
(2016) 03 BOM CK 0133

In the Bombay High Court

Case No : Confirmation Case No. 1 of 2015 and Criminal Appeal No. 923 of 2015

The State of Maharashtra

APPELLANT

Vs

Vitthal Tukaram Atugade

RESPONDENT

Date of Decision : 14-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 164, Section 366, Section 368, Section 428

Evidence Act, 1872 — Section 24, Section 25, Section 26, Section 27

Penal Code, 1860 (IPC) — Section 201, Section 302, Section 307, Section 363,

Citation : (2017) ALLMRCri 1274 : (2016) 2 Crimes 340 : (2016) 5 MhLJCrI 351

Hon'ble Judges : V.K. Tahilramani and A.S. Gadkari, JJ.

Bench : Division Bench

Advocate : G.P. Mulekar, APP, for the Appellant; Abhaykumar Apte, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

A.S. Gadkari, J.—1. The Confirmation No. 1 of 2015 arises out of the Reference made by the learned District Judge-1 and Additional Sessions Judge, Islampur, District-Sangli for confirmation of the death sentence awarded to the accused Vitthal Tukaram Atugade (hereinafter referred to as "accused") by its judgment and order dated 18th April 2015 passed in Sessions Case No. 4 of 2014.

The learned Additional Sessions Judge, Islampur convicted the accused for the offence punishable under Section 302 of the Indian Penal Code and sentenced him to suffer death sentence and to pay fine of Rs. 2000/- and in default of payment of fine to further undergo simple imprisonment for one month. It is directed that the accused be hanged by neck till he is dead subject to confirmation of death sentence by the High Court under Section 368 of Cr. P.C.

By the aforesaid judgment and order, the accused is also convicted for the offence punishable under Section 376(2)(f) of the Indian Penal Code and is sentenced to suffer life imprisonment and to pay fine of Rs. 2000/-. In default of

payment of fine, to further undergo simple imprisonment for one month.

The accused is further convicted for the offence punishable under Section 363 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs. 1000. In default of payment of fine, to further undergo simple imprisonment for 15 days.

The accused is convicted under Section 366 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for two years and to pay fine of Rs. 1000/-. In default of payment of fine, to further undergo simple imprisonment for 15 days. The accused is also convicted for the offence punishable under section 201 of the Indian Penal Code and is sentenced to suffer rigorous imprisonment for three years and to pay fine of Rs. 1000. In default of payment of fine to undergo simple imprisonment for 15 days.

The accused is further convicted for the offence punishable under Section 4 of the Protection of Children From Sexual Offences Act and is sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs. 1000/-. In default of the fine, to undergo simple imprisonment for 15 days.

The accused is also convicted for the offence punishable under Section 6 of the Protection of Children From Sexual Offences Act and is sentenced to suffer rigorous imprisonment for 10 years and to pay fine of Rs. 1000/-. In default of payment of fine to undergo simple imprisonment for 15 days.

2. The Trial Court has granted set off for pre-conviction detention period undergone by the accused since the date of his arrest i.e. for, 7.11.2013 till the date of passing of the order. As the sentence of death penalty is given to the accused, the learned Additional Sessions Judge, Islampur has made Reference as contemplated under Section 366 of the Code of Criminal Procedure to this Court for confirmation of the death sentence.

The accused being aggrieved by the same judgment and order dated 18th April 2015 passed in Sessions Case No. 4 of 2015 has preferred Criminal Appeal No. 923 of 2015. As both the confirmation and the appeal against confirmation are directed against the very same judgment and order dated 18th April 2015, both these matters are heard and decided together by the present judgment and order.

3. The prosecution case as has been enumerated from the record can briefly be stated as under:

(i) The first informant Smt. Kavita Hanmant Shirsat (PW-1) is the mother of the victim minor girl Miss. Vaishnavi then aged 7 years She was residing at Shirsatwadi, Taluka Shirala, District - Sangli along with her two minor daughters. Her husband was serving at Mumbai. The parental house of the first informant was at Atugadewadi, Taluka Shirala, District-Sangli. That on 4.11.2013 PW-1 Smt. Kavita along with her two daughters had been to her parental house at Atugadewadi for celebrating Diwali festival.

(ii) The accused herein is the cousin brother of Smt. Kavita (PW-1). On 6.11.2013 at about 11.30 a.m. the victim girl i.e. the daughter of Smt. Kavita was playing in the courtyard of the parental house of the said Smt. Kavita. The accused was proceeding to Sayyadwadi for his hair-cut. The accused enquired with the victim girl Miss. Vaishnavi as to whether she would accompany him to Sayyadwadi. PW-1 Smt. Kavita, mother of the said victim minor girl thereafter sent her daughter along with the accused. That the accused and the said Miss. Vaishnavi did not return upto 1.00 p.m. to the house. Therefore Smt. Kavita (PW-1) tried to contact accused on his cellphone from the cellphone of her father. However, the accused could not be contacted as the cellphone of the accused was switched off. That as the accused and the victim minor girl did not return to the house of the said Smt. Kavita till 3.00 p.m., Smt. Kavita told the said fact to her father and other relatives. Smt. Kavita and her family members thereafter searched the accused and Miss Vaishnavi at Chavanwadi and Chormarwadi, but the accused and the victim Miss. Vaishnavi could not be traced out. Smt. Kavita waited for the accused and the victim minor girl till night. However, they did not return to the house and therefore Smt. Kavita went to Kokrud Police Station and lodged the missing report on 6.11.2013. Shri Balkrishna Y. Patil (PW-18) registered the said missing report as missing case No. 11 of 2013 dated 6.11.2013 at about 10.30 p.m.

(iii) On 7.11.2013 at about 9.30 a.m. Prathamesh S. Jadhav (PW-7) a friend of accused, saw him near village Ghogaon. He noticed that the accused was under fear and perhaps did not sleep through out the night. The accused was hungry and therefore Prathamesh (PW-7) gave him snacks to eat. Prathamesh Jadhav (PW-7) thereafter informed the said fact to Akaram @ Balaso Atugade (PW-13) who is the uncle of Smt. Kavita. Prathamesh (PW-7) informed Akaram @ Balaso Atugade (PW-13) that accused is at village Ghogaon. Thereafter Akaram @ Balaso Atugade (PW-13) went to the village Ghogaon for bringing the accused. Akaram @ Balaso Atugade (PW-13) thereafter brought the accused to Atugadewadi. However the victim girl was not with him. Therefore the mother of the victim Smt. Kavita (PW-1) asked the accused about her daughter.

(iv) In the meantime, the police from Kokrud Police Station also reached to the house of Smt. Kavita and enquired with the accused about the victim minor girl. The accused informed all the persons present there that on 6.11.2013 at about 11.30 a.m. the victim minor girl was accompanying him for going to Sayyadwadi. That he took her in the hilly area of village Enpe and committed rape on her in the grass land. As the accused was apprehensive of the fact that the victim girl would disclose the said fact to the relatives, he committed her murder by throttling. He also informed that he had buried the dead body of victim minor girl at the spot near road leading from Enpe to Kodaiwadi near one bush.

(v) That Smt. Kavita (PW-1), her father Laxman Dhondiba Atugade and uncle Akaram @ Balaso Atugade (PW-13) along with accused and police went to the road leading from Enpe to Kondaiwadi, by jeep. The accused showed the spot

where he had buried the dead body of the victim girl. The fingers of the leg of the victim minor girl were protruding out from the earth. In the meantime, the police personnel from Kasegaon police station and the Tahsildar of Shirala Taluka namely Smt. Vijaya S. Yadav (PW-14) also came at the spot. The police took out the dead body by removing the earth on it. Smt. Kavita (PW-1) identified the said dead body as of her daughter, Miss. Vaishnavi. Abrasions were observed over the dead body of the victim girl and the blood was accumulated on the thigh in dried condition. The informant Smt. Kavita lodged the FIR with API Shri Waghmare. The FIR is at Exhibit-12. The FIR was carried by Police Constable Shri Jadhav to Kokrud Police station. Shri Dhondiram Kamble (PW-17) was on duty as PSO at Kokrud Police station. As per the said FIR, he registered the Crime No. 40 of 2013 under Sections 302, 376, 201, 363 and 366 of the IPC and under Section 4 of the Protection of Children from Sexual Offences Act, 2012. ASI Shri Dhondiram Kamble (PW-17) also sent copy of the said FIR to the Court of Judicial Magistrate First Class, Shirala. After the lodgment of the FIR, initial investigation was carried out by API Shri Waghmare and subsequently it was handed over to API Shri Bapusaheb Shinde (PW-19) then attached to Kasegaon Police station.

(vi) During the course of investigation, the Investigating Officer seized the articles which were found at the scene of offence and at other places. The Investigating Officer also recorded statements of various witnesses. He also collected necessary documents such as map of site/scene of offence, Postmortem notes, medical certificate and the reports from Chemical Analyser and after completion of the investigation, the Investigating Officer submitted chargesheet against the accused in the Court of J.M.F.C., Shirala, District-Sangli.

(vii) As the offence under Section 302 of the Indian Penal Code was exclusively triable by the Court of Sessions, J.M.F.C., Shirala committed the said case to the Court of Additional Sessions Judge, Islampur. After committal of the said case, the Additional Sessions Judge, Islampur framed charge below Exhibit-5 against the accused for the offences punishable under Sections 363, 367, 376(f), 302, 201 of the Indian Penal Code and under Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012. That the contents of the said charge were read over and explained to the accused in Marathi vernacular language to which the accused pleaded not guilty and claimed to be tried. The defence of the accused was of total denial and false implication in the present crime. In support of its case, the prosecution examined in all 19 witnesses. The learned Trial Court after recording the evidence of the prosecution witnesses and after hearing the parties to the said case, was pleased to convict the appellant as stated hereinabove by its judgment and order dated 18.4.2015.

4. Heard Mrs. G.P. Mulekar, the learned APP for the State (Original Complainant) in Confirmation Case No. 1 of 2015 and Mr. Abhaykumar Apte, the learned Advocate appointed, for the accused/respondent and with their able assistance we have also perused the entire record minutely.

5. Mr. Apte, the learned Advocate appointed for the accused submitted that in

the present case the prosecution has failed to prove the ingredients of Section 363 and 366 of the Indian Penal Code, as the accused had taken the victim minor girl with him with the consent of her mother i.e. PW-1 Smt. Kavita therefore the charge under the said sections is not at all attracted to the present case. He submitted that Smt. Kavita (PW-1) and Smt. Balabai Yadav (PW-12) have lastly seen the deceased victim minor girl in the company of the respondent on 6.11.2013 at about 11.30 a.m. That the dead body of the victim minor girl was recovered on 7.11.2013 at about 2.30 p.m. and therefore there is substantial time gap between last seen together and the discovery of the dead body. He submitted that due to the said substantial time gap, the theory of last seen together loses its importance. He submitted that Uttam and Ganesh, the brothers of the accused have not been examined and therefore adverse inference has to be drawn against the prosecution. He further submitted that the alleged extra judicial confession given by the accused to Shri Akaram @ Balaso Atugade (PW-13) is a very weak piece of evidence and the same should not be relied upon while basing the conviction of the accused. He submitted that the discovery panchanama (Exhibit-34) wherein the spot where the victim minor girl was buried is effected about 4.45 p.m. and the Panchanama Exhibit 32 at the instance of Smt. Kavita (PW-1) which was recorded at about 4.00 p.m. on 7.11.2013, shows that the police were already having the knowledge about the said spot. He therefore submitted that the said Exhibit 34 i.e. the panchanama of the spot where the dead body of the victim minor girl was buried cannot be relied upon. He further submitted that on the spot of incident, where it is alleged that the accused had committed rape on the victim minor girl, no blood stains were found even by the Forensic Expert though there were blood stains on the thigh of the victim minor girl. He submitted that the place/spot where the dead body of the victim minor girl was hidden till the evening, at that place also the blood stains were not found. He further submitted that Smt. Balabai Yadav (PW-12) is got up witness and there is no corroboration to her evidence about the facts stated by her. That PW-16, the Medical Officer who has examined the accused has not mentioned about any injuries on his private part and therefore the offence of rape is not proved. He submitted that the prosecution has not explained by leading evidence about the fact from where the accused procured the steel pot to pour the earth on dead body of the victim minor girl. That the Trial Court has not taken into consideration the report of the Chemical Analyser at all. He lastly contended that as the prosecution has failed to prove the case beyond reasonable doubt, the accused may be acquitted from all the charges levelled against him and in the alternative, he prayed the death sentence awarded by the Trial Court may be commuted to either life imprisonment or a more lesser sentence.

6. The learned APP for the State per contra opposed the appeal bearing No. 923 of 2015 filed by the accused and supported the judgment and order passed by the learned Trial Court. She submitted that the evidence on record clearly points out the finger of guilt towards the accused as the only person who has

committed the present heinous crime. She further submitted that the accused has committed an offence of rape and murder of a minor girl who was a helpless victim and was unable to defend herself. She submitted that the accused by deceitful means removed the said minor girl from the custody of her mother Smt. Kavita (PW-1) and with a view to fulfill his lust has committed the present gruesome crime and therefore the punishment awarded by the Trial Court need not be interfered with. She lastly submitted that the conviction and sentence awarded by the Trial Court may be maintained and the appeal preferred by the accused be dismissed.

7. With a view to effectively deal with the submissions advanced before us by Shri Abhaykumar Apte, the learned Counsel appointed for the accused and the learned APP for the State, it would be necessary and useful to refer to the evidence in detail of the prosecution witness. The prosecution has examined in all 19 witnesses.

8. PW-1 Smt. Kavita Hanmant Shirsat is the mother of minor victim girl namely Vaishnavi. PW-1 Smt. Kavita in her testimony has stated that, she was residing at Shirsatwadi, Taluka Shirala, District Sangli along with her two daughters namely Varsha and Vaishnavi, aged five and seven years respectively. That her husband was serving at Mumbai. She was doing labour work. That her parental house was at Atugadewadi, Shirala, District-Sangli. That her father and mother resided at Atugadewadi and both her brothers were working at Mumbai. That Shri Tukaram D. Atugade was her uncle. Shri Tukaram D. Atugade was having two sons namely Vitthal and Ganesh. That the accused Vitthal Tukaram Atugade and his mother Smt. Indubai were residing at Atugadewadi. That on 4.11.2013, she along with her two daughters had been to her parental house at village Atugadewadi for celebrating Diwali festival. That on 6.11.2013 at about 11.30 a.m. her both daughters namely Varsha and Vaishnavi were playing in the courtyard which was adjacent to her parental house. At that time the accused came there and asked her daughter Vaishnavi to accompany him for going to Sayyadwadi for a hair-cut. The accused thereafter took her daughter Vaishnavi along with him. Her parental house at Atugadewadi is in agricultural land. That her father and her uncles resided separately in the said house. Smt. Indubai i.e. the mother of the accused and the accused Vitthal used to reside in the said building separately.

That till 1.00 p.m. on 6.11.2013, the accused and her daughter Vaishnavi did not return to house and therefore she contacted the accused on his cellphone through the cellphone of her father. However, the cellphone of the accused was switched off. She then waited upto 3.00 p.m. and thereafter her father and her uncle took search of the accused and her daughter Vaishnavi. They searched the accused and Vaishnavi at Chavanwadi and Chormarwadi. However, the accused and Vaishnavi could not be traced out. On the same date, at about 10.30 p.m. she along with her father went to Kokrud Police station and lodged the missing report. The said missing report is at Exhibit 11. That on the next day, PW-1 Smt.

Kavita along with her family members again searched accused and Vaishnavi. On the next day i.e. on 7.11.2013 that about 11.00 a.m. her uncle namely Akaram @ Balaso D. Atugade (PW-13) received a phone call on his cellphone from PW-7 Prathamesh, the friend of accused. The friend of accused informed her uncle that accused was at village Ghogaon. That her uncle Akaram @ Balaso Atugade (PW-13) went to village Ghogaon and brought the accused. However, at that time her daughter Vaishnavi was not with him. She therefore asked accused about her daughter. The accused did not tell her whereabouts of her daughter Vaishnavi. In the meantime, the police from Kokrud Police Station came at her parental house. The accused thereafter informed her in the presence of police that, he took Vaishnavi in grass land in the hilly area of Kondaiwadi, committed rape on her and thereafter committed murder by pressing her neck. That he dragged the dead body of Vaishnavi from the said grass land near bridge of Kondaiwadi to Enpe. That he buried the dead body of Vaishnavi near the bush (Shend) in one pit. The police thereafter took her, her father and accused from a jeep to village Kondaiwadi. The accused thereafter showed road leading to village Kondaiwadi. They came near one bridge. The accused thereafter showed the spot near a bush where he had buried the dead body of Vaishnavi. At the said spot, PW-1 Smt. Kavita noticed the fingers of foot of Vaishnavi were protruding outside the earth. In the meanwhile, the police officer from Kasegaon police station came on the said spot. The Tahsildar of Shirala Taluka also came at the spot of incident. The police removed the dead body from the said spot by removing earth on the dead body. PW-1 Smt. Kavita identified the dead body as of her daughter Vaishnavi at the said spot. There were abrasions over her face, chest and back. The skin had turned black and reddish. She noticed that the blood had oozed out from her private part. After seeing the said dead body, Smt. Kavita (PW-1) was certain about the fact that the accused committed rape over Vaishnavi and murdered her. That her first information report was recorded by the police on the said spot of incident itself. The first information report is at Exhibit 12. That she was at the spot of incident till 7.00 p.m. The dead body of Vaishnavi was taken to Shirala Hospital for performing autopsy. Then at 1.00 a.m. in midnight the dead body of Vaishnavi was brought to the house and thereafter last rites were performed on the dead body. That the Police thereafter called her to Kokrud Police Station on 10.11.2013 and showed her an ornament (Painjan). PW-1 Smt. Kavita identified the said ornament-Painjan as of deceased Vaishnavi. PW-1 has also identified the clothes which were on the person of the deceased Vaishnavi at the time of incident.

Smt. Kavita (PW-1) was cross-examined at length by the accused. During the cross-examination, no material apart from a few minor admissions have been brought on record. PW-1 has admitted that her daughter Vaishnavi was using sandals as footwear. During the investigation, police did not seize it. That when she saw the dead body of Vaishnavi, she did not notice that blood was oozing. That the dead body of Vaishnavi was buried in one pit towards the side of road and it was covered with five to six buckets, full of earth. PW-1 Smt. Kavita in the

cross-examination has categorically denied the suggestion that no discussion took place between her and her family members and other villagers before lodging the first information report.

9. PW-2 Mangal Raghunath Lad is the panch-witness to the inquest panchanama of the dead body of Miss. Vaishnavi. The said panchanama is at Exhibit 15.

PW-3 is Sampat K. Kadvekar. He is panch-witness to the seizure of the clothes of accused at the time of his arrest and panch to the panchanama whereby Shri Mahadeo B. Patil (PW-6), the Principal of Dadasaheb Undalkar High School and Higher Secondary School at Undale, Taluka Karad identified the identity card of the accused which was found at the scene of offence.

PW-4 is Snajay Shankar Mane, the panch-witness to the seizure of clothes of the deceased Miss. Vaishnavi having blood stains on it.

PW-5 is Dattatraya R. Shiralkar, the panch-witness to the identification of the ornaments of the deceased Miss. Vaishnavi by her mother Smt. Kavita (PW-1).

PW-6 is Shri Mahadeo B. Patil, the Principal of Dadasaheb Undalkar High School and Higher Secondary School at Undale, Taluka Karad. This witness has identified the identity card of the accused. The said identity card was found at the scene of offence. The said identity card is at Exhibit 27. This witness has also identified the bona fide certificate of the accused which was issued during the course of investigation. The said bona fide certificate is at Exhibit 26.

It is to be noted here that in the evidence of the aforesaid witnesses they have proved the related Exhibits. That in their detailed cross-examination, no material which is useful or beneficial to the accused has been elicited.

10. PW-7 is Prathamesh Sitaram Jadhav, the friend of accused. PW-7 in his testimony has stated that the accused was studying in 11th and 12th standard along with him in Dadasaheb Undalkar High School and Junior College, Undale. That on 6.11.2013 at about 7.00 p.m. he received a call on his cellphone from his friend Sunil Atugade who told him that their friend Vitthal Atugade (accused) had taken the daughter of his sister along with him for cutting his hair, however, he did not return to the house and told PW-7 Prathamesh, to inform him if he finds the accused. That on 7.11.2013 at about 9.30 a.m., PW-7 Prathamesh was going to village Ghogaon by motorcycle, and when he reached Yelgaon Phata, he saw Vitthal Atugade (accused) going towards Ghogaon by walk. PW-7 Prathamesh asked accused where he was going, to which the accused told him that he was going to Ghogaon. PW-7 Prathamesh noticed that the accused was under fear. PW-7 told the accused to eat snacks as he felt that the accused did not sleep through out the night and was hungry. They thereafter went to one stall for eating snacks (bread - vada). PW-7, Prathamesh thereafter informed Sunil Atugade on his cellphone that the accused was found, however, the daughter of his sister was not with him. That Sunil Atugade, brother of accused and uncle of accused came at the said stall and they took the accused

along with them. At about 3.30 p.m., PW-7 Prathamesh was going to village Kumbhodewadi to meet his sister. On his way there was house of accused. PW-7 Prathamesh saw the crowd of people gathered in front of the house. He asked members of the said crowd about what had happened. The people present there informed him that the accused took daughter of his sister in the hill of Kondaiwadi and committed rape over her and murdered her. PW-7 Prathamesh thereafter went to the spot of incident instead of going to his sister's house. When PW-7 Prathamesh went to the said spot, the dead body of the victim girl was already taken outside the pit. Tahasildar Madam (PW-14), villagers and police were present on the said spot. PW-7 Prathamesh saw the dead body of victim girl. That the mother of the victim girl identified the said dead body.

In the detailed cross-examination, this witness has admitted that he, Sunil Atugade and accused were the student of Dadasaheb Undalkar High School and Junior College, Undale. That the accused was studying in science faculty. That he and accused were studying in the same class. During the tenure of junior college the accused was having good character and was good in study.

11. PW-8 is Subhash J. Karande. This witness is panch to the spot panchanama where the dead body of the victim girl Miss. Vaishnavi was discovered at the instance of the accused. The said panchanama is at Exhibit 34. This witness has stated that the accused gave memorandum that he was ready to show the spot where he has concealed the steel pot (Pati) and slack of deceased Miss. Vaishnavi and also showed the spot from where he brought the earth to bury the dead body of Miss. Vaishnavi. The said memorandum panchanama is at Exhibit 33. In pursuance of the said memorandum panchanama the accused showed the spot where he had committed rape over Miss. Vaishnavi and thereafter murdered her. The accused thereafter showed the grass land known as "Hirdiche Mohol". At the said spot, the said witness and police found one identity card of the accused issued by Dadasaheb Undalkar High School, Undale. The accused had informed the said witness and other persons that he was at the said spot along with the dead body of Miss. Vaishnavi till evening. The accused thereafter showed one land where there was standing crop of Jawar. The accused showed one silver ornament namely Painjan which was lying in the said Jawar crop. The Police seized the said ornament. The accused thereafter showed the spot from where he had brought the earth. It was the land of Kisan Sawant and the said land was ploughed. At that spot the earth was scattered. The accused thereafter walked little towards Kondaiwadi and after some distance from bushes of Shend produced one steel pot (Pati). The police seized the said pot by following due procedure. The said detailed panchanama effected at the instance of the accused is at Exhibit 34.

In a detailed cross-examination, this witness has admitted that the distance between the spot of incident where the dead body was found and the spot of incident which was in the land of Shankar Bagat (the accused committed rape and murdered Miss. Vaishnavi here) was about 1.1/2 K.M. This witness has

denied the suggestion that, he saw steel pot (article-A) for the first time in the Court.

12. PW-9 is Vithal Bapu Sawant. PW-9 in his testimony has stated that adjacent to his agricultural land, there is boundary of village Enpe. That his land is situated at village Kondaiwadi known as "Chid". That on 6.11.2013, he along with his wife had been to their agricultural land for harvesting the groundnut crop. That at about 2.30 p.m., he went to bring water from stream which is within the jurisdiction of village Enpe. At that time he saw one boy aged about 19 years in suspicious condition. While PW-9 was returning to his land, he saw the said boy again. He harvested the groundnut crop till 5.30 p.m. and while he was returning to his house he again saw the said suspected boy on the same spot. That on 7.11.2013 at about 3.30 p.m. he saw police personnel on the Kondaiwadi Enpe road near land of Baban Shankar Dargade. At that time he saw one boy in the custody of police. PW-9 has identified the said boy which he had seen on 6.11.2013 while going to the stream. PW-9 has identified the said boy in the Court as the accused herein.

In the cross-examination, this witness has admitted that when he saw the said suspected boy, he did not ask him about his name. No other material which is useful to the accused has been elicited in the cross-examination of this witness.

13. PW-10 is Shri Sachin Shamrao Mohite, a photographer by profession. This witness has snapped photographs of the spot of incident and other places as per instructions of the police. This witness has identified 20 photographs which he had taken at the instance of police.

14. PW-11 is Dr. Sunil Doulatrao Kamble. PW-11 in his testimony has stated that he was attached to Rural Hospital, Shirala as a Medical Officer since 2007 to 2013. That on 7.11.2013, API Kasegaon Police station sent the dead body of Kum. Vaishnavi Hanmant Shirsat to Rural Hospital Shirala. That on 7.11.2013 between 8.00 p.m. to 10.00 p.m. he performed autopsy on the dead body of Miss. Vaishnavi Shirsat.

On external examination, he found dead body was of a female. The age of the said girl was about 7 years. Rosary coloured frock was on the dead body. That the condition of the dead body was thin built and cold. The regarmortis was slightly present over upper and lower extrimities neck. Eyes were half opened and swollen. Patichiel hemmorrhage observed over both conjective. Tounge cynosed, oedamataus inside mouth cavity. Nasal blood oozing dark coloured. Nails deeply cynosed. Posterior vaginal wall tear 1/2 cm x 1/2 cm x 1/2 cm towards anal region. External and internal vagina dark blood stains. Finger flexed at the elbow join and deeply cynosed. He also found both lower limbs extended and flexed at knee joint. Nails cynosed.

PW-11 noticed the following surface injuries:--

"1. As mentioned in column No. 15.

2. Small abrasion 1/2 c.m. skin deep, near right side of neck with small contusion about 2 c.m. x 1 c.m. beneath it.
3. Abrasion 5 c.m. x 5 c.m. skin deep over left cheek redish in colour.
4. Abrasion 10 c.m. x 7 c.m. over both side of chest.
5. Abrasion 12 c.m. x 8 c.m. over abdomen blackish in colour.
6. C.L.W. at right leg, lower end of thigh to ankle joint 15 c.m. x 7 c.m. skin deep. Expour of muscle.
7. Abrasion left thigh 8 c.m. x 4 c.m. skin deep
8. Abrasion over back 19 c.m. x 8 c.m. skin deep."

On external examination, PW-11 noticed fracture of superior horn of thyroid cartilage. Laynax, Traceha and Brounchl Congested Larnx, trachea and surrounding muscles with hemorrhage. Right lung and left lung-both lungs odematous and congested. Heart empty and large vessels full of blood. Tongue deeply cynosed, mouth cavity froth with bloodstained. Stomach contains 100 M.L. gastric secretion with water. Organs of generation-Secondary sexual organs not developed.

PW-11 thereafter gave cause of death as "due to asphyxia due to throttling". PW-11 has proved Postmortem report which was in his handwriting. The said Postmortem report is at Exhibit 40. PW-11 has stated that as per the injuries mentioned in para-10 of Postmortem report (Exhibit 40) there was sexual assault. That injury mentioned in para-17(2) was sufficient to cause death and the said injury was corresponding with fracture of superior horn of thyroid cartilage. PW-11 has opined that, above referred fracture injury was possible due to pressing of neck. He has also stated that as per condition of the dead body the dead body might have been dragged on hard and blunt object having grass. That in view of injury Nos. 3 to 8 mentioned in para-17 of postmortem report, the dead body might have been dragged upto 50 to 100 meters. That C.L.W. on right leg of dead body might have been caused due to dragging of dead body on hard surface. PW-11 has issued advance cause of death certificate which is at Exhibit 41. PW-11 has opined that death of Miss. Vaishnavi might have been occurred 24 hours to 36 hours prior to conducting postmortem. The cause of injury sustained by Miss. Vaishnavi was due to dragging of her dead body on hard surface. PW-11 has further opined that injury Nos. 1 and 2 mentioned in column No. 17 of postmortem report are antemortem and age of injury was 2 to 4 hours prior to death. The said two injuries were grievous injuries.

In the cross-examination, PW-11 has admitted that tongue was inside the mouth. He has further admitted that there was no ligature mark on the neck of the dead body. That 24 hours to 36 hours prior to the postmortem of the dead body, death of the said girl might have occurred.

15. PW-12 is Smt. Balabai Maruti Yadav. She has deposed that the accused

Vitthal is son of her brother Tukaram Atugade. That on 6.11.2013 she received a message from her parental house about sickness of her mother. She left her matrimonial house at about 11.00 a.m. and was proceeding to Atugadewadi by walk. While going to her parental house at Atugadewadi, the accused met her near one bridge. That the daughter (deceased) of Smt. Kavita was with him. That Smt. Kavita was daughter of her brother Laxman. PW-12 asked the accused as to where he was going, to which, the accused replied that, he was going to Atugadewadi. The accused along with daughter of Smt. Kavita went to village Atugadewadi and PW-12 went to the house of her mother. At that time, a frock of rosary colour was on the person of the deceased. This witness has further deposed that the elder daughter of Smt. Kavita was with the accused when she went to the house of her mother. That on 7.11.2013 at about 9.00 a.m. PW-12 received a phone call from her brother Laxman Atugade who enquired with her as to whether the accused and Miss. Vaishnavi (deceased) had been to her house. PW-12 thereafter in the afternoon went to Atugadewadi from Gavaliwadi.

In the cross-examination, PW-12 has admitted that the Police did not read over the statement to her. The various suggestions given by the defence have been denied by this witness. In her further cross-examination she has admitted that on 6.11.2013 when she reached the house of her mother, she told Smt. Kavita (PW-1) that the accused was with her daughter and went to Atugadewadi.

16. PW-13 is Shri Akaram alias Balaso Dhondiba Atugade. PW-13 in his testimony has stated that Smt. Kavita Shirsat (PW-1) was the daughter of his brother Laxman Atugade and her matrimonial house is at village Shirsatwadi. That Smt. Kavita was having two daughters namely Vaishnavi and Varsha. That Tukaram Atugade is his fifth brother and resides behind his house. That the accused is the son of Tukaram Atugade. The accused is educated upto 12th standard from Dadasaheb Undalkar High School at Undale. That on 6.11.2013 at about 3.00 p.m., he returned from his agricultural land. At that time Smt. Kavita Shirsat told him that accused along with her daughter Miss. Vaishnavi had gone to Sayyadwadi for his hair-cut. However, the accused did not return home till that time. At about 10.00 p.m. his brother Laxman along with Smt. Kavita went to Kokrud Police Station to lodge the missing report. That on 7.11.2013, at about 9.00 a.m. to 9.30 a.m. he received phone call from Prathamesh Jadhav (PW-7) and the said witness informed him that the accused was at Ghogaon. PW-13 then along with his son Uttam and nephew Ganesh went to village Ghogaon. While proceeding towards village Ghogaon, at Yelgaon Phata he noticed the accused, however, Miss. Vaishnavi was not with him. He enquired with the accused about Miss. Vaishnavi and the accused told him that on 6.11.2013 he took Vaishnavi in a grass land at Kondaiwadi and committed rape over her. The accused also informed him that he pressed the neck of Miss. Vaishnavi, as he apprehended that she would disclose the said incident to others. The accused also informed that the dead body of Vaishnavi was concealed in the adjacent bushes of Shend, near one bridge on the Kondaiwadi to Enpe road. PW-13 along with accused returned to his house. Within five to ten minutes the Police from Kokrud Police

Station reached to his house. The accused also narrated the said incident to the police out of fear. The accused thereafter told the Police that he will show the place where he had buried the dead body of Miss. Vaishnavi. The accused thereafter took the said witness and other persons to the spot which was near to one bush and adjacent to Kondaiwadi - Enpe road near one bridge. At the said spot, fingers of the leg of Miss. Vaishnavi were seen protruding. In the meantime Tahasildar Madam of Shirala and Police officer of Kasegaon police station also came at the spot. The Police removed the earth from the dead body and took it out. PW-13 saw the dead body and identified it as of Miss. Vaishnavi. There were abrasions on her face, chest, back and legs. The blood which had oozed out from the private part was dried on her right thigh. When PW-13 saw the dead body of Miss. Vaishnavi, he was sure that the accused committed rape over Miss. Vaishnavi and subsequently murdered her by pressing her neck.

In his detailed cross-examination, this witness has admitted that he had come to the Court along with his sister Smt. Balabai (PW-12) and his brother Laxman Atugade. That within ten minutes he came from Atugadewai along with accused from Yelgaon Phata. An omission that PW-13 did not state before the police that there was dry blood on the right thigh of Miss. Vaishnavi has been brought on record by the defence. Apart from the aforesaid admissions, no other material which is useful to the accused has been brought in record.

17. PW-14 is Smt. Vijaya Sudhakar Yadav, the Tahasildar and Executive Magistrate Shirala, during the period from 8.6.2011 to 25.8.2014. She has deposed that on 7.11.2013 at about 2.00 p.m. she received intimation from the Police Constable of Kasegaon Police Station to remain present for conducting panchanama on the dead body of one girl at Kondaiwadi. The intimation letter is at Exhibit 49. PW-14 thereafter went to the said spot which was within the jurisdiction of Kondaiwadi at 2.30 p.m. to 3.00 p.m. She saw the spot of incident. The fingers of legs were appearing out of the earth. That the dead body was buried in the land of Baban Shankar Dargade, under the bush. That after the dead body was removed from the pit, the mother of victim girl, Smt. Kavita (PW-1) identified the said dead body. PW-14 noticed that the body of the said girl was slim. The frock of rosary colour was on the dead body and it was stained with blood. That the blood had oozed out from the nose. That there were injuries on her right cheek and abrasions over left cheek from forehead. That there were abrasion marks on the chest. That there was reddish abrasion mark on the abdomen. There were also abrasions on the hands from elbow joint. The nails of hands were blackish and bluish. PW-14 also noticed abrasion on the legs. That the private part of the body was torn and blood which had oozed out from the private part had dried on the right thigh. After completion of inquest panchanama, PW-14 signed it. The said inquest panchanama is at Exhibit 15.

In the cross-examination, this witness has admitted that she did not prepare rough sketch map where the dead body was found. That the distance between Shirala to Kondaiwadi is about 16 to 17 km. That on the spot of incident, the

police from Kasegaon, Shirala and Kokrud Police Station were present. That at the time of inspection of the dead body of Miss. Vaishnavi, the said spot was surrounded by lady constable and the said spot was covered by clothes.

18. PW-15 is Shri Bhimrao D. Waghmare, Assistant Police Inspector, then attached to Kokrud Police Station. PW-15 has deposed that on 6.11.2013, Smt. Kavita lodged the report about missing of her daughter Miss. Vaishnavi and her cousin brother i.e. accused Vitthal. PW-15 was incharge of Kokrud Police Station on 6.11.2013 and he recorded the said missing report bearing No. 11 of 2013 which is at Exhibit 11. That on 7.11.2013, at about 11.00 a.m., with a view to make an enquiry about missing of Miss. Vaishnavi and accused, PW-15 went to the house of Tukaram Atugade and came to know that the accused had arrived there. PW-15 therefore enquired with the accused. At that time Smt. Kavita, Tukaram Atugade i.e. father of accused and his uncle were present. That the accused informed PW-15 and all the persons that, he took Vaishnavi in the hilly area of village Kondaiwadi and committed rape over her and subsequently murdered her. That he buried her dead body near Kondiwadi-Enpe road near bush. As per the say of the accused, PW-15 and other persons went to the said spot by police jeep. The accused showed them the spot where the dead body of Miss. Vaishnavi was buried. PW-15 saw the said spot of incident. That the fingers of legs of Miss. Vaishnavi were protruding out from the earth. The Tahasildar Madam from Shirala also arrived at the said spot. When the process of spot panchanama and inquest panchanama was being carried out, Smt. Kavita (PW-1) lodged the FIR which is at Exhibit 12. PW-15 sent the said FIR (Exhibit 12) to Kokrud Police Station along with one Police Constable, Shri Jadhav to register the crime. The letter/order issued by PW-15 for registering the FIR is at Exhibit 52. The Police registered the crime bearing No. 14 of 2013 under Section 302 of IPC and the investigation of the said crime was entrusted to PW-15. PW-15 arrested the accused and informed PSO of Kokrud Police station on phone to take entry about the arrest of accused. After the arrest of the accused, he gave memorandum statement before PW-15 and expressed his desire to show the spot where he committed rape over Miss. Vaishnavi. The memorandum statement is at Exhibit 33. In pursuance of the said memorandum statement, the accused showed the hilly area of Kondiwadi known as "Hirdiche Mohol" and showed the spot where he committed rape over Miss. Vaishnavi. PW-15 noticed that at the said spot the grass had grown upto 4 feet and it was bent. PW-15 found one identify card of accused Vitthal at the said spot. The said identity card was issued by the High School at Undale village. PW-15 seized the said identity card in the presence of two pahch-witnesses. The accused thereafter showed the spot where he had kept the dead body of Miss. Vaishnavi till late evening on the date of incident. The accused showed the spot which was in the land of Bandu Sawant. At the said spot PW-15 found one silver ornament namely Painjan and the same came to be seized. The accused thereafter walked about four to five feet and stopped there. The said spot was land of Rajaram Sawant. At the said spot one more silver ornament namely Painjan was found lying. The same was

also seized by PW-15. The accused thereafter showed the road by which he went to the spot of burial of dead body of Miss. Vaishnavi. The accused also showed the spot from where he took earth. The said spot was situated in the lands of Kisan Sawant and the land was ploughed. The accused thereafter walked upto 442 ft. and stopped near one three of Nigdi. The accused produced one steel pot (pati) which was concealed in the bush. The said pot was seized by PW-15. The accused thereafter went towards Kondaiwadi and at a distance of about 163 feet he stopped near one bush of Shend. The accused produced one slack which was kept in the said bush. PW-15 also seized the said slack. PW-15 prepared a detailed panchanama as per the spot shown by the accused. The said panchanama is at Exhibit 34. PW-15 has also identified seized articles as slack (article-B), the ornament namely Painjan (article-C and D), steel pot (article-I) and identity card (Exhibit-27). PW-15 also recorded statements of Akarama Atugade (PW-13), Shri Laxman and Smt. Balabai Yadav (PW-12). PW-15 prepared rough sketch map of the spot shown by the accused which is at Exhibit 53. PW-15 thereafter took personal search of the accused and in presence of two persons seized the clothes which were on the person of accused. The seizure panchanama of clothes of accused is at Exhibit 17. PW-15 thereafter sent the accused for medial examination at Shirala by issuing letter to the Medical Officer. The said letter is at Exhibit 54. PW-15 collected death extract certificate of Miss. Vaishnavi. That on 10.11.2013, PW-15 called the complainant Smt. Kavita (PW-1) and in presence of two pancha-witnesses he showed the seized articles to the complainant. The complainant identified the seized articles. PW-15 thereafter prepared the panchanama about opening of seal of envelope and sealing of the said envelope again. The said panchanama is at Exhibit 27.

PW-15 thereafter sent the muddemal property to the Chemical Analyser, Mumbai along with covering letter. The said letter is at Exhibit 55. After completion of the investigation, PW-15 submitted chargesheet against the accused in the Court of J.M.F.C., Shirala. The death extract certificate of Miss. Vaishnavi is at Exhibit 56.

In the detailed cross-examination, no material at all, which is useful to the accused has been elicited. It appears to us that the cross-examination of this witness proceeded by putting him stock questions and suggestions.

19. PW-16 is Shri Namdeo K. Patil. PW-16 was then attached to the Primary Health Centre, Kokrud. He has deposed that on 8.11.2013 the police produced the accused before him for his medical examination. He examined the accused. He found that there was white stigma on glance penis. That there was no hormonal discharge. PW-16 collected samples of blood, semen, pubic hair and sample of nails of accused. After conducting medical examination, PW-16 found that the accused was able to perform sexual intercourse. PW-16 accordingly issued a medical certificate which is at Exhibit 61.

20. PW-17 is Shri Dhondiram G. Kamble, Assistant Sub-Inspector then attached to Kokrud Police Station. PW-17 has deposed that on 7.11.2013, when he was on duty as PSO at Kokrud Police station, Police Constable Shri Jadhav brought the

FIR recorded by API Shri Waghamare (PW-15). As per the said FIR, he registered the crime bearing No. 40 of 2013 under Sections 302, 376, 201, 363 and 366 of IPC and Section 4 of Protection of Children from Sexual Offences Act, 2012. He sent the said FIR to J.M.F.C., Shirala.

21. PW-18 is Shri Balkrishna Y. Patil, Assistant Sub-Inspector then attached to the Kokrud Police station. PW-18 has deposed that on 6.11.2013 when he was on duty as PSO at Kokrud Police Station, Smt. Kavita (PW-1) resident of Shirsatwadi came and lodged the missing report of her daughter. The said missing report bearing No. 11 of 2013 is at Exhibit 11.

It is to be noted here that in the cross-examination of PW No. 16, PW-17 and PW-18 no material which is beneficial to the accused has been elicited.

22. PW-19 is Shri Bapusaheb N. Shinde, Assistant Police Inspector then attached to Kasegaon Police Station between March 2011 to March 2014. PW-19 in his deposition has stated that on 7.11.2013 at about 1.15 p.m. the Police Head Constable Shri Pawar from Kokrud Police Station informed Kasegaon Police Station on telephone that the girl who was missing as per the missing complainant No. 11 of 2013 of Kokrud Police Station is found in dead, burried condition at Kondaiwadi in the land of Baban Shankar Daragade. He thereafter effected entry in the station diary of Kasegaon Police Station dated 7.11.2013. The said entry is Exhibit 66. He thereafter registered AD No. 34 of 2013. PW-19 thereafter issued a letter to Tahasildar, Shirala which is at Exhibit 49. He then went to the spot of incident at Kondaiwadi. The said spot was near the Enpe to Kondaiwadi road. He reached at the said spot of incident at about 2.00 p.m. In the presence of panch witness and Tahasildar of Shirala, PW-19 took out the dead body by removing the earth on it. He inspected the injuries and conducted inquest panchanama of the dead body. The inquest panchanama is at Exhibit 15. PW-19 thereafter he sent the said dead body to the Rural Hospital, Shirala for performing autopsy through lady constable namely Smt. Sutar. PW-19 thereafter drew the spot panchanama where the dead body was buried. The said panchanama is at Exhibit 32. He also drew rough sketch map of the said spot of incident which is at Exhibit 67. He then returned to Kasegaon Police Station and handed over the muddemal property i.e. sample of earth to the Muddemal Clerk of the Police Station. That the lady constable Smt. Sutar produced the frock which was on the person of the said victim girl. The same was seized by effecting panchanama which is at Exhibit 21. He then sent all the papers of enquiry pertaining to AD No. 34 of 2013 along with muddemal property to Kokrud Police Station for investigation in the crime registered by the said Police station.

In the cross-examination of this witness, no material which is useful to the accused is elicited and it appears to us that the said cross-examination proceeded by putting general questions to this witness.

23. After taking into consideration the evidence adduced by the prosecution witnesses, according to us, the following circumstances emerge on record as

against the accused:

(1) Last seen with the deceased Miss. Vaishnavi by PW-1 Smt. Kavita and PW-12 Smt. Balabai Yadav.

(2) Extra judicial confession given to Shri Akaram @ Balaso Atugade (PW-13).

(3) Accused showed the place where the dead body was buried in presence of panch-witness namely Shri Subhash Karande (PW-8).

(4) The accused showed the spot where he committed rape on the victim girl in the presence of panch-witness Shri Subhash Karande (PW-8) and an identity card of the accused was found at the said spot.

(5) From the spot of rape on the way to the spot of burial of dead body, two Painjans (ornaments) of the victim girl were found.

(6) The discovery of slack of the deceased girl and the pot (pati) which was used for pouring earth at the instance of accused in the presence of PW-8 (Exhibit 34).

(7) PW-9 Vitthal Sawant saw the accused near the spot of rape on 6.11.2013 in suspicious condition.

24. At the outset it is to be noted here that, we find substance in the contention raised by Shri Apte, the learned Counsel for the accused that the offence under Section 363 and 366 of IPC is not proved as against the accused. PW-1 Smt. Kavita in her testimony has specifically stated that the accused informed her that he was going to have his hair-cut at Sayyadwadi and thereafter with her permission, he took her daughter Miss. Vaishnavi (victim) along with him and therefore according to us the ingredients of Section 363 and 366 of the IPC i.e. kidnapping a person from lawful guardianship and/or abducting or inducing a woman to compel her marriage etc. are attracted in the present case.

25. The learned Counsel for the accused thereafter contended that though according to the prosecution the dead body of the victim girl was recovered at the instance of accused, however, no previous statement made by accused in relation to the said discovery was reduced in writing. In support of his contention, he placed reliance on the decisions of the Supreme Court in the case of Prabho Vs. State of U.P. reported in , AIR 1963 SC 1113 and in particular paragraph-9 of the said decision wherein it is observed as under:

"9. The main difficulty in the case is that the evidence regarding the recovery of blood stained axe and blood stained shirt and dhoti is not very satisfactory and the courts below were wrong in admitting certain statements alleged to have been made by the appellant in connection with that recovery. According to the recovery memo the two witnesses who were present when the aforesaid articles were produced by the appellant were Lal Bahadur Singh and Wali Mohammad. Lal Bahadur Singh was examined as prosecution witness No. 4. He did give evidence about the production of blood stained articles from his house by the appellant. The witness said that the appellant produced the articles from a tub on

the eastern side of the house. The witness did not, however, say that the appellant made any statements relating to the recovery. Wali Mohammad was not examined at all. One other witness Dodi Baksh Singh was examined as prosecution witness No. 3. This witness said that a little before the recovery the Sub-Inspector of Police took the appellant into custody and interrogated him; then the appellant gave out that the axe with which the murder had been committed and his blood stained shirt and dhoti were in the house and the appellant was prepared to produce them. These statements to which Dobi Baksh (P.W. 3) deposed were not admissible in evidence. They were incriminating statements made to a police officer and were hit by Sections 25 and 26 of the Indian Evidence Act. The statement that the axe was one with which the murder had been committed was not a statement which led to any discovery within the meaning of s. 27 of the Evidence Act. Nor was the alleged statement of the appellant that the blood stained shirt and dhoti belonged to him was a statement which led to any discovery within meaning of s. 27. Section 27 provides that when any fact is deposed to and discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved. In *Pulukuri Kotayya v. King Emperor*, 74 Ind App 65: the Privy Council considered the true interpretation of s. 27 and said:

"It is fallacious to treat the "fact discovered" within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this and the information given must relate distinctly to this fact. Information as to past user or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that "I will produce a knife concealed in the roof of my house" does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added "with which stabbed A.", these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant." (p. 77 of Ind. App).

We are, therefore, of the opinion that the courts below were wrong in admitting in evidence the alleged statement of the appellant that the axe had been used to commit murder or the statement that the blood stained shirt and dhoti were his. If these statements are excluded and we think that they must be excluded, then the only evidence which remains is that the appellant produced from the house a blood stained axe and some blood stained clothes. The prosecution gave no evidence to establish whether the axe belonged to the appellant or the blood stained clothes were his."

On going through the decision in the case Prabhoo (supra), we find that it is not stated anywhere that as the statement made by the accused was not reduced into writing, the recovery cannot be taken into consideration. On the other hand, what this decision states is that in relation to the statement made by the accused what parts are admissible and what parts are inadmissible. It was held that the statement of the accused that he used the axe to commit the murder is inadmissible. However, if the accused had stated that he will produce the axe which was concealed by him in his house, it would be admissible. The Supreme Court held that the Courts below were wrong in admitting the inadmissible portion in the statement made by the accused.

26. In the present case even after inadmissible parts are excluded from consideration of the evidence of PW-8 the panchwitness, in whose presence the accused showed the spot where the dead body of Miss Vaishnavi was buried, it is seen that the accused has stated that the dead body of the victim girl was in the said land. The accused has categorically made statement firstly before Smt. Kavita and thereafter in the presence of panch-witness PW-8 Shri Subhash Karande and in pursuance of the said statement, the dead body of Miss. Vaishnavi was discovered. That according to us the evidence of PW-8 Subhash Karande is corroborated by the evidence of Smt. Kavita (PW-1) on this aspect.

27. Mr. Apte, the learned Counsel for the accused thereafter placed his reliance on the decision of the Supreme Court in the case of Niranjana Panja Vs. State of West Bengal reported in , (2010) 6 SCC 525. Mr. Apte pointed out that in the said decision, it has been stated that for effecting a discovery, a statement has to be recorded on the part of the accused showing his readiness to produce the material object and it is only that part of the statement which is not incriminating and leads to discovery which becomes admissible. In the said case, the recovery was not relied upon because the weapon which was allegedly produced by the accused was never produced before the Court and the prosecution has also not given any explanation whatsoever about the disappearance of this weapon. On carefully going through this decision, we find that again it deals with the aspect as to what part of statement made by the accused is admissible and the ratio in this decision is that only the part of the statement which is not incriminating and leads to discovery becomes admissible. The ratio of this decision does not appear to be that if a statement made by the accused is not recorded, evidence relating to the discovery becomes inadmissible. Mr. Apte also relied upon two judgments delivered by the Supreme Court namely (1) Aher Raja Khima Vs. State of Saurashtra reported in , AIR 1956 SC 217 and (2) Vijender Vs. State of Delhi reported in , (1997) 6 SCC 171. The said two decisions also deal with Section 27 of the Indian Evidence Act and the fact of discovery at the instance of accused.

28. It is well settled that the observations in a judgment cannot be de hors the point which is sought to be raised and the facts in which such point is raised. The observations cannot by themselves form the ratio of the decision. The ratio of the decision is to be drawn after considering the facts of the case, the point which is

sought to be raised in the matter, the arguments which are canvassed in support of rival contentions in relation to such point, the discussion made by the Court with reference to such point canvassed by the counsel for the parties and the ultimate decision arrived thereupon. On taking into consideration all these aspects, the ratio of the decision has to be gathered. Any sentence in a judgment cannot be read as a statutory provision and the ratio in that regard is well settled by catena of decisions of the Apex Court. This has been clearly explained in different decisions of the Apex court including in the matter of Union of India & Ors. Vs. Dhanwanti Devi & Ors. reported in , (1996) 6 SCC 44. It has clearly ruled therein that the decision is what it decides and not what follows from it.

29. In the decisions in the case of Prabho (supra) and Niranjana Panja (supra), the question did not arise specifically for consideration as to whether failure to record the information given by the accused would render the evidence relating to discovery by the accused inadmissible. However, this question arose directly for consideration before the Supreme Court in the case of Mohd. Arif alias Ashfaq Vs. State (NCT of Delhi) reported in , (2011) 13 SCC 621 on which the learned APP has placed reliance. In the said case, the same question as in the present case specifically arose for consideration which can be seen from paragraph 169 of the judgment which reads thus:--

"Now coming to the second argument of failure to record the information, it must be held that it is not always necessary. What is really important is the credibility of the evidence of the investigating agency about getting information/statement regarding the information from the accused. If the evidence of the investigating officer is found to be credible then even in the absence of a recorded statement, the evidence can be accepted and it could be held that it was the accused who provided the information on the basis of which a subsequent discovery was made. The question is that of credibility and not the formality of recording the statement. The essence of the proof of a discovery under Section 27 of the Evidence Act is only that it should be credibly proved that the discovery made was a relevant and material discovery which proceeded in pursuance of the information supplied by the accused in the custody. How the prosecution proved it, is to be judged by the Court but if the Court finds the fact of such information having been given by the accused in custody is credible and acceptable even in the absence of the recorded statement and in pursuance of that information some material discovery has been effected then the aspect of discovery will not suffer from any vice and can be acted upon."

30. In Suresh Chandra Bahri Vs. State of Bihar reported in 1955 Supp (1) SCC 80, no discovery statement was recorded by the investigating officer of the information supplied by the accused to him. Further no public witness was examined by the prosecution to support the theory that such an information was given by the accused to him in pursuance of which some material discovery was made. The Supreme Court, however, in spite of these two alleged defects, accepted the evidence of discovery against the accused on the basis of the

evidence of the police officer. In the present case, we find the evidence of police officer PW-15 Bhimrao Waghmare to be wholly credible and reliable. He has not at all been shaken in his cross-examination. In such circumstances, we have no hesitation in relying on his evidence which shows that the spot where the dead body of the victim girl was buried was shown by the accused in presence of PW-8, the panch witness. In our view the decisions cited by the learned Counsel for the accused are of no help to him.

31. Mr. Apte, thereafter would contend that when the alleged discovery of the spot of rape, the spot of burial of the dead body and the spot of concealment of slack of deceased was discovered at the instance of the accused, he was handcuffed and therefore the said discovery cannot be relied upon in the eyes of law. We are unable to accept the said submission for the reasons that, there can be no doubt when the accused was handcuffed he may not be free from fear of the police or duress or pressure. But, that itself cannot be a reason to discard the recovery of weapon if it was otherwise found to be supported by evidence of the panch witnesses and the Investigating Officer. That handcuffing of a person by itself cannot be a reason to generalize the hypothesis that such a discovery cannot be reliable. That each case will have to be examined in its own peculiar circumstances. We are fortified in taking this view by the judgment delivered by the Division Bench of this Court in the case of Putalabai Bhimashankar Pattan Vs. State of Maharashtra reported in 2010 ALL MR (Cri) 2084. In the present case the accused in the presence of PW-8 Subhash Karande, the panch witness, Smt. Kavita (PW-1) and Shri Bhimrao Waghmare (PW-15) the Investigating officer made disclosure statement which has been recorded as per Exhibit 33 in the form of memorandum statement. We therefore do not find any substance in the submission of Shri Apte in that behalf.

32. Mr. Apte, the learned Counsel for the accused thereafter contended that the prosecution did not examine Mr. Uttam, son of PW-13 - Akaram @ Balaso Atugade and Mr. Ganesh, brother of accused, who according to him were present when the accused gave the said extra judicial confession to Shri Akaram @ Balaso Atugade (PW-13). He submitted that therefore an adverse inference has to be drawn against the prosecution.

The learned APP in reply to the said contention relied on the judgment in the case of Rohtash Kumar Vs. State of Haryana reported in , 2013 ALL MR (Cri) 2620 (S.C.) and submitted that it is the discretion of the prosecution to tender the witnesses to prove the case of the prosecution and the Court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive. The Supreme Court enumerated that the prosecution is not bound to examine all the cited witnesses and it drops the witnesses to avoid multiplicity or plurality of witnesses. Even otherwise in the present case the evidence of PW-13 Akaram @ Balaso Atugade according to us is wholly reliable and trustworthy and therefore there is no need to the prosecution to examine the said two witnesses as claimed

by the accused.

33. Mr. Apte thereafter submitted that the extra judicial confession given by the accused to PW-13 Akaram @ Balaso Atugade is very weak piece of evidence and the same should not be relied upon.

While repelling the said contention the learned APP relied on the judgment of the Supreme Court in the case of Chattar Singh & Anr. Vs. State of Haryana reported in , AIR 2009 SC 378, and in particular the paragraph Nos. 17 and 18 of the said decision wherein the Supreme Court has observed as under:

"17 Confessions may be divided into two classes i.e. judicial and extra-judicial. Judicial confessions are those which are made before a Magistrate or a court in the course of judicial proceedings. Extra-judicial confessions are those which are made by the party elsewhere than before a Magistrate or court. Extra-judicial confessions are generally those that are made by a party to or before a private individual which includes even a judicial officer in his private capacity. It also includes a Magistrate who is not especially empowered to record confessions under Section 164 of the Code of Criminal Procedure, 1973 (for short the "Code") or a Magistrate so empowered but receiving the confession at a stage when Section 164 of the Code does not apply. As to extra-judicial confessions, two questions arise: (i) were they made voluntarily? and (ii) are they true? As the section enacts, a confession made by an accused person is irrelevant in criminal proceedings, if the making of the confession appears to the court to have been caused by any inducement, threat or promise, (1) having reference to the charge against the accused person, (2) proceeding from a person in authority, and (3) sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. It follows that a confession would be voluntary if it is made by the accused in a fit state of mind, and if it is not caused by any inducement, threat or promise which has reference to the charge against him, proceeding from a person in authority. It would not be involuntary, if the inducement, (a) does not have reference to the charge against the accused person; or (b) it does not proceed from a person in authority; or (c) it is not sufficient, in the opinion of the court to give the accused person grounds which would appear to him reasonable for supposing that, by making it, he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him. Whether or not the confession was voluntary would depend upon the facts and circumstances of each case, judged in the light of Section 24 of the Indian Evidence Act, 1872 (in short "Evidence Act"). The law is clear that a confession cannot be used against an accused person unless the court is satisfied that it was voluntary and at that stage the question whether it is true or false does not arise. If the facts and circumstances surrounding the making of a confession appear to cast a doubt on the veracity or voluntariness of the confession, the court may refuse to act upon the confession, even if it is

admissible in evidence. One important question, in regard to which the court has to be satisfied with is, whether when the accused made the confession, he was a free man or his movements were controlled by the police either by themselves or through some other agency employed by them for the purpose of securing such a confession. The question whether a confession is voluntary or not is always a question of fact. All the factors and all the circumstances of the case, including the important factors of the time given for reflection, scope of the accused getting a feeling of threat, inducement or promise, must be considered before deciding whether the court is satisfied that in its opinion the impression caused by the inducement, threat or promise, if any, has been fully removed. A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt. (See *R. v. Warickshall*) It is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. Deliberate and voluntary confessions of guilt, if clearly proved, are among the most effectual proofs in law. An involuntary confession is one which is not the result of the free will of the maker of it. So where the statement is made as a result of harassment and continuous interrogation for several hours after the person is treated as an offender and accused, such statement must be regarded as involuntary. The inducement may take the form of a promise or of a threat, and often the inducement involves both promise and threat, a promise of forgiveness if disclosure is made and threat of prosecution if it is not. (See Woodroffe's *Evidence*, 9th Edn., p. 284.) A promise is always attached to the confession alternative while a threat is always attached to the silence alternative; thus, in one case the prisoner is measuring the net advantage of the promise, minus the general undesirability of a false confession, as against the present unsatisfactory situation; while in the other case he is measuring the net advantages of the present satisfactory situation, minus the general undesirability of the confession against the threatened harm. It must be borne in mind that every inducement, threat or promise does not vitiate a confession. Since the object of the rule is to exclude only those confessions which are testimonially untrustworthy, the inducement, threat or promise must be such as is calculated to lead to an untrue confession. On the aforesaid analysis the court is to determine the absence or presence of an inducement, promise etc. or its sufficiency and how or in what measure it worked on the mind of the accused. If the inducement, promise or threat is sufficient in the opinion of the court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil, it is enough to exclude the confession. The words "appear to him" in the last part of the section refer to the mentality of the accused.

18. An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made.

The value of the evidence as to the confession depends on the reliability of the witness who gives the evidence. It is not open to any court to start with a presumption that extra-judicial confession is a weak type of evidence. It would depend on the nature of the circumstances, the time when the confession was made and the credibility of the witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded thereon if the evidence about the confession comes from the mouth of witnesses who appear to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that he may have a motive of attributing an untruthful statement to the accused, the words spoken to by the witness are clear, unambiguous and unmistakably convey that the accused is the perpetrator of the crime and nothing is omitted by the witness which may militate against it. After subjecting the evidence of the witness to a rigorous test on the touchstone of credibility, the extra-judicial confession can be accepted and can be the basis of a conviction if it passes the test of credibility."

In the present case, the extra judicial confession given by the accused to PW-13 Akaram @ Balaso Atugade, who is his real uncle, in our considered view was free and voluntary is deserving highest credit because it flows from the highest sense of guilt. As stated earlier, the accused has failed to bring on record any material useful to him thereby creating doubt in the mind of this Court about the credibility of the evidence of PW-13 Akaram @ Balaso Atugade and the extra judicial confession stated therein. We therefore find the said extra judicial confession given by the accused to the PW-13 Akaram @ Balaso Atugade fully credible.

34. After taking into consideration the entire evidence available on record, according to us it is proved by the prosecution that the deceased, Miss. Vaishnavi was last seen in the company of accused, by Smt. Kavita (PW-1) and Smt. Balabai Yadav (PW-12) on 6.11.2013, between 11.00 a.m. to 11.30 a.m. That the accused was not traceable and did not return to his house till 11.00 a.m. of 7.11.2013 when Akaram @ Balaso Atugade (PW-13) brought him from village Ghogaon. That after receipt of information from PW-7 Prathamesh, PW-13-Shri Akaram @ Balaso Atugade went to fetch the accused at village Ghogaon where the accused gave him extra judicial confession. It is clear from the evidence that the said extra judicial confession given by the accused was voluntarily and without any duress or coercion and therefore the said extra judicial confession can safely be relied upon without any demur. The contention of Shri Apte that the extra judicial confession is a weak piece of evidence and ought not have been relied upon by the learned Trial Court, cannot be accepted, as according to us and as stated hereinabove, the said extra judicial confession was given by the accused to PW-13 who is his real uncle immediately on enquiry and without any pressure. It also appears to us that the said extra judicial confession was given by the accused due to repentance of the crime committed by him.

35. The next circumstance is that the appellant showed the spots/scene of

offence where he firstly committed rape over the victim Miss. Vaishnavi, the place where he thereafter kept the body of deceased Miss. Vaishnavi till the evening and subsequently buried it, has been duly proved by the evidence of PW-8 who is the panch-witness to the sai discoveries. The said witness has duly proved the memorandum statement of accused (Exhibit 33) and panchanama (Exhibit 34) by which the accused showed the aforesaid spots. It is to be further noted that from the spot where the accused had committed the rape on the victim girl, his college identity card was also found. The said identity card has been identified by PW-6 Shri Mahadeo B. Patil, the Principal of Dasaheb Undalkar College. When the accused showed the spots/pathways from which he dragged the body of Miss. Vaishnavi, two pajans (ornament) of the said victim were found at the time of recording panchanama (Exhibit 34). That PW-9 had seen the accused on 6.11.2013 near the agricultural land between 2.30 p.m. to 5.30 p.m. in suspicious condition. It is the said spot which was discovered at the instance of accused as the spot/scene where he had kept the body of deceased in the intervening period. Thus, the presence of the accused at the said spot i.e. near the field of Shri Vithal Sawant (PW-9) has been duly established by the prosecution.

36. The another incriminating circumstance against the accused is that, at his instance the slack which was worn by the deceased on 6.11.2013 has been discovered by the same panchanama Exhibit 34. The said slack has been identified by Smt. Kavita (PW-1), mother of victim.

In view of the evidence of PW-11 Dr. Sunil Kamble, it is also established that the victim Miss. Vaishnavi was raped on 6.11.2013 and we have no hesitation in holding that the accused is the perpetrator of the present crime.

37. After going through the entire evidence adduced by the prosecution which is available on record minutely, we are of the considered opinion that the same is more than sufficient to sustain the conviction of the accused under Sections 302 and 376 of IPC.

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

39. At this juncture a useful reliance can be placed on two celebrated judgments of the Supreme Court in the case of *Bachan Singh v. State of Punjab*, reported in , (1980) 2 SCC 684 : 1980 SCC (Cri) 580 and *Machhi Singh and Ors. v. State of Punjab* reported in , (1983) 3 SCC 470 : 1983 SCC (Cri) 681, the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category for awarding death sentence were indicated.

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

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

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender? The following guidelines which emerge from *Bachan Singh* case (*supra*) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38):

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the "offender" also require to be taken into consideration along with the circumstances of the "crime".

(iii) Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

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

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of

the community.

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

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

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

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-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".

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

41. The object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society have the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific

legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

42. It is the trite position of law that 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 by being adaptable, it must change from time to time so that it answers the cry of the people, the need of the hour and the order of the day. In the present day society, such crime is now considered a social problem and by reason therefore a tremendous change even conceptually is being seen in the legal horizon so far as the punishment is concerned.

43. The learned APP after taking into consideration the facts of the case submitted that it is the fit case to confirm the death sentence. She submitted that looking to the fact that the accused has raped and brutally murdered the victim child, it calls only for death penalty. She submitted that in similar cases where the victim girl was minor and was raped and murdered, the Supreme court and this Court have confirmed the death penalty to the accused persons. In support of her contention, she relied upon the following decisions:

1. Laxman Naik Vs. State of Orissa , (1994) 3 SCC 381,
2. Kamta Tiwari Vs. State of M.P. , (1996) 6 SCC,
3. State of U.P. Vs. Satish , (2005) 3 SCC 114,
4. Shivaji @ Dadya Alhat Vs. State of Maharashtra , AIR 2009 SC 56,
5. Confirmation Case No. 6 of 2013 State of Maharashtra Vs. Dattatraya Ambo Rokade,
6. Vasanta Sampat Dupare Vs. State of Maharashtra (2015 2 S.C.C. 253.
7. State of Maharashtra Vs. Raju Jagdish Paswan , 2013 ALL MR (Cri) 1431.
8. Rajendra Pralhadrao Wasnik Vs. The State of Maharashtra , 2012 ALL MR (Cri) 1375 (SC)
9. Confirmation Case No. 1 of 2015 the State of Maharashtra Vs. Shatrughna Baban Meshram.

44. At this stage, a useful reference can be made to the case of Rajendra Wasnik v. State of Maharashtra reported in , (2012) 4 SCC 37. In the said decision, after considering the earlier decisions relating to the sentencing policy in the cases of death sentence it was observed that, the Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see

towards which side the scale/balance of justice tilts. It was also so observed in the landmark decision by the Constitution Bench of the Supreme Court in the case of Bachan Singh v. State of Punjab reported in , (1980) 2 SCC 684. In the case of Bachan Singh (supra) the Supreme Court observed that death sentence ought to be given in the rarest of rare cases and only after drawing a balance-sheet of aggravating and mitigating circumstances.

45. In reply to the contention with respect to the confirmation of death sentence, the learned Counsel for the accused submitted that the present case in hand cannot be said to be case which would fall within "rarest of rare" category wherein the death sentence can be awarded or confirmed. He relied upon the three decisions of the Supreme Court and one decision of this Court wherein in similar circumstances, the Supreme Court and this Court commuted the death sentence to life imprisonment. The said decisions are as under:

(1) Shankar Kisanrao Khade v. State of Maharashtra reported in , 2013 DGLS (Soft) 323.

(2) Santosh Kumar Satishbhusan Bariyar v. State of Maharashtra reported in 2009 DGLS (Soft) 796.

(3) Bantu @ Naresh Giri v. State of M.P. reported in , 2001 DGLS (Soft) 1301.

Mr. Apte, the learned counsel appearing for the accused also placed reliance on one of the decisions of this Court in the case of The State of Maharashtra v. Sadashiv Jetappa Kamble in Cri. Confirmation Case No. 1 of 2013 to which one of us (Smt. V.K. Tahilramani, J.) is a member.

46. The first decision on which reliance was placed is the case of Shankar Khade (supra). Mr. Apte, the learned counsel appearing for the Appellant-accused pointed out that in the said case the accused had committed the murder of a minor girl of about 11 years with intellectual disability (moderate) after subjecting her to series of acts of rape. Accused No. 1 therein was convicted under Section 302 with death sentence and was also awarded other sentences under different Sections of the Indian Penal Code.

It is to be noted here that the Supreme Court in the said case has commuted the sentence of death penalty to life imprisonment and further directed that the sentence awarded to the accused therein to run concurrently. In the said decision, the Hon"ble Supreme Court after taking into consideration the catena of decisions delivered by the Supreme Court and after analyzing the same had reached to the conclusion that the death sentence be commuted in life imprisonment. The Supreme Court in paragraph No. 71 of the said decision has observed as under:

"71. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the

accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal."

47. The next decision on which Mr. Apte, the learned counsel appearing for the Appellant-accused relied upon is in the case of Santosh Kumar (supra). In the said decision, the Supreme Court after taking into consideration the entire law with respect to the category of "rarest of rare" case and commutation of death sentence to life imprisonment, commuted the death penalty to rigorous imprisonment for life. The third decision on which Mr. Apte placed reliance is in the case of Bantu @ Naresh Giri (supra). In the said case, the Hon'ble Supreme Court confirmed the conviction of the Appellant under Section 302 of the Indian Penal Code, but modified the sentence by commuting the sentence of death to imprisonment for life and for the offence punishable under Section 376 of the Indian Penal Code, the appellant was sentenced to undergo rigorous imprisonment for ten years.

48. Mr. Apte, the learned counsel appearing for the Appellant-accused also relied upon the decision in the case of The State of Maharashtra v. Sadashiv Jetappa Kamble in Cri. Confirmation Case No. 1 of 2013 wherein a Division Bench of this Court after taking into consideration the plethora of judgments of the Supreme Court and the High Court commuted the sentence under Section 302 of the Indian Penal Code of death to life imprisonment. However, the High Court ordered that the sentence under Section 376(2)(f) of the Indian Penal Code shall run consecutive after serving the life imprisonment under Section 302 of the Indian Penal Code. Mr. Apte has also placed reliance on the following decisions while praying for commutation of death sentence:--

1. Rajesh Kumar Vs. State of NCT Delhi , (2011) 13 SCC 706.
2. Duryodhan Rout Vs. State of Orissa , (2014) O Supreme (SC) 53008.
3. State of Bihar Vs. Sikandar Ansari (2008) O Supreme (Pat) 28761.
4. State of Maharashtra Vs. Tulshiram s/o. Mabu Potavi (2009) O Supreme (MAH) 31142 : (2010) O ALL MR (Cri. 789 Para 17 and 18.
5. State Vs. Mohd. Shaikh Noor Hussain (2006) 4 Crimes (HC) 505.
6. State of Gujrat Vs. Ratansingh @ Chinubhai Anopsinh , (2014) O Supreme (SC) 52610 : (2014) 4 SCC 16.
7. Shankarrao Kisanrao Khade Vs. State of Maharashtra , (2013) Supreme (SC) 51855 : (2013) 5SCC 546.

8. State of Maharashtra Vs. Ravindra @ Babu Suresh , (2011) ALL MR (Cri) 1.

9. Rajkumar Vs. State of Madhya Pradesh (Cri. Appeal 1419-1420 of 2013 dated 25.2.2014.

49. The Constitution Bench of the Supreme Court in the case of Bachan Singh (supra) has observed that before the death sentence is imposed a balance-sheet of aggravating and mitigating circumstances should be drawn and thereafter the decision whether or not the death sentence is to be imposed should be taken. Similar view is taken in a catena of decisions by the Supreme Court including in the case of Rajendra Wasnik (supra).

50. In this view of the matter, we have proceeded to examine the aggravating and mitigating factors in the present case.

The aggravating factors in the present case are that, the deceased Miss. Vaishnavi was the daughter of cousin sister of the accused, the accused after taking permission of Smt. Kavita (PW-1) took the victim girl with him on the pretext for going to Sayyadwadi for his hair-cut. That on his way he firstly committed rape on the said victim girl and subsequently he murdered her. That thereafter he buried the said dead body of the victim girl. That the said victim minor girl Miss. Vaishnavi was innocent, helpless and defence less.

51. The mitigating factors are that, on the date of commission of offence, the accused was approximately only 20 years of age. That immediately on the next date i.e. on 7.11.2013 he gave extra judicial confession of his guilt to PW-13 Akaram @ Balaso Atugade, his real uncle. PW-7 Prathamesh who noticed accused firstly on 7.11.2013 in his evidence has stated that the accused was having good character and was good in study at college. It appears from the evidence that the accused was remorseful of his misdid/crime and therefore at the very first instance he gave the said extra-judicial confession to his uncle Shri Akaram @ Balaso Atugade (PW-13). The accused has no criminal background or any antecedents at his discredit.

52. After taking into consideration the entire evidence available on record, we are of the considered opinion that it is not a case which falls in the category of "rarest of rare" case where the imprisonment of death sentence is imperative. This is also not a case where the imposition of any other sentence would not serve the ends of justice or would be an inadequate sentence.

53. Thus once we draw the balance-sheet of aggravating and mitigating circumstances and examined them in the light of facts and circumstances of the present case, we have no hesitation in coming to the conclusion that this is not a case where the Court ought to have imposed the extreme penalty of death sentence on the accused. In view of the same, we are unable to uphold the confirmation of the death sentence of the accused. We may also note here that we have observed the demeanor of the accused in the Court during the course of hearing of the present appeal and it appeared to us that the accused has

remorse for the crime committed by him. We are after taking into consideration the evidence on record, also of the opinion that the accused may not be a threat to the society at large after his release from jail, after he undergoes sentences. Therefore, while partly allowing the appeal filed by the accused only with regard to the quantum of sentence we commute the death sentence awarded to the accused to one of life imprisonment under Section 302 of IPC. We also uphold the sentence awarded to the accused under Section 376(2)(f) of IPC. In our view, the ends of justice would sub-serve the purpose of sentencing if both the sentences, are directed to run consecutive i.e. after the accused completes his sentence under section 302, the sentence under Section 376(2)(f) start and the accused to undergo the said sentence. While taking this view, we are fortified by the decision of the Supreme Court in the case of *Swamy Shraddananda v. State of Karnataka* reported in , 2008 (13) SCC 767. In the said case also the accused had been sentenced to death. The Supreme Court felt that it was not a fit case to award a death sentence but the Supreme Court observed that a sentence of life imprisonment which, subject to remission, normally works out to a term of 14 years would be grossly disproportionate and inadequate. The Supreme Court further observed that in such case, the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, in which case the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court, i.e. the vast hiatus between 14 years" imprisonment and death. The Court, therefore, can substitute a death sentence by life imprisonment for rest of life of convict or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual terms as specified in the order, as the case may be. Observing thus, the Supreme Court substituted the death sentence by imprisonment for life and directed the accused shall not be released from prison till the rest of his life.

54. At this stage a useful reference to the judgments of the Supreme Court in the case of *Ronny Vs. State of Maharashtra* reported in , (1998) 3 SCC 625 and *Ravindra Trimbak Chouthmal Vs. State of Maharashtra* reported in , (1996) 4 SCC 148. In the case of *Ronny (Supra)*, the accused persons had committed gang rape and murder of a lady during the course of the same incident. In this case, the Supreme Court felt it appropriate that the sentence under section 376(2)(g) of I.P.C. for gang rape shall run consecutively after serving the sentence for offence of murder i.e. the Supreme Court directed that the sentence of imprisonment under section 376(2)(g) of 10 years RI shall be served after the sentence of life imprisonment is over. So also, in the case of *Ravindra Chouthmal (Supra)*, the Supreme Court directed that the sentence of seven years RI for the offence under section 201 of the I.P.C. be directed to run consecutively after the sentence of the life imprisonment had run its course. In the case of *Ravindra*

Chouthmal, the accused had murdered his wife and thereafter to cause the evidence of the crime to disappear, he had cut the body and thrown the head in the creek.

55. In a decision of this Court, in the case of State of Maharashtra Vs. Kamlakar Tanaji Shinde reported in , 2010 All MR (Cri) 3415, the Division Bench of this Court directed that sentence of imprisonment under Section 364 of IPC shall be served after serving sentence of imprisonment under Section 302 of IPC. Similar view was taken by this Court, in the decision in the case of Sunil Anandrao. Sawant Vs. Government of Maharashtra reported in , 2010 All MR (Cri) 1723 wherein this Court directed the sentence of three years RI under Sections 307 shall run consecutively after serving the sentence for the offence of murder.

56. According to us, there can be no doubt that the offence committed by the accused deserves severe condemnation and is a heinous crime, but after taking into consideration the cumulative effect of the facts and circumstances and on balancing the aggravating and mitigating circumstances of the case, we do not think the present case falls in the "rarest of rare" case.

57. Hence, were not inclined to confirm the sentence of death as stated above. However, as stated earlier by us, we are inclined to make sentence of imprisonment under Section 302 and 376(2)(f) of IPC consecutive. Thus after taking into consideration the entire evidence available on record and after having regard to the totality of the circumstances, we pass the following order:

(i) The conviction of the accused under Section 302 and 376(2)(f) of IPC is maintained. The sentence of death awarded by the Trial Court under Section 302 of IPC is commuted to life imprisonment and fine imposed there of i.e. Rs. 2000/- is maintained. In default of payment of fine, the accused to undergo simple imprisonment for one month;

(ii) The sentence of imprisonment for life under Section 376(2)(f) of IPC is maintained.

(iii) The accused is acquitted of offence punishable under Section 363 and 366 of IPC;

(iv) The conviction of the accused under Section 201 of IPC awarded by the Trial court is maintained;

(v) The conviction of the accused under Sections 4, and 6 of the Protection of Children From Sexual Offences Act as awarded by the Trial Court is maintained;

(vi) The sentences awarded under Section 201 of IPC and under Sections 4 and 6 of the Protection of Children From Sexual Offences Act to run concurrently with the sentence of life imprisonment awarded under Section 302 of IPC;

(vii) The sentences of life imprisonment awarded for the offence punishable under Section 376(2)(f) of IPC shall run consecutively i.e. after the accused serving life imprisonment under Section 302 of IPC;

(viii) The accused is entitled for set off as contemplated under Section 428 of Cr.P.C. for the pre-conviction detention undergone by the accused from the date of his arrest i.e. from 7.11.2013 till the date of his conviction by the Trial Court i.e. upto 18.4.2015.

(ix) The Reference is answered accordingly and the appeal preferred by the accused is partly allowed.

58. Before parting with the present judgment, we may place on record the efforts put in by the learned Advocate Shri Abhaykumar Apte appointed by the Legal Aid Panel and we quantify his fees at Rs. 20,000/- to be paid to him by the High Court Legal Services Committee.