Reportable

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NOS.2486-2487 OF 2014
[Arising out of S.L.P. (Crl.) No. 330-331 of 2013]

Vasanta Sampat Dupare ... Appellant

Versus

State of Maharashtra ... Respondent

J U D G M E N T

Dipak Misra, J.

In these two appeals, we are required to deal with a sordid and despicable act of a married man who, at the time of incident was in wedlock for more than two scores having a criminal background, has yielded not only to the inferior endowments of nature but also has exhibited the gratification of pervert lust and brutish carnality. The prey of such degradation and depravity was a minor girl

aged about four years, daughter of Pinki, PW-1, and Krushna, PW-4. The appellant, as per the prosecution version, after satisfying his uncontrolled, insatiable and rapacious savage desire, battered the girl to death. This led to his facing trial for the offences punishable under Sections 302, 376(2)(f), 363, 367 and 201 of the Indian Penal Code (for short, "IPC") in Sessions Trial No. 252/2008 before the Learned Additional Sessions Judge, Nagpur, who considering the evidence on record and keeping in view the nature of the crime vide judgment dated 23.02.2012 after recording the conviction in respect of aforesaid offences, imposed the death sentence, apart from other punishment in respect of other offences and sent, as required under Section 366(1) of the Code of Criminal Procedure (for short, "CrPC"), for confirmation by the High Court. The judgment of conviction and the order of sentence was challenged by the appellant in Criminal Appeal No. 112/2012 and it was heard along with the Criminal Confirmation Case No.1 of 2012 wherein the Division Bench of the High Court confirmed the sentence of death awarded by the trial

Court and as a logical corollary dismissed the criminal appeal preferred by him. The said judgment is the subject of assailment in the present appeal.

2. According to the prosecution case on 3.4.2008 about 9-10 p.m., informant, Krushna Dudhraj Sharma, father of the deceased, lodged a report at the police station Wadi stating that he was staying in a tenanted house with his wife and two daughters, the kidnapped girl aged about 4 years and her sister aged about six months. One Subhash Sonawane was residing along with his wife and son in the neighbourhood of the informant as a tenant of the common landlord, Kushal Bansod. The appellant, Vasanta Dupare, a friend of Subhash Sonawane, was a frequent visitor to the house of Subhash. On the fateful day when the informant, carpenter by profession, returned home about 7.00 p.m., he found his wife weeping and on a query being made, she disclosed that Vasanta Dupare had taken the elder daughter on his bicycle while she was playing in the courtyard of the house and she had not yet returned home. He, being perturbed, searched for his daughter in the vicinity, but it

was an exercise in futility. Thus, the initial allegation was that the appellant had kidnapped his minor daughter. On the basis of the aforesaid report, a crime was registered against the accused for an offence punishable under Section 363 of the IPC.

3. As the prosecution version further undrapes, on the same day, Santosh Ghatekar, PW-13, Assistant Police Inspector, while returning to the police station, received the information that the appellant was moving around Gati Godown located on Khadgaon Road, and he passed on the said information to Police Inspector D.J. Chauhan, PW-16, and eventually the appellant was apprehended and brought to the police station. While in police custody, on 4.4.2008, he took the investigating agency to the spot where he had after ravishing the minor girl child had murdered her. A memorandum of panchnama to that effect was prepared in the morning of 4.4.2008 and thereafter he led the police to the place of incident wherefrom the dead body of the minor girl was recovered. At his instance, the bicycle used was recovered from the godown located in between Khadgaon

to Kamleshwar road belonging to one Ashwin Prakash Agrawal. Thereafter, the initial offence registered under Section 363 IPC was converted to offences under Section 376(2)(f), 367, 302 and 201 of the IPC. The Investigating Agency examined number of witnesses under Section 161 CrPC and completed all the formalities and laid the chargesheet before the competent court which in turn committed the matter to the Court of Session.

4. The accused-appellant pleaded his innocence and non-involvement and took the plea that he had been falsely implicated due to animosity.

5. The prosecution, to substantiate the charges levelled against the appellant, examined 17 witnesses. After closure of the evidence of the prosecution, the accused was examined under Section 313 of the CrPC and he pleaded complete denial and false implication. The defence chose not to adduce any evidence.

6. The learned trial Judge, on the basis of the evidence brought on record came to hold that the mother of the minor girl, Pinki, PW-1, knew the appellant because of his frequent visits to her neighbour Subhash; that she had

seen the accused in the courtyard where the minor girl was playing along with other children; that she had also seen him going on a bicycle from the behind; that Vandana Ramkar, PW-5, had deposed categorically that while she was present outside Chandrawanshi Hospital after finishing her work, she saw the appellant going on the bicycle with the deceased and she had revealed when Pinki had made an enquiry about her daughter; that Baby Sharma, PW-6, and Minal @ Twinkle, PW-3, the child witness, have also unequivocally deposed that they had seen the accused taking the minor girl with him at the relevant time from the locality in question; that Baby Sharma had further deposed that the minor girl had fallen down from the bicycle near her shop and the cyclist had purchased 'Minto Fresh' for the girl who was wearing black top and blue skirt; that she had identified the cyclist and also the photograph of the girl who had accompanied the appellant at the relevant time; that Subhash Sonawane, PW-11, had stated that the accused had been to his house for repairing his tape recorder on that day; that version of Subhash had received corroboration from

his wife, Kavita, who has deposed that her daughter Akanksha and the victim were playing in the courtyard and at that juncture the appellant was standing in the courtyard; that the appellant had told Akanksha and the daughter of PW-1 that he would buy chocolates for them and, therefore, they should accompany him; that it had come in the testimony of Kavita, PW-12, that Akanksha, who was not having appropriate clothes on her person came back home and by that time accused took the victim girl on his bicycle; that Manisha, PW-2, who knew the appellant, had deposed that he had come to her house on the bicycle along with the girl and on being asked he had told her name and she was wearing black top and blue midi and the accused had mentioned to her that she was the daughter of his friend; that Baby Sharma, PW-6, had identified the clothes of the deceased which were on her person on the day of the incident and had also identified him that he was the person who had taken the girl; that the panch witnesses Ramprasad, PW-7 and Anand Borkar, PW-8, had stood embedded in their testimony about the recovery wherefrom the girl was

taken and the place where the dead body was found, and they had also remained firm in their testimony proving the panchnama to indicate the seized incriminating materials, that is, two stones smeared with blood, blood mixed sample earth, branches of trees having blood stains, minto fresh and empty chocolate wrappers and nikar and other clothes of the accused from the spot; that the other two panch witnesses, namely, Purushottam Gore, PW-9, and Sanotsh Keche, PW-10, had stated about the parcels containing clothes of the deceased and various samples taken from the body of the deceased, received from the hospital and the recovery of the bicycle from the godown; and that nothing had been elicited which would create any kind of concavity in the testimony of these witnesses; and that the investigating officers had not given any room for doubt; that the examining doctor, Dr. Prashant Barve, who had conducted autopsy on the deceased had remained inflexible in the testimony as regards the reports; and that the ocular and the documentary evidence brought on record established beyond reasonable doubt that the accused by alluring a

minor girl of four years for giving chocolates, had kidnapped her, raped her and caused injuries; and also had intentionally made disappear the evidence of the crime committed by him. On the aforesaid reasoning, the learned trial Judge found the appellant guilty of the offences and treated the same as a crime of extreme brutality, for he had committed rape on a minor girl aged about four years without thinking about the effect on the victim. It was also opined by the learned trial Judge that the accused was in mid 40s and had caused injuries by crushing stones weighing 8.5 kg. and 7.5 kg with force upon her when she was in unbearable pains because of the ferocious act of rape and injuries sustained by her; and that the accused was having criminal antecedents as he was prosecuted for various offences in four cases. Taking into consideration the totality of circumstances, that is, the aggravating and the mitigating circumstances, the learned trial Judge regarded the case as rarest of the rare cases and sentenced the appellant to suffer death penalty under Section 302 IPC, life imprisonment and fine of Rs.2,000/- with the default clause for the offence

punishable under Section 376(2)(f) of the IPC; rigorous imprisonment for seven years and fine of Rs.1000/- with default clause for the offence punishable under Section 363 of the IPC; rigorous imprisonment for seven years and fine of Rs.1000/- with default clause for the offence punishable under Section 367 of the IPC; and rigorous imprisonment for three years and fine of Rs.1000/- with default clause for the offence punishable under Section 201 of the IPC with the stipulation that all the sentences relating to imprisonment shall be concurrent and submitted the proceedings to the High Court under Section 366(1) of the Code of Criminal Procedure, 1973 for confirmation of death sentence by the High Court.

7. As has been stated earlier, the appellant preferred a Criminal Appeal assailing the conviction and the sentence and the High Court appreciated the evidence afresh and found that the evidence of the witnesses was impeccable and totally beyond reproach and the prosecution had been able to prove the offences to the hilt. While dealing with the confirmation of the sentence, the High Court referred to various decisions and opined as follows:

"The accused raped a four years old girl and thereafter battered and smashed her head by two heavy stones and killed her. The aggravating circumstance as pointed out by us must be such as would have shocked the conscience of the community in general. The accused had acted in diabolical manner and had designedly lured the unsuspecting Muskan to accompany him on the bicycle. Battering of the head of the girl of tender years was done by the accused with extreme cruelty. The crime has been committed by the accused in an extremely cruel manner exhibiting brutality and utter perversity. The history sheet of the accused which is placed on record exhibits several prosecutions against him. The accused has not displayed any remorse or repentance for the act done by him and we do not find any material to indicate that there is a possibility of the accused reforming himself. The accused would continue to be a menace to the society and, therefore, according to us, this is a rarest of rare case calling for the extreme.

The mitigating circumstances which are brought on record against the accused are that the accused is middle aged man of 45 years with no previous conviction so far. The accused is a married person having a family. However, the aggravating circumstances far out way the mitigating circumstances and according to us, the extreme penalty of death imposed by the trial court deserves to be confirmed."

8. We have heard Mr. Sanjiv Das, learned counsel for the appellant and Mr. Shankar Chillarge, learned counsel for the respondent-State.

9. It is submitted by the learned counsel for the appellant that the learned trial Judge as well as the High Court has committed gross illegality in placing reliance on the testimony of the parents of the deceased and other witnesses to establish the last seen theory, which has really not been established. It is urged by him that the leading to recovery of the dead body of the deceased and the clothes are not in consonance with Section 27 of the Evidence Act. Learned counsel would submit that the panch witnesses who have alleged to have supported the prosecution story have really paved the path of deviancy which has been lost sight of by the learned trial Judge as well as by the High Court. It is his further submission that there are material inconsistencies, contradictions and omissions, which had seriously affected the prosecution's case and the chain of circumstances for implicating the accused in the crime has really not been established. It is propounded by him that the witnesses who have been

cited by the prosecution to establish the chain of circumstances, fundamentally the last seen theory, cannot be given credence to regard being had to the unacceptable contradictions and infirmities. Finally, it is canvassed by the learned counsel for the appellant that the present case could not fall under the category of rarest of the rare cases warranting capital punishment and the criminal background that has been taken into consideration by the learned trial Judge as well as by the High Court is of not such nature by which the appellant can be treated or regarded as a menace to the society and, therefore, if this Court affirms the conviction, it should substitute the punishment to that of life imprisonment.

10. Mr. Shankar Chillarge, learned counsel for the respondent-State in support of the view expressed by the High Court, contends that the prosecution has succeeded in proving the guilt of the appellant beyond reasonable doubt and the scanning of the evidence by the learned trial Judge, which has been re-appreciated by the High Court, does not remotely indicate any contradiction or

discrepancy. It is proponed by him that all the witnesses have remained absolutely unshaken in their version and nothing substantial has been elicited from them during the cross-examination which could create a dent in their testimony. Learned counsel would further contend that if the ocular and documentary evidence is appreciated in proper perspective, there remains no scintilla of doubt that the appellant had committed the brutal and heinous crime and in such a circumstance when the society cries for justice, the Court should not show any leniency for conversion of the sentence.

11. To appreciate the rival submissions raised at the Bar, we think it appropriate to refer to the postmortem report of the deceased. The said report by the doctor, namely, Dr. Prashant Barve, PW-15, which has been brought on record as Exhibit 55, describes that at the time of postmortem, the face was flattened, eyes closed, mouth partially opened, tongue was clinched and lacerated between teeth, blood was oozing through mouth, nostrils and ears. It was also noticed that dry grass leaves adhered over body at back side and dry

blood-stains were present over face, neck, perineum and lower limb. He has found the following injuries on the dead body of the deceased:

> "1) Multiple scratch abrasions present over front of chest and front of neck size varying from 1 cm x 1/4 cm, to 3 cm. x 1/4th cm., reddish brown.
>
> 2) Contused abrasion involving fore-head, eyes, nose, both cheeks and lips red and dark red coloured, underlying bone fractured, underlying, muscle lacerated.
>
> 3) Multiple scratch abrasion present over left lower leg and left foot size varying from ½ cm. x 1/4th cm., to 1 cm. x 1/4th cm., reddish brown.
>
> 4) Multiple scratch abrasion present over back of trunk upper 2/3rd of size varying from 1 cm. x 1/4th cm. to 5 cm. x 1/4th cm., reddish brown.
>
> 5) Abrasion of size 1 cm. x ½ cm. present over left knee, reddish brown."

12. According to the doctor, he had found during internal examination that under scalp haemotoma was present over left frontal and right frontal region of size 4 cm. x 4 cm, dark red, the frontal bone was fractured and depressed, fracture line extended up to occipital bone

through right temporal and parietal bone fracture on interior and middle eranial side. The subarachined hemorrhage was present all over the brain surface and meninges was congested. In his opinion, the cause of death was head injury, associated with the injury on the genital region. He has testified that the two stones that were sent to him in sealed cover along with the requisition, Exhibit 62, for opinion, could have been used to cause the injuries on the victim. He has weighed the stones which is 8.5 kg and 7.5 kg. and has opined that there had been forceful sexual intercourse.

13. From the aforesaid medical evidence, it is clear as crystal that there was forcible sexual intercourse with the girl and the death was homicidal in nature.

14. Having analysed the said aspect, it is to be seen whether the prosecution has really established the complicity of the appellant in the crime in question. We have enumerated the reasons ascribed by the learned trial Judge and the concurrence given by the High Court, but to satisfy our conscience, we have thought it seemly

to peruse the evidence with all insight and concern by ourselves.

15. As is manifest, the father of the victim, Krishna, PW-4, had lodged the FIR immediately i.e. at 9:10 p.m. The FIR clearly stated that the accused had taken away the victim. The role of the accused and the suspicion was thus immediately reported. PW-1, mother of the deceased, has deposed that her daughter, the deceased girl, was playing in the courtyard along with other children while she was doing the household work and when she came back to courtyard, she found that the child was missing and she saw the appellant going on the bicycle. Be it clarified, she had not actually seen the accused taking away the victim but, as the evidence brought on record do reveal, five prosecution witnesses are the eye witnesses to the factum of accused taking away the minor girl. On a studied scrutiny of the evidence it becomes graphically clear that when the mother had gone in search of her, Vandana Ramkar, PW-5, had told her that the child had gone on bicycle with the appellant. PW-5, in her testimony, has unambiguously

stated about the said fact. It has come in the testimony of PW-1 that her daughter was wearing a blue midi and black top on her person, and she has identified the said clothes which have been brought on record as Articles 6, 9 and 10. From the cross-examination it is manifest that they knew the appellant earlier, and it is also demonstrable from the evidence of Vandana Ramkar, PW-5, that the appellant had taken the girl on the bicycle. It has come in the evidence of Baby Sharma, PW-6, that about 7.30 pm on 3.4.2008 the appellant while going on the bicycle fell down near grocery shop and, thereafter, the cyclist and the girl came to purchase "Minto Fresh". As deposed by her the girl was wearing a black top and blue skirt on her person. The said witness has identified the appellant and also identified the photograph of the girl, Article 12. She has also identified the clothes of the girl. PW-12, Kavita, has deposed that her husband, Subhash, PW-11 and Krushna, PW-4, father of the girl, were working at the same place and on the fateful day the appellant had come to her house and told her husband Subhash, PW-11, who was busy in repairing a

tape-recorder that he could repair the same and after checking it, he found some parts were damaged and needed to be replaced and for the said purpose he took Rs.20 from PW-11 and after 15 minutes came with the part and tried to repair it but could not succeed. He left the house of PW-11 at 4.00 pm. It is in her testimony that about 6.00 pm the appellant came to her house again and as she was feeling giddy and had reclined on the cot, he sprinkled some water on her face. It is deposed by her that her daughter, Akansha, and the deceased were playing in the courtyard and at that time the appellant who was standing in the courtyard had told Akansha and the minor girl that he would buy them chocolates and, therefore, they should accompany him. As the daughter of PW-12 was not wearing proper clothes she came back to her and the appellant took the deceased with him. According to her testimony the girl sat on the rod of the bicycle. It is testified by her that as the appellant did not bring back the child, they went in search of her. She has clearly deposed about the acquaintance of the appellant with her family. It is apt to

state here that nothing has been elicited in the cross-examination to raise any doubt about the veracity of her version.

16. Manisha, PW-2, has deposed that her father-in-law runs a tea stall and she had the occasion to know the appellant. She has supported the version of the prosecution by stating that the appellant had come to her house about 7.30 p.m. and a girl aged about four years was with him. She has stated that the girl was dressed in black top and blue apparel and on a query being made, the appellant had introduced the child as the daughter of his friend and he was going to 'Tekdi-Wadi' along with the girl. In the cross-examination it has only been elicited that she was not aware of the character of the appellant. In this context, the evidence of Ku. Minal @ Twinkle, PW-3, aged about 11 years is extremely significant. She has clearly deposed that PW-1 is a resident of the locality and she knew the deceased girl as she used to come to their house for playing with her younger sister. She has emphatically stated that the deceased was going on a bicycle sitting on the front rod with one person and on

being asked she said she was going to eat chocolates. She has identified the accused. From the aforesaid evidence, it is quite vivid that the appellant was last seen with the deceased and there is no justification to discredit the testimony of the witnesses. Nothing has been brought on record that they had any axe to grind against the appellant. The fact that the appellant was taking the minor child on his bicycle, and stopped at shop of Baby Sharma, PW-6, to purchase chocolate and was also seen at other places as testified by other witnesses has been proven to the hilt. There are really no contradictions and discrepancies that would compel the court to discard their evidence.

17. Be it noted, in appeal the High Court has observed that even if the testimony of Minal, PW-3, is left out from consideration there is ample evidence to show that accused had taken the deceased under the guise of offering her chocolates. In our considered view, there is no justification not to rely upon the testimony of the said witness. She has identified the appellant in court and has stood firm in her version. Her identification of the

accused-appellant in the open court is piece of substantive evidence as has been held in ***Dana Yadav V. State of Bihar***[1] and such identification by her has not been shaken or contradicted. Be it noted, the High Court has not rejected the said evidence, but has only opined that even if the testimony is not accepted, then also the identification has been proved. We think the testimony of PW-3 further strengthens the case of the prosecution. Considering the evidence brought on record in totality, the irresistible conclusion is that the deceased was last seen with the appellant. In this context, a fruitful reference may be made to the observations made in ***Dharam Deo Yadav V. State of Uttar Pradesh***[2], wherein it has been held thus:

> "... if the prosecution, on the basis of reliable evidence, establishes that the missing person was seen in the company of the accused and was never seen thereafter, it is obligatory on the part of the accused to explain he circumstances in which the missing person and the accused parted company."

In the instant case, the appellant has not offered any explanation.

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[1] (2002) 7 SCC 295
[2] (2014) 5 SCC 509

18. The next circumstance which has been taken note of by the learned trial Judge as well as by the High Court pertains to leading to discovery by the appellant. As is evincible, the panch witness, Anand Borkar, PW-8, has proved Exhibit 29, the statement of the accused relating to discovery of the spot wherefrom the dead body was found. He has also supported the seizure panchnama, Exhibit 31, wherefrom the blood stained earth, two stones, nikar, Minto Fresh chocolate and one empty rapper were seized. According to the said witness the said articles were seized vide Exhibit 31. PW-10, Santosh Keche, has proved the seizure of the bicycle from the godown at the instance of the appellant. The spot which was shown by the appellant and the godown from which bicycle was seized, as has come in the evidence, is in the vicinity where the dead body was found. Vide Exhibit 34, the clothes, handkerchief and foot wear of the accused were seized. The stones smeared with blood had been seized at the instance of the accused.

19. Learned counsel for the appellant has submitted that the seizure witnesses cannot be believed as the

proper procedure has not been followed. As we find from the evidence on record the appellant was in custody and he had led to recovery. The search and seizure has also been supported in minute detail by the Investigating Officer. It is also evident that the search witnesses are independent witnesses and their evidence inspire confidence. While accepting or rejecting the factors of discovery, certain principles are to be kept in mind. The Privy Council in ***Pulukuri Kotayya V. King Emperor***[3] has held thus:

> "It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Information as to past user, or the past history, of the object produced is not related to its discovery in the setting in which it is discovered. Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the

[3] AIR 1947 PC 67

> commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which *I* stabbed *A*', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

20. In ***Mohmed Inayatullah V. The State of Maharashtra***[4], while dealing with the ambit and scope of Section 27 of the Evidence Act, the Court held that:-

> "Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases is not always free from difficulty. It will therefore be worthwhile at the outset, to have a short and swift glance at the section and be reminded of its requirements. The section says:
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> "Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."
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> The expression "provided that" together with the phrase "whether it amounts to a confession or not" show that the section is in the nature of an exception to the preceding provisions particularly Sections 25 and 26. It is not necessary in this case to consider if this section qualifies, to any

[4] (1976) 1 SCC 828

extent, Section 24, also. It will be seen that the *first* condition necessary for bringing this section into operation is the *discovery of a fact*, albeit a relevant fact, in consequence of the information received from a person accused of an offence. The *second* is that the discovery of such fact must be deposed to. The *third* is that at the time of the receipt of the information the accused must be in police custody. The *last* but the most important condition is that only "so much of the information" as relates *distinctly* to the fact *thereby* discovered is admissible. The rest of the information has to be excluded. The word "distinctly" means "directly", "indubitably", "strictly", "unmistakably". The word has been advisedly used to limit and define the scope of the provable information. The phrase "distinctly relates to the fact thereby discovered" is the linchpin of the provision. This phrase refers to that part of the information supplied by the accused which is the *direct* and *immediate* cause of the discovery. The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only, of the information which was the clear, immediate and proximate cause of the discovery. No such guarantee or assurance attaches to the rest of the statement which may be indirectly or remotely related to the fact discovered.

At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be

> perceived by the senses, and that it does not include a mental fact (see *Sukhan* v. *Crown*[5]; *Rex* v. *Ganee*[6]). Now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this (see *Palukuri Kotayya* v. *Emperor*; *Udai Bhan* v. *State of Uttar Pradesh*[7])."

21. In ***Aftab Ahmad Anasari V. State of Uttaranchal***[8] after referring to the decision in ***Palukuri Kotayya*** (supra), the Court adverted to seizure of clothes of the deceased which were concealed by the accused. In that context, the Court opined that:-

> "The part of the disclosure statement, namely, that the appellant was ready to show the place where he had concealed the clothes of the deceased is clearly admissible under Section 27 of the Evidence Act because the same relates distinctly to the discovery of the clothes of the deceased from that very place. The contention that even if it is assumed for the sake of argument that the clothes of the deceased were recovered from the house of the sister of the appellant pursuant to the voluntary disclosure statement made by the appellant, the prosecution has failed to prove that the clothes so recovered belonged to the

[5] AIR 1929 Lah. 344
[6] AIR 1932 Bom 286
[7] 1962 Supp 2 SCR 830
[8] (2010) 2 SCC 583

> deceased and therefore, the recovery of the clothes should not be treated as an incriminating circumstance, is devoid of merits".

22. In ***State of Maharashtra* v. *Damu***[9] it has been held as follows:

> " ... It is now well settled that recovery of an object is not discovery of a fact as envisaged in [Section 27 of the Evidence Act, 1872]. The decision of the Privy Council in *Pulukuri Kotayya* v. *King Emperor* is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

23. The similar principle has been laid down in ***State of Maharashtra* v. *Suresh***[10], ***State of Punjab* v. *Gurnam Kaur***[11], ***Aftab Ahmad Anasari* v. *State of Uttaranchal***, ***Bhagwan Dass* v. *State (NCT of Delhi)***[12], ***Manu Sharma* v. *State (NCT of Delhi)***[13] and ***Rumi Bora Dutta* v. *State of Assam***[14].

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9 (2000) 6 SCC 269
10 (2000) 1 SCC 471
11 (2009) 11 SCC 225
12 (2011) 6 SCC 396
13 (2010) 6 SCC 1
14 (2013) 7 SCC 417

24. In the case at hand, as is perceptible, the recovery had taken place when the appellant was accused of an offence, he was in custody of a police officer, the recovery had taken place in consequence of information furnished by him and the panch witnesses have supported the seizure and nothing has been brought on record to discredit their testimony.

25. Additionally, another aspect can also be taken note of. The fact that the appellant had led the police officer to find out the spot where the crime was committed, and the tap where he washed the clothes eloquently speak of his conduct as the same is admissible in evidence to establish his conduct. In this context we may refer with profit to the authority in ***Prakash Chand v State (Delhi Admn.)***[15] wherein the Court after referring to the decision in ***H.P. Admn. V. Om Prakash***[16] held thus:

> "... There is a clear distinction between the conduct of a person against whom an offence is alleged, which is admissible under Section 8 of the Evidence Act, if such

[15] (1979) 3 SCC 90
[16] (1972) 1 SCC 249

> conduct is influenced by any fact in issue or relevant fact and the statement made to a Police Officer in the course of an investigation which is hit by Section 162 of the Criminal Procedure Code. What is excluded by Section 162, Criminal Procedure Code is the statement made to a Police Officer in the course of investigation and not the evidence relating to the conduct of an accused person (not amounting to a statement) when confronted or questioned by a Police Officer during the course of an investigation. For example, the evidence of the circumstance, simpliciter, that an accused person led a Police Officer and pointed out the place where stolen articles or weapons which might have been used in the commission of the offence were found hidden, would be admissible as conduct, under Section 8 of the Evidence Act, irrespective of whether any statement by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 of the Evidence Act."

26. In ***A.N. Vekatesh and another v. State of Karnataka***[17] it has been ruled that:-

> "By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct

[17] (2005) 7 SCC 714

> under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand* v. *State (Delhi Admn.)*. Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act."

27. We have referred to the aforesaid authorities only to highlight that in the present case the provision under Section 27 of Evidence Act is clearly attracted and we see no illegality in the seizure and the Panch witness have remained embedded in their version. Nothing has been suggested to disregard their evidence. Therefore, we have no hesitation in holding that there is ample proof of seizure of the articles. That apart, we have also additionally considered the conduct of the appellant that

speaks eloquently, for it is worthy of being considered within the admissible parameters.

28. The next circumstance which has been accepted by the learned trail Judge and the High Court is the identification of the clothes and matching of blood stains of the appellant's clothes. On the clothes that has been seized, the stains of human blood of 'A' Group are detected. The chemical analysis report, Exhibit 77, has indicated that stains of human blood of 'A' group which is detected on seized clothes, and the blood group that has been found on the clothes of the accused including his underwear and handkerchief is the same. The matching of the blood group gains signification in such a circumstance. The incriminating articles, namely, stones smeared with blood, the clothes and the blood group matching is an important circumstance showing complicity of the appellant in the crime in question.

29. Another facet which has immense significance is the injury report. It graphically depicts the injuries on the private parts of the minor girl which has been caused by sexual intercourse. Stains of human blood of 'A' group

have also been noticed on the front portion of the nikar of the accused as per Exhibit 77 which matches the blood group found on the stones.

30. The other relevant circumstance that weighs against the appellant is that the dead body of the deceased was recovered at the instance of the appellant. It was within his special knowledge. The tap where he had washed his clothes was quite nearby. In this context, it is worthy to note that the accused had disclosed the facts and on the basis of his disclosure statement he had led to the place where the dead body of the victim was found. In ***Deepak Chandrakant Patil V. State of Maharashtra***[18], it was observed by this Court:

> "... The fact that he knew about the dead body of the deceased lying in the garden behind the house of A-1 is almost clinching in nature and leaves nothing to doubt..."

31. Regard being had to the aforesaid circumstances, it is to be seen whether on the basis of the said circumstances, it can be held whether such circumstances lead towards the guilt of the accused

[18] (2006) 10 SCC 151

regard being had to the principle that they lead to a singular conclusion that the appellant is guilty of the offence and it does not allow any other probability which is likely to allow the presumption of innocence of the accused. In this context, we may refer with profit to the decision rendered more than six decades back in ***Hanumant Govind Nargundkar V. State of M.P.***[19], wherein it has been held as follows:

> " ... 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 proved. 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."

[19] AIR 1952 SC 343

32. In ***Sharad Birdhichand Sarda*** **v.** ***State of Maharashtra***[20], the five golden principles which have been stated to constitute the "panchsheel" of the proof of the case based on circumstantial evidence are that the circumstances from which the conclusion of guilt is to be drawn must or should be and not merely "may be" fully established; that 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; that the circumstances should be of a conclusive nature and tendency; that they should exclude every possible hypothesis except the one to be proved; and that 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.

33. In ***C. Chenga Reddy*** **v.** ***State of A.P***[21] it has been held that in a case based on circumstantial evidence, the

[20] (1984) 4 SCC 116
[21] (1996) 10 SCC 193

circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature, moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. That apart, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.

34. We may also take note of the fact that the appellant in his statement under Section 313 CrPC, except making a bald denial, has not stated anything. In this context, we may refer with profit to a decision in ***Suresh*** (supra) wherein it has been held that there can be three possibilities when an accused points to the place where the incriminating material is concealed without stating that it was concealed by himself. Elucidating on the three possibilities, the Court observed thus:

> " ... One is that he himself would have concealed it. Second is that he would have seen somebody else concealing it. And the third is that he would have been told by another person that it was concealed there. But if the accused declines to tell the criminal court that his knowledge about the concealment was on account of

> one of the last two possibilities the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the criminal court that the concealment was made by himself."

35. On a critical analysis of the evidence on record, we are convinced that the circumstances that have been clearly established are that the appellant was seen in the courtyard where the minor girl and other children were playing; that the appellant was seen taking the deceased on his bicycle; that he had gone to the grocery shop owned by PW-6 to buy Mint chocolate along with her; that the accused had told PW-2 that the child was the daughter of his friend and he was going to 'Tekdi-Wadi' along with the girl; that the appellant had led to discovery of the dead body of the deceased, the place where he had washed his clothes and at his instance the stones smeared with blood were recovered; that the medical report clearly indicates about the injuries sustained by

the deceased on her body; that the injuries sustained on the private parts have been stated by the doctor to have been caused by forcible sexual intercourse; that the stones that were seized were smeared with blood and the medical evidence corroborates the fact that injuries could have been caused by battering with stones; that the chemical analysis report shows that the blood group on the stones matches with the blood group found on the clothes of the appellant; that the appellant has not offered any explanation with regard to the recovery made at his instance; and that nothing has been stated in his examination under Section 313 CrPC that there was any justifiable reason to implicate him in the crime in question. Thus, we find that each of the incriminating circumstances has been clearly established and the chain of circumstances are conclusive in nature to exclude any kind of hypothesis, but the one proposed to be proved, and lead to a definite conclusion that the crime was committed by the accused. Therefore, we have no hesitation in affirming the judgment of conviction

rendered by the learned trial Judge and affirmed by the High Court.

36. Now we shall proceed to deal with the facet of sentence. In ***Bachan Singh v. State of Punjab***[22], the Court held thus:-

> "(*a*) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (*b*) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

37. In the said case, the Court referred to the decision in ***Furman v. Georgia***[23] and noted the suggestion given by the learned counsel about the aggravating and the

[22] (1980) 2 SCC 684
[23] 33 L Ed 2d 346 : 408 US 238 (1972)

mitigating circumstances. While discussing about the aggravating circumstances, the Court noted the aggravating circumstances suggested by the counsel which read as follows:-

> "*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 Code of Criminal

> Procedure, 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."

After reproducing the same, the Court opined:-

> "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."

38. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances:-

> "*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. If 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 impaired his capacity to appreciate the criminality of his conduct."

After reproducing the above, the Court observed:-

> "We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence."

39. In the said case, the Court has also held thus:-

> "It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines 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."

40. In ***Machhi Singh and Others v. State of Punjab***[24] a three-Judge Bench has explained the concept of rarest of the rare cases by stating that:-

> "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 realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for 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."

41. Thereafter, after adverting to the aspects of the feeling of the community and its desire for self-preservation, the Court opined that the community may

[24] (1983) 3 SCC 470

well withdraw the protection by sanctioning the death penalty. The Court in that regard ruled thus:-

> "But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

42. It is apt to state here that in the said case, emphasis was laid on certain aspects, namely, manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of the victim of murder.

43. After so enumerating the propositions that emerged out from ***Bachan Singh*** (supra) were culled out which are as follows:-

> "The following propositions emerge from *Bachan Singh 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 have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

44. Thereafter, the three-Judge Bench opined that to apply said guidelines, the following questions are required to be answered:-

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

> (*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

45. In ***Haresh Mohandas Rajput v. State of Maharashtra***[25] while dealing with the situation where the death sentence is warranted the two-Judge Bench referred to the guidelines laid down in ***Bachan Singh*** (supra) and the principles culled out in ***Machhi Singh*** (supra) and opined as follows:-

> "In *Machhi Singh* v. *State of Punjab* this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in *Bachan Singh* to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the 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

[25] (2011) 12 SCC 56

between the aggravating and the mitigating circumstances."

After so stating, the Court ruled thus:-

"The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the 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 coexistence. 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 fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. (See *C. Muniappan* v. *State of*

T.N[26]*.*, *Dara Singh* v. *Republic of India*[27], *Surendra Koli* v. *State of U.P.*[28], *Mohd. Mannan*[29] and *Sudam* v. *State of Maharashtra*[30].)

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 the death sentence should be awarded, would depend upon the factual scenario of the case in hand."

46. In ***Dhanjoy Chatterjee alias Dhana v. State of W.B.***[31], this Court was dealing with the murder of a young girl of about 18 years. The Court took note of the fact that the accused was a married man of 27 years of age, the principles stated in ***Bachan Singh's*** case and further took note of the fact that rise of violent crimes against women in recent years, and thereafter on consideration of aggravating factors and mitigating circumstances and opined that:-

"In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the

[26] (2010) 9 SCC 567
[27] (2011) 2 SCC 490
[28] (2011) 4 SCC 80
[29] (2011) 5 SCC 317
[30] (2011) 7 SCC 125s
[31] (1994) 2 SCC 220

> 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."

47. After so stating, the Court took note of the fact that the deceased was a school going girl and it was the sacred duty of the appellant, being a security guard, to ensure the safety of the inhabitants of the flats in the apartment but to gratify his lust he had raped and murdered the girl in retaliation which made the crime more heinous. Appreciating the manner in which the barbaric crime was committed on a helpless and defenceless school-going girl of 18 years the Court came to hold that the case fell in the category of rarest of the rare cases and accordingly affirmed the capital punishment imposed by the High Court.

48. In ***Laxman Naik v. State of Orissa***[32] the Court has commenced the judgment with the following passage:-

> "The present case before us reveals a sordid story which took place sometime in the afternoon of February 17, 1990, in which the alleged sexual assault followed by brutal and merciless murder by the dastardly and monstrous act of abhorrent nature is said to have been committed by the appellant herein who is none else but an agnate and paternal uncle of the deceased victim Nitma, a girl of the tender age of 7 years who fell a prey to his lust which sends shocking waves not only to the judicial conscience but to everyone having slightest sense of human values and particularly to the blood relations and the society at large".

49. Be it stated, in the said case the High Court had dismissed the appellant's appeal and confirmed the death sentence awarded to him. While discussing as regards the justifiability of sentence the Court referred to the decision in ***Bachan Singh's case*** and opined that there were absolutely no mitigating circumstances and, on the contrary, the facts of the case disclosed only aggravating circumstances against the appellant. Elaborating further the Court held thus:-

[32] (1994) 3 SCC 381

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

After so stating the Court while affirming the death sentence opined that:-

> " .....The victim of the age of Nitma could not have even ever resisted the act with which she was subjected to. The appellant seems to have acted in a beastly manner as after satisfying his lust he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and others, the appellant with a

> view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold-blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare cases attracting no punishment other than the capital punishment and consequently we confirm the sentence of death imposed upon the appellant for the offence under Section 302 of the Penal Code."

50. In ***Kamta Tiwari and State of M.P.***[33] the appellant was convicted for the offences punishable under Sections 363, 376,302 and 201 of IPC and sentenced to death by learned trial Judge and the same was affirmed by the High Court. In appeal the two-Judge Bench referred to the propositions culled out in ***Machhi Singh*** and expressed thus:-

> "Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances — but found aggravating circumstances aplenty. The evidence on record clearly establishes that

[33] (1996) 6 SCC 250

> the appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him 'Tiwari Uncle'. Obviously her closeness with the appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder — as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."

51. In ***Bantu v. State of Uttar Pradesh***[34] a five year minor girl was raped and murdered and the appellant was awarded death sentence by the trial Court which was affirmed by the High Court. This Court found the

[34] (2008) 11 SCC 113

appellant guilty of the crime and thereafter referred to the principles stated in ***Bachan Singh, Machhi Singh*** (supra) and ***Devender Pal Singh v. State of A.P.***[35] and eventually came to hold that the said case fell in the rarest of the rare category and the capital punishment was warranted. Being of this view, the Court declined to interfere with the sentence.

52. In ***Rajendra Pralhadrao Wasnik v. State of Maharashtra***[36], the appellant was awarded sentence of death by the learned trial Judge which was confirmed by the High Court, for he was found guilty of the offences punishable under Sections 376(2)(f), 377 and 302 IPC. In the said case, the prosecution had proven that the appellant had lured a three year old minor girl child on the pretext of buying her biscuits and then raped her and eventually being apprehensive of being identified, killed her. In that context, while dismissing the appeal, the Court ruled thus:

> "When the Court draws a balance sheet of the aggravating and mitigating circumstances, for the purposes of

[35] (2002) 5 SCC 234
[36] (2012) 4 SCC 37

> 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.
>
> Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief" and "confidence", in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self."

53. At this juncture, we may refer to some authorities where in cases of rape and murder, the death penalty was not awarded. In ***State of T.N. V. Suresh and Another***[37], the Court unsettled the judgment of acquittal recorded by the High Court and found that the accused was guilty of rape of a pregnant woman

[37] (1998) 2 SCC 372

and also murder. While awarding the sentence of life imprisonment, the Court expressed the view:-

> "The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A-2 and A-3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A-2 and A-3, though we are not inclined, at this distance of time, to restore the sentence of death passed by the trial court on those two accused".

From the aforesaid authority, it is seen that the Court did not think it appropriate to restore the death sentence passed by the trial court regard being had to the passage of time.

54. In ***Akhtar V. State of U.P.***[38], the appellant was found guilty of murder of a young girl after committing rape on her and was sentenced to death by the learned Sessions Judge and the said sentence was

[38] (1999) 6 SCC 60

confirmed by the High Court. The two-Judge Bench referred to the decisions in ***Laxman Naik*** (supra), ***Kamta Tiwari*** (supra) and addressed itself whether the case in hand was one of the rarest of the rare case for which punishment of death could be awarded. The Court distinguished the two decisions which have been referred to hereinabove and ruled:-

> "In the case in hand on examining the evidence of the three witnesses it appears to us that the accused-appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused-appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death".

55. In ***State of Maharashtra V. Barat Fakira Dhiwar***[39], a three-year old girl was raped and murdered by the accused. The learned trial Judge convicted the accused and awarded the death

[39] (2002) 1 SCC 622

sentence. The High Court had set aside the order of conviction and acquitted him for the offences. This Court, on scrutiny of the evidence found the accused was guilty of rape and murder. Thereafter, the Court proceeded to deal with the sentence and in that context observed:-

> "Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases", as envisaged by the Constitution Bench in *Bachan Singh* v. *State of Punjab*. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 IPC, to imprisonment for life".

56. Keeping in view the aforesaid authorities, we shall proceed to adumbrate what is the duty of the Court when the collective conscience is shocked because of the crime committed. When the crime is diabolical in nature and invites abhorrence of the collective, it shocks the judicial conscience and impels it to react keeping in view the collective conscience,

cry of the community for justice and the intense indignation the manner in which the brutal crime is committed. We are absolutely conscious that Judges while imposing sentence, should never be swayed away with any kind of individual philosophy and predilections. It should never have the flavour of Judge-centric attitude or perception. It has to satisfy the test laid down in various precedents relating to rarest of the rare case. We are also required to pose two questions that has been stated in ***Machhi Singh's*** case.

57. Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and

eventually raped her in a brutal manner, as if he had the insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life spark. The barbaric act of the appellant does not remotely

show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous. In this context, we may fruitfully refer to a passage from ***Shyam Narain V. State (NCT of Delhi)***[40], wherein it has been observed as follows:

> "The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a "tsunami" of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of sensitive polity".

In the said case, while describing the rape on an eight year old girl, the Court observed:

> "Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in

[40] (2013) 7 SCC 77

> cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers."

58. In the case at hand, as we find, not only the rape was committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and

barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

59. We are absolutely conscious that mitigating circumstances are to be taken into consideration. Learned counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not pre-meditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. Learned counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had number of cases are pending against him. That alone may not be sufficient. The appalling cruelty shown

by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to the society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.

60. As we perceive, this case deserves to fall in the category of rarest of the rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven make a four year minor innocent girl child the prey of his lust and deliberately cause her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and

indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of rarest of the rare case and we unhesitatingly so hold.

61. Consequently, we dismiss the criminal appeals preferred by the appellant and affirm the death sentence.

.....J.
[DIPAK MISRA]

.....J.
[ROHINTON FALI NARIMAN]

.....J.
[UDAY UMESH LALIT]

NEW DELHI
NOVEMBER 26, 2014.