IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE S.MANU

MONDAY, THE 20TH DAY OF MAY 2024 / 30TH VAISAKHA, 1946

DSR NO. 2 OF 2018

AGAINST THE JUDGMENT DATED 12.12.2017 IN SC NO.662 OF 2016 ON THE FILES OF THE COURT OF SESSION/SPECIAL JUDGE FOR SCHEDULED CASTES AND SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989 AS AMENDED BY ACT 1 OF 2016, ERNAKULAM DIVISION

PETITIONER:

STATE OF KERALA
BY N.K.UNNIKRISHNAN, SPECIAL PUBLIC PROSECUTOR

RESPONDENT:

MUHAMMED AMEER-UL ISLAM
AGED 22 YEARS, S/O. NIZAMUDHEEN, RAMPURSATHRA PANCHAYATH, WARD NO.8, NEAR BAITHUR MUHARAM JUMA MASJID, DOLDAGRAMAM, NAGAON DISTRICT, ASSAM STATE.
BY SR.ADV.SASTHAMANGALAM S. AJITHKUMAR

THIS DEATH SENTENCE REFERENCE HAVING BEEN FINALLY HEARD ON 12.04.2024, ALONG WITH CRL.A.113/2018, THE COURT ON 20.05.2024 DELIVERED THE FOLLOWING:

2024:KER:32954

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.B.SURESH KUMAR

&

THE HONOURABLE MR. JUSTICE S.MANU

MONDAY, THE 20TH DAY OF MAY 2024 / 30TH VAISAKHA, 1946

CRL.A NO. 113 OF 2018

AGAINST THE JUDGMENT DATED 12.12.2017 IN SC NO.662 OF 2016 ON THE FILES OF THE COURT OF THE PRINCIPAL SESSIONS JUDGE, ERNAKULAM

APPELLANT/ACCUSED:

MUHAMMAD AMEER-UL-ISLAM
S/O.NIZAMUDHEEN, AGE 23 YEARS, OCC: LABOURER,
R/AT-RAMPURSATHRA PANCHAYATH, WARD NO.8, NEAR BAITHUR MUHARAM JUMA MASJID, DOLDAGRAMAM,
DISTRICT NAGOAN, STATE: ASSAM.

BY ADVS.
SASTHAMANGALAM S. AJITHKUMAR (SR.)
RAYJITH MARK
SREEJITH S. NAIR
V.S.THOSHIN
P.A.MEERA
E.A.HARIS
SATHEESH MOHANAN

RESPONDENT/COMPLAINANT:

STATE OF KERALA
THROUGH SUB INSPECTOR OF POLICE, KURUPPAMPADI POLICE STATION, ALUVA, ERNAKULAM, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY N.K.UNNIKRISHNAN, SPECIAL PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12.04.2024, ALONG WITH DSR.2/2018, THE COURT ON 20.05.2024 DELIVERED THE FOLLOWING:

2024:KER:32954

C.R.

P.B.SURESH KUMAR & S.MANU, JJ.

Death Sentence Reference No.2 of 2018

&

Criminal Appeal No.113 of 2018

Dated this the 20th day of May, 2024

JUDGMENT

P.B.Suresh Kumar, J.

We are called upon in these cases to adjudicate the sustainability of the conviction and the death sentence imposed on the accused in a horrifying case of rape and murder. The facts are deeply disturbing and represent an egregious violation of human dignity and sanctity of life, for after committing rape in an inhumane manner, the victim has also been murdered horrendously. Its impact on the society was profound and far reaching as it instilled not only fear, but also a sense of vulnerability, particularly amongst women. It eroded the trust reposed in institutions responsible for ensuring public safety. It sparked public outrage and calls for justice, leading to

demands for reforms in law, policies and social attitudes towards violence against women and vulnerable groups. No doubt, social impact of a crime of this nature needs to be tackled through a multifaceted approach including judicial response by holding the perpetrators accountable through a fair trial and appropriate sentencing, in order to give a strong message that such acts will not be tolerated by the society. Let us examine the sustainability of the conviction and sentence imposed on the accused, keeping in mind the background aforesaid of the case.

Background

2. The Death Sentence Reference and Criminal Appeal arise from S.C.No.662 of 2016 on the files of the Court of the Special Judge for Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, Ernakulam. The sole accused in the case stands convicted for the offences punishable under Sections 449, 342, 376, 376A and 302 of the Indian Penal Code (IPC) and sentenced among others, to death. Since the trial court passed a sentence of death, the proceedings has been submitted to this Court for confirmation in terms of Section 366(1) of the Code of Criminal Procedure, 1973 (the Code). The

appeal is instituted by the appellant challenging his conviction and sentence.

3. Inasmuch as the conviction of the accused and the sentence imposed on him are under challenge, it is necessary to consider the sustainability of the conviction and sentence before dealing with the DSR. The accused who is a native of Assam was a migrant labourer. He was residing during April, 2016 at Vaidyasalapadi near Perumbavoor. The accused was aged 22 years then. The victim, a 30 year old law student was one who was brought up in an impoverished background by her mother, and the latter was deserted by her husband during the early childhood of the victim. The victim and her mother were since then residing in a small three room house put up in the puramboke land on the side of an Irrigation Canal in a place named Vattolipady near the place where the accused was residing. The mother of the victim belongs to Ezhava Community and her father belongs to Pulaya Community, a Scheduled Caste.

4. On 28.04.2016, the victim was alone in the house during day time, as her mother had gone to visit on that day, some of her acquaintances. When the mother returned

home by about 8.30 p.m., the front door of the house was found to be locked from inside and there was no response from the victim when she was called out. The mother then informed the matter to one of her neighbours and he, in turn, informed the matter to the police. The Sub Inspector of Police, Kuruppampady who was on patrol duty came to the house of the victim forthwith, and on a search made by him, it was found that the back door of the house was kept ajar. When the Sub Inspector of Police entered the house through the back door, he found the body of the victim in the middle room lying in a pool of blood, half naked with grievous injuries throughout her body. A part of the internal organs of the victim was also seen pulled out. A case was registered immediately on the basis of the statement given by the member of the Panchayat who was also present at the house when the body was found by the Sub Inspector of Police. The investigation in the case revealed that it was a case of rape and murder committed by the accused, and final report was accordingly submitted in the case, alleging commission of offences punishable under Sections 449, 342, 376, 376A, 302 and 201 IPC and Sections 3(1)(a), 3(1)(w)(i) & (ii) and 3(2)(v) of the Scheduled Castes

and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

Prosecution Case

5. The case of the prosecution as disclosed in the final report is that on 28.04.2016, between 5.30 p.m. and 6 p.m., the accused barged into the house of the victim with the intention to rape her; that when the victim resisted his attempt to rape her, the accused covered her nose and mouth; that when the victim continued to resist the attempt of the accused, he bit her on her left shoulder after strangulating her with a churidar shawl that was on her neck; that when the resistance on the side of the victim continued, the accused became frustrated and out of such frustration and vengeance, he mercilessly attacked the victim with a knife which he carried; that one of the injuries inflicted by the accused to the victim includes a grievous penetrating injury deep inside her genitals caused by inserting the knife repeatedly through her vagina in such a manner that a portion of her internal organs came out of the body. It was alleged by the prosecution that after committing the crime, the accused left the house through its back door, walked towards the canal, threw away the knife to

the property on the northern side of the house, crossed the canal to reach the southern side of canal-bund road and escaped to his home State, Assam, by catching a train from Aluva Railway Station, in the early hours of the following day.

Proceedings before the trial court

6. On the accused being committed to trial, the trial court framed charges against him for the offences punishable under Sections 449, 342, 376, 376A, 302 and 201 IPC and Sections 3(1)(a), 3(1)(w)(i) & (ii) and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989. When the charges were read over and explained to the accused, he denied the same and pleaded not guilty.

7. The prosecution, thereupon, examined 100 witnesses as PWs 1 to 100 and proved through them 291 documents as Exts.P1 to P291 series. MOs 1 to 36 were the material objects identified by the witnesses. Exts.D1 to D14 were the documents proved by the accused through the prosecution witnesses.

8. After closing the evidence, when the circumstances appearing against the accused in the evidence

of the prosecution were put to the accused, he admitted that (i) he was residing at Vaidyasalapadi prior to the date of occurrence in the building of PW10; (ii) that his mobile phone number is 8893608594; (iii) that the mobile number of his brother, PW79 is 9633892260; (iv) that the mobile number of his mother is 9126556923; (v) that he was taken into custody by the police from Kanchipuram and; (vi) that he was using mobile number 7397097067 at Kanchipuram. In the context of the evidence tendered by PW55, the doctor who examined the accused on 17.06.2016, that he noted a healed injury on the right index finger of the accused, the explanation offered by the accused while being questioned under Section 313 of the Code is that the said injury was caused by one Rajan Mesthiri using a knife. The answer given by the accused in this regard reads thus:

> "കൂലി തർക്കത്തെ തുടർന്ന് രാജൻ മേശിരി എന്നെ കത്തി കൊണ്ട് മുറിവ് ഏല്പിച്ചതാണ് ഉണങ്ങിയ മുറിവായി കണ്ടത്. മറ്റുള്ള കാര്യം അറിയില്ല."

When the accused was asked whether he wants to state anything in addition during his examination under Section 313 of the Code, he prayed for an opportunity to file a written statement, and thereupon, he filed a written statement reciting, among others, that the victim was murdered by Anarul Islam

and Hardath Baruwa; that since they are his friends and since he had already planned to leave to his native place on the following day and also since he suffered an injury on his hand, he worked till the afternoon and left the locality after collecting money from his brother. The relevant portion of the said statement reads thus :

> "അനാറുൾ ഇസ്ലാമും ഹർദത്ത് ബർവയും 27.04.2016-)o തീയതി സംഭവസ്ഥലത്ത് വിവരിക്കുന്ന വീട്ടിൽ വെച്ച് ഒരു പെൺകുട്ടിയെ കൊലപാതകം ചെയ്യുകയും ശരീരത്തിൽ ആകമാനം മുറിവുകൾ ഏൽപ്പിക്കുകയും ചെയ്തു എന്നറിഞ്ഞതു കൊണ്ടും ടിയാർ എൻ്റെ കൂട്ടുകാർ ആയതുകൊണ്ടും പിറ്റേദിവസം ഉച്ചവരെ പണിക്കു പോയി നാട്ടിലേക്ക് പോകാൻ തീരുമാനിച്ചിട്ടുള്ളതും ആയതിനുശേഷം പിറ്റേദിവസം ഞാൻ പതിവുപോലെ ജോലിക്ക് പോയി. ആ സമയം മുതലാളി എന്നോട് വഴക്കടിക്കുകയും തിരികെ വീട്ടിൽ എത്തിയശേഷം സഹോദരനെ കണ്ട് 2,000/- രൂപ വാങ്ങി, എൻ്റെ കൈയ്ക്ക് പരിക്കു പറ്റിയതിനാലും മേൽപ്പറഞ്ഞ പ്രശ്നങ്ങൾ നിലനിൽക്കുന്നതിനാലും ഞാൻ തിരികെ സ്വന്തം നാട്ടിലേക്ക് പോയിട്ടുള്ളതാണ് "

As the court did not find the case to be one fit for acquittal in terms of Section 232 of the Code, the accused was called upon to enter on his defence, and at that stage, the accused examined five witnesses on his side as DWs 1 to 5 and marked through them five additional documents, viz, Exts.D15 to D19.

Decision of the trial court

9. The trial court, thereupon, on an appraisal of the evidence on record, found that the accused is not guilty of the offences punishable under Section 201 IPC and Sections 3(1)(a), 3(1)(w)(i) & (ii) and 3(2)(v) of the Scheduled Castes

and Scheduled Tribes (Prevention of Atrocities), Act, 1989 and acquitted him of the charges framed for the said offences. He was, however, found guilty of the offences punishable under Sections 449, 342, 376, 376A and 302 IPC and sentenced him, among others, to death. The accused is deeply aggrieved by his conviction and sentence.

Proceedings before this Court

10. Heard the learned Senior Counsel for the accused as also the learned Special Public Prosecutor.

11. The learned Senior Counsel for the accused made elaborate submissions on facts as also on principles of law involved in the case. We are not referring to the arguments advanced by the learned Senior Counsel here, as we propose to deal with the same elaborately in the course of our discussion on the legal and factual aspects involved in the case. Suffice it to say that the essence of the submissions made by the learned Senior Counsel was that the prosecution has not proved the guilt of the accused beyond reasonable doubt, going by the standards prescribed for cases on circumstantial evidence. The learned Special Public Prosecutor refuted every argument advanced by the learned Senior Counsel and

supported the impugned judgment, pointing out that the evidence let in by the prosecution would establish beyond reasonable doubt, the charges against the accused on which he has been found guilty. The learned Special Public Prosecutor has also asserted that in the peculiar facts of this case, the sentence of death was warranted and rightly awarded by the trial court.

12. In the light of the submissions made by the learned counsel for the parties on either side, the point that falls for consideration is whether the conviction of the accused for the offences punishable under Sections 449, 342, 376, 376A and 302 IPC, and the sentences imposed on him including the sentence of death, are sustainable in law.

13. In order to examine the sustainability of the conviction of the accused, it is necessary to scrutinise the relevant evidence.

Oral evidence

14. PW1 is the member of the Panchayat on whose statement, the case was registered by the Kuruppampady police. PW1 is a person who knew the victim as also her mother. PW1 deposed that when he proceeded to the house of

the victim on receiving information about the murder, the police party had reached the house of the victim and they had shown to him the dead body of the victim in the middle room of the house. PW1 also deposed that the Sub Inspector of Police then required him to come to the police station and accordingly, he went to the police station and gave Ext.P1 first information statement at about 9.30 p.m. on the same day. PW2 is the mother of the victim. PW2 deposed that she left home at about 10 a.m. on the date of occurrence, leaving the victim alone at home, to meet some of her acquaintances and that when PW2 returned at about 8.30 p.m., there was no light in the house and when she knocked at the door and called out the victim, there was no response. PW2 deposed that she then called PW28, one of her neighbours, and there was no response from the victim even when PW28 and other neighbours who had gathered called out her name. PW28 then called the police and the police reached the house in no time. PW2 deposed that the police after going to the rear side of the house, took PW2 to Perumbavoor Government Hospital, and on the next day, she saw the dead body of the victim at the crematorium. PW2 identified MO9 as the churidar bottom and MO10 as the top of

the churidar worn by the victim on the date of occurrence. PW2 also identified MO11 as the shawl of the victim. The evidence tendered by PW2 was corroborated by PW28. In addition, PW28 deposed that the police went to the rear side of the house and then told him that the victim was lying dead in the house.

15. PW93 was the Sub Inspector of Police, Kuruppampady police station during the relevant period. PW93 deposed that on 28.04.2016, at about 8.45 p.m., while he was on patrol duty, PW59, the Police Officer who was in charge of the General Diary in the Police Station called him over telephone and informed that the door of a house at Vattolipady is not being opened, and when he proceeded to that house, there was no light there and when he proceeded to the rear side of the house with a torch, it was noticed that the back door of the house was kept ajar. When he entered the house, he found the body of a girl lying still in a pool of blood in a half naked position in the middle room of the house with injuries throughout her body and that a shawl was tied around her neck. It was also deposed by PW93 that when he examined the body with the aid of the torch carried by him, it was found that the person was no more. The relevant portion of the evidence

tendered by PW93 in this regard reads thus:

> "ടോർച്ചുകൊണ്ട് വാതിൽ തള്ളി തുറന്നു ടോർച്ചടിച്ചു നോക്കി. നടുമുറിയിൽ ഒരു പെൺകുട്ടി ചോരയിൽ കുളിച്ചു അർദ്ധനഗ്നയായി അനക്കമില്ലാതെ കിടക്കുന്നതു കണ്ടു ഞാൻ മാത്രം അകത്തു കയറി ശരീരത്തിൽ ടോർച്ച് അടിച്ചു ബാക്കി ശരീരത്തിൻ്റെ പല ഭാഗങ്ങളിലായി മുറിവുകളോടെ രക്തം വാർന്നു മരിച്ചു കിടക്കുന്നതായി കണ്ടു. കഴുത്തിൽ ഒരു ഷാൾ ചുറ്റി മുറുക്കിയിരിക്കുന്നതായി കണ്ടു. ചുരിദാറിൻ്റെ top വയറു കാണത്തക്കവിധം മുകളിലേക്ക് തെറുത്തു വച്ചിരിക്കുന്നതായി കണ്ടു. ചുരിദാറിൻ്റെ bottom വും ഷട്ടിയും വലതു കാലിൽ നിന്നും പൂർണമായി ഊരി ഇടതുകാൽ മുട്ടുവരെ ഇറക്കി വച്ചിരിക്കുന്നതായി കണ്ടു."

It was also deposed by PW93 that when he came out through the rear door of the house, he found PW1 there and PW93 had shown to him also, the dead body of the victim. PW93 further deposed that he immediately contacted the police station and directed to send persons to guard the scene, and as PW2 had no other place to go, he made arrangements to shift PW2 to the hospital. PW93 deposed that he left the scene after instructing PW18 and one Siraj who came in the meanwhile, to guard the scene. PW93 also deposed that thereupon, he registered the crime after recording the statement from PW1. PW93 identified MO9 churidar bottom, MO10 churidar top and MO11 shawl as the clothes found on the body of the deceased when he saw the body for the first time.

16. PW59 was the police officer who was in charge of the General Diary of the Kuruppampady Police Station on 28.04.2016 and he corroborated the evidence tendered by

PW93 as regards the information passed on to PW93 by him. PW18 was the police officer who was on guard duty at the house of the victim on the night of 28.04.2016. PW18 deposed that when he reached the house of the victim as required by the Police Officer in charge of the General Diary, the Sub Inspector of Police had already reached the house of the victim and PW18 guarded the scene till 8 a.m. on the following day. PW19 was the police officer who took over the guard duty of the scene of occurrence from PW18 and guarded the scene thereafter, and he deposed the said fact in his evidence.

17. PW6 is a neighbour of the victim and she deposed that she saw the victim between 9 a.m. and 10 a.m. on 28.04.2016, when the victim came to draw water from a public tap near her residence and that the victim was wearing a churidar at the said time. PW7 is another neighbour of the victim who deposed that he saw the victim carrying water from the public tap by about 5 p.m. on 28.04.2016. PW7 also confirmed that the victim was wearing a churidar then.

18. PWs 3, 4 and 5 were persons residing in the neighbourhood of the house of the victim during the period of the occurrence. All of them had close acquaintance with the

victim and her mother. The house of PW3 is on the south and the house of PW5 is on the east of the house of the victim. The house of PW4 is one located on the west of the house of PW3 and there is a road separating the houses of PW3 and PW4. PW3 deposed that she saw the victim carrying water to her house on the date of occurrence at about 9.30 a.m., and at about 5.30 p.m., she received a call from her sister and after the conversation, while standing in front of her house, she heard a screaming sound of a lady from the northern side of her house. It was also deposed by PW3 that while she was trying to locate the place from where the screaming sound was heard, PW5 approached her house and enquired with her as to the place from where the said sound arose and she replied to PW5 that it was from the direction of the house of the victim. PW3 deposed that while so, both of them heard the sound of the door of the house of the victim being closed. PW3 deposed that by that time, PW8 came along that way in a bicycle and enquired with them as to the reason for being outside their houses. PW3 deposed that at that time, PW4 was standing on the road separating their houses and PW5 replied to PW8 that a screaming sound was heard from the house of the victim. It

was deposed by PW3 that PW8 left the scene right then, remarking that there is nothing unusual to hear such sounds from the house of the victim. PW3 deposed that by that time, PW4 also came to the courtyard of her house and enquired with them as to the place from where the screaming sound arose and PW3 replied that it was from the house of the victim. PW3 deposed that when PW4 left, PW3 moved towards PW5 to continue the conversation and PW5 then told her that she saw someone bending down and standing up in the backyard of the house of the victim. PW3 deposed that after PW5 had left, she moved further towards the house of the victim and she then saw a person proceeding from the rear side of the house of the victim. PW3 deposed that after moving a little further, the said person got into the canal by holding the 'Vattamaram' tree that stood upright there. PW3 deposed that he was a short person and was wearing a yellow shirt then. PW3 identified the accused as the said person who proceeded from the house of the victim on the relevant day. PW3 also deposed that she identified the accused in the jail in front of the Magistrate on 20.06.2016.

19. During cross-examination, PW3 clarified that

one can reach the house of the victim from the house of PW3 in ten seconds and the persons who come and go from the house of the victim can be seen from her house as well. It was also deposed by PW3 in cross-examination that the police recorded her statement on four occasions and that she did not disclose every fact to the police on 29.04.2016. PW3 denied the suggestion made by the counsel for the accused that it was since the facts disclosed by her in her subsequent statements were false that she did not disclose the same in her first statement, and she clarified that she did not disclose everything in her first statement owing to fear. Similarly, PW3 denied the suggestion made by the counsel for the accused that she could not have seen the accused for want of light. Likewise, PW3 also denied the suggestion made by the counsel for the accused that she saw the picture of the accused in newspapers as also on television before she had identified the accused in the jail. PW3 also denied the suggestion made by the counsel for the accused that she was shown the photographs of the accused before she identified the accused in jail. PW4, PW5 and PW8 corroborated fully, the evidence tendered by PW3 as regards the conversations PW3 had with

them in the presence of others on the relevant day. Among them, PW4 clarified that she was conversing with PW3 from the road separating her house with the house of PW3. The evidence tendered by PW3 as regards the telephone communication she had with her sister at about 5.30 p.m. was corroborated by PW77, the Nodal Officer of Idea Cellular, a mobile service provider who proved the incoming call for a duration of fifty-five seconds at 17:41:23 hours in the mobile number of PW3 namely, 9207185407 on 28.04.2016. Ext.P131 is the call data records pertaining to the said mobile number and Ext.P131(a) is the said incoming call received by PW3 on the fateful day. The evidence tendered by PW3 as regards the identification of the accused in the test identification parade was corroborated by PW78, the concerned Judicial Magistrate. Ext.P146 is the memorandum and Ext.P147 is the report prepared by PW78 in connection with the test identification parade conducted by him at the District Jail, Kakkanad on 20.06.2016.

20. PW36 is a person who was running a plywood factory near Perumbavoor. PW36 deposed that the accused had worked in his factory for sometime and he was employed to cut the veneer roll used for manufacturing plywood and that

only a healthy person could do the said work. PW10 is the owner of the building in which the accused was residing till the date of the occurrence. The said fact has been admitted by the accused while being questioned under Section 313 of the Code. PW10 identified the accused and deposed that the accused was residing in his building with PW12 and a few others including PW33, the stepson of the accused. PW10 also deposed that on 28.04.2016, he saw the accused at about 10.30 a.m. and he was informed by the accused then that he did not go to work on that day. PW10 also deposed that at the relevant time, he saw the victim standing in front of her house. PW12 corroborated the evidence tendered by PW10 that the former was residing with the accused in the building of PW10. In addition, PW12 also deposed that there were about ten migrant workers in the second floor of the building of PW10 including the accused and that the accused resided there along with him and others till 28.04.2016. PW12 also deposed that when he returned to the room on that day, the accused was not there and the accused came a little later. PW12 deposed that on being asked by the accused to give his telephone number to the accused, while he was writing down his telephone number

on a slip to be given to the accused, he noticed an injury on the right index finger of the accused. PW12 further deposed that the accused left the place after sometime and he called PW12 at about 8.30 p.m. to ascertain whether anybody came to the room in search of him. PW12 also deposed that the accused made a similar call to him on the morning of the following day at about 7.30 a.m. to ascertain whether the police came in search of him. PW12 identified MO21 and MO21(a) as the chappals worn by the accused and MO23 as the knife usually kept by the accused in his bag. PW13 is another migrant labourer who was residing with the accused and PW12 in the building of PW10. PW13 also deposed that the accused did not go to work on 26th and 27th of April, 2016. PW13 also identified MO21 and MO21(a) as the chappals of the accused. PW33 also corroborated the evidence tendered by PW10 that he was residing in the same building in which the accused was residing. In addition, PW33 also deposed that the accused married his mother. PW33 also identified MO21 and MO21(a) as the chappals worn by the accused. PW79 is none other than the brother of the accused. PW79 deposed that on the date of occurrence, he arranged a sum of Rs.2,000/- for the accused

from PW14, another migrant worker, to enable the accused to go to Assam. PW14 corroborated the said part of the evidence tendered by PW79.

21. PW30 is a manpower supplier who deposed that it was he who secured an employment for the accused in Dong Song company at Kanchipuram and that the accused was working in the said company from 08.06.2016 till 14.06.2016. PW31 is a resident of Kanchipuram engaged in selling mobile SIM cards and providing recharge facilities for the same. PW31 identified the accused as a person who purchased a SIM card from him. PW31 deposed that he sold an activated Airtel SIM card to the accused and its number was 7397097067 and that he recharged the same also on a few occasions at the instance of the accused.

Medical Evidence

22. PW90 is the police surgeon who conducted the post-mortem examination of the body of the victim on 29.4.2016. Ext.P175 is the post-mortem report. The ante-mortem injuries noted by PW90 at the time of post-mortem examination, as deposed by her, are the following:

1. Incised wound 1.5x0.4 cm, bone deep, vertical on the right temple, 2 cm outer to outer angle of eye.

2. Three linear superficial lacerations 2x0.2cm each, 0.2cm apart, horizontally placed, parallel to each other, on the right ala of nose.

3. Abrasion 0.2x0.2cm on the tip of nose.

4. Abrasion 2.6x0.6cm, vertically oblique on the right side of face, its lower outer end is 0.5cm out of the ala of nose.

5. Curved abrasion 1.3x0.8cm with its convexity facing upwards on the right side of face 3cms outer and 1cm below the ala of nose.

6. Curved abrasion 1x0.5cm with its convexity facing left, on the left side of face, 1cm outer to ala of nose.

7. Superficial laceration 2.5x0.3x0.3cm, vertically oblique, on the left side of upper lip. Its inner upper end just blow the left nostril.

8. Contusion 3.5x1.5x5cm, horizontal on the left side of upper lip margin, just outer to midline.

9. Lacerated wound 1.5x1x0.5cm on the inner aspect of upper lip in the midline, tearing the frenulum.

10. Lacerated wound 0.5x0.2x0.1cm on the left side of gum margin in between the central and lateral incisors.

11. Abrasion 1x1.5cm on the left side of chin, 2cm outer to midline.

12. Linear abrasion 2cm long, horizontal, on the under surface of chin across midline and just behind jaw border.

13. Incised wound 2x0.6cm, bone deep, vertical, on the right side of chin, 3cm outer to midline, with a tailing 1cm downwards and inwards from its lower end.

14. Incised wound 4x0.7cm, bone deep, vertical, on the right side of face extending to the chin, with a tailing of 2cm downwards and inwards from its lower end.

15. Two superficial linear incised wounds 1.6cm each, vertical, and 0.5cm apart, just inner to the lower one third of previous injury.

16. Incised wound 4x0.5cm, bone deep, vertical, over the right angle of jaw.

17. Incised wound 2.5x0.4x0.3cm, horizontal, on the left jaw margin, 6cm outer to midline with a tailing of 0.5cm on both ends.

18. Incised punctured wound 1.5x0.5cm, vertical, on the right side of neck, 1.5cm outer to midline, 5cm above the upper end of breast bone. Both ends of the wound

were sharply cut. The wound track, 3.5cm deep, directed backwards, inwards and terminated in the body of VIth cervical vertebra, with a clean cut 1.5x0.5x0.5cm on its front aspect. The wound showed a side cut of 0.2x0.1x0.1cm at its upper right border 0.4cm below its upper end.

19. Incised punctured wound 3.8x1.5cm, on the left side of front of neck, vertically oblique, its lower inner end 1.5cm outer to midline, 5cm above the upper end of breast bone. Both ends of the wound were sharply cut. The wound track was directed backwards, inwards and downwards for a depth of 4.3cm, with a side cut 0.2x0.1x0.1cm at its inner border 0.4cm below its upper end.

20. Incised wound 2.8x1x2.1cm, oblique on the left side of front of neck. Its lower inner end 2cm outer to midline and 5cm above inner end of collar bone. Internal jugular vein was seen cleanly cut.

21. Abrasion 2x1cm, vertical, front of neck in the midline, 2cm above the upper end of breast bone.

22. Abrasion 0.3x0.3cm, on the right side of front of neck, 2cm outer to midline, 2cm above the upper end of breast bone.

23. Pressure abrasion with intervening normal areas, 12.5cm long and 3.5 to 3.8cm broad, horizontally placed, on the front and sides of neck. It was placed 5cm behind the chin.

    Flap dissection of neck was done under bloodless field. Skin and subcutaneous tissue underneath the pressure abrasion on the left side of the neck showed infiltration of blood. Left sternomastoid muscle showed a contusion 3x3cm, involving its whole thickness at the upper one third. Left sternohyoid muscle showed a contusion 2x2x0.4cm. There was infiltration of blood, 0.5x0.5x0.5cm underneath the injury No.22.

24. Incised punctured wound 1x0.2cm, 2.8cm deep, oblique, on the left side of back of neck. Its lower inner end 2.5cm outer to midline, 7 cm below occiput. Both ends of the wound were sharply cut. The track was directed forwards and inwards.

25. Contusion 8x5x1cm on the right temporal region of scalp (seen after dissection).

26. Incised wound 9.5x3cm, bone deep, vertical, on the right side of front of chest. Its upper end was 2cm outer to midline, 1cm above the inner end of collar bone. There was a tailing of 1cm extending from the lower

end.

27. Incised wound 3.5x0.5cm, bone deep, vertical on the front of chest, parallel to and 0.5cm inner to above injury. Its upper end was 4 cm below inner end and collar bone, with a tailing 1.5cm from the lower end.

28. Incised wound 2.5x0.2x0.2cm on the left side of front of chest, 1cm outer to midline, 4cm below inner end and collar bone with a tailing 1.1cm from the lower end. (Injury Nos.26, 27 and 28 were parallel to each other)

29. Two abrasions 0.2x0.1cm, 1cm apart on the back of tip of shoulder.

30. Incised penetrating wound 4x1.5cm, vertically oblique on the left side of front of chest. Its lower inner sharp end 2cm outer to midline and 18cm below inner end of collarbone, with a side cut 0.3x0.3x0.1cm, 0.4cm below its upper end. The other end of the wound was blunt. The wound was seen entering into the abdominal cavity and terminated on the front aspect of body of T11 vertebra (making a cut 3x0.5x0.2cm) after transfixing the liver through the left margin of aorta. The wound was directed backwards, inwards and upwards for a depth of 13cm. The retroperitoneal tissue was infiltrated with blood.

31. Lacerated penetrating wound 7x6cm, over the perineum involving the vagina on the front aspect to the anal canal posteriorly. It was extending from the fourchette on the front aspect along the sides of vaginal wall extending backwards to the anal orifice completely tearing the perineal body and muscles of pelvic floor. Anterior vaginal wall was intact. The wound was seen extending to the pelvic cavity through the recto-uterine pouch for a depth of 15cm, lacerating the mesentery at multiple sites. The lower part of the small intestine was seen torn near the ileocaecal junction. The descending colon was seen severed at 30cm from the rectal junction. Loops of small intestine were seen protruding externally through this wound along with the bloodstained fluid; which showed varying shades of decomposition. There was infiltration of blood on the paracolic gutter and retro peritoneal region. Hymen was not in an identifiable state due to injury.

32. Abrasion 4x0.3cm, oblique on the right side of back of trunk with its upper inner end 10cm outer to midline, 38cm below top of shoulder. (The abrasion was modified with super added ant erosions).

33. ' ⊂ ' shaped interrupted abraded contusions over an

area 5.5x0.3x0.3 cm, 5.2x0.3x0.3cm each, placed 1cm apart, concavity facing each other, on back of left shoulder, 12cm outer to midline 6cm below top of shoulder.

34. ' ⌒ ' shaped interrupted abraded contusions over an area 5.1x0.3x0.3cm, 5.1x0.3x0.3cm each, placed 1cm apart, concavity facing each other, on back of left shoulder, 3cm outer to midline 12cm root of the neck.

(Injury Nos.33 and 34 suggestive of bite mark)

35. Multiple small abrasions over an area 10x5cm on the back of trunk across midline and to the right just above the top of hipbone. (The abrasion was modified with super added ant erosions).

36. Abrasion 0.5x0.5cm over the knuckle of the left index finger.

37. Multiple small abrasion over an area 8x4cm along the left groin.

38. Abrasion 10x0.5cm vertically oblique on the inner aspect of right thigh. Its lower inner end 15cm above knee.

PW90 deposed that there was a typing error in the post-mortem certificate and the same was rectified as per Ext.P175(a) correction report. It is seen that as per Ext.P175(a) correction report, it was directed that injury No.29 shall be read as “Two abrasions 0.2x0.1cm, 1cm apart on the back of tip of right shoulder”.

23. It was opined by PW90 in her deposition that the death was due to the combined effect of injuries 2 to 11 suggestive of smothering, injuries 21 to 23 suggestive of strangulation, injuries 18 to 20 sustained to neck, injury 30 sustained to abdomen and injury 31 sustained to external

genitalia. PW90 also deposed that she noticed evidence of sexual assault. PW90 clarified that injuries 2 to 12 are different forms of blunt injuries produced on the face of the victim in and around nostrils and mouth due to application of blunt force and that they are nail mark injuries produced by the fingertips and palm during the process of smothering the victim who was consciously and actively resisting when such force was applied on her. Injuries 7, 8, 9 and 10, according to PW90, are the typical injuries produced during the attempt of smothering and during the process of forcefully preventing her from making any cry or sound. PW90 further opined that injuries 13 to 17 were incised wounds of varying dimensions, which were seen on lower part of the face and neck region of the victim. PW90 further opined that they are sharp force injuries produced as a result of direct infliction during the course of confrontation or assault. According to her, these injuries are superficial, which had not gone too deep. However, according to PW90, such injuries could be caused while resisting actively against inflictions of this nature. With reference to injuries 21, 22 and 23, PW90 opined that these injuries were the consequence of a fatal pressure produced on the vital area around the neck by a

ligature material, preferably one which is of a soft and broad nature, occurring in ligature strangulation along with the injuries produced in palmer strangulation. PW90 confirmed that the said injuries resulted on account of fatal pressure on the neck of the victim. Referring to injuries 18 to 20, PW90 opined that these injuries were incised stab injuries that had gone deep into the fatal area in the neck region leading to the death of the victim. PW90 confirmed that these injuries were independently fatal injuries because these stab wounds had gone deep and injured her jugular vein, which is the major blood vessel in the head and neck region, which could lead to severe internal haemorrhage leading to death. PW90 further opined that injury 30 was a deep penetrating stab wound produced by a sharp single edged cutting weapon, which had been inflicted on the lower part of the chest, which entered into the abdominal cavity penetrating the liver, and which went deep injuring the aorta and terminating in the vertebral column on the back portion, resulting in severe bleeding into the cavity. PW90 confirmed that this injury was independently a fatal injury sufficient to cause death.

24. According to PW90, injury 31 was a lacerated

penetrating wound produced over the perineum region that included external genitalia area wherein an incised wound can look like a lacerated wound. On a query from the Public Prosecutor, PW90 clarified that MO23 knife with a blade length of 22 cm with hilt and handle, which measures about 14cm, while being introduced into the region multiple times along with rocking and reintroduction or twisting into the region would result in severe mutilation and crushed injuries to the surrounding tissues and organs. PW90 further deposed that MO23 single edged weapon with hilt might have been introduced deep into the perineum, which could cause a lacerated looking incised wound. PW90 further deposed that Injury 31 was an independent fatal injury sufficient to cause death. It was deposed by PW90 that a piece of mesentery and intestine 13x3cm was brought along with the body in a separate transparent synthetic bag and with reference to the same, it was deposed by PW90 that the portion of the mesentery along with intestinal portion were seen lying separately outside the body and such a course is possible only if the weapon is severed, twisted or pulled out. It was also deposed by PW90 that injuries 33 and 34 are possible if biting

is done through an intervening dress material. PW90 affirmed that injury No.23 could be caused by MO11 shawl. It was also deposed by PW90 that injuries 37 and 38 could be caused while forcibly removing the dress or forcibly widening the thighs.

25. PW55 was the Resident Medical Officer attached to the District Hospital, Aluva. PW55 deposed that he had examined the accused on 17.06.2016 on a requisition made by the police and he found a few injuries on the body of the accused then. Ext.P55 is the certificate issued by PW55 in this regard on 17.06.2016. PW55 also deposed that injury No.1 among the injuries noted by him namely, “A healed injury of 0.25 x 0.25cm on the root of right index finger medially placed” is a healed injury and that the same could be caused by a bite by another human being in the course of tough resistance. PW55 also deposed that on examination of the accused, he was found potent. PW55 further deposed that he had collected samples of blood, buccal swab, pubic hair and scalp hair of the accused and entrusted the same to the investigating officer for forensic examination.

26. PW56 was the Assistant Surgeon attached to the District Hospital, Aluva during 2016. He deposed that on

24.06.2016, he collected the blood sample of the accused for DNA examination and handed over the same to the investigating officer at the Police Club, Aluva.

27. PW61 was the police surgeon attached to the District Hospital, Ernakulam during April, 2016. PW61 deposed that on 30.06.2016, he examined the accused at the Police Club, Aluva and that when he asked the accused about the injury found on his right index finger, the accused informed him that he sustained the said injury on account of the bite by a girl when he attempted to close her mouth. Ext.P64 is the wound certificate issued by PW61 in this regard. The wound referred to by PW61 in his evidence is recorded in Ext.P64 as “Circular, crater shaped (depressed) scar (healthy) of 0.5cm diameter at the left aspect of the middle crease of right index finger”. It was deposed by PW61 that the injury is consistent with the alleged incident and is highly suggestive of an avulsion of thick skin with loss of underlying soft tissues by a human bite as alleged.

DNA Evidence

28. It is unnecessary to go into entirety, all the forensic evidence let in by the prosecution, as we find that only

some among them are relevant in the context of the point formulated for decision. In order to make the discussion precise and brief, we are referring to the relevant evidence object wise, and not witness wise.

I. **MO10 churidar top**;

(a) MO10 churidar top was seized by PW99 while holding the inquest on 29.04.2016. PW99 produced MO10 before the Jurisdictional Magistrate along with other articles as per Ext.P211 property list on 02.05.2016. MO10 was sent for examination to the Forensic Science Laboratory, Thiruvananthapuram (the Laboratory) on 06.05.2016 as per Ext.P201 forwarding note of the investigating officer and the same was received at the Laboratory on 07.05.2016 evidenced by Ext.P157 receipt. The object was initially examined by PW85, the Assistant Director of the Serology Division of the Laboratory and on her examination, it was found that the bloodstains in MO10 belong to Groups 'A' and 'O'.

(b) After the serological examination, MO10 was forwarded to the Biology Division of the Laboratory in terms of an internal communication. The object was examined at the Biology Division of the Laboratory by PW89, the Assistant

Director of Biology Division, and on his examination, saliva was found on the left shoulder portion of MO10. Ext.P174 is the report submitted by PW89 in this regard.

(c) Later, MO10 was forwarded by PW89 to the DNA Division of the Laboratory. As the DNA sequencer at the Laboratory was out of order then, on the request made by the investigating officer, the jurisdictional Magistrate issued a direction to the Laboratory to forward MO10 to the Rajiv Gandhi Centre for Bio Technology, Thiruvananthapuram (Rajiv Gandhi Centre) for DNA examination. Ext.P160 is the letter issued by the Jurisdictional Magistrate in this regard. In terms of Ext.P160, the jurisdictional Magistrate required the Laboratory to forward MO10 to the Rajiv Gandhi Centre for examining the saliva found therein as the DNA Sequencer of the Laboratory was damaged. Ext.P160(a) is the covering letter, in terms of which MO10 was forwarded to the Rajiv Gandhi Centre. Ext.P160(b) is the acknowledgement of the receipt of MO10 dated 12.05.2016 issued by the Rajiv Gandhi Centre. PW82 was the Scientist in the Rajiv Gandhi Centre who examined MO10. DNA extracted from a portion of the churidar top cut out from its left shoulder portion was subjected to DNA profiling and on DNA profiling,

alleles of 'X' and 'Y' chromosomes were found in the DNA, indicating both male and female chromosomes. According to PW82, Y-chromosomes will be seen only in the case of male DNA. Ext.P161 is the report issued to that effect by PW82. The report is that the DNA extracted from MO10 contained the DNA of a male person also. After examination, MO10 was sent back to the Laboratory on 19.05.2016 with Ext.P160(c) covering letter and the same was received at the Laboratory on 19.05.2016 itself as evidenced by Ext.P160(d) letter.

(d) In the meanwhile, the accused was arrested by PW100 on 16.06.2016 and on his arrest, his blood sample and buccal swab were collected by PW55. The said two items were produced before the Jurisdictional Magistrate on 17.06.2016 as per Ext.P240 property list and the same along with a few other items were forwarded to the Laboratory on 18.06.2016 and it was received at the Laboratory on 20.06.2016 as evidenced by Ext.P157(e) receipt. By the time, the defect of the DNA sequencer of the Laboratory was rectified. PW81, the then Joint Director of the Laboratory, in the circumstances, subjected MO10 for DNA examination of the stains of blood found in the said object. PW81 found that the stains of blood in MO10 are of

two types. The DNA extracted from type I blood stain was found to be matching with the DNA extracted from the tooth sample of the victim. The other type of the stain, namely type II stain was found to be a admixture of blood belonging to two individuals, including a male person, and the DNAs extracted from the said type II stain matched with the DNA extracted from the tooth sample of the victim as also the blood sample of the accused. Ext.P158 is the report submitted by PW81 in this regard. In other words, MO10 contained the stains of the blood of the accused as also that of the victim.

(e) It is seen that after the DNA profiling, the blood sample of the accused was internally forwarded to the Serology Division of the Laboratory for grouping of blood. Thereupon, the serological examination of the blood sample of the accused was also conducted by PW85. Ext.P169 is the report submitted by PW85 thereafter. In Ext.P169, PW85 reported only that the sample of blood belongs to Group 'A'.

(f) As noted, PW56 collected the blood sample of the accused on 24.06.2016 and the said sample was produced by the investigating officer before the Jurisdictional Magistrate and the same was forwarded directly to the Rajiv Gandhi

Centre as per Ext.P246 forwarding note and it was received at the Rajiv Gandhi Centre on 27.06.2016. PW82 conducted the DNA examination, and the male DNA isolated from the blood sample of the accused was found to be matching with that of the male DNA isolated from MO10 churidar top earlier. Ext.P162 is the report submitted by PW82 in this regard.

(g) Item No.2 in Exts.P158, P169 and P174 reports of the Laboratory is MO10 churidar top and item No.41 in Exts.P158 and P169 reports is the blood sample of the accused. The facts described in sub-paragraphs (a) to (f) in respect of MO10 churidar top have been affirmed by PWs 81, 82, 85, 89 and 99 in their evidence.

II. **Nail clippings of the victim**;

(a) The nail clippings of both hands of the victim were collected by PW90 at the time of post-mortem examination on 29.04.2016 and the said nail clippings along with the tooth sample of the victim and a few other items were entrusted to PW23, a Woman Civil Police Officer and the same were seized by PW99 on 29.04.2016 itself as per Ext.P14 seizure mahazar. The said items were produced before the Jurisdictional Magistrate by the investigating officer on

03.05.2016 as per Ext.P213 property list. The nail clippings and the tooth sample of the victim were forwarded to the Laboratory for DNA profiling on 06.05.2016 as per Ext.P201 forwarding note and it was received at the Laboratory on 07.05.2016 as evidenced by Ext.P157 receipt. On receipt of the same, it was examined by PW89 on 07.05.2016 and later forwarded the same to the DNA Division of the Laboratory and which were examined at the DNA Division by PW81. In the said examination, it was found that the blood stains and tissues in the nail clippings were a admixture of bloodstains having both male and female DNA profiles. It was also found that the female DNA profile isolated from the nail clippings are identical to the DNA isolated from the tooth sample of the victim collected at the time of post-mortem examination. Later, on receipt of blood sample and buccal swab of the accused on 20.06.2016, PW81 subjected the same for DNA profiling and the male DNA profile isolated from the nail clippings were found to be matching with the DNA profiles isolated from the blood and buccal sample of the accused. The said facts are also reported by PW81 in Ext.P158 report.

(b) Item Nos.7(a) and 7(b) in Ext.P158 report are

the nail clippings of the victim and item Nos.41 and 42 in the said report are the blood sample and buccal sample respectively of the accused. The facts described in sub-paragraph (a) in respect of the nail clippings of the victim have been affirmed by PWs 23, 81 and 99 in their evidence.

III. **Brown stain collected from the rear door frame of the house of the victim**;

(a) PW80, the Scientific Assistant attached to the Ernakulam Rural Forensic Science Laboratory, who examined the scene of occurrence on 29.04.2016 collected, among others, a brown stain found on the rear door frame of the house of the victim on a cotton gauze and handed it over to PW99, the investigating officer after packing and labelling the same. The same was seized by PW99 in terms of Ext.P17 mahazar. Exts.P149 and 150 are the reports submitted by PW80 in this regard. The said article was produced by PW99 before the Jurisdictional Magistrate as per Ext.P212 property list on 02.05.2016 and the same was forwarded to the Laboratory along with other items on 06.05.2016 as per Ext.P201 forwarding note. The article was received at the Forensic Science Laboratory on 07.05.2016 as evidenced by Ext.P157.

PW85 who examined the said article in the serology division of the Laboratory found that the brown stain is of the Group 'A'. The said fact also has been reported by PW85 in Ext.P169 report. After the serological examination, the article was forwarded to the DNA Division of the Laboratory and on examination, it was found by PW81 at the DNA Division of the Laboratory that the blood stain was identical to the type II blood stain found on MO10 churidar top and the female DNA extracted from the same matched with the DNA extracted from the tooth sample of the victim and the male DNA extracted from the same matched with the blood sample of the accused. The said fact has been reported by PW81 in Ext.P158 report.

(b) Item No.31 in Exts.P158 and P169 reports is the stain collected by PW80 from the rear door frame of the house of the victim and item No.41 therein is the blood sample of the accused. The facts described in sub-paragraph (a) in respect of the brown stain collected on a cotton gauze from the rear door frame of the house of the victim have also been affirmed by PWs 80, 81, 85 and 99 in their evidence.

IV. MO23 knife;

(a) MO23 knife was recovered by PW99 on

30.04.2016 from the property situated on the northern side of the house of the victim as per Ext.P18 seizure mahazar and the same was produced before the Jurisdictional Magistrate on 04.05.2016 as per Ext.P216 property list. The same was forwarded to the Laboratory as per Ext.P201 forwarding note and it was received at the Laboratory on 07.05.2016 evidenced by Ext.P157 receipt. PW85 though examined the same at the Laboratory, the group and origin of the stain of blood on MO23 could not be found out. The object was later forwarded to the DNA Division of the Laboratory and the same was examined there by PW81. The DNA extracted from the blood stains contained in MO23 was found to be matching with the DNA extracted from the tooth sample of the victim. The said fact has also been reported by PW81 in Ext.P158 report.

(b) Item No.36 in Ext.P158 report is MO23 knife and item No.6 in the said report is the tooth sample of the victim collected at the time of post-mortem examination. The facts described in sub-paragraph (a) in respect of MO23 knife have been affirmed by PWs 81 and 99 in their evidence.

V. **Mos 21 and 21(a) chappals**;

(a) MO21 and MO21 (a) chappals were recovered

by PW99 on 02.05.2016 as per Ext.P19 seizure mahazar and the same were produced before the Jurisdictional Magistrate on 04.05.2016 as per Ext.P218 property list. The said objects were forwarded to the Laboratory on 27.05.2016 as per Ext.P210 forwarding note and were received at the Laboratory on 28.05.2016 evidenced by Ext.P157(b) receipt. Even though the group and origin of the blood stains found on the chappals could not be determined by PW85 on serological examination, when the same were forwarded to the DNA Division, the same were examined there by PW81. The DNA extracted from the blood stains contained in MO21 series chappals were found to be matching with the DNA extracted from the tooth sample of the victim. The said fact has also been reported by PW81 in Ext.P158 report.

(b) Item No.38 in Ext.P158 report is MO21 and 21(a) chappals and item No.6 in the said report is the tooth sample of the victim collected at the time of post-mortem examination. The facts described in sub-paragraph (a) in respect of MO21 series of chappals have been affirmed by PWs 81 and 99 in their evidence.

Investigation

29. PW94 was the Deputy Superintendent of Police, Crime Branch, Thrissur at the time of occurrence and he was a member of the team constituted for investigation of the subject case. PW94 deposed that it was he who took the accused into custody from Kanchipuram on 14.06.2016. PW99 was the police officer who conducted the initial investigation in the case. In addition to what has already been referred to as spoken to by PW99 in his evidence in relation to the forensic evidence let in by the prosecution, it was also deposed by PW99 that it was he who held the inquest of the body of the deceased at about 9.30 p.m. on 29.04.2016. Ext.P8 is the inquest report. The manner in which the dead body of the deceased was found at the time of holding the inquest, as deposed by PW99, reads thus:

> "തല കിഴക്കോട്ടും കാലുകൾ പടിഞ്ഞാറോട്ടുമായി മലർന്ന കിടക്കുകയായിരുന്നു. ചുരിദാർ ടോപ്പ് വയറിനു മുകളിലേക്കു തെറുത്തു കയറ്റി വച്ചിരുന്നു. കഴുത്തിൽ ഷാൾ ചുറ്റി മുറുക്കിയ നിലയിലായിരുന്നു. ചുരിദാർ ബോട്ടം panties എന്നിവ വലതു കാലിൽ നിന്നും പൂർണമായും ഊരിയും ഇടതു കാൽ മുട്ടുവരെ ഇറക്കി വച്ച നിലയിലും ആയിരുന്നു. മൃതദേഹത്തിലും വസ്ത്രങ്ങളിലും തറയിലും രക്തം ഉണങ്ങി കട്ട പിടിച്ചിരുന്നു. ആന്തരിക അവയവങ്ങൾ യോനി ഭാഗത്തു കൂടി പുറത്തേക്കു ചാടിയ നിലയിലായിരുന്നു. ആന്തരികാവയവത്തിൻ്റെ ഒരു ഭാഗം വേർപെട്ടു തറയിൽ കിടപ്പുണ്ടായിരുന്നു. ശരീരത്തിൽ കണ്ട മുറിവുകൾ inquest -ൽ വിവരിച്ചിട്ടുണ്ട്."

PW99 identified MO9 churidar bottom, MO10 churidar top, MO11 shawl and MO18 undergarment found on the body of the deceased at the time of holding the inquest. It was explained

by PW99 in his evidence that it was recited by him in Ext.P8 inquest report that the body of the deceased was first found by PW2 as PW99 was under the impression that it was PW2 who first saw the body and the said impression was drawn from the conduct of PW2 which he observed on the previous day when he went to the house of the deceased at 9.15 p.m. It was later clarified by him that the body of the deceased was first found by PW93.

30. PW100 was the Deputy Superintendent of Police, Ernakulam Rural from 28.05.2016. He took over the investigation in the case on 28.05.2016. PW100 deposed that the accused was arrested on 16.06.2016 at Aluva Police Club. Ext.P227 is the custody memo prepared at the time of arrest. It was also deposed by PW100 that the articles seized from the accused at the time of his arrest includes MO32 SIM card of the mobile number 8893608594. It was further deposed by PW100 that it was only after the test identification parade to which the accused was subjected to, his custody was sought and obtained for investigation. It was further deposed by PW100 that on investigation, it was found that the wife of the accused, Kanchan had two mobile connections bearing numbers

8609146986 and 8906026232 and PW33, the stepson of the accused was using 9946645863. It was further deposed by PW100 that during investigation, it was disclosed to him by the accused that he has two friends namely Anarul Islam and Hardath Baruwa and that he has kept a knife in their house; that on the basis of the said statement, the accused was taken to the house of the said friends as shown by the accused and a mahazar was prepared; that on further investigation, it was revealed that the persons named Anarul Islam and Hardath Baruwa never resided in the house shown by the accused. The relevant portion of the evidence tendered by PW100 reads thus:

> "എന്നാൽ എൻ്റെ തുടർന്നുള്ള അന്വേഷണത്തിൽ പ്രതി പറഞ്ഞ മേൽ വിവരങ്ങൾ അന്വേഷണത്തിന് വഴി തെറ്റിക്കുന്നതിനുവേണ്ടി ബോധപൂർവ്വം കളവായി പറഞ്ഞിട്ടുള്ളതാണ് എന്നും മേൽ പറഞ്ഞ സുഹൃത്തുക്കൾ പ്രതിക്ക് ഉണ്ടായിരുന്നില്ല എന്നും MO23 കത്തി യഥാർത്ഥത്തിൽ പ്രതിയുടെ കൈവശം ഉണ്ടായിരുന്നതാണ് എന്നും ബോധ്യമായിട്ടുള്ളതാണ്. മാത്രമല്ല പ്രതിയോട് ചോദിച്ചതിൽ പ്രതിക്ക് അനറുൾ ഇസ്ലാമിൻ്റെയോ ഹർദർ ബറുവയുടേയോ മേൽവിലാസവും ഫോൺ നമ്പർ തുടങ്ങിയ കാര്യങ്ങളൊന്നും തന്നെ പറഞ്ഞു തരുവാൻ കഴിഞ്ഞിട്ടില്ലാത്തതാണ്. എൻ്റെ അന്വേഷണത്തിൽ പ്രതി ചൂണ്ടികാണിച്ചതന്ന വീട്ടിൽ മേൽ പറഞ്ഞ പേരുകളുള്ള രണ്ടു പേർ താമസിച്ചിട്ടില്ല എന്നു വ്യക്തമായി ബോധ്യപ്പെട്ടു."

Even though PW100 was subjected to thorough cross-examination, the evidence tendered by him as regards the mobile numbers used by the wife and stepson of the accused have not been challenged.

<u>Call records</u>

31. PW68 is the Nodal Officer of Reliance

Communication Ltd. PW68 has made available the call records of the mobile number 8893608594 used by the accused. Ext.P85 is the call records for the period from 01.11.2015. PW68 deposed that for the period from 01.11.2015 to the date of occurrence namely, 28.04.2016, there were extensive contacts from the said number to the mobile numbers of the wife of the accused namely 8609146986 and 8906026232, the stepson of the accused namely 9946645863, the brother of the accused namely 9633892260 and to the mobile number of PW12 namely 8086015819. PW68 also gave evidence as to the tower locations through which the said mobile number passed through from 28.04.2016, during the journey of the accused from Aluva to Siliguri in West Bengal. It was deposed by PW68 that on 02.05.2016, the location of the number was at Siliguri in West Bengal and thereafter, the said mobile number was not in use.

32. PW69 is the Nodal Officer of the mobile service provider namely Bharati Airtel Ltd. PW69 made available the call records of the mobile number 7397097067 used by the accused while he was in Kanchipuram. Ext.P88 is the call records of the said mobile number. PW69 deposed that there

were calls from this number to the mobile numbers of the wife of the accused namely 8609146986 and 8906026232 and the stepson of the accused namely 9946645863.

Appreciation of oral evidence :

33. It is long settled that in a case on circumstantial evidence, the circumstances from which the conclusion of guilt is drawn shall be conclusively established. Keeping in mind the said principle, let us now appreciate the oral evidence let in by the prosecution. It was argued strenuously by the learned Senior Counsel for the accused that the evidence tendered by PW3 that she saw the accused proceeding from the rear side of the house of the victim at about the time at which the occurrence allegedly took place is highly unbelievable. According to the learned Senior Counsel, PW3 is not a person who had any previous acquaintance with the accused and as such, it is impossible for PW3 to identify the accused so as to state before the court that it was the accused who proceeded from the rear side of the house of the victim, especially when she had no case that she noticed any of his special features. The learned Senior Counsel did not dispute the fact that PW3 identified the accused later on 20.06.2016 in the

test identification parade conducted for the said purpose. But according to him, no sanctity could be attributed to the said identification, as by that time, photographs of the accused had already been published in print and visual media.

34. We have meticulously perused the evidence tendered by PW3. As noticed, the evidence tendered by PW3 except as regards the part that she saw the accused, was corroborated by PW4, PW5, PW8 and PW77. It is after she left the company of PW4, PW5 and PW8, that she claimed to have seen the accused on the rear side of the house of the victim. Ext.P71 is the sketch of the house of the victim and its surroundings prepared by PW63. It is shown in Ext.P71 that the house of the victim is one facing towards the east, close to the canal bund and there are two ancillary structures of the house on its rear side namely its western side close to the canal bund. There was a tree close to the canal bund, a little away from the ancillary structures attached to the house as referred to above which is described in the sketch as 'Vattamaram'. The sketch shows that the canal runs east-west and there is a road also on the east-west direction on the south of the canal and that one can reach the southern road by crossing the canal. The sketch

shows that the house of PW3 is situated adjoining the road referred to above just opposite to the house of the victim, and as spoken to by PW3, one can reach the house of the victim from the house of PW3 in a few seconds, and if the lie of the building is as stated in Ext.P71 sketch, which is not disputed, the persons who come and go from the house of the victim could be very well seen from the house of PW3. The visibility of the house of the victim from the house of PW3 is more, if one moves towards the northern boundary of the property of PW3. This aspect has been clarified by PW3 during her cross-examination. The relevant portion of the evidence tendered by PW3 reads thus:

> "എൻ്റെ വീടിനു ചുറ്റും മതിൽ ഉണ്ടു. ഒരു മീറ്റർ ഉയരത്തിലുള്ള മതിൽ ആണ്. റോഡിൻ്റെ ഭാഗം മതിൽ ഉള്ള ഭാഗത്തു വന്നു നിന്നാൽ റോഡിലൂടെ പോകുന്നവരെ കാണാൻ സാധിക്കില്ല എന്നുപറയുന്നു. (Q) ശെരിയല്ല (A) വൈകുന്നേരം നിങ്ങൾ കണ്ട വ്യക്തി സന്ധ്യമയങ്ങുന്ന നേരമായതിനാൽ മിന്നായം പോലെയാണ് കണ്ടുവെന്ന് പറയുന്നു. (Q) ശെരിയല്ല. സന്ധ്യമയങ്ങിയിട്ടില്ല. ഞാൻ ശെരിക്കു കണ്ടതാണ് . (A) കണ്ട വ്യക്തിയുടെ പൊക്കം, നിറം, ധരിച്ചിരുന്ന വസ്ത്രം, രൂപം, (description) എന്നിവയൊക്കെ പോലീസിൽ പറഞ്ഞോ (Q) ഡ്രസ്സ് ഞാൻ പറഞ്ഞിരുന്നു. ഉയരം കുറഞ്ഞ ചെറുപ്പക്കാരനായിരുന്നു. കണ്ടാൽ അറിയും എന്നു പറയാം (A)"

35. No doubt, PW3 being a person who had no previous acquaintance with the accused, a doubt would naturally arise as to how she could correctly identify a person who was proceeding from the rear side of the house of the victim. It appears that the investigating officer in the case also

had the same doubt and it is seen that it is on account of the said reason that a test identification parade was arranged to enable PW3 to identify the accused. It has come out on record that the accused was taken into custody from Kanchipuram on 14.06.2016 and his formal arrest was recorded on 16.06.2016. The accused was produced before the Jurisdictional Magistrate on 17.06.2016 and remanded to judicial custody. Test identification parade was conducted by PW78, the authorised Judicial Magistrate at the District Jail, Kakkanad on 20.06.2016. Ext.P146 is the memorandum and Ext.P147 is the report prepared by PW78 in this regard. No argument was advanced in connection with the manner in which the test identification parade was conducted by PW78. A perusal of the evidence tendered by PW78 indicates that the test identification parade was conducted by PW78 flawlessly and PW3 had correctly identified the accused in all the three rounds of the test. As noted, the point pressed into service by the learned Senior Counsel for the accused to impugn the identification of the accused made by PW3 is that his photographs were published in print and visual media before he was produced before the Magistrate and that the evidence tendered by PW3 that she did

not see the photographs of the accused in print and visual media before the test identification parade cannot be believed, for it would have been the natural instinct of anyone in the locality to know as to who committed this gruesome murder. The learned Special Public Prosecutor met the said argument pointing out that police custody of the accused was obtained only after the test identification parade; that he was not shown to the public before the test identification parade and that there was no occasion, therefore, for anybody to see the accused before the test identification parade. It was also asserted by the learned Special Public Prosecutor that even thereafter, when the accused was taken out for investigation, his face was masked. We find substance in the assertions made by the learned Special Public Prosecutor. In the evidence tendered by PW100, he made identical assertions as made by the learned Special Public Prosecutor. The suggestion made to PW3 during cross-examination that the photograph of the accused was published in Mathrubhumi Daily on 18.06.2016 was emphatically denied by PW3. The relevant suggestions and its answers read thus:

"എൻ്റെ വീട്ടിൽ വരുത്തുന്ന പത്രം മാതൃഭൂമി ആണ് . 18.06.2016 ൽ മാതൃഭൂമി പത്രത്തിൽ ഒരു വ്യക്തിയുടെ മുഖം മറച്ചുള്ള പടം വന്നിരുന്നില്ലേ. (Q) എനിക്കറിയില്ല. ഞാൻ കണ്ടിട്ടില്ല (A) ആ

പത്രത്തിൽ പ്രതിയുടെ പൂർണകായ രൂപം വന്നു എന്ന് പറയുന്നു. (Q) അതു ഞാൻ കണ്ടിട്ടില്ല (A)"

As evident from the suggestion made to PW3, even the counsel for the accused has no case that any photograph of the accused without a mask on his face was published before the test identification parade. Be that as it may, the accused has no case that his face was not covered when he was produced before the Magistrate on 17.06.2016. Even the suggestion made in this regard to PW100 was only that the accused was made to wear a helmet on the said day. PW100 has not only denied the said suggestion but also clarified that his face was covered at that time. The relevant portion of the deposition reads thus :

"17.6.2016-ൽ പ്രതിയെ കോടതിയിൽ helmet ധരിപ്പിച്ചുവെന്നു പറഞ്ഞാൽ ശരിയല്ല. മുഖം മറച്ചാണ് ഹാജരാക്കിയത്."

The learned Senior Counsel for the accused contended that if as a matter of fact, the accused was produced before the court after covering his face, there was no need at all for the investigating officer to seek the permission of the court to cover his face when he was taken out of the jail. The learned Senior Counsel relied on the prayer in Ext.P239 remand application dated 17.06.2016 to bring home the said point. The relevant portion of the remand application read thus:

"പ്രതിയുടെ Test Identification Parade നടത്തേണ്ടതിനാലും പ്രതിയെ ജയിലിൽ നിന്ന് പുറത്ത് അയക്കാതിരിക്കുന്നതിനും, അയക്കേണ്ടിവരുന്ന പക്ഷം പ്രതിയെ മുഖംമൂടി ധരിപ്പിച്ചു പുറത്തിറക്കുന്നതിനും അതോടൊപ്പം പ്രതിയെ പ്രത്യേക സെല്ലിൽ താമസിപ്പിക്കുന്നതിനുള്ള നിർദ്ദേശം ജയിൽ ആധികൃതർക്ക് നൽകുന്നതിനും അപേഷിച്ചുകൊള്ളുന്നു."

We do not find any merit in this submission also. Merely for the reason that such a prayer was made in the remand application, it cannot be inferred that the accused was produced before the court without covering his face.

36. In this context, it is relevant to point out that the evidence on record would indicate that PW3 belongs to a well-to-do family, and her husband is running a supermarket. Having regard to the said background of PW3, we do not think that PW3 would say in a court that she has seen the accused proceeding from the rear side of the house of the victim, if as a matter of fact, she has not seen the accused, especially when she has no reason to falsely implicate the accused in the case. When this aspect was put to the learned Senior Counsel for the accused in the course of the arguments, the learned Senior Counsel conceded that under normal circumstances, there is no reason for such a person to make a statement of this nature, if she has not seen the accused. But, it was then added by the learned Senior Counsel that since the occurrence was a horrendous act, which created a shock in the minds of the

people around the residence of the victim, the possibility of PW3 giving evidence in the aforesaid fashion on an earnest belief that the accused is the assailant, as he was found to be the assailant by the police, cannot be ruled out. We are unable to accept the said argument.

37. Another ground on which the evidence tendered by PW3 was attacked by the learned Senior Counsel for the accused is that, PW3 has not disclosed in her first statement to the police that she saw the accused after the conversations she had with PWs 4 and 5 and that therefore, no sanctity could be attributed to that part of the evidence tendered by PW3. The learned Senior Counsel did not, however, dispute the fact that PW3 has disclosed the said fact in her subsequent statements to the police. But, according to him, the same will not improve the credibility of the evidence tendered by the witness. The learned Special Public Prosecutor did not dispute the fact that PW3 did not disclose in the first statement given to the police that she saw the accused. But, it was pointed out by the learned Special Public Prosecutor that she explained satisfactorily the reason for not doing so, viz, that she did not disclose the fact aforesaid in her first statement to

the police on account of fear. According to the learned Senior Counsel, the explanation offered by the witness cannot be accepted, for if the non-disclosure was on account of fear, then there is absolutely no reason to disclose the same at a later point of time also. No doubt, the non-disclosure of the fact aforesaid by PW3 in her first statement would certainly create a doubt in the mind of the court as to the veracity of that part of the evidence tendered by PW3. But, on a close scrutiny of the evidence, having regard to the ground reality that witnesses would face inconveniences, at times, even harassment, in a case of this nature, according to us, the explanation offered by PW3 that she did not disclose in the first statement that she saw the accused, on account of fear is a plausible explanation, and merely on account of that reason, the disputed part of her evidence cannot be rejected. We take this view also for the reason that PW3 could identify the accused in all the three rounds of the test identification parade conducted, flawlessly, from among persons having similar features including persons who hail from other States. In the light of the discussion aforesaid, according to us, there is absolutely no reason to doubt the veracity of the evidence tendered by PW3 that she

saw the accused on the date of occurrence at the rear side of the house of the victim at about the time at which the occurrence allegedly took place.

38. Although the evidence tendered by PW10 has not been challenged by the learned Senior Counsel for the accused, the evidence tendered by PW12 was seriously challenged on the ground that he is a migrant labourer, who will have no option, but to oblige the police, if he is required by the police to give evidence in a particular fashion. According to the learned Senior Counsel, in the circumstances, no credence could be attributed to his evidence. No doubt, inasmuch as the said witness being a migrant labourer, he will certainly have a tendency to oblige the police. As such, we are of the view that the evidence tendered by such a witness has to be carefully scrutinised. As far as the evidence tendered by PW12 is concerned, the fact that the accused had been to the room where he was residing, in the evening hours of the date of occurrence and left the room after sometime with his belongings, is not disputed. The challenge is against the evidence tendered by PW12 that the accused called him at about 8.30 p.m. on 28.04.2016 and at about 7.30 a.m. on

29.04.2016 and enquired with him as to whether the police came in search of him. No doubt, it has been established by the prosecution that the accused contacted PW12 over telephone twice at about 8.30 p.m. on 28.04.2016 and also twice, at about 7.30 a.m., on 29.04.2016. Ext.P85(g6), Ext.P85(g7), Ext.P85(g8) and Ext.P85(g9) were the calls made by the accused to PW12. But, merely for the reason that the accused made calls to his room-mate twice after leaving the room on the date of the occurrence and on the subsequent morning, it cannot be inferred that the accused had enquired with PW12 the facts spoken to by PW12 in his evidence. That part of the evidence tendered by PW12 does not inspire confidence and according to us, it is not safe to place reliance on the said part of the evidence. If that part of the evidence is kept apart, what remains is the evidence tendered by PW12 that MO23 is a knife which the accused usually carries in his bag and MO21 series were the chappals of the accused. Of course, PW12 also deposed that he noticed an injury on the right index finger of the accused on 28.04.2016.

39. A close scrutiny of the evidence tendered by PW12 would indicate that the accused does not dispute the fact

that MO23 was a weapon that was kept in their room, even though the accused does not admit the evidence tendered by PW12 that he used to carry the same in his bag. The said fact can be inferred from the suggestions made by the counsel for the accused to PW12. The relevant portion of the deposition reads thus:

> "ഇങ്ങനെ വഴക്ക കൂടുമ്പോൾ ഇപ്പോൾ കാണിച്ച MO23 കൊണ്ട് നിങ്ങൾ അമീറിനെ കുത്താൻ ശ്രമിച്ചില്ലേ (Q) ശെരിയല്ല. അങ്ങനെ ഒന്നും ഉണ്ടായിട്ടില്ല. (A) ഇങ്ങനെ കുത്താൻ ശ്രമിച്ചപ്പോൾ അമീറിൻ്റെ കൈമുറിയാൻ ഇടയായി എന്ന് പറയുന്ന (Q) ശെരിയല്ല (A) അമീറിനെ കുത്തുവാൻ ശ്രമിച്ച കത്തി 30-)0 തീയതി നിങ്ങളുടെ മുറിയിൽ നിന്നും പോലീസ് ബന്തവസ്സിൽ എടുത്തുവെന്ന പറയുന്ന. (Q) ശെരിയല്ല. (A) "

We do not find any reason to doubt the veracity of the evidence tendered by PW12 that he saw an injury on the right index finger of the accused on 28.04.2016 also, as the accused himself had admitted in his examination under Section 313 of the Code in respect of the evidence tendered by PW12 that PW12 had obtained an ointment for him to apply on the injury noted by him. The question and answer read thus:

> "അമീറിൻ്റെ കയ്യിൽ രക്തം കണ്ടപ്പോൾ എന്തുപറ്റിയെന്ന ചോദിച്ചുവെന്നും അതു പിന്നെ പറയാം എന്ന അമീർ പറഞ്ഞുവെന്നും PW12 തുടർന്ന മൊഴി നൽകിയിരിക്കുന്ന. എന്തെങ്കിലും പറയാനുണ്ടോ (Q) ശെരിയല്ല.സുജൽ എനിക്ക് ointment വാങ്ങിക്കൊണ്ട് തരുകയാണ് ചെയ്തത്. (A)"

As far as the identification of MO21 series chappals of the accused, it is seen that the evidence tendered by PW12 in this regard is corroborated by the evidence of PW14 and PW33, and

among them, PW33 is none other than the stepson of the accused, who was residing in the building of PW10 where the accused was residing. PW14, as noted, is a migrant worker who is a friend of the brother of the accused, from whom the brother of the accused arranged money to be given to the accused to go to his native place on the date of occurrence. PW14 was, in fact, examined by the prosecution to prove the said fact and also the fact that PW14 entrusted with the accused a mobile phone to be handed over to the mother of PW14, which the accused was using throughout his journey. During cross-examination of the said witness, the suggestion made by the counsel for the accused was that the accused was wearing MO21 series chappals when he met PW14 on the date of occurrence. It appears that the said question was put to PW14 only to show that MO21 series of chappals recovered from the place near the scene of occurrence do not belong to him, for if it were abandoned by the accused, he could not have been wearing the same when he met PW14. PW14 denied the said suggestion and asserted that the accused was wearing a Hawai chappal at that point of time. The relevant portion of the evidence read thus:

"MO21 & 21(a) ചെരുപ്പ ധരിച്ചുകൊണ്ടല്ലേ അമീർ നിങ്ങളുടെ അടുത്ത് വന്നത് (Q) ഹവായ് ചപ്പൽ ഇട്ടു കൊണ്ട് ആണ് വന്നത് (A)."

That part of the evidence tendered by PW33 that MO21 series are the chappals of the accused has not been challenged in cross-examination. In the circumstances, there is no reason to doubt the veracity of the evidence tendered by PW12 that MO21 series are the chappals of the accused. In the circumstances, we are of the view that the evidence tendered by PW12 can certainly be accepted, except as regards the evidence as to the contents of the conversations the accused had with PW12 on 28.04.2016 and 29.04.2016, for which there was no corroboration.

40. The evidence tendered by PW61, the doctor who examined the accused on 30.06.2016 was another piece of evidence which was seriously challenged by the learned Senior Counsel for the accused. As noted, it was deposed by PW61 that the accused disclosed to him at the time of examination that injury No.1 noted in Ext.P64 certificate was sustained on account of the bite by a girl when he attempted to close her mouth. According to the learned Senior Counsel, inasmuch as the accused was in the custody of the police, it is an ingenious act committed by the police, for it amounts to an admission of

guilt on the part of the accused. We find force in the said argument. But, that does not mean that the evidence tendered by PW61 is liable to be rejected, as the learned Senior Counsel has not attributed any malice against PW61. The argument of the learned Senior Counsel is only that in all probability, the accused must have been coerced by the police to say so before PW61. It is all the more so since, the accused himself admits that he suffered an injury on 28.04.2016 on his right index finger, even though he had different versions at different times as to the cause of the said injury. In other words, the evidence tendered by PW61 that the injury he noticed on the right index finger of the accused on 30.06.2016 is suggestive of a human bite, can certainly be accepted.

41. True, the evidence tendered by PW100 as regards the persons Anarul Islam and Hardath Baruwa named by the accused have been challenged by the accused in cross-examination by putting to him a few questions which would suggest that those persons lived in the locality of the house of the victim. The said attempt of the accused, according to us, cannot be accepted as sufficient to discredit the categoric evidence tendered by PW100 that the persons named by the

accused did not live in the locality at all and the names aforesaid have been referred to by the accused to mislead the investigation.

Arguments of the accused:

42. As already noticed, elaborate arguments have been advanced by the learned Senior Counsel for the accused, of which, we have dealt with hitherto only a few relating to the acceptability of the evidence tendered by some of the witnesses. Let us, therefore, consider the remaining arguments.

(a) The learned Senior Counsel contended that the subsequent conduct of the accused is not consistent with the commission of a crime of this nature. The learned Senior Counsel elaborated the said submission by pointing out that the evidence tendered by PW12, the room-mate of the accused, PW79, the brother of the accused and PW14, the friend of the brother of the accused would show that the conduct of the accused after the alleged occurrence was not consistent with the prosecution case. No doubt, after the occurrence, the accused went to his room, had a chat with PW12 and then proceeded to meet PW79 for money. Thereafter he along with PW79 met PW14 and secured the

amount as required by the accused and it was from there, he proceeded to Aluva railway station, after changing his clothes for his journey to Assam. Even though the said subsequent conduct would appear to be that of a normal person, merely for the reason that the accused behaved in such a manner, it cannot be said that he was not involved in the crime.

(b) It was argued persuasively by the learned Senior Counsel that the prosecution case that the accused proceeded to rape a girl with a bottle of liquor and a knife is highly improbable. True, it was alleged by the prosecution that the accused poured liquor into the mouth of the victim after inflicting injuries on her. It appears, such an allegation was made since it was stated in the chemical analysis report of the viscera of the victim namely, Ext.P176 that the sample of blood contained 93 mg. of ethyl alcohol in 100 ml. of blood, and the said quantity of ethyl alcohol is slightly above the normal range of ethyl alcohol produced in the blood in a putrefying body, if there is no external injection. PW90 explained that the normal range of ethyl alcohol present in a putrefying body would be 20mg. to 60 mg. per 100 ml. The case aforesaid of the prosecution that the accused poured liquor into the mouth of

the victim after inflicting injuries on her, can only be construed as an inference made by the investigating officer from the evidence collected by him, for there is no eye-witness to the occurrence. Further, inasmuch as we cannot rule out the possibility of consumption of liquor by the victim herself, it cannot be presumed that the accused carried liquor with him. In the circumstances, we are unable to endorse the argument that the prosecution story is totally improbable, merely for the reason that the accused carried with him a knife, when he proceeded to the house of the victim with the evil intention of committing rape on her.

(c) It was also argued by the learned Senior Counsel that MO7 knife was recovered from the scene of occurrence only on 07.05.2016, and the same creates a doubt as to whether the scene of occurrence was altered. MO7 was a kitchen knife that was used in the house of the victim. Merely for the reason that the said knife was not seized at the time of preparation of the scene mahazar along with other articles, it cannot be said that the scene of occurrence was altered.

(d) Another argument advanced by the learned Senior Counsel was that there is no evidence to establish the

blood group of the victim. The learned Public Prosecutor met this argument pointing out that, merely for the reason that the group of the blood of the victim was not reported in Ext.P169, it cannot be said that the blood of the victim was not present in the material object, for the group of the blood of the accused, viz, 'A' group being the dominant group, when the sample is an admixture of blood belonging to two groups, only the particulars of the dominant group would be revealed in the serological examination. The learned Public Prosecutor reinforced the said argument, placing reliance on the evidence tendered by PW85 to that effect. It is unnecessary to examine the sustainability of the argument advanced by the learned Public Prosecutor in this regard. Inasmuch as the DNA of the persons concerned was extracted from their blood samples, according to us, the fact that the blood group of the victim was not established is of no consequence, for DNA evidence is more authentic than the evidence based on the blood group of the individual.

(e) In the context of the DNA evidence tendered by the prosecution with reference to MO10 churidar top, it was vehemently argued by the learned Senior Counsel that

inasmuch as MO10 was not packed and sealed at the scene of occurrence itself when it was seized, it cannot be contended that the saliva found therein originated from the crime scene. The learned Senior Counsel relied on the evidence tendered by PW23, the Woman Police Constable who removed MO10 churidar top from the dead body at the time of holding inquest, that the said object was not sealed. It was pointed out by the learned Special Public Prosecutor that MO10 was soaked in blood at the time of holding the inquest and it could not have, therefore, been packed and sealed. It was, however, pointed out by the learned Public Prosecutor, placing reliance on the evidence tendered by PW99, the police officer who held the inquest that MO10 was in his safe custody until the said material object was produced before the Jurisdictional Magistrate, and inasmuch as the said evidence tendered by PW99 has not been discredited in his cross-examination, the accused cannot be heard to contend that the saliva contained in the said material object were likely to be contaminated. We find force in the argument advanced by the learned Special Public Prosecutor and accordingly, we are rejecting the argument raised by the learned Senior Counsel based on the

evidence tendered by PW23. True, it can still be argued that merely for the reason that the purity of the sample of saliva contained in MO10 churidar top was maintained, it cannot be said that the saliva found in the said material object originated from the crime scene. Injuries 33 and 34 noted by PW90 at the time of post-mortem examination as recorded by her in the post-mortem certificate, are bite mark injuries of the assailant on the back left shoulder of the victim. PW85 is the scientist who first subjected MO10 to serological examination. Later it was forwarded to PW89 for biological examination. It was PW89 who detected saliva in MO10. It is categorically stated by PW89 in Ext.P174 that saliva was detected from the left shoulder blade portion of MO10 churidar top corresponding to the places where PW90 noticed injuries 33 and 34 on the body of the victim. PW82, the Scientist at the Rajiv Gandhi Centre deposed that he found saliva from a portion of MO10 cut out from the area from where saliva was detected by PW89. In other words, it can certainly be inferred that the saliva found on MO10 churidar top originated from the crime scene. Needless to say, the argument advanced by the learned Senior Counsel in this regard is only to be rejected and we do so.

(f) In the context of the DNA evidence let in by the prosecution with reference to MO10 churidar top, the learned Senior Counsel also argued that inasmuch as an admixture of the blood of the accused and the victim were not detected on MO10 churidar top at the Rajiv Gandhi Centre, the evidence tendered by PW81 to that effect is liable to be rejected as it is obvious that the bloodstains found therein is contaminated. We do not find any substance in this argument, for Rajiv Gandhi Centre was neither requested by the Jurisdictional Magistrate nor by the Laboratory, to examine the bloodstains contained therein.

(g) In the context of the DNA evidence let in by the prosecution with reference to the nail clippings of the victim, the learned Senior Counsel argued that PW89 is the first person to examine the nail clippings and he did not find anything in the nail clippings. According to the learned Senior Counsel, inasmuch as the nail clippings were examined by PW89, the normal procedure is to scrape down the nail to get the samples and if the nails were scraped down by PW89, there would be nothing left for PW81 to examine in the nail clippings and therefore, if PW81 finds any sample in the nail clippings, it can

only be an addition. We do not find any merit in this argument also. Ext.P174 report submitted by PW89 recites categorically that the nail clippings were examined only to detect fibres and other foreign materials therein and the same were, thereafter, preserved for DNA examination. The evidence tendered by PW89 in this regard has not been discredited by the accused in his cross-examination.

(h) It was argued by the learned Senior Counsel in the context of the DNA evidence let in by the prosecution with reference to the brown stain collected in cotton gauze from the rear door frame of the house of the victim that what was examined by PW81, was an unsealed packet and as such, the possibility of contamination cannot be ruled out. We do not find any substance in this argument also. As already mentioned, the said item was forwarded to the Laboratory along with a few other items as well, in terms of Ext.P201 forwarding note and the same was first examined by PW85. In Ext.P169 report, it is categorically stated by PW85 that the items received as per Ext.P201 forwarding note were packed and sealed. PW85 confirmed that she conducted serological examination of some of the items contained in the packet including the subject item

in her evidence. It is recited in Ext.P169 report that after the serological examination, the said item was forwarded in an unsealed packet to the DNA division for DNA examination. The said fact has also been confirmed by PW85. In the absence of the possibilities of contamination of the sample in the Laboratory brought out in the examination of PW85, we do not think that there is any merit in the argument advanced by the the learned Senior Counsel.

(i) It was argued by the the learned Senior Counsel in the context of the DNA evidence let in by the prosecution with reference to MO23 knife that inasmuch as it was reported by PW85 that the quantity of the bloodstain was insufficient for determining the origin or group, there should have been an explanation from the prosecution as to how then PW81 could find an admixture of blood in the said sample so as to enable him to extract DNA from it.

(j) It was argued by the learned Senior Counsel, placing reliance on Ext.P149 report of PW80 that the brown stain found by PW80 on the rear door frame of the house of the victim was collected only on one cotton gauze, whereas, Ext.P169 report of PW85 indicates that the brown stain was

collected in two pieces of cotton gauze. According to the learned Senior Counsel, in the absence of any explanation for the said anomaly, no reliance can be placed on the DNA evidence in respect of the brown stain. We do not find any substance in this argument. No doubt, Ext.P149 does not indicate as to the number of cotton gauzes on which the brown stain was collected. It is, however, recited in Ext.P149 itself that the samples were handed over to the investigating officer only after packing and labelling the same. The packets were opened only by PW85. As such, it can be inferred that the brown stain was collected on two cotton gauzes and non-mentioning of the number of the cotton gauzes in which the brown stain was collected in Ext.P149 can only be a *bonafide* omission.

(k) In the context of the obligation of the prosecution to establish that the material objects seized during investigation have been produced before the jurisdictional Magistrate without undue delay, it was argued by the learned Senior Counsel that even though MO10 churidar top was seized on 29.04.2016, it was produced before the Jurisdictional Magistrate only on 02.05.2016. We do not find any merit in this argument as well. Inasmuch as it has come out in evidence

that MO10 was soaked in blood at the time of its seizure, the delay of two days in producing the said material object in court is not a significant one.

Circumstances proved :

43. The fact that the death of the victim is a homicide has been satisfactorily established in the case through the evidence tendered by PW90. The accused has no case that the death is not a homicide. The moot question, however, is whether the facts proved in the case are sufficient to establish the guilt of the accused. According to us, the following are the circumstances that could be derived from the facts proved in the case:

(i) the accused was an able bodied, healthy migrant labourer residing in the close vicinity of the house of the victim.

(ii) the accused did not go to work on the date of occurrence and PW10 saw the accused at about 10.30 a.m. on the road near the house of the victim.

(iii) PW7 saw the victim carrying water to her house at about 5.00 p.m. on the fateful day and she was wearing a churidar then.

(iv) PWs 3, 4 and 5 heard a screaming sound from the house of the victim at about 5.30 p.m. followed by a loud door closing sound.

(v) PW3 saw the accused proceeding from the rear side of the house of the victim shortly after she heard the screaming and door closing sounds.

(vi) PW93 was the first person who saw the dead body of the victim after the occurrence and when he saw the dead body, the body was in such a position that the victim was subjected to sexual assault.

(vii) the accused made preparations to leave the locality of the house of the victim immediately after the occurrence at about 6.30 p.m., and left the locality in the early hours of the following day to his native place in Assam.

(viii) the accused admitted in the statement filed by him under Section 233(2) of the Code that he left the locality on account of the murder of the victim.

(ix) even though the accused stated that two of his friends named in the said statement are responsible for the murder of the victim, he could not establish that the said persons actually exist in reality and therefore, the explanation

offered by the accused that he left the locality on account of the involvement of his friends in the crime was false.

(x) the accused did not come back to the locality of the house of the victim after the occurrence.

(xi) there is no explanation from the accused as to why he chose not to come back to the locality after the occurrence, especially when his close relatives and friends, including his brother and stepson continued to live and work in the locality.

(xii) the accused, who was using mobile number 8893608594 extensively to contact his friends and relatives till the date of occurrence, had used the said mobile connection after the occurrence only during his journey from Aluva to Siliguri.

(xiii) no explanation is offered by the accused for not using the mobile number 8893608594 after the occurrence, even though he was very much holding with him, the SIM card of the said connection.

(xiv) the accused secured another mobile connection with number 7397097067 on reaching Kanchipuram later, and he was using the said number thereafter to contact

his friends and relatives.

(xv) the accused has not offered any explanation for having secured a new mobile connection from Kanchipuram when he already held a prior mobile connection and also since there was no impediment in using the said mobile connection any more.

(xvi) PW90 opined that the victim was murdered after subjecting her to sexual assault and that there was also resistance from the victim on the attempts made by the assailant to rape her.

(xvii) PW90 opined that all the incised wounds suffered by the victim, including injury No.31 could be caused by MO23.

(xviii) the stains of blood found on MO23 is that of the victim.

(xix) MO23 was a knife that was used by the accused in the room where he was residing with PW12 and others.

(xx) PW90 opined that injury Nos.33 and 34 are suggestive of bite marks on the back of the left shoulder of the victim, and saliva of the accused was found on MO10 churidar

top covering that part of the body.

(xxi) PW61 opined that the injury found by him on the right index finger of the accused is suggestive of human bite and the said injury was one suffered by the accused on the date of occurrence.

(xxii) the accused has inconsistent versions as regards the cause of the injury suffered by him on his right index finger. The suggestion made by him to PW12 as regards the same is that it was an injury caused by PW12, whereas his explanation during the examination under Section 313 of the Code is that the same was caused by one Rajan Mesthiri.

(xxiii) the saliva found in MO10 churidar top from the portion corresponding to injury Nos.33 and 34 is that of the accused and there is no explanation from the accused as to how his saliva happened to be found in MO10 churidar top as found on the body of the victim when the dead body was seen by PW93.

(xxiv) the blood of the accused was found in MO10 churidar top as found on the body of the victim.

(xxv) the bloodstains in the nail clippings of the victim was found to be the admixture of bloodstains of the

victim and the accused.

(xxvi) the brown stain found on the rear door frame of the house of the victim is that of the admixture of the blood of the victim as also the accused.

(xxvii) the blood found in MO21 and 21(a) series chappals belonging to the accused and recovered from a place near the house of the victim, is that of the victim.

Conclusion as to the guilt :

44. The question that remains to be considered is whether the circumstances established in the case would prove the commission of the various offences for which the accused has been charged and found guilty. This being a case on circumstantial evidence, it is necessary to keep in mind the principles to be followed in arriving at a finding as to the guilt of the accused. The principles are:

(1) that the circumstances from which the conclusion of guilt is drawn are fully established,

(2) that the facts so established are consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) that the circumstances are of a conclusive nature and tendency,

(4) that they should exclude every possible

hypothesis except that the accused is guilty, and

(5) 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.

It is also necessary to state in this context that in the light of the provision contained in Section 3 of the Indian Evidence Act, a fact is said to be proved not only when, after considering the matters, the court either believes it to exist, but also when the court considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. No doubt, the standard of proof required to be applied in a case of this nature is “proof beyond reasonable doubt”, but that does not mean that the degree of proof must be beyond a shadow of doubt [See **Iqbal Moosa Patel v. State of Gujarat**, (2011) 2 SCC 198]. In other words, the degree of proof need not reach certainty, but it must carry a high degree of probability. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence 'of course it is possible, but not in the

least probable,' the case is proved beyond reasonable doubt [See **Miller v. Minister of Pensions** (1947) 2 ALL ER 372]. Doubts would be called reasonable if they are free from a zest for abstract speculation. To constitute reasonable doubt, it must be free from an over-emotional response. Doubts must be actual and substantial doubts as to the guilt of the accused person arising from the evidence, or from the lack of it, as opposed to mere vague apprehensions. A reasonable doubt is not an imaginary, trivial or a merely possible doubt; but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case [See **State of U.P. v. Krishna Gopa**l, (1988) 4 SCC 302]. Needless to say, smelling doubts for the sake of giving benefit of doubt is not the law [See **Lal Singh v. State of Gujarat**, (2001) 3 SCC 221].

45. The offences on which the accused is found guilty are the offences punishable under Section 449 IPC, house-trespass in order to commit offence punishable with death, Section 342 IPC, wrongful confinement, 376 IPC, rape, 376A IPC, causing death of the victim of rape and 302 IPC, murder. The charges framed against the accused for the said offences read thus :

"Firstly, that you, on or about the 28th day of April, 2016 in between 5.30 p.m and 6 p.m at the residence of Jishamol at Periyarvalley Canal Bund Puramboke committed trespass in the building, where the deceased resided, into the commission of an offence punishable with death and thereby committed an offence punishable under Section 449 of the I.P.C and within my cognizance.

Secondly, that you, on or about the 28th day of April, 2016 in between 5.30 p.m and 6 p.m at the residence of Jishamol at Periyarvalley Canal Bund Puramboke wrongfully confined the said Jishamol and thereby committed an offence punishable under Section 342 of the I.P.C and within my cognizance.

Thirdly, that you, on or about the 28th day of April, 2016 in between 5.30 pm and 6 p.m at the residence of Jishamol at Periyarvalley Canal Bund Puramboke committed rape without the consent of Jishamol and thereby committed an offence punishable under Section 376 of the I.P.C and within my cognizance.

Fourthly, that you, on or about the 28th day of April, 2016 in between 5.30 p.m and 6 p.m at the residence of Jishamol at Periyarvalley Canal Bund Puramboke committed rape without the consent of Jishamol and in the course of such commission, inflicted injuries with dangerous weapons which cause the death of Jishamol and thereby committed an offence punishable under Section 376(A) of the I.P.C and within my cognizance.

Fifthly, that you, on or about the 28th day of April, 2016 in between 5.30 p.m and 6 p.m at the residence of Jishamol at Periyarvalley Canal Bund Puramboke committed murder by intentionally causing the death of Jishamol and thereby committed an offence punishable under Section 302 of the I.P.C and within my cognizance.

Sixthly, that you, on or about the 28th day of April,

> 2016 in between 5.30 p.m and 6 p.m at the residence of Jishamol at Periyarvalley Canal Bund Puramboke after committing rape and murder of Jishamol caused the evidence of the commission of that offences to disappear and thereby committed an offence punishable under Section 201 of the I.P.C and within my cognizance."

The circumstances found to have been proved by the prosecution as referred in the preceding paragraphs consist of the oral evidence given by PW3, previous and subsequent conduct of the accused as spoken to by persons known to him and his relatives, medical evidence and DNA evidence.

46. Inasmuch as the circumstances include DNA evidence, it is necessary to mention that the DNA evidence is in the nature of opinion evidence as envisaged under Section 45 of the Indian Evidence Act, and like any other opinion evidence, its probative value varies from case to case depending on the facts and circumstances and the weight accorded to other evidence on record [See **Pattu Rajan v. State of T.N.**, (2019) 4 SCC 771]. In **Mukesh v. State (NCT of Delhi)**, (2017) 6 SCC 1, after referring to the various judgments rendered earlier, the Apex Court held that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality

control or quality assurance. If the sampling is proper, and if there is no evidence as to the tampering of the samples, the DNA test report deserves to be accepted. Paragraph 228 of the said judgment reads thus:

> "228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted."

In **Mukesh**, the Apex Court has quoted with approval, a passage from the judgment in **Pantangi Balarama Venkata Ganesh v. State of A.P.**, (2009) 14 SCC 607, wherein a two-Judge Bench of the Apex Court referred to the evidence tendered by an expert on the subject that the probability of two persons except identical twins having the same DNA fingerprint is around 1 in 30 billion world population. Reverting to the facts of this case, in the absence of any case for the accused that he has an identical twin, and in the absence of any material to indicate that the chain of custody as also the purity of the samples were not maintained during investigation, we are of the view that the DNA evidence let in by the prosecution can certainly be accepted.

47. In the light of the evidence that the dress on the dead body of the victim, namely MO10 churidar top, contained the saliva and blood of the accused, the evidence that the nail clippings of the victim contained the admixture of blood of the victim as also the accused, the evidence that the brown stain found on the rear door frame of the house of the victim is that of the admixture of the blood of the accused and the victim, the evidence that the blood found on MO21 series chappals belonging to the accused is that of the victim, the evidence that the injuries were inflicted on the victim using MO23 knife that was used in the room of the accused, the evidence that the saliva of the accused was found on MO10 churidar top at its portion corresponding to the area covering injuries Nos.33 and 34 bite marks, the evidence that the accused suffered a bite injury on his right index finger on the date of occurrence, the evidence that the accused is an able bodied healthy person who was residing in the locality of the house of the victim, the evidence that he did not go to work on the date of occurrence, the evidence that the accused was seen moving from the house of the victim immediately after the screaming sound was heard from the house of the victim, the

evidence that the accused absconded from the locality after the occurrence, the evidence that the accused offered false explanation for leaving the locality, the evidence that the victim was very much alive before the screaming sound was heard from the house of the victim and the evidence that her dead body was found in the house of the victim a few hours after the screaming sound, it can certainly be inferred that it was the accused who caused the death of the victim. Inasmuch as the death is proved to be a homicide, in the light of the evidence tendered by PW90 as to the cause of death, it can be conclusively held that it was a murder, and the same was committed by the accused.

48. If the accused is the person who caused the death of the victim, in the light of the evidence of PW90 that the victim was murdered after subjecting her to sexual assault, the evidence of PW90 that there was continuous resistance on the side of the victim on the attempts of the accused to rape her, the evidence of PW90 that injury No.31 is a lacerated penetrating wound which has been produced over the perineum region which includes external genitalia, the evidence of PW90 that injury No.31 is possible by introducing

MO23 multiple times in the region, the evidence of PW90 that the ante-mortem injuries found on the body of the victim includes bite marks, the evidence of PW61 that the injuries suffered by the accused on his right index finger is suggestive of human bite and the evidence of PW93 that when he saw the dead body at about 8.45 p.m. on the date of occurrence, the body was in such a position that the victim was subjected to sexual abuse, according to us, it can certainly be inferred that the accused had the required *mens rea* to commit rape on the victim and that he subjected the victim to rape, though not by penetrating his penis into her vagina, but by inserting an object into the vagina as defined under Section 375(b) IPC, and inasmuch as the death of the victim was also caused while committing the rape, the offence punishable under Section 376A IPC is also made out. Further, inasmuch as it is found that it was the accused who committed rape and murder at the house of the victim, it can be inferred that the accused is guilty of the offences punishable under Sections 342 and 449 IPC also.

49. Even though the ingredients of the various offences for which the accused has been charged can be

inferred from the circumstances established in the case, a doubt would naturally arise that if the intention of the accused was only to commit rape on the victim, why had he then caused her death and also mutilate, in a barbaric and gruesome manner, her private parts. Inasmuch as the ingredients of the various offences have already been established in the case, it is suffice to say that the acts of brutality committed by the accused on the body of the victim to cause her death can only be regarded as acts committed out of frustration, aggression and vengeance as also to evade the law and get rid of the criminal liability. It is well known that even though there is no specific formula to predict what drives a particular person to commit a crime, individuals who engage in such acts of brutality are typically influenced by a combination of various psychological and social factors. The conduct of the accused in causing the death of the victim after committing rape, in the case on hand, can be construed as an act of precaution, consciously intended to conceal his identity and his connection to the crime. As regards the abhorrent manner in which the crime was committed by the accused, factors namely, sexual perversion or sexual gratification,

sensation and thrill-seeking contribute to the drive of the assailant to commit the crime. It is also well known that persons who commit such gruesome acts normally have issues controlling their impulses and is in a fit of rage.

50. One of the arguments advanced by the learned Senior Counsel for the accused which has not been dealt with hitherto by us, is the argument that the prosecution has not established satisfactorily the motive of the accused. The materials on record as discussed in the preceding paragraphs would indicate beyond doubt that the motive of the accused was to commit rape on the victim. Be that as it may, in a case on circumstantial evidence, motive assumes significance. It is by now settled that if there are other circumstances which conclusively establish that it was the accused and no one else who committed the crime, then motive becomes immaterial [See **Yuvaraj Ambar Mohite v. State of Maharashtra**, (2006) 12 SCC 512]. Inasmuch as it is found that the circumstances proved in the case conclusively establish the guilt of the accused, even assuming that the prosecution has not established the motive of the accused, the same is immaterial, in the context of considering the correctness of the impugned

judgment.

51. In the light of the discussion aforesaid, according to us, the finding rendered by the trial court that the accused is guilty of the offences punishable under Sections 449, 342, 376, 376A and 302 IPC, is in order.

Sustainability of the death sentence :

52. Inasmuch as it is found that the conviction of the accused is liable to be affirmed, it is necessary now to consider the sustainability of the death sentence imposed on the accused. Imposing death sentence being a process where the right to life guaranteed to the accused under the Constitution is deprived, it shall be in accordance with the procedure established by law. The imposition of death sentence is a serious function to be discharged uninfluenced by individual perceptions of Judges. It is not easy to derive the principles to be kept in mind while undertaking an adjudication of an issue of this nature from the plethora of decisions rendered by the Apex Court over the years, for there has been serious changes in the judicial approach on the question of imposing death sentence, on account of various factors including the demands from a section of the public for abolition

of death sentence, changes brought out in the legislative policy and change in the perception of individuals, including Judges, towards awarding of death sentence. At the same time, in the absence of elaborate procedural provisions in statutes governing the field, the principles to be followed while resolving the question can be derived only from judicial precedents. Let us understand the principles.

53. The Criminal Procedure Code, 1861 marks the beginning of the legislative governance relating to death sentence in India. Proviso to Section 380 of the said statute necessitated courts to state reasons for not awarding death sentence. In other words, the scheme of the said statute was that 'death sentence is the rule, and imprisonment for life is the exception'. Even when the said statute was replaced by the Code of Criminal Procedure, 1898, an identical provision was included in Section 367(5) of the new statute. In terms of the Code of Criminal Procedure (Amendment) Act, 1955, Section 367(5) of the 1898 Code was deleted. As a result, it ceased being a necessity for the courts to record reasons for not awarding death sentence. By this amendment, sentencing was left to judicial discretion of the court and this was the beginning

of the changes that took place in the sentencing structure. The position continued till the introduction of the Code of Criminal Procedure, 1973. Section 235 of the Code now makes it mandatory for the Judge to hear the convicted accused on the question of sentence and Section 354(3) makes it mandatory for the Judge to state special reasons for awarding death sentence. In short, the change brought about in the legislative approach is that 'imprisonment for life is the rule and death sentence is the exception', as against the original position that ‘death sentence is the rule, and imprisonment for life is the exception.’ Sub-section (3) of Section 354 of the Code mandates that when the conviction of an accused is for an offence punishable with death or, in the alternative, imprisonment for life or imprisonment for a term, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons for such sentence.

54. Law relating to award of death sentence in India has evolved through policy reforms as also judicial pronouncements including the judgments of the Apex Court in the celebrated decisions, viz, **Jagmohan Singh v. State of U.P.**,

(1973) 1 SCC 20 and **Rajendra Prasad v. State of U.P.**, (1979) 3 SCC 646. The expression "rarest of rare cases" was one coined by the Apex Court in **Bachan Singh v. State of Punjab**, (1980) 2 SCC 684, in the context of awarding death sentence. **Bachan Singh** was a case where the questions considered were whether the death penalty is unconstitutional and if not, whether the sentencing procedure provided in Section 354(3) of the Code is unconstitutional, for it invests the court with unguided and untrammelled discretion and allows death sentence to be arbitrarily or freakishly imposed on a person found guilty of an offence punishable with death or, in the alternative, imprisonment for life. Both questions aforesaid were answered in the negative in **Bachan Singh**. The principles laid down in **Bachan Singh** were summarized by a Three Judge Bench of the Apex Court later in **Machhi Singh v. State of Punjab**, (1983) 3 SCC 470, thus:

> "38. In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. 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."

In **Machhi Singh**, the Apex Court has gone into the reasons why the society as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine, and held that the society would crave for death penalty only in 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 sentence, irrespective of their personal opinion as regards the desirability or otherwise of retaining death sentence. The Apex Court has also broadly classified such cases under categories; (i) manner of commission of murder (ii) motive for commission of murder (iii) anti-social or socially abhorrent nature of the crime (iv) magnitude of the crime and (v) personality of victim of murder. Paragraphs 32 to 37 of the judgment of the Apex Court in **Machhi Singh** dealing with this

aspect read thus:

> "32. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of "reverence for life" principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent 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. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:
>
> I. Manner of commission of murder
>
> 33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
>
> (i) when the house of the victim is set aflame with the end in view to roast him alive in the house.
>
> (ii) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
>
> (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.
>
> II. Motive for commission of murder

> **34**. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.
>
> III. Anti-social or socially abhorrent nature of the crime
>
> **35**. (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.
>
> **36**.When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.
>
> V. Personality of victim of murder
>
> **37**. When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

55. The principles laid down in **Bachan Singh** and **Machhi Singh** governed the field for quite a long period. It was, however, felt that the list of categories of rarest of rare cases crafted in **Machhi Singh** cannot be exhaustive and ought to be given an even more expansive adherence owing to the

changed social and legal scenario. The observation made by the Apex Court in this regard in **Swamy Shraddananda (2) v. State of Karnataka**, (2008) 13 SCC 767, is worth referring to. Paragraph 43 of the judgment reads thus:

> "43. In Machhi Singh the Court crafted the categories of murder in which "the community" should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself."

As could be seen from the extracted passage, the change in the approach as regards the awarding of death sentence that was brought about is that even though the categories formulated in **Machhi Singh** provide very useful guidelines, the said

guidelines cannot be taken as inflexible, absolute and immutable and that there would be scope for flexibility as observed in **Bachan Singh** itself. That apart, in **Swamy Shraddananda,** the Apex Court laid down a jurisprudential basis for the concept of 'life imprisonment till the remainder of the natural life' to take care of situations where the court finds that life imprisonment which, in the light of the power of remission conferred on the executive, is only imprisonment for a period of 14 years, is grossly inadequate and at the same time, having regard to the facts and circumstances of each case, death sentence cannot be imposed in the light of the principles laid down in **Bachan Singh** and **Machhi Singh**. Paragraph 92 of the judgment in **Swamy Shraddananda** dealing with the said aspect reads thus:

> “92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into

> endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all."

The approach made in **Swamy Shraddananda** has been affirmed by the Constitution Bench of the Apex Court in **Union of India v. V. Sriharan**, (2016) 7 SCC 1. In the said case, it was also held that if the court finds in a given case that the imposition of death sentence may not be warranted and at the same time, imprisonment for a period of 14 years is grossly inadequate, it is free to decide the number of years of imprisonment to be awarded to the accused beyond the period of 14 years, in the place of imprisonment for life or death penalty provided for, for the offence, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae. Paragraph 98 of the said judgment reads thus:

> "98. While that be so, it cannot also be lost sight of that it will be next to impossible for even the lawmakers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeonhole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the lawmakers thought it fit to prescribe the minimum and the maximum sentence to be

> imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary which is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists and judicial pronouncements revealed earlier, to determine from the nature of such grave offences found proved and depending upon the facts noted, what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae."

56. After referring to a *catena* of judicial pronouncements, post **Bachan Singh** and **Machhi Singh**, the Apex Court has laid down in **Ramnaresh v. State of Chhattisgarh**, (2012) 4 SCC 257 a nearly exhaustive list of aggravating and mitigating circumstances. Paragraph 76 of the said judgment reads thus:

> "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 and thereafter, in Machhi Singh . 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."

57. In **Sangeet v. State of Haryana**, (2013) 2 SCC 452, a Two Judge Bench of the Apex Court took the view that the application of aggravating and mitigating circumstances

needs a fresh look, for aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal and therefore, a balance sheet cannot be drawn up for comparing the two, as consideration for both are distinct and unrelated. It was also held in the said case that in the sentencing process, both “crime” and “criminal” are equally important. It was also observed by the Apex Court in the said case that as the courts have not taken the sentencing process as seriously as it should be, with the result that in capital offences, it has become Judge-centric sentencing rather than principled sentencing. After referring to the decision in **Sangeet**, in **Shankar Kisanrao Khade v. State of Maharashtra**, (2013) 5 SCC 546, the Apex Court has held that to award death sentence, the “crime test” that is, the aggravating circumstances favouring capital punishment has to be fully satisfied, that is, 100% and “criminal test” 0%, that is, no mitigating circumstance favouring the accused. In other words, the view was that if there is any mitigating circumstance, the criminal test may favour the accused to avoid the capital punishment. It was also held in the said case that even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating

circumstances favouring the accused, still we have to apply finally the "rarest of the rare case test" which depends upon the perceptions of the society and must not be Judge-centric. Paragraph 52 of the said judgment read thus:

> "**52.** Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

In **Shankar Kisanrao Khade**, the Apex Court has also taken the pain to indicate the factors that weighed with the Apex Court in commuting death sentence to sentence for imprisonment for life as also in confirming the death sentence. Young age of the accused, the possibility of reforming and rehabilitating the

accused, the accused having no prior criminal record, the accused not likely to be a menace or threat or danger to the society or community, the accused having been acquitted by one of the courts, the crime was not premeditated, the case was one of circumstantial evidence etc. are some of the factors that weighed with the Apex Court in commuting the capital sentence to imprisonment for life while the cruel, diabolic, brutal, depraved and gruesome nature of the crime, the crime resulting in public abhorrence, shocking the judicial conscience or the conscience of society or the community, the reform or rehabilitation of the convict, defencelessness of victims, the crime was either unprovoked or that it was premeditated etc. are some of the factors that weighed with the Court in affirming the death sentence.

58. **Crime test :** As noticed, death sentence can be imposed only when life imprisonment appears to be an altogether inadequate punishment, having regard to the relevant circumstances of each crime. Inasmuch as the case on hand is one where, when the attempts made by the accused to commit rape on the victim was resisted continuously by her, the accused out of frustration and vengeance not only inflicted

on the victim several stab injuries causing her death, but also mutilated brutally and barbarously, her genital organs using MO23 knife, to the extent of pulling out parts of her internal organs. It was a cold blooded murder without provocation, for the only sin committed by the victim was that she resisted the attempt of the accused to commit rape on her. As indicated, the crime committed is in the nature of extreme brutality, that shocks conscience of the society. The facts aforesaid, according to us, satisfy the crime test. As explained by the Apex Court in **Ramnaresh**, similar is the view taken by the Apex Court in **Mukesh v. State (NCT of Delhi)**. Paragraph 513 of the judgment in **Mukesh** reads thus:

> **"513.** If we look at the aggravating circumstances in the present case, following factors would emerge:
>
> (*i*) Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the complainant (PW 1) naked in the cold wintery night and trying to run the bus over them.
>
> (*ii*) The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflects the threat to which the society would be posed to, in case the accused are not appropriately punished. More so, it reflects that there is no scope of reform.
>
> (*iii*) The horrific acts reflecting the inhuman extent to which the accused could go to satisfy their lust, being

completely oblivious, not only to the norms of the society, but also to the norms of humanity.

(*iv*) The acts committed so shook the conscience of the society."

59. **Criminal test** : Coming to the criminal test, it is seen that in terms of the interim order passed in this matter on 11.05.2023, this Court appointed Ms.Nuriya Ansari associated with project 39A of the National Law University, New Delhi to conduct a mitigation investigation in respect of the accused. A report has been submitted before this Court on 02.08.2023 even before deciding the appeal preferred by the accused. It is seen that the investigator interviewed the accused, his near relatives excluding his wife and child and also a few community members. She also collected longitudinal data retrospectively, by seeking an individual account of the life of the accused over different periods of time. She also evaluated the mental status of the accused. The conclusion arrived at by the mitigating investigator in the report filed by her reads thus:

"E. Conclusion

a. The mitigating circumstances identified and presented in this report have no bearing on the guilt and are no justification for crime. However, they are meant to understand the circumstances and life history of the accused to assess their extreme culpability and reformation.

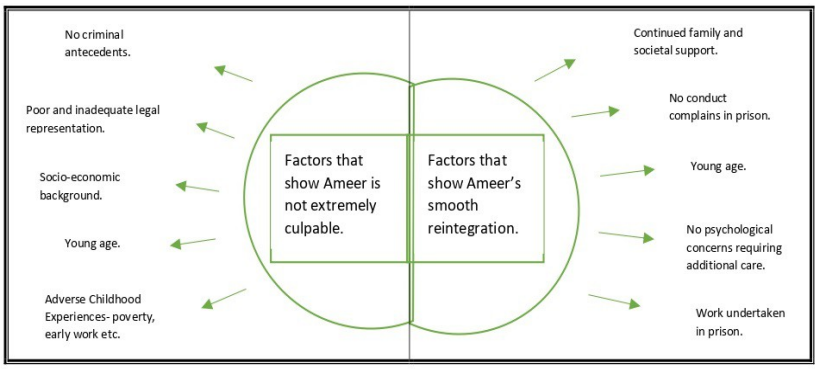

Fig 4.

Presenting factors that reduce Ameer's extreme culpability and will help in his smooth rehabilitation and reintegration.

b. After having understood Ameer's life from his childhood to present day, it was found to be full of adverse childhood experiences which consisted of poverty impacting his education, his living condition, family's health and eventually resulting in his early entry into workspace. In the interviews it was found that Ameer has no previous criminal antecedents nor his family has any legal history. He was only 21 years old when he was arrested and incarcerated, his young age and engagement in prison work gives an assurance of his smooth reintegration into society. His lack of criminal record reflects having no history of unstable behaviour, which is further supported by the prison conduct report.

c. According to the case history collected, Ameer, who was unable to follow the proceedings due to a language barrier in the first place, received weak legal representation making him unable to actively participate in the trial. With respect to his reintegration into society: Ameer has a 7-year-old daughter, his parents and one younger sister dependent on him. The continued family ties he has reflect the importance of his presence in his family and their dire dependence on him. Since Ameer's family and he himself have no information about his wife Fauzila, Ameer's daughter is completely dependent on him for her future. Ameer's long solitary experience was an added punishment given to him. Through the interviews it was clear that Ameer too is dependent on his family for support and strength. Even in prison, it was one of the primary reasons motivating him to keep himself engaged in prison. When released, Ameer would not only be supported by his family, but he himself will be sufficiently motivated to provide for his family.

> d. He and his family hold onto hope for justice and to reunite with each other, which should be considered by the Hon'ble court in deciding a sentence for Ameer that focuses on correctionalization over prisonization. The factors stated above and in Fig. 4, show how Ameer is not extremely culpable and the sentence given to him by the Ld. Trial court did not consider his reformative abilities before giving him the death penalty.
>
> e. Therefore, it is requested that the Hon'ble Court take the aforementioned mitigating factors into account when deciding on an appropriate sentence for Ameer ul Islam. If given the chance, he also has a chance to reintegrate into society.
>
> The present report is being filed by myself, Ms. Nuriya Ansari, associated with Project 39A at National Law University, Delhi, in order to bring on record a report authored by me, pursuant to directions passed by this Hon'ble Court by Order dated 11.05.2023 in the present case. The facts stated in the above report are true and correct to my knowledge and belief. No part of it is false and no material has been concealed therefrom."

Poor and inadequate legal representation, according to the investigator, is one of the factors which would show that the accused is not extremely culpable. Having regard to the manner in which the case was defended by the counsel for the accused as evident from the records of the case, it cannot be said that the legal aid extended to the accused was poor and inadequate. From the materials, what is discernable is that the accused was well defended in the case. Be that as it may, we fail to understand as to how poor and inadequate legal representation could be named as a factor reflecting the culpability of the accused. The remaining factors cited by the investigator to show that the accused is not extremely

culpable are (i) want of criminal antecedents, (ii) socio-economic background, (iii) young age and (iv) adverse childhood experiences of the accused. Likewise, according to the investigator, (i) continued family support and societal support, (ii) absence of conduct complaints in prison, (iii) young age, (iv) absence of psychological concerns requiring additional care and (v) work undertaken in prison, are factors that would show the smooth reintegration of the accused. In **Mukesh**, factors such as want of criminal antecedents, young age, current family situation, conduct in prison etc. have not been accepted as sufficient factors to commute death sentence to imprisonment for life. Paragraphs 514 to 517 of the said judgment read thus:

> **514.** As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/appellants, namely, A-3 Akshay, A-4 Vinay and A-5 Pawan placed on record, through their individual affidavits dated 23-3-2017, following mitigating circumstances:
>
> (*a*) Family circumstances such as poverty and rural background,
>
> (*b*) Young age,
>
> (*c*) Current family situation including age of parents, ill-health of family members and their responsibilities towards their parents and other family members,
>
> (*d*) Absence of criminal antecedents,
>
> (*e*) Conduct in jail, and
>
> (*f*) Likelihood of reformation.
>
> In his affidavit, accused Mukesh reiterated his innocence and only pleaded that he is falsely implicated in the case.
>
> **515.** In *Purushottam Dashrath Borate* v. *State of*

> *Maharashtra* [*Purushottam Dashrath Borate* v. *State of Maharashtra*, (2015) 6 SCC 652 : (2015) 3 SCC (Cri) 326] , this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.
>
> **516.** Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal-justice system. As held in *Om Prakash* v. *State of Haryana* [*Om Prakash* v. *State of Haryana*, (1999) 3 SCC 19 : 1999 SCC (Cri) 334] , the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.
>
> **517.** Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "*the rarest of rare cases*". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances."

The remaining mitigating circumstances pointed out by the investigator are factors such as the work undertaken by the accused in prison and the absence of psychological concerns. We do not think that the said mitigating circumstances are

sufficient to commute a death sentence to imprisonment for life. In other words, there are no mitigating circumstances that favour the accused.

60. Rarest of the Rare Test : As already noticed, rarest of the rare test depends upon the perception of the society, viz, whether the society would approve the awarding of death sentence in a case of this nature, and while applying the said test, the court has to look into factors such as the society viewing the act with abhorrence, extreme indignation etc. In this context, it is apposite to refer to a passage from the decision of the Apex Court in Mukesh dealing with the identical issue. The passage reads thus:

> "The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of "*the rarest of rare cases*" where the question of any other punishment is "unquestionably foreclosed". If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the "rarest of rare category", then one may wonder what else would fall in that category. On these reasonings recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons."

The facts are similar, and according to us, in a case of this

nature, the society would certainly approve the awarding of death sentence, especially since the victim was a young lady who was forced to live in a structure on the side of the public road, on account of her impoverished social background, and the crime was one committed within the premises of her own shelter. Needless to say, the death sentence awarded to the accused is liable to be confirmed and we do so.

Conclusion

In the circumstances, the criminal appeal is dismissed and the death sentence awarded to the accused is confirmed.

Before parting with the case, it is necessary to observe that it is with a heavy heart that we uphold the ultimate penalty of death sentence to the accused in the case. We hope and fervently believe that this judgment would serve as a resolute deterrent to those who would consider perpetrating such abhorrent acts in future, so that persons similarly placed like the victim who are innumerable in our society, would live with a sense of security and without fear. It is apposite in the circumstances to conclude this judgment with the celebrated statement made by the Nobel Laureate,

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Alexander Solzhenitsyn, "Justice is conscience, not a personal conscience, but the conscience of the whole humanity".

Sd/-

P.B.SURESH KUMAR, JUDGE.

Sd/-

S.MANU, JUDGE.

Ds/YKB/Mn