IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE
HON'BLE SHRI JUSTICE RAVI MALIMATH,
CHIEF JUSTICE
&
HON'BLE SHRI JUSTICE VISHAL MISHRA

CRIMINAL REFERENCE (CAPITAL PUNISHMENT) No.16 of 2018

BETWEEN:-

IN REFERENCE
RECEIVED FROM SESSIONS JUDGE,
RAISEN (M.P.)

.... APPELLANT

(BY SHRI S.S. CHOUHAN - PUBLIC PROSECUTOR)

AND

JITENDRA UIKEY

.... RESPONDENT

(BY SHRI AKASH CHOUDHARY – ADVOCATE AS AMICUS CURIAE)

AND

CRIMINAL APPEAL No. 9023 of 2018

BETWEEN:-

JITENDRA UIKEY S/O SHRI KISHANLAL UIKEY, AGED ABOUT 24 YEARS, R/O SANTOSH JIJA KA MAKAN GRAM NAYAPURA SODARPUR THANA OBEDULLAGANJ TEHSIL GOUHARGANJ DISTRICT RAISEN (M.P.) PERMANENT ADDRESS GRAM JHIRANYAPURA THANA RAISEN DISTT. RAISEN (M.P.)

.... APPELLANT

(BY SHRI AKASH CHOUDHARY – ADVOCATE AS AMICUS CURIAE)

AND

STATE OF MADHYA PRADESH THROUGH POLICE STATION OBEDULLAGANJ DISTRICT RAISEN (M.P.)

.... RESPONDENT

(BY SHRI S.S. CHOUHAN – PUBLIC PROSECUTOR)

Reserved on : 22.06.2023

Pronounced on : 01.08.2023

This criminal reference as well as the appeal having been heard and reserved for judgment, coming on for pronouncement this day, ***Hon'ble Shri Justice Vishal Mishra*** *passed the following:*

JUDGMENT

This judgment shall govern the disposal of death reference and criminal appeal as they arise from the judgment dated 27.10.2018 passed by the Additional Sessions Judge, Gauharganj District Raisen in Special Case No.24 of 2018, whereby accused-Jitendra (hereinafter referred to as the 'appellant') has been convicted and sentenced as under -

Conviction	Sentence
Under Section 366 of IPC	Rigorous imprisonment for 10 years and fine of Rs.500/- and in default, to suffer one month imprisonment.
Under Section 376(2)(j) of IPC	Imprisonment for life and fine of Rs.500/- and in default, to suffer one month imprisonment.
Under Section 376(2)(m) of IPC	Imprisonment for life and fine of Rs.500/- and in default, to suffer one month imprisonment.
Under Section 376AB of IPC	Death sentence
Under Section 376A of IPC	Death sentence
Under Section 302 of IPC	Death sentence and fine of Rs.500/- and in default, to suffer one month imprisonment.
Under Section 201 of IPC	Rigorous imprisonment for 7 years and fine of Rs.500/- and in default, to suffer one month imprisonment.
Under Section 5n/6 of the Protection of Children from Sexual Offences Act, 2012	Imprisonment for life and fine of Rs.500/- and in default, to suffer one month imprisonment.

With the direction that the custodial sentences shall run concurrently

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

(**i**) A missing complaint (Ex.P/1) has been lodged by the father of the deceased-victim (PW1) on 14.08.2018 to the effect that his minor daughter aged about 7 years is missing since the evening of 13.08.2018. She went to her *Dadi*'s house namely Ghisiya Bai (PW3) on 13.08.2018 at 5 p.m. for playing. *Dadi*'s house is situated near his residence. On 14.08.2018, when he came back from the work, his wife (PW2) apprised him that their minor daughter had gone to

Dadi's house for playing but did not return back home. On enquiring from *Dadi*, it came to the knowledge that the appellant who was known to the victim as a distant relative took her for giving toffee and thereafter when he was asked about the details regarding the victim, he stated that after purchasing and giving toffee to her, he has left the victim at *Dadi*'s house. Despite search being made, she could not be traced out. Thereafter, an FIR was registered as Crime No.406 of 2018 for the offence under Section 363 of IPC at Police Station Obedullaganj District Raisen (Ex.P/38) against unknown person. The matter was taken up and investigated.

(ii) During the course of investigation, the shopkeeper Saurabh (PW4) was interrogated and he informed that the appellant never came to his shop with the girl child for purchase of toffee. Thereafter, the appellant was again called for interrogation and in his memorandum recorded under Section 27 of the Evidence Act (Ex.P/4), he has admitted the fact that he took the victim on the pretext of purchasing toffee for her, took her to a nearby jungle, committed rape on her and thereafter, by pressing her neck, killed her and hid the dead body in the jungle. Statements of witnesses under Section 161 of CrPC were recorded.

(iii) On the basis of appellant's memo under Section 27 of the Evidence Act and with his help, the dead body of the victim was found for which entire videography was got

conducted on the spot and the same was produced along with the certificate under Section 65B of the Evidence Act. After recovery of the dead body of the victim, inquest proceeding was done and thereafter the same was sent for post-mortem examination. Autopsy Surgeon Dr. Vinay Prabha (PW14) found injuries on the private parts of the victim and gave a finding regarding commission of rape as well as death to be homicidal in nature caused by strangulation. Therefore, the offences under Sections 376AB, 302, 201 of IPC and Section 5m/6 of the POCSO Act were added in the case.

(iv) Upon conclusion of the investigation, charge sheet was filed and charges were framed against the appellant to which he pleaded not guilty and claimed to be tried. During the trial proceedings, the prosecution examined as many as 28 witnesses and exhibited documents marked as Ex.P/1 to Ex.P/58. Then the appellant was examined under Section 313 of CrPC. His defence was that of innocence and false implication by the police.

(v) After conclusion of the trial, the learned trial Court arrived at a conclusion that the appellant was guilty of the commission of aforesaid offences and accordingly he was convicted and sentenced in the manner as indicated above. With regard to capital punishment/death penalty, the present reference is being made to this Court for confirmation of death penalty.

(vi) The accused-appellant has also preferred the criminal appeal against the impugned judgment of conviction which is taken up for consideration along with the death reference.

3. Shri Akash Choudhary, Advocate who has been appointed as amicus curiae to argue the death reference has consented for arguing the criminal appeal filed on behalf of the appellant-accused.

4. It is argued by the learned amicus curiae that the entire case is based upon circumstantial evidence, last seen evidence and recovery of dead body of the girl child at the instance of the appellant. The appellant has been arrayed in the case merely on the basis of memo prepared under Section 27 of the Evidence Act and on the basis of recovery of the dead body at his instance. But, the recovery of the body at the instance of the appellant is doubtful because as per the *dehati nalishi* which is recorded by the father (PW1) on 14.08.2018 at 23:45 Hrs. (Ex.P/2) wherein it is mentioned that his daughter was missing since the evening of 13.08.2018 when her grandmother had taken her to her house and thereafter on 14.08.2018, the appellant took her from *Dadi*'s house to deliver her to father's house. The appellant gave a statement that he took the victim, bought her a toffee and left her in front of *Dadi*'s house. On the basis of the aforesaid, an FIR was registered as Crime No.79 of 2018 at Police Outpost Goharganj for the offence under Section 363 of IPC against unknown person. During the investigation, a suspicion was drawn upon the appellant as he has given a disclosure statement under Section 27 of the Evidence Act on

16.08.2018 at 14:30 Hrs. (Ex.P/4) wherein he has stated that he committed the offence with the victim and the dead body was hidden in the jungle and he shall lead the police party to the spot to recover the body. The police authorities went to the spot and recovered the dead body for which seizure memo (Ex.P/5) was prepared at 15:30 Hrs. on 16.08.2018.

5. It is his case that if the entire case of the prosecution is believed as it is, then the fact regarding the information being received to G.S. Narvariya Scientific Officer (PW15) who was summoned by the police authorities arrived at the spot on 16.08.2018 and performed forensic analysis of the crime scene. He has admitted in his chief examination that on 16.08.2018 at 1 p.m. in the afternoon Station House Officer of Police Station Obedullaganj namely K.S. Mukati (PW28) informed him that the dead body of the victim was lying in the forest nursery located within the jurisdiction of Goharganj Police Outpost (*Chowki*). The aforesaid aspect is unexplained by the prosecution in the entire case. Thus, the very information regarding the dead body lying in the jungle cannot be stated to be given by the appellant for the first time on 16.08.2018 at 14:30 Hrs. The Scientific Officer (PW15) was already having an information about the same at 1 p.m. and he was available on the spot for analysis of the crime scene. This itself creates a serious doubt over the prosecution story to the extent that the police authorities were having information of the dead body of the victim prior to his disclosure statement. The entire case is based upon the circumstantial evidence as well as the last seen theory but the fact remains that from the date of missing of the victim till the recovery of the dead body,

there is a gap of nearly five days and looking to the fact that the so-called recovery at the instance of the appellant could not be proved by the prosecution as Scientific Officer G.S. Narvariya (PW15) has admitted in his examination-in-chief that he was given the information regarding the location of dead body on telephone at 1 p.m. on 16.08.2018. Therefore, the very genesis of connecting the appellant with murder of the girl child and rape could not be made out in view of the settled proposition of law that the time period from the date of missing till recovery of the dead body should have been explained by the prosecution and there should not be any unexplained link between the two. It is argued that the prosecution has not been carried out in a fair and impartial manner. He has placed reliance upon the decision of the Hon'ble Supreme Court in the case of Bhalinder Singh vs State of Punjab (1994) 1 SCC 726.

6. It is further argued that Scientific Officer G.S. Narvariya (PW15) has neither been declared hostile nor there is any re-examination to the aforesaid aspect. Therefore, the prosecution version has to be accepted that he came to know about the body of the girl child on 16.08.2018 at 1 p.m. from SHO K.S. Mukati (PW28). Learned amicus has further relied upon the judgments of the Hon'ble Supreme Court in the cases of Raja Ram vs State of Rajasthan (2005) 5 SCC 272 and Assoo vs State of M.P. (2011) 14 SCC 448 to the effect that under such circumstances, the prosecution version has to be accepted.

7. The second argument which is being advanced is based upon the memorandum of the appellant recorded under Section 27 of the Evidence Act by the police authority (Ex.P/4).

8. It is argued that this is the key document (Ex.P/4) on which the entire case of the prosecution is based upon. It is a disclosure statement made to the police authorities. The learned amicus has drawn attention of this Court to the definition of Section 27 of the Indian Evidence Act to the effect that the statement recorded under Section 27 shall make it evident that unless and until, an object is discovered on the basis of an alleged information supplied by a person, the same is not admissible. It is argued that as per the prosecution story, there was information of the dead body prior to recording of disclosure statement of the appellant. Therefore, it cannot be said that there is recovery of the body at the instance of the appellant. He has placed reliance upon the testimony of SHO K.S. Mukati (PW28) and also the statement of Scientific Officer G.S. Narvariya (PW15). Placing reliance upon the judgments rendered by the Hon'ble Supreme Court in the cases of Krishan Mohar Singh Dugal vs State of Goa (1999) 8 SC 552, State of Haryana vs Jagbir Singh (2003) 11 SCC 261 and Vijender vs State of Delhi (1997) 6 SCC 171, it is argued that there was virtually no connecting link to complete the chain of circumstances as far as the appellant is concerned. Therefore, the entire prosecution story is falsified as there is no eyewitness to the incident.

9. The third argument which is being raised by the counsel appearing as an amicus curiae is based upon the DNA report (Ex.P/50).

10. The learned Additional Sessions Judge has heavily relied upon the said report and observed that the DNA report is a clinching proof against the appellant and clearly shows that the offence was committed by him. However, the manner in which the samples were collected,

sealed and sent for forensic examination is itself doubtful. It is argued that there is admission on the part of the Investigating Officer that he has not sealed the samples while sending them to the forensic examination. It is further submitted that no seals were sent to the forensic, therefore, it cannot be said that the samples which were collected were the same which have been sent for forensic examination. The prosecution placing heavy reliance upon the DNA report was required to clearly establish the seizure of articles from the victim as well as from the accused, sealing of the articles as well as sending them to forensic expert in a sealed manner. In absence of specific evidence being brought on record by the prosecution to the aforesaid effect, the report which has been received is itself doubtful and the conviction cannot be based upon such report.

11. The counsel appearing as an amicus curiae has further relied upon the judgment of the Hon'ble Supreme Court in the case of Mukesh vs State (NCT of Delhi) (2017) 6 SCC 1 to establish that there had been no quality control or quality assurance or if there is any evidence of tampering of samples, the DNA report cannot be accepted. It is argued that the first sample was seized from the accused on 16.08.2018 at 9.15 p.m. which includes semen slides, pubic hair and the other articles of the accused which was taken by Dr. K.P. Yadav (PW25) and seized by SHO K.S. Mukati (PW28). However, there is no *Namuna* seal (seal sample), therefore, it clearly shows that the articles were not sealed when they were handed over to the SHO. He has further drawn attention of this Court to the statement of Dr. K.P. Yadav (PW25) wherein he was put a specific question regarding the same and

he has given a lame explanation that although in the medical report (Ex.P/41), there is no mentioning of the fact that semen slides were sealed but he has submitted that it were included in the process itself. There is no evidence regarding custody or storage of the seized articles, by whom and where they were kept until they were dispatched to Forensic Science Laboratory on 19.08.2018. No evidence has been produced to establish that the articles of the accused were kept in *Malkhana* or any other safe place. There is no evidence on record to show that which seals were put by the Doctor and which seals were put by the SHO and which seals were actually found in the Forensic Science Laboratory. The seals which were sent to the Forensic Science Laboratory have not been identified. It is argued that they cannot be automatically accepted. They are required to be matched with the sealed samples but no such proceedings have been drawn. Moreover, the constable or the police officer who took the articles to the laboratory has not been examined by the prosecution as a witness. As such, there is a missing link from seizure of articles to sending it to the laboratory. Thus, the entire chain of circumstances is not complete. For this, he has placed reliance upon the judgment of this Court in Vijay Singh vs State of M.P. 2004 (4) MPLJ 543 and has argued that it was incumbent upon the prosecution to prove the seized articles that the seized articles had remained intact since the time they were taken into custody by the prosecution to the time they were received by the chemical examiner. Further, he has placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of Mahmood vs State

of U.P. AIR 1976 SC 69 wherein it is held that after sealing the parcel the seal should not remain with the investigation agency.

12. Similar was the situation while seizing the articles from the deceased, therefore, adverse inference in terms of Section 114 of the Evidence Act has to be drawn as the prosecution has deliberately concealed the articles from the court. The prosecution has not produced the *Malkhana* register nor the *Malkhana* In-charge was examined to establish the safe custody of the articles and to rule out the possibility of tampering. Mere oral testimony is not sufficient to prove that the articles were deposited in the *Malkhana*. For this, learned counsel appearing as an amicus curiae has placed reliance upon the judgment rendered by the Supreme Court in the case of State of Rajasthan vs Gurmail Singh (2005) 3 SCC 59.

13. Another argument is raised with respect to delay in sending the samples. The samples from the accused and the deceased were obtained on 16.08.2018 and they were not sent to Forensic Science Laboratory immediately but waited till the blood samples of the accused were obtained on 19.08.2018. The dispatch memo (Ex.P/31) mentions about dispatch of two different samples, each having 2.5 ml but both were not separately marked. The laboratory report does not mention receiving of two samples. Thus, the entire prosecution story is vitiated owning to the fact that from seizure of articles till preparation of the DNA report, the prosecution appears to have cooked a story as they failed to explain the sealing of samples and recovery of any seal by the forensic laboratory. Thus, the entire prosecution story is vitiated and under such scenario, the accused cannot be convicted.

14. The next argument is raised with respect to last seen theory. As per the prosecution, the appellant was last seen with the deceased in the evening of 13.08.2018 and the dead body was recovered on 16.08.2018. Thus, there is a huge gap between the date of last seen and the recovery of the dead body. As per prosecution, the appellant-accused was last seen with the girl child on 13.08.2018 and her dead body was recovered on 16.08.2018. There is a gap of 3-4 days. Therefore, it would not be safe to convict the appellant on the basis of last seen theory alone. It is argued that last seen theory is an important link in the chain of circumstances that would point out towards the guilt of the accused. It has to be established by leading cogent evidence. He has placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of Nizam vs State of Rajasthan (2016) 1 SCC 550 and has argued that where time gap is long, it would be unsafe to base the conviction on the last seen theory. It is safer to look for corroboration from other circumstances and the evidence adduced by the prosecution. He has further placed reliance upon the judgment passed by the Hon'ble Supreme Court in the case of Ramreddy Rajesh Khanna Reddy vs State of A.P. (2006) 10 SCC 172 wherein it is held that even in the case where time gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is too small, the possibility of any person other than the accused being the author of the crime becomes impossible and the court should look for some other corroboration. Under these circumstances, it is argued that the appellant has been falsely implicated in the case. He has not committed any offence in any manner. The learned trial Court has

committed an error in convicting the appellant and holding him guilty of the offences as mentioned in para 1 above and imposing death penalty along with other punishments as there is no cogent and credible evidence available on record coupled with the fact that the entire case is based upon the circumstantial evidence and the evidence which led by the prosecution also does not complete the chain of circumstances and the fact that there is no explanation with respect to collecting of samples and sealing it which vitiates the DNA report and looking to the time gap between the last seen and the recovery of the dead body, the appellant could not have been convicted with death penalty, rather he should have been acquitted of all the charges as the prosecution has failed to make out a case against the appellant.

15. The counsel appearing as an amicus curiae has further argued that for the purpose of DNA report, when the accused was examined under Section 313 of CrPC, he was not explained regarding the DNA report and his conviction being based on that report. The aforesaid provisions are mandatory in nature and were required to be complied with by the authorities prior to arriving at any conclusion. This itself makes the entire prosecution story as doubtful. He has placed heavy reliance upon the judgments in the cases of Raju vs State of M.P. 2001 SCC OnLine MP 425, Sukhkit Singh vs State of Punjab (2014) 10 SCC 270, Bhalinder Singh vs State of Punjab (1994) 1 SCC 726, Bharat vs State of M.P. (2003) 3 SCC 106, Kanhaiya Lal vs State of Rajasthan (2014) 4 SCC 715 and Malleshappa vs State of Karnataka (2007) 13 SCC 399.

16. *Per contra*, learned Public Prosecutor has vehemently opposed the contentions and has supported the impugned judgment of conviction. It is argued that there is sufficient evidence available on record against the appellant. It is contended that there is no dispute with respect to the age of the victim. On the date of incident i.e. 13.08.2018 she was less than 4 years. The missing report was filed at the behest of her father. The FIR was registered on 14.08.2018 on the statement made by the father. It is submitted that the father has been examined as PW1 and he has categorically stated that he was informed by the appellant that he dropped the deceased-victim in front of *Dadi*'s house after getting her toffee then he went away. The statement of *Dadi* namely Ghisiya Bai (PW3) reveals that the accused dropped the deceased near the wall on the road. The statement of the shopkeeper Sourabh was recorded as PW4. He categorically stated that the appellant did not come to his shop with the girl child on 13.08.2018 for purchasing toffee, rather he came alone on 14.08.2018 to purchase *Rajshree gutkha.* Thus, the statement made by the appellant was found to be false. Thereafter, he was again interrogated. His statement under Section 27 of the Evidence Act was recorded on 16.08.2018 at 14.30 Hrs. wherein he has made a disclosure regarding commission of offence by him and he has further stated that he would lead the police party so that they may recover the dead body which was hidden by him in the jungle. Thereafter, at his instance, the dead body of the girl child was recovered on 16.08.2018 at 15:30 Hrs.

17. The argument regarding the information of dead body of the victim at the instance of appellant and the information given to the

Scientific Officer of the forensic laboratory was made to point out that the SHO has already given information with respect to the dead body to the Scientific Officer on 16.08.2018 at 1 p.m. Therefore, the police authorities were already having the knowledge regarding the dead body lying in the jungle at 1 p.m. Hence, it cannot be said that the appellant was the first person to give information with respect to dead body and at his instance, the same has been recovered. With respect to the aforesaid, it is argued that the appellant has been interrogated on two different occasions by the police authorities, *firstly*, when the information was given that the girl child was with the appellant for purchasing of toffee and *secondly*, when the statement of shopkeeper Saurabh (PW4) was recorded and when on interrogation, he gave the information regarding dead body lying in the jungle and he will lead the police party to the spot. The investigation officer K.S. Mukati (PW28) in his statement has categorically stated that as soon as the information with respect to dead body was given by the accused, prior to going for search of the body, he has telephoned the Scientific Officer (PW15) and has given the information with respect of the dead body of the girl child lying in the jungle. Scientific Officer G.S. Narvariya (PW15) has given a statement that he received the said information on 16.08.2018 at 1 p.m. from SHO K.S. Mukati (PW28). In para 12 of SHO's statement, he has stated that he interrogated the appellant on 15.08.2018 and in para 15 thereof, he further reiterated that on 15.08.2018, he interrogated the appellant. The appellant was left free because he has stated that after purchasing toffee and giving it to the child, he left her in front of her *Dadi*'s house. It is argued that the entire

evidence may be seen then there is no cross-examination made by the prosecution to clarify the aforesaid aspect. If the entire statement of the Investigating Officer and the Scientific Officer is seen, it is clear that they were told that dead body is hidden in the jungle but no one knew where it was hidden. It was only the accused who escorted them to the spot where the dead body was lying. The fact remains that the body was recovered on the basis of the disclosure's statement made by the appellant. There is no dispute with respect to the dead body being recovered at the instance of the appellant. Under these circumstances, the arguments advanced before this Court are of no help to the appellant. The learned trial Court has not committed any error in convicting the appellant.

18. With respect to the arguments advanced creating a doubt over the DNA report (Ex.P/50) and seizure of samples and its sealing and sending it to the forensic laboratory is concerned, if the statement of the investigating officer K.S. Mukati (PW28) is seen that he has categorically stated that the samples were duly collected, they were sealed and after obtaining the blood sample of the accused, the same were sent for chemical examination on 19.08.2018. The Scientific Officer G.S. Narvariya (PW15) has found the samples in a sealed condition which is reflected from the report and the same is produced before the Court as Ex.P/50. It is specifically mentioned in the report that the sent samples were found in the sealed condition and the sample of the seal was found. Thus, there was no dispute with regard to sampling, seizing and sending it to the forensic laboratory. It is contended that the entire evidence which has been recorded before the

trial Court does not reflect any cross-examination to the aforesaid effect. Therefore, no doubt can be cast upon seizures and sealing of the articles and collection of sample. Further, the seizure memo (Ex.P/33) clearly shows that the articles were seized, sealed and sealed samples were kept by the police authorities. The DNA report which is received clearly establishes the factum of deceased's sample matching with that of the accused. The learned Public Prosecutor has drawn attention of this Court to paragraph 6 of the impugned judgment wherein the factum of photography and videography being done by Sheikh Nisar (PW13) with respect to seizure of articles has been dealt with which was also accompanied with certificate under Section 65B of the Evidence Act (Ex.P/21 and Ex.P/22). Moreover, there is a recovery of clothes of the deceased. Therefore, it cannot be said that the DNA report which was found to be positive and also supported by the corroborative evidence, could not be relied upon. A positive result of the DNA test would constitute clinching evidence against the accused. Thus, there cannot be any illegality committed by the learned trial Court in convicting the appellant.

19. Another argument which is raised is with respect to the last seen theory. The prosecution has produced three last seen witnesses namely Mushtak (PW5), Jagdish (PW6) and Aasif (PW7) who have categorically stated that they saw the appellant taking the girl child and thereafter she went missing. They have not been declared hostile by the prosecution. There is no other evidence on record to show that the girl child was last seen with any other person except the appellant. Moreover, recovery of dead body at the instance of the appellant,

seizure of clothes from the possession of the appellant coupled with the DNA report which was found to be positive establishes the guilt of the accused. Therefore, the argument advanced with respect to the last seen theory are also of no help to the appellant. Hence, virtually all the arguments which have been raised by the learned amicus curiae have been negated by the Public Prosecutor after taking this Court through the entire evidence available on record.

20. It is further argued by the learned Public Prosecutor for the State that the post-mortem report (Ex.P/23) which is prepared by Dr. Vinay Prabha (PW14) clearly reflects that there were injuries on the private parts of the girl child and she succumbed to death by strangulation and the nature of death was reported as homicidal.

21. As far as the death penalty being awarded to the appellant is concerned, it is argued that all the factors such as aggravating circumstances, mitigating circumstances and the tests to be applied viz. 'crime test', 'criminal test' and 'R-R test' are seen then the case falls under the category of the 'rarest of the rare case'. The age of the victim was below 4 years and the accused was aged about 24 years. He was known to the victim and taking advantage of the same, has taken her for the sake of purchasing the toffee, took her to the jungle and committed the offence. The manner in which the offences have been committed is a glaring example of heinousness and brutality on a small child of four years who under the good faith and belief of the accused accompanied him on being given an allurement of buying her a toffee. Thus, this is a case where the crime against the female child has been committed with brutality and is virtually a crime against the society at

large. Finding all the factors against the appellant and considering the theory of 'residual doubt' and the state of mind of the accused, the learned trial Court has rightly arrived at a conclusion that it is a fit case of imposition of capital punishment. He has prayed for upholding the capital punishment and dismissal of the appeal preferred by the accused-appellant.

22. To buttress his submissions, the learned Public Prosecutor has placed reliance on the decisions rendered in the cases of State of U.P. vs Deoman Upadhyaya AIR 1960 SC 1125; Machhi Singh vs State of Punjab, (1983) 3 SCC 470; Sharad Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116; State of U.P. vs Satish, (2005) 3 SCC 114; Vikram Singh vs State of Punjab, (2010) 3 SCC 56; Mohd. Arif vs State (NCT of Delhi), (2011) 13 SCC 621; Nar Singh vs State of Haryana, (2015) 1 SCC 496; Yogesh Singh vs Mahabeer Singh, (2017) 11 SCC 195 and C. Muniappan vs State of T.N., (2010) 9 SCC 567.

23. Heard the learned counsels of the parties and perused the record.

24. From the perusal of the record, it is seen that the age of the victim was 4 years at the time of commission of offence. The girl child was missing since 13.08.2018 and the report to that effect (Ex.P/1) was lodged by the father of the victim (PW1) on 14.08.2018 on 23.55 Hrs. on the basis of which an FIR being Crime No.406 of 2018 (Ex.P/38) was got registered against the accused. The father of the deceased (PW1) has informed the police authorities regarding the fact that the accused had dropped the deceased in front of the house of grandmother after getting her toffee and went away.

25. As per the father (PW1), the child went to her grandmother's house for playing and she was taken away by the accused to leave her to her parental house and when the accused was asked about the same, he gave a statement that he had dropped the child after purchase of toffee in front of her grandmother's house and then he went away. This is how the appellant was introduced in the prosecution. The investigating agency went ahead and interrogated the shopkeeper Saurabh (PW3) who has categorically stated that the accused did not come with any girl child to get toffee with her. Thereafter, the accused was again called for and interrogated by the police authority. He again reiterated the same and stated that he has dropped the girl child back to her grandmother's house and went away for doing work but when he was made aware of the statement of the shopkeeper then he has made a disclosure statement to the police authorities which is recorded under Section 27 of the Evidence Act on 16.08.2018 at 14:30 Hrs. which is exhibited as Ex.P/4 wherein he has categorically stated as under :-

> ''मैनें स्वैच्छया पुलिस अभिरक्षा में कथन दिया कि दिनांक 13.08.2018 को [redacted] को घिसिया दादी संतोष जीजा के घर से टॉफी दिलाने के बहाने लेकर गया था, [redacted] हैहरगंज के सामने जंगल में ले जाकर उसके साथ गलत काम (बलात्कार) किया और गला दबाकर उसे जान से मारकर लाश को जंगल में ही छुपा दिया है, चलो चलकर निशा की लाश बरामद कराये देता हूँ ।''

26. On the basis of this disclosure statement made by the appellant, the offences under Sections 376AB, 302, 201 of IPC and Section 5m/6 of the POCSO Act were enhanced and he was taken into custody. The

age of the girl child was not disputed, therefore, the provisions of POCSO Act were clearly attracted. The birth certificate of the prosecutrix is Ex.P/13 wherein the date of birth is recorded as 01.04.2015, therefore, at the time of incident she was 3 years, 4 months and 12 days. The birth record of the hospital was exhibited as Ex.P/40 which was proved by Nitin Dwivedi (PW24). The statement of father (PW1) to the aforesaid effect was also recorded. Therefore, as pointed out already, there is no dispute with respect to the age of the victim.

27. Vide Ex.P/5, the seizure memo of the body was prepared which was found at the instance of the accused. The body was seized on 16.08.2020 at 15:30 Hrs. Thereafter, identification *panchnama* of the dead body was prepared (Ex.P-6) which was duly identified by the father (PW1). The marg intimation (Ex.P-7) was recorded on 16.08.2018 at 15:55 Hrs. (Ex.P./7) and thereafter the body was sent for post-mortem examination. The doctor who conducted the post-mortem of the deceased has given the report regarding commission of rape and thereafter death by strangulation. The post-mortem report is Ex.P/23. Thus, the doctor has confirmed the factum of rape and murder by throttling and the autopsy report states the death to be homicidal in nature and the entire suspicion was drawn against the present appellant. Further, memorandum of the accused under Section 27 of the Evidence Act (Ex.P/16) has been recorded regarding recovery of clothes which were worn by him at the time of commission of offence and which were hidden in the house and at the instance of the accused, the same were recovered from his house on 17.08.2018.

28. The learned amicus curiae has raised a serious doubt with respect to involvement of the accused-appellant in the commission of offence on the ground of recovery of body of the deceased cannot be said to be at the instance of the appellant as the police authorities were having information regarding the same prior to his disclosure statement (Ex.P/4). To the aforesaid effect, the investigation is required to be seen. SHO K.S. Mukati (PW28) is the investigation officer in the case. The interrogation with the accused was done on two occasions. Initially, there was a '*Gum insan'* report (Ex.P/1) dated 14.08.18 at 23:55 Hrs. on the basis of which an FIR under Section 363 of the IPC was registered on 14.08.2018 at Police Station Obedullaganj District Raisen against unknown person. From the perusal of the FIR, it is clear that the name of the appellant was informed by the *Dadi* namely Ghisiya Bai (PW3) who stated about taking of the girl child by the appellant for dropping her to the parents' house. Thereafter, the appellant was interrogated. Initially, he stated that he has taken the girl child, purchased her a toffee and thereafter left her back in front of *Dadi*'s house. But, when the shopkeeper Sourabh (PW4) was interrogated by the police authorities to ascertain the aforesaid fact, he stated that the accused/appellant has not come with any girl child to his shop drawing a suspicion against the appellant. He was again interrogated by the police authorities on 16.08.2018 where he made a disclosure statement (Ex.P/4) at 14:30 Hrs. The argument raised that police authorities were well aware of the body of the deceased at 1 p.m. because the information to the Scientific Officer was given on 16.08.2018 at 1 p.m. by the Investigating Officer through his mobile.

29. The argument advanced is that after interrogation with the appellant by the police authorities and prior to recording his statement under Section 27 of the Evidence Act, the information was given to the Scientific Officer on telephone was on the pretext that as the disclosure is already made by the appellant, therefore, just to avoid any delay in the investigation, he has informed the Scientific Officer. Thereafter, the disclosure statement was penned down by the police authorities. The aforesaid aspect further gets strength from the fact that the appellant has escorted the police authorities to the place of the incident and has got recovered the dead body. The statements of the Investigating Officer and the Scientific Officer nowhere reflect that they were aware of the exact location of the dead body. Rather, they were informed that the dead body is hidden in the jungle but where it was, was not disclosed. It was the appellant who took the police party to the exact location from where they could recover the dead body. *Rojnamchas* were prepared to the aforesaid aspect. Therefore, it cannot be said that the dead body was not recovered at the instance of the accused. The aforesaid aspect was explained by the prosecution. Therefore, the said argument is of no help to the appellant. Apart from the aforesaid, vide Ex.P/16, there is a recovery of clothes of the accused from his possession and he has made a disclosure statement to this effect.

30. That apart, the appellant has also been seen by some of the persons of the locality namely Mustak (PW5), Jagdish (PW6) and Aasif (PW7) who have given statements to the effect that they have seen the appellant carrying the girl child. They were never declared hostile by the prosecution. Therefore, as far as the last seen theory is concerned,

the accused-appellant was last seen with the victim as there is no other statement on record to show that the deceased was last seen with anyone else coupled with the statement made by the shopkeeper Sourabh (PW4) who has supported by the prosecution story to the extent that the appellant Jitendra has never come with the girl child to his shop for purchase of toffee. The aforesaid aspects were correctly appreciated by the learned trial Court. When the statement of Investigation Officer K.S. Mukati (PW28) is seen, particularly paragraphs 12 to 18 it is clear and the doubts which have been raised by the defence were explained by him in his cross-examination. Thus, the ground regarding recovery of dead body at the instance of the appellant is clearly made out from the aforesaid. Thus, the ground raised by the defence is unsustainable.

31. As far as the validity of the disclosure statement under Section 27 of the Evidence Act is concerned, the law is apparently clear to the aforesaid. Section 27 of the Evidence Act is required to be seen. It reads thus :

> *"27. How much of information received from accused may be proved.—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."*

32. The Hon'ble Supreme Court in the case of Aloke Nath Dutta vs State of W.B. (2007) 12 SCC 230 has held as under :-

> *"53. It is, however, disturbing to note that a confession has not been brought on record in a manner contemplated by law. Law does not envisage taking on record the entire confession*

> *by marking it an exhibit incorporating both the admissible and inadmissible part thereof together. We intend to point out that only that part of confession is admissible, which would be leading to the recovery of dead body and/or recovery of articles of Biswanath; the purported confession proceeded to state even the mode and manner in which Biswanath was allegedly killed. It should not have been done. It may influence the mind of the court. (See State of Maharashtra v. Damu (2000) 6 SCC 269)."*

33. In the case of Union of India v. R. Metri, (2022) 6 SCC 525, the Hon'ble Supreme Court has held as under :

> *"45. It could, thus, be seen that the extra-judicial confession is a weak piece of evidence. Unless such a confession is found to be voluntary, trustworthy and reliable, the conviction solely on the basis of the same, without corroboration, would not be justified."*

34. Another judgment on the point is the case of Swamy Shraddananda vs State of Karnataka (2007) 12 SCC 288 and Rahul vs State (NCT of Delhi) (2023) 1 SCC 83.

35. From the aforesaid judgments, it is apparently clear that the confessional statement or disclosure statement should disclose the commission of crime and should be supported by subsequent recovery of the incriminating articles.

36. As to recording of memorandum prior to arrest of the accused, the Hon'ble Supreme Court in the case of Mohd. Arif vs State (NCT of Delhi), (2011) 13 SCC 621 has held as under :

> *"172. The Court in Suresh Chandra Bahri case [1995 Supp (1) SCC 80] then stated in para 71 that the two essential requirements of application of Section 27 of the Evidence Act are that (1) the person giving information was accused of any offence; and (2) he must also be in police custody. The Court then went on to hold that:*

> *"71. ... The provisions of Section 27 of the Evidence Act are based on the view that if the fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information is true and consequently the said information can safely be allowed to be given in evidence because if such an information is further fortified and confirmed by the discovery of articles or the instrument of crime and which leads to the belief that the information about the confession made as to the articles of crime cannot be false."*

37. Further, in Vikram Singh vs State of Punjab, (2010) 3 SCC 56, the Honble Supreme Court has held as under :

> *40. In State of U.P. v. Deoman Upadhyaya [AIR 1960 SC 1125 : 1960 Cri LJ 1504] this is what a Constitution Bench had to say while examining the scope and applicability of Section 27. The Bench relying on the observations made by the Privy Council in Pakala Narayana Swami v. King Emperor [(1938-39) 66 IA 66 : AIR 1939 PC 47] observed as under : (Deoman Upadhyaya case [AIR 1960 SC 1125 : 1960 Cri LJ 1504] , AIR pp. 1128-29, para 7)*
> *"7. Section 27 of the Evidence Act is one of a group of sections relating to the relevancy of certain forms of admissions made by persons accused of offences. Sections 24 to 30 of the Act deal with admissibility of confessions i.e. of statements made by a person stating or suggesting that he has committed a crime. By Section 24, in a criminal proceeding against a person, a confession made by him is inadmissible if it appears to the court to have been caused by inducement, threat or promise having reference to the charge and proceeding from a person in authority. By Section 25, there is an absolute ban against proof at the trial of a person accused of an offence, of a confession made to a police officer. The ban which is partial under Section 24 and complete under Section 25 applies equally whether or not the person against whom evidence is sought to be led in a criminal trial was at the time of making the confession in custody. For the ban to be effective the person need not have been accused of an offence when he made the confession. The expression, 'accused person' in Section 24 and the expression 'a person accused of any offence' have the same*

connotation, and describe the person against whom evidence is sought to be led in a criminal proceeding. As observed in Pakala Narayana Swami v. King Emperor [(1938-39) 66 IA 66 : AIR 1939 PC 47] , by the Judicial Committee of the Privy Council : (AIR p. 52)

'... Section 25 covers a confession made to a police officer before any investigation has begun or otherwise not in the course of an investigation.'

The adjectival clause 'accused of any offence' is therefore descriptive of the person against whom a confessional statement made by him is declared not provable, and does not predicate a condition of that person at the time of making the statement for the applicability of the ban. Section 26 of the Evidence Act by its first paragraph provides:

'26. Confession by accused while in custody of police not to be proved against him.—No confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.'

By this section, a confession made by a person who is in custody is declared not provable unless it is made in the immediate presence of a Magistrate. Whereas Section 25 prohibits proof of a confession made by a person to a police officer whether or not at the time of making the confession, he was in custody, Section 26 prohibits proof of a confession by a person in custody made to any person unless the confession is made in the immediate presence of a Magistrate. Section 27 which is in the form of a proviso states:

'27. How much of information received from accused may be proved.—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.'

The expression, 'accused of any offence' in Section 27, as in Section 25, is also descriptive of the person concerned i.e. against a person who is accused of an offence, Section 27 renders provable certain statements made by him while he was in the custody of a police officer. Section 27 is founded on the principle that even though the evidence relating to confessional or other statements made by a person, whilst he is in the

> *custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable insofar as it distinctly relates to the fact thereby discovered. Even though Section 27 is in the form of a proviso to Section 26, the two sections do not necessarily deal with evidence of the same character. The ban imposed by Section 26 is against the proof of confessional statements. Section 27 is concerned with the proof of information whether it amounts to a confession or not, which leads to discovery of facts. By Section 27, even if a fact is deposed to as discovered in consequence of information received, only that much of the information is admissible as distinctly relates to the fact discovered. By Section 26, a confession made in the presence of a Magistrate is made provable in its entirety."*

38. Thus, the aforesaid makes it clear regarding the involvement of the appellant in commission of the offence and the same is certified by the doctor who has conducted the postmortem report.

39. Now, adverting to the medical evidence on record, it may be seen that Dr. Vinay Prabha (PW14) who conducted the autopsy on deceased's body has given a post-mortem report (Ex.P/23). The extracts thereof are as under :

> *"A dead body of a female child aged about 6 years lying supine on PM table wearing red colour frock. All four limbs are semi-flexed and body is in stage of early decomposition. Maggots 3 to 4 mm crawling all over the body. (Lt) eye is bulging, (Rt) eye decomposed. Black hair on scalp. Peeling off of skin at many place, tongue protracted outside, teeth are inside. Face is cyanosed. Neck is tilted to left side. Growing effect over buttock and pessimism. Small loop of intestine putrefied present outside the anus. Muddy particles over palm, sole and other parts of the body. One ante-mortem lacerated wound over sub clavicular region of (Lt) side of chest size 2 x 1 x 1 cm. Two loop of yellow colour leggy tied around the neck with sliding knot (Lt) side encircling the neck and ante-mortem irregular bruise below the cloth (leggy) is present around neck which is*

dark brown and its width varies from 1 to 1½ inches and neck is constricted by cloth and respiratory and muscles are squeezed and respiratory passage obstructed and inflamed. On examination of private part (arrow banana hai) there is multiple laceration over the clitoris and at joining skin and mucous with laceration of labia muscle size varies from 2 x 1 cm to ½ x ½ cm. Genitalia are swollen. Growing effect over buttocks, perineum and around anal coral. All injuries on neck, chest and genitalia are ante-mortem in nature. Internal organs earlier stage decomposition solid particles in place."

Opinion of the Autopsy Surgeon

"Body is in dying state of early decomposition. There are signs of ante-mortem injuries in genital parts as well as around the neck of strangulation suggestive of sexual intercourse followed by strangulation and death. Mark around neck can be produced with yellow colour leggy is used for constricting neck. Vaginal smear slides and swab preserved. Clothing and article said to be used in strangulation pressured sealed and given to concerned police. Death is homicidal. Duration of death is within 3-5 days since PM examination."

40. Thereafter, a minute examination was got done and on the examination of the deceased, Dr. Vinay Prabha (PW14) has noted as follows :

2. प्रायवेट पार्ट का एग्जामिनेशन– एक से अधिक छिला हुआ घाव, योनी की गुप्तांग पर, चमड़ी पर, मिकोसा पर और लेबिया मोजेरा पर था, जिसका आकार 2 गुना 1 सेमी से हाफ गुना हाफ सेमी था। प्रायवेट पार्ट सूजा हुआ था। उक्त सारी चोटे गले, चेस्ट, छाती, गुप्तांग पर थी, जो कि एंटीमॉर्टम एंजुरी थी अर्थात उक्त चोटे मृत्यु के पहले की थी।

3. एग्जामिनेशन ऑफ इंटर्नल आर्गन – इंटर्नल आर्गन, अरली स्टेज ऑफ डिकम्पोजिशन था। इंटर्नल आर्गन का पर्दा, पसली, फुसफुस, कंठ, श्वास नली, दाहिनी फेफड़ा, बाया फेफड़ा, पेरीऑन परकरसियम, ह्दय, वृहद वाहिका, आंतों की झिल्ली, मुंह एवं ग्रासनली, पेट एवं उसके भीतर की वस्तुए, छोटी एवं बड़ी आंत एवं उसके भीतर की वस्तुएं, यकृत, प्लीहा, गुर्दा, ये सभी साफ्ट एवं फ्लैबी थे।

4. अभिमत – मेरे मत में मृतिका का शरीर, अरली स्टेज ऑफ डिकम्पोजिशन में था। मृतिका के गुप्तांगों में, गले में और उसके प्रायवेट पार्ट में मृत्यु के पहले की चोटें थी। मृतिका को आई हुई मृत्यु पूर्व चोटें, सेक्सुअल इंटरकोर्स के दौरान एवं उसके दबाव से आना प्रतीत होती थी तथा उसकी

मृत्यु, उसके गले में लेगी के द्वारा लपेटकर, गला दबाने से, दम घुटने से होना संभव थी।

...

6. मृत्यु के प्रकार – मृतिका की मृत्यु, मानव वध प्रकृति (होमेसाइडल नेचर की थी।) की थी। मेरे द्वारा मृतिका का शव परीक्षण, मृतिका की मृत्यु के 3 से 5 दिन के भीतर किया गया था। मेरे द्वारा दी गई शव परीक्षण रिपोर्ट प्र. पी–23 है, जिसके ए से ए भाग पर मेरे हस्ताक्षर है।

41. The post-mortem report (Ex.P/23) revealed that the girl child was subjected to rape and thereafter strangulated. The specimens were collected, sealed and thereafter handed over to the forensic examination by the police authority. The same was sent for forensic examination after collecting the sample for DNA. The same is not disputed.

42. The learned amicus curiae has raised a serious objection with respect to the manner in which the samples were collected, sealed and sent for chemical examination.

43. It is argued that once the prosecution could not establish that the proper procedure is being followed, the DNA report could not have been taken into consideration for basing the conviction of the appellant. With respect to the aforesaid argument, it is seen that the specimens of vaginal smear, blood sample, clothes (red frock and yellow colour leggy), viscera, stomach and seal sample were prepared by the autopsy surgeon Dr. Vinay Prabha (PW14). All the articles were sealed and thereafter handed over to the police. For DNA examination, the blood sample of the accused was collected. The Chemical Examiner has given the report on 29.09.2018 which was duly presented before the trial Court and marked as Ex.P/50 by SHO K.S. Mukati (PW28) from where it is seen that the samples which were seized and sealed were received

by the Forensic Officer in a sealed form along with the seals. The extracts of the DNA report (Ex.P/50) are reflected as under : -

तालिका 1 : प्रकरण के विभिन्न प्रदर्शो से प्राप्त पुरूष Y chromosome STR DNA Profile का विवरण निम्नानुसार हैं :–

STR Genetic Markers	प्रदर्श A (B/R-7677) मृतिका xxx के स्त्रोत कपडे (लैगी, फ्रॉक) से	प्रदर्श B (B/R-7678) मृतिका xxx के स्त्रोत वेजाईनल स्लाइड से प्राप्त डीएनए प्रोफाइल	प्रदर्श J (B/R-7684) आरोपी जितेन्द्र के स्त्रोत ब्लड सैंपल से प्राप्त डीएनए प्रोफाइल
DYS576	उपरोक्त प्रदर्श से Y chromosome STR DNA Profile प्राप्त नहीं हुई।	19	19
DYS3891		13	13
DYS635		24	24
DYS389II		29	29
DYS627		17	17
DYS460		11	11
DYS458		16	16
DYS19		16	16
YGATAH4		14	14
DYS448		20	20
DYS391		11	11
DYS456		15	15
DYS390		25	25
DYS438		11	11
DYS392		11	11
DYS518		40	40
DYS570		19	19
DYS437		14	14
DYS385		11,15	11,15
DYS449		30	30
DYS393		13	13
DYS439		10	10
DYS481		24	24
DYF387S1		37,39	37,39
DYS533		12	12

उपरोक्त तालिकानुसार –

- मृतिका xxx के स्त्रोत कपड़े (लैगी, फ्रॉक) प्रदर्श A (B/R-7677) से पुरूष Y chromosome STR DNA Profile प्राप्त नही हुई।
- मृतिका xxx के स्त्रोत वेजाईनल स्लाइड प्रदर्श B (B/R-7678) से पुरूष Y chromosome STR DNA Profile प्राप्त हुई।
- मृतिका xxx के स्त्रोत वेजाईनल स्लाइड प्रदर्श B (B/R-7678) से पुरूष Y chromosome STR DNA Profile के प्रत्येक जेनेटिक मार्कर पर पाए गये एलील

एवं आरोपी जितेन्द्र के स्त्रोत ब्लड सैंपल प्रदर्श J (B/R-7684) से प्रापत Y chromosome STR DNA Profile के प्रत्येक जेनेटिक मार्कर पर पाए गये एलील एक समान हैं।

तालिका 2 : प्रकरण के विभिन्न प्रदर्शो से प्राप्त Autosmal STR DNA Profile का विवरण निम्नानुसार हैं :–

Genetic Markers	प्रदर्श C (B/R-7679) मृतिका xxx के स्त्रोत ब्लड सैंपल से प्राप्त डीएनए प्रोफाइल	प्रदर्श D (B/R-7680) मृतिका xxx के स्त्रोत वेजाईनल स्लाइड से प्राप्त डीएनए प्रोफाइल	प्रदर्श G (B/R-7683) आरोपी जितेन्द्र द्वारा पेश करने पर जप्त अंडरवियर से प्राप्त डीएनए प्रोफाइल	प्रदर्श H, I (B/R-7683, B/R-7683) आरोपी जितेन्द्र द्वारा पेश करने पर जप्त पेंट एवं शर्ट	प्रदर्श F, J (B/R-7682, B/R-7684) आरोपी जितेन्द्र के स्त्रोत प्यूबिक हैयर एवं ब्लड सैंपल से प्राप्त डीएनए प्रोफाइल
D3S1358	16,17	उपरोक्त प्रदर्श से Autosomal STR DNA Profile प्राप्त नहीं हुई।	16,18	उपरोक्त प्रदर्श से Autosomal STR DNA Profile प्राप्त नहीं हुई।	16,18
vWA	17,19		14,14		14,14
D16S539	9,11		11,12		11,12
CSF1PO	10,11		12,2		12,2
TPOX	11,11		9,11		9,11
D8S1179	14,15		11,14		11,14
D21S11	30,30		29,32.2		29,32.2
D18S51	19,22		15,19		15,19
D2S441	10,10		10,12		10,12
D19S433	12,13.2		12,13		12,13
TH01	9,9		7,9		7,9
FGA	22,25		24,26		24,26
D22S1045	15,16		15,19		15,19
D5S818	10,12		11,12		11,12
D13S317	11,11		10,11		10,11
D7S820	8,12		10,12		10,12
SE33	17,18		17,32.2		17,32.2
D10S1248	13,14		15,16		15,16
D1S1656	11,17,3		11,16		11,16
D12S391	19,24		18,20		18,20
D2S1338	18,23		18,24		18,24
AMELOGENIN	XX		XY		XY
Y-INDEL	–		2		2
DYS391	–		11		11

उपरोक्त तालिकानुसार –

- घटनास्थल से जप्त मिट्टी से सने बाल प्रदर्श D (B/R-7680) से Autosomal STR DNA Profile प्राप्त नही हुई।
- आरोपी जितेन्द्र द्वारा पेश करने पर जप्त पेंट प्रदर्श H (B/R-7683) एवं शर्ट प्रदर्श I (B/R-7683) से Autosomal STR DNA Profile प्राप्त नही हुई।

- आरोपी जितेन्द्र द्वारा पेश करने पर जप्त अंडरवियर प्रदर्श G (B/R-7683) एवं आरोपी जितेन्द्र के स्त्रोत प्यूबिक हेयर प्रदर्श F (B/R-7682), ब्लड सैंपल प्रदर्श J (B/R-7684) से एक समान पुरूष Autosomal STR DNA Profile प्राप्त हुई।
- आरोपी जितेन्द्र द्वारा पेश करने पर जप्त अंडरवियर प्रदर्श G (B/R-7683) एवं आरोपी जितेन्द्र के स्त्रोत प्यूबिक हेयर प्रदर्श F (B/R-7682), से मिश्रित Autosomal STR DNA Profile प्राप्त न होने के कारण इसका मिलान, मृतिका xxx के स्त्रोत ब्लड सैंपल प्रदर्श C(B/R-7679) से प्राप्त महिला Autosomal STR DNA Profile से किया जाना संभव नहीं है।

अभिमतः–
डीएनए प्रोफाइलिंग हेतु प्राप्त प्रदर्शों पर किये गये परीक्षण एवं प्राप्त परिणामों के आधार पर निम्नलिखित निश्चियात्मक परिणाम प्राप्त हुये –

- **मृतिका xxx के स्त्रोत (प्रदर्श B) से प्राप्त प्ररूष Y chromosome STR DNA Profile एवं आरोपी जितेन्द्र के स्त्रोत (प्रदर्श J) से प्राप्त Y chromosome STR DNA Profile एक समान हैं।**

44. Thus, the DNA report clearly establishes that the blood samples collected from the accused and the samples which were collected from the victim were matching. In view whereof, it is apparently clear that the accused was the person who had taken away the girl child and committed rape upon her and thereafter murdered her. The learned amicus curiae has raised the said objection for the first time but during the course of investigation/trial, no effort was made by the defence regarding the aforesaid. Further, no application was filed for calling the Forensic Officer who has conducted the DNA examination. In absence of any efforts being made by the defence, no benefit can be extended at this stage. Further, after arrest of the accused, he was sent for examination and he was examined by Dr. K.P. Yadav (PW25) vide Ex.P-41 in which he has opined that the appellant/accused was capable of performing sexual intercourse. Thereafter, on 19.08.2018, the blood sample of the accused was collected and handed over to the Investigating Officer K.S. Mukati (PW28) for sending it to the forensic

officer which is exhibited as Ex.P/36. This fact is narrated by Constable Balwan Singh (PW19). Moreover, DNA report (Ex.P/50) has clearly clarified the aspect that the samples were received in a sealed condition by the laboratory for verification, therefore, the collection, sealing and handing is done in a full proof manner and the same cannot be doubted.

45. A co-ordinate Bench of this Court in the case of Santosh Markam vs State of M.P. 2022 SCC OnLine MP 2186 has considered the aspect that the conviction can be based on the DNA evidence also. In this regard, reference may also be made to the decision rendered by this Court in Deepak @ Nanhu Kirar vs State of M.P. 2020 CrLJ 2076.

46. Another argument is raised that when the statement of the accused under Section 313 of CrPC was recorded, no question was put with respect to the DNA report rather Question No.182 reflects that a question qua DNA report was put to the accused. He was well aware of this fact that the DNA report is against him. Then, the examination of the prosecution witnesses was conducted. Thus, there is no miscarriage of justice to the appellant looking to Question No.182. The judgment passed by the Hon'ble Supreme Court in the case of Nar Singh v. State of Haryana, (2015) 1 SCC 496 is relevant for the aforesaid aspect. Thus, the facts and circumstances of the case clearly reflect the guilt of the accused. This is a case of circumstantial evidence and the entire chain of circumstance is complete and duly proved by the prosecution.

47. With respect to the completion of chain of circumstances, the relevant facts are as under :

(i) The accused took away the girl child (since deceased) from the house of her grandmother on the pretext of getting her toffee;

(ii) The deceased who was aged 3 years 4 months 12 days knew the accused as her "*Chacha*" does not resist;

(iii) The accused cooked up a story of having dropped the deceased back to her *Dadi*'s house after getting her toffee;

(iv) The story of accused is falsified by shopkeeper Saurabh (PW4);

(v) Recovery of the dead body at the instance of the accused;

(vi) Availability of last seen testimonies;

(vii) No plausible explanation offered by the accused;

(viii) The post-mortem report indicates the death by throttling after rape;

(ix) Several injuries found on the person of the deceased indicating cruel use of force;

(x) Injury on the glans of the accused; and

(xi) DNA report indicating guilt of the accused.

48. Thus, from the aforesaid it can safely be inferred that the accused is the person who has taken away the girl child, committed rape on her and then murdered her. Recovery of the dead body at the instance of the appellant, recovery of clothes of the accused worn at the time of commission of offence, the DNA report being found positive coupled with the post-mortem report given by Dr. Vinay Prabha (PW14) makes

it apparently clear that the accused was the person who was responsible for rape and murder of the girl child aged about 4 years.

49. For the offences which have been registered against the appellant under the POCSO Act, the presumption contemplated by Section 29 thereof came into operation and the burden shifts upon the appellant and it is for him to rebut the presumption and to prove that he has not committed the offence. In the present case, the appellant-accused has failed to prove his innocence as all the evidences which have been collected during investigation/trial go against him. The presumption in terms of Section 29 of the POCSO Act would only lead to finding of guilt against the accused. The aforesaid aspect was considered by the Hon'ble Supreme Court in the case of Pappu vs State of U.P., (2022) 10 SCC 321 with reference to paragraph 108 thereof.

50. In the facts and circumstances of the instant case, on the basis of disclosure statement of the accused-appellant recorded under Section 27 of the Evidence Act, the body of the deceased-victim was recovered. Thus, the aforesaid was sufficient to enable the prosecution as well as the learned trial Court to place reliance upon the disclosure statement (Ex.P/4).

51. So far as the circumstantial evidence is concerned, the Hon'ble Supreme Court in the case of Sharad Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116 has held as under

> *"159. It will be seen that this Court while taking into account the absence of explanation or a false explanation did hold that it will amount to be an additional link to complete the chain but these observations must be read in the light of what this Court said earlier viz. before a false explanation can be used as*

additional link, the following essential conditions must be satisfied:
(1) various links in the chain of evidence led by the prosecution have been satisfactorily proved,
(2) the said circumstance points to the guilt of the accused with reasonable definiteness, and
(3) the circumstance is in proximity to the time and situation.
160. If these conditions are fulfilled only then a court can use a false explanation or a false defence as an additional link to lend an assurance to the court and not otherwise. ..”

52. Similar view was followed in the case of Sudama Pandey vs State of Bihar (2002) 1 SCC 679.

53. In the present case, the entire chain of circumstances is proved. From the aforesaid analysis, it is apparently clear that the trial Court has not committed any error in holding the appellant guilty and convicting and sentencing him as stated above.

54. So far as the sentence awarded by the learned trial Court, the same is required to be seen.

55. The learned amicus curiae on the question of sentence has argued that if the Court has arrived at the conclusion that the guilt of the accused-appellant is proved then instead of awarding capital punishment, some lesser punishment may be awarded looking to the entire facts and circumstances of the case as well as the age of the accused-appellant. The theory of reformation is required to be seen by the Court. He has placed reliance on the decisions rendered by the Hon’ble Supreme Court in the cases of Irappa Siddappa Murgannavar vs State of Karnataka, (2022) 2 SCC 801 and Pappu vs State of U.P., (2022) 10 SCC 321 wherein in almost similar fact-situation, after

holding the accused guilty, the Hon'ble Supreme Court has modified the sentence and the death sentence is commuted into that of imprisonment for life, with the stipulation that the appellant shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of 30 years.

56. The learned Public Prosecutor has opposed the contentions and submitted that it is the fit case for awarding death sentence to the accused since all the evidence collected during investigation/trial clearly establishes the guilt of the appellant.

57. The law is well settled that even in cases of circumstantial evidence, the death sentence can be awarded. The same was considered by a three-Judge Bench of the Hon'ble Supreme Court in the case of Ravishankar vs State of M.P. (2019) 9 SCC 689. The theory of "residual doubt", which effectively creates a higher standard of proof over and above the "beyond reasonable doubt" standard used at the stage of conviction, as a safeguard against routine capital sentencing, keeping in mind the irreversibility of death is also to be considered. Further, the power to modify the sentence from capital punishment to that of imprisonment for life or for more than 20 or 30 years lies with the constitutional courts. The Hon'ble Supreme Court in the cases of Union of India v. V. Sriharan, (2016) 7 SCC 1 has taken note of the aforesaid aspect and observed thus :

> *"105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a*

> *modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court."*

58. The proposition of law which emerges from the judgments dealing with cases of death sentence has been clarified that the death sentence cannot be imposed except in the rarest of rare cases, for which special reasons have to be recorded, as mandated in Section 354(3) of the Criminal Procedure Code. It is required to be seen that whether a case falls within the category of the rarest of rare, the brutality, and/or the gruesome and/or heinous nature of the crime, the state of mind, the socio-economic background of the offender etc. are also required to be taken into consideration.

59. In this regard, reference may be made to the landmark decisions of the Hon'ble Supreme Court in the case of Bachan Singh vs State of Punjab AIR 1980 SC 898 and the propositions formulated thereon in a subsequent judgment rendered in Machhi Singh v. State of Punjab AIR 1983 SC 957. In Amar Singh Yadav vs State of U.P., (2014) 13 SCC 443, it is held :

> *22. This Court noticed the aggravating and mitigating circumstances in Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257 and held as follows:*
> *"76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh v. State of Punjab (1980) 2 SCC 684 and thereafter, in Machhi Singh v. State of Punjab, (1983) 3 SCC 470. The aforesaid judgments, primarily dissect these principles into two different compartments—one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant*

aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.
(2) The offence was committed while the offender was engaged in the commission of another serious offence.
(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.
(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.
(5) Hired killings.
(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.
(7) The offence was committed by a person while in lawful custody.
(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.
(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.
(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.
(12) When there is a cold-blooded murder without provocation.
(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.
(2) The age of the accused is a relevant consideration but not a determinative factor by itself.
(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.
(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.
(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.
(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.
(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused."

60. In the case of Machhi Singh (supra), a three-judge Bench of the Supreme Court analyzed the decision rendered in the case of Bachan Singh (supra) and formulated the following propositions for

determination of the rarest of rare cases, which are to be applied when the question of awarding death sentence arises;

> *(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;*
> *(ii) Before opting for the death penalty the circumstances of the offender' also require to be taken into consideration along with the circumstances of the crime;*
> *(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment of 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 struck between the aggravating and mitigating circumstances before the option is exercised."*

It was further laid down that in order to apply these guidelines, inter alia, the following questions may be asked and 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?*
>
> *If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the Court would proceed to do so."*

61. Accordingly, we proceed to prepare a chart of aggravating and mitigating circumstances in the instant case, as under -

Aggravating circumstances	**Mitigating circumstances**
(i) The deceased is a child aged about 3 years and 4 months.	(i) The accused belonged to weaker socio-economic background.
(ii) Injuries caused to the deceased before murder indicating brutal state of mind. The injury on the glans of the accused indicating brutality and forcefully the rape was committed.	(ii) He is a person aged about 24 years.
(iii) The accused was a relative of the deceased and she used to address him as "*Chacha*". A relationship of trust and confidence has broken down.	(iii) He has dependent mother.
(iv) Immediately after the incident accused went to shop of Saurabh to get *Rajshree gutkha* which reflects his state of mind.	(iv) He has no criminal antecedents.
(v) The deceased in her innocence desired to have toffee, trusted the accused and went with him.	
(vi) The accused tried to destroy evidence and hide the dead body.	
(vii) After the incident accused behaved normally which indicates he has no repentance of the crime.	
(viii) The way the offence is committed is shocking & the chances of repeating can't be ruled out.	

62. The aggravating circumstances are required to be seen which is a crime test. Thereafter, the mitigating circumstances which again gives a crime test are required to be considered. The test which is to be applied for death sentence are crime test, criminal test and R-R test.

63. The mitigating circumstances are established in the present case. The victim was aged about 4 years and the appellant-accused was aged about 24 years at the time of commission of offence. The victim was known to the accused as he was in near relation with the victim and taking advantage of the aforesaid, she without any resistance accompanied the accused-appellant who has given temptation of purchasing her a toffee. Taking advantage of the aforesaid condition, she was taken by him to a jungle and thereafter she was raped and murdered. Therefore, all the mitigating circumstances are available in the present case. As pointed out already, the accused was 24 years of age and the victim was a child aged about 4 years. The state of mind of the accused is indicative of the fact that just to fulfill his lust for sex, he committed the rape on the victim aged 4 years and murdered her and hid her dead body in the jungle.

64. Now the theory of R-R test is to be applied along with the theory of reformation. R-R test depends upon various factors. Perception of the society that is society centric and not a judge centric. Whether the society will approve the awarding of death sentence to certain type of crimes or not. The court is required to look into the variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes which shake the collective conscience of the society.

65. In the present case, although the offence has been committed taking advantage of the position that the victim was known to the accused but the fact remains that the it does not constitute a case which could be stated to be falling under the category of rarest of rare case. The theory of residual doubt is also required to be considered which effectively creates a higher standard of proof over and above beyond reasonable doubt. Although in the instant case, the prosecution has successfully established the case beyond any reasonable doubt against the accused but the theory of residual doubt has to be applied as a safeguard against the routine capital sentencing keeping in mind the irreversibility of death. The age of the accused is required to be seen and whether there is a possibility for reformation or not is required to be kept in mind prior to sentencing for death.

66. Applying the aforesaid test, it cannot be said that the present case is falling under the category of 'rarest of rare case'. Therefore, this Court deems it appropriate to modify the sentence awarded to the appellant under various sections. Instead of death penalty being given to the accused-appellant for offence under Sections 376AB, 376A and 302 of IPC, he is punished with an imprisonment for life without any remission. The remaining sentences as awarded by the learned trial Court are kept intact. The convictions awarded to the appellant by the learned trial Court after holding him guilty are maintained, however, the sentence imposed is being modified only to the extent indicated above.

67. In the result, the criminal appeal preferred by the accused-appellant is partly allowed in the following terms :

(i) The impugned convictions for the offences under Sections 366, 376(2)(j), 376(2)(m) & 201 of IPC and Section 5n/6 of the POCSO Act and the consequent sentences therein are affirmed.

(ii) The impugned convictions for the offences under Sections 376A and 376AB of IPC are affirmed; however, instead of death sentence, the appellant is sentenced to imprisonment for life, to mean imprisonment for the remainder of his natural life.

(iii) The impugned conviction for the offence under Section 302 of IPC is affirmed; however, instead of death sentence, the appellant is sentenced to imprisonment for life.

(iv) The other terms of sentences awarded to the appellant including the amount of fine and default stipulations are also confirmed.

(v) All the substantive sentences awarded to the appellant shall run concurrently.

68. The criminal appeal is allowed in part and disposed off in above terms.

69. With the aforesaid observations, the criminal reference is answered accordingly.

70. The Registrar (Judicial) is directed to send a duly attested copy of this judgment to the concerned trial Court as mandated under Section 371 of the CrPC for needful.

71. Before parting, we must put on record our appreciation for the valuable assistance rendered by the learned *amicus* curiae to this Court and in dispensation of justice and disposal of this case. The High Court Legal Services Authority shall remit fee of Rs.10,000/- (Rupees Ten Thousand) to the *amicus* curiae who assisted this Court.

(RAVI MALIMATH)
CHIEF JUSTICE

(VISHAL MISHRA)
JUDGE

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