed offence punishable under Sections 302, 376(2)(f), 377, 363, 364, 367 and 201 of IPC and Sections 4 and 6 of PCFSO Act.

4. There is no eye witness in the present case and the case depends only upon circumstantial evidence. When the entire case hinges 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 probabilities 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 to be inconsistent with his innocence.

5. 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 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.

6. Before we go to the circumstances against the accused in the present case, we would like to advert to the medical evidence. PW 13 Dr. Jain conducted the post mortem on 23.1.2013 from 10.50 a.m. to 11.50 a.m. on the dead body of the victim girl. Dr. Jain has stated that on 23.1.2013 he received the dead body of female of five years. On external examination, he noticed the following injuries:

- 1) Lacerated wound seen over posterior vaginal wall with width 0.5 cm. muscle deep hymen torn at 6 O'clock position reddish, blood oozes out.
- 2) Lacerated wound over right lateral vaginal wall 1 x 0.2 cm. muscle deep reddish, blood oozes out.
- 3) Two lacerated wounds seen over anal region at 12 O'clock and 3 O'clock position of size 2 x 1 cm. mucosa deep and 1 x 0.5 cm. mucosa deep respectively reddish.
- 4) Two tiny abrasions seen over upper lip mucosal aspect in a middle region 2.5 x 1.5 cm. reddish
- 5) Finger nails were cyanosed.

7. On internal examination, Dr. Jain noticed hemorrhage under scalp over

occipital region 5 x 3 cm. reddish and meninges were congested. Brain matter congested and oedematous. On cut section petechial hemorrhages seen over white matter. Both lungs were congested and oedematous with petechial hemorrhages.

Thoracic cavity contained dark fluid blood. Stomach contained 200 cc. Semi digested rice, dal and sabu like food material. All visceral organs were congested. In the opinion of Dr. Jain, all injuries were ante-mortem in nature.

The final cause of death is "asphyxial death due to smothering associated with head injury and sexual assault". According to Dr. Jain, Injury Nos. 1 and 2 mentioned in column no. 17 are possible by repeated sexual acts and forceful penetration of penis in vagina. Injury no. 3 is possible by repeated sexual acts and by inserting penis in anus. Injury no. 5 is possible if mouth is pressed with the help of hands. Injury no. 4 is possible by nail. Injury no. 19 over head under the scalp is possible if head is dashed against hard object. Probable time since death is within 2 to 4 hours after her last meal. Death is within 12 to 24 hours prior to conducting post-mortem examination.

8. The injuries as seen on the dead body of the victim girl, the cause of death and the circumstance in which the body was found 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 only contention is that he is not responsible for the injuries on the victim girl or her death.

9. In order to evaluate whether the accused is responsible for the injuries on the victim girl and her death, we would have to evaluate the evidence which is circumstantial in nature.

10. In order to prove it's case, the prosecution has relied on the following incriminating circumstances, which according to the prosecution conclusively prove the guilt of the accused.

(1) On 22/01/2013, 2.00 p.m. onwards the victim girl was found missing from her house.

(2) On 23/01/2013 at about 2.30 a.m. the body of victim girl was found lying outside the door of her house in a naked condition. She was not making any movements. She was dead. There were injuries on her person including private part.

(3) The cause of death of deceased was found to be asphyxia due to smothering associated with head injury and sexual assault. The victim girl was found to be raped and sodomized before causing her death. The death of the deceased was found to be caused in between 2.00 p.m. to 4.00 p.m.

(4) On 22/01/2013 the accused who was residing in Room No. 8 on the ground floor of building in which victim girl was residing with her family in Room No. 3 was present alone in his house during the afternoon.

(5) On 22/01/2013 at about 4.30 p.m., the accused was seen dropping white plastic gunny bag in the lane near his house.

(6) On 23/01/2013 at about 2.00 a.m. (i.e. in between the night of 22/01/2013 and 23/01/2013), the wife of accused had seen the accused going outside the house.

(7) On 23/01/2013 after police started making inquiry about the victim girl, suddenly the accused went to village Kamothe to his brother's house without informing his wife. The conduct of accused was found to be suspicious by his family members.

(8) On 24/01/2013 when accused returned from Kamothe to his house he was found to be in tension and on inquiry by his wife, he told her that he was not feeling well.

(9) On 24/01/2013 the accused visited Dr. Nilima Pawar. On examination, Dr. Nilima Pawar found that the accused was under tension and his blood pressure was high.

(10) On 24/01/2013 after the accused came back from clinic of Dr. Nilima Pawar on inquiry by his wife as to why he was under tension, the accused told her that he committed rape and murder of the victim girl.

(11) On 25/01/2013, in the house search of accused, police have seized cushion covers of sofa set stained with blood, one cloth used for cleaning the floor and one sari used as bed-sheet stained with blood found during the house-cum-seizure panchanama.

(12) On 26/01/2013 after the arrest of the accused one white colour plastic gunny bag stained with blood, one orange colour shirt stained with blood and black colour pant of deceased victim girl were recovered at the instance of accused from the debris near his house.

(13) As per C.A. Report Exh. 25 DNA profile of blood detected on the plastic gunny bag (Art. 23-A), shirt (Art. 25-A) of deceased which was recovered at the instance of the accused and sari used as bed-sheet (Article 21 A) found in the house of the accused are identical and matched with the DNA profile of the victim girl;

(14) C.A. Report Exh. 25 shows that DNA profile of semen detected on the Bermuda (Art. 16A) of the accused, sari cum bed-sheet (Art. 21A), vaginal swab, anal swab of the deceased and blood sample of accused is identical and matching with DNA profile of accused;

(15) The previous conduct of the accused that is his propensity to commit crimes in relation to women. About few years prior to incident, the accused outraged the modesty of a woman (i.e. PW6) residing at his native village Dudhanoli, due to which, the entire family of the accused had to permanently leave village Dudhanoli;

(16) The accused is a sex-maniac which is seen from the fact that he was forcibly committing sexual intercourse with his wife without her consent two to four times in a week;

(17) The accused used to stare at women by slightly opening the door or by looking into the mirror in the show-case in his house that is the accused used to look at women with an evil eye (PW 2 and PW 14);

11. It is not disputed by the defence that from 2 p.m. of 22.1.2013 the victim girl was missing. However, Mr. Apte, the learned advocate for the accused submitted that the accused had nothing to do with the disappearance or death of the victim girl. That the victim girl was missing from 2 p.m. on 22.1.2013 is brought on record through the evidence of PW 1 Datta and PW 2 Kavita. PW 1 Datta is the father of the victim girl. He has stated that he was residing in Room No. 3 on the ground floor of Om Sai building which was situated near the office of Shiv Sena at Koprigaon. He was residing there with his wife, one son and two daughters that is his son Mahesh aged 10 years, his daughter Manisha aged 7 years and the victim girl aged 5 years. All the three children used to stay at home. Datta has stated that the accused was residing in the very same building in Room No. 8 on the same floor. Datta has stated that on 22.1.2013 at about 9 a.m. he went out to do labour work. He came back at about 7 p.m. At that time, his wife Kavita told that Priya was missing. Kavita told him that she had gone for work at about 10 a.m. and came back at 12 noon. She then went to her parents house and returned back at about 2 p.m. At that time, Mahesh and Manisha were present at home but the victim girl was not at home. Thereafter, his wife went for daily work at about 2 p.m. His wife Kavita received telephone call from one Avaghade Mama the agent of the landlord that Priya was not at home. His wife then came back at 5 p.m. His wife started searching for the victim girl but she was not traced. His wife Kavita then called her brother and mother. They including Datta searched for the victim girl in Koprigaon till 9.00 p.m. Thereafter, he along with his wife went to APMC Police Station and gave missing report. At that time, they gave photograph of the victim girl to the police. Thereafter they searched in various places for the victim girl, but they could not trace her. At about 2.30 a.m. they returned home and they found that the victim girl was lying in front of their house in naked condition. She was not making any movement. Datta then informed the police that they found their daughter but she was not making any movement. Thereafter they took their daughter to Navi Mumbai Municipal Corporation Hospital. Doctor examined their daughter and told them that she is dead. They saw various injuries on the body of their daughter. They saw that blood was coming out from the private part and the vagina was torn. They also saw injuries on the anus. Datta then lodged F.I.R.

12. PW 2 Kavita who is mother of the victim girl has stated that they were residing in Om Sai building on the ground floor. The accused was also residing in the very same building on the ground floor. She was residing in the building along with her husband and children Mahesh, Manisha and victim girl. Her

husband does labour work. He leaves home at 9.00 a.m. and comes back at 7.00 p.m. She also does labour work for which she leaves home at 10.00 a.m. and comes home at 12 noon and thereafter leaves home at 2.00 p.m. and comes back at 4.00 p.m. to 4.30 p.m. During the period she goes out of the house, her three children used to remain in the house. On 22.1.2013 she left the house at 10 a.m. Her husband had gone for doing labour work.

Before leaving she cooked rice, dal and dish of sago. She came back home at about 12 noon her three children were present in the house. She gave food to all the three children and they had meals. Thereafter, Kavita received phone from her father that her father was unwell, hence, Kavita went to her father's house. At about 2.00 p.m. She returned home. At that time, Mahesh and Manisha were present in the house, however, she did not find younger daughter i.e. the victim girl. She did not pay much attention as she thought that her younger daughter must be playing nearby. She then left the house at about 2.15 p.m. At about 4.35 p.m. she received a telephone call from one Avaghade Mama who told her that her younger daughter was not present at home. She inquired with Avaghade Mama about her two other children, then Avaghade Mama gave phone to Mahesh and Kavita had talk with her son Mahesh. Mahesh told her that his sister was not found since afternoon. Then Kavita came home. She searched for her daughter. As her daughter was not found, she contacted her husband and parents on mobile. Her mother, her brother and husband came home. All of them searched for the victim girl in Koparigaon and surrounding area. However, they could not trace her. They then went to APMC police station and she lodged missing report (Exh. 11). While lodging report, she gave description of her daughter and description of the clothes her daughter was wearing i.e. orange colour shirt and black colour half pant (Art. 25-A and 24-A). Thereafter they again searched for her daughter but could not trace her. At about 2.30 a.m. they returned home. At that time, they saw that her daughter was kept in front of the door of their house in naked condition. Their daughter was not making any movements. Then they took their daughter to Govt. hospital. The Doctor examined their daughter and declared that she was dead. She saw various injuries on the body of her daughter.

13. According to the medical evidence, the cause of death of deceased was found to be asphyxia due to smothering associated with head injury and sexual assault. The victim girl was found to be raped and sodomized before causing her death. The death of the deceased was found to be caused in between 2.00 p.m. to 4.00 p.m. The next circumstance against the accused is that the accused was all alone in the house in the afternoon of 22.1.2013 which shows that he had opportunity to commit the crime in his house. The evidence of PW 18, PW 19 and PW 20 shows that the accused was all alone in the house in the after noon of 22.1.2013. PW 18 Asha the wife of the accused has stated that they were residing in room no. 8 of Om Sai Building. The accused is her husband. They had two sons and two daughters. She, the accused, daughters Nisha and Manisha, sons Mahendra and Rupesh and grand son Omkar were residing in Room No. 8. Omkar is the son of her daughter Manisha. Manisha was residing with them as

her husband had expired. Family of Datta was residing at Room No. 3 of their building. She knew the victim girl. She used to play outside the house.

14. Asha has stated that she was doing labour work in the grain market at Vashi, hence, she used to leave in the morning at 10.15 a.m. and come back at 7.30 p.m. Her son Mahendra was working in Optician shop. He left the house at 9.00 a.m. and came back at 10.00 p.m. Her son Rupesh was working in another Optician shop, he left the house at 9.00 a.m. and came back at 11 p.m. Her daughter Manisha was working in a Mall at Palm Beach area, she left the house at 8 a.m. and came back home at 8 p.m. Her daughter Nisha was working in a Beauty Parlour. She left the house at 9 a.m. and came back at 10 p.m. Her grand son Omkar went to school at 12 noon and came back at 6 p.m. Asha has stated that her husband i.e. accused was staying at home since last four years. He was not doing any work or job. When all the members leave the house, the accused used to alone remain in the house. On 22.1.2013 she had gone to attend her job. Both her sons as well as both her daughters had gone to attend their jobs and her grand son had gone to school. Hence, her husband was alone in the house. At about 7.30 p.m. she came home. At that time, she came to know that daughter of Datta was missing.

15. PW 19 Mahendra is the son of the accused. He has stated that he, his parents, two sisters, one brother and son of his sister were residing together in Room No. 8 in Om Sai Building. He was serving as salesman in Optician shop. He leaves the house at 9.30 a.m. and comes back at 11.00 p.m. His mother, brother, sisters were also working. They also leave the house in the morning and come back in the evening. Son of his sister goes to school at 12 noon and comes back in the evening. His father used to alone remain present in the house. His father was not doing any work.

16. PW 20 Nisha is the daughter of the accused. She has stated that she and her family were residing in Om Sai Building in Room No. 8. She knew the family of Datta who was residing in Room No. 3 in the same building i.e. Om Sai. She stated that she was serving in Lakme Saloon Beauty Parlour, hence, she used to leave the house at 10.30 a.m. and come back at 7.00 p.m. Nisha has stated that except her father, all the members of her family used to leave the house for doing work. Her father was not doing any work and used to stay alone at home.

17. PW 2 Kavita has also stated that the wife and children of the accused used to go for work and the accused was not doing any work and used to remain at home. PW 14 Mangal has also stated that the accused did not do any work and he used to remain present in his house. PW 25 APT Dighe has stated that during investigation it transpired that on the day of the incident, the entire family members of the accused had gone out of the house and the accused was present alone at home. It is further pertinent to note that the accused in his statement u/s 313 of Cr. P.C. has admitted that on 22.1.2013 his wife, both his sons, both his daughters and his grand son had gone out of the house and he was alone in the house. This is in answer to Question Nos. 6 to 10 recorded in his statement u/s

18. Thus from the evidence of PW Nos. 2, 14, 18, 19, 20 and 25, it is seen that the accused was alone in his house in the afternoon of 22.1.2013. The evidence of PW 13 Dr. Jain shows that the death of the victim girl occurred within 2 to 4 hours after her last meal. The evidence of PW 2 Kavita who is the mother of the victim girl, shows that on 22.1.2013 at 12 noon, she came home and gave food to her three children including the victim girl and all the children had their meals. The food consisted of rice, dal and dish of sago (saboodana). This same food i.e. Saboodana was found in the stomach of the victim girl during post mortem. This shows that at about 12 noon on the day of the incident, the victim girl had her food (lunch) and according to Dr. Jain, death occurred within 2 to 4 hours of the last meal. That means the death occurred between 2.00 p.m. to 4.00 p.m. i.e. the time when the accused was alone at home. The house of the accused was just about one or two rooms away from the house of the victim girl and as per the evidence of PW 18 Asha the victim girl used to often play outside the house. This shows that the accused had every opportunity to take the victim girl inside his house and commit the dastardly act.

19. It is the prosecution case that on 22.01.2013, the accused committed rape and murder of the victim girl, thereafter, he put her dead body in a white plastic gunny bag and kept the bag in a lane near his house. PW 4 Vinod and PW 5 Sanjay had seen the accused coming from the side of the staircase with a bag of white colour and keeping the bag in the lane. PW4 Vinod has stated that on 22.01.2013, he went to Koparigaon to meet PW 10 Parshuram in connection with a plot. In Koparigaon, there is Shivsena office and Parshuram was having his office in that Shivsena office. PW 4 Vinod reached the office at about 3.30/3.45 p.m. At that time, his friend PW 5 Sanjay was with him. PW 10 Parshuram was also present in the Shivsena office. They had discussion in relation to a plot. After the meeting, PW 4 Vinod and PW 5 Sanjay came out of Shivsena office at about 4.30 p.m. There was one parking shed in front of the building which is near Shivsena office and they were standing below the said shed. When they were standing, one old man came from staircase side. According to PW 4 Vinod, the said old man was short and he was wearing only Bermuda pant. He was holding a bag of white colour. He went in the lane and kept the bag in the lane which was in front of the parking shed.

On 26.01.2013, PW 4 Vinod and PW 5 Sanjay and one other person came to the office of Parshuram. At that time. Parshuram told them that rape and murder of a girl in the building in front of the office had taken place. He told them that the incident took place on 22.01.2013 and police have arrested one old man. At that time, Vinod told Parshuram that on 22.01.2013, they saw one old man going with bag. Parshuram told him that he should inform this fact to the police. Thereafter, Vinod and Sanjay went to APMC Police Station and disclosed the aforesaid fact.

20. On 07.02.2013, PW 4 Vinod was called for test identification parade to Taloja

jail. In the jail, he identified the accused as the person who kept the bag in the lane. Vinod identified the plastic bag (Article 23-A) which was carried by the accused. He also identified Bermuda (Article 16-A) which was worn by the accused. It has come in the evidence of PW 4 Vinod that he saw the accused from a distance of 10-15 feet.

21. The evidence of PW 5 Sanjay is on the same lines as that of PW 4 Vinod. This witness has also identified the accused as the old short person wearing a Bermuda pant and who was carrying a white colour bag and who had hurriedly dropped the white bag in the lane opposite them. He has identified the accused in TIP as well as in Court. He also identified the white plastic bag (Article 23-A) as well as the Bermuda (Article 16-A) worn by the accused. The C.A. Report shows that this white bag bore blood stains of the group of the deceased.

22. Mr. Apte submitted that PW 4 Vinod and PW 5 Sanjay saw the accused from a distance of 15-20 feet, hence, there could be a mistake in identifying the accused. Both these witnesses have seen the accused in broad daylight at 4.30 p.m. They saw him from a distance of 15-20 feet. They have given description of the accused that is he was a short old man and wearing only a Bermuda. He was carrying a white plastic bag. Both these witnesses have not only identified the accused but they have also identified the Bermuda (Article 16A) as well as the plastic gunny bag (Article 23A). The accused is before us and we have seen that he is a short man as well as he looks old. Moreover, these witnesses have identified he accused in test identification parade held by PW 21 Ratnanjali and thereafter they have identified the accused in the Court.

23. That PW 4 Vinod and PW 5 Sanjay have correctly identified the accused as the person carrying the white plastic bag and who kept the bag in the lane, is further corroborated by the evidence of PW 21 Ratnanjali who is the Executive Magistrate. PW 21 Ratnanjali has stated that on 06.02.2013, she received letter from JMFC, Vashi directing her to hold test identification parade. On 07.02.2013, she sent a letter to the Senior P.I., APMC Police Station requesting him to keep the witnesses present for test identification parade on 08.02.2013. She also sent copy of this letter to the Superintendent of Taloja jail where she wanted to hold test identification parade. On 08.02.2013, she held the parade in Taloja jail. PW 21 Ratnanjali, the Executive Magistrate, has stated that she took precaution that the witnesses would not be able to see the accused prior to the parade. She instructed the jailer to bring six dummy prisoners similar to the physical appearance of the accused. The jailer brought six dummies. She was satisfied that six dummies were similar in appearance to the accused. Thereafter, PW 4 Vinod and PW 5 Sanjay identified the accused in the parade one after the another. After the first witness i.e. PW 4 Vinod identified the accused, PW 21 Ratnanjali took precaution to see that the first witness who identified the accused was sent outside the jail premises and thereafter the second identifying witness was brought in.

24. Mr. Apte submitted that the test identification parade was not properly held.

The memo of test identification parade and the evidence of PW 21 Ratnanjali, the Executive Magistrate contain the details of the steps adopted by the Executive Magistrate and we find that sufficient safeguards have been taken by the Executive Magistrate. It has been observed by the Supreme Court in case of State of Maharashtra Vs. Suresh, as under:-

22. If potholes were to be ferreted out from the proceedings of the magistrates holding such parades possibly no test identification parade can escape from one or two lapses. If a scrutiny is made from that angle alone and the result of the parade is treated as vitiated every test identification parade would become unusable. We remind ourselves that identification parades are not primarily meant for the court. They are meant for investigation purposes. The object of conducting test identification parade is two fold. First is to enable the witnesses to satisfy themselves that the prisoner whom they suspect is really the one who was seen by them in connection with the commission of the crime. Second is to satisfy the investigating authorities that the suspect is the real person whom the witnesses had seen in connection with the said occurrence. So the officer conducting the test identification parade should ensure that the said object of the parade is achieved. If he permits dilution of the modality to be followed in a parade, he should see to it that such relaxation would not impair the purpose for which the parade is held, vide Budhsen and Another Vs. State of U.P., and Ramanathan Vs. The State of Tamil Nadu,

25. After carefully scanning through the evidence of PW 21 the Executive Magistrate who held the parade and the Memo of the test identification parade, we feel that the safeguards adopted by PW-2 Executive Magistrate were quite sufficient for ensuring that the parade was conducted in a reasonably foolproof manner. Nothing has been elicited in cross-examination of PW 4 Vinod and PW 5 Sanjay or PW 21 Executive Magistrate so as to cause us to discard their testimony. Their testimony establishes that on 22.01.2013 at 04.30 p.m., they saw the accused carrying white plastic bag (Art. 23-A) and keeping it in the lane. Both the witnesses have identified not only the accused but also the white plastic bag (Exh. 23-A) which was carried by the accused as well as the Bermuda (Art. 16-A) worn by the accused.

26. It is pertinent to note that the white plastic bag (Art. 23-A) was recovered at the instance of the accused along with the clothes of the deceased which were identified by the parents of the deceased. PW 12 Mustaqali is the panch witness who has deposed on this aspect. Mustaqali has stated that on 26.01.2013, he was called by one constable from APMC Police Station, hence, he went to APMC Police Station. The accused was present in the APMC Police Station. The accused made a statement that he kept the dead body of the girl and her shirt and half pant in one bag and had kept the bag behind the staircase. The said statement was recorded in memorandum panchnama (Exh. 35).

Thereafter, the accused took the police and panchas near the staircase of Om Sai Building. He went behind the staircase and took out one white plastic bag. The

said plastic bag was a big plastic bag having capacity of 50-60 kgs. Thereafter, the accused took out clothes from the white plastic bag that is one black coloured half pant (Art. 24-A) and orange colour shirt (Art. 25-A). They saw blood stains on the pant and the shirt. In addition on the pant they saw faeces. These articles were packed and seals were put thereon. Thereafter, panchnama (Exh. 36) was drawn. This bag was sent to CA and as per CA report (Exh. 25), the blood found on the plastic gunny bag matched with DNA profile of the deceased girl. This witness has identified the white plastic bag (Article 23 A) as the same bag which was taken out by the accused and half pant (Article 24A) and orange colour shirt (Article 25A) as the very same which were produced by the accused. PW 1 Datta, the father of the victim girl and PW 2 Kavita, the mother of the victim girl have identified the orange colour shirt and black colour half pant as belonging to their daughter. At the time when the missing report Exh. 11 was lodged, PW 2 Kavita the mother had given the description of her daughter's clothes that is orange colour shirt and black colour pant. Clothes of this very description were recovered at the instance of the accused and the shirt bore blood stains of the group of the deceased girl. The evidence of recovery of gunny bag and clothes of the deceased at the instance of the accused is further corroborated by PW 26.

27. As far as the circumstance of recovery of plastic bag and clothes of the deceased is concerned, Mr. Apte, learned Advocate for the accused, submitted that the evidence of PW 12 Panch witness Mustaqali shows that the accused after making a statement led them near the staircase of Om Sai Building, he went behind the staircase and took out a white plastic bag in which the clothes of the deceased were found whereas panchnama Exh. 36 shows that the accused led them to an open place in between Om Sai Building and Suyog Apartment and from the debris lying there, he took out a white coloured gunny bag. On going through the panchnama Exh. 35, we find that the accused has stated that he hid the bag in the debris behind the staircase of Om Sai Building. Thus, even the panchnama shows that the debris was lying near Om Sai Building. The evidence of the panch witness recorded in Marathi shows that the accused took out the bag from the kachra (debris) which was behind the staircase of Om Sai Building. The panchnama as well as evidence of PW 12 shows that the place the bag was produced from was a heap of debris lying near Om Sai building. The panch witness does not state that the bag was under the staircase but states that it was behind the staircase. The area behind the staircase may be situated between two buildings. The facts remains consistent that the place from where the bag was taken out was a heap of debris near Om Sai Building. Thus, we do not find any discrepancy between the evidence of this witness and the memorandum and panchnama Exh. 35 and Exh. 36.

28. Mr. Apte submitted that the plastic gunny bag in which the body of the deceased girl was kept, was a bag used for packing and storing sugar. He submitted that the accused must have taken this bag from the house itself and in such case, the family members ought to have identified the plastic gunny bag.

He submitted that non-identification by the family members of this plastic bag shows that the entire prosecution case is false. As far as this aspect is concerned, it is not the prosecution case that the plastic bag was taken from the house of the accused, hence, there would be no occasion for the family members to identify this plastic gunny bag. PW 4 Vinod and PW 5 Sanjay had seen the accused carrying a white plastic bag (Article 23 A) and keeping it in the lane at about 4.30 p.m. on 22.01.2013. They have identified the plastic gunny bag (Article 23A) as well as the accused before the Court. Thus, we find no merit in the submission that as the family members of the accused did not identify the plastic gunny bag, the entire prosecution case is false.

29. Thereafter Mr. Apte vehemently argued that the bag was found in an open place and such recovery from an open place is of no consequence. As far as the aspect of recovery of bag in which the clothes of the deceased were found from a place which is open and accessible to others is concerned, we would like to make a reference to a decision of the Supreme Court in the case of State of Maharashtra Vs. Bharat Fakira Dhiwar, wherein the case of State of Himachal Pradesh Vs. Jeet Singh, is referred and it was observed as under:

There is nothing in Section 27 of the Evidence Act which renders the statement of the accused inadmissible if recovery of the articles was made from any place which is "open or accessible to others". It is a fallacious notion that when recovery of any incriminating article was made from a place which is open or accessible to others, it would vitiate the evidence u/s 27 of the Evidence Act. Any object can be concealed in places which are open or accessible to others. For example, if the article is buried in the main roadside or if it is concealed beneath dry leaves lying on public places or kept hidden in a public office, the article would remain out of the visibility of others in normal circumstances. Until such article is disinterred, its hidden state would remain unhampered. The person who hid it alone knows where it is until he discloses that fact to any other person. Hence, the crucial question is not whether the place was accessible to others or not but whether it was ordinarily visible to others. If it is not, then it is immaterial that the concealed place is accessible to others.

30. In the case in hand, it is seen that the bag was kept in the debris and it was found only after the bag was taken out by the accused from the debris. In such circumstances, the prosecution has proved recovery of bag at the instance of the accused in which the clothes of the deceased were found. This is an additional circumstance against the accused.

31. The appellant came to be arrested on 25.01.2013. On 26.01.2013, the spot panchnama was carried out during which the house of the accused was searched. Some incriminating articles were found during the search. This is the next circumstance against the accused. PW 11 Gajara is the panch witness in whose presence the search was carried out. At about 5.00 pm, he was passing by Om Sai Building, at that time, he was called by the police. He saw that many policemen were present. So also 4-5 persons wearing clothes like doctor were

present. At that time, the accused was also present. PW 26 P.I. Bhong was also present. They all went to Room No. 8 of Om Sai Apartment. PW 26 P.I. Bhong rang the doorbell. The door was opened by one girl. On inquiry, the girl informed that her name was Nisha (PW 20). PW 26 P.I. Bhong told Nisha that he wanted to take search of the house and whether she has any objection. Nisha replied in the negative. There was one room and in that room there was partition and there was kitchen on the other side. There was one sofa with cover. They saw blood stains on it. There was one cloth for cleaning tiles which was kept on the window. Some bloodstains were found on that cloth. On the bed, there was a sari which was used as a bed-sheet (Article 21-A). On the sari/bed-sheet, blood stains were found. These articles and three cushion covers were seized from the house of the accused.

32. The evidence of PW 11 Gajara is corroborated by the evidence of PW 20 Nisha and PW 26 P.I. Bhong as well as by the evidence of PW 27 More who was the Asstt. Chemical Analyzer attached to Forensic Science Laboratory, Kalina. Nisha has stated that on 25.1.2013 police along with experts from Forensic Laboratory came to her house. Her father was also with them. The police told that they wanted to take search of the house, hence, she gave them permission to search. The experts found blood stains on the bed-sheet, cushion cover and other articles. All these articles were seized and police obtained her signature and that of her father on the panchnama.

33. PW 27 More who is an expert from Forensic Science Laboratory, has stated that on 25.01.2013, he received message from his superior that he should go to APMC Police Station and meet Investigating Officer who will take him to the spot of the incident. Accordingly, he went to APMC Police Station along with his team consisting of three other persons from F.S.L. After reaching the police station, they all proceeded to the spot of the incident. They went to Om Sai Building at Koparigaon. The accused was also present along with the police. More has stated that when he visited the spot of the incident, they wore uniform such as white apron, gloves and mask. This is corroborated by the evidence of panch witness PW 11 Gajara who has stated that when he reached Om Sai Building, he saw 4-5 persons were wearing clothes like doctor. More and his team carefully inspected the premises. They saw one sofa on the right side. They saw three cushions on the sofa. On careful examination, they found stains on the cushion cover of the sofa. On test being conducted, it was found that they were blood stains. They also saw one blood stained cloth in the window which was also taken charge of. There was one bed in the inner side of the partition. On checking the cover of the bed, they found that it was covered with sari. They found stains on the sari which tested positive for blood stains. All these articles were taken charge of. These articles were sent to C.A.. As per C.A. Report Exh. 25 colly, the blood stains found on the sari cum bed cover tallied with DNA sample of the deceased. This clearly shows that the deceased was taken by the accused inside his house and thereafter, rape was committed by him on the victim girl in his house, otherwise there was no reason for presence of blood stains of the deceased on the bed

cover in the house of the accused. Semen stains were also found on the bed cover. As per C.A. report (Exh. 25 colly), semen stains tallied with DNA sample of the accused.

34. When the postmortem was conducted on the dead body of the victim girl, vaginal and anal swab were taken. These swabs were taken during the postmortem by PW 13 Dr. Jain. These swabs were specifically taken for detection of semen. These swabs were sent to C.A.. So also other articles were sent to C.A. by the Investigating Officer i.e. the Bermuda of the accused, the sari cum bed-sheet and the blood sample of the accused. As per C.A. Report Exh. 25, DNA profile of semen found in the vaginal and anal swab tallied with the DNA profile of the accused. So also, the Bermuda (Art. 16A) which was on the person of the accused when he was arrested tested positive for semen which tallied with DNA sample of the accused. PW 4 Vinod and PW 5 Sanjay had seen the accused wearing this very same Bermuda on the day of the incident.

35. PW 16 Dr. Thakur had collected the blood of the accused for DNA profiling. Dr. Thakur has stated that on 29.01.2013, she was on duty at NMMC hospital. At about 11.30 a.m., the accused was brought for blood collection for DNA profiling. She filled in prescribed identification form on which there was a photograph of the accused. She attested the said photograph by signing it with her stamp. She obtained signatures of three witnesses on that form. Then, she personally collected blood of the accused and transferred the blood into two containers of 1.5 ml each. Thereafter, she kept both these containers in one plastic container and that plastic container was packed by means of sticking bandage and it was sealed by means of sealing wax with metallic seal of NMMC Hospital. She then handed over the prescribed form and sealed packet containing blood sample to Police Naik B. No. 1761 Katake (PW 23) who took that sample to Kalina Forensic Science Laboratory.

36. PW 23 Police Naik Katake has deposed about taking the sealed packet containing containers of blood and identification form to F.S.L. at Kalina on 29.01.2013. The DNA report (Exh. 25) shows that DNA profile of the semen found on the underwear/Bermuda Article 16A, blood sample of the accused and the vaginal swab and anal swab are from the same male source and identical in nature. This Bermuda (Article 16-A) has been identified by PW 18 Asha who is the wife of the accused as belonging to her husband. P W 4 Vinod and PW 5 Sanjay have also identified the Bermuda as the same one worn by the accused when they saw him on 22.01.2013 at 4.30 p.m. carrying a bag and keeping the bag in the lane. Exh. 25 clearly shows that the accused committed rape on the victim girl as well as sodomized her. The very same report also shows that bloodstains found on the sari/bed-sheet in the house of the accused tally with the DNA sample of the deceased girl. This shows the presence of the victim girl in the house of the accused. This shows that the accused took the victim girl to his house and raped and sodomized her.

37. The prosecution case is that spot panchnama was conducted on 25.01.2013.

During this panchnama, the house of the accused was searched and in the search, some cushion covers were found bearing blood stains. So also the bedsheet cum sari (Article 21 A) on the bed was found bearing blood stains. One cloth used for cleaning was also found bearing blood stains. Mr. Apte submitted that the incident occurred on 22.01.2013 and the house of the accused was searched on 25.01.2013 and during this search, blood stains were found on various articles like cushion cover, bedsheet and cleaning cloth. He submitted that if the blood stains of the victim girl fell on the cushion covers and the bedsheet on 22.01.2013, the family members of the accused would have noticed the said blood stains and would have made inquiry regarding the same. He submitted that in such case, the prosecution case that blood stains were found on various articles in the house of the accused does not seem probable and the accused has been falsely implicated.

38. As far as the above aspect is concerned, we have examined the cushion covers and we find that they are printed cushion covers with red being a predominant colour on the cushion covers. In such case, a lay person would not have noticed blood stains on the cushion covers as they were not specifically looking for the same like the investigating agency and the F.S.L. Experts looking for blood stains and other stains. As far as sari cum bedsheet (Article 21A) is concerned, it is seen that it is a very dark colour sari. It is a printed sari with circular prints. In the print, there is also red colour. Moreover, blood stains were found in the corner of this sari. Looking to all these facts, for a lay person, the blood stains would not have been easily noticeable. As far as the cloth piece is concerned, the C.A. report shows that it was washed. Moreover, the evidence of PW 19 Mahendra shows that they had 3-4 clothes in the house with which they used to daily clean and wash the floor, hence, it is not necessary that the same cloth was used every day. As stated earlier, the cloth appeared to be washed which shows that the cloth must have been washed by the accused due to which the blood stains were not easily visible.

39. It is the prosecution case that after raping, sodomizing and causing the death of the victim, the accused put her body in the bag (Art. 23 A) and kept it in the lane at 4.30 p.m. Thereafter at night, he went out of the house at 2.00 a.m. and removed the body of the girl and kept it in front of her house. The prosecution is relying on the evidence of PW 18 Asha who is the wife of the accused and PW 1 Datta and PW 2 Kavita who are parents of the victim girl. Asha has stated that on 22.01.2013, she came home at about 07.30 p.m. All the family members had taken dinner and went to sleep at about 01.00 a.m. Little after 02.00 a.m., she saw her husband going outside the house. The evidence of PW 1 Datta shows that from the evening of 22.01.2013, they searched for his daughter, however, they could not find her. When they returned home in the night at about 2.30 am. on 23.01.2013, they saw the dead body of their daughter lying naked in front of the door of their house. She was not making any movement. PW 2 Kavita who is the mother of the victim girl has also stated about search being taken for their daughter from the evening of 22.01.2013. She

has also stated that when they returned home at about 2.30 a.m., she saw that the dead body of her daughter was kept in front of the door of their house. Her daughter was naked. She was not making any movement. The evidence of PW 4 Vinod and PW 5 Sanjay shows that on 22.01.2013 at 4.30 p.m., they saw the accused carrying one white plastic bag (Article 23A) and keeping it in the lane. As stated earlier from the evidence of PW 13 Dr. Jain who has stated that the death took place between 2-4 hours after her last meal and the evidence of PW 2 Kavita who is the mother of the victim girl who has stated that she gave food to her children at about 12 noon it becomes clear that the death occurred in between 2.00 p.m. to 4.00 p.m. Thus, it becomes crystal clear that the accused committed the crime between 2.00 p.m. to 4.00 p.m., thereafter, he put the dead body of the victim girl in a large plastic gunny bag (Art. 23 A) and kept the bag in the lane. Thereafter, in the midnight, he went out of the house at 2.00 a.m. and took out the dead body of the victim girl from the gunny bag which was kept in the lane and kept the dead body in front of the house of the victim girl.

40. The subsequent conduct of the accused which has been deposed by PW 7 Dr. Pawar, PW 18 Asha, PW 19 Mahendra and PW 20 Nisha also shows mens rea on the part of the accused. PW 18 Asha who is the wife of the accused has stated that on 23.01.2013 at about 7.00 a.m., police came and knocked the door of their house. At that time, police inquired about the victim girl. Then Asha left the house to attend to her labour work. When she came back at about 7.30 p.m., she found that her husband was not present in the house. She learnt from her daughter Nisha that her husband i.e. the accused had gone to Kamothe to the house of his brother. She found it strange that her husband did not tell her before going to the house of his brother. This shows that the accused was frightened on seeing the police and therefore, he went away without telling his wife to the house of his brother at Kamothe. On 24.01.2013, Asha's husband i.e. the accused came back. That time she saw that her husband was in tension. She asked her husband as to why he was in tension. Her husband told her that he was not feeling well. Thereafter, she told her husband that he should go to the Doctor, hence, her husband i.e. the accused went to PW 7 Dr. Pawar.

41. The evidence of PW 19 Mahendra who is the son of the accused is on similar lines as that of PW 18 Asha. Mahendra has stated that on 22.01.2013, when he returned home, he found that his father was under tension. On 23.01.2013, when he returned home, his sister Nisha told him that their father went to the house of their uncle at Kamothe, therefore, he contacted his cousin Rajesh on phone and verified whether his father was present in the house of Rajesh. Rajesh told him that his father i.e. the accused was present at his house. Mahendra had suspicion as to why his father suddenly went to Kamothe and also because there was one previous incident at Village Dudhanoli where the accused had molested a woman (PW 6 Suvarna). The evidence of PW 20 Nisha shows that on 22.01.2013 i.e. on the date of the incident, when she came home at 7.00 p.m. and saw the face of her father, she realized that he was under tension. On 23.01.2013, she was having weekly off, hence she was present at home. Her

father was also present at home. On 23.01.2013, she came to know that the daughter of PW 1 Datta was raped and murdered. On that day, all members of the house went for work and her father went to the house of their uncle at Kamothe.

42. PW 7 Dr. Pawar has stated that on 24.01.2013 at about 7.30 p.m./8.00 p.m., the accused came into her cabin. He saw that the accused was under tension. The accused told her that he was feeling uneasiness. On checking, she found that blood pressure of the accused was high. There were no other symptoms. The entry in respect of arrival of the accused as patient was taken in the diary (Article 27). The diary shows that on 24.01.2013, the accused was checked by Dr. Pawar. Thus, the subsequent conduct of the accused which has been deposed by PW 18 Asha, PW 19 Mahendra and PW 20 Nisha shows that on 23.01.2013 when the police made inquiry at the house of the accused, the accused without telling his wife went away to the house of his brother at Kamothe. It is pertinent to note that the accused in his statement under 313 has admitted that on 23.01.2013, he went to the house of his brother at Kamothe without informing his wife PW 18 Asha. The evidence of these three witnesses and PW 7 Dr. Pawar together further shows that on the day of the incident as well as on 24.01.2013, the accused was under tension. The family members had no occasion to observe the accused on 23.01.2013 as on that day, he had gone to the house of his brother.

43. The previous conduct of the accused shows that he had propensity towards committing crimes of sexual nature. This is seen from the evidence of PW 6 Suvarna, PW 18 Asha, PW 19 Mahendra and PW 20 Nisha. Asha has stated that when she found her husband (accused) had gone to his brother's house on 23.01.2013 without telling her and on seeing that he was under tension, she suspected him because at their native place at Dudhanoli, the accused had caught hold of PW 6 Suvarna when Suvarna had gone to attend the call of nature. Due to this, the villagers had assaulted her husband and due to this incident, they had to permanently leave village Dudhanoli on the day of the incident itself.

44. PW 19 Mahendra has also stated that he had suspicion against his father i.e. the accused as the accused was under tension, the accused had suddenly gone to Kamothe and because there was previous incident which took place at village Dudhanoli. Mahendra has stated that at Dudhanoli, his father had outraged the modesty of a woman and therefore, the villagers had assaulted his father and they had to leave village Dudhanoli.

45. PW 20 Nisha has also stated that her father caught the hand of one woman in village Dudhanoli and therefore, they were required to leave village Dudhanoli. The woman whose hand the accused had caught in village Dudhanoli is PW 6 Suvarna.

46. PW 6 Suvarna is a resident of village Dudhanoli. She is a teacher by

profession. She has stated that earlier the accused was residing at village Dudhanoli. The house of the accused was two houses beyond her house. Previously, they used to go to answer the call of nature in an open space. In the year 2004 when she was sitting for toilet, at that time, the accused tried to outrage her modesty. The accused pushed her and tried to catch hold of her. She resisted. She was frightened and went running home. She narrated the incident to her family members. Then her husband and others beat the accused. From the night of that day, the accused left village Dudhanoli permanently. The evidence of Suvarna, PW 18 Asha, PW 19 Mahendra and PW 20 Nisha shows the mindset of the accused in relation to woman. It is pertinent to note that the accused has admitted the incident at village Dudhanoli which is seen from the answers to questions 78 and 79 in his statement under 313.

Q. 78:- It is in the evidence of PW 6 Suvarna that she herself and her husband assaulted you. What have you to say about it?

Ans:- It is true.

Q. 79:- It is in the evidence of PW 18 Asha your wife, PW 19 Mahendra your son and PW 20 Nisha your daughter that because of incident of outraging modesty, you and your family were required to leave village Dudhanoli? Ans:- It is true.

47. In addition to the evidence of PW 6 Suvarna, PW 18 Asha, PW 19 Mahendra and PW 20 Nisha, the evidence of PW 14 Mangal is also relevant. Mangal was residing in Room No. 9 in Om Sai Building. Her house was adjacent to the house of the accused. This witness has stated that the accused did not do any work and used to remain at home. During day time, the wife of the accused, sons and daughters used to go for work. The grandson of the accused used to go to school at 12 noon and come back at 6.00 p.m. She has stated that whenever she used to open or close her door, at that time, the accused used to stare at her by slightly opening the door or by looking into the mirror in the showcase. She told her neighbour about this fact and her neighbour told her that the accused is in habit of looking at women with an evil eye. She did not speak anything to the accused considering his old age. The evidence of PW 2 Kavita also shows that the accused was having evil eye towards her and her daughter. The accused used to stare at her and her daughter. She ignored this fact thinking that the age of the accused is like that of her father.

48. The accused is a sex maniac which is seen from the fact that he was forcibly committing intercourse with his wife without her consent 2-4 times in a week. This has been stated by PW 18 Asha who is the wife of the accused. Asha has stated that her husband used to forcibly commit sexual intercourse with her without her consent 2-4 times in a week. Thus, it is seen that the accused was committing marital rape on regular basis.

49. Another circumstance against the accused is the circumstance of extrajudicial confession which was made by the accused to his wife PW 18 Asha. Asha has stated that on 24.1.2013 she saw her husband was under tension. She asked her

husband why he was under tension. At that time, her husband told her that he was not feeling well, therefore, she told her husband to go to the Doctor. Her husband then went to PW 7 Dr. Pawar. After half an hour, her husband came back home. When her husband came back, she asked him why he was under tension. At that time, her husband told her that he had committed rape and murder of a girl. He mentioned the surname of the girl which we do not wish to reproduce here. We find that the extra judicial confession made by the accused to PW 18 Asha inspires confidence and is corroborated by other evidence led by the prosecution.

50. It has been held by the Supreme Court in the case of Sahadevan and another Vs. State of Tamil Nadu, that whenever the court, upon due appreciation of the entire prosecution evidence, intends to base a conviction on an extra-judicial confession, it must ensure that the same inspires confidence and is corroborated by other prosecution evidence. In the case of Kavita Vs. State of Tamil Nadu, the Supreme Court stated the dictum that:

4. There is no doubt that convictions can be based on extrajudicial confession but it is well settled that in the very nature of things, it is a weak piece of evidence. It is to be proved just like any other fact and the value thereof depends upon the veracity of the (witnesses) to whom it is made.

While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extrajudicial confession, the Supreme Court in State of Rajasthan Vs. Raja Ram, stated the principle that:

19. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the Court.

51. In the case of Alope Nath Dutta and Others Vs. State of West Bengal, the Supreme Court, while holding the placing of reliance on extrajudicial confession by the lower Courts in absence of other corroborating material as unjustified, observed:

87. Confession ordinarily is admissible in evidence. It is a relevant fact. It can be acted upon. Confession may under certain circumstances and subject to law laid down by the superior judiciary from time to time form the basis for conviction. It is, however, trite that for the said purpose the court has to satisfy itself in regard to: (i) voluntariness of the confession; (ii) truthfulness of the confession; and (iii) corroboration.

52. Accepting the admissibility of the extra-judicial confession, the Supreme Court in Sansar Chand Vs. State of Rajasthan, held that:

29. There is no absolute rule that an extrajudicial confession can never be the basis of a conviction, although ordinarily an extrajudicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju Vs. State of Mysore, , Mulk Raj Vs. The State of U.P., Sivakumar Vs. State by Inspector of Police, Shiva Karam Payaswami Tewari Vs. State of Maharashtra, and Mohd. Azad

@ Samin Vs. State of West Bengal,

53. The Supreme Court in the case of Sahadevan and another Vs. State of Tamil Nadu, on analysis of the earlier judgments on extrajudicial confession has observed thus:-

.... It will be appropriate to state the principles which would make an extrajudicial confession an admissible piece of evidence capable of forming the basis of conviction of an accused. These precepts would guide the judicial mind while dealing with the veracity of cases where the prosecution heavily relies upon an extrajudicial confession alleged to have been made by the accused:

- (i) The extra-judicial confession is a weak evidence by itself. It has to be examined by the court with greater care and caution.
- (ii) It should be made voluntarily and should be truthful.
- (iii) It should inspire confidence;
- (iv) An extra-judicial confession attains greater credibility and evidentiary value, if it is supported by a chain of cogent circumstances and is further corroborated by other prosecution evidence.
- (v) For an extra-judicial confession to be the basis of conviction, it should not suffer from any material discrepancies and inherent improbabilities.
- (vi) Such statement essentially has to be proved like any other fact and in accordance with law.

54. Having stated the principles which need to be kept in mind by the Court while examining the acceptability and evidentiary value of extra-judicial confession, we have examined the evidence relating to the extra-judicial confession. In the present case, we find that the extra-judicial confession made by the accused to PW 18 Asha is voluntary and true and there is sufficient corroboration to the same. Nothing has been elicited in cross-examination of PW 18 Asha so as to disbelieve her testimony on the point of extra-judicial confession. We have examined the evidence in relation to extra-judicial confession with great care and caution and we find that the same is made voluntarily and is truthful and it inspires confidence. Moreover, it is supported by a chain of cogent circumstances which corroborate the same. The evidence of PW 18 Asha clearly shows that the accused made an extra-judicial confession that he had raped and murdered the victim girl. As stated earlier, there is nothing in the cross-examination so as to cause us to discard her testimony on this point. Moreover, there is sufficient corroboration to this extra-judicial confession from other circumstances which have been proved by the prosecution in this case. We have already adverted to the fact that vaginal swab and anal swab were taken from the body of the victim girl and the DNA analysis shows that it was identical to that of the accused. Blood stains of the victim girl were found on the sari cum bed-sheet (Art. 21A) in the house of the accused. The clothes of the victim girl

were recovered at the instance of the accused. These circumstances to our mind show a chain of cogent circumstances which also provide sufficient corroboration to the extra-judicial confession made by the accused.

55. So far as the offence of rape is concerned, the evidence of PW 13 Dr. Jain who carried out the postmortem on the dead body of the victim girl shows that the victim girl was raped and sodomized. The prosecution has examined PW 8 Dr. Tambe who has examined the accused and issued certificate Exh. 19 which shows that the accused is capable of sexual intercourse. The accused has admitted that he was examined by PW 8 Dr. Tambe. PW 13 Dr. Jain who conducted the postmortem on the dead body of the victim girl has stated that on external examination, he noticed lacerated wound over posterior vaginal wall with width 0.5 cm. Laceration was muscle deep. The hymen was torn and blood was oozing out. Dr. Jain noticed another laceration on the right lateral vaginal wall. This laceration was also muscle deep and blood was oozing out. Dr. Jain has also noticed two lacerations over the anal region at 12 O'clock and 3 O'clock position. The medical evidence, thus, totally supports that the victim girl was subjected to rape as well as violent anal intercourse.

56. Where the entire case hinges on circumstantial evidence, great care must be taken while evaluating the circumstantial evidence which we have in the present case. We have discussed the 17 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 forms 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.

57. That the accused committed an offence u/s 376(2)(f) of IPC is proved beyond reasonable doubt by the prosecution, that is the accused committed rape on a woman below 12 years of age. In view of the evidence on record, there can be no doubt that the victim girl was five years old. Both PW 1 Datta and PW 2 Kavita have stated that she was five years old. In addition, the prosecution has brought the birth certificate (Exh. 72) of the victim girl on record through the evidence of PW 25 Puspallata Dighe. Exh. 72 shows that the date of birth of the victim girl was 17.8.2007. The incident took place on 22.01.2013. Thus, on the date of the incident, the victim girl was 5 years, 5 months old, hence offence u/s 376(2)(f) is clearly made out. However, we have noticed that the accused has been convicted u/s 376 as well as Section 376(2)(f) of IPC. 376(2)(f) is an aggravated version of Section 376, hence, in such case when a person is convicted u/s 376(2)(f) of IPC, he cannot be convicted u/s 376 which is a less aggravated form of Section 376(2)(f). In such case, only the conviction u/s 376(2)(f) can be sustained and not one u/s 376 of IPC. This follows the same analogy that if a person is convicted u/s 326 of IPC for causing injury to person

"A", he cannot again be convicted u/s 324 of IPC for causing injuries to the same person. Similarly for the same transaction, an accused cannot be convicted u/s 392 as well as Section 395 of IPC. In such case, the conviction u/s 376 simpliciter would have to go and the conviction u/s 376(2)(f) is retained. In any event, the trial Court had framed charge u/s 376 and in the alternative, 376(2)(f) of IPC in which case the accused can be convicted under any of the charges and not both. As it is proved by the prosecution that the accused has committed aggravated offence that is u/s 376(2)(f), the conviction u/s 376(2)(f) can be sustained.

58. Mr. Apte submitted that the accused cannot be convicted u/s 302 of IPC because there was no intention on the part of the accused to cause the death of the victim girl. He submitted that the accused did not want to murder the victim girl and cause her death but he covered her mouth so that the victim girl should not shout for help and attract the attention of other people. He submitted that in a similar case, the Supreme Court held that case was not made out for the offence u/s 302 of IPC and the accused were convicted u/s 304 Part II of IPC. He placed reliance on the decision in the case of State, Govt. of NCT of Delhi Vs. Sunil and Another, Mr. Apte pointed out that in that case a child of four years was raped by two accused and thereafter, her death was caused. According to the Doctor in the said case, the child died due to intracranial damage consequent upon surface force impact to the head. The Supreme Court held that this happened during the course of the ravishment committed by either both or by one of the rapists without possibly having any intention or even knowledge that their action would produce any such injury. It was in such case that it was held that the case falls u/s 304 Part II of IPC and not u/s 302 of IPC.

59. In the present case, the death of the victim girl is not caused only on account of head injury or due to smothering but it was on account of asphyxia due to smothering associated with head injury as well as sexual assault. The sexual assault of both rape and sodomy have caused extensive injuries which are reflected in the evidence of PW 13 Dr. Jain. The act of the accused of rape and sodomy on the victim girl caused a number of lacerations on the vaginal and anal region. The lacerations on the vaginal region were multiple in number and they were muscle deep. It must have caused extensive injuries, which is seen from the fact that when postmortem was carried out the next day, blood was still oozing out which is seen from the evidence of Dr. Jain. Looking to the cumulative injuries caused by the accused, it can certainly be said that the case is covered by Section 300 of IPC. Even if the case does not fall under the first clause of Section 300, the case would certainly fall under the second clause of Section 300 that is if the act is done with intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused. Looking to the nature of injuries, the decision in the case of Sunil (supra) would not be applicable to the facts of the present case.

Moreover, it is seen that in the case of Sunil (supra), the Supreme Court was

considering the case in an appeal against the acquittal as the High Court had acquitted the accused therein. It is well settled that different considerations apply on the mind of the Court while considering a case of an appeal against acquittal. The Court always takes a more lenient view in such cases as the accused has earlier been acquitted.

We are not inclined to accept the submission of learned counsel for accused that accused had no intention to cause the murder of victim girl for the reason that the intention of the accused can very well be gathered from the facts and circumstances of the case as well as evidence on record. The motive of a person in commission of crime always locks up in the mind of accused and it is difficult to unlock. Therefore, the intention of accused in commission of crime can be inferred only on the basis of the facts and circumstances of the case and the evidence adduced by the prosecution. It is pertinent to note that the victim girl was residing in room No. 3 of same building in which the accused was residing in Room No. 8. The accused was not stranger to victim girl. She was knowing the accused. After committing such heinous act of rape and sodomy, it was not safe for accused to let the victim girl to go to her house and to invite risk of disclosing incident to her family members. The cause of death of deceased was not only asphyxia but also found to be associated with head injury as well as injury to her private parts. Thus, in the light of facts and circumstances of the case as well as evidence on record the inference can be drawn that the accused has intentionally caused the death of deceased by banging her head on the hard object like bed or flooring of room so as to leave no scope for any evidence to remain against him.

60. On careful scrutiny of the evidence, we are of the opinion that the offence u/s 302, 376(2)(f), 377, 363, 364, 367 and 201 of IPC as well as offence u/s 3 and Section 5(i)(l) and (m) of PCFSO Act is made out. However, it is noticed that the trial Court has also convicted the accused under Sections 5(h) and 5(k) of the PCFSO Act. Section 5(h) and 5(k) read as under:-

5. Aggravated penetrative sexual assault-

(a).....

(b).....

(c).....

(d).....

(e).....

(f).....

(g).....

(h) whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or

(j).....

(k) whoever, taking advantage of a child's mental or physical disability, commits penetrative sexual assault on the child; or

(l).....

Looking to the evidence on record, we find that these two offences are not made out. There is no evidence to show that the accused used any deadly weapon, fire, heated substance or corrosive substance while the offence was committed. So also it is nobody's case that the child was mentally retarded or physically disabled in any manner. In such case, offence under Sections 5(h) and (k) are not made out, however, the offence under Sections 5(i), 5(l) and 5(m) are made out which read as under:

5. Aggravated penetrative sexual assault-

(a).....

(b).....

(c).....

(d).....

(e).....

(f).....

(g).....

(h).....

(i) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(j).....

(k)....

(l) whoever commits penetrative sexual assault on the child more than, once or repeatedly; or

(m) whoever commits penetrative sexual assault on a child below twelve years:
or

(n).....

Section 5(i), 5(l) and 5(m) are punishable u/s 6 of the PCFSO Act, hence, the case for conviction u/s 6 of the PCFSO Act is made out.

61. On going through the evidence adduced by the prosecution, we find that there is sufficient evidence to sustain the conviction under Sections 363, 364, 367, 201, 376(2)(f), 377 and 302 of IPC and Section 3 and Section 5(i), (l) and (m) of the PCFSO Act. This leads us to that all important question that is, whether the death sentence should be confirmed.

62. 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 by the informed man i.e. the Judge that leads to determination of the sentence.

63. 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. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

64. 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.

65. Learned APP submitted that looking to the facts of this case, it is a fit case to confirm the death sentence. She submitted that looking to the fact that the accused has committed rape and sodomy on a young innocent, helpless, defenceless girl and thereafter murdered her, calls only for a death penalty. She placed reliance on the decisions in the following cases:-

1. Kamta Tiwari Vs. State of M.P.,
2. State of Maharashtra Vs. Suresh,
3. State of U.P. Vs. Satish,

4. Shivu and Another Vs. R.G. High Court of Karnataka and Another,
5. B.A. Umesh Vs. Regr. Gen. High Court of Karnataka,
6. Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra,

On the point of death sentence, the learned APP placed reliance on a decision of the Supreme Court in the case of Kamta Tiwari (supra). In the said case, the accused kidnapped a young girl and thereafter he committed rape on her, strangled her to death and threw the dead body in a well. 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. In Bachan Singh Vs. State of Punjab, this Court indicated, while discussing the sentencing policy, the guidelines to be followed for imposing the extreme penalty of death. From the guidelines so indicated this Court in its later judgment in Machhi Singh and Others Vs. State of Punjab, formulated the following propositions, which are to be applied when the question of awarding death sentence arises:

- (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. In other words 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 or 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 has to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised.

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 a abhorrence of such crime.

66. The learned APP also relied on a decision in the case of State of Maharashtra

Vs. Suresh, In the said case, the accused had committed rape and murder of a four years old girl. The trial Court had convicted the accused under Sections 376 and 302 of IPC and sentenced the accused to death for the offence u/s 302 of IPC. The Supreme Court has observed as under:-

Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime, but as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases" envisaged by the Constitution Bench in Bachan Singh Vs. State of Punjab,

Learned APP pointed out that had the accused in the case of Suresh not been acquitted by the High Court, the Supreme Court would have confirmed the death penalty awarded by the trial Court. She stated that the facts in the case of Suresh and the present case are similar, hence, the penalty of death deserves to be confirmed in this case.

67. 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.

68. The learned APP also placed reliance on a decision of the Supreme Court in the case of Shivu and Another Vs. R.G. High Court of Karnataka and Another, In the said case, the main accused was sentenced to death as he had committed rape on a young girl. It was held in paragraphs 21 and 22 as under:-

21.....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.

22. 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-?-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for 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-?-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.

After considering the decision of the Constitution Bench of the Supreme Court in *Bachan Singh Vs. State of Punjab* (supra) and the decision of the three judges of the Supreme Court in *Machhi Singh Vs. State of Punjab*, (2010 ALL SCR (O.C.C.) 233] (supra), the Supreme Court in the case of *Shivu* held that there was no hesitation in holding that the case at hands falls in rarest of rare category and death sentence awarded by the trial Court and confirmed by the High Court was appropriate. The learned APP submitted that the present case certainly falls in Category (i) that is 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. She further submitted that the present case also falls in category (5) that is the victim of the murder is an innocent child.

69. In the case of *B.A. Umesh Vs. Regr. Gen. High Court of Karnataka*, violent rape was committed on the victim and thereafter she was murdered. The Supreme Court has taken into account the antecedents of the appellant and his subsequent conduct and held that it indicates that he is a menace to the society and is incapable of rehabilitation. The Supreme Court further observed that the offences committed by the appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape on the victim. Observing thus, the death sentence was confirmed.

70. In the case of *Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra*, a married person aged 31 years committed rape on a three year old minor girl and thereafter committed her murder. The Supreme Court, after considering its earlier decisions relating to the death sentence, stated some of the aggravating circumstances which are as under:-

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
2. The offence was committed while the offender was engaged in the commission of another serious offence.
3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
4. The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
5. Hired killings.
6. The offence was committed outrageously for want only while involving

inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty u/s 43 Cr. P.C.

9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

10. 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.

13. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.

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

Learned APP pointed out that the present case is covered by three of the aggravating circumstances which are as under:-

(10) 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.

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

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

71. The Supreme Court in the case of Wasnik has also set out the mitigating circumstances which are as under:-

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment on in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused.

72. In case of *Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra*, , after considering the earlier decisions relating to the sentencing policy, the following principles were set out:-

(1) The Court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the Court, imposition of any other punishment, i.e., life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

The Supreme Court further observed as under:-

Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the Court, while exercising its jurisdiction. It is difficult to state, it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the Court may consider in its endeavour to do

complete justice between the parties.

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.

73. In the case of Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra, the Supreme Court observed that the Court has to examine the conduct of the accused prior to, at the time of the crime as well as after the commission of 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 had tendency of indulging in crimes of sexual nature. He had habit of staring at women with an evil eye and had even pounced on PW 6 Suvarna and tried to sexually attack her due to which, he was beaten by the villagers and the accused had to permanently leave village Dudhanoli. The accused also used to have forcible intercourse with his wife on regular basis.

74. We would also like to advert to some other decisions of the Supreme Court wherein death sentences were given in case of rape and murder of minor child.

In the case of Laxman Naik Vs. State of Orissa, 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:-

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 other, 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 u/s 302 of the Penal Code. As regards the punishment u/s 376, neither the learned Trial Judge nor the High Court have awarded any separate and additional substantive sentence and in view of the fact that the sentence of death awarded to the appellant has been confirmed we also do not deem it necessary to impose any sentence on the appellant u/s 376.

75. In a 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. In the decision in the case of Md. Mannan @ Abdul Mannan Vs. State of Bihar, 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.

76. 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 and one decision of this Court wherein, according to him, in similar cases, the Supreme Court and this Court commuted the death sentence to life imprisonment. The decisions of the Supreme Court are as under:-

1. Shankarlal Gyarsilal Dixit Vs. State of Maharashtra,
2. Amit @ Ammu Vs. State of Maharashtra,
3. Rahul @ Raosaheb Vs. State of Maharashtra (2005) 10 SCC 322
4. Sandesh @ Sainath Kailash Abhang Vs. State of Maharashtra,
5. Shankar Kisanrao Khade Vs. State of Maharashtra,

Mr. Apte also placed reliance on one decision of this Court in the case of The State of Maharashtra Vs. Babu alias Ravindra Suresh Kamble,

77. As far as the first decision in the case of Shankarlal (supra) is concerned, it is seen that the case was of rape and murder, the accused therein was acquitted. This decision was based on the facts of the case which emerged from the evidence of the witnesses who were examined in the said case. The evidence in the said case and the present case is not at all similar. In the present case, we have already dealt with 17 circumstances which according to us have been proved by the prosecution against the accused. Thus, this decision would be of no help to the accused.

78. In the case of Amit @ Ammu Vs. State of Maharashtra, the accused was convicted for rape and murder of a girl of about 11-12 years. The conviction was based only on circumstance of "last seen" and recovery of articles such as matchbox used for burning school bag and other articles. Mr. Apte drew our attention to the fact that in the case of Amit, the accused had committed rape on a girl who was about 11-12 years and thereafter committed murder, yet the Supreme Court reduced the sentence to life imprisonment.

As far as the case of Amit is concerned, the victim girl was 11-12 years of age that is she was almost of the age of puberty whereas the victim girl in the present case is a girl who had seen only five summers. Besides, the case of Amit was only under Sections 376 and 302 of IPC whereas in the present case Section 377 is also involved. The injuries seen on the private part of the girl are not only extensive in nature but in addition to it, serious injuries were found on the anal region also. Thus, the facts of this case cannot be said to be similar to the facts of the present case.

79. In the case of Rahul (supra), the accused raped a girl aged about 4-1/2 years and caused her death by inflicting cut injuries on her neck. Mr. Apte pointed out that in the case of Rahul (supra), the accused enticed the girl aged about 4-1/2 years and took her to a deserted place. He then committed rape on her and later caused her death. After causing death, he kept the body in a gunny bag and put it in a pit. In the said case, the Supreme Court observed that the appellant committed a serious crime in a very ghastly manner but the accused was aged 24 years at the time of the crime. Considering the age of the appellant and other circumstances that he had no previous criminal record, the death sentence was commuted to life.

The case of Rahul is distinct from the present case. In the case of Rahul, the accused had no previous criminal record whereas in the present case, the evidence of the witnesses shows that the accused had a predisposition towards offences relating to women which is seen from the evidence of PW 6 Suvarna, PW 18 Asha, PW 19 Mahendra, PW 20 Nisha, PW 2 Kavita and PW 14 Mangal. PW 14 Mangal who is the neighbour of the accused has clearly stated that whenever she used to open or close her door, at that time, the accused used to stare at her by slightly opening the door or by looking into the mirror in the showcase. PW 2 Kavita has also stated that the accused was looking at her as well as her daughters with an evil eye. PW 18 Asha, PW 19 Mahendra and PW 20 Nisha have stated that in their native village Dudhanoli, the accused had caught hold of PW 6 Suvarna due to which he was beaten by the villagers and the accused and his family had to leave the village. PW6 Suvarna has stated that at village Dudhanoli when she was sitting for toilet, the accused pushed her and tried to catch hold of her. Because of the said incident the accused was assaulted by villagers and the accused and his entire family had to permanently leave Village Dudhanoli. In addition, PW 18 Asha, the wife of the accused, has stated that the accused used to have forcible intercourse with her two to four times in a week.

80. Mr. Apte then pointed out that in the case of Sandesh @ Sainath Kailash Abhang Vs. State of Maharashtra, though the accused had committed an offence of rape and murder, the death sentence was commuted to life. On perusal of the facts of the said case, it is seen that the death sentence was commuted to life because the accused therein was 23 years of age and the prosecution led no evidence to show that the accused was incapable of being reformed. Moreover what weighed on the mind of the Supreme Court while commuting the sentence

to life was that the main motive was robbery and the accused did not enter the house with intention to commit rape and for various other reasons mentioned in the judgment, it was held that the accused was not aware of the consequence of his act. In the present case, the accused was 53 years of age when he committed the offence. The prosecution has led evidence to show that the accused is incapable of being reformed which evidence has been led by PW 6 Suvarna, PW 14 Mangal, PW 2 Kavita, PW 18 Asha, PW 19 Mahendra and PW 20 Nisha. Not only PW 2 Kavita and PW 14 Mangal stated that the accused used to look at women with evil eye and used to stare at them but PW 6 Suvarna has stated that at village Dudhanoli when she was sitting for toilet, the accused pushed her and tried to catch hold of her. The accused knew out of past experience that if he tried to rape a full grown woman, she would resist and he would land into trouble. Hence, the accused chose a young, innocent, defenceless, minor girl as his victim knowing that such young child of tender age would not be able to put up a resistance. Looking to the evidence of these witnesses, the possibility of the accused being reformed if permitted to join mainstream of the society does not at all seem possible. On the other hand, he would be a menace or irreformable anti-social element to the society.

81. In the case of Sandesh @ Sainath Kailash Abhang Vs. State of Maharashtra, the main motive was robbery and the Supreme Court, looking to the evidence on record, held the accused did not enter the house with intention to commit rape whereas in the present case, the main intention was to sexually attack a young girl, to commit rape and have anal sex with her. The brutality with which the accused attacked the young girl of five years would show that the act was done with intention of causing such bodily injuries which the accused knew to be likely to cause the death of the minor girl. Not only the accused inhumanly raped a young girl, had brutal anal sex with the girl but he has also banged her head on the hard substance due to which hemorrhage was caused under the scalp over the occipital region which was 5 cm x 3 cm. This shows the force used by the accused while committing the act.

82. In the case of Sandesh @ Sainath Kailash Abhang Vs. State of Maharashtra, the victim girl was not a child of five years but was a fully grown woman. There is nothing to show that the injuries on account of sexual assault were as serious as those found in the present case. In the case of Sandesh @ Sainath Kailash Abhang Vs. State of Maharashtra, it would not be expected that there would be extensive injuries to the vaginal region because the victim was a married woman. Looking to all these facts, the death sentence was commuted to life.

83. Moreover, in the case of Sandesh @ Sainath Kailash Abhang Vs. State of Maharashtra, the Supreme Court observed that it is not possible to lay down as a principle of law as to in which cases the death penalty should or should not be imposed. One aspect that is to be taken into account is the possibility of the accused being reformed. He being young and having no criminal involvement in similar crimes are relevant considerations. In the said case, nothing has been led

by the prosecution to show that the accused had any antecedents and there was no possibility of his being reformed, hence, in view of these facts, the death sentence was commuted to life. However, in the present case, the prosecution has led evidence to show that the accused is involved in anti-social and criminal behaviour towards women. Moreover, the accused is not young. In fact, in the case of Shankar Kisanrao Khade Vs. State of Maharashtra, , the Supreme Court has observed that the accused being a middle age of 52 years, reformation or rehabilitation is practically ruled out.

84. Mr. Apte then pointed out that in the case of Shankar Kisanrao Khade Vs. State of Maharashtra, the Supreme Court in similar circumstances commuted the death sentence to life imprisonment. He pointed out that in the said case, the age of the accused was similar to the accused in the present case that is the accused was 52 years old. He further pointed out that Khade's case was also a case under Sections 363, 376 and 302 of IPC. The victim girl in the said case was 11 years of age whereas the victim girl in the present case is 5 years of age. The victim girl in the present case is a tender child of 5 years whereas the victim in Khade had almost reached puberty. Moreover, one big distinction in the case of Shankar Kisanrao Khade Vs. State of Maharashtra, and the present case is that the accused was not convicted u/s 377 in the case of Khade whereas in the present case, the accused has also being convicted u/s 377 of IPC. Not only the victim girl had sustained extensive injuries to her vaginal walls but she also sustained extensive injuries to the anal region which can be seen from the evidence of PW 13 Dr. Jain. Further the case of Shankar Kisanrao Khade Vs. State of Maharashtra, was not conducted under the PCFSO Act. Though the accused had some antecedents in the case of Shankar Kisanrao Khade Vs. State of Maharashtra, it is seen that they were not of similar nature. The facts in the case in which he was previously convicted were entirely different from the facts in the case in which he was convicted whereas in the present case, it is seen that the accused has a history of indulging in antisocial crimes against women.

85. If we compare the present case to the case of Shankar Kisanrao Khade Vs. State of Maharashtra, it is seen that the victim girl in the present case suffered double the agony of the victim girl in Khade's case. The brutality perpetrated by the accused was also double. Moreover, the pain and the suffering that the victim girl had to undergo was also double. The victim girl was violently and bestially raped and sodomized. Moreover in the case of Shankar Kisanrao Khade Vs. State of Maharashtra, , the accused had two sons dependent on him. In the present case, no one is dependent on the accused as his wife, two sons and two daughters are all working.

86. In the case of Babu @ Ravindra Kamble (supra), the fact that the accused was 23 years of age and had no antecedents and the fact that no material was placed before the Court to arrive at a conclusion that the accused would be a menace to the society in future weighed on the mind of the Court and the death penalty was reduced to life imprisonment.

87. 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.

88. 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 to undermine the public confidence in the efficacy of law and society could 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.

89. The object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has 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.

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

(1) The victim girl was a helpless, innocent child of five years when the accused violently and inhumanly raped her, brutally sodomized her and caused her death.

(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) Thereafter, the accused put the body of the victim girl in a gunny bag and after sometime, threw the naked body of the girl in front of her parent's house.

(7) 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, no one is dependent on the accused and his family members are working and they are all independent. Thus even considering the crime test and criminal test as laid down in the case of Shankar Kisanrao Khade Vs. State of Maharashtra, which from para 57 of Khade's Judgment becomes clear are just different terms for aggravating circumstances (crime test) and mitigating circumstances (criminal test). We find that crime test is fully satisfied that is 100% and criminal test is 0%..

91. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. The case of Nirbhaya in Delhi and the Shakti Mills rape in Mumbai are glaring examples of how violent crimes against women are increasing day by day. Would the society not expect the accused who has committed rape on a tender girl of 5 years in an extremely brutal, barbaric, gruesome manner and caused her death for no fault of hers, to be hanged? Would the society not expect, the holders of the judicial powers centre, to award proportionate sentence to the accused who had no respect for human values and treated a young girl of 5 years in most brutal, cruel and inhuman manner? He not only committed a rape on a young minor girl but also had forcible anal sex with her and also caused serious injuries to her head. 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.

92. 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.

93. The accused has also been convicted under Sections 3 and 5 of the PCFSO Act. The statement of objects and reasons shows that the data collected by the National Crime Records Bureau shows that there has been increase in cases of sexual offences against children. This is corroborated by the "Study on Child Abuse: India 007" conducted by the Ministry of Women and Child Development. Looking to the fact that there has been increase in sexual offences against the children, PCFSO Act was enacted to protect the children from the offences of sexual harassment and pornography. Thus, it is seen that only on account of

increase in crimes wherein the victims are children offender years that the PCFSO Act has been enacted. Had there not been an increase in crime of sexual nature against minor children which is being seen by the society, such an act would not have been enacted.

94. 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 sub-serve the basic requirement of the society. It is a requirement of the society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability, 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, 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 and amendment to IPC 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 awarding 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 committing such 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.

95. Not only is the victim an innocent child and the accused a middle aged married man of 53 years of age with four children 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 and perverse manner. It can hardly be even imagined that what torture and suffering the minor child must have faced during the course of commission of this crime. All her private parts were torn, lacerated and bleeding. 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 that he 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, in the perception of the society it would surely be a "rarest of rare" case wherein the death sentence is required to be imposed. 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 weight-age to the mitigating circumstances. 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.

96. Before we part with the Judgment, we must place on record our appreciation for the valuable assistance rendered by Mrs. Usha V. Kejariwal, the learned APP. We must also appreciate the sincere and dedicated efforts taken by Mr. Abhaykumar Apte who was appointed by the High Court Legal Services Committee to appear on behalf of the accused/appellant. Legal fees to be paid to Mr. Abhaykumar Apte in this matter by the High Court Legal Services Committee are quantified at Rs. 25000/-. 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 u/s 302 of IPC on the accused Dattatray alias Datta Ambo Rokde vide Judgment and Order dated 07.06.2013 passed by Special Judge (PCFSO Act) Thane in Special Case No. 1 of 2013 is confirmed.
- ii. The conviction and sentence under Sections 376(2)(f) as well as Section 377 of IPC is maintained.
- iii. The conviction for the offence u/s 3 punishable u/s 4 and 5(i)(l) & (m) punishable u/s 6 of PCFSO Act is maintained. As the accused is sentenced to life imprisonment under Sections 376(2)(f) and 377 of IPC, no separate sentence is imposed under the Sections 4 and Section 6 of PCFSO Act.
- iv. The conviction of the accused under Sections 376 of IPC simplicitor and for the offence under Sections 5(h) and 5(k) of PCFSO Act is set aside.
- v. The conviction and sentence of the accused under Sections 363, 364, 367 and 201 of IPC as awarded by the trial Court is maintained.
- vi. Thus, the reference is answered accordingly and appeal is partly allowed.
- vii. Office to furnish copy of this Judgment and Order to the accused who is in jail through concerned Prison authorities.