IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.338 of 2021

Arising Out of PS. Case No.-187 Year-2020 Thana- SIDHWALIYA District- Gopalganj

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Jai Kishor Sah

... ... Appellant

Versus

The State of Bihar

... ... Respondent

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with

DEATH REFERENCE No. 4 of 2021

Arising Out of PS. Case No.-187 Year-2020 Thana- SIDHWALIYA District- Gopalganj

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The State of Bihar

... ... Petitioner

Versus

Jai Kishor Sah

... ... Respondent

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Appearance :

(In CRIMINAL APPEAL (DB) No. 338 of 2021)

For the Appellant/s : Mr. Sarva Deo Singh, Advocate
Mr. Sanjay Kumar, Advocate

For the Respondent/s : Mr. Abhimanyu Sharma, APP

For the Informant : Mr. Satish Kumar, Advocate

(In DEATH REFERENCE No. 4 of 2021)

For the Petitioner/s : Mr.Xxxxx

For the Respondent/s : Mr.Xxxxxxxxx

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CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date : 26-06-2023

The court of learned 6th Additional Sessions Judge-cum-Special Judge (POCSO), Gopalganj, has, by a judgment dated 10.02.2021, passed in POCSO Case No. 24 of 2020 (CIS No. 24 of 2020) arising out of Sidhwaliya P.S. Case No. 187 of 2020, held the appellant Jai Kishor Sah guilty of the offences punishable

under Section 376-AB, 302 read with 201/34 of the IPC and Sections 5/6, 9/10 of the Protection of Children from Sexual Offences Act ('POCSO Act' for short). After having convicted the appellant for commission of the aforesaid offences, the learned trial court has sentenced him to death and the appellant has been directed to be hanged by neck till his last breath for the offence punishable under Section 302 of the IPC, by an order dated 20.02.2021. The appellant has also been awarded a fine of Rs. 50,000/- for the aforesaid offence and in case of default of payment of fine, the appellant has been sentenced to undergo imprisonment for a year. For the proved offence punishable under Section 6 of the POCSO Act, the appellant has been awarded life imprisonment till the remainder of his natural life with a fine of Rs. 50,000/- with a default clause. Further, for the proved offence punishable under Section 10 of the POCSO Act, the appellant has been sentenced to imprisonment for 7 years with fine, with a default clause. No separate sentence has been imposed for the offence punishable under Section 376-AB of the IPC resorting to Section 42 of the POCSO Act, in the light of the sentence of life imprisonment awarded for the offence punishable under Section 6 of the POCSO Act. Further the appellant has been sentenced to undergo imprisonment for 5 years for the charge punishable under Section 201 of the IPC with a fine of Rs. 10,000/-, with default

clause. For brevity and clarity, the findings of conviction and imposition of sentences are being placed herein below in tabular form:

Cr. Appeal (D.B.) No. 338 of 2021				
	Convicted under Sections	Sentence		
Jai Kishor Sah		Imprisonment	Fine (Rs.)	In default of fine
	302 of the IPC	Death. To be hanged by neck till his last breath.	50,000/-	S.I. for one year
	201 of the IPC	R.I. for five years	10,000/-	S.I. for six months
	376-AB of the IPC	-	-	-
	6 of the POCSO Act	Life Imprisonment for the remainder of natural life	50,000/-	S.I. for one year
	10 of POCSO Act	R.I. for seven years	10,000/-	S.I. for six months

2. All the sentences have been directed to run concurrently.

3. The learned trial court, after having passed the sentence of death, has submitted the records of the trial to this Court for confirmation of the sentence in accordance with Section 366(1) of the CrPC giving rise to Death Reference No. 4 of 2021. The convict has preferred an appeal against the judgment of conviction and the order of sentence passed by the learned trial court under Section 374(2) of the CrPC. This is the background in

which these two matters have been considered by this Court and are being disposed of by the present judgment and order.

4. We had heard Mr. Sarva Deo Singh, learned counsel for the appellant in Criminal Appeal (DB) No. 338 of 2021 on 19.01.2023. During the course of hearing of the appeal he had submitted on 19.01.2023, that he would be addressing the Court on the point of sentence, he having found it difficult to assail the finding of conviction recorded by the trial court on merits in the facts and circumstances of the case in the light of the evidence adduced at the trial.. Accordingly, these matters were heard on 02.02.2023.

5. Mr. Abhimanyu Sharma, learned Additional Public Prosecutor addressed this Court on behalf of the State whereas Mr. Satish Kumar Sinha has represented the informant.

6. We have perused the impugned judgment and order and the records of the trial court including the prosecution's evidence in order to satisfy ourselves about the correctness of the finding of conviction recorded by the trial court.

7. It is the prosecution's case as disclosed in the written report of the informant addressed to the Station House Officer (SHO), Sidhwaliya, Gopalganj that his daughter, aged about 9 years (the victim) used to go to the appellant's place everyday to babysit his child. On 25.08.2020 also, the victim had gone to the

appellant's house. The informant remained under the impression that she was in the appellant's house. As she did not returned till 04:00 pm, all the family members of the informant started searching her and went to the house of the appellant. The appellant's house was found locked. The informant asserted in his FIR that the victim used to return by 1:00-2:00 pm. As she had not returned and the appellant was also traceless, the informant suspected that the appellant might have killed the victim after committing rape, and escaped to avoid criminal prosecution. From the records, it further appears that the appellant was apprehended by the police on 25.08.2020 itself from behind the house of one Robin Pandey where he had concealed himself. According to the prosecution's case, he confessed his guilt before the police. Based on the confessional statement of the appellant dead body of the victim was recovered from the appellant's house which was found packed in a plastic sack. An inquest report was prepared and the dead body of the victim was sent for post-mortem examination. The post-mortem examination found cause of death as asphyxia due to throttling with associated evidence of sexual assault present.

8. The police upon completion of investigation submitted its chargesheet and subsequently cognizance was taken for the offences punishable under Sections 376-AB, 302, 201 of the IPC and Sections 4, 6 and 8 of the POCSO Act on 26.11.2020.

The charge was framed on 15.12.2020 for commission of the offences punishable under Section 376-AB, 302, 201/34 of the IPC and Section 5/6 and 9/6 of the POCSO Act. The appellant denied the charges and claimed to be tried. At the trial, prosecution examined eight witnesses, namely, viz., the informant (PW-4), the Investigating Officer (PW-7), the Doctor (PW-8) who was one of the members of the Medical Board which had conducted the autopsy, the grandfather of the victim (PW-2), mother of the victim (PW-3) and uncles of the victim (PW-5 and PW-6). In addition the prosecution brought on record following documentary evidence to substantiate the charge against the appellant:-

(i) Ext. 01 Signature of Chandan Kumar on inquest report.

(ii) Ext. 02 Signature of Chandan Kumar on seizure list.

(iii) Ext. 03 Endorsement on written report.

(iv) Ext. 04 Formal F.I.R.

(v) Ext. 05 Confessional statement of Jai Kishore Sah.

(vi) Ext. 06 Inquest report.

(vii) Ext. 07 Seizure list of the clothes.

(viii) Ext. 08 Post Mortem Report

(ix) Ext. 09 F.S.L. Report.

9. After closure of the evidence of the prosecution, the appellant was questioned under Section 313 of the CrPC, based on the evidence adduced at the trial so as to give the appellant a**n** opportunity to explain the circumstances emerging against him. The appellant, in response to the questions under Section 313 of the CrPC, simply denied the evidence against him and vaguely answered that he was falsely implicated. No evidence, however, was adduced on behalf of the defence. The trial court after having appreciated the evidence on record has recorded the finding of conviction as noted above and has imposed various sentences which have already been mentioned.

10. There appears to be no controversy over the fact that the victim was aged nearly 9 years and in any case less than 12 years as on the date of occurrence. Before referring to the depositions of the witnesses which proved the prosecution’s case that the victim’s dead body was found in one of the rooms of the house of the appellant, based on the disclosure made by him to the police immediately after he was apprehended, we consider it appropriate, in the aforesaid circumstance, to refer to the medical evidence , i.e. the post-mortem report (Exhibit-8), which has been proved by Dr. A.K. Akela (PW-8), who was a member of the Board constituted for the examination of the dead body of the

victim. He proved following injuries in his deposition, which were found on the person of the victim: -

"External Examination –

Rigor mortis present on both upper and lower limb, both eyes closed, mouth closed, both lips swollen and bluish in color, blood stained present over both nostril, multiple bruises on lower abdomen and upper thigh bilateral. Blood stained in perineum, bruises over mid beck both side, size 1/2' x 1/2'. Vagina wide open with tear in vulva and vagina at 06 o'clock in position, about 1/2'x1/4' x muscle deep, vulva swelling present, Vaginal swab taken for investigation.

On Dissection -

Neck and thorax – Trachea intact, Hyoid bone fracture, both lung congested, heart – right and left chamber partially filled with blood. All viscera intact. Bladder empty. Uterus small and intact. Vaginal swab report D.R. No.-60 dated 26.08.2020 – no spermatozoa seen.

Time since death – 24 hrs."

11. He also deposed, based on the entries in the postmortem report that asphyxia due to throttling was the cause of death of the victim and there was associated evidence of sexual assault present.

12. The Investigating Officer (PW-7) deposed at the trial that after the appellant was apprehended, he confessed his guilt and, based on his confession and identification, the dead body of

the victim was recovered from the house of the appellant. The confessional statement was in the handwriting of the appellant himself with his signature, wherein, he vividly described the manner in which the occurrence had taken place. It is noticeable that the appellant was apprehended at 05:45 P.M. on 25.08.2020 by the police when he had concealed himself somewhere behind the house of one Banti Pandey.

13. PW-1, while supporting the prosecution's case, deposed that the appellant was apprehended by the police on 25.08.2020, when he had concealed himself at a lonely place and disclosed to the police officials, during the course of investigation, that he had packed the dead body of the victim in a sack and concealed the same in his house so that he could dispose it of in the night. He also deposed that when the door of the house of the appellant was opened, he had seen the dead body of the victim in a sack, which was duly recovered by the police. He proved his signature on the Inquest Report (Exhibit-1) and the Seizure List (Exhibit-2).

14. PW-2, the grandfather of the victim, while supporting the initial version of the prosecution's case, as disclosed in the FIR, deposed that the appellant, after his arrest, had disclosed that the dead body of the victim was lying in his house, in his confessional statement before the police, whereupon

the dead body of the victim was recovered from his (the appellant's) house.

15. PW-3, the mother of the victim, also deposed that when the lock of the house of the appellant was broken open, the dead body of the victim was recovered from the sack concealed in the house.

16. Similarly, PW-4, the informant, deposed at the trial that the door of the appellant’s house was found locked when he had gone there in search of the victim and subsequently after the appellant was apprehended by the police, he disclosed that he had raped the victim, killed her by throttling and kept her dead body in his house in a sack so that he could submerge it in the river, in the night. When the lock was broken-opened, the dead body of the victim was found concealed in a sack kept in a bed *(chauki)* in the house of the appellant.

17. PW-5, the uncle of the victim, also supported the prosecution’s case that on the disclosure made by the appellant to the police after his arrest from behind the house of Banti Pandey, the dead body of the victim was recovered from the appellant’s house after breaking open the lock. He is an eyewitness to the recovery of the dead body of the victim from the house of the appellant.

18. Another uncle of the victim (PW-6) also supported the prosecution's case that the dead body of the victim was recovered from the house of the appellant in his presence after the disclosure made by him before the police in his confessional statement after he was arrested.

19. The appellant did not take any clear defence at the trial and simply denied the materials which emerged against him during the course of the trial, in his answer to the questions put by the learned trial court in conformity with Section 313 of the CrPC. The appellant did not explain the circumstance in which the dead body of the victim was recovered from his house.

20. Mr. Sarva Deo Singh, learned counsel appearing on behalf of the appellant has submitted, though feebly, that the entire occurrence appears to be the handiwork of Banti Pandey. He has submitted that as it is a case of circumstantial evidence, the appellant ought not to have been convicted as the complete chain of circumstances pointing towards the appellant's guilt as the only hypothesis cannot be said to have been proved beyond all reasonable doubts.

21. Mr. Abhimanyu Sharma, learned Additional Public Prosecutor appearing on behalf of the State, has submitted that the appellant, in his confessional statement during the course of the investigation, had disclosed to the police that when the victim had

come to his house as usual at about 11:00 A.M. on 25.08.2020, his wife was not present in the house and taking advantage of the circumstance, he had committed penetrative sexual assault upon the victim. Further, as the victim was under severe pain and was attempting to scream, the appellant had pressed her mouth and nose leading to her death. In the meanwhile, soon thereafter, the appellant's wife returned and having noticed the entire occurrence, started abusing the appellant. After some altercation, the wife of the appellant also left the house. The appellant disclosed the entire circumstance to Banti Pandey, who advised him to throw away the dead body of the deceased in a river. Accordingly, the appellant packed the dead body of the deceased in a plastic sack and it was further packed in a white plastic sack. He, thereafter, had kept the dead body in the plastic sacks in his house and had gone to the house of Banti Pandey. They had decided to dispose of the dead body in the night and when he and Banti Pandey had gone to have toddy, he was apprehended by the police. Based on the said confessional statement, the dead body of the victim was recovered from the house of the appellant, he contends. He has argued that it is not a simple case of discovery of a fact based on the disclosure made by an accused in a confessional statement before the police, rather it is a case of recovery of the dead body of a minor girl below 12 years, who was found murdered after commission of

rape from the house of the appellant. The appellant did not explain the circumstances in which the dead body of the victim was found concealed in the appellant's house. In such circumstance since as the medical evidence corroborates sexual assault on the victim, which was disclosed by the appellant in his confessional statement, the finding of conviction is just and proper.

22. It has also been argued that it is one of the rarest of the rare cases where a minor girl below 12 years of age has been killed by the appellant after commission of rape and, therefore, the sentence of death imposed by the trial court cannot be said to be unjustified.

23. Mr. Sarva Deo Singh, learned counsel appearing on behalf of the appellant, on the other hand, has placed heavy reliance on the Supreme Court's decision in the case of ***Pappu v. State of U.P.***, reported in **(2022) 10 SCC 321**, whereby the Supreme Court, in similar set of facts, commuted the death sentence awarded to the appellant of that case into that of imprisonment for life. He has argued that this case does not fall within the category of the "rarest of the rare" case.

24. We have carefully gone through the impugned judgment and order of the trial court as also the records of the trial court. We have given our thoughtful considerations to the rival submissions made on behalf of the parties. It is manifest from the

evidence of the prosecution's witnesses that the dead body of the victim was recovered from the house of the appellant. The dead body of the victim was not just lying, but it was found concealed in a plastic sack. There is consistent evidence on record that the house of the appellant was locked. It is not the appellant's defence that he did not reside in the house. He did not explain the circumstance how the dead body of the victim was lying in his house, even when an opportunity was given to him to explain the circumstances under Section 313 of the CrPC. The medical evidence suggests that the victim was sexually assaulted and indicates penetrative sexual assault. The recovery of the dead body of the victim, at the instance of the disclosure made by the appellant to the police during the course of the investigation, proves that he had the knowledge about the fact that the dead body of the victim was lying in his house, which was locked from outside. The prosecution's witnesses are consistent in their deposition that the victim used to go to the appellant's house everyday for babysitting and, on the fateful day, she had not returned on her usual time. The circumstances suggest presence of the victim in the house of the appellant when she was killed. Recovery of the victim's dead body from the house of the appellant, based on the revelation made by the appellant, is a strong circumstance pointing towards the guilt of the appellant.

25. It is trite that in a case of circumstantial evidence, the inferences are drawn by the Courts from the proved facts as circumstances from which inference can be deduced. An inference is to be drawn by the Court in the case of the circumstantial evidence keeping in mind as to whether the chain of circumstances is complete or not. Only when the circumstances, if collectively considered, lead to the only irresistible conclusion that accused is the perpetrator of the crime, he can be held guilty of the offence based on the circumstantial evidence.

26. The five principles lucidly laid down by a three-Judge Bench of the Supreme Court in the case of ***Sharad Birdhichand Sarda v. State of Maharashtra***, reported in **(1984) 4 SCC 116**, have been consistently followed by the Courts for appreciation of circumstantial evidence. Paragraphs 152 to 154 of the said decision, read thus: -

> "***152.*** *Before discussing the cases relied upon by the High Court we would like to cite a few decisions on the nature, character and essential proof required in a criminal case which rests on circumstantial evidence alone. The most fundamental and basic decision of this Court is Hanumant v. State of Madhya Pradesh [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] . This case has been uniformly followed and applied by this Court in a large number of later decisions up-to-date, for instance, the cases of Tufail (Alias) Simmi v. State of Uttar Pradesh [(1969) 3 SCC 198 : 1970 SCC (Cri)*

55] and Ramgopal v. State of Maharashtra [(1972) 4 SCC 625 : AIR 1972 SC 656] . It may be useful to extract what Mahajan, J. has laid down in Hanumant case [(1952) 2 SCC 71 : AIR 1952 SC 343 : 1952 SCR 1091 : 1953 Cri LJ 129] :

> *"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."*

153. *A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*

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

It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao

Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made: [SCC para 19, p. 807: SCC (Cri) p. 1047]

> *"Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*
>
> *(3) the circumstances should be of a conclusive nature and tendency,*
>
> *(4) they should exclude every possible hypothesis except the one to be proved, and*
>
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*
>
> 154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

27. Applying those principles in the present case, we notice that the prosecution was able to conclusively prove that the dead body of the victim was recovered from the house of the appellant. Further, the said recovery was made based on the disclosure made by the appellant. The appellant was charged of commission of offence punishable under Sections 5/6 and 9/10 of

the POCSO Act in addition to Sections 302, 201 read with 34 and Section 376-AB of the IPC. The prosecution was able to make out a case of penetrative sexual assault and murder of the victim at the time of framing of charge with the aid of postmortem report showing *antemortem* injury of sexual assault and the fact that the victim's dead body was found in the house of the appellant. It has never been the appellant's defence that he was not the only male member who lived in the house. The prosecution having established these two aspects, in our opinion, Section 29 of the POCSO Act comes into operation with full force. Section 29 of the POCSO Act reads thus: -

> ***"29. Presumption as to certain offences***.— *Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved."*

28. In the present case, there was an onus upon the appellant to prove contrary to what was being alleged against him and that he had not committed the offence punishable under the provisions of the POCSO Act, since in our considered opinion the prosecution was able to make out of case of commission of offence punishable under section 6 of the POCSO Act.

29. Considering all these circumstances together, as noted above, we are of the considered view that the circumstances

proved at the trial by way of evidence point towards one and the only hypothesis that the victim was killed by the appellant after having sexually assaulted her. The chain of circumstances are complete in the present case, which are incapable of explanation of any other hypothesis than that of the appellant's guilt. We, therefore, see no reason to interfere with the conviction recorded by the trial court in its impugned judgment.

30. The question now is as to whether the act of the appellant proved at the trial falls in the category of "rarest of the rare case" to sustain the sentence of death imposed by the learned trial court for the offence punishable under Section 302 of the IPC. Section 354 (3) of the CrPC reads as under:-

> "**354. Language and contents of judgment**.—
>
> xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
>
> (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

31. The aforesaid provision requires the Courts to record 'special reasons' in case it decides to impose sentence of death in relation to an offence which is punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years. In case of ***Bachan Singh v. State of Punjab***, reported in **(1980) 2 SCC 684**, the Supreme Court construed the expression

"special reasons" in the context of Section 354 (3) as "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Going further, the Supreme Court concluded that extreme penalty should be imposed only in extreme cases, which was the legislative policy underlying Section 354 (3) of the CrPC. Having said so, the Supreme Court in the case of ***Bachan Singh*** (supra) ruled, attuned to the legislative policy delineated in Section 354 (3) that the normal rule is that offence of murder should be punished with sentence of life imprisonment. Only when the Court finds that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its execution and manner of its execution of great danger to the society at large, the Court may impose the death sentence. Propounding the theory of the "rarest of the rare cases", the Supreme Court in the case of ***Bachan Singh*** (supra), laid down the law as under, in paragraph 209:-

> "***209.*** *There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for*

them. Facts and Figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

32. Following dictum in the case of ***Bachan Singh*** (supra) and taking the doctrine of "rarest of rare case", further, the Supreme Court in the case of **Machhi Singh & Ors. Vs. State of Punjab** reported in **(1983) 3 SCC 470** made following observations in paragraph, relevant portion whereof is being reproduced hereinunder: -

32. …… Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by "killing" a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so "in rarest of rare cases" when its

collective conscience is so shocked that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, ...”

33. Explaining further the proposition enunciated in the case of ***Bachan Singh*** (supra), ***Machhi Singh*** (supra) laid down the guidelines/principles for imposition of death sentence in paragraphs 38 to 40, which read thus: -

*“**38.** In this background the guidelines indicated in Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] :*

“(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

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

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

imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

39. *In order to apply these guidelines inter alia the following questions may be asked and answered:*

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

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

40. *If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."*

34. In the case of ***Rameshbhai Chandubhai Rathod v. State of Gujarat*****,** reported in **(2009) 5 SCC 740**, a two-Judge Bench of the Supreme Court had the occasion to deal with an issue of imposition of sentence in the case of rape and murder of a young child by a young man. There being difference of opinion, when the matter was placed before a three-Judge Bench, the

Supreme Court in case of ***Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*****,** reported in **(2011) 2 SCC 764** took a view that the trial court was obliged to render a finding on whether the accused could be reformed and rehabilitated and that the young age of the accused (only 27 years old) was a mitigating factor operating in his favour. Finally, the three-Judge Bench in the case of ***Rameshbhai Chandubhai Rathod*** (supra) commuted the death sentence into that of life imprisonment for the remainder of the natural life of the appellant of that case, but subject to any remission or concession at the instance of the Government for the good and sufficient reasons.

35. In case of ***Ravishankar v. State of M.P.*****,** reported in **(2019) 9 SCC 689**, the Supreme Court, though made it clear that even in the case where the conviction is based on circumstantial evidence, capital punishment could indeed be awarded, but then proceeded to observe that the Supreme Court had been increasingly applying the theory of "residual doubt", which effectively create a higher standard of proof over and above "beyond reasonable doubt" standard, used at the stage of conviction as a safeguard against routine capital sentencing keeping in mind the irreversibility of death. Applying this theory and indicating certain "residual doubts", the Supreme Court in the case of ***Ravi Shankar*** (supra), which related to offence of

kidnapping, rape and resultant death of a 13 years old girl and destruction of an evidence, held that the said case fell short of "rarest of rare" case. In the said case also, the Supreme Court commuted the death sentence into one of the life for the remainder of natural life.

36. The theory of 'residual doubt' in case of circumstantial evidence was referred to in case of ***Shatrughna Baban Meshram Vs. State of Maharashtra*** reported in **(2021) 1 SCC 596**, in which the Supreme Court, going by higher or stricter standard for imposition of death penalty, a sentence alternative to death sentence was found to be appropriate. In case of ***Rajendra Pralhadrao Wasnik Vs. State of Maharashtra*** reported in **(2019) 12 SCC 460**, the appellant before the Supreme Court was convicted of the offence punishable under Section 376 (2) (f), 377 and 302 of the IPC for rape and murder of a three (3) year old girl on the basis of circumstantial evidence and was sentenced to death. In appeal, the Supreme Court, though did not lay down any hard and fast rule that death sentence could not be awarded after conviction was based on circumstantial evidence, but proceeded to commute death sentence into life after noticing that the trial court and the High Court did not consider various factors including the probability of the appellant before the Supreme Court to be reformed. The Supreme Court held in paragraph 47 as under:-

*"**47.** Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be overemphasised. Until Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] , the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in Bariyar [Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, (2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] and in Sangeet v. State of Haryana [Sangeet v. State of Haryana, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in Sangeet [Sangeet v. State of Haryana, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not*

be possible. If that should happen, the option of a long duration of imprisonment is permissible."

37. In the case of ***Kalu Khan v. State of Rajasthan*****,** reported in **(2015) 16 SCC 492**, the Supreme Court, while examining various factors, took into account the criminal antecedent of an accused and that the circumstantial evidence included extra judicial confession as the factors for commuting the sentence of death into that of imprisonment for life.

38. Socio-economic factors relating to a convict may also be taken into consideration for the purpose of deciding whether to award life sentence or death sentence was emphasized by the Supreme Court in the case of ***M.A. Antony v. State of Kerala*****,** reported in **(2020) 17 SCC 751**. In the case of ***Mohd. Mannan v. State of Bihar*****,** reported in **(2019) 16 SCC 584**, the Supreme Court held that in deciding whether a case falls within the category of the rarest of the rare, the brutality, and/or gruesome and/or heinous nature of crime is not the sole criterion. It is not just the crime, which the Court is to take into consideration, but also the criminal, state of his mind and his socio-economic background. Awarding death sentence is exceptional and life imprisonment is the rule, the Supreme Court held. What may be the aggravating circumstances and mitigating circumstances from the point of view of imposition of death sentence or in the

alternative, imprisonment for life has been keenly addressed, with reference to the decisions in the case of ***Bachan Singh*** (supra) and ***Machhi Singh*** (supra), **in the case** of ***Shankar Kisanrao Khade v. State of Maharashtra***, reported in **(2013) 5 SCC 546**, paragraph 49 of which reads as under: -

> ***"49.*** *In Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] cases, this Court laid down various principles for awarding sentence : (Rajendra Pralhadrao case [Rajendra Pralhadrao Wasnik v. State of Maharashtra, (2012) 4 SCC 37 : (2012) 2 SCC (Cri) 30] , SCC pp. 47-48, para 33)*
>
> *"'* ***Aggravating circumstances — (Crime test)***
>
> *(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.*
>
> *(2) The offence was committed while the offender was engaged in the commission of another serious offence.*
>
> *(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.*
>
> *(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.*
>
> *(5) Hired killings.*

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances — (Criminal test)

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in

contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

*(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.' [**Ed.**: As observed in Ramnaresh v. State of Chhattisgarh, (2012) 4 SCC 257, pp. 285-86, para 76.] "*

39. In case of ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra***, reported in **(2009) 6 SCC 498**, the Supreme Court has ruled that the nature, motive and impact of crime, culpability, quality of evidence, socio-economic circumstances, impossibility and rehabilitation are some of the factors, the Court may take into consideration while dealing with such cases. The decisions on the point of sentencing a convict to death in exceptional circumstances by recording reasons has been elaborately dealt with by the Supreme Court in case of ***Pappu*** (supra). In case of ***Pappu*** (supra), a seven year old girl child was brutally raped and murdered. The Supreme Court viewed that the heinous nature of crime definitely disclosed aggravating circumstances, particularly when the manner of its commission showed disturbing and shocking conscious. The Supreme Court, however, noticed that the appellant had no criminal antecedent and came from a very poor socio-economic background and had a family comprising wife, children and aged father and had unblemished jail conduct. The Supreme Court opined that when all these factors were added together and it was also visualized that there was nothing on record to rule out probability of reformation and rehabilitation of the appellant, it would be unsafe to treat the case falling in “rarest of the rare” category.

40. In the present case, the appellant, on the date of filing of the appeal in 2021, was 24 years. He has a family with his wife and two infants, as has emerged from the materials on record. There is nothing on record to demonstrate that he has any criminal antecedent. Further, there is nothing against him as regards his jail conduct. We need not go into the theory of a 'residual doubt', his conviction being based on circumstantial evidence, as propounded in the case of ***Shatrughna Baban Meshram*** (supra) in the present set of facts and circumstances of the case, as noted above, for the purpose of commuting the appellant's death sentence to an appropriate sentence of imprisonment for life for the offence punishable under Section 302 of the IPC. Applying the 'crime test', we do hold that the said test is fully satisfied against the appellant considering the ghastly manner in which the crime was executed by the appellant. However, applying the 'criminal test', as noted above, we are of the view, taking a cue from the Supreme Court's decision in case of ***Pappu*** (supra), that the present case cannot be said to be falling in the category of "rarest of rare" case and it cannot be said that there is no chance of the appellant's reformation considering his age, family and socio-economic background as to require the termination of his life for his culpability.

41. We consider it, just and proper, to apply the course adopted in various cases involving crimes of similar nature to commute the sentence of capital punishment to life imprisonment without application of the provisions of premature release/remission before mandatory actual imprisonment for a substantial length of time.

42. Accordingly, the sentences imposed by the trial court for various offences found to have been proved against the appellant stand modified in the following terms.

(i) The death sentence awarded to the appellant for the offence punishable under Section 302 of the IPC, in the facts and circumstances of the case, is commuted into that of imprisonment for life with the stipulation that the appellant shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of 25 years.

(ii). The trial court has sentenced the appellant to life imprisonment for remainder of the appellant's natural life for the proved offence punishable under Section 6 of the POCSO Act with a fine of Rs. 50,000 and in default for payment of fine to serve simple imprisonment for one year. The trial

court, applying Section 42 of the POCSO Act has not passed a separate sentence for the proved offence punishable under Section 376-AB of the IPC. In the present facts and circumstances, we consider it just and proper to modify the sentence by imposing punishment of imprisonment for a term of 20 years for the offence punishable under Section 376-AB of the IPC with a fine of Rs. 50,000 with the stipulation that in the default of payment of find, the appellant shall serve simple imprisonment for one year.

(iii) The sentence for the offence punishable under Section 6 of the POCSO Act is modified to rigorous imprisonment for a term of 20 years with a fine of Rs. 50,000, and in default of payment of fine he will have to serve simple imprisonment for one year.

(iv) The sentences awarded to the appellant for other offences found proved against him are confirmed.

(v) All the sentences shall run concurrently.

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

(vii) The direction of the trial court for payment of compensation to the victim is also upheld.

43. In addition, it is directed that half of the fine imposed by way of sentence shall be payable to the father of the victim, who has been identified as the survivor of the victim of sexual assault, in addition to the compensation awarded by the impugned order.

44. Consequently, Criminal Appeal (DB) No. 338 of 2021 is partly allowed and the reference made by the trial court under Section 366 (1) of the CrP.C giving rise to death reference No. 4 of 2021 stands answered.

(Chakradhari Sharan Singh, J)

I agree.
Rajesh Kumar Verma, J:

(Rajesh Kumar Verma, J)

Pawan/Ranjan/
Nishant/-

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