HIGH COURT OF ANDHRA PRADESH

FRIDAY ,THE TWENTY NINETH DAY OF MAY

TWO THOUSAND AND TWENTY

PRSENT

THE HONOURABLE SRI JUSTICE C.PRAVEEN KUMAR

THE HONOURABLE SRI JUSTICE K SURESH REDDY

CRIMINAL APPEAL NO: 305 OF 2020

Between:

1. Patan Mohammad Rafi @ Giddu, S/0. P.Vali,
   Aged 25 years, Muslim, R/o. D.No. 7/59, Molakavaripalli,
   H/O Angallu Village, Kurabalakota Mandal,
   Chittoor District.

...PETITIONER(S)

AND:

1. The State of Andhra Pradesh Rep by its. Public Prosecutor,
   High Court, amaravathi

...RESPONDENTS

Counsel for the Petitioner(s): V V S MURALI KRISHNA

Counsel for the Respondents: PUBLIC PROSECUTOR (AP)

The Court made the following: ORDER

THE HON'BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

THE HON'BLE SRI JUSTICE K.SURESH REDDY

R.T. No.2 of 2020 and Criminal Appeal No.305 of 2020

COMMON JUDGMENT : (*Per Hon'ble Sri Justice C.Praveen Kumar)*

1) R.T. No.2 of 2020 arises out of a letter written by the I Additional District & Sessions Judge, Chittoor, in POCSO S.C. No.60 of 2019 seeking confirmation of death sentence awarded against the accused therein.

2) Criminal Appeal No.305 of 2020 is filed by the accused challenging his conviction under Section 5(j)(iv) read with Section 6 of POCSO Act and sentence of death; conviction under Section 5(m) read with Section 6 of POCSO Act and sentence of imprisonment for a term which shall not be less than 20 years and to pay fine of Rs.1,000/-in default, R.I. for 3 months; conviction under Section 302 I.P.C. and the sentence of imprisonment for life and to pay fine of Rs.1,000/- in default, R.I. for 3 months; conviction under Section 201 I.P.C. and sentence of 5 years rigorous imprisonment and to pay fine of Rs.1,000/- in default R.I. for 3 months; and conviction under Sections 376A and 376 AB I.P.C. (no separate sentence is awarded). All the substantive sentences were directed to run concurrently.

3) The substance of the charge against the accused is that on 7.11.2019 at 9.50 PM at KNR Convention Centre, situated in Chenetha Nagar, Hamlet of Anagallu of Kurabalakota Mandal, the accused committed rape on a minor girl by name, Eddasiri Varshitha, aged 5 years and during the course of the same, caused her death. It is said that in order to cause disappearance of the dead body and with an intention to screen himself from legal punishment, threw the dead body outside the convention centre and also got his hair tonsured.

4) The facts, as culled out from evidence of the prosecution witnesses are as under :

i) On 7.11.2019 at about 7.30 PM, P.W.1 (father of the deceased) his wife, brother-in-law and three daughters along with one, Anitha, who is related to P.W.1, went to KNR Kalyana Mandapam, situated in Chenetha Nagar of Madanapalli Mandal to attend the pre-marriage function of the daughter of his maternal uncle by name, A.Venkata Ramana Reddy. It is said that P.W.1, along with his wife and others, had dinner and as the marriage was scheduled to take place in the early hours of next day, wanted to return home along with family members and come back on the next day morning to attend the marriage. At about 10 PM or 10.15 PM, when P.W.1 reached to his car along with his wife and

other family members, noticed his 3rd daughter missing. He informed the same to his relatives and searched for her in the kalyana mandapam. In spite of their best efforts till 1.00 AM, they could not trace her. Thereupon, P.W.1 is said to have approached one, Krishnappa (P.W.14) a sooth sayer and resident of Kummarapalli Village, who informed P.W.1 that his daughter is within a distance of 100 meters from the kalyana mandapam. Thereafter, all of them returned to kalyana mandapam, searched for P.W.1's daughter, but in vain. Again at 3.30 AM, they went to the house of P.W.14 and brought him to the kalyana mandapam. He saw the sastram and informed P.W.1 and his family members that the deceased is within the surroundings. Basing on the information furnished by P.W.14, they searched the entire area till 5.00 AM, but could not trace her. P.W.1 & others requested the Manager of the kalyana mandapam (P.W.6) to display the CC TV footages from the cameras erected in the mandapam. P.W.6 called the technician (P.W.15) and with his help, displayed the CC TV footages. All the relatives of the deceased witnessed the CC TV clippings. It is said that in the CC TV clippings, they noticed one person taking photographs of the deceased with his cell-phone, in front of the water fountain in the Kalyana Mandapam at about 9.54 PM. Later, he followed her towards bathroom side, which are

on the backside of the kalyana mandapam. There is no material as to what happened thereafter as there were no cameras in that area. Ten to twelve minutes thereafter, the said person alone entered the dining hall of the kalyana mandapam

ii) The evidence of P.Ws.4 and 5 would show that, at about 10.15 PM, they were informed that one person was taking away a box containing 100 cups of ice cream. P.Ws.4 intercepted the said person and questioned him as to why he is taking such huge quantity of ice cream. He replied that the ice creams are required for the Drivers, for munching along with the liquor. P.W.4 followed him to some distance and informed the same to P.W.5, who was kept in-charge of dining hall. Both of them snatched the ice cream box from the assailant and brought them back to the dining hall. It is said that the person, who was seen taking photos of the deceased girl in the CC TV footage and the person who took away the ice cream box, is one and the same.

5) On 7.11.2019, P.W.17, who also attended reception and returned home at 9.00 PM, received information at 10.30 PM about the missing of daughter of P.W.1. On 8.11.2019 at 6.15 AM, P.W.17 found the body of the deceased behind the compound wall of the kalyana mandapam in a prone condition. On hearing his cries, P.W.1 and others rushed to

back side of the kalyana mandapam and found the dead body with injuries on left side of the ear, waist, left leg etc., The body was shifted to a distance of 50 meters as the ground at that place was not good. Thereafter, P.W.1 set the law into motion by lodging a report with P.W.26, S.I. of Police on 8.11.2019 at 10.30 AM. ExP1 is the said report. Basing on the same, a case in crime No.132 of 2019 came to be registered under Section 302 I.P.C. Ex.P22 is the original F.I.R. Thereafter, P.W.26 proceeded to the scene of offence and posted a guard. Further investigation in this case was taken up by P.W.27, the Inspector of Police. According to him, on receipt of information about the registration of a crime, he rushed to Mudivedu Police Station by 10.50 AM and received a copy of the F.I.R. Thereafter, he proceeded to the scene of offence and noticed the body of the deceased Varshitha in the presence of P.W.18 and other blood relatives. He then held inquest over the dead body between 11.15 AM and 1.45 PM. During inquest, he examined P.Ws.1, 2 and others and recorded their statements and also seized M.O.2 (legging of the deceased). Ex.P6 is the inquest report. The panchayatdars unanimously opined that an unknown suspect person aged between 25 and 30 years wearing dark blue colour full hand T-shirt and black colour pant killed her due to unknown reasons. He also got prepared panchanama of the observation report, which is marked as Ex.P7. After inquest, the dog squad came to the scene and moved from

dining hall to the toilet and again moved from ladies toilet to outside the convention hall up to a distance of 100 meters towards Anagallu. After completion of inquest proceedings, P.W.27 forwarded the dead body to the Government Hospital, Madanapalli through Women Police Constable Manjula for conducting postmortem examination and to preserve viscera, vaginal swabs, seminal stains, if found on the deceased. P.W.23, who was working as a Civil Assistant Surgeon, District Hospital, Madanapalli, conducted autopsy over the dead body of the deceased on 8.11.2019 at 3.00 PM and noticed the following injuries:-

> "Examination of external genitalia :
>
> A lacerating injury measuring 1 cm x 0.5 cm x 0.5 cm present at the posterior part of the introitus (cavity of vaginal canal) extending on to the perineum. A horizontal laceration of 1 cm x 0.5 cm x 0.5 cm present in the middle of labia minora on right side and laceration in extending downwards for 1 cm of the Vaginal orifice and vaginal walls are contused. Hymen torn irregularly. All the above structures of vagina are Oedematous and covered with blood clots.
>
> Anal orifice :- is torn posteriorly and the tear is extending internally up to external anal sphincter. Anal orifice is contused and oedematous covered with haemorrhagic fluid. All of the above injuries of vagina and the anal are ante-mortem in nature.
>
> Head and neck : Scalp and Skull : intact. Brain and meninges congested. Hyoid bone intact. Neck structures are normal, sub conjunctival haemorrhags are seen on both eyes.

Thorax : Bony cage is intact. Both lungs are congested. There is a lacerated injury of 1.5 cm x 1 cm x 1 cm present at the tip of the base of the right lung covered with clotted blood. Pericardial haemorrhages are seen at the apex of the heart.

Heart : Normal in size on cut section clotted blood present in all four chambers. Both lungs are congested on cut section.

Abdomen : Stomach partially digested food, around 100 ml without any suspicious smell present. Liver, spleen, both kidneys are all of normal size and congested on cut section. Bowels are distended with gases. Uterus is empty and normal in size, spine and spinal cord are normal. ”

6) Ex.P17 is the Postmortem Certificate issued. The Postmortem Doctor also preserved vaginal and anal swabs, abdominal viscera, hyoid bone for chemical analysis by RFSL. It is to be noted here that no opinion is given with regard to the cause of death. After the receipt of analyst and DNA report, which were marked as Exs.P15 and P16 respectively, the Doctor opined that the deceased would appeared to have died of shock and asphyxia due to sexual assault, 12 to 18 hours prior to Postmortem Examination.

7) P.W.27, who continued with the investigation prepared a rough sketch of the scene vide Ex.P8, took photographs of the scene of offence through his cell phone vide Ex.P23 (13 photos) and viewed the CC TV clippings. In the CC TV footage of the function hall, P.W.27 noticed movements of the suspect from 21.43 minutes to 22.18 minutes, in which from 21.53 minutes to 21.56 minutes i.e., for a period of three minutes

he was seen along with the deceased. According to him, from 22.11 minutes to 22.18 minutes, the suspect was seen single. CC TV footages of six cameras were seized and exhibited in open court. It is said that these CC TV footages were taken from DVR to Pen Drive and later DVR and DVR power supply box were seized under Ex.P9. DVR was marked as M.O.5, Power supply box as M.O.6, and pen drive as M.O.7. He also gave a requisition to the Superintendent of Police to collect Tower IDs, which covered the cell phones at the scene of offence during the particular periods. Since the suspect was using a TVS Moped, he thought that he is a driver and a local person. It is said that on 9.11.2019, P.W.27 went to R.K. Plaza, Madanapalli, developed the images of the suspected person into 6 x 8 inches through P.W.7. Ex.P4 is the photo of the suspect developed by P.W.7 and Ex.P5 is the receipt issued by P.W.7.

8) On 15.11.2019, as per the instructions of the Superintendent of Police, Chittoor, P.W.28 – Sub-Divisional Police Officer, Madanapalli, took up investigation from P.W.27. After verifying the investigation done by P.W.27 and CC TV footages, examined the witnesses, but, however, did not record their statements, as some of the statements were already recorded by P.W.27. On 16.11.2019, at about 8.00 AM, while he was present in Mudivedu Police Station, received credible information about the movement of the accused. Immediately, he secured P.W.19 and others and left

the Police Station along with C.I. and staff. At about 9.00 AM, he noticed the accused standing at Bandapalli cross situated at 150th mile stone on Madanapalli-Punganur road. On seeing them, the accused tried to run away. With the assistance of staff, the accused was apprehended and questioned in the presence of mediators. After recording the confessional statement, he was arrested at 11.30 AM and LG Q6 mobile phone with two SIM cards (one that of Airtel and another is JIO SIM) and a memory card were seized. M.O.7 is the mobile phone. M.Os.9 and 10 are the two SIM cards, while M.O.11 is memory card. P.W.28 examined the photo gallery of M.O.7 and seized three photos of deceased Varshitha with date 7.11.2019 at 21.57 hours, 21.56 hours and 21.56 hours (the same were said to have been exhibited in the Court). On further search, they found the accused in possession of cash of Rs.3,870/- (M.O.8). The above mentioned M.Os. came to be seized under Ex.P10. Pursuant to the confession made, the accused lead them to his house situated in Molakavaripalli, hamlet of Anagallu village of Kurabalakota Mandal and produced one blue colour full hands T-shirt with hood cap and blue colour jeans pant. He also showed TVS XL Motorcycle bearing No.AP 03 Q 2633 parked in front of the house of P.W.10. P.W.28 seized the clothes, which are M.Os.12 and 13 and M.O.4 – TVS XL moped under Ex.P11. Thereafter, the accused was remanded on 17.11.2019. On 18.11.2019, P.W.28 filed a memo for

altering the section of law. He also filed a requisition before the court to forward the accused for potency test. P.W.24 is the Doctor who conducted the potency test and issued Ex.P19. He was of the opinion that there is nothing to suggest that the said person is incapable of having sexual intercourse. On 18.11.2019, P.W.29 examined P.Ws.9 and 10 and recorded their statements. On the very same day, P.W.1 produced photographs of the deceased along with birth certificate, which are marked as Exs.P2 and P3 respectively. His evidence further show, on 19.11.2019 he prepared three separate letters of advice with a request to the court to send the DVR containing the recorded CC TV footages to the Director, FSL, along with the questionnaire. Ex.P26 is the letter of advice and the proceedings issued by the Court forwarding the same to the Director, FSL which is marked as Ex.P27. A second letter was issued to send the viscera to Assistant Director, RFSL, Tirupati. Ex.P28 is letter of advice and Ex.P29 is the letter addressed by the Court to RFSL, Tirupati. He also addressed a third letter of advice for sending the frock, legging of the deceased and the dress of the accused as detailed in column No.5 of letter of advice. Ex.P30 is the letter of advice. On the very same day, he also filed a requisition before the I Additional Judicial First Class Magistrate, Madanapalli, for holding a test identification parade. On 20.11.2019, P.W.28 filed a memo before the Court to send the accused to the Director, FSL, Vijayawada,

for taking his blood samples for conducting DNA test. Accordingly, the accused was produced before P.W.21, the Director, FSL, for taking blood samples. Ex.P32 is the requisition and order passed by the court on 20.11.2019, which is marked as Ex.P33. P.W.20 received a sealed card board box along with forwarding letter, letter of advice, F.I.R. and mahazarnama from the Special Court through P.C. which contained items 1 to 4 mentioned in his report dated 4.12.2019. Ex.P14 is the opinion running into three pages (details will be discussed later).

9) It is also to be noted here that on 22.11.2019, P.W.28 prepared a revised letter of advice in respect of clothes and vaginal swabs and filed the same before the Court, which is marked as Ex.P34. On 23.11.2019, P.W.25 – I Additional Junior Civil Judge, Madanapalli, basing on a requisition from SDPO, Madanapalli, conducted test identification parade of the accused. P.Ws.4 and 5 appeared before the Magistrate; pursuant to which, she recorded their statements with regard to the features of the accused and thereafter, all of them went to Sub-Jail, Madanapalli at 3.00 PM, where the test identification proceedings were conducted. Ex.P21 is the said proceeding.

10) On 27.11.2019, P.W.28 took police custody of the accused and at 8.30 AM took him to the scene of offence and got reconstructed the scene of offence. Ex.P12 is the sketch

of the reconstructed scene of offence done in the presence of P.W.19 and another. He also got videogrpahed the scene of offence and filed the memory card before the court, vide M.O.14.

11) P.W.21, who is the Assistant Director in APFSL, Mangalagiri, deposed about collection of blood samples of the accused for DNA profiling, on 21.11.2019, receipt of two card board boxes from the court on 22.11.2019, which contained nine items and for conducting Autosomal STR analysis. After conducting the test, he submitted his opinion dated 06.12.2019 along with the enclosures, which are placed on record as Ex.P15. After collecting all the necessary documents, P.W.28 filed a charge-sheet on 10.12.2019 before the Special Court, which was taken on file as POCSO S.C. No.60 of 2019. On appearance of the accused, charges as stated earlier came to be framed on 23.12.2019 and thereafter additional charges were framed on 4.2.2020. In support of its case, the prosecution examined P.Ws.1 to 28 and got marked Exs.P1 to P34. After completing the prosecution case, the accused was examined under Section 313 Cr.P.C. with reference to the incriminating circumstances appearing against him in the evidence of prosecution witnesses, to which he denied and stated that a false case has been foisted and that he was not present at the convention centre on that day. He also states that he is not the person

who was seen in the CC TV footage. However, did not adduce any defence evidence in support of the pleas taken.

12) Though there are no eyewitnesses to the incident, but, relying upon the CC TV footage; evidence of P.Ws.4 and 5, who found the accused in the hall on that day; the accused being last seen in the company of the deceased; the stains found on the legging and frock of the deceased tallying with DNA profile of the accused; and his conduct in trying to screen away the evidence by getting himself tonsured, the trial court found him guilty on all the counts and sentenced him to death and other terms of imprisonment. Challenging the same, the accused preferred Criminal Appeal No.305 of 2020, while R.T. No.2 of 2020 is on a reference made by the trial court for confirmation of death sentence awarded against the accused.

13) Sri V.V.S. Murali Krishna, learned Counsel appearing for the Appellant through video conference would submit that the entire case is based on trial by media. The pressure put upon by the media made the court to decide the case in haste without giving any proper opportunity to the State Brief Lawyer to prepare the case to his ability.

14) It is his case that, within one week from the date of framing of Charges, the trial has commenced and the State Brief Lawyer who was appointed on 20-11-2019 and ratified on 23-11-2019, never had any opportunity to go through the

papers. He further pleads that the trial went on day-to-day basis and within no time the entire trial was over. The manner in which the cross-examination of the witnesses was done, show that the State Brief Panel Lawyer who was entrusted with the case was totally unprepared.

15) Coming to the merits of the case, he would contend that the test identification parade conducted by the learned Magistrate cannot be believed for more than one reason. According to him, the evidence on record, more particularly, the evidence of PW11 would show that within three [03] days after the incident, the accused underwent zero cutting and the evidence of P.W.11 also indicate that much prior to the date of test identification parade, the photographs of the accused were shown to him by three youngsters, which indicate that by then the photo of the accused were in circulation in social media. In the absence of any material to show that persons with tonsured hair were put up along the accused as non-suspects, in the test identification parade and since the photographs were in circulation in social mediate by then, pleads that holding of test identification parade is a farce.

15-a) He next pleads that though the evidence of the witnesses, who watched the C.C. footage, say in chief that, they noticed the accused taking photographs of the deceased and later followed her till the back side of the function hall i.e.

upto the place where there were toilets, but admitted in the cross-examination that the face of the accused was not properly visible in CC TV footage. He took us through the evidence of PW3, PW5, PW7, PW15 & PW27 to show that their evidence clearly indicate that the face of the accused in C.C. footage was not clear. He further contends that the out of 21 cameras installed in the community hall, the prosecution mainly relied upon six [06] cameras i.e. cameras nos. 2, 4, 13, 19 & 21 to prove that the accused was last seen in the company of the deceased. But the footings of these cameras, which were analyzed by an expert and submitted vide report Ex.P14 would show that these footings were only till 10.00 p.m. Though PW27 deposed about the events which took place after 10.00 p.m., but the clippings of the said period were not sent to P.W.21 for analysis. Therefore, his plea is that, it is highly impossible to believe that, within a span of about 10 minutes, the accused would have committed the offence in the bathroom as alleged in the charge-sheet, bring the body out and throw it over a compound wall, which is of 25 feet. He would submit that, things would have been different had there been no function in the Convention Center. On the other hand, at that point of time, a reception was going on and number of persons were coming in and going out from the back doors of the hall. Having regard to above, he would submit that the identification of accused and his involvement in the offence is doubtful.

15-b) While denying the fact that the accused has committed the offence, he would contend that when the evidence of investigating officer shows that the height of the compound wall behind the convention hall was about 25 feet, the question of accused throwing a girl aged about 5 years and weighing about 15 kilograms, to a distance of 15 to 20 meters away from the wall is highly impossible. In other words, he would submit that when the world record in throwing shot put of 7.5 kilograms is 20 meters, the question of the accused throwing the body of a girl weighing 15 kilograms to such a distance from over a compound wall which is 25 feet in height is highly improbable. According to him, this circumstance is sufficient to falsify the case of the prosecution.

15-c) He would further contend that when the evidence on record shows that the body of the deceased was traced by PW17 on the morning of 08.11.2019 at 6.15 a.m., and though the investigating officer claims to have examined PW17 immediately, but, a perusal of the charge-sheet show that this witness was added as LW41 pursuant to an Order dated 07.01.2020 passed in a memo filed by Special Public Prosecutor, dated 06.01.2020, i.e., after commencement of trial. Hence, submits that a doubt arises as to whether really the body of deceased was traced on the next day morning. In other words, he would contend that, if really the deceased was traced, as spoken to by PW17, there was no justification

for the police in not enclosing 161 Cr.P.C., statement of this witness along with the charge-sheet filed in the court.

15-d) Coming to the defects and the discrepancies in the DNA analysis, the learned counsel could contend that PW23 in his evidence deposed that, the vaginal and anal swabs, abdominal viscera, hyoid bone were preserved for chemical analysis by RFSL, but the samples preserving method for DNA analysis being different, no evidence was adduced as to whether such methods were adopted. He would further contend that though item nos. 1 to 4 in Ex.P30-clothes, and item nos. 5 and 6 were packed in separate sealed boxes containing vaginal swabs and anal swabs respectively, were sent to State FSL, but Ex.P15 report shows that the Analyst received two sealed cardboard boxes with four seals and one seal respectively. No explanation is forthcoming as to the varying number of seals on the boxes.

15-e) He would further contend that the cardboard box-I contains four cloth line covers, while cardboard box-II contains four rubber corked bottles and two glass slides which are not shown in letter of advice – Ex.P30. Hence, the same gives rise to a suspicion of samples being tampered with, more so when the evidence of I.O. is silent or fails to explain as to how four corked bottles and two new glass slides reached the SFSL.

16) Insofar as DNA profiling is concerned, he would contend that it is strange as to how the leggie worn by the girl contained whitish fluid and tallied with DNA profiling of the accused, when the said apparel was not on the body of the victim. The inquest as well as the panchanama of the scene show that this leggie was seized from the scene of offence and not from the body of the deceased. Even the charge-sheet shows that the accused is said to have committed the offence when the victim girl removed her leggie in the bathroom. No explanation is forthcoming from the prosecution as to how this leggie contains whitish fluid tallying with the DNA of the accused. Apart from that, it is also urged that, when item no.4 does not contain whitish or brown stain, it is strange as to how DNA profiling is obtained. In the same way, he would submit that item nos. 2, 3 and 5 should have mixed DNA profiles like item nos. 6, 7 and 8. There is absolutely no explanation from the scientific expert on these aspects. He would further submit that a careful examination of the profiling indicate what is known as “ski slope” in DNA profiling, a phenomenon characterized by decreased peak heights as one goes from left to right, which is the result of the “missing of the larger DNA targets because of the poor quality of samples resulting in the degradation of the DNA in the sample” and “poor handling methods” which support the claim that item nos. 6, 7, 8, 9 and 10 have been tampered with by breaking the seals of the original cardboard box and

the sudden appearance of rubber corked bottles and glass slides. It is further pleaded that, the inability of identification of the alleles at the markers sl. no. 10, 24 and 25 of item no. 6, along with the 'ski slope' is a definite proof that none of these items can be relied upon for any scientific conclusion as the samples have degraded and unfit for evaluation.

17) The counsel took us through the reports of both the experts to show that the scientific investigation done was based on objects which are tampered with after its seizure. Hence, pleads that it is a fit case where the accused should either be given benefit of doubt or an opportunity should be given to the accused to cross-examine the witnesses, more particularly, the scientific experts on these aspects.

18) The same is strongly opposed by Sri. K. Srinivasa Reddy, the learned Public Prosecutor appearing for the State of Andhra Pradesh. He would contend that, even if the test identification parade is rejected on technical grounds, there lies the oral evidence and the C.C. TV footage to show that the accused was present in the hall on that day. He further pleads that, though the C.C. TV footage are not clear, the evidence of PW5 & PW6 amply establish the presence of the accused in the hall on that day, as they intercepted him when he was taking away a box containing 100 cups of ice cream from the dining hall. There is no explanation from the

accused as to why and for what purpose he came to the function hall on that day.

19) Coming to the height of the compound wall, which is on the rear side, the learned Public Prosecutor would contend that, the function hall was constructed on an elevated area and the compound wall level which is raised from the bottom is to a height of 25 to 30 feet (retaining wall), meaning thereby, that the height of the compound wall from the ground level is only 3 feet. Therefore, the possibility of throwing the small girl over a wall of 3 feet, after committing the offence cannot be improbable. He also contends that the height of the retaining wall is raised to a height of 25 feet due to a vagu (canal) behind the hall. He further pleads that, even if there are minor discrepancy with regard to the place where the dead body was found, but that does not falsify the criminal case. He would contend that, there was no necessity for the prosecution to foist a false case against the accused.

20) Insofar as DNA profiling is concerned, he would contend that, not a single question was put to the expert to show as to how it is false. In other words, he would contend that the points raised now are too technical which only an expert can answer and in the absence of any cross-examination, the appellant cannot take advantage of the same and try to find fault with the report.

21) Insofar as the whitish liquid over the leggie of the deceased is concerned, he would contend that, since he has carried the deceased along with the leggie, it must have come into contact with the body or frock resulting in whitish fluid touching the leggie. He pleads that, there is no un-usuality in the said circumstance and even if the same is rejected, still the stains on the frock establish the involvement of the accused in the crime. He would further contend that, the two main circumstances, namely, the accused being last seen in the company of the deceased and the white patch on the frock which when compared with the DNA profiling of the accused proved similar, are sufficient to base a conviction, coupled with medical report, which shows that the death was due to shock and asphyxia due to sexual assault.

22) The learned Public Prosecutor would further contends that, after the accused was taken into police custody, scene of offence was reconstructed vide orders in Crl. M.P. No.57 of 2019, which would clearly indicate that it was the accused who was responsible for the incident.

23) Insofar as glass slides and rubber corked bottles are concerned, he would contend that, slides are prepared from the foreign material on the private parts and the cotton swabs are kept in the corked bottles, which is the normal practice for which no evidence is necessary. Hence, pleads that the argument of the learned counsel for the appellant that the

boxes were tampered with and the corked bottles are kept inside the boxes before they were sent to the expert is incorrect. He further submits that no explanation is forthcoming from the accused as to how the photographs of the deceased are in his cell-phone and also as to why he is present in the function hall.

24) Relying upon the judgment of the Hon'ble Supreme Court in ***Vasanth Sampath's case*** [2017 (5) SCJ 628] and also in ***Ravi vs. State of Maharashtra*** [2019 SCJ online 738], he would contend that, there is no illegality in the findings given by the Trial Court and this being the rarest of the rare case, pleads that the sentence of the death awarded warrants no interference.

25) In reply, the learned counsel for the appellant would contend that, there are many factual mistakes in the evidence of witnesses, more particularly, with regard to the dress worn by the appellant. While the evidence of witnesses at the time of the inquest was that the accused was wearing black pant, but, what was seized pursuant to the confession made by the accused is a blue colour pant. Therefore, the stains, if any found on the clothes are only invented for the purpose of the case and to connect the accused with the crime. He would further submits that though the accused was earlier involved in the offence of this nature, when he was aged about 11 years, but the said case ended in an acquittal. Therefore, he

would contend that, the same cannot be aground to say that he is a habitual offender.

26) The learned counsel for the appellant in reply again submitted that the State Brief Lawyer was not given time to prepare himself for the case and since the entire trial was over within a period of two months from the date of its institution and in view of the law laid down by the Hon'ble Apex Court in ***Anokhilal Vs. State of Madhya Pradesh*** *(o)* pleads that, it is a fit case for ordering re-trial by setting aside the conviction and sentence imposed, as the accused cannot be punished without giving him a full opportunity of being defended by a Lawyer capable of doing the case to the best of his ability.

27) The point that arises for consideration is, ***whether the prosecution was able to prove the guilt of the accused beyond reasonable doubt and if so, whether it can be categorized as "rarest of rare case" for awarding death sentence?***.

28) **Cause of death**.

(i) Before dealing with the circumstances relied upon by the prosecution to connect the accused with the crime, it is to be seen first as to whether it is a case of homicidal or otherwise.

[(o) Criminal Appeal Nos.62-63 of 2014, dated 10-12-2019 (Supreme Court)]

(ii) P.W.23 is the Civil Assistant Surgeon, District Hospital, Madanapalle, who conducted postmortem examination over the dead body of the deceased Varshitha, aged about 5 years. According to him, himself and Doctor Radhika conducted autopsy at 3.00 PM on 8.11.2019 and found external and internal injuries. They noticed rigor mortis in all the four limbs and tongue bitten by the teeth. External examination revealed multiple irregular excoriations of the skin of varying size from pin head to half to one cm present over the both sides of the trunk, suprapubic region, inner sides of thighs and all over the limbs.

(iii) Examination of external genitalia reveals the following injuries:-

> "A lacerating injury measuring 1 cms x 0.5 cm x 0.5 cm present at the posterior part of the introitus (cavity of vaginal canal) extending on to the perineum. A horizontal laceration of 1 cms x 0.5 cms x 0.5 cms present in the middle of labia minora on right side and laceration in extending downwards for 1 cm of the Vaginal orifice and vaginal walls are contused. Hymen torn irregularly. All are above structures of vagina are Oedematous and covered with blood clots."
>
> Anal orifice is torn posteriorly and the tear is extending internally up to external anal sphincter. Anal orifice is contused and oedematous covered with haemorrhagic fluid. All of the above injuries of vagina and the anal are ante-mortem in nature. Though hyoid bone was intact and neck structures are normal, but the Doctors found lacerated injury measuring 1.5 cm x 1 cm x 1 cm present at the tip of the base of the right lung covered with clotted blood. Having regard to the above, the vaginal and anal swabs, abdominal viscera, hyoid bone are preserved for chemical analysis by RFSL. The

Doctors opined that the time of death was 12 to 18 hours prior to postmortem examination.

(iv) After receipt of DNA report and the Analyst Report, which are marked as Exs.P16 and P15 respectively, opined cause of death as due to shock and asphyxia due to sexual assault. Ex.P17 is the certificate issued by the Doctor. There is absolutely no cross-examination of the Doctors with regard to the cause of death. The suggestion given that they failed to give opinion independently was denied

(v) The evidence of PW22 would reveal that there was sexual assault on the victim-girl. Injuries were noticed both on the anal orifice, vaginal walls and the hymen was torn irregularly. After receiving the analyst report and the DNA report, the doctors opined the death was due to *shock and asphyxia due to sexual assault.*

(vi) From the evidence of the Postmortem Doctor, coupled with the inquest report, it stands established that it was a case of homicidal death. Further, the opinion of the Doctors, more particularly, the Postmortem Doctor would reveal that having regard to the nature of injuries found both on vagina as well as anal region, coupled with the injury at the tip of the base of the right lung, it can be said without any doubt that the victim was sexually assaulted leading to death due to shock and asphyxia.

29) Admittedly in the instant case, there are no eye-witnesses to the incident and the case rests on circumstantial evidence. In a case arising out of circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. All the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. [***C.Chenga Reddy and Ors. v. State of Andhra Pradesh*** (1996 (10) SCC 193)]

30) In ***G. Parshwanath v. State Of Karnataka***[1]**,** the Apex Court held that, in cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved independently. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this

[1] (2010) 8 SCC 593

aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The Court thereafter has to consider the effect of proved facts.

31) In ***Hanumant v. The State of Madhya Pradesh***[2], the Court explained one of the possible ways to prove a case based on circumstantial evidence. The Court held that, in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a conclusive nature and they should be such as to exclude every hypothesis but the one proposed to be proved.

32) The Supreme Court in ***Trimukh Maloti Kikran v. State of Maharashtra***[3], held as follows:

> *"In the case in hand there is no eye-witness of the occurrence and the case of the prosecution rests on circumstantial evidence. The normal principle in a case based on circumstantial evidence is that the circumstances from*

[2] AIR 1952 SC 343
[3] 2006(10) SCC 681

which an inference of guilt is sought to be drawn must be cogently and firmly established; that those circumstances should be of a definite tendency unerringly pointing towards the guilt of the accused; that the circumstances taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and they should be incapable of explanation on any hypothesis other than that of the guilt of the accused and inconsistent with his innocence".

33) Keeping in view the law laid down by the Supreme Court we shall now proceed to deal with the matter. From the judgment of the Apex Court referred to above it is very clear that in order to establish a case based on circumstantial evidence, the prosecution has to prove each of the circumstance relied upon by them and the circumstances so proved should be consistent only with the hypothesis of the guilt of the accused and inconsistent with his innocence.

34) In the instant case, the prosecution mainly relied on the following circumstances:-

I. **Identification of the accused.**
   a) *Last seen;*
   b) *C.C. TV footage showing the accused in Kalyana Mandapam;*
   c) *Photographs of the deceased in cell phone of the accused; &*
   d) *Test Identification parade.*

II. ***Presence of semen/whitish stains on the clothes of the deceased, which matches with the DNA of the accused;*** *[and]* **recovery of clothes of the accused at his stance, which contain dark stains and whitish substance.**

III. False explanation given by the accused with regard to his employment with PW8 and leaving the station after the offence by getting his hair tonsured.

35) The counsel for the appellant also relied upon the improbabilities in the case of prosecution, which according to him create a doubt with regard to the participation of the accused in the commission of offence.

A) Throwing the dead body outside the compound wall of the Kalyana Mandapam;

B) *Tampering of sealed boxes sent to forensic lap for DNA Analysis and the configuration of allelic patterns.*

36) **(I)** "**Identification of the accused"**.

(a) ***Last Seen***:-

i) In order to prove the first circumstance, namely the accused being "***last seen"*** near the deceased, the prosecution mainly relied upon the evidence of PW1 to PW5, C.C. TV footages and the test identification parade. PW1 to PW5 were examined to prove the said circumstance.

ii) PW1 in his evidence deposed that, on 07.11.2019 at about 7.30 p.m., himself, his wife, three daughters and his brother-in-law went to KNR Kalyana Mandapam to attend the marriage of the daughter of his maternal uncle, by name, A.Venkata Ramana Reddy. After having dinner, P.W.1 thought of going home along with his family members with an intention to return on next day morning for the marriage. At about 10.00 p.m., they reached towards the car, but found

their daughter [deceased] missing. They searched for her, but could not trace her till 1.00 a.m. Then they went to a sooth-sayer [PW14] who informed them that the girl is within a distance of 100 meters from the function hall. They again searched for her but in vain. Again at 3.30 a.m., P.W.1 brought PW14 to the Kalyana Mandapam, who reiterated about the presence of his daughter within the range. PW1 along with others searched for her till 5.00 a.m., but could not tracer her. He then requested the Manager of the Kalyana Mandapam [PW6] to display the C.C. cameras erected in the Kalyana Mandapam. The technician was called and the C.C. TV footages were displayed at 5.00 a.m., which show that, at about 9.45 p.m., on the previous day, one person was taking the photographs of the deceased with his mobile phone at a water pool erected in-front of the Kalyana Mandapam and later followed her to the back side of Kalyana Mandapam, where bathrooms were located. The C.C. TV footage also shows that, about 10 to 12 minutes later the said person came from the back side of the Kalyana Mandapam and entered the dining room, but, he was alone. At about 6.15 a.m., his relative, by name, Sudhakar Reddy [PW17] informed them about the tracing of a dead body behind the Kalyana Mandapam i.e., outside the compound wall in a prone position. He rushed back and noticed the dead body with injuries. Thereafter, law was set into motion.

iii) However, in cross-examination, PW1 admits stating that, the assailant was wearing hood cap, as such, his face was not visible properly, but, however, admits that, they could see the assailant properly in the dining room. According to him, the C.C. TV footage was seen by all his relatives and in the C.C. TV footage, the said person was wearing black colour shirt, blue pant and red chappals. However, to a suggestion that, in the C.C. TV footage, the face of the assailant was not visible and it was blur was denied by him.

iv) PW2 is the brother of PW1, whose evidence is on the same lines as that of PW1. In the chief, he deposed that, after tracing the dead body, it was shifted to a distance of 50 meters from the said place to a good place as the place where the dead body was found was not good. In the cross-examination, he denies the suggestion that the face of the accused was not properly visible and that he cannot identify him. He also denies the suggestion that he identified the accused in the court at the instance of the police. It is to be noted here, both PW1 and PW2 identified the accused in the court.

v) PW3 is a relative of PW1 who also attended the marriage reception at Kalyana Mandapam on 07.11.2019. He also deposed about the photographs taken by the accused and he following the deceased. In the cross-examination, he admits that, C.C. TV footage was in black and white and the

assailant covered his top and back of head with hood cap. He further admits that, the face of the accused was not clear in the C.C. TV footage. He further admits that, PW2 was not present when they were seeing the C.C.TV footage and that nobody informed him about the missing of the deceased.

vi) PW4 is a resident of Akulavaripalli village who knows PW1 and PW2. According to him, on 07.11.2019 he went to KNR Kalyana Mandapam situated at Chenetha Nagar of B.Kotha Kota to attend a marriage reception. According to him, at about 10.00 p.m., PW1 came and enquired with him as to whether he saw his daughter. Thereafter, all of them searched for the deceased. He also deposed about PW1 bringing a sooth-sayer at 3.30 a.m. and the search being made in the surroundings. On a request made, the Manager of the Kalyana Mandapam displayed the C.C. TV footage at 5.00 a.m., wherein, PW4 along with others noticed a person taking photographs of the deceased at water fountain in-front of the Kalyana Mandapam and later followed her to the back side of the Kalyana Mandapam where bathrooms were located. Thereafter, could not see both of them. About 10 minutes later, they noticed one person/now accused entering the dining hall. According to him, he noticed the accused taking away ice cream boxes containing 100 cups of ice cream from the dining hall. When he questioned as to why he is taking such huge quantity of ice creams, the said person replied stating that the ice creams are required for the drivers

for munching with liquor. He followed him to a certain distance and informed PW5 about the acts of the accused.

vii) Though, he was subjected to cross-examination, but nothing useful came to be elicited to discredit his testimony. On the other hand, it has been elicited that PW4 informed PW5 about the accused taking away ice creams. He also informed police about the accused capturing the photos of the deceased with his mobile. To a suggestion that he could not have identified the accused as he was wearing hood cap was denied by him. He clarified the same stating that since he has seen the accused in dining hall taking away ice creams, he can identify him.

viii) PW5 who is also known to PW1 and PW2 and others, deposed about attending the marriage reception on 07.11.2019. He in his evidence categorically deposed that, he and PW4 were entrusted with the duty of arranging dinner in the dining hall. He deposed about the enquires made by PW1 with regard to missing of his daughter; search made in the Kalyana Mandapam; PW1 bringing a sooth-sayer at 3.30 a.m.; watching C.C. TV footage, wherein a stranger/accused was seen taking photographs of the deceased and also following her to the back side of the Kalyana Mandapam, where the bathrooms were situated. His evidence further discloses the information given by PW4 with regard to one person taking away ice creams, pursuant to which, he and

PW4 snatching the ice cream box from the assailant, and he identifying the person in test identification parade as the person who took away ice creams.

ix) In the cross-examination of PW5, it has been elicited that the C.C. TV footages are in colour and the accused was wearing hood cap in the C.C. TV footage. He further admits that, in the C.C. TV footage, the face of the accused was not clear due to wearing of hood cap, but having regard to the fact that, he accosted him when he was taking away the ice creams, states that he could identify the accused in test identification parade. To a suggestion that, he has not seen the accused along with PW4 in taking away ice creams was denied by him. It has been elicited that, PW4 and himself were entrusted with the duty of arrangements for dinner in the dining hall.

x) Though, PW5 in his evidence admits that, the face of the accused was not clear as the accused was wearing hood cap, but, it was elicited from him that, he intercepted the accused when he was taking away the ice cream boxes. In-fact PW4 and PW5 in their evidence categorically deposed that, the person whom they saw following the deceased and the person who was taking ice cream from the dining hall is one and the same. Though, PW5 was cross-examined at length, nothing has been elicited to show that he could not have identified the accused. On the other hand, it stands established that the

person, who was taking photograph of the girl and later on intercepted while he was leaving the hall with ice cream boxes is one and the same.

xi) From the evidence of these five witnesses, the prosecution was able to establish that a stranger [accused] took photographs of the deceased and later followed her upto the backside of the mandapam, where the bathrooms were located. Though, PW1, PW2 and PW3 in their cross-examination in one breath admit that the face of the accused was not clearly visible as he was wearing hood cap, while denying the suggestion made on the said aspect, but, the evidence of PW4 and PW5, in our view, establish the presence of the accused, for the reason, that at about 10.10 p.m., the accused entered the dining hall and tried to take away a box containing 100 cups of ice cream. Seeing the same, PW4 intercepted and questioned the accused as to why he is taking the ice cream box. The accused gave evasive answer and being not satisfied with the same, he informed PW5 who was also kept in-charge of the dining hall along with him. PW5 came there, questioned the accused and forcibly took away the ice cream box. Subsequently, both of them identified the accused in the court, which was within a period of two months from the date of incident.

xii) Their evidence in court would show that the person present in the court hall is the same person whom they have

accosted when he was taking away the ice cream box from the dining hall. It is not the case of the accused that he was wearing a mask or that there was no light at the place where he was intercepted. Hence, identification of the accused by PW4 and 5 in the court [we will deal his identification in the test identification parade a little later] cannot be doubted. In-fact, nothing has been elicited in the evidence of PW4 and 5 to disbelieve the same. On the other hand, it was elicited that since they have intercepted and had an argument with the accused, it was easy for them to identify the accused in the court.

(b) ***C.C. TV footage showing the accused in Kalyana Mandapam:-***

i) It would be useful to refer to the evidence of PW27 the investigating officer who categorically deposed about C.C. Camera footages, wherein, he noticed the suspect from 21.53 to 22.18 minutes. His evidence reads as under:-

> "in C.C. camera footage, he found the suspect from 21.43 minutes to 22.18 minutes, in which 21.53 minutes to 21.56 minutes, he was seen along with the deceased person and from 22.11 minutes to 22.18 minutes, he was seen single. This evidence of PW27 get support from PW1 to PW5 as well, who saw the C.C. TV footages on 0.11.2019 at 5.00 a.m., in the function hall. His evidence further discloses that in Camera No. 3

relating to 21.48 minutes, the deceased was playing with another girl. In Camera No. 4, which gives the clipping between 21.53 minutes, the suspected person was found taking photographs of the deceased near water fountain. In Camera No. 19, which relates to 21.55 hours, the suspect person was found trapping the deceased and taking her towards toilets. This was the last video in which the deceased was found. The other C.C. TV footages from Camera Nos. 13, 21 and Camera No. 2 showed that at 22.11 minutes, the suspected person along was found in dining hall and between 22.11 12 minutes to 22.15 minutes, the suspect was found taking ice creams at dining hall and between 22.16 minutes to 22.18 minutes, the suspect was seen going out of function hall. The deposition indicates that these C.C. TV footages were exhibited in the open court in the presence of the accused and his counsel. The evidence of PW27 shows that these C.C. TV footages were taken from DVR to Pen Drive and later seized the DVR under Ex.P9 Mahazar".

ii) The evidence of PW20 the Scientific Officer –APFSL, Mangalagiri, show that he found Item No. 1 contained C.C. TV footage. He has extracted the C.C. TV video of channel 2, 4, 13, 19 & 21 pertaining to 07.11.2019 between 21.00 to 22.00 hours and he has carefully examined those video file, frame by frame using AMPED FIVE software and found that these

files unedited. Though, PW20 extracted the C.C. TV footage of channel 2, 4, 13, 19 & 21, we feel that the pictures in channel no. 4 & 19 establish the suspect taking the photographs of the deceased near water fountain and thereafter the suspect trapping the deceased and taking her towards toilet. Though, PW20 analysed the C.C. TV footages of Camera No. 2, 13 & 21 also, which relate to C.C. TV footages after 22.00 hours, but taking advantage of incorrect timing given in the evidence of PW20, the learned counsel would contend that, there is no evidence with regard to the accused being present in the dining hall and taking the ice cream boxes.

iii) Though P.W.27 admits in the cross that the face of the accused was not clear in the CC TV footage, but from the evidence of P.Ws.4,5 and 20, it stands established that, a person/accused who has nothing to do with the function, entered the Convention Center, took photographs of the deceased, trapped her and followed her towards back side of the hall where the toilets are situated and about 10 to 12 minutes later, entered the dining hall and tried to take away a box containing ice creams. The evidence through C.C. TV footages gets corroboration from the evidence of PW1 to PW5, more particularly from the evidence of PW4 and PW5 and it stand established that accused was present in the function hall and seen along with the deceased.

(c) ***Photographs of the deceased in cell phone of the accused***:-

(i) One another circumstance, which establishes the presence of the accused in the Mandapam is the photographs of the girl/deceased in the cell-phone of the accused. The evidence of PW28, who was working as Sub-Divisional Police Officer, Madanapalli show that, on 16.11.2019 at 8.00 a.m., while he was present in the Mudivedu Police Station, received credible information regarding the movement of the accused. He secured the presence of PW19, left the police station and noticed the accused standing by the side of the road. On seeing the police, the accused tried to ran away, but, with the assistance of his staff, he apprehended him and questioned him in the presence of mediators. A thorough search of accused lead to recovery of LG Q6 mobile phone with 2 SIM cards, (Airtel and JIO SIM) and a memory card. MO.7 is the mobile phone, MO.9 and MO.10 are SIM cards and MO.11 is memory card. He also examined the photo gallery of MO.7 and found three photos of the deceased with date 07.11.2019 at 21.57 hours, 21.56 hours and 21.56 hours. The same were seized under Ex.P10 in the presence of independent mediator. These photos of the deceased girl existing in the gallery of the mobile phone were exhibited to the witness in the trial court.

(ii) PW20 who is the Scientific Officer in APFSL, examined the contours of the girl child present in the images extracted from the mobile phone [item no. 4] and found them to be similar to the visible facial contours of the girl child present in

the C.C. TV video footages extracted from DVR/item no. 1. He also issued Section 65B Certificate along with the report Ex.P14. In-fact, no cross-examination of PW20 was done on these aspects. The only suggestion given was that his Assistant has done the tests and that PW20 simply singed the report, which was denied by him.

(iii) Further, a perusal of the Section 313 Cr.P.C. statement of the accused shows that except bare denial, no explanation is forthcoming as to how the photographs of the deceased were in the "gallery" of his cell-phone. This circumstance also corroborates the evidence of PW4 and PW5 with regard to his presence in the hall and taking photographs of the deceased.

(d) ***Test Identification parade***:-

i) The next question that falls for consideration is whether the presence of the accused in the Kalyana Mandapam stands established through IT parade. Much comment has been made by the learned counsel for the appellant with regard to the manner in which the "Test Identification Parade" was conducted.

ii) The learned counsel for the appellant would contend that, the accused was not present in the function hall on that day. According to him, he is not the person in the C.C. TV footage and also denies his identification by the witnesses. In other words, the learned counsel for the appellant would contend that, no credence can be given to the identification

conducted on 23.11.2019 by the learned Magistrate, as he failed to conduct the test identification parade in the manner prescribed under law. According to him, non-suspects similar to suspect were not placed in the test identification parade, as the accused by then got his moustache removed and also tonsured his head.

iii) In order to appreciate the argument advanced, it would be useful to refer to the evidence of PW4, PW5, PW11 and PW12 before dealing with the evidentiary value of the Test Identification Parade.

iv) PW4 in his evidence deposed that, he identifying the accused in the test identification parade held on 23.11.2019 in Sub-Jail, Madanapalli. According to him, the accused, who is present in the court hall, is the person whom he has seen in C.C. TV footage; dining hall; and in the test identification parade. Similar is the evidence of P.W.5.

v) PW11 in his evidence deposed that, on 08.11.2019 at about 10.00 a.m., the accused came to his shop and asked him to do zero cutting. He did zero cutting and shaving to the accused. Similarly, the evidence of PW12 is that, on 14.11.2019 between 6.00 and 7.00 a.m., the accused came to his shop and asked him to tonsure his head. When he asked, why he wants to tonsure his head, when he is having zero cutting, he replied that to get thick hair, it is needed. Then he tonsured the hair and also clean shaved his moustache. From

the evidence of these two witnesses, it is clear that the accused had zero hair cutting and couple of days later, got tonsured his head. Therefore, by the date of test identification parade, which was held on 23.11.2019, the accused got his head hair cut to zero level/tonsured.

vi) The test identification parade which was conducted by the Magistrate [PW25] in Sub-Jail, Madanapally, does not anywhere indicate that the five non-suspects, who were placed along with the suspect for identification, were also having tonsured head. The evidence of PW25 only shows that as the suspect was wearing full hands shirt and jeans pant, the non-suspects were made to wear identical attire and were having similar features. It is said that, when the Magistrate [PW25] questioned the suspect about the identity of the non-suspects, he expressed satisfaction and did not raise any objection with regard to the arrangements made for test identification parade. Thereafter, he was asked to take position among the non-suspects in the test identification parade. PW4 and PW5 identified the accused in the test identification parade and also in the court. No other witness was subjected to test identification parade.

vii) The evidence of PW25 does not categorically establish that persons identical were placed as non-suspects, in the test identification parade. Therefore, the argument that no importance can be given to the test identification parade

cannot be brushed aside. But, here is a case where PW4 and PW5, have not only seen the accused in the dining hall, but, also intercepted him and entered into an argument with him, thereafter forcibly took away the ice cream box from him. Definitely, they had an opportunity of seeing him from close quarters. Things would have been different had these two witnesses had only a glimpse of the accused in the C.C. TV footage or otherwise, which is not the case here.

viii) Even otherwise, it is well established that test identification parade is not a substantive piece of evidence and can be used only as corroborative evidence to the statement made in the court. The evidentiary value of the Test Identification Parade came up for consideration before the Apex Court in catena of judgments.

ix) In ***Visveswaran v. State Rep. By S.D.M***[4], the Apex Court held that, "*the identification of the accused either in test identification parade or in Court is not a sine qua non in every case if from the circumstances the guilt is otherwise established. Many a times, crimes are committed under cover of darkness when none is able to identify the accused. The commission of crime can be proved also by circumstantial evidence*".

[4] 2003(6) SCC 73

x) In ***Siddharth Vashisht @ Manu Sharma v. State (NCT of Delhi)***[5] the Apex Court after referring to various judgments of the Court held that, *"the proposition of law is quite clear that, even when there is no previous TIP, court may appreciate dock identification as being above board and more than conclusive".*

xi) In ***Malkhansingh & Ors. v. State of Madhya Pradesh***[6] it has been held that, "*the identification parades belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure, which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. They do not constitute substantive evidence and these parades are essentially governed by Section 162 of the Code of Criminal Procedure".* It has been further held that, *"failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact".*

xii) In view of the law laid down by the Apex Court in the judgments referred to above, it is clear that even if the argument of the learned counsel for the appellant that test identification parade cannot be looked into is accepted, as the persons similar to suspects were not put up for test identification parade, but their identification, in the court,

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[5] (2010) 6 SCC page 1
[6] (2003) 5 SCC 746

can be accepted, having regard to the law laid down and for the reasons that P.Ws.4 and 5 identified the accused in the court within two months of the incident. Hence, it stands established that the accused was present in the function hall and he was a person last seen in the company of the deceased.

37) ***(II). Presence of semen/whitish stains on the clothes of the deceased, which matches with the DNA of the accused;*** *[and]* **recovery of clothes of the accused at his stance, which contain dark stains and whitish substance.**

i) DNA is the abbreviation of Deoxyribo Nucleic Acid. It is the basic genetic material in all human body cells. It is not contained in red blood corpuscles. However, it is present in white corpuscles and carries the genetic code. DNA structure determines human character, behaviour and body characteristics. DNA profiles are encrypted sets of numbers that reflect a person's DNA makeup which, in forensics, is used to identify human beings. DNA which is a complex molecule, has a double helix structure which can be compared with a twisted rope 'ladder'.

ii) DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has

regularized Forensic Science resulting in radical help in the administration of justice. In our country also DNA evidence is being increasingly relied upon by courts. After the insertion of Section 53A by Act 25 of 2005 in the Criminal Procedure Code, DNA profiling has now become a part of the statutory scheme. Section 53A relates to examination of a person accused of rape by a medical practitioner. Similarly, Section 164A has been inserted by Act 25 of 2005, for medical examination of the victim of a rape, the description of material taken from the person of the woman for DNA profiling is a must. (***Mukesh and Ors. V. State for NCT of Delhi and Ors.***[7]).

iii) *"The globally acknowledged medical literature shows that in cases of sexual assault, DNA of the victim and the perpetrator are often mixed. Traditional DNA analysis techniques like "autosomal- STR" are not possible in such cases. Y-STR method provides a unique way of isolating only the male DNA by comparing the Y- Chromosome which is found only in males. It is no longer a matter of scientific debate that Y-STR screening is manifestly useful for corroboration in sexual assault cases and it can be well used as excalpatory evidence and is extensively relied upon in various jurisdictions throughout the world. Science and Researches have emphatically established that chances of degradation of the `Loci' in samples are lesser by this method and it can be more*

[7] AIR 2017SC2161

effective than other traditional methods of DNA analysis. Although Y-STR does not distinguish between the males of same lineage, it can, nevertheless, may be used as a strong circumstantial evidence to support the prosecution case. Y-STR techniques of DNA analysis are both regularly used in various jurisdictions for identification of offender in cases of sexual assault and also as a method to identify suspects in unsolved cases. Considering the perfect match of the samples and there being nothing to discredit the 1"Y-STR analysis for detection and objective confirmation of child sexual abuse", authored by Frederick C. Delfin – Bernadette J. Madrid – Merle P. Tan – Maria Corazon A. De Ungria. (Ravi vs. State of Maharashtra, dt.3.10.2019).

iv) Before dealing with the facts in issue, it would be appropriate to refer to the authorities with regard to the evidentiary value of DNA profiling.

v) In ***K.T. Thomas, J. in Kamti Devi (Smt.) and Anr. v. Poshi Ram***[8], the Apex Court held that, "*Section 112 of the Evidence Act was enacted at a time when the modern scientific advancements with deoxyribonucleic acid (DNA) as well as ribonucleic acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate. ...*"

[8] [(2001) 5 SCC 311]

vi) ***Santosh Kumar Singh v. State Through CBI***[9] was a case of a young girl who was raped and murdered. The DNA reports were relied upon by the High Court which were approved by the Court and the court held that, "*the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Kamti Devi v. Poshi Ram (supra). In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the Appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9.*"

vii) In ***Rajkumar v. State of Madhya Pradesh***[10], the Court was dealing with a case of rape and murder of a 14 year old girl. The DNA report established the presence of semen of the Appellant in the vaginal swab of the prosecutrix. The conviction was recorded relying on the DNA report. In the said context, the following was observed :-

> *"8. The deceased was 14 years of age and a student in VIth standard which was proved from the school register and the statement of her father Iknis Jojo (P.W. 1). Her age has also been mentioned in the FIR as 14 years. So far as medical evidence is concerned, it was mentioned that the deceased prosecutrix was about 16 years of age. So far as the analysis report of the material*

[9] (2010) 9 SCC 747]
[10] [(2014) 5 SCC 353]

> *sent and the DNA report is concerned, it revealed that semen of the Appellant was found on the vaginal swab of the deceased. The clothes of the deceased were also found having Appellant's semen spots. The hair which were found near the place of occurrence were found to be that of the Appellant."*

viii) Having regard to the law laid down, it is now to be decided whether the presence of whitish fluid on the clothes of the deceased, which matches with the DNA profiling of the accused can be looked into so as to connect the accused with the crime.

ix) PW21 who is the Assistant Director [APFSL], Mangalagiri in his evidence deposed that, pursuant to a requisition given by the I Additional District and Sessions Judge, Chittoor, the accused was produced for collection of blood sample for DNA profiling examination on 21.11.2019. The same was collected and shown as Item No. 1. His evidence further shows that, on 22.11.2019, they received two card board boxes from the court, which contained nine [9] items, which were shown as Item No. 2 to 10 in his report. DNA was extracted from Item No. 1 to 10 and subjected to Autosomal STR analysis by using global filer kit and Item Nos. 1 to 8 were subjected to Y-STR analysis by using Y-filer plus kit. According to him, the Autosomal STR DNA profile obtained from Item Nos. 2, 3, 4 and 5 are identical and the same is found to be identical with Autosomal DNA profile obtained from Item No. 1, i.e., blood of the accused.

x) Insofar as Item Nos. 6, 7 and 8 are concerned, he deposed that, mixed DNA profile has been generated, which again tallies with the DNA profile obtained from Item No. 1. He further states that, allelic pattern of Item Nos. 2, 3, 4 and 5 matches with the allelic pattern of Item No. 1. All the alleles of Item No. 1 are present in the allelic patterns of Item Nos. 6, 7 & 8.

xi) Insofar as Item Nos. 9 & 10 is concerned, he would submit that there was no proper amplification. He further deposed that, Y-DNA profile of Item Nos. 2 to 7 is matching with the allelic pattern of Item No. 1. He categorically deposed that, Autosomal STR analysis conclusively prove that the DNA profile obtained from source of Item No. 2 [whitish stain on the frock]; Item No. 3 [whitish stain on red coloured legging]; Item No. 4 [stain on torn T-shirt], Item No. 5 [stain on jeans pant] are of accused.

xii) Insofar as Item Nos. 6, 7 and 8 are concerned, he deposed that, DNA profile of accused is present in mixed DNA profile in Item No. 6. Ex.P15 is his report. Though, PW21 was cross-examined at length, nothing has been elicited to discredit his testimony.

xiii) As seen from the arguments advanced, on one hand, it has been urged that the card boxes sent for analysis have been tampered with and on the other hand, it is urged that, the samples have degraded themselves making it

impermissible for analysis. We feel that both cannot go together. If really the intention of the prosecution was to fix the accused by inserting material, they would have definitely inserted the swabs and slides, which are fit for analysis and which would give positive results. That being so, the argument that the prosecution has falsely set up a case by tampering with the card boxes, may not be correct.

xiv) As seen from the arguments advanced, the next plea of the accused is that, when Item No. 4 does not contain whitish fluid, it is strange as to how it turned positive to DNA profiling. A perusal of the report shows that, Item No. 4 is a *torn hood cap T-shirt with dirty stains.* It is nobody's case that the dirty stains on the T-shirt were that of mud. It could be whitish fluid [semen] getting into contact with mud while committing the offence or otherwise. There is nothing on record to show that PW21 had any animosity or grudge to give a false report. As stated earlier, no cross-examination was done on this aspect. The Autosomal DNA profile obtained from Item Nos. 2, 3 4 and 5 were found to be identical and matching with the DNA profile obtained from Item No. 1 i.e., blood sample obtained from the accused.

xv) Even if there is any amount of doubt with regard to Item No. 4, but, Item No. 2 – frock, contain *whitish and dark brown stains* which tallies with DNA profile of accused. The fact that the frock is that of the deceased is not in dispute. No

suggestions were given to PW1 to PW3 disputing the dress worn by the deceased and the dress seized at the time of inquest. The said frock had whitish and dark brown stains, which tallied with the Autosomal DNA profile of Item No. 1 (blood of accused).

xvi) Similar is Item No. 3 –the legging, which contains *whitish stain*. A comment has been made with regard to the presence of whitish fluid on the legging, on the ground that the same was not found on the body of the deceased. But as seen from the charge-sheet, rape was committed in the bathroom when the girl was removed the legging and thereafter the body and legging were thrown outside. One finds legging and the body of the deceased at different places. Hence, the argument of the learned Public Prosecutor that, the semen must have come into contact with the legging during the process of either committing the rape or throwing the body together with the legging, cannot be ruled out. Similarly, the blue colour jeans pant of the accused, which was discovered basing on the confession of the accused, seized from the house of the accused, contains dirty brown and whitish stains. The stains found on the pant tallied with the DNA profiling of the accused.

xvii) The learned counsel for the appellant tried to contend that, it is difficult to believe that the accused would have kept the pant containing stains in his house even after the

incident. But, the evidence available on record show that the incident, in question, took place, on 07.07.2019 and within few days thereafter, the accused was arrested and immediately the clothes were seized from his house. In-fact, the evidence on record also shows that the accused was not in town after the incident, as he went to Chhattisgarh in pursuit of his employment, in the lorry of PW8 within two days after the incident. Therefore, the argument of the learned counsel for the appellant that the prosecution has forcibly applied semen on the pant of the accused and on the legging of the deceased before sending it to expert cannot be accepted. In-fact, such a plea was never taken by the accused in his 313 Cr.P.C., examination nor was it suggested to Investigating Officer. Therefore, even if Item No. 6, 7 & 8 are excluded from consideration, still the results on Item Nos. 2, 3 & 5 establish the link and connect the accused with the crime.

38) **(III). False explanation given by the accused with regard to his employment with PW8 and leaving the station after the offence by getting his hair tonsured.**

i) During his examination under Section 313 Cr.P.C., the accused took a plea that he never worked as a cleaner in the Lorries owned by PW8 and that the allegations made against him with regard to his employment with PW8 are all false. But, PW8 in his evidence categorically deposed that, on 9.11.2019, the accused requested him on phone to send him

for duty in any lorry. Accordingly, he asked the accused to meet him on 10.11.2019 at Basinikonda and on that day, he sent the accused for duty along with one driver Noushad to Chattisgarh. Though, PW8 was cross-examined at length, it was never suggested to him that he was not working with him as a cleaner or driver of the lorries owned by him. On the other hand, suggestions were to the effect that the identification of photo in Ex.P4 and also the identification of the accused was at the instance of the police, coupled with the genuinity of records maintained towards the allotment of work to drivers and cleaners. Strangely, the accused disowns everything and comes up with an explanation that he was never in employment with PW8. But, we see no reason to disbelieve the evidence of PW8. It appears that, after the incident the accused wanted to leave the station and accordingly requested PW8 to send him for duty in any lorry, which can be taken as one the circumstance to connect the accused with the crime.

ii) Further, in 313 Cr.P.C., examination, the accused while denying the evidence of PW9 [S. Nooruddin] who is his father-in-law, stated that, his wife went to the house of PW9 only for delivery and returned back immediately. However, the evidence of PW9 and PW13 [brother-in-law of accused] is to the effect that, wife of accused was residing in the house of PW9 since last 4 or 5 years after her marriage with the accused.

iii) These two circumstances, which we have referred to above, show that the accused has been taking inconsistent pleas and is not coming forward with the true version and trying to get over the situation by giving false explanation.

39) As stated by us earlier, the counsel for the appellant submitted that, there are couple of circumstances which would indicate improbability in the case and also false implication of the accused in the crime.

A) ***Throwing the dead body outside the compound wall of the Kalyana Mandapam.***

i) The learned counsel for the appellant urged that, it is highly impossible to believe that the accused would have thrown the deceased over a compound wall, which was 25 to 30 feet in height, after committing the offence. The averments in the charge-sheet shows that with a view to screen the rape and murder the accused took the dead body of the deceased girl and threw it outside the KNR Convention Centre.

ii) P.W.27 – Investigating Officer speaks to these facts, which are as under:-

> *"There is a wall between Ladies Toilet and where the dead body of the deceased was first seen. The height of the wall from the ladies toilet to the place of the dead body is between 25-30 feet. Witness adds that the wall at the bathroom to the compound wall is only 3 feet in height and the height of the wall on the backside of the Kalyana Mandapam is between 25-*

30 feet, as there is a vanka on the backside of the Kalyana Mandapam and so the wall appears to be very height from the backside of the Kalyana Mandapam.

The scene of offence panchanama shows that the height of the wall is about 21 feet from the floor. P.W.26 in his cross-examination further admits that the distance between the compound wall and the place of the dead body was 15 meters i.e., the first place of finding the dead body. Since the evidence on record show that the body was taken to a distance, since place where the dead body was found on the next day morning was not good".

iii) In view of the evidence of P.W.27, the learned counsel for the appellant would contend that since height of the compound wall is 25 feet from the ground level, it is very difficult to believe that the accused would have thrown the body over the said wall. At first blush, the said argument appeared to be very impressive and convincing, but, a close perusal of the material on record, more particularly, the photographs which are placed on record and a reading of the panchanama of the scene of offence proved otherwise.

iv) A perusal of the photograph of the scene of offence which are placed on record as Ex.P23, show that the toilets are located at the backside of the Kalyana Mandapam and immediately after the toilet, there is a wall which is of three feet in height. The function hall was constructed on an elevated area, as such a retaining wall was raised from the

ground level which was at a depth of about 25 feet from the floor level of the Mandapam. Hence, a retaining wall came to be raised to such height. For that reason only the Investigating Officer in his evidence deposed (referred to above) that height of the wall on the backside of the Kalyana Mandapam is 25-30 feet and the wall at the toilet is only three feet in height. The photographs also indicates existence of a vanka behind the Kalyana Mandapam i.e., this vanka is a depth of 25 feet from the floor area of the function hall. Therefore, there cannot be any two interpretations to the evidence of P.W.27 with regard to the existence of a compound wall which is of 3 feet in height. We make it very clear that the height of the compound wall is not 25-30 feet from the floor level of Kalyana Mandapam, but 25-30 feet wall is the retaining wall. After raising the retaining wall to a height of 25-30 feet, a compound wall to a height of three feet came to be raised behind the toilets, from where the accused must have thrown the deceased. Hence, the argument of the learned counsel for the appellant that it is improbable to believe that accused would have thrown the deceased to a distance, over the height of the compound wall, cannot be accepted. As the body was thrown from a small height, it must have fallen over a distance and thereafter it was dragged to a neater place in the morning. Hence, the argument of the learned counsel for the appellant that the case of the

prosecution on this aspect is false and cannot be believed, is liable to be rejected.

B) ***Tampering of sealed boxes sent to forensic lab for DNA Analysis.***

(i) It is no doubt true that the letter of advice and the revised letter of advice does not refer to item 10 of Ex.P15 and also about putting the swabs in a corked bottle. Though the letter of advice is silent with regard to the two glass slides and putting the slides in the corked bottle, the learned Public Prosecutor would contend that the evidence of the Postmortem Doctor show that the anal and vaginal swabs were taken and preserved for chemical analysis by the RFSL. Though the Postmortem Doctor was cross-examined at length, but nothing was suggested with regard to the manner in which they were stored and also the opinion given by them with regard to the cause of death.

(ii) It is not in dispute that vaginal swabs and anal swabs were sent to lab for examination through court. The letter of advice which are placed on record as Ex.P28 show sending of viscera of the deceased, while Ex.P30 speaks about sending of clothes in one box, another sealed box containing vaginal and the third sealed box containing anal swabs of the deceased. It is no doubt true that there is no reference to the two glass slides and these cotton swabs being kept in a cork bottle in the letter of advice.

(iii) But, the learned Public Prosecutor would contend that the cotton swabs are invariably kept in a corked bottle otherwise they would become unfit for analysis. It is his pleas that the letter of advice only speaks about the items sent and which are fit for analysis and other instruments carrying the items which are to be analyzed. We feel that the argument of the learned Public Prosecutor cannot be brushed aside. If really the argument of the learned counsel for the appellant that the items sent to RFSL lab are tampered with by inserting two glass slides, the same should have yielded positive result. But, a perusal of Analyst report show that there was no proper amplification of DNA in items 9 and 10 i.e., lightly stained cotton swabs and dried smear on glass slides respectively. Further, the State Brief Lawyer who appeared for the accused before the trial court, did not question the expert on any of these aspects. Be that as it may, even otherwise, as observed earlier, if really the intention of the prosecution was to tamper with the sealed boxes for the purpose of creating evidence, so as to implicate the accused in the case, definitely they would have inserted glass slides from which they could have derived positive result. Therefore, the argument of the learned counsel for the appellant that a case has been built up against the accused may not be correct.

(C) ***Remand of the case back to the trial court for re-trial.***

i) It is to be noted here that a Legal-Aid-Advocate defended the accused before the trial court. The incident in question took place on 7.11.2019 and the charge-sheet was filed on 10.12.2019. The State Brief Lawyer was appointed on 20-11-2019, which was ratified on 23.11.2019. Charges came to be framed on 23.12.2019 and additional charges on 4.2.2020. The trial commenced with the examination of P.W.1 on 31.12.2019 i.e., even before additional charges were framed and within one week after framing of charges. The trial was completed on 20.1.2020. About 28 witnesses were examined by the prosecution.

ii) P.Ws.1 and 2 were examined on 31.12.2019. P.Ws.3,4 and 5 were examined on 02.1.2020. P.Ws.6, 7 and 8 were examined on 3.1.2020. P.Ws.9 to 13 were examined on 6.1.2020. P.Ws.14 to 16 were examined on 7.1.2020. P.Ws.17 and 18 were examined on 8.1.2020. P.W.19 was examined on 9.1.2020. P.Ws.20 to 22 were examined on 10.1.2020. P.Ws.23 and 24 were examined on 13.1.2020. P.Ws.25 and 26 were examined on 17.1.2020 and P.Ws.27 and 28 were examined on 20.1.2020. Section 313 Cr.P.C. examination of the accused was recorded on 27.1.2020 and the judgment was pronounced on 24.2.2020.

iii) From the facts referred to above, it is clear that, the incident took place on 07.11.2019. A charge-sheet was filed on 10.12.2019 and the appointment of the State Brief Lawyer

was ratified on 23.11.2019. Therefore, within 15 days from the date of incident, a State Brief Lawyer was appointed to contest the matter. He had nearly one and half months time to prepare himself for the trial, which commenced on 31.12.2019. Therefore, the argument of the learned counsel for the appellant that there was no proper opportunity for the State Brief Lawyer to defend the case cannot be accepted. Things would have been different had no Lawyer was appointed till the commencement of trial or a Lawyer came to be appointed just before commencement of trial. In the instant case, the State Brief Lawyer was given enough opportunity and time to prepare himself for case and as is borne from the record, he made his best effort to deal with the case. Therefore, the question of remanding the matter for a denovo trial, as sough by the appellant, on the ground that the Lawyer who was incompetent to defend the case was appointed or that the Lawyer has not properly conducted the trial or that sufficient time was not given to the Lawyer to prepare the case cannot be accepted.

D) One another argument advanced by the learned counsel for the appellant is that one Sudhakar Reddy, who was examined as P.W.17 and who claims to have seen the dead body on the morning of 08-11-2019, was not shown as a list witness in the charge-sheet filed. Only after framing of the charge and during the course of trial, he was shown as a list witness on 7.1.2020 i.e., a day prior to his examination-in-

chief. Hence, pleads that the evidence of P.W.17 cannot be taken into consideration. It is to be noted here that the evidence of Investigating Officer as well as the evidence of P.W.17 would show that they were examined immediately after the dead body was traced. It appears that since his evidence was only to the effect of seeing the dead body outside the Convention Centre, he was not shown as a list witness in the charge-sheet. But, subsequently he was added as a list witness after obtaining necessary orders from the Court, which is evident from the record. Showing Mr.Sudhakar Reddy as a list witness and examining him as P.W.17 was never challenged, nor was it suggested to him that he is made to speak false. But, a perusal of the evidence of P.W.17 would show that he saw the dead body on the next day. Even if his evidence is eschewed, the tracing of the body of the deceased outside the Kalyana Mandapam on that day remains unimpeached.

40) **Potency of the accused**.

Insofar as the potency of the accused is concerned, PW24 examined the accused, on 22.11.2019, as per the requisition from I Additional District Judge, Chittoor and found to be potent enough to commit the act. Ex.P19 is the certificate issued by him.

41) Having regard to all the circumstances stated above, we feel that the prosecution has proved the circumstances relied

upon by them and circumstances so proved form a chain of events connecting the accused with the crime.

SENTENCE

42) The learned counsel for the appellant would submit that the trial court failed to give reason for imposing death penalty as the said court was carried away by the nature of the crime. The mitigating circumstances favouring the appellant were not properly considered.

43) On the other hand, the learned Public Prosecutor would contend that the instant case satisfies the principles of "rarest of rare case" and the appellant who has committed the crime of rape and murder of a young girl of 5 years old in a most gruesome manner does not deserve any sympathy or leniency.

44) Issue that arises for consideration is, ***whether case on hand can be treated as "rarest of rare" case so as to award death sentence?***

45) Before dealing with the same, it would be useful to refer to punishments awarded by the trial court:-

Offence		Punishment
(i)	Section 5(j)(iv) r/w Sec.6 of POCSO Act	Death sentence
(ii)	Section 5(m) r/w Sec.6 of POCSO Act	R.I. for 20 years & fine of Rs.1,000/-, in default, R.I. for 3 months
(iii)	Sections 376A & 376AB IPC	No separate sentence

(iv)	Section 302 I.P.C.	Imprisonment for life; fine of Rs.1,000/-, in default, R.I. for 3 months
(v)	Section 201 I.P.C.	R.I. for 5 years & fine of Rs.1,000/-; in default R.I. for 3 months.

46) From the above it is clear that death sentence was not awarded for causing the death of the deceased, but it was awarded under Section 5 (j)(iv) read with Section 6 of POCSO Act, which deals with aggravated penetrative sexual assault.

47) After the amendment, Section 6 has been substituted as follows:

> "6. (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.
>
> (2) The fine imposed under Sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.
>
> (Emphasis applied)"

> The minimum sentence for an aggravated penetrative sexual assault has been thus increased from 10 years to 20 years and imprisonment for life has now been expressly stated to be imprisonment for natural life of the person. Significantly, 'death sentence' has also been introduced as a penalty for the offence of aggravated penetrative sexual assault on a child below 12 years."

From the above it is clear that in a case of aggravated penetrative sexual assault, the minimum punishment prescribed is 20 years, which may go up to death sentence, which is inclusive of imprisonment for life. As observed by

us, death sentence in this case came to be imposed for the offence punishable under Section 5(j)(iv) read with Section 6 of POCSO Act, but not under Section 302 I.P.C. All the judgments which have been placed before use by the counsel appearing for either side relate to awarding death sentence in cases tried for the offence punishable under Section 302 I.P.C. or under Section 302 read with Section 376 I.P.C.

48) In ***Ravi's case*** (supra) it is further held as under :

> "44. The Constitution Bench of this Court in (Bachan Singh v. State of Punjab) MANU/SC/0111/1980 : (1980) 2 S.C.C. 684, while upholding the constitutionality of death penalty Under Section 302 Indian Penal Code and the sentencing procedure embodied in Section 354(3) of the Code of Criminal Procedure, struck a balance between the protagonists of the deterrent punishment on one hand and the humanity crying against death penalty on the other and elucidated the strict parameters to be adhered to by the Courts for awarding death sentence. While emphasising that for persons convicted of murder, life imprisonment is the 'rule' and death sentence an 'exception', this Court viewed that a rule abiding concern for the dignity of the human life postulates resistance in taking the life through laws instrumentality and that the death sentence be not awarded "save in the rarest of the rare cases" when the alternative option is foreclosed.
>
> 45. In (Machhi Singh v. State of Punjab) MANU/SC/0211/1983 : (1983) 3 S.C.C. 470, this Court formulated the following two questions to be considered as a test to determine the rarest of the rare cases in which the death sentence can be inflicted:
>
> (a) Is there something uncommon, which renders sentence for imprisonment for life inadequate calls for death sentence?
>
> (b) Rather the circumstances of the crime such that there is no alternative, but to impose the death sentence even after

according maximum weightage to the mitigating circumstances which speaks in favour of the offender?

46. Machhi Singh then proceeded to lay down the circumstances in which death sentence may be imposed for the crime of murder and held as follows:

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,

(b) In cases of "bride burning" and what are known as "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

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.

47. It thus spells out from Machhi Singh (supra) that extreme penalty of death sentence need not be inflicted except in gravest cases of extreme culpability and where the victim of a murder is ... (a) an innocent child who could not have or has not provided even an excuse, much less a provocation for murder...", such abhorrent nature of the crime will certainly fall in the exceptional category of gravest cases of extreme culpability.

48. This Court in Machhi Singh's case confirmed the death sentence awarded to Kashmir Singh - one of the Appellants as he was found guilty of causing death to a poor defenceless child (Balbir Singh) aged 6 years. The Appellant Kashmir Singh was categorised as a person of depraved mind with grave propensity to commit murder.

49. Bachan Singh and Machhi Singh, the Constitution Bench and the Three-Judge Bench decisions respectively, continue to serve as the foundation-stone of contemporary sentencing jurisprudence though they have been expounded or distinguished for the purpose of commuting death sentence, mostly in the cases of (i) conviction based on circumstantial evidence alone; (ii) failure of the prosecution to discharge its onus re: reformation; (iii) a case of residual doubts; and (iv) where the other peculiar 'mitigating' circumstances outweighed the 'aggravating' circumstances."

49) The aggravating and mitigating circumstances, as suggested by Dr. Chitale were mentioned in ***Bachan Singh's case*** (supra). Paragraphs 202 to 207 of the judgment reads as under:-

> "202. Drawing upon the penal statutes of the States in (U.S.A. framed after Furman v. Georgia) (33 L Ed 2d 346 : 408 US 238 (1972), in general, and Clauses 2(a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":
>
> Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion:
>
> (a) if the murder has been committed after previous planning and involves extreme brutality; or
>
> (b) if the murder involves exceptional depravity; or
>
> (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed
>
> (i) while such member or public servant was on duty; or
>
> (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or
>
> (d) if the murder is of a person who had acted in the lawful discharge of his duty Under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance Under Section 37 and Section 129 of the said Code.
>
> 203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated

already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.

204. In Rajendra Prasad (1979) 3 S.C.C. 646 : 1979 S.C.C. (Cri) 749, the majority said : "It is constitutionally permissible to swing a criminal out of corporeal existence only if the security of State and Society, public order and the interests of the general public compel that course as provided in Article 19(2) to (6)". Our objection is only to the word "only". While it may be conceded that a murder which directly threatens, or has an extreme potentiality to harm or endanger the security of State and Society, public order and the interests of the general public, may provide "special reasons" to justify the imposition of the extreme penalty on the person convicted of such a heinous murder, it is not possible to agree that imposition of death penalty on murderers who do not fall within this narrow category is constitutionally impermissible. We have discussed and held above that the impugned provisions in Section 302 of the Penal Code, being reasonable and in the general public interest, do not offend Article 19, or its "ethos" nor do they in any manner violate Articles 21 and 14. All the reasons given by us for upholding the validity of Section 302 of the Penal Code, fully apply to the case of Section 354(3), Code of Criminal Procedure, also. The same criticism applies to the view taken in (Bishnu Deo Shaw v. State of W.B.) (1979) 3 S.C.C. 714 : 1979 S.C.C. (Cri) 817 which follows the dictum in Rajendra Prasad (1979) 3 S.C.C. 646 : 1979 S.C.C. (Cri) 749.

205. In several countries which have retained death penalty, pre-planned murder for monetary gain, or by an assassin hired for monetary reward is, also, considered a capital offence of the first-degree which, in the absence of any ameliorating circumstances, is punishable with death. Such rigid categorisation would dangerously overlap the domain of legislative policy. It may necessitate, as it were, a redefinition of 'murder' or its further classification. Then, in some decisions, murder by fire-arm, or an automatic projectile or bomb, or like weapon, the use of which creates a high simultaneous risk of death or injury to more than one person, has also been treated as an aggravated type of offence. No

exhaustive enumeration of aggravating circumstances is possible. But this much can be said that in order to qualify for inclusion in the category of "aggravating circumstances" which may form the basis of "special reasons" in Section 354(3), circumstance found on the facts of a particular case, must evidence aggravation of an abnormal or special degree.

206. Dr. Chitale has suggested these mitigating factors:

Mitigating circumstances-In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts, and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a "child", that is, "a person who at the date of murder was less than 16 years of age",

> cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children."

50) At this stage it is also to be noted that in cases arising out of circumstantial evidence the courts have been adopting varying standard while awarding death sentence. The judgments of the Bachan Singh's case and Machhi Singh's case referred to earlier continued to serve as the foundation stone of contemporary sentencing jurisprudence though they have been expounded or distinguished for the purpose of commuting death sentence, mostly in the cases of (i) conviction based on circumstantial evidence alone; (ii) failure of the prosecution to discharge its onus re: reformation; (iii) a case of residual doubts; and (iv) where the other peculiar 'mitigating' circumstances outweighed the 'aggravating' circumstances [***Ravi's case*** (supra)].

51) In the above judgment it has also been observed that the object and purpose of determining quantum of sentence has to be 'society centric' without being influenced by a 'judge's' own views, for society is the biggest stake holder in the administration of criminal justice system.

52) As stated earlier, the conviction in the instant case was one under the provision of POCSO Act. Taking note of increasing child sexual abuse cases, the Parliament in their wisdom enhanced the minimum sentence for the aggravated

penetrative sexual assault to not less than 20 years, which may extend to natural life or penalty of death. Justice R.Subhash Reddy in ***Ravi's case*** (supra) observed as under :

> "Even then, we cannot forget the legislative intent which resulted in amendments to POCSO, while dealing with the offences against the children. At the same time, even for imposing the death sentence, for cases arising out of the provisions under POCSO Act, 2012, it is the duty of the Courts to balance the aggravating and mitigating circumstances. To balance such aspects, the guidelines in Bachan Singh v. State of Punjab and further reiterated in the case of Machhi Singh and Ors. v. State of Punjab and in the case of Sushil Murmu v. State of Jharkhand MANU/SC/1020/2003 : (2004) 2 SCC 338, will continue to apply. Further, repeatedly, it is said by this Court, in the various judgments that the aggravating and mitigating factors are to be considered with reference to the facts of each case and there cannot be any hard and fast rule for balancing such aspects."

53) From the above, it is very evident that even in cases arising under the provisions of POCSO Act, it is the duty of the Court to balance the aggravating and mitigating circumstances following the guidelines laid down in Bachan Singh's case reiterated in Machhi Singh's case and in the case of ***Sushil Murmu v. State of Jharkhand*** [(2004) 2 SCC 338].

54) The material on record further show that the conviction in the instant case was based on circumstantial evidence and the prosecution mainly relied upon two circumstances viz., last seen and whitish stains on the clothes of the deceased, which tallied with the DNA profiling of the accused. Dealing

with cases arising out of the circumstantial evidence, the Apex Court in ***Aloke Nath Dutta and ors. vs. State of West Bengal*** [11] held that the death penalty should ordinarily not be awarded in a case arising out of circumstantial evidence and that there should be some special reason for awarding death penalty. Paragraph 174 of the said judgment reads as under :

> "174. There are some precedents of this Court e.g. (Sahdeo v. State of U.P.) [(2004) 10 S.C.C. 682] and (Sk. Ishaque v. State of Bihar) [(1995) 3 S.C.C. 392] which are authorities for the proposition that if the offence is proved by circumstantial evidence ordinarily death penalty should not be awarded: We think we should follow the said precedents instead and, thus, in place of awarding the death penalty, impose the sentence of rigorous imprisonment for life as against Aloke Nath. Furthermore we do not find any special reason for awarding death penalty which is imperative."

55) In the case of ***Bishnu Prasad Sinha v. State of Assam*** [(2007) 11 S.C.C. 467] the Apex Court has held that ordinarily, death penalty would not be awarded, if the guilt of the accused is proved by circumstantial evidence, coupled with some other factors that are advantageous to the convict. Paragraph 55 of the said judgment reads as under:

> "55. The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the Appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the

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[11] (2007) 12 SCC 230

> proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, Appellant 1 showed his remorse and repentance even in his statement Under Section 313 of the Code of Criminal Procedure. He accepted his guilt."

56) In the case of ***Swamy Shraddananda v. State of Karnataka*** [(2007) 12 SCC 288], the Apex Court held that the convictions based on seemingly conclusive circumstantial evidence, should not be presumed to be fool-proof. Paragraph 87 of the said judgment reads as under:

> "87. It has been a fundamental point in numerous studies in the field of death penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as foolproof incidences and the fact that the same are' based on circumstantial evidence must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability calculus, must attract negative attention while deciding maximum penalty for murder."

57) ***Sunil vs. State of Madhya Pradesh*** [12] was a case where the accused aged about 25 years was charged for the offence of rape and murder of a 4 years old child. The sentence of death awarded by the trial court and affirmed by the High Court was altered to imprisonment for life. In the said judgment, mitigating circumstance which weighed with

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[12] (2017)4SCC 393

the Court was age of the accused and the reformation and rehabilitation of the accused, which were not considered by the courts below while awarding death sentence.

58) In ***Rajendra Prahladrao Wasnik v. State of Maharashtra***, (Review Petition (Crl.) Nos. 306-307 of 2013) the accused was found guilty of rape and murder of three years old child. The death sentence was commuted to life imprisonment with a rider that the accused shall not be released from custody for the rest of his normal life.

59) In ***Sandesh vs. State of Maharashtra*** [13] the Apex court once again acknowledged the principle that it is for the prosecution to lead evidence to show that there is no possibility that the convict cannot be reformed.

60) Similarly, in ***Mohinder Singh vs. State of Punjab*** [14] the court held that life life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the "rarest of rare" doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme.

61) From the judgments referred to above, it is very clear that various factors have to be taken into consideration while

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[13] (2013) 2 SCC 479
[14] (2013)3SCC 294

awarding death sentence. The factors being, age of the criminal, social status, his background, whether he was convicted or confined, any possibility of reformation and rehabilitation or whether it is a case where the reformation is impossible and if let free, whether he would be a menace to the society.

62) At this stage, learned Public Prosecutor would submit that in view of the judgment of the Apex Court in ***Ravi's case*** (supra) the finding of the trial court in awarding death sentence cannot be said to be improper. In the said case, the deceased, who was a girl, aged about 2 years, was found undressed underneath the cot of the accused and that the accused was present in the house at that point of time. There was bleeding from her private parts and no explanation was forthcoming from the accused as to how the girl came into room. Under those circumstances, the Apex Court by majority of two judges awarded death sentence. But, here is a case where the conviction is not for causing the death of the deceased. It is for the offence punishable under Section 5(j)(iv) read with Section 6 of POCSO Act. Apart from that it is also to be noted here that the present case is based only on circumstantial evidence, as none have seen the accused committing the offence or the accused carrying the girl or being in his custody or throwing her over the compound wall. Though the prosecution tried to show that the offence was

initially committed in the bathroom, but no evidence to that effect is placed on record.

63) At this stage, it is also to be noted that the 'Residual doubt' is a mitigating circumstance, sometimes, used and urged before the Jury in the United States and, generally, not found favour by the various Courts in the United States. We also in this country expect the prosecution to prove its case beyond reasonable doubt, but not with absolute certainty. But, in between "reasonable doubt" and "absolute certainty", a decision maker's mind may wander possibly, in a given case, he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". [(***Ashok Debbarma's case*** (supra)].

64) ***Vijay Raikwar v. State of Madhya Pradesh***[15] was a case involving rape and murder of a girl aged about 7½ years, while confirming the conviction for the offences punishable Under Section 376(2)(f) read with Section 201 Indian Penal Code and also Under Sections 5(i), 5(m) and 5(r) read with Section 6 of the POCSO Act, the Apex Court commuted the death sentence to life imprisonment.

65) In ***Nand Kishore v. State of Madhya Pradesh*** (Criminal Appeal No. 94 of 2019, dated 18.1.2019) and in ***Raju Jagdish Paswan v. State of Maharashtra*** [AIR 2019

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[15] (2019) 4 S.C.C. 210

(S.C.) 897], the Apex Court modified the death penalty to that of life imprisonment, without any remission.

66) At this stage learned Public Prosecutor would contend that the case of the appellant stands on the different footing as he was involved once in a case relating to child abuse. But, no evidence has been placed on record in support of the same, except a stray sentence in the evidence of the Investigating Officer that at the age of 11 years, the accused was involved in a child abuse case, which ended in an acquittal. Neither the facts of the case nor the grounds of acquittal are placed on record. Therefore, we feel that the said circumstance shall not weigh with the court while dealing with the sentence to be awarded. Since the accused was aged about 25 years at the time of the incident; eking out his livelihood by working as a cleaner in the lorries owned by P.W.8; being from a lower strata of the society and not in a position to defend himself by engaging a lawyer of his choice and as there is possibility of reformation of the accused, since the prosecution never pleaded that it is not possible to reform him, we feel that ends of justice would be met if the sentence of death imposed on the accused under Section 5(j)(iv) read with Section 6 of POCSO Act is altered to imprisonment for life without any remissions, while confirming the conviction and sentence imposed by the trial court under Section 5(m) read with Section 6 of POCSO Act; conviction and sentence imposed by the trial court under Section 302 I.P.C.;

conviction and sentence imposed under Section 201 I.P.C.; and conviction under Sections 376A and 376 AB I.P.C. The substantive sentence of imprisonment shall run concurrently.

67) The reference is answered accordingly, while Criminal Appeal filed by the accused against the Judgment, dated 24.02.2020, in POCSO S.C. No.60 of 2019 on the file of the I Additional District and Sessions Judge-FAC-Judge for Special Court for Speedy trial of offences under POCSO Act, Chittoor, is dismissed modifying the sentence as indicated above.

Consequently, miscellaneous petitions pending, if any, shall stand closed.

JUSTICE C.PRAVEEN KUMAR

JUSTICE K.SURESH REDDY

Date : 29.5.2020.
SKMR/SM