IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CONFIRMATION CASE NO.3 OF 2015

THE STATE OF MAHARASHTRA
(Through Crime Branch DCB,
CID, Unit-VII in C.R.No.18 of 2014) .. **Applicant**

Versus

CHANDRABHAN SUDAM SANAP
Aged 30 years, presently r/o
Shree Saikrupa Bldg No.B/2,
Room No.108, Karve Nagar,
Kanjurmarg (E), Mumbai
(Presently lodged at Yerwada
Central Prison, Pune) .. **Respondent**

WITH

CRIMINAL APPEAL NO.1111 OF 2015

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(Presently lodged at Yerwada
Central Prison, Pune) .. **Appellant**

Versus

THE STATE OF MAHARASHTRA
(Through Crime Branch DCB,
CID, Unit-VII in C.R.No.18 of 2014) .. **Respondent**

...

Mr. Raja Thakare, Special P.P. with Mrs.M.M. Deshmukh for applicant State in Confirmation Case No.3/15 and for respondent in Cr. Appeal No.1111 of 2015.

Mr.Nitin Pradhan i/b Ms.S.D. Khot, Aditya Lawari, Ms.Ameeta Kuttikrishnan and Karan Thorat for respondent in Confirmation Case No.3/2015 and for the appellant in Cr.Appeal No.1111 of 2015.

CORAM: RANJIT V. MORE & SMT. BHARATI H.DANGRE, JJ.

RESERVED ON : 1st NOVEMBER, 2018

PRONOUNCED ON : 20th DECEMBER, 2018

JUDGMENT (Per BHARATI H. DANGRE, J)

1 An incident of rape and fatal assault that occurred in the National Capital on 16th December 2012 which involved a 23 year old physiotherapist intern, shocked the conscience of the whole nation. The incident generated widespread national and international coverage and was widely condemned both in India and abroad. There was unrest and public protest in the capital which was followed in several major cities in its own way. Social networking sites were put to use to raise a demand of strict law against rape. This resulted into constitution of a

three Member Committee on 23rd December 2012 headed by the Former Chief Justice of the Supreme Court Justice J.S. Verma to recommend amendments to the Criminal Law so as to provide for speedy trial and enhance punishment for offence of sexual assault against woman. The said Committee submitted its report on 23rd January 2013. Sensing the urgency and to subdue the wide uproar amongst the general public, the Criminal Law (Amendment) Ordinance 2013 was promulgated on 3rd February 2013. This was followed by the Department-related Parliamentary Standing Committee on Home Affairs tabling its report recommending amendments to the criminal law. After obtaining the assent of the President on 2nd April 2013, the Criminal Law (Amendment Act) 2013 was brought into force, which sought to amend the Indian Penal Code, Code of Criminal Procedure 1973, the Indian Evidence Act, 1872, and also the Protection of Children from Sexual Offence Act, 2012.

Barely could have the law makers given a sigh of relief by enacting a drastic law dealing with the offences against women and before the Court seized of the said trial,

could deliver its verdict, in August 2013, a 22 year old photo journalist who was interning with an English Magazine in Mumbai was gang raped by five persons, including a juvenile when she had gone to the deserted Shakti Mills Compound in relation to an assignment. This incident brought in question the safety of women into city like Mumbai which, with its active night life was considered safe heaven for women. The Sessions Court in Delhi, delivered its verdict on 10th September 2013, convicting the perpetrators of the crime. Another incident in the financial capital of the country - Mumbai, shocked the whole nation. This time it was another young girl Esther aged 22 years who fell prey of the bestial proclivity at the hands of a man who ended her journey of life mercilessly for satisfying his lust.

The series of incidents which came to highlight and several other incidents which are not even reported by the media or not even reported to the police have resulted in the entire womenfolk in the country posing a question of their safety and security. The entire womenfolk is heard raising an outcry and find themselves in a panic striken state of mind and

expect the Executive Legislature and the Judiciary to restore their faith in the system. They echo the sentiments similar to what Madeleine Albright has once remarked :-

> *"It took me quite a long time to develop the voice and now that I have it, I am not going to be silent"*

2 The prosecution case, as unfolded, discloses that Ms.Esther Anuhya, aged 23 years, on completion of her B-Tech Degree course, was recruited as a Software Engineer in TCS in Goregaon at Mumbai. The deceased was a resident of Machilipatnam, Andhra Pradesh and had completed her graduation from Kakinada. On acquiring a degree, she shifted to the city of Mumbai and was residing in YWCA Hostel for Women in Andheri.

The deceased came to reside with her parents at Machilipatnam on account of the leave availed by her and she stayed there from 22nd December 2013 to 4th January 2014. Shri Singavarapa Surendra Prasad, PW No.26, the father of the deceased accompanied her to Vijaywada, nearest Railway station to Machilipatnam at about 5.00 a.m on 4th January

2014, from where a train was available to Mumbai. Ms.Esther boarded LTT Express at Visakhapatnam which reaches Mumbai on the next day at 5.00 a.m. At 9.00 p.m, she had a telephonic conversation with her father and she informed her father that she had reached Solapur. The LTT Express was to reach Mumbai at 5.00 a.m in the morning and accordingly reached the station. PW No.26 – Singavarapa – attempted to contact her in the morning on her mobile phone to inquire whether she had reached safely, but the call was not answered and the mobile went on ringing. The father, thereafter, contacted the Hostel to inquire whether Esther had reached there but he received a reply in the negative. On 5th January 2014 itself, the father (PW 26) approached Vijaywada Railway Police Station and lodged a missing complaint. With the said missing complaint, the devastated father landed at Lokmanya Tilak Terminus Railway Station, Mumbai. He was informed by the railway police that the jurisdiction was that of Kurla Police Station and resultantly, he approached the Kurla Police Station.

Then, began a frantic search of Esther and it continued till the date when it was revealed on the father that

his daughter is no longer alive and this happened on 16th January 2014 when body of Esther was traced in the bushes on the Express Highway. The body was found in a burnt and decomposed condition but the father could identify Esther, his daughter by the ring in her finger and also from her belongings which were lying nearby. The area where the body was traced was falling in Kanjur Marg area and a complaint came to be lodged at Kanjur Marg police station alleging that Esther was murdered by some unknown person. The body was handed over to the grief-striken father on 17th January 2014 after completion of the necessary formalities for the purpose of conduct of last ritual and the father carried it to Machilipatnam for performance of last rites.

3 On a complaint being lodged, the Investigating machinery was set into motion by the Kanjur Marg Police Station. The spot panchnama was drawn in presence of panch witnesses. A broken wrist watch of Fast Track Company, knicker and a pad, one pink colour T-shirt of 'M' size, one scarf of slate colour with white dots, one mobile phone containing

two sim cards, and a tuft of hair were found lying on the spot and all the said articles were seized by drawing a panchnama. The same were forwarded to the Forensic Laboratory. A map of the spot came to be drawn and it reveals that the said spot is at a distance of approximately 8.90 metres from the Service Road adjoining to the Eastern Express. The Forensic Personnels who reached the spot also collected the samples of soil, dry grass and oily grass at the place of incident. The photographer was also summoned who clicked the photographs of the spot along with the photographs of the body of the deceased. Inquest Panchnama was drawn in presence of panch witness and it divulged that the body was in a partly burnt condition and on the chest portion, there was a black brassiere which was also partly burnt. The portion of abdomen was completely burnt, whereas the private parts and adjoining parts were found to be partly burnt.

The body was forwarded for post mortem to Sir J.J. Hospital and PW No.25 Dr. Gajanan Chavan conducted the post mortem and submitted a report and expressed the probable cause of death as “Blunt injuries over body and genital injuries”

and reserved the final opinion, pending the Chemical Analysis of the samples.

4 The investigation was carried out initially by Kanjur Marg Police Station but it came to be transferred to the Crime Branch. PI Dattatraya Naikodi registered the FIR, and carried out further investigation in Crime No.6 of 2014 for the offence punishable under Sections 302 and 201 of the Indian Penal Code. Further investigation was carried out by PW No. 34 Nishikant Tungare, Sr. Police Inspector attached to Kanjur Marg Police Station. During the investigation, the CCTV footage from the Lokmanya Tilak Terminus was obtained with the assistance of PW No.33 Shri Vishal Patil who was on duty in RPF, since the security of LTT was under the Government Railway Force and RPF. The necessary clippings/footage was collected from the 36 cameras installed at the LTT Railway Station. The CCTV footage revealed that Esther had walked out of the Railway station on 5th January along with one stranger who was walking along with her, carrying her trolley bag. The said CCTV footage was shown to the complainant i.e. father of the deceased on

laptop at Machilipatnam on 3rd February 2014. The complainant identified his daughter who was going along with a trolley and while coming out, she was talking on mobile and one stranger was pulling her trolley bag. His statement came to be recorded. On the basis of the CCTV footage, an investigation team proceeded to carry out further investigation and made inquiries from the persons on the railway station and nearby spot on the Expressway where the body was found. Based on certain statements which came to be recorded, the Investigating Machinery succeeded in arresting one Chandrabhan Sanap as the person who was accompanying Esther on 5th January 2014 while coming out of Platform No.4 as seen in the CCTV footage. The accused Shri Chandrabhan Sanap came to be arrested vide Arrest Panchnama dated 2nd March 2014 and panch Salim Mushtaq Shaikh executed the said panchnama. The accused was taken into custody at Kanjur Marg Police Station and on physical search of the accused, one piece of paper was found in his back pocket of jeans pant and it was a writing of an Astrologer Rajabhau Aher from Nashik, Trimbakeshwar. It was in the form of a Kundli. Similarly, one Nokia Mobile was also

found in another pocket of his jeans pant with one sim card which was seized. After the arrest of the accused, he made a statement of disclosure in presence of panch witness that he was ready to produce the motor cycle which was used by him to carry the deceased to the spot of crime. On such disclosure statement being made, the motor cycle came to be seized. Further, the accused also made disclosure statement leading to seizure of bag and articles belonging to the deceased which came to be seized from two distinct places. The said articles were identified by the complainant as the one belonging to his daughter. On seizure, the said articles were forwarded for Chemical Analysis. The accused was also referred for medical examination and was examined by Dr.Kushal Tayde who opined that his genital organs are normal and that he was capable of performing a sexual act.

On completion of the investigation, chargesheet was filed before the Addl. Metropolitan Magistrate, 37th Court, Mumbai on 26.5.2014. The case was committed to the Sessions Court and came to be registered as Sessions Case No.388 of 2014. The prosecution alleged that deceased Esther, resident of

Vijaywada, working at TCS in Mumbai had boarded LTT Express at Vijaywada on 4th January 2014 to reach Mumbai. However, when she reached Mumbai, she was kidnapped by accused Chandrabhan Sanap who took her to the place of incident and after committing rape on her, committed her murder and in order to destroy the evidence, burned the body at a secluded place at a close distance on the Eastern Expressway. The accused was charged for abducting Esther on 5th January 2014 at 5.30 am from Lokmanya Tilak Terminus Station on the pretext of dropping her at the hostel and thereafter he made to sit her on his bike and took her to a lonely place behind the bushes on Mumbai-Thane Service Road and forcibly committed sexual intercourse with her. He was charged with Sections 364, 366, 376(2)(m), 376(A), 392 r/w Section 397, 302, and 201 of Indian Penal Code. He was also charged with offence punishable under Section 170 of the IPC since he pretended to hold office of Railway Security RPF and by assuming his character as such, refrained from paying Parking charges. He was also charged with Section 147 of the Railways Act, 1989 for committing an offence of trespass.

The accused pleaded not guilty to all the said charges and thereafter, the prosecution proceeded to prove the charges against the accused by adducing evidence. The prosecution examined 39 witnesses. The statement of the accused under Section 313 of the Code of Criminal Procedure came to be recorded and the accused examined four witnesses in his defence.

5 On conclusion of the trial, the Sessions Court delivered its verdict on 27th October 2015 and 30th October 2015. The learned Addl. Sessions Judge convicted the accused for the offence punishable under Sections 302, 364, 366, 376(2)(m), 376A, 392 r/w Section 397 and 201 of the IPC. He was acquitted of the offences punishable under Section 170 of the IPC and Section 147 of the Indian Railways Act. For offence punishable under Section 302 of the IPC and the accused was ordered to be hanged by neck till he is dead. On conviction under Section 364, 366 and 376(2)(m), the accused was sentenced to suffer Rigorous Imprisonment for 10 years separately. On conviction under Section 376A, he is sentenced

to suffer RI for Life, which shall mean the Imprisonment for remainder of his natural life. For offence punishable under Section 392 r/w Section 397, he is sentenced to suffer RI for 7 years. Further, for offence punishable under Section 201 of the IPC, he is sentenced to suffer RI for 7 years. All the substantive sentences of the Imprisonment of the accused are directed to run concurrently. The accused is directed to pay compensation of Rs.50,000/- which is directed to be paid to the parents of the deceased provided they are ready to accept the same.

While imposing the death sentence, the Addl. learned Sessions Judge has recorded that the accused has acted with extreme brutality and committed the offence in a pre-planned and a diabolical manner. The learned Sessions Judge has also observed that the Society's abhorrence to the crime of rape and murder which had compelled the legislature to introduce death penalty itself proved that '*rarest of rare*' case is implied in it when the offence of murder while committing rape is punishable with Death. The Lower Court has referred to the barbaric act of the accused by referring to the genital injuries and the head injuries which have been described as the cause of

death associated with smoothering. By striking a balance between the aggravating and mitigating circumstances in favour and against the accused, the Sessions Judge concluded that the enormity of the crime which shocked the conscience of the Society and on drawing a balance sheet between the aggravating and mitigating circumstances after giving due weightage to both, the conduct of the accused clearly fell within the '*rarest of rare*' act and in the backdrop of the gruesome, calculated and diabolic offence causing death of a helpless, young, and an innocent girl aged 23 years deserves only death penalty and has accordingly, imposed the same on the accused on his conviction under Section 302 of the IPC.

6 In view of Section 28(2) of the Code of Criminal Procedure, since the sentence of death was imposed, the matter has been made over for Confirmation to the High Court and it came to be registered as Confirmation Case No.3 of 2015. The Confirmation Case No.3 of 2015 which has been placed before the High Court came to be tagged by order dated 5th January 2016 with Criminal Appeal No.1111 of 2015 filed by the

accused/appellant. By consent of the learned counsel for the accused as well as the learned Special Public Prosecutor, the matter was fixed for hearing on 3rd September 2018. Both the matters were taken up for final hearing on 11th October 2018 and accordingly, the accused was directed to be produced. We concluded the hearing of the matter on 1st November 2018 after conducting day to day hearing.

In support of the confirmation case, we have heard Special Public Prosecutor Mr.Raja Thakare. In the said case, the accused is represented by Advocate Shri Nitin Pradhan along with Ms.Shubhada Khot. In Criminal Appeal No.1111 of 2015, Shri Nitin Pradhan appears for the appellant and the State is represented by Special Public Prosecutor Shri Thakare. We have heard both the matters on day-to-day basis and the accused was present in the Court on all the dates of hearing.

7 With the assistance of the learned Special Public Prosecutor Shri Thakare and Shri Pradhan learned counsel for the accused, we have scrutinized the entire record and the evidence brought on record by the prosecution and also the

defence. The learned counsel Shri Pradhan appearing for the appellant would submit that the prosecution has not discharged its burden in proving the guilt of the accused beyond reasonable doubt when it was duty bound to establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must result into a chain of events which would lead to no conclusion other than the guilt of the accused. Shri Pradhan would submit that the circumstances cannot lead to other hypothesis and mere suspicion, however, grave it may be, cannot be a substitute for a proof and in the case based on circumstantial evidence, the Court must be extra cautious in relying on the evidence brought on record by the prosecution. Shri Pradhan would submit that in the present case, several links are missing and there is no proof of any motive, much less a strong motive attributed to the accused and in absence of such proof, the most vital requirement of law to prove a case of circumstantial evidence is non-existence. Shri Pradhan submits that body of the deceased which was discovered, was in an advanced stage of decomposition and was beyond recognition and in this

background, the prosecution has not made out a case of rape and in fact, no injuries to that effect could be discerned from the post mortem report and Shri Pradhan is very critical about the manner in which the prosecution has brought an improved version of its case through the doctor who conducted the post mortem by raising certain queries and in its response, then proceeded to foist a charge of rape on the accused. Shri Pradhan is also critical of the recovery of the articles of the deceased at the instance of the accused by effecting disclosure panchnama. Shri Pradhan would submit that there is no evidence brought on record by the prosecution establishing that the deceased was either abducted or kidnapped by the accused and then done to death by him as alleged after committing rape. The entire evidence, according to Shri Pradhan is a vast suspicion with no clinching material to establish any of the ingredients of the abduction, rape or murder by destroying the evidence. Shri Pradhan has also disputed the legality of the evidence brought on record in form of CCTV footage, which is the only genesis on the basis of which the prosecution is deriving an inference that the deceased was last seen in the

company of the accused. Shri Pradhan is also critical of the said evidence brought on record without a certificate being issued under Section 65B of the Indian Evidence Act which mandates issuance of a certificate. Shri Pradhan also attacked the case of the prosecution and has submitted that the entire evidence adduced before the trial court by the prosecution through video-conferencing is in utter contrast to section 273 of the Code of Criminal Procedure. The submission of Shri Pradhan is that the judgment passed by the trial Court fails to take into consideration the basic canons on the touch stone of which the circumstantial evidence has to be appreciated by the trial court and it has faulted in imposing the death sentence which do not meet the requirement of the '*rarest of rare*' theory as propounded by the Hon'ble Apex Court nor does it derive a conclusion that imposition of any other sentence would have been inadequate.

8 As against this, Special Public Prosecutor Shri Thakare submits that the prosecution has successfully established the circumstances which pointed to the accused and the Special P.P would submit that it has not relied on a solitary

circumstance but through the evidence brought on record, the prosecution has established a chain of circumstances which is aptly corroborated and led to an irresistible conclusion that it was only the accused who had committed the crime. Based on the evidence brought on record, in form of CCTV footage, Shri Thakare would submit that the last seen theory has been invoked by the prosecution and on account of the close proximity of the time between the event of the accused having been last seen in the company of the deceased and the factum of death and in such a situation the accused should explain how and in what circumstances he parted the company of the deceased. Shri Thakare would submit that no doubt the theory of last seen together is not of universal application and may not always be sufficient to sustain a conviction unless it is supported by other links in the chain of circumstances. Shri Thakare would rely on the evidence brought on record by the prosecution in form of the conduct of the accused on the previous night of the day of incident through witnesses who are otherwise completely innocuous and had narrated the events that took place in the normal circumstances. His submission is

that the subsequent conduct of the accused after commission of the crime has also been brought on record through evidence of the witnesses who had deposed about the acts of the accused in the normal course and Shri Thakare submits that the statements of these witnesses were recorded even before the Investigating Agency had zeroed down on the accused to be the person who was responsible for causing death of the accused. Shri Thakare would submit that the Sessions Court, by taking into consideration the totality of circumstances and the cumulative effect of the evidence brought on record has appreciated the same in light of the well settled norms of criminal jurisprudence and has arrived at a finding of guilt against the accused. As far as the imposition of death penalty is concerned, we would refer to his submission a while later when we come to the point of sentencing.

9 The case of the prosecution is based on circumstantial evidence and the prosecution has relied on 39 witnesses to establish its case apart from several documentary evidence.

10 The body of Esther was traced on 16.01.2014 and the prosecution places reliance on the spot panchnama proved by PW-2 Bapu Adsul. The said panchnama is exhibited as Exhibit-38. The spot panchnama reveals that the body of the deceased was found at a place located to the East of the Service Road of Eastern Express Highway at a distance of about 29 feet. The spot panchnama discloses that on the said place a space of 5 x 3 feet was in a burned condition and at a distance about 8 feet from the said place there is a space of 4 x 3 feet which is blackish in colour where the dead body was lying. The spot panchnama further reveals that on careful perusal of the spot, at the north of the said place, a Samsung Duos company mobile is lying at a distance of 5 feet. One rubber mobile cover dark blue in colour was also found lying on the spot. On the spot one black gray colour scarf with white spots was also found which came to be seized. On the spot one pink colour T-Shirt in partly burned condition with M-size also came to be seized from the spot. Further, at a distance of 2 feet from where the body was lying, one Fast track company watch with a black dial with broken belt was also lying on the spot. The spot

panchnama further reveals that a purple colour doted knicker and white colour pad attached to the said knicker was also lying on the spot. All the said articles were seized from the said spot and came to be seized. The prosecution also relied on the Inquest Panchnama which was proved by PW-6 Nirmala Kadu and was exhibited as Exhibit-84. The Inquest panchnama discloses that the dead body of the deceased was partly burnt and blackened. It also mentions of long black hair of the deceased which were found in partly burnt condition, eyes were open and had blackened. The face was completely burnt and so also both the ears. Some portion of the body including the left hand was bereft of any skin and was exposed. The right hand was spread over and the second finger was bent and yellow metal ring was found in the middle figure. The chest portion was found to be completely burned and the black brassiere was attached to the body and the portion of abdomen was charred.

The body of the deceased was sent for conduct of postmortem and Dr.Gajanan Chavan prosecution witness No.25 has carried out the postmortem and proved the postmortem report which is exhibited at Exhibit-127. The postmortem

report relied on by the prosecution also refers to black colour bra with avulsed hook-metallic. Rigor mortis was absent in the body and postmortem report makes mention to the following effect:

> *"Variable mix pattern of decomposition seen. Facial skin burnt, blackish adherent to skull bone, Skin absent at some places of extremities and abdomen exposing bones and abdominal viscera at places. Ends of long bones are nibbled and exposed. Natural separations seen at most of the joints without evidence of ante mortem fractures No Maggots".*

As far as the column of surface wound and injuries the postmortem notes mention as under :

> *1. Contusion over LT-Left fronto temporal area 4 x 5 cm, blackish red colour."*
>
> *2. Contusion over lower lip right side against canines-blackish red in colour 2 x 2 cm. Both contusion confirmed by cut section.*

The postmortem makes note of decomposition seen in pericardium and heart. Abdomen is found to be absent. The opinion as to the probable cause of death has been cited as follows :-

> *"Blunt injuries over body and genital injuries seen. However, final opinion result, pending for CA of samples".*

The final cause of death certificate came to be issued and exhibited at Exhibit-128. The cause of death in the said certificate is described as follows :-

> *"Death due to Head injury with smothering associated with genital injuries.*"

11 The prosecution has also relied on the response to the query raised by the Investigating Officer to the team of doctors who conducted the postmortem in regard to the injury in column No.15 which postmortem was described in the postmortem notes to the following effect.

> *"15. injuries to external genitals. Indication of purging-genitals distorted due to decomposition, vaginal wall shows blackish reddish discoloration at posterior wall, confirmed by cut section*"

The query that was raised by the Senior Police Officer to the J.J. Hospital on 28.07.2014 raised the following doubts:-

> *"(i) What can cause the state of the organs mentioned in column no.15*
>
> *(ii) In the state of organs in column no.15 whether can be caused by forcible insertion of anything in the vagina.*

(ii) Whether the state of organs as mentioned in column 15 is on account of decomposition."

The Medical Officer replied to the said query on 12.08.2014 by the following reply:-

(i) As to point no.1 the state of the organs can caused due to antemortem injuries to the private part and subsequently due to its decomposition.

(ii) As to point no.2 answer state of organs as mentioned in column 15 can caused on account insertion of anything into the vagina.

(iii) As to point no.3 answer to point no.1 to be perused.

12 On the basis of the aforesaid documentary evidence the prosecution has established that the deceased whose body was found on the Service Road of the Eastern Expressway on 16.01.2014 was subjected to forcible sexual intercourse and thereafter was done to death by causing Head injury coupled with smothering. It is also the case of the prosecution that the death had occurred on account of the said Head injury with smothering associated with genital injuries and the prosecution attributed it to the accused and it is alleged that she was assaulted on her head resulting into the injury mentioned in column no.17 which was confirmed by cut section. It is also

the case of the prosecution that the contusion over lower lip right side against the canines, which is reflected as blackish red in colour depicts the force applied. Further the prosecution also relies on the response to the query report to sustain the charge that the injuries to the genitals are ante-mortem and subsequently decomposed. The postmortem report had mentioned the same to be distorted due to decomposition.

13 The prosecution relies on oral testimony of witnesses to support its case based on circumstantial evidence. The case of the prosecution is unfolded by the complainant, the father of the deceased who is examined as PW no.26 i.e. Singavarapa. PW No.26 is resident of Nobel Colony, Machilipatnam, Andhra Pradesh. Deceased Esther, aged 23 years was his daughter. He has deposed before the Court that she had completed her B-Tech and she was a scholar academically and on acquiring the educational qualification, she immediately secured a job in TCS as a software engineer. In Mumbai, he had arranged for her stay in YWCA Hostel for Women at Andheri. Shri Singavarapa deposed that whenever his daughter used to get leave, she used

to come to stay in Machilipatnam and on 22nd December 2013, she came to reside with him and stayed till 4th January 2014. He further deposed that on 4th January 2014, he took her to Vijaywada which was the nearest railway station and from there, she boarded LTT Express which reaches Mumbai at 5.00 a.m on the next day. He contacted her on her mobile phone at 9.00 p.m when he was informed by his daughter that she had reached Solapur and that she was going to sleep. He has further deposed that when he attempted to contact her in the morning, her mobile phone was ringing but nobody was responding. He, therefore, contacted the YWCA Hostel and it was reported that Esther did not report to the hostel. Thereafter, PW No.26 lodged a missing complaint with the Railway Police Station at Vijaywada and landed in Mumbai and approached the Kurla Police Station. He further deposed that he undertook search of his daughter and the police found the last signal of the location of her mobile at Bhandup and on further search on Express Highway, on 16th January 2014, the body of his daughter was found near Express Highway in the bushes. He recognised the body to be of his daughter from a

finger ring in her finger. He has deposed that the condition of the body was very bad and beyond recognition. He lodged an FIR and took possession of the body for performance of last rites. He has further deposed that the Investigating team at Kanjur Marg contacted him and they inquired about the articles which his daughter was carrying, which he informed to be a trolley bag, laptop bag, one sack, one or two handbags and some other articles. He was also shown the CCTV footage on pen-drive when he recognized his daughter entering the platform along with the trolley and a bag and sack on her back. In one footage, he recognized his daughter who was holding a mobile and one man was drawing her trolley. This witness has deposed that his daughter was wearing one wrist watch of Fast Track company when she left the house. PW No.26 also recognized a Yellow metal ring on her finger which was seized and marked as Article 27 and also the Fast Track wrist watch as well as her other belongings i.e. scarf, trolley bag, identity card, spectacles etc. The identity of the body found lying near Bhandup on the Express Highway was established by PW No.26 as to be of his daughter.

However, in order to establish the identity of the body biologically, DNA Sampling was carried out. The prosecution has relied on the testimony of Shrikant Hanumant Lade - PW No.28, Assistant Director FSL, Kalina. Shrikant Lade is a Post Graduate in Bio-Chemistry and trained at Centre for DNA Finger Printing Diagnosis at Hyderabad. He had deposed that he had handled 2500 cases and had given evidence in 200 cases. In his deposition, he has given the details of the uniqueness of a body cell containing DNA and has deposed DNA technique is a very sensitive and stable technique. He deposed that from 15 intact cells, DNA profile is generated and the source of DNA is stated to be any type of body cell, blood, semen, saliva, hair with root without root, teeth, nails, dandruff, ear wax, muscle tissues and bone. He further deposed that on 18th January 2014, he received a letter from Kanjur Marg Police Station and received 2 sealed phials, one sealed test tube and three plastic containers in sealed condition. He further deposed that the description of articles in parcels was blood sample of Singaravapa, the father of the deceased. He was requested by the Investigating Agency to examine the

vaginal swab, bone, teeth and nail of deceased as against the blood sample of the claimant i.e Singavarapa (PW 26). He further deposed that he extracted DNA from the bone teeth and blood sample of Singavarappa and the DNA profiles were generated. After that, he prepared a report at Exhibit-17. He further deposed that he had also obtained the articles in sealed parcel i.e Identity card, belt, spectacles, jeans pant, ladies half T-shirt, ladies top, kajal pencil and he had extracted DNA from sweat detected from Exhibit-1 i.e. Identity card with belt and spectacles and the bone of deceased which was received at the time of earlier DNA sampling. He analysed the same with the Controlled DNA Profile of bone sample of the deceased and submitted his report at Exhibit-22. He opined that DNA profile of sweat detected on Identity card, belt and spectacles and DNA profile of bone teeth is identical and from one and the same source of female origin.

Through this witness, the prosecution has therefore established that the body found on the Expressway on 16th January 2014 was of the daughter of PW no.26 and the articles which were seized during the course of investigation and

claimed by the prosecution to be belonging to the deceased were proved to be matching with the DNA extracted from the bone of the deceased.

14 The deceased Esther who had boarded the train at Visakhapatnam, reached its destination at Mumbai with Esther but thereafter, her whereabouts were not known and she did not report to the Women's Hostel at Andheri where she was lodged. The Investigating Agency was therefore, focused on investigating as to how did this young girl who alighted the train at Lokmanya Tilak Terminus, reached the place where her body was traced i.e. on the Service road adjoining the Eastern Express Highway. The prosecution relied on the CCTV footage from the cameras which were installed on the Lokmanya Tilak Terminus to establish and prove that Esther had reached LTT. The Investigating Agency approached the RPF authorities since the security of the LTT was entrusted to the Government Railway Force and the RPF. For security purposes, the 36 CCTV cameras were installed on the railway station with its display being monitored in the CCTV control room. On requisite

permission from the RPF, the Personnel from the Company who was maintaining CCTV cameras was instructed to provide the CCTV footage. The CCTV footage came to be transmitted to the pen drive and it was collected for the period from 4.00 a.m to 7.00 a.m on the date of incident i.e. 5th January 2014 when Esther de-boarded the train at LTT which she had boarded at Visakhapatam. The CCTV footage was transmitted to the pen drive which came to be sealed after undergoing the entire requisite procedure on 18th January 2014 and Vishal Patil was examined by the prosecution as PW No.33. Further, Shri Pandey who was working in the CCTV Department in Central Railway is also examined as a PW No.31.

The said witness has deposed before the Court that there are cameras installed on all the platforms of LTT and also in the rooms and there were two monitors, the first monitoring 20 cameras and another monitoring 16 cameras. He also deposed before the Court that the servers are kept in the control room and there is an automatic recording system in camera. He further deposed that there is Hard disk in the server and recording gets saved in the server. He further

deposed that in one server, there is recording of 12 days and in another server, there is recording of one month and after the expiry of the said period, recordings are automatically deleted from the said servers. He also deposed that since there was some fault in the server, he visited the control room in the month of January and at that time, the Police Officers from Kanjur Marg Police Station sought for a footage and he informed that it could be done only with the permission of the RPF. He deposed that after obtaining the necessary permission, he had transmitted the footage of 5th January 2014 which was available on CCTV camera to the pen drive. The footage was played and verified and thereafter, the pen drives were sealed in presence of two panch witnesses.

15 The CCTV footage which was obtained with the permission of the RPF was shown to the father of the deceased PW 26 by visiting Machilipatnam on 3rd April 2014. The said footage which was carried in a pen-drive was displayed on the laptop to him by PI attached to CID i.e Ashok Dabhle who is examined by the Prosecution Witness No.29. PW no.29

deposed before the Court that when he visited Machilipatnam and showed the CCTV footage to the complainant, he identified his daughter while going with the trolley and while she was talking on mobile and one person was pulling her trolley. He further deposed that PW No.26 identified the trolley bag as belonging to his daughter and he also informed that he was aware of the articles in the said bag since he was present at the time when his daughter packed her bag. This version is corroborated by PW no.26 who deposed before the Court when he was shown the CCTV footage on pen-drive and he saw his daughter entering the platform along with the trolley and a bag and sack on her back.

The prosecution, therefore, established through the evidence of these witnesses that Esther had reached Mumbai by LTT Express and deboarded the train since the CCTV clippings recorded the images of Esther walking on the Railway Platform at 04.59.30 when she was seen pulling a trolley bag. However, the next footage of 05.06.45 is an image of one person wearing white t-shirt and blue jeans pulling the trolley bag and woman seen in the earlier footage following him talking on mobile

phone. The CCTV footage which was recorded from 4.00 am to 7.00 am on 5th January 2014 is in form of different clips.

16 The prosecution has also examined the panch witness Girish Mishra who is examined as PW No.1 and who has proved the panchnama prepared while transmitting the data from the Control room to the pen drive. PW No.1 has deposed before the Court that an attempt was made to search the footage of 1 ½ hour as there were too many cameras. He further deposed that two pen drives of 64 GB were to be used to retrieve the data of 5th January 2014 from 4.00 am to 7.00 a.m. He further deposed that the pen drive was inserted in Digital Video Recorder (DVR) which was connected to 16 cameras on the said railway station and before the data was transmitted, it was ensured that the pen drive was blank. He then deposed that pen drive was removed from DVR and connected to the computer thereby properties of the pen drive of 425 files were copied in another pen drive and he signed the panchnama which was prepared by which pen drives were seized, sealed and stamped.

The CCTV footage obtained by the Investigating Agency during the course of investigation and which was put before the trial Court through Prosecution Witness No.31 is the axis of the whole chain of circumstances relied upon by the prosecution. We requested the learned Special Public Prosecutor Shri Raja Thakare to play the CCTV footage before us so that we can appreciate the case of the prosecution. Accordingly, the pen drive which carried the CCTV footage was connected to the laptop during the course of hearing and we had an opportunity to examine the entire footage and the learned Special Public Prosecutor also supplied the still photographs of the relevant clippings on which the prosecution relies. A copy of pen drive was also supplied to Shri Pradhan, learned counsel for the accused.

17 On examination of the various clippings, both running and in form of still photographs, reveal the following details.

1 *The first clip beginning time is 04:48:20 a.m, which is recorded in the camera installed on platform no.5 towards Kalyan side. In this clip, it*

is seen that one person is getting down from a stationary train wearing white t-shirt and blue jeans and having a bottle of cold-drink in the hand. The clip is upto 04:49:06 a.m. This clipping will have to be appreciated in light of evidence of PW 18 who has identified the accused as the person who had purchased the bottle of Thums-Up from his stall.

2 *The next clipping is of 5th Jan from platform no.5, starting time is 04:57:14. Here, a person in white t-shirt gets down from a railway boggie and sits near the pillar of the railway shade. He gets up at 04:58:30 and thereafter walks till 04:58:51.*
A screenshot is taken at 04:58:48 where the face of the accused is clearly visible.

3 *Next footage is from the CCTV camera installed in Hall 2. The clipping starts at 04:59:30 which shows one lady going inside the waiting area pulling a trolley bag and having other bag on the shoulder (Although the features of the person are not identifiable). The clipping ends at 05:00:20.*

4 *This footage is from the camera installed in the hall and relevant time is 05:00:57 wherein a girl is seen pulling a trolley bag having other shoulder bag and wearing a scarf. The clipping is till 05:01:10.*

5 *There is one more clipping captured in the CCTV camera installed on platform no.5 towards CST showing same lady walking while pulling a trolley bag and having one more bag and purse on the shoulder. Both these clippings (4 and 5) make is clear that it is one and the same woman.*

6 The next footage is of 05:06:45 when one person wearing white t-shirt and blue jeans is alighting from one of the boggies and walks on the platform. The screenshot is taken at 05:07:02 where the face is clear and the person is the same as in the earlier clippings. This is on platform no.5 towards CST. The clipping is upto 05:07:06.

7 The next clipping is on the CCTV camera installed on platform no.4. The relevant time is 05:10:52 when it is seen that the same man with the white t-shirt and blue jeans is pulling the trolley bag and the same woman which was seen in the earlier footages is walking along talking on mobile phone.

Screenshot is taken at 05:11:13 when the face of the person pulling the trolley bag can be clearly seen. Also the pink t-shirt worn by the woman is seen. It is upto 05:11:15.

18 Relying on the CCTV footage, the prosecution has established that Esther reached Mumbai at approximately 4.59.30 a.m when she approached the waiting area pulling her own trolley bag and having another bag on her shoulder. In another clipping, she is walking while pulling her trolley bag and one more bag and purse on her shoulder. The earlier clippings recorded at 4.48.20 am discloses one person getting down from a stationary train wearing white t-shirt and blue jeans and having a bottle of cold-drink. The screen shots of the

said clipping clearly reveal that it is the accused who is present before us. Another clipping captures the person in white t-shirt walking on the railway platform and we had noticed that he was walking in a shaky condition. A screen shot taken at 4.58.48 clearly focuses on the face and the said person in the said screen shot in the accused who is present before us. In the last footage recorded at 05.10.52, the accused in white t-shirt and blue jeans is seen pulling the trolley bag and Esther who is seen in the earlier footage is following him and she is talking on her mobile phone. The pink t-shirt worn by the woman is clearly seen. Thus, the prosecution with the help of CCTV footage has established its case to the extent that Esther reached the LTT and she exited the railway station along with the accused. Shri Pradhan has alleged that the said evidence led by the prosecution do not withstand the test of 'evidence' in terms of the Evidence Act and we would be dealing with the said submission a later.

19 In order to further corroborate the presence of accused at LTT and to establish that the deceased accompanied

him while leaving the Terminus, the prosecution has relied on three witnesses. PW No.18 Shivkaran Chhotelal Patel who is running a Canteen at Kurla Terminus Railway Station deposed before the Court that 18th February 2014, the police came inquiring to him as to whether any person had purchased cold-drink or water from him on 5th January 2014. He stated before the Court that it was not possible for him to exactly state if it is so, since thousands of people come to him. However, he further deposed that on 5th January 2014, one person had approached him after opening the stall and purchased a Thumbs-up for Rs.34/- and gave him currency note of Rs.100/- and when he requested him to give change of Rs.4 and he refused to hand over the change, in turn, this witness gave him a chocolate. Then, the accused started abusing him and argued with him for approximately 10 to 15 minutes and that is how he remembered him. He also deposed that he was his first customer and he had a mustache and his forehead was broad and he was wearing white t-shirt and blue colour pant and one key was hanging from his pocket. He also deposed that his height was 5.5" and he was having a well built body and was of

28 to 29 years of age. He further deposed that he can identify the said person if shown to him. He also stated before the Court that he was asked to attend the Arthur Road Jail for Identification Parade of the accused and in the said Parade, he identified the person who came to his shop on 5th January 2014 and purchased cold-drink and abused him.

Another witness examined by the prosecution is Shri Surendra Nair PW No.19, working as an A.C. Mechanic in Central Railway who deposed that on 4th January 2014, he was on duty at Kurla Terminus and on the relevant date, he was on stand-by duty. He further deposed that on that date, there was no A.C. mechanic in Tulsi Express and was sent as A.C. Mechanic in the said train which was to arrive at Kurla Terminus at 4.30 a.m. He deposed that the said train arrived at 4.30 a.m and he was standing near the train for boarding it along with two attendants since he was to enter the A.C. Compartment before one hour of departure and switch on the A.C. At that time, he was approached by one person informing that he is from railway staff and he wanted to go by the train. He also informed that he was a coolie and his services are

confirmed as a gang-man. PW No.19 Surendra informed the said person that he can go to the General coach and he went there and came back informing that there was no place in the general boggie and thereafter this witness told the said person to go to sleeper coach since there was quota for Nashik Manmad. PW No.19 deposed that the said person was having Thumbs-up bottle in his hand and there was no luggage. He also deposed that he was wearing white color t-shirt and jeans pant and he was well built and not having hair from the front side. On inquiry by the police, PW No.19 informed the police about such a person with whom he had interacted and his statement was recorded on 22nd January 2014. PW No.19 also identified the accused during Identification Parade held on 25th January 2014 at Arthur Road Jail. This witness also identified the accused on the screen of the Video Conference.

The third witness whom the prosecution has examined to establish the presence of the accused on LTT platform along with the deceased in the early hours of 5th January 2014 is PW no.20 Ramesh Rathod. The said witness was engaged in the job of Supervisor in the pre-paid taxi booth at Kurla Terminus

railway station and the nature of his work is to look after the workers and go to RTO for the said purpose. He deposed before the Court that on 4th January 2014, he was on night duty and his duty hours were from 9.00 pm to 9.00 am on 5th January 2014. He further deposed that on 5th January 2014, Visakhapatnam train came on platform at 5.00 am to 5.15 am and he saw one lady going with one man who was having trolley bag in his hand. PW 20 – Ramesh Rathod inquired from him whether he required a taxi and he answered that he was having vehicle. The witness gave the description of the said person as having broad mustache and bald from front side and wearing t-shirt and blue jeans pant and was of approximately 35 years. He deposed before the Court that the police were making inquiries about the said incident regularly in regards to one girl missing from the said railway station and when he came to know about such an inquiry, he on his own went to Crime Branch Ghatkopar on 20th March 2014 and he gave his statement to the police that he saw the girl going with one person. This witness was summoned for Test Identification Parade on 25th March 2014 which was held in Arthur Road Jail

and identified the accused person as the one who was with the girl on 5th January 2014. The said witness also identified the accused person on the Video Conferencing screen.

The CCTV footage which was obtained, during the course of investigation, was also shown to one Hemant Dharma Kohli examined as PW No.27 who was residing in the vicinity where the accused was residing i.e. at Kanjur Marg. The said witness deposed that he knew the accused Chandrabhan Sanap and his family members since he was residing in the same area where the witness was residing. When the CCTV footage was shown to him, he identified the person in the footage walking on the platform with one bottle of cold-drink in his hand. He further deposed to the Court that he identified the said person in another footage as Chandrabhan Sanap who was pulling the trolley bag.

20 Thus, the prosecution with the assistance of the aforesaid witnesses has established the presence of the accused on the platform where the deceased terminated her journey from Visakhapatam and the prosecution has established its case

that the accused convinced the deceased to follow him or assured her of reaching the destination at Andheri and as such, the deceased handed over her trolley bag to the accused and both of them were seen walking out of the railway station between 5.10.52 a.m and 5.11.15.a.m.

21 Chandrabhan came to be arrested on 2nd March 2014 after his identity was established during the course of investigation on the basis of the CCTV footage and the statements recorded. The arrest of the accused was effected by drawing an arrest panchnama at Kanjur Marg Police Station in relation to C.R.No.06 of 2014 in presence of panch witness Salim Mushtaq Shaikh who is examined as PW No.8. The arrest panchnama was prepared after physical search of the accused and on inquiry, the accused gave his address of Nashik and also supplied another address of Building No.2, Door No.108, Karve Marg, Kanjur Marg (West). On inquiry, in relation to the accused person at his given address, the prosecution was able to collect further evidence in relation to the past and post incident conduct of the accused and which was brought before the Court. PW No.12 is one Rajashree Shetty who was residing

in MHADA building, Karve Nagar, Kanjur Marg and who was knowing the accused Chandrabhan Sanap. The said witness deposed before the Court that she knows one Nandkishore Sahu (PW No.9) who is staying adjacent to her house and who used to visit her for consuming liquor and on occasions, accused who was also known as Choukya, also used to visit her house. She deposed before the Court that on 4th January 2014, at about 10.30 p.m, Nandkishore Sahu came to her house with liquor and when they were consuming liquor, Chandrabhan Sanap also came there with a bottle of liquor and asked for some snacks. However, since there was no food in her house, he asked for a key of motorcycle of Nandkishore and took his bike and Nandkishore waited for the accused to return with his bike. This version is corroborated by Nandkishore Sahu who is examined as PW no.9. The prosecution also relies heavily on the said witness, as according to it, it is to this witness, the accused had given an extra judicial confession about the commission of crime. Nandkishore Sahu is the owner of motorcycle bearing No.MH-03-AY-0241. In his deposition before the Court, he recognized the accused produced by Video

conferencing as Chandrabhan Sanap @ Choukya who was residing behind his building. Nandkishore deposed that he knew him as he was staying at Kanjur Marg and they used to play cards. He deposed that on 4th January 2014, he visited Rajashree who was staying in the chawl and doing the business of selling liquor, where he consumed liquor till 11.30 p.m. He stated that at about 11.30 p.m, Chowkya came there and sat for consuming liquor and till 1.30 a.m, they were sitting there. PW No.9 further deposed that the accused told that he was hungry and asked for some eatables. However, there was nothing there to eat and therefore, he asked for key of his motorcycle and the accused took his bike and went away at 1.30 a.m. It is further deposed by PW No.9 that he waited for 40 – 45 minutes, but he did not return back and thereafter, he went to his house and went to sleep.

PW no.9 further deposed that at 7.30 a.m, he received a phone call from the accused and PW no.9 visited his house where is mother and sister were present. He noticed one hand bag and one trolley bag there and there was also one white colour t-shirt stained with mud lying there. Thereafter,

he came after wearing the clothes and when this witness asked for the key of his motorcycle, the accused told him that as there was no petrol and he had parked the vehicle at highway and he asked him to accompany by taking some other vehicle. PW 9 Nandkishore further deposed that he asked for a motor bike from Kadir Murgiwalla and on his splendor, the accused sat behind him and told him that he would take him to the place where the motorcycle was parked. On reaching the Service road at Bhandup where the motorcycle was parked, but when he attempted to start the motorcycle, he did not succeed as there was no petrol. PW 9 deposed that thereafter the accused went 100 ft away inside the bushes and he followed him. He asked the accused what he was searching for. At that time, he saw one girl was lying there and she was not alive and he deposed that she was 23 – 24 years old. On seeing the body, PW 9 was scared and he came back and the accused followed him running. At this point of time, as per the version of PW No.9, he has deposed to him that he had gone to Kurla Terminus by taking his bike and one girl got down from the train. He asked the girl where she wanted to go and when she

informed him that she wanted to go to Andheri, he told that he is also going to Andheri and he had taken her on the motorcycle and brought her on the spot. He further told that he had taken her in the bushes and thereafter he raped her and when she started shouting, he pressed her mouth and strangulated her by scarf and killed her. PW 9 further deposed that he put petrol in the said motorcycle from another motorcycle and reached home. PW 9 further deposed that he was threatened by the accused not to report this incident to anybody. As per the said witness, on 6th January 2014 and 7th January 2014, the accused called him and threatened him, but he refused to receive his calls as he was aware that the accused is of quarrelsome nature and two more crimes were registered against him. The witness deposed that on 15th January 2014, he did not receive the call of the accused and thereafter, he proceeded to Nashik since his mother's health was not good. He was called in the police station on 4th March 2014 and he went to the Crime Branch office and got his statement recorded on 6th March 2014. The prosecution has heavily relied on the extra-judicial confession and which is clearly criticized by Shri

Pradhan and the reliability of the prosecution on the said extra-judicial confession would be dealt by us at a later point of time.

22 In order to further establish the link of the accused to the crime in question, the prosecution has placed reliance on testimony of witnesses who throws light on the subsequent conduct of the accused after commission of the crime. PW No.13 – Mohd. Usman Lalmiya Khan - who is the Secretary of the building where the accused was residing deposed that he knew Chandrabhan Sanap as he was staying in the area since 15 years in the MMRDA room. This witness also deposed that he was aware that a case of theft is registered against the accused. He further deposed that the accused was married for three times and his first wife had expired and his second wife had left him and he was residing with his third wife in the said house. He deposed that on 5th January 2014 at 9.00 a.m, he saw the accused going with his mother and at that time, the accused was having one bag on his back and one trolley bag. He further deposed that the police had recorded his statement on 12th March 2014.

23 At the time of arrest of the accused by executing the arrest panchnama on 2nd March 2014, the accused was subjected to physical search. During the search, one xerox copy of letter was found in his back pocket of jeans pant and on further inquiry, it was found that it was a kundli prepared by Jyotish Visarath Rajabhau Aher. The said kundli of the accused was prepared on 6th January 2014. The Investigating Agency, therefore, turned to Shri Rajabhau Aher and he was cited as a witness by the prosecution and examined as PW No.17. Shri Rajabhau Aher deposed before the Court that he was an Astrologer and used to prepare Horoscope. He deposed that on 5th January 2014, at about 2.00 p.m, he was approached by Chandrabhan Sanap who was accompanied by one elderly lady. The witness deposed that he was under pressure and he told him that his stars are not good and therefore, he wants to show his horoscope. Accordingly, the horoscope was prepared and PW No.17 informed the accused that there are few faults in his horoscope Kal Sarp Dosh and Ati Gandh dosh and he advised him to perform Shanti Puja at Trimbakeshwar. The witness deposed that he handed over to the accused the visiting card of

one Prasad Shukla and asked him to approach him to perform the puja. The witness has categorically deposed that after discussing the horoscope, the accused asked him if any sin has been committed by him against woman, whether the Puja could rectify him. The said witness also identified the xerox copy of the horoscope prepared by him and since the original of the horoscope was with the accused.

In order to complete the chain of the conduct of the accused, the prosecution has examined another witness who has performed the Kal Sarp Puja as per advise of PW no.17. The said witness is Prasad Sharadchandra Shukla and examined as PW no.16 by the prosecution. The said witness deposed before the Court that he was working as a Priest in Trimbakeshwar temple and was performing the puja of Kal Sarp Yog. He deposed that one Rajabhau Aher, an Astrologist sends people to him for performance of puja. He further deposed that on 5th January 2014, Chandrabhan Sanap visited him on recommendation of Rajabhau Aher for performing puja of Kal Sarp Yog and Ati Gandh Yog. The arrangements of stay of the accused were made by PW no.16 at his home and he had

also brought his horoscope. He accepted an amount of Rs.3,000/- from the accused and performed puja on 6th January 2014 at 7.30 a.m which was completed at 11.45 a.m. The witness deposed that the accused was accompanied by his mother. The accused further deposed that he asked him a specific query as to whether a sin committed towards a lady could be cleared by performing this puja, to which the witness replied that there is no relation between one's act and this Puja, but because of this puja, problems are solved. The prosecution has relied on the Register maintained by this witness and who deposed before the Court that he used to maintain the register and enter the name of the person, date and amount. The extract of the said register mentioning the name of Sanap on 6th January 2014 in the handwriting of PW 16 is exhibited at Exhibit-112. The said extract of the register was seized in presence of panch witness Ashok Kumar Pandey who is examined as PW no.15 by the prosecution. The aforesaid witnesses have thus been relied upon by the prosecution to establish the conduct of the accused post-commission of the offence.

24 Another circumstance which the prosecution has relied upon is the presence of the accused on the Eastern Expressway on the early hours of 5th January 2014. The prosecution has relied on the testimony of one Pralhad Kumar Yadav examined as PW No.23 who happened to be strolling his dog on the highway near Service road in the morning hours. The said witness deposed before the Court that he was working in a Salt Office which was located between Kanjur Marg and Bhandup and he was staying in the office. He had further deposed that in early morning, he used to take the dog belonging to his owner for stroll on highway near service road. On 19th January 2014, one constable approached the said witness and took him to the police station for making certain inquiries. He revealed to the police that he had seen one person starting the bike near service road and when he inquired from the said person whether his bike was not starting. The witness deposed that when he saw the said person, he found mud on his shoulder and he inquired whether he had a fall which the person answered in the negative. He further inquired whether he should assist him in starting the bike to

which the person answered that there was no petrol in the tank. The witness further deposed that there was one bag on his back and one bag was kept on the petrol tank. Thereafter, he parked the said bike and he started proceeding towards Vikhroli and also pulled the trolley bag. The said witness has deposed that the said person was walking in front of him and was wearing a white colour t-shirt and blue colour jeans pant and his height was 5.5" and complexion was of wheatish colour. This witness further identified the accused to be the same person whom he had spotted on 5th January 2014 on the Express Road by identifying him in the Identification Parade held in Arthur Road Jail on 25th January 2014. The said witness also identified the accused present on the screen of the video conferencing and he clarified that he is the same person, but at that time, he was not having a beard and he was of a strong built. The prosecution has relied upon this witness who happens to be a chance witness and who deposed about the presence of the accused on the service road on the Expressway at morning hours on 5th January 2014 i.e. the date on which Esther landed at Lokmanya Tilak Terminus but was untraceable.

25 The prosecution brought on record the evidence in form of the seizure of the belongings of the deceased which she had carried at the time when she left her hometown to proceed to her work place. The prosecution has examined PW-4 and PW-5 who are the panch witness to the disclosure panchnama. On a disclosure statement given by the accused, and when he showed his willingness to produce the bag belonging to Esther, a disclosure panchnama was executed on the arrest of the accused on 03.03.2014. The accused made a statement that he is ready to produce the bag which Esther was carrying and the accused has taken the said bag to Nashik and handover to one elderly lady. A memorandum statement of the accused was recorded under a panchnama exhibited at Exhibit-44 and 44A and PW-4 Abdul Satar Sayad Ali Shaikh has acted as a panch witness on the said panchnama. The said disclosure memorandum laid to recovery of one trolley bag of black colour with words “Skybag” endorsed on it. The said bag was handed over by the accused to one old lady in Nashik and this lady is also examined by the prosecution as a witness named as

Kamlabai Kisan Sanap who is examined as prosecution witness No.24. The said witness corroborated the disclosure statement leading to the discovery of the bag and depose before the Court that she was doing labour work and on one day when she was sitting near the public toilet, accused person, whom she identified on the V.C. Screen came there and asked her if she can accept the said bag. She further deposed that when she asked the accused why he is giving the same, he informed that his sister is no more and, therefore, he gives the black colour bag of the wheels. She deposed there were clothes inside the bag and she sold it and kept the bag at Misrawada in a room. She handed over the bag to police when she was approached by the police and identified the said bag of black colour when shown to her at the time of deposition. Another circumstance relied on by the prosecution is the recovery of the bag which the deceased was carrying and the bag and its contents were seized at the instance of the accused on a disclosure statement being made by him and were seized from the sister's room of the accused. PW-5 Pradeep Shirodkar acted as a panch witness to the said disclosure panchnamma at Exhibit- 81 and 81A

which led to seizer of certain articles belonging to deceased namely:-

> *(i) An identification card of University College of Engineering (JNEU, Kakinada) bearing the deceased name;*
>
> *(ii) An used black and blue framed spectacles with a broken glass;*
>
> *(iii) An old jeans pant of blue colour;*
>
> *(iv) An used ash gray colour half ladies T-Shirt and another black and pink hosiery ladies top.*
>
> *(v) A light blue colour pant and one leggings of green colour.*
>
> *(vi) One used eye pencil of Maybelline company.*

The said articles came to be seized on executing a seizure panchnama at the instance of the accused from Room No.12 in Sai Building where the sister of the accused was residing and running a mess. All the said articles were placed in a plastic bag in the house belonging to the sister of the accused and the articles came to be seized and marked as Articles.

26 Out of the said articles the I-Card belonging to the deceased Esther was forwarded for DNA Analysis in sealed parcels. Prosecution witness No.28 Shrikant Hanumant Lade, the Assistant Director in FSL Kalina Generated the DNA profile from the sweat detected on one Exhibit-L on the I-card and Exhibit-L-2 spectacles he compared the same with the bone samples of the deceased. The prosecution has thus established that the said articles which were seized at the instance of the accused belonged to the deceased Esther and these articles i.e. the identity card and the spectacles were identified by the father of the deceased as belonging to Esther.

The prosecution has also examined PW-14 Satyawan Gawade who has acted as a panch to the panchnama executed for seizure of the brassiere which was found on the body of the deceased at the time of the conduct of postmortem. The said brassier came to be seized and the panchnama executed on 17.01.2014 records that belt and hook of the brassiere was broken and it was having holes on it. The prosecution relied on the said circumstance to strengthen its case that the deceased

was subjected to forcible man handling and the broken hooks and belt of the brassiere was indicative of the same.

27 The aforesaid evidence brought on record by the prosecution establishes its case that Esther who was travelling from Visakhapatnam to Mumbai did reach Mumbai by the LTT Express Lokmanya Tilak Terminus express on the fateful day and went missing and her body could be traced only on 16.01.2014. The deceased was last seen in the company of the accused in the CCTV footage drawn from the cameras fitted on the LTT terminus station and she has been identified by the prosecution witness No.26 her father. The person whom she was accompanying in the CCTV footage is identified by prosecution witness No.27 Hemant Dharma Koli who was staying in the area where the accused were residing. The prosecution has also relied upon the testimony of PW-18, PW-19, PW-20 and PW-21 who had identified the accused as the same person who was present on the platform on Kurla Terminus on 05.01.2014 and PW No.20 has been relied by the prosecution to establish his case that the deceased along with

accused left the LTT terminus on 05.01.2014. The prosecution has also relied on the Test Identification Parade where all the aforesaid witness have identified the accused as the person who was present on the platform and whom the deceased had accompanied when she exited the LTT terminus.

These aforesaid circumstances are relied upon by the prosecution and which it has brought on record through various witness. The investigating officers have been examined in form of prosecution witness No.29, 30, 34, 35, 36, 37 and 38. The investigating officer has deposed before the Court about the details of the investigation including the recording of the various witnesses and forwarding of the material seized for Chemical Analysis and also has thrown light on the seizer traced to the disclosure statement of the accused. PW-39 is the executive Magistrate who has conducted the postmortem report and since the postmortem report in form of memorandum panchnama of Identification Parade was also accepted through PW-56 at Exhibit-163, this witness was made available for cross-examination at the instance of the accused and was extensively cross-examined.

28 In the backdrop of the aforesaid material brought on record by the prosecution which we have carefully scrutinized, we would proceed to deal with the arguments of the learned counsel for the accused which came to be advanced by Advocate Shri Pradhan. Learned counsel Shri Pradhan makes a submission that the prosecution has failed to prove the guilt of the accused beyond reasonable doubt by bringing on record cogent and reliable evidence. He submits that the prosecution case was based on circumstantial evidence, but according to him, the events brought on record are bereft of any material connecting the accused to the crime. Referring to the evidence brought by the prosecution on record, Shri Pradhan vehemently disputes the case of the prosecution that deceased was subjected to sexual harassment and that she was raped. He would invite our attention to the post-mortem report and also the expert who has proved the said report in form of Prosecution Witness No.6. By inviting our attention to the state in which the body was found and which, according to Shri Pradhan, was completely in a decomposed state and was

charred beyond recognition. Shri Pradhan would submit that injury to the private part which has been described to be the cause of death in the final opinion submitted by the Doctor is not an inference based on any material. Shri Pradhan would place heavy reliance on the testimony of PW 6, the panch witness to the Inquest Panchnama who had categorically stated that the body was half burnt and that the chest portion was completely burnt. According to him, the credibility of the said witness is doubtful since she states that she did not remember the material particulars.

Further, he also makes a reference to the testimony of the Medical Officer of the J.J. Hospital who conducted the post-mortem i.e. Dr. Gajanan Chavan. Shri Pradhan is heavily critical about his response to the query raised by the Investigating Officer and the submission of Shri Pradhan is that initially the charge of Section 376 was not invoked and applied against his client, but after the period of approximately 5 months, query was raised by the Investigating Officer on 28th July, 2014 which was responded to by doctor conducting the post mortem. Learned counsel Shri Pradhan submit that the

accused was arrested in March but the query was raised only on 28th July 2014 which was replied on 12th August 2014. Shri Pradhan would take us through the post-mortem notes and submit that it does not disclose any discoloration and as far as the injury on the private part is concerned, it is only reported for the first time in response to the query report. Resultantly, the order sheet on which Shri Pradhan would place a reliance does not disclose an offence under Section 376 of the IPC. According to Shri Pradhan, the charge was framed against the accused only when the response to the query was received. According to him, the expert opinion of the doctor defies the logic and he would invite our attention to one document which is in form of a letter addressed to the Director of Forensic Science Laboratory where the blood of the father of the deceased came to be forwarded to the Forensic Science Laboratory and Shri Pradhan submits that the crime details in the said letter refers to an offence being registered under Section 302, 201 of the IPC and did not include Section 376. In substratum, his submission is that the offence of rape is not at all made out since the post mortem report by itself did not refer

to any indications of rape but in column 15, it only mentioned about the genitals being distorted due to decomposition and which was short of the proof of sexual assault or rape.

29 Another submission of the learned counsel Shri Pradhan is to the effect that the entire trial and conduct of proceedings against the accused is vitiated on account of non-compliance of a mandatory requirement contemplated under Section 273 of the Code of Criminal Procedure. He submits that in terms of Section 273 of the Code, all the evidence taken in the course of the trial or other proceedings shall be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader except as otherwise expressly provided. The submission of Shri Pradhan is that the said principle enumerated in the said section is to safeguard the right of an accused to have a fair trial and he would place reliance on the Report of 41st Law Commission of India as regards Section 353 which is a reproduction of Section 273. Shri Pradhan would also place reliance on the judgment

of Patna High Court in case of ***Bigan Singh Vs.King Emperor***[1] and also a judgment in case of ***Chhotey Lal and ors Vs. King Emperor.***[2] He also placed reliance on a judgment of the Privy Council in case of ***Basil Ranger Lawrence Vs. Emperor,***[3] where the Privy Council concluded that the trial was vitiated on account of the defect in the procedure. He would place reliance on the following observation of the Privy Council which reads thus :

> *"It is an essential principle of our criminal law that the trial of an indictable offence has to be conducted in the presence of the accused; and for this purpose trial means the whole of the proceedings, including sentence. There is authority for saying that in cases of misdemeanor there may be special circumstances which permit a trial in the absence of the accused, but on trials for felony the rule is invoidable, unless possibly the violent conduct of the accused himself intended to make trial impossible renders it lawful to continue in his absence. The result is that sentence passed for felony in the absence of the accused is totally invalid. In the present case, a double error has been made."*

30 Shri Pradhan has also placed reliance on the judgment of the Bombay High Court in case of ***Baban s/o Rakhmaji Bichkule Vs. State of Maharashtra,*** [4]**1998 All M.R. Cri.1533.** Apart from the aforesaid judgments, Shri Pradhan

1 (1927) PATNA 691
2 AIR (1927) OUDH 353
3 AIR (1933) Privy Council 218
4 (1998) 5 Bom.C.R. 813

has placed reliance on the judgment of the Hon'ble Apex Court in case of ***State of Maharashtra Vs. Dr.Praful B.Desai,***[5].

The said judgment itself provides an answer to the objection raised by the learned counsel Shri Pradhan. The Hon'ble Apex Court has scrutinizing the judgment dated 23rd April 2001 delivered by Bombay High Court in Criminal Appeal No.3193 of 1999 was dealing with an issue as to whether the evidence recorded through video conferencing would meet the mandate contemplated in Section 273 of the Code of Criminal Procedure. The Hon'ble Apex Court in the said judgment has categorically held that the recording of evidence by Video Conferencing also satisfied the object of Section 273 *viz.* that the evidence be recorded in presence of the accused. The observation made by the Hon'ble Apex Court needs a reproduction :

> 18. Thus the law is well settled. The doctrine "Contemporanea exposition est optima et fortissimm" has no application when interpreting a provision of an on-going statute/act like the Criminal Procedure Code.
>
> 19. At this stage we must deal with a submission made by Mr Sundaram. It was submitted that video-conferencing could not be allowed as the rights of an accused, under Article 21 of the

5 (2003) 4 SCC 601

Constitution of India, cannot be subjected to a procedure involving "virtual reality". Such an argument displays ignorance of the concept of virtual reality and also of video conferencing. Virtual reality is a state where one is made to feel, hear or imagine what does not really exists. In virtual reality one can be made to feel cold when one is sitting in a hot room, one can be made to hear the sound of ocean when one is sitting in the mountains, one can be made to imagine that he is taking part in a Grand Prix race whilst one is relaxing on one sofa etc. Video conferencing has nothing to do with virtual reality. Advances in science and technology have now, so to say, shrunk the world. They now enable one to see and hear events, taking place far away, as they are actually taking place. To take an example today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV. If a person is sitting in the stadium and watching the match, the match is being played in his sight/presence and he/she is in the presence of the players. When a person is sitting in his drawing-room and watching the match on TV, it cannot be said that he is in presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both, the person sitting in the stadium and the person in the drawing-room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video conferencing both parties are in presence of each other. The submissions of Respondents counsel are akin to an argument that a person seeing through binoculars or telescope is not actually seeing what is happening. It is akin to submitting that a person seen through binoculars or telescope is not in the "presence" of the person observing. Thus it is clear that so long as the Accused and/or his pleader are present when evidence is recorded by video conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273, Criminal Procedure Code.

Recording of such evidence would be as per "procedure established by law".

20 Recording of evidence by video conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the Accused. The Accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the Accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded Court room. They can observe his or her demeanor. In fact the facility to play back would enable better observation of demeanor. They can hear and rehear the deposition of the witness. The Accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of play back would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in Court. All these objects would be fully met when evidence is recorded by video conferencing. Thus no prejudice, of whatsoever nature, is caused to the Accused. Of course, as set out hereinafter, evidence by video conferencing has to be on some conditions.

31 No doubt under the Indian Legal System, the evidence which is admissible and collected under the Indian Evidence Act, and the Code of Criminal Procedure prescribes the mechanism how such evidence collected could be brought before the Court of Law. The judgment of the Apex Court in case of ***State of Maharashtra Vs. Dr. Praful Desai*** (supra) can be considered as a landmark specially in incorporating the use

of modern technology and thereby make the criminal trials more techno-savy and aimed at curbing the delays in conduct of such trials. Since the said judgment recognizes video conferencing as a mode for producing the evidence before the Court where the witnesses may not be conveniently or necessarily examined in the Court, and in the backdrop that there has been a significant rise in the trend to resort to video conferencing. In case of ***Amitabh Bagchi Vs. Ena Bagchi***[6] *the* Calcutta High court opined that a practical outlook ought to be adopted by a Court in allowing electronic video conferencing as it is a cost effective and facilitates the Court procedure and avoids delay of justice. In the latest judgment in case of ***Dr.Kunal Saha Vs. Dr. Sukumar Mukherjee***, the Hon'ble Apex Court went a step further and has ordered recording of evidence of the following expert witnesses through internet conferencing instead of video conferencing.

Thus, the Indian Legal System has now recognized video conferencing as an extremely effective instrument to collect evidence as it assists in curbing the unnecessary

6 AIR 2005 CAL 11

attendance and also at times save the parties from the costs borne on transportation and avoid other inconveniences that may arise when a witness is unable to travel on account of his pre-occupied schedule and specially the expert witnesses. This advance facility of video conferencing has reduced the evidential impediment and legal uncertainties surrendering the use of Information Technology such as cost of procuring equipments, other technological issues involving data protection, filing of voluminous documents and the evidence adduced in the absence of physical presence of the parties. The facility of video conferencing has also given a new dimension of internationally commissioned arbitration and brought consistency in the proceedings established in the Indianised form of arbitration.

32 The use of video conferencing is there to stay and we do not feel that there is any infraction of the right of the accused when the evidence is adduced through video conferencing. In order to fall in tune with the law enunciated by the Hon'ble Apex Court, the Code of Criminal Procedure

itself came to be amended and a proviso came to be inserted by in Section 275 with effect from 21st December 2009 which pertains to "recording in warrant cases". The proviso added to sub-section (1) of Section 275 reads thus :

> *"Provided that evidence of a witness under this sub-section may also be recorded by audio video electronic means in the presence of the Advocate of the person accused of the offence"*

33 In light of the aforesaid judgment, we do not find any substance in the submission advanced by Shri Pradhan, in as much as we are also of the opinion that advancement of Science and Technology must also benefit the procedural law and the judgment relied upon by the learned counsel Shri Pradhan are of a period when technology had not advanced so much and it was not even contemplated at the relevant time that a day would come when the evidence could be recorded when the witnesses are miles away. The Indian Courts in the last few decades have been pro-active in embracing the advance technology and use of video conferencing for recording of evidence is one such pioneer step. In light of aforesaid developments, we do not find any flaw when the evidence in the present trial was recorded through video conferencing.

34 Shri Pradhan also objects to the reliance of the prosecution on the CCTV footage which is in the form of electronic evidence and advances a submission that the Indian Evidence Act, 1872 came to be amended by Act No.21 of 2000 where Section 65A and 65B came to be inserted as special provisions of dealing evidence relating to electronic record. He makes a categorical submission that the contents of the electronic record can be proved only in accordance with the provisions of Section 65B. He would place reliance on the authoritative pronouncement of the Apex Court in case of ***Anwar P.V. vs. P.K. Basheer***[7]***,*** where the Apex Court had considered the electronic evidence and its evidentiary value. The submission is that the said evidence is admissible strictly on compliance of the condition stipulated in Section 65-B and which includes a certificate as contemplated in clause (4) of Section 65B. Thus, according to Shri Pradhan, such a certificate issued by a competent person ensures its source and authenticity which are the two hall marks pertaining to electronic record, since electronic records are more susceptible

7 (2014) 10 SCC 473

to tampering, alteration, transportation etc. Shri Pradhan would submit that in the present case, the CCTV footage relied upon by the prosecution to prove a circumstance that the accused was present on the platform of Lokmanya Tilak Terminus on the day when Esther arrived on LTT, cannot be relied upon, in absence of any such certificate being produced on record. Shri Pradhan would submit that the prosecution has relied on the evidence of PW 33, an RPF Personnel from Lokmanya Tilak Terminus and PW no.31, an employee of the Central Government. It is only through this witness the prosecution has relied on the footage dated 5th January 2014 which was available on the CCTV cameras and was handed over to the Investigating Officer in a pen-drive and after transmitting the data. According to Shri Pradhan, said clippings are inadmissible in evidence in terms of Section 65B of the Indian Evidence Act.

Per contra, the Special Public Prosecutor Shri Thakare, apart from relying on the judgment of the Hon'ble Apex Court in the case of ***Anwar P.V. vs. P.K. Basheer*** (supra) has also placed reliance on a latest judgment delivered by the

Hon'ble Apex Court in case of ***Shafhi Mohd Vs. State of Himachal Pradesh***[8]**.** The submission of the Special P.P is to the effect that the said certificate as contemplated under clause (4) of Section 65B of the Evidence Act is not a pre-requisite for considering it as an admissible evidence.

35 We have considered the arguments of both the counsel on the said point and we delved into the issue. The Information Technology Act, 2000 enacted by Parliament is a legislation which provides legal recognition for transactions carried by means of electronic data interchange and other means of electronic communication which involves the use of alternatives to paper base methods of communication and storage of information to facilitate electronic filing of documents with the Government agencies. The statements of objects and reasons of the said enactment highlights the background in which the said enactment was introduced, being the new communication systems and digital technology which have brought in dramatic changes, a revolution is occurring in the way people transact business and correspondingly, there is

8 (2018) 2 SCC 801

also a revolution in the manner in which such evidence is tendered before the Court. A documentary evidence in form of electronic record, therefore, had to find its way in the Indian Evidence Act and an amendment was introduced to the said Act, wherein Section 59 which deals with 'proof of facts by oral evidence' came to be amended and the contents of documents or electronic records were permitted to be proved by oral evidence. Section 65A and 65B came to be introduced by making a special provision for proving the contents of electronic record in terms of Section 65B. The said section which contains a non-obstante clause permitted any information contained in an electronic record being printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer, deemed it to be a document if the conditions stipulated in the section were satisfied in relation to the information and computer in question and it held such record being admissible in any proceedings, without proof or production of the original, as evidence of any contents of the original or of any fact stated therein of which direct evidence would be admissible. The said section then stipulated the

conditions in respect of a computer so as to make the evidence drawn from such a source admissible. The Hon'ble Apex Court in case of ***Anwar P.V. vs. P.K. Basheer*** (supra) construed the said provision and concluded that the Evidence Act do not contemplate or permit the proof of the electronic record by oral evidence if requirements under Section 65B of the Indian Evidence Act are not complied with. After referring on the two Judge Bench decision in case of ***State (NCT of Delhi) Vs. Navjot Sandhu***[9] which had an occasion to consider an issue on production of electronic record as evidence in form of print outs of the computer records of the calls pertaining to the cell phones, the three Judges Bench made following observations:

> "The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under Section 63 read with Section 65 of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of Sections 59 and 65Adealing with the admissibility of electronic record. Sections 63and 65 have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by Sections 65A and 65B. To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be

9 (2005) 11 SCC 600

> overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65B are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is inadmissible.

The proposition set out by the aforesaid judgment makes it clear that an electronic record by way of secondary evidence shall not be admitted by evidence unless the requirement of section 65B are satisfied and in case of CD/VCD chips, the same shall be accompanied by the certificate in terms of Section 65B obtained at the time of taking the documents, without which the secondary evidence pertaining to that technical record is inadmissible. The said certificate contemplated under Section 65B is in terms of Sub-section (4) of Section 65 which reads thus :

> (4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say,—
>
> (a) identifying the electronic record containing the statement and describing the manner in which it was produced;
> (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

> (c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

What is thus contemplated is a certificate purported to be signed by a person occupying a responsible official position in relation to operation of the relevant device or management of the relevant activities to certifying to the effect that he had identified the electronic record containing the statements and also certifying that the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purpose of any activities regularly carried on and that the information derived was regularly fed into the computer in the ordinary course of the activities. The certificate should also contain a declaration to the effect that the computer was operating properly or not, mentioning the period during which it was out of operation. The said certificate is, however, not produced by the witnesses who were

relied by the prosecution and therefore, Shri Pradhan makes a statement that the said evidence is not admissible. Our attention was invited to the judgment in case of ***Shafi Ahmed*** (supra). The Hon'ble Apex Court was called upon to deal with an apprehension expressed on the question of applicability of conditions under sub-section (4) of section 65B of the Evidence Act to the effect that if a statement was given in evidence, a certificate was required in terms of the said provision from a person occupying a responsible position in relation to operation of the device or management of the relevant activities. In this backdrop, the Apex Court made the following observations.

> 11. Sections 65A and 65B of the Evidence Act, 1872 cannot be held to be a complete code on the subject. In Anvar P.V. (supra), this Court in para 24 clarified that primary evidence of electronic record was not covered under Sections 65A and 65B of the Evidence Act. Primary evidence is the document produced before Court and the expression "document" is defined in Section 3 of the Evidence Act to mean any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purpose of recording that matter.
>
> 12 The term "electronic record" is defined in Section 2(t) of the Information Technology Act, 2000 as follows:
>
> "Electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche."
>
> 13. Expression "data" is defined in Section 2(o) of the Information Technology Act as follows.
>
> "Data" means a representation of information, knowledge,

> facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."
>
> 14. The applicability of procedural requirement under Section 65B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot be held to be excluded. In such case, procedure under the said Sections can certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in absence of certificate under Section 65B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65B(h) is not always mandatory.
>
> 15. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by Court wherever interest of justice so justifies.

The Hon'ble Apex Court has, therefore, clarified the legal position on the subject of admissibility of electronic evidence in absence of the certificate contemplated under Section 65B(4) of the Evidence Act being produced and has clarified that a party who is not in possession of device from where the document is produced, such party cannot be required to produce the

certificate under Section 65B(4) and the applicability of the requirement of certificate being merely procedural can be relaxed.

36 Though Shri Pradhan is extremely critical about the reliance on the judgment in case of ***Shafhi Mohd*** (supra) and which, according to him, is not sustainable in wake of the Three Judge Bench decision in ***Anwar P.V. vs. P.K. Basheer*** (supra) and he submits that the said judgment in case of Shafhi is a mere clarification and does not amount to ratio and hence cannot be relied upon. We are unable to accede to the argument of Shri Pradhan to declare that the law laid down in ***Shafhi Ahmed*** is *per incuriam* for, in our opinion, it is not upon for us to access whether it is so since we are bound by the ratio of the said judgment which gets clearly attracted in the facts of the present case.

37 The witness examined by the prosecution on the said point i.e. Prosecution Witness No.31 who was working in the CCTV department of the Central Railway has deposed

before the Court about the operation and the mechanism of automatic recording system on the LTT Railway Station. He has clearly deposed that there are two monitors covering 20 and 16 cameras respectively which are fixed on all the platforms and inside the rooms. He has also deposed that there is a hard disk in the server and recording is saved there and after expiry of period of one month, in case of one server and 12 days in case of another server, the recording is automatically deleted. The said witness has deposed that the technique in the server is under the control of the Central Railway. He had categorically deposed that the footage was collected in January 2014 with the permission of the RPF and which was transmitted to the police officials from Kanjur Marg Police station in a pen drive. The said evidence is corroborated by the testimony of PW no.33 who was on duty in RPF who was responsible for the security of the Lokmanya Tilak Terminus and for ensuring the security, he deposed before the Court that 36 CCTV cameras were installed on railway station. The said witness also corroborated that the display of the said cameras is in the CCTV control room and the maintenance of CCTV cameras was given to a private company.

This witness has given the date on which the police had approached the RPF and the said date is disclosed as '18th January 2014'. After obtaining the permission from the RPF, instructions were given to Shri Pandey who was responsible for maintenance of the CCTV cameras to give the footage to the Investigating Officer. A specific question was put to this witness as to whether there was any fault in the CCTV server during the said period and he deposed that on 18th January 2014 there was the fault and the server was not working on account of fluctuation in electricity and therefore, Shri Pandey was called for maintenance. The prosecution has also examined the panch witness Shri Girish Mishra who is a signatory to the process of transmission of data which is exhibited as Exhibit-36. The panchnama gives a detail of the procedure that was adopted and the witness has also deposed as to how the footage came to be searched and the data came to be retrieved of the time slot between 4.00 am to 7.00 am of 5th January 2014. Perusal of the panchnama would disclose the detailed procedure that was followed for transmitting the data in the pen drive, and it was ensured that the said pen drive was blank, and thereafter, it

also describe the folders that were retrieved from two DVRs i.e. DVR1 and DVR2 and how it was downloaded and transmitted. The entire procedure being enumerated in the panchnama, we do not have any hesitation to hold that it was not susceptible for any intervention as the cameras affixed on the LTT were recording the events and storing it as a part of its regular activity and it was being fed into the hard disk in the ordinary course of the said activities. We have perused the cross-examination of the said witnesses, which, in any way, do not shake the credibility of the witnesses as far as the technical procedure described by the said witnesses and the witnesses had categorically admitted that the hard disk was never seized by the police, but what was transmitted was the data from the two DVRs. In such circumstances, we do not find merit in the submission of Shri Pradhan that the electronic evidence relied on by the prosecution do not stand the scrutiny of Section 65B of the Evidence Act.

38 Shri Pradhan also makes a serious complaint that the learned Sessions Judge has completely thrown to air the

procedure for conduct of a criminal trial. Shri Pradhan has invited our attention to certain dates and specifically the roznama dated 20th November 2014 when the accused was not produced in person and when he was called on video conferencing, it was informed by the jail authority that he was suffering from Tuberculosis and is hospitalized and grievance is that in his absence the trial was conducted. We have carefully perused the roznama and we have noted that on occasions, the accused was produced from Judicial Custody and whenever this was not done, he was produced through video conferencing.

We have carefully perused the roznama of the proceedings which forms part of the paper book. From the perusal of the proceedings dated 13th November 2014, we have noted that an application was filed by the Advocate for the accused for adjourning the case till the accused gets proper medical treatment. The learned Sessions Judge in this backdrop observed that direction was already given for administering proper medical treatment to the accused and he was taken to Sir J.J. Hospital and therefore, there was no need to adjourn the case. On an application filed for giving proper

medical treatment, since the accused was suffering from fever, cold, cough and body pain, directions were issued by the Court, and he was taken to Sir J.J. Hospital and his blood sample was also collected and it was suspected that he was suffering from Tuberculosis. The Court therefore, gave directions to the concerned Medical Officer to get him properly examined and thereafter, he be treated further for the ailment. On the subsequent date i.e. 14th November 2014, the accused was produced from the jail and he complained about ill-health. On 20th November 2014, accused was not produced from Judicial Custody but the witnesses were present. Application for adjournment was filed on behalf of the accused. When he was called on video conferencing, it was informed that he was suffering from Tuberculosis and he was hospitalized. The learned Addl. Sessions Judge record that the counsel for the accused came at 12 noon and sought an adjournment and subsequently moved an application for adjournment and he stated before the Court that he would proceed with him only in presence of the accused and he was not ready to proceed in his absence. The witness also stated before the Court that

somebody had approached him yesterday and even it was informed by the police officials that the accused is trying to approach the witnesses to tamper with the evidence. The Court, therefore, issued directions after recording the statement of witnesses that somebody had tried to approach him. However, since the accused was not produced on that day, either on video conferencing or through jail, the matter came to be adjourned to 24th November 2014. It appears that on 24th November 2014, the accused was not present from Judicial Custody since he was undergoing treatment and hospitalized, but on the said date, when two witnesses i.e. PW No.8 and PW No.9 were examined, the Advocate for the accused was present and he cross-examined both the witnesses on the said date. However, thereafter, on 3rd December 2014, the accused was produced on video conferencing. On 10th December 2014, the session judge received the medical report of the accused and an adjournment was sought by the counsel for the accused as he was not keeping well which came to be granted. The Court has clearly noted in its next order dated 12th December 2014 passed below Exhibit 94 on an application for meeting his father who

was on death-bed. While rejecting the said application, the learned Judge has observed that the accused is suffering from Tuberculosis and is hospitalized in the jail and in such circumstances, it is not advisable for him to mingle in general public. When we have carefully gone through the record, we have noted that barring two dates, i.e. 20th November 2014 and 24th November 2014, the accused was produced either from video conferencing or from Judicial Custody and in his absence since he was hospitalized, his counsel was present and had willingly cross-examined the witnesses. In the backdrop of the aforesaid facts, we do not find any merit in the submission of Shri Pradhan that the proceedings against the accused are vitiated on account of his non-production on certain dates.

Shri Pradhan also took an objection to the reliance on the evidence of PW No.9 in form of extra-judicial confession. He submits that it cannot form the basis of conviction and its reliance is unsustainable. It is no doubt true that evidence in form of extra-judicial confession is a weak piece of evidence and the Court must ensure that it inspires confidence and it necessarily needs a corroboration by other prosecution

evidence. The extra-judicial confession withstand the scrutiny, must be voluntary and inspiring confidence. The admissibility and evidentiary value of such a confession is by this time well-settled and the Hon'ble Apex Court in case of ***Sahadevan and Another v. State of Tamil Nadu***[10]***,*** observed thus :

> *15.1 In Balwinder Singh v. State of Punjab [1995 Supp. (4) SCC 259], this Court stated the principle that*
>
> *"10 An extra-judicial confession, by its very nature is rather a weak type of evidence and requires appreciation with a great deal of care and caution. Where an extrajudicial confession is surrounded by suspicious circumstances, its credibility becomes doubtful and it loses its importance.*
>
> *15.4 While explaining the dimensions of the principles governing the admissibility and evidentiary value of an extra-judicial confession, this Court in the case of State of Rajasthan v. Raja Ram [(2003) 8 SCC 180] stated the principle that :*
>
> *"19 An extra-judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has been made".*
>
> *The Court, further expressed the view that:*
>
> *"19 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*

10(2012) 6 SCC 403

indicate that he may have a motive of attributing an untruthful statement to the accused".

15.6 Accepting the admissibility of the extra-judicial confession, the Court in the case of Sansar Chand v. State of Rajasthan [(2010) 10 SCC 604] held that :-

"29. There is no absolute rule that an extra-judicial confession can never be the basis of a conviction, although ordinarily an extra-judicial confession should be corroborated by some other material. [Vide Thimma and Thimma Raju v. State of Mysore, Mulk Raj v. State of U.P., Sivakumar v. State (SCC paras 40 and 41 : AIR paras 41 & 42), Shiva Karam Payaswami Tewari v. State of Maharashtra and Mohd. Azad v. State of W.B. (2008) 15 SCC 449]"

The aforesaid proposition holds good till date and the Rule of Prudence does not require that each and every circumstance mentioned in the confession must be separately and independently corroborated. In the present case, the prosecution has relied on the testimony of PW 9, not in isolation but his version is corroborated by independent witnesses.

39 On careful analysis of the prosecution evidence brought on record and on hearing the learned Special P.P, we note that the case of the prosecution is based on circumstantial

evidence and the onus to prove its case by leading cogent and reliable evidence is on the prosecution. When the case of the prosecution rest on circumstantial evidence and there is no direct evidence in form of eye witnesses, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused are fully established and lead to a singular conclusion of guilt of the accused. When any prosecution case is based on circumstantial evidence, it must be borne in mind that the circumstance from which the conclusion of guilt has to be drawn should be fully established and it should be consistent with only one hyphothesis i.e. the guilt of the accused. Each circumstance should be conclusive and proved by the prosecution. It is imperative for the prosecution to built up chain of events so complete as not to leave any doubt in the mind of the Court and each circumstance must point finger only towards the guilt of the accused and the evidence should be led to create an effect which excludes any possibility of accused being innocent. In other words, the circumstances forming chain of events should prove cumulatively the guilt of the accused alone to the exclusion of others. Thus, the

circumstantial evidence is a closed and fine network of incidents webbed together from which there is no escape. It would be appropriate for us to refer to the observations of the Hon'ble Apex Court in case of ***Sharad B. Sarda Vs. State of Maharashtra***[11] which read as under :

> 152. Before discussing the cases relied upon by the High Court, we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence 24 Cri.Confirmation Case no.3.2013 alone. The most fundamental and basic decision of this Court is Hanumant V. State of Madhya Pradesh. This case has been uniformly followed and applied by this Court in a large number of later decisions up-to date, for instance, the cases of Tufail (Alias) Simmi .v. State of Uttar Pradesh and Ramgopal v. State of Maharashtra. It may be useful to extract what Mahajan, J has laid down in Hanumant case:
>
> It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be roved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.

11 1984 AIR 1622

153. A close analysis of this decision would show 25 Cri.Confirmation Case no.3.2013 that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

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

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade vs. State of Maharashtra where the following observations were made:(SCC para 19, p. 807:SCC(Cri)p.1047).

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive 26 Cri.Confirmation Case no.3.2013 nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

The ratio emanating from said judgment has been consistently followed by the Hon'ble Apex Court as well the High courts, and has provided a guiding ratio while deciding cases which hinges on circumstantial evidence.

40 In the backdrop of the said principle, we will have to examine whether the prosecution has firstly proved the incriminating circumstances against the accused and whether the incriminating circumstance established by the prosecution are so interwoven to each other that it points towards the guilt of the accused and the chain of events in form of circumstances brought on record by the prosecution leads to an irresistible conclusion that it is only the accused who is responsible for commission of the crime in question leading to the death of Esther. From the evidence which we had referred to above, the prosecution has proved the following circumstances :-

(i) The deceased Esther who was working with TCS Andheri, Mumbai and a resident of Vijaywada, Andhra Pradesh has boarded the train from Vijaywada to LTT, Kurla on 4th January 2014.

(ii) Phone calls made by her father to Esther on 5th January were not answered and she did not reach her hostel located in Andheri.

(iii) A partly burnt decomposed body was found on 16th January 2014 near the service road of Eastern Express Highway near Kanjur Marg which came to be identified by PW no.26 as to be of his missing daughter Esther.

(iv) The post mortem report establish that the death of the deceased was homicidal and there was injury to her private parts, thereby establishing that she was raped.

(v) The Inquest Panchnama and Post Mortem report establish the the body was partly burnt and attempt was made to destroy the evidence by burning the body.

(vi) The accused consumed liquor at the residence of PW no.12 in the company of PW no.9 and then left his residence by a motorcycle belonging to PW No.9.

(vii) The CCTV footage collected from the LTT Railway station disclosed that the accused was loitering on the platform at 4:50 am

(viii) In the CCTV footage it is seen that the deceased had accompanied the accused while leaving LTT and she was last seen in the company of the accused in the footage.

(viii) The accused was seen near the spot on the Eastern Express Highway with the trolley bag and a bag pack belonging to the deceased.

(ix) The circumstance of the accused seen along with the trolley bag in the morning on the date of incident by PW 13 leaving the building.

(x) The subsequent conduct of the accused i.e. going to the Astrologer and performing a puja in order to wash off the sin committed on a woman and the entry in the register of PW 17 establishing that he has paid an amount of Rs.3,000/- for performing the said puja.

(xi) Articles 22, 23 and 24 belonging to the deceased were identified by PW No.26 came to be recovered at the instance of the accused along with her articles i.e. identity card, spectacles, her eye-liner, pencil and the DNA Test confirm that it belonged to the deceased.

(xii) The accused in his extra-judicial confession to PW 9 had disclosed that he had poured petrol on the dead body of Esther and set it on fire after committing rape and on killing her.

(xiii) The medical examination of the accused about his potency test and mental health.

41 The aforesaid circumstances and the chain of events which has been brought by the prosecution on record has been established by cogent and reliable evidence in form of oral and documentary evidence. The above circumstances and the chain of events is complete with regard to the commission of crime in question leading to death of Esther. The cumulative effect of the entire prosecution points unmistakable towards the guilt of the accused.

42 The prosecution has also proved the circumstance of the deceased last seen in the company of the accused. It has relied upon the evidence in form of the CCTV footage and the recording at the Kurla Terminus dated 5th January 2014. The prosecution witness no.26 – father of the deceased has identified the deceased in the CCTV footage whereas PW 27 Hemant, a person staying in the area where the accused was residing has identified the accused in the CCTV footage of the platform to be the accused. The prosecution has relied on the evidence of PW No.21 Ganesh Shetty working as Pay and Park

Supervisor at Kurla Terminus who had seen the accused and deceased leaving together on motorcycle on 5th January 2014. The said witness has also identified the accused during the Test Identification Parade conducted in Arthur Road jail. Through the said witness, the prosecution has established that the deceased alighted at LTT in the morning hours on 5th January 2014 and she left the railway station along with the accused on his motorcycle. The prosecution has thus pressed into service the last seen theory which comes into play where the deceased is seen lastly in the company of the accused and where the time gap between the point of time when the accused and the deceased was last seen alive and when the deceased is found dead, is so small that the possibility of any person other than the accused being the author of the crime becomes impossible. By invoking the said doctrine of last seen together, the burden of proof then shifts to the accused requiring him to explain as to how a live person became a deceased and at what point of time did he part with the company of the deceased since they were last seen together. In case of ***Trimukh Maroti Kirkan Vs.***

State of Maharashtra[12], the Hon'ble Apex Court observed thus :

> 22 Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes placed in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer any explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime.

43 The doctrine of last seen together shifts the burden of proof on the accused requiring him to explain how the incident occurred. Failure on the part of the accused to furnish any explanation in this regard would give rise to a very strong presumption against him. Section 106 of the Indian Evidence Act, 1872 mandates that any fact which is especially within the knowledge of any person, then the burden of proving that fact is upon him. Section 106 reads thus :

> *106. Burden of proving fact especially within knowledge.— When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him.*

12 (2006) 10 SCC 681

Illustrations

(a) When a person does an act with some intention other than that which the character and circumstances of the act suggest, the burden of proving that intention is upon him.
(b) A is charged with travelling on a railway without a ticket. The burden of proving that he had a ticket is on him

The accused has failed to discharge the said burden. Further when this circumstance relied on by the prosecution has been put to the accused while being examined under Section 313 of the Code of Criminal Procedure, except denial, he has not offered any explanation. In **Sunil Clifford Daniel Vs. State of Punjab**[13] , the Hon'ble Apex Court has observed thus :

> "It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C. to furnish some explanation with respect to the incriminating circumstances associated with him, and the Court must take note of such explanation even in a case of circumstantial evidence, to decide as to whether or not, the chain of circumstances is complete."

In ***State of Maharashtra Vs. Suresh***[14], the Apex Court has observed thus :

> *"when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculpating him. In a situation like this such a false*

13 (2012) 11 SCC 205
14 (2000) 1 SCC 471

answer can also be counted as providing "a missing link" for completing the chain.

When the prosecution has proved its case beyond reasonable doubt and the accused has expected to furnish some explanation to the incriminating circumstances which have come in evidence and put to him. A false explanation may be counted as providing a missing link for completing the chain of circumstances and a non-explanation would also be taken as a link for completing the chain of circumstances.

44 In ***Munish Mubar Vs. State of Haryana***[15], where the Act was dealing with a case where the dead body of the deceased, an NRI was found lying in a plot of land having multiple injuries and the boarding card issued by the Jet Airways and one blood stained hammer and a knife was found near her body. The appellant who claimed to be arrested while travelling in a Santro car and the Investigating Officer collected the records related to parking of the said Santro car at the relevant time from car parking stand of New Delhi Airport. The appellant upon his arrest made a disclosure statement to the

15 (2012) 10 SCC 464

police to show the place where he had disposed of the dead body of “A” and recovered the articles belonging to and the blood stained clothes of the deceased. The call record of the appellant's telephone were also pressed into service to establish that he was present in the vicinity of the place of occurrence. The appellant failed to offer any explanation in respect of the incriminating circumstance associated with him. The Apex court then held that it was the duty of the appellant to furnish some explanation in his statement under Section 313 of the Code of Criminal Procedure and under what circumstances, his car had been parked at Delhi Airport and it remained there for three hours on the date of occurrence during exactly the time period in which the deceased was to arrive and was then allegedly done to death by the appellant. Appreciating the case of the prosecution based on circumstantial evidence, when the circumstances were fully established and found to be consistent with the hypothesis regarding guilt of the accused, the Hon'ble Apex Court dismissed the Appeal filed by the appellant on the ground that the prosecution had proved its case beyond reasonable doubt.

45 In the case in hand, prosecution has pressed into service several circumstances, each being independent and conclusive. Each of the circumstances relied on by the prosecution being taken together form a chain of events leading to the accused being the perpetrator of the crime and each and every circumstance was put to the accused while being examined under Section 313 of the Code. The accused has answered every question put to him by asserting that he did not know or that the circumstance put to him was false. On asked as to why the witnesses are deposing against him, he responded to Question no.378 by saying that on say of the police, the witnesses had deposed against him.

The accused had relied on three witnesses as defence witnesses. The first witness relied on by the prosecution is one Abhijit Dattatraya Sathaye working as Senior Assistant Editor with Mumbai Mirror. The said witness had deposed that he had covered Esther Anuhya murder case from the time of registration of the offence till the filing of the charge-sheet. The extract of Mumbai Mirror has been exhibited

as Article 40 which had published the photographs of the accused along with a kundli. He deposed that he had obtained the photograph of kundli from his friends and it came to be published in the newspaper. The said Article 40 also highlighted the criminal antecedents of the accused and which described him as history-sheeter, being indulged into activity of bag lifting in railway. The said witness being subjected to cross-examination by the prosecutor admitted that the accused was history sheeter and bag lifter in the railway and many cases were registered against him in Gowandi, Nasik, Manmad and Madhya Pradesh. Another witness which the accused has examined is Defence Witness No.2 and is the senior crime reporter in Mid Day Newspaper who had published the photographs of the accused, victim and the witnesses. Article 41 which carried a news about the incident was also placed on record during the said witness. Another reporter of Mid-Day Sagar Rajput came to be examined as D W no.3 who had published the photograph of the accused, parents and wife in the newspaper dated 8th March 2014 and the name of the accused was disclosed as Chandrabhan Sanap. The said cutting

of newspaper is exhibited as Article 42. Another defence witness examined by the accused is Vikas Phulkar working as Nodal Officer in Vodafone Limited. He deposed that the Call Details Record (CDR) of Phone No. 9833841248 in the name of Nandkishore Sahu was given by him to the police and he has given a certificate under Section 65B of Evidence Act. The said witness has been cross-examined by the learned Prosecutor who had deposed that from 12th February 2014 to 2nd March 2014, there was no phone call or SMS delivered from the said mobile and since the mobile was not active, it cannot be said whether its location was Mumbai or out of Mumbai. However, it is admitted by the witness that on 6th January 2014, Sahu received phone call from Mobile No.7775853547 and two calls were received on 8th December 2014 from the same number. The cross examination of the defence witness only lead to the conclusion that the said witnesses examined by the accused in no way come to his rescue nor have they been able to demolish the prosecution case based on circumstantial evidence. The only attempt on the part of the accused was to establish through the DW No.1 to DW No.3 is that the face of the

accused was known to the general public and it was all over published in the newspaper and that is how Shri Pradhan makes a feeble attempt to argue before us that the Test Identification Parade conducted is faulty and cannot be relied on by the prosecution.

46 The specific submission advanced by Shri Pradhan is that the evidence of Prosecution Witness No.39 and the cross-examination of this witness who conducted the Test Identification Parade exposes the case of the prosecution. The said witness who conducted the Test Identification Parade was subjected to exhaustive cross-examination. He deposed before the Court that he was conversant with the guidelines while conducting the Test Identification Parade and accordingly, he has mentioned the procedure followed by him in the Memorandum. He had admitted that there was a lapse on his part to mention in the panchnama that unauthorized persons were not present at the time of Test Identification Parade. The extensive cross-examination of the said witness do not yield any benefit to the accused. Though certain procedural lacunae have

been attempted to be drawn from the said witness, it does not shatter the testimony of the said witness. In any contingency, the law as regards the Test Identification Parade and the reliance on such evidence is settled by now. Test Identification Parade has been considered as merely a corroborative piece of evidence and not substantive evidence. Even in absence of Test Identification Parade, the convictions have been sustained and when the witnesses have identified the accused before the Court, it has been held that mere fact that no Test Identification Parade was conducted, would not be a reason to discard the evidence of the witnesses. The Hon'ble Apex Court in case of ***Ashok Debbarma @ Achak Debbarma vs State Of Tripura*** [16] has observed thus :

> *17. Above-mentioned decisions would indicate that while the evidence of identification of an accused at a trial is admissible as substantive piece of evidence, would depend on the facts of a given case as to whether or not such a piece of evidence can be relied upon as the sole basis of conviction of an accused.*

47 In ***Malkhansingh and Ors. vs. State of Madhya Pradesh***[17], this Court clarified that the Test

16 (2014) 4 SCC 747
17 AIR 2003 SC 2669

Identification Parade is not a substantive piece of evidence and to hold a Test Identification Parade is not even rule of law but a rule of prudence so that the identification of the accused inside the Court room at the trial can be safely relied upon. We are of the view that if the witnesses are trustworthy and reliable, a mere fact that no Test Identification Parade was conducted, itself, would not be a reason for discarding the evidence of those witnesses. Thus, when the witnesses examined by the prosecution has identified the accused in the Court, an irregularity of procedure as sought to be pointed out by Shri Pradhan cannot be a ground to discard the substantial piece of evidence in form of identification of the accused by the witnesses in the Court. In any case, identification of an accused in a Test Identification Parade is only a circumstance corroborative of the identification of the accused in Court. Further, such conduct of Test Identification Parade may lose its worth if the witnesses either know the accused or if they have been shown his photographs or if he has been exposed by the media to the public. Holding a Test Identification Parade only assist the Investigating Agency to ascertain whether the

investigation is being conducted in a proper manner and in a proper direction.

48 The evidence brought on record by the prosecution thus establishes its case beyond reasonable doubt. Though Mr. Pradhan has invited our attention to the extensive cross-examination to which the prosecution witnesses were subjected to, he was not able to pinpoint from their cross-examination that the credibility of these witnesses is doubtful and that they are not trustworthy. The evidence adduced during the course of trial needs to be appreciated cumulatively and in its correct and true perspective. It is the duty of the Court to unravel the truth and while appreciating the evidence its primary attempt should be to sift the chaff from grain and to ascertain from the evidence brought on record as to whether there is a ring of truth in their testimony. Where the evidence brought on record is consistent and corroborated by other piece of evidence, then, there is no reason as to why version of prosecution case, as unfolded, be not believed.

49 With the assistance of the learned counsel appearing on both sides, our attention was painstakingly drawn to the extensive and exhaustive cross-examination of all the witnesses. We do not find nor has Mr. Pradhan been able to convince us that testimony of the witnesses suffer from material discrepancies and discrepancies are of such a nature that it will materially affect the case of the prosecution itself.

When a witness is examined at length, it is but natural that his testimony suffer from some discrepancies as he may mis-out on some discrepant details but in such circumstances, the Court appreciating evidence should keep in mind that it is only when the discrepancies in evidence of witness are so incompatible with the credibility of his version, it is only then the Court would be justified in doubting his evidence. Mr. Pradhan has not been successful in inviting our attention to any major contradictions which would require our attention and consideration.

We cannot refrain ourselves from taking note of the fact that the prosecution witnesses have been made to

undergo lengthy and pervasive cross-examinations, but at occasions, the cross-examination was not as to the 'Relevant Fact' which would test the credibility of the witness and we would record only with displeasure that it was on issues which were not relevant. We must note with great responsibility that though burden of proof to prove the guilt of the accused lies on the prosecution and in a case based on circumstantial evidence, the prosecution is duty bound to prove the existence of each fact independently and taken together which would lead to chain of circumstances, through the prosecution witnesses who would prove a particular fact and these prosecution witnesses can be subjected to cross-examination. Section 137 of the Indian Evidence Act, 1872 permits the cross-examination of a witness by the adverse party who has been called and who has deposed before the Court. However, the purpose of cross-examination being to attack the credibility of witness who is deposing before the Court and though at times its object is to ascertain the truthfulness of these witnesses, it is also rule of prudence and also contemplated under Section 149 of the Indian Evidence Act, 1872 that witness should not be subjected

to such questions unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded. The purpose of questions which may be lawfully permitted in cross-examination and which are set out in section 146 of the Indian Evidence Act, 1872, are any questions which tend to test his veracity, to discover who he is and what is his position in life or to shake his credit by injuring his character. The cross-examinations of the prosecution witnesses in the present case have been carefully scrutinized by us and we have noted that the trial Court has rightly appreciated the testimonies of these witnesses. The Sessions Court, who is in better position to appreciate the evidence since it is the only Court which gets an opportunity to observe the demeanor of the witness, has observed that though none of the witnesses examined by the prosecution can be disbelieved and the evidence of these witnesses was found to be trustworthy and not affecting the prosecution case. In respect of some of the witnesses, like PW-16 and PW-17, namely, the Astrologer and Priest, learned Sessions Judge has noted that the evidence of these witnesses does not create any incriminating fact in

connection with the offence with which the accused is charged and there is no reason for the police to fabricate such a piece of evidence after going to such a far-off place to the scene of offence and its occurrence. Panch-witnesses whose credibility was attempted to be destroyed by subjecting them to serious cross-examination, also did not result into any shadow being cast on their credibility.

50 In the backdrop of the aforesaid facts when the prosecution case is found to be not deficient in trust and a minor discrepancies here and there would not belie the case of the prosecution in its entirety. Even if there is some minor discrepancies, they are not worthy attaching any significance. If the major portion of the prosecution case is found to be complying with the parameters of the burden or proof being discharged by the prosecution, then we do not feel that there is any scope for us to interfere with the finding recorded by learned Sessions Judge after examining and scrutinizing the evidence in totality and on consideration of the cumulative effect. The attempt of Mr. Pradhan to read one line here and

one line there from the cross-examination is not of any succor to him to shake the trustworthiness of the prosecution case.

51 Mr. Pradhan has also faintly attempted to argue before us that motive is not proved by the prosecution. We are afraid that the said submission is to be referred to, only to be rejected. It is settled position of law that in each and every case it is not incumbent on the prosecution to prove the motive for crime. The Hon'ble Apex Court in the case of ***Vijay Shankar v. State of Haryana [(2015) 12 SCC 644]*** was pleased to observe in paragraph 12 :

> "In each and every case it is not incumbent on the prosecution to prove the motive for the crime. Often, motive is indicated to heighten the probability of the offence that the accused was impelled by that motive to commit the offence. Proof of motive only adds to the weight and value of evidence adduced by the prosecution. If the prosecution is able to prove its case on motive, it will be corroborative piece of evidence. But even if the prosecution has not been able to prove its case on motive that will not be a ground to throw the prosecution case nor does it corrode the credibility of the prosecution case. Absence of proof of motive only demands careful scrutiny of evidence adduced by the prosecution. In the present case, absence of convincing evidence as to motive makes the Court to circumspect in the matter of assessment of evidence"

Once we have concluded that prosecution on the basis of the medical evidence brought on record has proved that the deceased was subjected to rape and the accused was tried for the offence punishable with rape, we do not think that the motive of the accused in committing the crime needs to be exclusively spelt out. It is obvious that the accused who after drinking liqour was wandering the whole night and spotted on the railway platform in the early hours and on seeing a young lonely helpless woman, who easily fell prey to his concocted story of offering to drive her to destination and who took her to the secluded spot from where the body was recovered in a highly decomposed state, we need not to find motive for committing the crime with which the accused was charged.

52 Mr Pradhan was severally critical about the manner in which the test identification memorandum was exhibited during the course of trial. He submitted that the memorandum of test identification parade is brought on record through PW 36, API attached to crime branch unit and this witnesses was appointed as co-ordinating officer for conducting of the test

identification parade which was conducted on 25th March 2014 in the Arthur Road Prison. Mr. Pradhan, submitted that the test identification parade was carried out by Nayab Tahsildar V. J. Kanekar and the memorandum discloses that one Sachin Suresh Gaikwad and Kirit Joshi have acted as panch to the said memorandum panchnama and have signed the same. However, panchanma according to Mr. Pradhan is not signed by PW-36 nor he is author of the document and therefore in terms of the section 61 of the Indian Evidence Act, 1872 which mandates that the contents of the documents may be proved either by primary or secondary evidence, said memorandum panchanama exhibited do not satisfy the test prescribed under the Indian Evidence Act, 1872. In order to buttress his submission, Mr Pradhan relied upon decision of the Apex Court in ***Ramchandra Kapse vs. Haribansh Rambal Singh***[18] . We have carefully perused the said judgment and we fail to understand as to how this judgment assists the submission of Mr. Pradhan. The said judgment is pronounced in the backdrop of the Representation of Peoples Act, 1951 and what the

18*[(1996) 1 SCC 206]*

Hon'ble Apex Court was dealing with was an issue arising out of election petition and whether he was indulged in "corrupt practices". We do not see any relation of the said judgment to the facts in hand. However, the argument advanced by Mr. Pradhan needs to be rejected in the backdrop of section 291A of the Code of Criminal Procedure, 1973, which was inserted in the Code by amendment with effect from 23rd June 2006 and which reads thus :

> **"Identification report of Magistrate**
> Any document purporting to be a report of identification under the hand of an Executive Magistrate in respect of a person or property may be used as evidence in any inquiry, trial or other proceeding under this Code, although such Magistrate is not called as a witness:
>
> **Provided** that where such report contains a statement of any suspect or witness to which the provisions of section 21, section 32, section 33, section 155 or section 157, as the case may be, of the Indian Evidence Act, 1872(1 of 1872), apply, such statement shall not be used under this Sub-Section except in accordance with the provisions of those sections.
>
> The Court may, if it thinks fit, and shall, on the application of the prosecution or of the accused, summon and examine such Magistrate as to the subject matter of the said report."

53 In the backdrop of the said provision, we do not find any fault in the prosecution exhibiting the said memorandum through one of the investigating officer. In any contingency, Mr. V.J. Kanekar, the Resident Deputy Collector who had conducted the test identification parade was brought into witness box and since the document in the form of memorandum panchanama was already exhibited, he was not examined by the prosecution; but at the same time opportunity was afforded to the accused to cross-examine him. In the cross-examination, the witness has re-iterated the fact that he had followed the procedure stated by him in the memorandum. He has withstood the scrutiny on the manner in which the cross-examination has been conducted and Mr. Pradhan has failed to point out any legal infirmity in conducting of the test identification parade which would nullify its effect.

54 It is not now strange to note that the crimes and specially the crimes against the society are duly reported by the print media as well as the electronic media. When such crimes are reported, all the details of the investigation even when in

progress is frequently reported including the photographs of the suspect or the accused. Whenever a person is arrested as a suspect and before he is converted to an accused, the media is all out with the details of investigation and some times, at the cost of investigation. However, there being no restraint on the media publishing such stories sometimes out of public curiosity and public interest involved, it is not uncommon to find photographs of the suspect/accused being made known to the public. In such circumstances, the Test Identification Parade may lose its credibility and will have to be accepted in a corroborative piece of evidence. Therefore, we do not find any merit in the submission of Shri Pradhan.

55 On being satisfied with the case of the prosecution which has established the factum of commission of the crime by the accused, which involved extreme depravity and reflective of unrestrained selfishness, which conserves the individual interest and the ultimate tendency of the accused, we come to the issue of imposition of death penalty on the accused. The learned Addl. Sessions Judge has given due consideration to the cogent

and reliable evidence brought on record and has arrived at an inference that the crime in question was performed by the accused with exceptional depravity and brutality. Before awarding the death sentence, the learned Sessions Judge has drawn a balance sheet of aggravating and mitigating circumstances and examined the facts of the case so as to record a finding whether the case falls within 'rarest of rare' and whether it satisfies the test laid down by the Hon'ble Apex Court almost four decades back in case of ***Bachan Singh Vs. State of Punjab***[19]. The learned Judge has taken into consideration the mitigating circumstances put forth i.e. the absence of direct evidence, accused being of young age, absence of criminal antecedents, his diagnosis for Tuberculosis and he being the sole earning member in the family on whom his wife, children and old mother are dependent on. Another mitigating circumstance in form of the subsequent conduct of the accused while undergoing the sentence was also pressed into service and it was attempted to canvass that there was no complaint against him from the jail authorities during the

19 AIR 1980 SC 989

period of under trial detention. The learned Judge has given due consideration to the said mitigating circumstance as against the aggravating circumstances which were noted to be as follows:-

> *(a) Offence committed in a pre-planned and diabolical manner with exceptional brutality and depravity.*
>
> *(b) Anti-social nature of the crime*
> *and*
>
> *(c) the incident has caused a stir in the society and shocked its collective conscious.*

By drawing a balance sheet between the aggravating and mitigating circumstance, the learned Sessions Judge observed that by taking into consideration the manner in which the offence was executed, the enormity of the crime and the collective conscious of the society being shocked, the balance-sheet is drawn of mitigating and aggravating factors and even if maximum weightage is given to the mitigating factors, the aggravating factors far outweigh the balance. The Sessions Judge has placed reliance on the observations of the Bombay High Court in case of ***State of Maharashtra Vs. Haresh***

Mohandas Rajput Criminal Appeal No.1020 of 2001 decided on 11th January 2008 wherein the following observations were made :

> *"Moreover, social impact of the crime, particularly where it relates to offences against women, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude of imposition of meager sentence or too sympathetic view may be counter productive in the long run and against social interest which needs to be cared for, protected and strengthened by string of deterrence inbuilt in the sentencing system:*
>
> *"Sexual violence apart from being a dehumanizing act is also an unlawful intrusion of the right to privacy and sanctity of a female. It is a serious blow to her supreme honour and offends her self-esteem and dignity. It degrades and humiliates the victim and leaves behind a traumatic experience. It has been rightly said that whereas a murderer destroys the physical frame of a victim, a rapist degrades and defiles the soul of a helpless female. The courts are, therefore, expected to try and decide cases of sexual crime against women with utmost sensitivity. A socially sensitized Judge is a better armour in cases of crime against women than long clauses of penal provisions, containing complex exceptions and complicated provisos."*
>
> *"Once a person is convicted for an offence of rape, he should be treated with a heavy hand. An undeserved indulgence or liberal attitude in not awarding adequate sentence in such cases would amount to allowing or even to encouraging potential criminals. The Society can no longer endure under such serious threats. Courts must hear the loud cry for justice by Society in cases of heinous crime of rape and impose*

> *adequate sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the Court* ***(Dinesh vs. State of Rajasthan*** *MANU/SC/8078/2006 : 2006 CriLJ 1679)*

56 The question, therefore, which we are called upon to decide is whether the death sentence inflicted by the learned Sessions Judge on the Appellant, needs to be confirmed or not. The Constitution Bench of the Hon'ble Apex Court in case of ***Bachan Singh Vs. State of Punjab*** (supra) was called upon to decide the constitutionality of Section 302 of the IPC insofar as it provides death sentence and also of Section 354(3) of the Cr.P.C and the following observations needs a reproduction :

> *195. In Jagmohan, this Court had held that this sentencing discretion is to be exercised judicially on well-recognised principles, after balancing all the aggravating and mitigating circumstances of the crime. By "well-recognised principles" the Court obviously meant the principles crystallized by judicial decisions illustrating as to what were regarded as aggravating or mitigating circumstances in those cases. The legislative changes since Jagmohan - as we have discussed already - do not have the effect of abrogating or nullifying those principles. The only effect is that the application of those principles is now to be guided by the paramount beacons of legislative policy discernible from Sections 354(3) and 235(2), namely: (1) The extreme penalty can be inflicted only in gravest cases of extreme culpability: (2) In making choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also.*

196. We will first notice some of the aggravating circumstances which. In the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

197. Pre-planned, calculated, cold blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench, in Ediga Anamma, in these terms:

The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.

198. It may be noted that this indicator for imposing the death sentence was crystallized in that case after paying due regard to the shift in legislative policy embodied in Section 354(3) of the CrPC, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In Paras Ham's case, also, to which a reference has been made earlier, it was emphatically stated that a person who in a fit of anti-social piety commits "bloodcurdling butchery" of his child, fully deserves to be punished with death. In Rajendra Prasad, however, the majority (of 2:1) has completely reversed the view that had been taken in Ediga Anamma regarding the application of Section 354(3) on this point. According to it, after the enactment of Section 354(3), 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons" necessary for imposing death penalty "must relate not to the crime as such but to the criminal".

199. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the 'man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

200. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if. the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful

discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other,

204. Dr. Chitaley has suggested these mitigating factors: Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:
(1) That the offence was committed under the influence of extreme mental or emotional disturbance.
(2) The age of the accused. It the accused is young or old, he shall not be sentenced to death.
(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
(6) That the accused acted under the duress or domination of another person.
(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

> *207. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.*

57 The above aforesaid observations of the Constitutional Bench of the Apex Court would reveal that in finding out the presence or absence of special reasons, the Court is duty bound to pay due regard to both the crime and the criminal. Though it has been held that what is the relative

weight given to the aggravating and mitigating factors would depend on the facts and circumstances of each case. However, in many cases, the extreme cruelty and the beastly manner in which the crime is committed, is itself a demonstrated index of the deprived character, then, the special reasons can legitimately be said to exist. The Apex Court further in case of ***Machhi Singh Vs. State of Punjab*** (supra) pondered upon the imposition of death penalty and clarified the principle of '*rarest of rare*' as enunciated in ***Bachan Singh*** (supra). It made the following observations:-

> The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent to those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'Killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self preservation the killer has to be killed, the

community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so (in rarest of rare cases) when its collective conscience is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entrain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I Manner of Commission of Murder When the murder is committed in an extremely brutal, grotesque, diabolical. revolting, or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
(i) When the house of the victim is set aflame with the end in view to roast him alive in the house.
(ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
(iii)When the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II Motive for Commission of murder When the murder is committed for a motive which evince total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (2) a cold blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust. (c) a murder is committed in the course for betrayal of the motherland.

III Anti Social or Socially abhorrent nature of the crime
(a) When murder of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them with a view to reverse past injustices and in order to restore the social balance.
(b) In cases of 'bride burning' and what are known as '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. IV Magnitude of Crime 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. V Personality of Victim af murder When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder. (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

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

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

(iii)Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment 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 has 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.

58 It is no doubt true that the question that is required to be posed before imposing a death sentence is whether there is something uncommon about the crime which renders a

sentence of Imprisonment for Life inadequate and whether there exists circumstances to impose a death sentence and there is no alternative but to impose such a sentence. There cannot be any quarrel about the fact that commission of crime in the Society has a drastic and draconian effect on the members living in the society. Rape has always been looked upon as a crime to be ranked alongside murder in terms of seriousness because of the violence and the violation it involves. The way in which a Society protects its victims of crime is a barometer of that society's standards of human dignity and decency. When a woman in the society is raped, it is not only she who is subjected to rape, but it is the tendency that is reflected to overpower, to violate and to crash the dignity of the entire woman creed in the society. In light of the various incidents of rape which have been reported and taken cognizance of, the unequivocal feeling generated from the law makers, the law implementers and the law protectors is that the tendency of the rapists should be given serious attention, before we lose our female population to a group of persons who are lost of any sympathy. The hands of all the above, either in form of law

makers or law implementers are duty bound to expunge the said crime from our society and this can happen only when we deal with such a perpetrator of crime in most deterrent manner. The ultimate aim of sentencing is not only to punish the wrong doer but also to create a deterrent effect on others being indulging into such an act. When the legislators have made stiffer laws, none the less, it is the duty of the judiciary to enforce them. The Hon'ble Apex Court in case of ***Purushottam Dashrath Borate & Ors Vs. State of Maharashtra***[20] has observed to the following effect

> "23 It is an established position that law regulates social interests and arbitrates conflicting claims and demands. Security of persons is a fundamental function of the State which can be achieved through instrumentality of criminal law. The society today has been infected with a lawlessness that has gravely undermined social order. Protection of society and stamping out criminal proclivity must be the object of law which may be achieved by imposing appropriate sentence".

Therefore, in this context, the vital function is that this Court is required to discharge is to mould the system to meet this challenge. The facts and given circumstances in each case, the nature of the commission of the crime, the conduct of the

20 (2015) 6 SCC 652

accused and all other attending circumstances are relevant facts which would enter into the area of consideration.

59 We are dealing with an accused who has been found guilty of rape and murdering a young woman of 22 years and we have taken note of the abhorrent, grotesque and the pervert manner in which her life has been taken away. The entire conduct of the accused amounts to decadence and for a small pleasure, a young woman who had just stepped into womanhood has been done to death with extreme vileness. The incident that occurred in the National Capital on 16th January 2012 has brought about a change in the criminal law itself and Section 376-A came to be inserted for providing punishment for causing death. By the said amended section whosoever committed an offence punishable under sub-section (1) of sub-section (2) of Section 376 and in the course commission, inflicts an injury which causes the death of the woman or causes the woman to be in persistent vegetative state, is liable to be punished with Rigorous Imprisonment which shall not be less than 20 years but which may extend to

Imprisonment for Life, which shall mean, Imprisonment for the reminder of that person's natural life or with death.

60 With the paradigm shift in the policy of sentencing for commission of an offence of rape and causing death of a woman after committing rape and where the penalty of an Imprisonment for a term of minimum 20 years is introduced, the said offence of rape has to be tackled with great seriousness.

When such cases are brought on trial, which had shocked the collective conscious of the Society, the Society expects the judiciary to deal with such offender sternly and at that time, it may demand to inflict punishment no less than death penalty irrespective of its personal opinion about the desirability or otherwise of imposing death penalty. Though in several terms, the Apex Curt has held that Life Imprisonment is the rule and the death sentence to be imposed as the exception, it has also carved out a category of '*rarest of rare*' where the Court may be justified in imposing a death penalty after drawing a balance sheet of aggravating and mitigating

circumstances and granting full weightage to the mitigating circumstances before exercising the option of death sentence While making such a decision, it is also expected to find out whether there is something unknown about the crime committed which justifies imposition of death penalty and that no other penalty other than death penalty is adequate. In case of ***Dhananjoy Chatterjee Vs. State of West Bengal***[21], the Hon'ble Apex Court while dealing with a case of circumstantial evidence conclusively establishing the guilt of the accused who had committed rape and murder of a young girl of 18 years by a security guard of a building, relying on the prosecution case, has taken into consideration the rising crime rate particularly violent crime against women had a re-look at the criminal sentencing by the courts. The following observations are relevant:

> 14. In recent years, the rising crime rate particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of

21 (1994) 2 SCC 220

> course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall 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.
>
> 15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting 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.

61 In case of ***Laxman Naik vs. State of Orissa***[22], the Hon'ble Supreme Court while dealing with a case based on circumstantial evidence of rape and murder of a 7 year old girl by her own uncle considered the circumstances and while imposing the extreme penalty of death, made the following observations :

22 1994 3 SCC 381

> "26 This brings us to the question of sentence to be imposed upon the appellant for the offences for which he has been found guilty by the two courts below as well as by us as discussed above. In this connection it may be pointed out that this Court in the case of Bachan Singh v. State of Punjab while discussing the sentencing policy, also laid down norms indicating the area of imposition of death penalty taking into consideration the aggravating and mitigating circumstances of the case and affirmed the view that the sentencing discretion is to be exercised judicially on well-recognized principles, after balancing all the aggravating and mitigating circumstances of the crime guided by the legislative policy discernible from the provisions contained in Sections 253(2) and 354(3) of the Code of Criminal Procedure. In other words, the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty it may be noticed that there are absolutely no mitigating circumstances in the present case.

62 In ***Molai & Anr Vs. State of Madhya Pradesh***[23] while dealing with the submission of the learned counsel for the appellant that it was not the case which did not fall into *rarest of rare* category and death penalty was uncalled for, the Apex Court observed thus :

23 AIR 2000 SC 177

37 We have very carefully considered the contentions raised on behalf of the parties. We have also gone through various decisions of this Court relied upon by the parties in the courts below as well as before us and in our opinion the present case squarely falls in me category of one of the rarest of rare cases, and if this be so, the courts below have committed no error in awarding capital punishment to each of me accused. It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the home and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under- garment and thereafter took her to die septic tank along with the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned counsel for the accused (appellants) could not point any mitigating circumstances from the record of me case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below.

63 In case of ***Haresh Mohandas Rajput Vs. State of Maharashtra***[24], the Hon'ble Apex Court while dealing with the situation where the death sentence is warranted, after referring

24 AIR 2011 SC 3681

to the guidelines laid down in *Bachan Singh (supra)* and the principles culled out in *Machhi Singh* (supra) opined to the following effect :

> 19 In Machhi Singh & Ors. v. State of Punjab, AIR 1983 SC 957, this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of a community is so shocked that it will expect the holders of the judicial powers center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between aggravating and mitigating circumstances.
>
> 20. "Rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful co-existence of the society. The crime may be heinous or brutal but may not be in the category of "rarest of the rare case". There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious co-existence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously

executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fiber of the society, e.g. crime committed for power or political ambition or indulge in organized criminal activities, death sentence should be awarded. (See: C. Muniappan & Ors. v. State of Tamil Nadu, AIR 2010 SC 3718; Rabindra Kumar Pal alias Dara Singh v. Republic of India, (2011) 2 SCC 490; Surendra Koli v. State of UP & Ors., (2011) 4 SCC 80; Mohd. Mannan (supra); and Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra, (2011) 7 SCC 125).

21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether death sentence should be awarded, would depend upon the factual scenario of the case in hand.

64 In case of ***Rajendra Pralhadrao Wasnik Vs. State of Maharashtra,***[25] the Hon'ble Apex Court was confronted with a case of rape and murder of 3 year old girl child by a married person aged 31 years by luring her on the pretext of buying biscuits. While upholding the death sentence imposed by the Court below in the backdrop of the circumstantial evidence

25 2012(4) SCC 37

brought on record by the prosecution, Their Lordships analyzed the principles laid down in the case of ***Bachan Singh*** (supra). The following observations were drawn to justify the imposition of sentence of death penalty :

> 35 It can hardly be even imagined that what torture and brutality the minor child must have faced during the course of commission of this crime. All her private parts were swollen and bleeding. She was bleeding through her nose and mouth. The injuries, as described in EX.P17 (the post mortem report) shows the extent of brutal sexual urge of the accused, which targeted a minor child, who still had to see the world. He went to the extent of giving bites on her chest. The pain and agony that he must have caused to the deceased minor girl is beyond imagination and is the limit of viciousness.
>
> 37 When the Court draws a balance-sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.

65 The Division Bench of this Court in case of ***State of Maharashtra Vs. Rakesh Manohar Kamble***[26] while hearing the death confirmation Appeal of an accused who was found

26 (2014) All MR (Cri) 2043

guilty of the charge of rape and murder of a young girl, by relying upon the judgment of the Hon'ble Apex Court in case of ***Dhananjoy Chatterjee Vs. State of West Bengal*** (supra), ***Molai & Anr Vs. State of Madhya Pradesh***[27] and ***Rajendra Pralhadrao Wasnik Vs. State of Maharashtra***[28], while confirming the death penalty has observed thus :-

> 93 Now, let us consider the mitigating circumstances.
>
> i) Insofar as the first mitigating circumstance i.e. mental and emotional disturbance or extreme provocation is concerned, it is not available to the accused. In the present case, it is not the case of the accused that they were under mental and emotional disturbance or there was provocation by the deceased.
>
> ii) As laid down in various cases, the age of the accused is a relevant consideration but not a determinative factor by itself. As a matter of fact, the Apex Court in the case of Dhananjoy Chatterjee itself has found that though the accused was of a young age, the said cannot be said to be a mitigating circumstance in his favour.
>
> iii) From the material on record which has come on record it can be seen that both the accused have been on earlier occasion convicted for the offences punishable under Sections 380, 454, 457, 392 of the Indian Penal Code and under MCOC ACT. We, therefore, find that the chance of the accused in not indulging in the commission of the crime and they

27 AIR 2000 SC 177
28 (2012) 4 SCC 37

being reformed and rehabilitated is not available in the present case.

iv) It is not the case of the accused that they were mentally defective and defect impaired their capacity to appreciate the circumstances of their criminal conduct.

v) It is not the case of the accused that there are other circumstances which in normal course of life would render the act committed by the accused as morally justified.

vi) From the perusal of the evidence on record, it also cannot be said that the act was not committed in pre-ordained manner and death has resulted in the commission of another crime.

vii) It is also not the case that it is unsafe to rely upon the testimony of sole eye witness.

In that view of the matter, we find that there are no mitigating circumstances in the present case, which would come to the rescue of the present appellants.

94. However, in view of the Judgment of the Apex Court in the case of Shankar Kisanrao Khade (supra) that even if both the tests are satisfied, still the Court will have to apply finally the rarest of the rare case test. The Apex Court in various cases has found that the rarest of rare test depends upon the perception of the society that is "society-centric" and not "Judge-centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not.

95. In the case of Machhi Singh's case the Apex Court has observed that the court has to consider whether the collective conscience 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. As such, while deciding the present case, we will have to keep ourself aloof from our personal opinion as regarding the desirability or otherwise of retaining death penalty. What is required by us, is to decide as to whether in the perception of the society at large, the present case is a case which can be considered as rarest of rare case warranting death sentence.
>
> 96. At this stage, it will be appropriate to refer to the quotation of Lord Denning which has been quoted by the Apex Court in the case of Depak Rai vs. State of Bihar (supra), which is as under: ..... the punishment is the way in which society expresses its denunciation of wrongdoing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformative or preventive and nothing else....The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.

66 In light of the aforesaid dictum following from the catena of judgments, where the higher Courts had an opportunity to ponder over the imposition of death penalty, it had applied the crime test and the criminal test and held that "motivation of the perpetrator, vulnerability of the victim, enormity of the crime, the execution thereof are factors which

normally weigh with the court in awarding the death sentence terming it as the rarest of the rare cases. In some cases, capital punishments was awarded on the basis of crime test even if the criminal test was not satisfied and in some cases, capital punishment was awarded both on crime test and criminal test, whereas in other category of cases, the capital punishment was awarded both on crime test, criminal test and *rarest of rare* test. (R-R test). In some cases, capital punishment was awarded by applying the balancing test i.e. by balancing the mitigating and aggravating circumstances.

67 The imposition of death penalty has been a subject matter of severe criticism mainly of it being violative of human rights and its irreversibility. Though the constitutionality of it has been upheld in India, it is often clamped by those who do not find favour with it as being reflection of uncivilized polity and on the count that 'an eye for an eye' has become an ancient appeal. The Law Commission in its 31st Report had recommended for its retention and was of the view that India cannot afford to experiment with its abolition. It looked at it as

a potential deterrent. However, the recent 262nd Report of the Law Commission has taken a different view and made its recommendation to the following effect.

> *7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.*
> *7.2.2 The march of our own jurisprudence--from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to rarest of rare cases - shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity, the Commission feels that time has come for India to move towards abolition of the death penalty.*
>
> *7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.*
>
> *7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war.*

The report also highlights the fact that the capital punishment has failed to achieve its deterrent effect.

68 It is no doubt true that while examining the Constitutional validity in the year 1980 in case of ***Bachan Singh*** (supra), the Hon'ble Supreme Court articulated the theory of '*rarest of rare*' and emphasized on the fact that Judges should not be blood thirsty and a proposition evolved was that it should impose capital punishment only when no other punishment in the opinion of the Judges is adequate. Those who favour imposition of death penalty by strictly going by the guidelines issued in case of ***Bachan Singh*** (supra) would argue that imposition of death penalty would not be termed as arbitrary because in any case, it is imposed by following due process of law and as the factors culled out in the authoritative pronouncement of the Hon'ble Apex Court, it is to be imposed in the backdrop of the abhorrence of the crime, when it shocks the conscience of the Society and the Judges too. Article 21 which guarantees a right to life and liberty prescribes that no person should be deprived of his life and liberty, except in

accordance with the procedure established by law. The Code of Criminal Procedure which sets out the procedure for subjecting the accused to a trial and prescribes for his journey from a suspect to an accused, and an accused to a convict, contains sufficient safeguards in itself. Section 354(3) of the Code of Criminal Procedure makes it imperative for the Court when it awards the sentence of death to record special reasons for imposition of such a sentence. Further, Section 366 contains a provision for confirmation of such a sentence of death by the High Court and in this process, the High Court is expected to arrive at its independent decision, after appreciating the evidence on the quantum of the sentence imposed by the Sessions Court. In form of these aforesaid safeguards and after assessing the culpability of the accused, the recording of special reasons while imposing a sentence of death, ensures the compliance of Article 21 of the Constitution.

69 We have heard the appeal and closed it for judgment. During the intervening period, the Hon'ble Apex court has delivered verdict in a couple of cases in relation to

the imposition of capital punishment. We have taken note of the judgment of the Hon'ble Apex Court delivered on 28th November 2018 in case of ***Chhannu Lal Verma Vs. The State of Chhattisgarh***[29], wherein His Lordship Justice Kurien Joseph in light of the latest report of the Law Commission has ordered to commute death sentence of a life convict to Imprisonment and explicitly opined that the imposition of death penalty calls for a review and due emphasis has to be given before driving a person to death to ascertain whether the person is capable of reformation and rehabilitation and whether he would be a threat to Society or whether not granting death penalty would send a wrong message to the Society. The following observation of Their Lordship needs a reproduction :-

> *15. The appeal has been pending before this Court for the past four years. Since the Appellant has been in jail, we wanted to know whether there was any attempt on his part for reformation. The superintendent of the jail has given a certificate that his conduct in jail has been good. Thus, there is a clear indication that despite having lost all hope, yet no frustration has set on the Appellant. On the contrary, there was a conscious effort on his part to lead a good life for the remaining period. A convict is sent to jail with the hope and expectation that he would make amends and get reformed. That there is*

29 MANU/SC/1352/2018

such a positive change on a death row convict, in our view, should also weigh with the Court while taking a decision as to whether the alternative option is unquestionably foreclosed. As held by the Constitution Bench in Bachan Singh (supra) it was the duty of the State to prove by evidence that the convict cannot be reformed or rehabilitated. That information not having been furnished by the State at the relevant time, the information now furnished by the State becomes all the more relevant. The standard set by the 'rarest of rare' test in Bachan Singh (supra) is a high standard. The conduct of the convict in prison cannot be lost sight of. The fact that the prisoner has displayed good behaviour in prison certainly goes on to show that he is not beyond reform.

16. In the matter of probability and possibility of reform of a criminal, we do not find that a proper psychological/psychiatric evaluation is done. Without the assistance of such a psychological/psychiatric assessment and evaluation it would not be proper to hold that there is no possibility or probability of reform. The State has to bear in mind this important aspect while proving by evidence that the convict cannot be reformed or rehabilitated

70 Further, a Three Judges Bench in ***Sukhlal Vs. State of Madhya Pradesh***[30] on 20th November 2018 commuted the death sentence of a convict and reduced it to 18 years with the following observations :

30 Cr.Appeal No.1563-1564/18

> *"However, insofar as award of death penalty by the Sessions Court, which has been upheld by the High Court is concerned, we are of the opinion that the High Court has erroneously affirmed death penalty without correctly applying the law laid down by this Court in* ***Bachan Singh*** *(supra). Time and again, this Court has categorically held that Life Imprisonment is the rule and death penalty is the exception and even when the crime is heinous or brutal, it may not still fall under the category of rarest of rare. The decision to impose the highest punishment of death sentence in this case does not fulfil the test of "rarest of rare case where the alternative option is unquestionably foreclosed". Bachan Singh (supra) in no unequivocal terms sets out that death penalty shall be awarded only in the rarest of rare cases where Life Imprisonment shall be wholly inadequate or futile owing to the nature of the crime and the circumstances relating to the criminal. Whether the person is capable of reformation and rehabilitation should also be taken into consideration while imposing death penalty.*
>
> *In view of the above, while upholding the conviction of the appellant awarded by the Sessions Court, and confirmed by the High Court, we commute the death sentence to that of Life Imprisonment with a cap of 18 years."*

It is to be noted that following the said judgment, Three Judges of the Hon'ble Apex Court on December 12, 2018 considered the review petition in case of ***Rajendra Wasnik*** (supra) who was also sentenced to death and the Hon'ble Apex Court in its earlier judgment has upheld the imposition of the death

sentence. The Review Petition was taken up in light of the Constitution Bench Judgment of the Court in case of ***Mohd Arif @ Ashfaq Vs. Registrar, Supreme Court of India***[31] the Review Petition filed by ***Rajendra Wasnik*** was taken up for consideration after a gap of more than 3 ½ years. After taking the review of the various authoritative pronouncements imposing death penalty and also taking note of the judgment in case of ***Chhannu Lal Verma Vs. The State of Chhattisgarh*** *(supra),* the Hon'ble Apex Court again emphasized on reformation, rehabilitation and re-integration of the convict into the Society and the following observation needs a reproduction :

> *47. Consideration of the reformation, rehabilitation and re-integration of the convict into society cannot be over-emphasized. Until* ***Bachan Singh****, the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity.* ***Bachan Singh*** *placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in* ***Bariyar*** *and in* ***Sangeet v. State of Haryana***[32] *where there is a tendency to give primacy to the crime*

31 (2014) 9 SCC 737
32 (2013) 2 SCC 452

and consider the criminal in a somewhat secondary manner.

As observed in ***Sangeet*** *"In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social re-integration of the convict into society.*

Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social re-integration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible.

71 We have also taken note of the judgment in a Review Petition in case of ***M.A. Antony @ Antappan Vs. State of Kerala***[33] where the Hon'ble Apex Court by taking into consideration the socio-economic factors leading to the crime has commuted the death sentence with the following observations :

33 (Rev.Pet No.245/10 in Cr.Appeal 811/09 of Supreme Court dt.12/12/2018

28. On an overall consideration of the facts of the case from the point of view of the crime and the criminal, we are of opinion that even though the case may be one of circumstantial evidence, it is now well settled that that by itself is not enough to convert a sentence of death into a sentence of imprisonment for life. We have held so in Rajendra Pralhadrao Wasnik and do not feel the necessity of repeating what has already been said.

29. We are also of opinion that all the courts including this Court overlooked consideration of the probability of reform or rehabilitation and social reintegration of the appellant into society. There is no meaningful discussion on why, if at all, the appellant could not be reformed or rehabilitated.

30. The Trial Court was in error proceeding on the basis, while awarding a sentence of death to the appellant by observing that he was a hardened criminal. There is no such evidence on material or on record.

31. The socio-economic condition of the appellant was a significant factor that ought to have been taken into consideration by the Trial Court as well the High Court while considering the punishment to be given to the appellant. While the socio-economic condition of a convict is not a factor for disproving his guilt, it is a factor that must be taken into consideration for the purposes of awarding an appropriate sentence to a convict.

33. In view of the above discussion, the death sentence awarded to the appellant is converted into a sentence of imprisonment for life.

72 All murders are cruel but the cruelty may vary in its degree of culpability and it is only when the culpability assumes proportion of extreme depravity that constitute the special reasons for inflicting a death penalty, and it can be justiciably imposed. In ***Bachan Singh*** (supra), the Hon'ble Apex Court while interpreting Section 354(3) and 235(2) of the Code of Criminal Procedure, it elaborated two aspects i.e. the death which is an extreme penalty be inflicted only in gravest cases of extreme culpability and secondly in making the choice of sentence due regard must be paid to the circumstances of the offender also. Further, in case of ***Machi Singh (supra),*** elaborate guidelines came to be issued regarding the test of '*rarest of rare*' to be applied and the two principles culled out from the said judgment makes it imperative to find answers to two questions (a) Is there something uncommon about the crime which renders sentence to Imprisonment for life, inadequate? (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after awarding maximum weightage to the mitigating circumstances which speak in favour of the offenders.

73 Drawing the balance sheet in the present case, we have taken note of the following circumstances which would be considered as aggravating circumstances :

(i) the offence relates to commission of heinous crime of rape and murder by an accused who has substantial history of indulging into offences of theft;

(ii) The offence of murder was committed for a petty achievement of satisfying the lust of the accused;

(iii)The offence was committed in a barbaric manner with no regard to life of a person and mercilessly the evidence was attempted to be destroyed;

(iv)The victim was an innocent helpless young woman and accompanied the accused who promised her to be dropped at her destination;

(v) The murder is committed for motive which evidences total depravity, meanness and is committed without any provocation;

(vi) Crime is committed so brutally that it shocks the conscience of the society and also the judicial conscience.

74 The mitigating circumstances which can be culled out in favour of the accused are*:*

(i) Young age of the accused and no previous criminal antecedents being brought on record;

(ii) The chances of accused not indulging in commission of such type of crime again and probability of he being reformed and rehabilitated;

(iii) That the crime committed was not in a pre-ordained manner and there was no motive to commit the said crime;

(iv) The case is based totally on circumstantial evidence and the prosecution has failed to conclusively prove that the accused was only responsible for commission of the crime

(v) Ill-health of the accused since he was treated for Tuberculosis while undergoing the sentence.

75 We have given our due consideration to the aggravating and the mitigating factors which would be attracted in the present case in light of the Constitution Bench judgment. The basic aim of a modern welfare State is to provide a safe and secured environment to its citizens so that

they can grow and also lead to nation's growth. The civilization of a particular society is measured in terms of how woman in the said society are treated and dealt with. The recent developments in the few years have given rise to a feeling of uncertainty and fear in the mind of woman folk in this country where women are worshipped in form of goddess. The women in this country may not demand they be worshipped in the modern days scenario but they would surely expect to breathe freely and feel safe and comfortable in and outside their houses. Women in this country after a long journey are lead on the path of empowerment and it is the bounden duty of the State to empower them by assuring their safety and security. The Law came to be strengthened to deal with the physical assault on women by carrying out the amendments in form of the Criminal Amendment Act 2013 so that the perpetrators of crime against women are dealt sternly and with iron hand. Offence of rape which affects the dignity of woman and when a woman is ravished or undergoes any sexual assault on her dignity, it not only causes physical harm but carries with it a deep sense of some deathless shame, and this was the focal

point in introducing the said amendment. It is then duty cast on the judiciary of this country to do justice according to law.

76 Sentencing policy of any Modern Welfare State should be aimed at imposing appropriate sentence and its object being kept in mind i.e. the protection of the Society and weeding out the criminal proclivity. **Friedmann** in his "Law in changing society" stated that "State of Criminal Law continues to be a decisive reflection of social consciousness of society". The law accordingly, is expected to adopt a collective conscience mechanism and at the same time, it should achieve the deterrent effect. In **Mahesh Vs. State of Madhya Pradesh,**[34] the Apex Court while refusing to reduce the death sentence imposed on the convict observed to the following effect :

> *"It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."*

34 1987 (2) SCR 710

77 In ***State of Madhya Pradesh Vs. Munna Choubey and Anr***[35] the Hon'ble Apex Court made the following observations: -

> *"The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.*
>
> *Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious*

35 (2005) 2 SCC 710

> *crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences."*

78 Reformative theory is recognized as one of the leading theory for imposition of penalty but we are of the specific opinion that undue stress on the same would defeat the basic tenets of imposition of penalty in cases where the crime committed obnoxiously shocks the collective conscience of the society. Public abhorrence of the crime need a reflection through Court's verdict and though the imposition of penalty should not be judge-centric, but at the same time, it cannot afford to ignore the collective social conscience. The judiciary cannot be expected to be a mute spectator in the entire scenario when neither a young girl child of two years or a woman of 70 years feel safe in this country. We cannot shut our eyes to the cases reported day-in and day-out about such young girls and women being raped and victimized. The deterrence by enhancing the sentence for rape has witnessed another angle where a person causes death of a woman and Criminal Law

(Amendment) Act of 2013 has introduced Section 376-A and has imposed penalty of Rigorous Imprisonment for a term which shall not be less than 20 years but which may extend to Imprisonment for life where a person commits an offence punishable under sub-section (1) or sub-section (2) of Section 376 and in the course of such commission, inflicts an injury which causes the death of a woman. It is time for the judiciary to impose appropriate sentence which is proportionate to the crime committed and even by applying the theory of 'crime and criminal', the Court is expected to take into consideration the social interest and the consciousness of the Society for award of appropriate sentence. The discretion vested in the court to impose a death sentence is well guided by the principles evolved by catena of judicial decisions and by balancing the aggravating and mitigating circumstances. The Court is expected to administer the criminal judicial system which would provide an effective and meaningful life to a girl child and the women in this country. We also cannot be unmindful of the fact that when we talk of the right of the accused, it is equally important for us to take into consideration the

expectation of the family of the victim. Crime against women which are on the rise need to be tackled on all fronts in a manner which should respond to the Society's cry for justice against such criminals. Esther was done to death by the accused for no-fault of her own, except for a reason that she is a woman and she fell prey to the sinister design of accused to fulfil his lust. The said attitude of the accused, according to us, deserves a death sentence.

79 We have taken note of the mitigating circumstances and also applied our mind as to whether there is any possibility of reformation of the accused. The accused is now 33 years of age and at the time of commission of offence, he was aged approximately 29 years. It has been brought on record that he is married three times since his first wife has died and second one has deserted him and he is living with his third wife. He is capable of understanding the consequences of his act and cannot claim the benefit of being in his adulthood, but he is a mature adult. We have noticed that there is no remorse on his part. It has also been brought on record that he

had a previous history of being involved in activities prohibited by law and he was involved in petty cases of theft. As against this, the manner of commission of crime by him and causing death of the deceased is extremely shocking. Merely because his behaviour as an under trial prisoner is good and satisfactory, can be no ground to absolve him of the most gruesome and cruel act which he has indulged into. Such a person would surely remain a menace to the Society and in this backdrop, we are of the firm view that there are no extraneous mitigating circumstances available on record which may justify imposition of sentence less than a death sentence which the learned Sessions Court has imposed.

We record that the case of the appellant deserves to be falling in the category of '*Rarest of Rare*' and it also amounts to devastation of social trust, shocks the social conscience and calls for an extreme penalty of capital punishment.

80 In view of the aforesaid discussion, we uphold the order of conviction and sentence as recorded by the learned

Addl. Sessions Judge and confirm the death sentence awarded to the appellant/accused.

81 In view of the judgment and order passed in the above Confirmation Case No.3 of 2015, the Criminal Appeal No.1111 of 2015 filed by he appellant/accused deserves a dismissal and is accordingly dismissed.

(SMT. BHARATI H. DANGRE, J.) **(RANJIT V. MORE, J)**

Tilak