HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

D.B.: Hon'ble Shri P.K. Jaiswal &
Hon'ble Shri S.K. Awasthi, JJ.

Criminal Reference No.03/2018

The State of Madhya Pradesh
Versus

Naveen @ Ajay s/o Datta Ji Rao Gadke

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Mr. Manoj Dwivedi, learned Additional Advocate General for the State of Madhya Pradesh.
Mr. Amit Dubey, amicus curiae for respondent / accused Naveen @ Ajay s/o Datta Ji Rao Gadke.

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Criminal Appeal No.3830/2018

Naveen @ Ajay s/o Datta Ji Rao Gadke
Versus

The State of Madhya Pradesh

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Mr. Avinash Sirpurkar, learned Senior Counsel along with Ms. Seema Sharma, learned counsel for appellant / accused Naveen @ Ajay s/o Datta Ji Rao Gadke.
Mr. Manoj Dwivedi, learned Additional Advocate General for the respondent / State of Madhya Pradesh.

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J U D G M E N T
(Pronounced on this 24th day of December, 2018)

Per S.K. Awasthi, J.

The 5th Additional Sessions Judge, Indore, District Indore (MP) has awarded the sentence of death to the accused Naveen @ Ajay s/o Datta Ji Rao Gadke; and has made a reference of the proceedings to this Court for confirmation of the death penalty passed by the impugned judgment.

2. Appellant Naveen @ Ajay s/o Datta Ji Rao Gadke has preferred criminal appeal against the conviction and sentence of death and other sentences awarded to him by the trial Court.

3. Since the reference and the appeal are arising out of the same impugned judgment, therefore, both are being disposed of by this common judgment.

4. Accused Naveen @ Ajay s/o Datta Ji Rao Gadke has challenged the judgment dated 12th May, 2018 passed by the learned 5th Additional Sessions Judge, Indore (MP) in Sessions Trial No.87/2018 convicting him under the following sections: -

Conviction		**Sentence**	
Section (s)	**Act**	**Imprisonment**	**Fine**
363	IPC, 1860	5 years RI	Rs.5,000/-
366-A	IPC, 1860	7 years RI	Rs.5,000/-
5 (m) (i) / 6	POCSO Act, 2012	Death sentence	
376 (A) (2) (i) (j) (k) (m)	IPC, 1860	Death sentence	
302	IPC, 1860	Death Sentence	Rs.5,000/-
201	IPC, 1860	5 years RI	Rs.5,000/-

5. The prosecution case, in short, is that complainant Sunil and his wife were engaged in the business of selling balloons and were residing at Rajawada, Indore (MP). On 20.04.2018, complainant Sunil along with his family members was sleeping at platform near Rajawada; at about 03.00 AM, his daughter (baby girl) aged about three months and four days started weeping, then her mother Sonubai (PW-1) woke up and fed milk, thereafter, the deceased (baby girl) slept. At

about 05.00 AM in the morning, when Sunil and his family members woke up, they did not find the deceased on the place and they searched for her, however, they did not find her. Thereafter, Sunil lodged a missing report of his daughter at Police Station, Sarafa, Indore; and on the basis of the report, Police registered First Information Report being Crime No.50/2018 (Ex.P/7) under Section 363 of the Indian Penal Code, 1860 against unknown person.

6. On 20.04.2018 at about 13.27 Hours, one Deepak Jain s/o Prakash Chandra Jain (PW-5) gave information (Ex.P/8) to the Police Station MG Road, Indore (MP) that one dead body of about three months girl child is found at Shreenath Palace Society, Indore near Rajawada, Indore. On this information, Marg Intimation No.15/2018 under Section 174 of the Code of Criminal Procedure, 1973 was recorded.

7. After lodging of the First Information Report (Ex.P/7), when complainant Sunil (PW-4) came to know about the discovery of dead body of a three months girl child, he went to the spot and identified the deceased as his missing daughter. Thereafter, Sub Inspector Bundel Singh Suneriya (PW-27) prepared identification memorandum of dead body vide Ex. P/4; and sent her body for postmortem. Dr. Poonam Mathur (PW-20) along with Team of Doctors conducted

postmortem on the dead body of the deceased; and submitted autopsy report Ex.P/53.

8. During investigation, Police visited the place of occurrence; and prepared spot map Ex.P/11. Police collected blood stained cotton from the spot vide seizure memorandum Ex.P/12. During investigation, Police collected information from Closed Circuit Television (CCTV) footage nearby the place of occurrence in which it was found that the present appellant / accused has taken away the deceased. Sonubai (PW-1) and Rekhabai (PW-2) identified the present appellant / accused as the person who has taken the deceased. Then, police arrested him; and on the basis of disclosure memorandum of the appellant / accused, clothes and slipper (which were worn by the accused at the time of alleged offence) and also bicycle (which was used in the commission of the offence and on the handle gripe of which blood stains were found) were seized. Seized articles were sent to the State Forensic Science Laboratory, Sagar (MP) vide Ex.P/70; and Forensic Science Laboratory (FLS), Sagar submitted its report dated 28.04.2018 vide Annexure P/71.

9. Police recorded statement of the witnesses under Section 161 of the Code of Criminal Procedure, 1973. Police also seized clothes, blood sample, viscera, vaginal smear swab and anal swab of the deceased and

thereafter sent to the FSL Unit for DNA Examination; and in this regard identification form of State FSL, Sagar Ex.P/51 was prepared. The aforesaid seized articles were sent to FSL for chemical analysis and DNA Test.

10. Police also seized CCTV footage collected from various places. Birth certificate (Ex.P/68) of the deceased was also obtained and as per that certificate, her date of birth is mentioned as 16.01.2018. After completion of the investigation, charge sheet was filed before the Special Judge (under POCSO Act), Indore.

11. Learned trial Court framed charges against the appellant / accused under Sections 363, 366-A, 376 (A) (2) (i), (j), (k) and (m), 302 and 201 of the Indian Penal Code, 1860 and also under Sections 5 (M) (I) and 6 of the Protection of Children from Sexual Office Act, 2012, to which the accused pleaded not guilty and claimed to be tried.

12. The prosecution examined as many as 29 witnesses and exhibited 78 documents of the prosecution and four documents of defence. Statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 was recorded in which he denied the prosecution case and stated to be innocent and claimed to be falsely implicated due to enmity; however, in defence, he has not examined any witness.

13. The learned Special Judge, Indore, after having heard the submissions of the learned counsel for both the parties and having considered the evidence brought on record, came to the conclusion that the charges framed against the appellant / accused were proved beyond reasonable doubt; hence, the Court held him guilty for the alleged offence by convicting and sentencing him, as mentioned above. Against which, Criminal Appeal No.3830/2018 has been filed by the appellant / accused under Section 374 (2) of the Code of Criminal Procedure, 1973; and Criminal Reference No.03/2018 under Section 360 (1) of the Code of Criminal Procedure, 1973 has also been made by the learned Special Judge, Indore for confirmation of the capital punishment.

14. We have heard the learned counsel for the parties and perused the impugned judgment and evidence available upon record.

15. Before entering into the merits of the submissions of the learned counsel for the parties, we would like to mention, in brief, what the prosecution witnesses have stated in their statement.

16. Sonubai w/o Sunil (PW-1) is the mother of the deceased. She has stated that 10-11 days ago at about 09.00 PM, accused Navin came to her mother (Dhannobai). He was having two bottles of liquor; and

he insisted her mother to consume liquor, but her mother thrown the bottle. Due to which, bottle of liquor was broken. Thereafter, accused Navin was making a demand from her mother the amount for purchasing liquor. When she (her mother) refused to pay the amount, then he made a quarrel with her mother. When her brother Mangesh tried to let accused Navin go out, her father Rajaram went outside and called the Police; and on their intervention, the accused went away. At that time, her husband Sunil was not present, but at about 11.30 PM he came back; then she narrated her about the incident. After taking dinner, they slept on the platform in front of Rajwada with other members of the family. Her daughter was sleeping between her and husband Sunil. At about 03.00 AM, when her daughter woke up, then she fed milk to her infant; and after that, they slept. At about 05.00 AM, when she woke up, she did not find her daughter, then she informed her husband and parents about the missing of daughter. They made search of dauther, but they could not search her out. At about 02.30 PM, they went to Police Station, Sarafa, where her husband lodged First Information Report. After lodging FIR, they came to know about dead body of her daughter was found in the basement of a building situated near Rajwada. Then she along with Rekha reached there

and saw that blood was on the staircase of basement; however, she did not find her daughter there, because her brother Mangesh and husband Sunil took her to MY Hospital for postmortem. On the next day, Police took her and Rekhabai to the Office, where they watched TV (CCTV) in which they saw that one person was taking her daughter on bicycle. She and Rekhabai identified the person as Navin, who took her daughter.

17. Rekhabai (PW-2) deposed that she was married to one Suresh. After death of Suresh, she resided with accused Navin. Accused Navin was working in a Tea Stall. They lived happily together for a period of 2-3 years, after that Navin started beating and misbehaving with her and her children. He was also a drug addict, therefore, she ousted him from her house. Thereafter, Navin started living at Gadra Khedi. She further stated that Sonubai (mother of the deceased) is daughter-in-law of her sister (Shantabai). Sonubai came to her house and informed her that her daughter is missing since 05.00 AM. Then they started search of daughter of Sonubai. However, she did not trace her out. When they came back to Rajwada, somebody told them that a dead body of a girl was found. After receiving this information, they reached on the spot, where blood was found on the stairs; however, dead body was not there. The dead body was sent for post-

mortem. Police took her and Sonubai to Police Office situated at Regal Talkies, where they watched CCTV footage in which they saw that one person was taking daughter of Sonubai in one hand and by other hand, he was taking his bicycle; and she identified the person as Navin, who took the deceased.

18. Dhannobai (PW-3) mother of Sonubai also corroborated the statement of Sonubai (PW-1).

19. Sunil (PW-4) father of the deceased has stated that he is engaged in the business of sale of balloons'. He is having two sons and two daughters and her youngest daughter was aged about 3-4 months. At the time of incident, they were living at Rajwaha. The incident is about 10-11 days ago. He went to Kota for playing drum. He is also a Drummer. When he came back on Thursday at about 11.00 PM, then his wife Sonubai told him that accused Navin came with two bottles of liquor and when her mother Dhannobai thrown out the bottle of liquor, then the accused was making demand of money for liquor. When accused Navin did not leave the place, then her brother Mangesh thrown out him. After that, they slept on the platform of Rajwada. Her youngest daughter was sleeping between him and his wife. At about 03.00 AM, his wife Sonu fed milk to youngest daughter and slept. At about 05.00 AM in the morning, her wife

found that youngest daughter was not there. Then they started her search. When she was not traced out, then at about 02.00 PM, he went to Police Station, Sarafa and lodged FIR. When they were searching his daughter, brother-in-law Mangesh informed that her daughter is found at Shreenath Complex situated near Rajwada. Thereafter, he went to the spot with Mangesh and found that his daughter was in dead condition. He identified her daughter; and saw that blood was oozing from her private part. Then Police prepared identification panchnama of the deceased vide Ex.P/4 and sent her dead body for postmortem. Next day, Police took her wife and Rekhabai to Police Office situated at Regal Square where they watched CCTV footage in which they saw that the accused is taking her daughter in one hand and by other hand, he was taking his bicycle. Rekhabai and Sonubai identified the person as the present accused, who abducted her daughter.

20. Dipak Jain (PW-5) deposed that he is engaged in business of readymade garment and doing it in Shiv Vilas Palace, Shrinath Complex near Rajwada. On 20.04.2018 at about 12.30 PM when he was in his house, received telephone call of his worker Sunil Sharma who informed that dead body of a girl is lying in the basement of the complex. After receiving this information, he came to the aforesaid place; and found

that one dead body of a girl lying inside the Iron Gate in the basement. He informed to Police Station, MG Road, Indore regarding the incident. The Police lodged report as Ex.P/8. After that Police visited the spot. After that some relative of the girl came there and identified her. He saw that girl sustained injury on her head and blood was also oozing from her vaginal part. Police prepred the spot map Ex.P/11 in his presence; and also seized blood stains from the spot vide Ex.P/12.

21. Sunil Sharma (PW-6) also supported statement of Dipak Jain (PW-5).

22. Assistant Sub Inspector Ramlal Romade (PW-7) has stated that on 19.04.2018 he was posted as ASI at Police Station, Sarafa. He was in duty at Rajwada FRV from 21.00 hours to 08.00 hours. At about 09.30 PM he was standing with FRV Vehicle in front of Rajwada Gate. A family, engaged in selling balloons, is residing on *Otla* in front of Rajwada Gate. One old person came to him and told that one person on account of bottle of liquor was quarreling and at that time, the person, who was making altercation, also came there; then he dragged out him from the aforesaid place and went away on his bicycle. He identified the accused as the person who was quarreling with the family of the complainant Sunil.

23. Subhash Choudhary – Teacher of Indore Kautilya Academy (PW-8) has stated in his statement that he prepared three DVD vide Ex.P/13; proved CCTV footage Article A-1 and issued certificate under Section 65-B of the Information Technology Act vide Ex.P/14.

24. Jagdish Suhagir (PW-9) – an employee of Modi Creation, Rajwada, Indore engaged in CCTV Camera installation, operating and service work has proved CCTV footage Article A-3 and issued certificate under Section 65-B of the Information Technology Act.

25. Dr. Mayuri Thanwar (PW-15) in Court statement has stated that she visited the place of occurrence along with phorographer Head Constable Suresh; and proved documents Ex.P/44, Ex.P/45, Ex.P/46 and Ex.P/47. The same has been corroborated by Suresh Kumar Sharma (PW-29).

26. Court statement of Dr. Poonam Mathur (PW-20) and Dr. Prashant P. Rajput (PW-19) has also been recorded and they have stated that they have conducted postmortem on the dead body of the deceased and proved the same vide Ex.P/53.

27. Sub Inspector Narendra Jaiswar (PW-28) deposed that on 20.04.2018 complainant Sunil lodged report at Police Station Sarafa; and on the basis of this report, he registered FIR bearing Crime No.50/2018

under Section 363 of the Indian Penal Code, 1860. On the same day at 05.00 PM he visited the spot from where the girl was taken away and prepared the spot map Ex.P/7.

28. Sub Inspector Bundel Singh Suneriya (PW-27) has stated that during investigation of Crime No.50/2018 registered at Police Station, Sarafa he went to the place of occurrence (basement of Shree-nath Palace), where a dead body of a girl aged about 3-4 months was found; the body of the said girl was identified by her father Sunil and maternal uncle Mangesh; and he prepared identification memo Ex.P/4.

29. Station House Officer Shiv Pal Singh Kushwaha (PW-26) has deposed that on 20.04.2018 he was posted as Station House Officer, Police Station Bhanwarkuwa, Indore; on the direction of the DIG, Indore, SIT was constituted for investigation of Crime No.50/2018 under Section 363 of the Indian Penal Code, 1860 registered at Police Station Sarafa and he was one of the Member of the SIT. During investigation, CCTV footage was procured from the CCTV Camera installed near the place of occurrence and these footings were seen by him and after that Rekhabai and Sonubai also saw CCTV footage and the recording of the aforesaid CCTV footage between 04.30 to 05.00 AM dated 20.04.2018. After seeing the CCTV footage,

Sonubai and Rekhabai identified the accused Navin @ Ajay as a person who abducted the daughter of Sonubai. Thereafter, he recorded statement of Rekhabai and Sonubai. Rekhabai informed him that accused Navin is residing at 26, Gadrakhedi. He along with the Team Members reached to the house of accused situated at Gadrakhedi; and after seeing the Police, the accused tried to escape. However, he was surrounded and arrested by the Police Party. Thereafter interrogation was made from the accused, and his disclosure statement under Section 27 of the Indian Evidence Act, 1872 was recorded and at the instance of the accused, he recovered one blood stained trouser, T-shirt and slipper from his house. Thereafter, the accused was sent to the hospital for medical examination. After that, one bicycle was also recovered on the strength of the accused, which was used during the offence; and he prepared seizure memo Ex.P/43. After getting permission of DNA Examination of the accused, he sent it to MY Hospital, Indore on 23.04.2018 where blood sample of the accused was taken for sending it to the DNA Examination. In this regard, identification memorandum of the accused was prepared by Dr. Deepak Phanse (PW-17). Thereafter, the aforesaid blood sample was sent to the FLS along with other articles, which were seized from the place of occurrence

and received from MY Hospital, Indore. He also obtained birth certificate of the deceased from District Hospital, Indore in which her date of birth is mentioned as 16.01.2018. He also proved documents Ex.P/37, Ex.P/48, Ex.P/52, Ex.P/75 and Ex.P/76.

30. Learned Senior Counsel for the appellant / accused has submitted that there is no eye witness of the incident. The prosecution case rests upon the circumstantial evidence. However, the prosecution has failed to prove complete chain of the alleged offence. Sonubai (PW-1) and Rekhabai (PW-2) although claimed that they have identified the person who had taken the deceased along with him in CCTV footage, but they did not say definitely that the girl which was seen in the CCTV footage was the daughter of Sonubai (PW-1). The learned trial Court has failed to appreciate the fact that the seized CCTV footage, marked as Article A/1, A/2 and A/3, do not show the clear picture of appellant / accused and the deceased. Even one of the article A/2 in which date "01.08.2009" is mentioned and on the basis of such type of CCTV footage, learned trial Court convicted and punished the appellant / accused, which is bad and not sustainable in law. As per postmortem report Ex.P/53, hymen of the deceased was ruptured. However, MLC of the appellant / accused Ex.P/17 shows that no injury and smegma was

found on the private part of the appellant / accused which shows that no rape was committed by the appellant / accused. In the present case, the date of incident is 20.04.2018; on the same day, the appellant / accused was arrested; the prosecution conducted investigation within a period of seven days from the date of incident and filed challan on 27.04.2018. After filing of the challan, learned trial Court on 28.04.2018 framed charges under Sections 363, 366-A, 376 (2) (i) (j) (k) and (m) (d), 302 and 201 of the Indian Penal Code, 1860 and also under Section 5 (m) (i) read with Section 6 of the Protection of Children from Sexual Offence Act, 2012 against the appellant / accused; and case was fixed on 01.05.2018 for recording prosecution evidence. The learned trial Court pronounced the judgment on 12.05.2018 convicting the appellant (as mentioned above). It is very unfortunate that because of media in hurry, learned trial Court completed the trial within a period of fifteen days and convicted the appellant / accused. The appellant / accused has not been given proper opportunity to defend himself and the learned trial Court has violated the principles of natural justice in convicting the appellant / accused. The prosecution did not examine any independent witness residing near the place of incident and the statement of the witnesses does not corroborate with the

medical evidence. Under these circumstances, learned Senior Counsel for the appellant / accused prayed that the impugned judgment of conviction and sentence passed by the learned trial Court be set aside; and the accused be acquitted from the aforesaid offences.

31. On the other hand, learned Additional Advocate General for the State of Madhya Pradesh has submitted that although there is no eye witness of the incident, however, there is ample evidence available on record to establish the guilt of the appellant in the present crime. As per postmortem report there was multiple injuries found on the body of the deceased and blood was also found in and around the vagina and injuries found on the body of the deceased could be possible by the result of sexual assault. He further submitted that the prosecution has succeeded to establish the charges framed against the appellant / accused; and there is no reason to disbelieve the statement of prosecution witnesses. He prayed for dismissal of the criminal appeal by maintaining the conviction and sentence passed by the learned trial Court.

32. Dr. Poonam Mathur (PW-20) Professor, Department of Obstetrics and Gynecology, MY Hospital, Indore who conducted postmortem of the deceased along with Team of Doctors [Dr. Prashant P. Rajpoot, Demonstrator, Department of Forensic Medicine,

MGM Medical College, Indore and Dr. B.K. Singh, Associate Professor, Department of Forensic Medicine, MGM Medical College, Indore] on 20.04.2018 at 05.15 PM and found the following injuries on the body of the deceased: -

> "1. Red colour contusion of size 0.6 x 0.5 cm present on right side of upper lip just right lateral to mid-line near the junction with the gum.
> 2. Red colour contusion of size 1.5 x 0.3 cm present saggitally over parietal region of scalp 6.0 cm above glabella just right lateral to mid-line.
> 3. Red colour contusion of size 3.0 x 1.0 cm present saggitally over frontal region 3.0 cm above glabella just right lateral to mid-line.
> 4. Red colour contusion of size 1.5 x 0.5 cm present saggitally in mid-line 8.0 cm above glabella just right lateral to mid-line.
> 5. Laceration of size 0.5 x 0.2 x 0.2 cm present on lower lip 1.5 cm right lateral to mid-line and surrounding the laceration contusion of size 1.5 x 0.8 cm was found.
> 6. Multiple scratch abrasions (15 in number) present over left side of cheek and neck regions over the region of 3.0 x 3.0 cm starting right lateral to mid-line just above the upper mandibular border, size of abrasion varies between 0.8 to 0.3 cm and 0.2 to 0.1 cm curvilinear in shape with concavity upward appeared to be nail marks.
> 7. Multiple scratch abrasion (04 in number) present over left side of neck in nearly horizontal line over the size of 4.0 cm x 0.5 cm near the junction of neck with the body, size of scratch marks varies between 0.8 to 0.2 cm and 0.3 to 0.2 cm curvilinear in shape with concavity upward appeared to be nail marks.
> 8. On opening scalp, effusion of blood present over inner aspect of scalp in right fronto temporo occipital region and left fronto temporo parietal occipital region.
> 9. 19.0 cm U-shape fracture involving left parietal, left occipital, right occipital and right temporo parietal occipital region, starting on left side 4.0 cm above right external auditoroy canal going backward till just

below the lambdoid suture fusion point and continue towards anteriorly passing just above right LAC and ending at base of skull in anterior part of anterior cranial fossae. Effusion of blood present surrounding the fracture line.

10. Meninges was found tense, on opening the meninges, SDH was found over both fronto parietal regions (of parietal regions 3 cm x 2.5 cm x 0.2 cm and in patches over frontal regions) and SAH was found all over the brain at places.

11. Vagina: - Laceration reddish in colour present involving lower 1/3rd of anterior anal wall and posterior vaginal wall making continouity between them and penineal tissue between them found destructed. Tissue surrounding lower vaginal and anal region also found lacerated in continouity with above mentioned laceration. Hymen was found torn and descruted in posterior half and remnant on anterior part visible, surrounding torn part reddish contusion seen. Posterior fouchette and posterior junction of libia majora and libia minora not appreciable due to destruction.

Anus: - In whole of the circumference of anus reddish colour contusion of size 3.0 x 1.0 cm was found near torn anal sphincter.

Uterus: - Present and uterine cavity found empty."

33. In the opinion of the doctors, the death of the deceased was due to cranio-cerebral damage as a result of blunt force trauma to the head region and its consequences; sexual assault of less than 24 hours old; and duration of death was within 12-36 hours since postmortem examination.

34. The statement of Dr. Poonam Mathur (PW-20) was not challenged in her cross-examination. The learned trial Court, after considering the injuries found on the body of the deceased, came to the conclusion,

that her death was homicidal in nature and before her death, she was subjected to sexual assault.

35. In the present case, it is true that there is no named FIR and the incident has not been seen by any one. Hence, the case of the prosecution rests upon the circumstantial evidence.

36. In the case of **Praful Sudhakar Parab** v. **State of Maharashtra** reported in **AIR 2016 SC 3107 = (2016) 12 SCC 783**, the Hon'ble Apex Court laid down that where case rests squarely on circumstantial evidence, interference of guilty can be justified only when all the incriminating facts and circumstances of the case are found to be incompatible with the innocence of the accused or guilty of any other person. For a conviction in murder case on circumstantial evidence, the following conditions must be fulfilled: -

> (i) the circumstances from which the conclusion of guilt is to be drawn should be fully established;
>
> (ii) 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;
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> (iii) the circumstances should be of a conclusive nature and tendency;
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> (iv) they should exclude every possible hypothesis except the one to be proved; and
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> (v) 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.

37. The clothes and vaginal smear swab slide of the deceased and the blood sample of the accused were sent for DNA examination. Y-Chromosomal STR DNA profile of the accused collected from his blood sample have matched by all 25 Genetic Markers with DNA profile of the deceased collected from her frock and Vaginal smear swab slide. The conclusion of the Scientific Officer & Assistant Chemical Examiner, FSL, Sagar is that it is the accused who committed offence against the victim.

38. The argument of the learned Senior Counsel for the appellant / accused is that the report of DNA is not categorical so as to link the appellant / accused with the alleged crime. However, do not find any merit in such an argument. Forensic Science Experts Dr. Anil Kumar Singh and Dr. Kamlesh Kaitholiya, who have given the report Ex.P/72 were not called for evidence, and therefore, in terms of Section 293 of the Code of Criminal Procedure, 1973, the report is not open to question as the defence had an opportunity to cross examine the expert.

39. So far as the argument of the learned Senior Counsel for the appellant / accused proceeds on the basis that even report does not prove that the crime has been committed by the appellant. We have examined the argument raised by the learned Senior

Counsel for the appellant / accused.

40. In the case of **Phool Kumar Singh** v. **Delhi Administration** reported in **AIR 1975 SC 905**, it has been held by the Apex Court that report of the expert is admissible in evidence under Section 293 of the Code of Criminal Procedure, 1973 and can be doubted only by the cross-examination of the witness.

41. In the case of **Bhagwan Das** v. **State of Rajasthan** reported in **AIR 1957 SC 589**, the Apex Court held that the opinion of the expert cannot be discarded on the basis of the books on medical jurisprudence unless the passages which are sought to be discredited in the opinion of the expert are put to him. The Court has held in para No.13, as under: -

> "13. The learned Sessions Judge was of the opinion that the evidence of the doctor P.W. 11 made the story that Shivlal could walk for a little distance upon the Khala of Hukma or was able to talk so as to make a dying declaration, improbable. But the learned Judges of the High Court disposed of this matter by saying that the doctor was comparatively young and that his statement was not in accord with the opinion expressed in books on Medical Jurisprudence by authors like Modi and Lyon. But it cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case now before us nor is this a satisfactory way of disposing of the evidence of an expert unless the passages which are sought to discredit his opinion are put to him. This Court in **Sundarlal** v. **The State of Madhya Pradesh** [**AIR 1954 SC 28 (A)**] disapproved of Judges drawing conclusions adverse to the accused by relying upon such passages in the absence of their being put to medical witnesses. The learned Judges of the High Court were, therefore, in error in accepting

the testimony of these witnesses in support of the correctness of the two dying declarations nor could the statement of the deceased alleged to have been made in the circumstances of this case be considered sufficient to support the conviction of the accused. The recovery of the kassi is a wholly neutral circumstance because it has not been proved that it belonged to Bhagwandas."

42. The Supreme Court in the case of **Dharam Deo Yadav vs. State of Uttar Pradesh**, **(2014) 5 SCC 509** noticed the dilemma that many a times reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from the clutches of law. Therefore, the Judiciary should be equipped to understand and deal with the forensic science which is free from the infirmities. The Court held as under:-

"**Expert scientific evidence**:

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31. Scientific evidence encompasses the so-called hard science, such as physics, chemistry, mathematics, biology and soft science, such as economics, psychology and sociology. Opinions are gathered from
persons with scientific, technical or other specialized knowledge, whose skill, experience, training or education may assist the Court to understand the evidence or determine the fact in issue. Many a times, the Court has to deal with circumstantial evidence and scientific and technical evidence often plays a pivotal role. Sir Francis Bacon, Lord Chancellor of England, in his Magnum Opus put forth the first theory of scientific method. Bacon's view was that a scientist should be disinterested observer of nature, collecting observations with a mind cleansed of harmful preconceptions, that might cause error to creep into the scientific record. Distancing themselves from the theory of Bacon, the US Supreme Court in *Daubert v.*

Merrell Dow Pharmaceuticals, Inc., 125 L Ed 2d 469::509 U.S. 579 (1993), held as follows:-

> "Science is not an encyclopedic body of knowledge about the universe. Instead, it represents a process for proposing and refining theoretical explanations about the world that are subject to further testing and refinement."

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DNA and identity of skeleton

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34. The counsel appearing for the appellant, as already indicated, questioned the reliability of DNA report and its admissibility in criminal investigation. It was pointed out that DNA is known for being susceptible to damage from moisture, heat, infrared radiation etc. and that may degrade the sample of DNA. Further, it was pointed out that during carriage, during its storage at police stations or laboratories, it is prone to contamination and, therefore, the extent of absoluteness can never be attributed to DNA results.

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36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence.

More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house.

37. *The accused, in his examination under Section 313 CrPC, had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in Section 313 CrPC statement may offer an additional link in the chain of circumstances to complete the chain. See Anthony D'souza v. State of Karnataka (2003) 1 SCC 259. We are, therefore, of the considered view that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence in this case and correctly recorded the conviction and we are now on sentence.*"

43. In the case of **Santosh Kumar Singh** v. **The State through CBI** reported in **(2010) 9 SCC 747**, Hon'ble Supreme Court has held that DNA report must be accepted as scientifically accurate and is an exact science. It is further held that it would be a

dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert. The Court cannot usurp the function of an expert. Relevant extract from paragraphs No.68 and 71 of the said decision reads as under: -

> "68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of text books and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court Crl. Appeal No.87 of had not been put to the expert witnesses. In **Bhagwan Das & another** v. **State of Rajasthan** [**AIR 1957 SC 589**] it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.
>
> 71. We feel 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 **Smt. Kamti Devi** v. **Poshi Ram** [**AIR 2001 SC 2226**]. 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 No.9."

44. Recently, in the case of **Mukesh & another**

v. **State (NCT of Delhi) and another** reported in **(2017) 6 SCC 1**, the Apex Court was examining the gruesome murder of a girl, who was raped and killed in a moving bus. As regards DNA profile, the Court has observed in paragraphs No. 455, 456, 457, 458 and 461, as under: -

> "455. Before considering the above findings of DNA analysis contained in tabular form, let me first refer to what is DNA, the infallibility of identification by DNA profiling and its accuracy with certainty. DNA – De-oxy-ribonucleic acid, which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. DNA is the genetic blue print for life and is virtually contained in every cell. No two persons, except identical twins have ever had identical DNA. DNA profiling is an extremely accurate way to compare a suspect's DNA with crime scene specimens, victim's DNA on the blood-stained clothes of the accused or other articles recovered, DNA testing can make a virtually positive identification when the two samples match. A DNA finger print is identical for every part of the body, whether it is the blood, saliva, brain, kidney or foot on any part of the body. It cannot be changed; it will be identical no matter what is done to a body. Even relatively minute quantities of blood, saliva or semen at a crime scene or on clothes can yield sufficient material for analysis. The Experts opine that the identification is almost hundred per cent precise. Using this i.e. chemical structure of genetic information by generating DNA profile of the individual, identification of an individual is done like in the traditional method of identifying finger prints of offenders. Finger prints are only on the fingers and at times may be altered. Burning or cutting a finger can change the make of the finger print. But DNA cannot be changed for an individual no matter whatever happens to a body.
>
> 456. We may usefully refer to Advanced Law Lexicon, 3rd Edition Reprint 2009 by P. Ramanatha Aiyar which explains DNA as under:-
>
> "DNA.- De-oxy-ribonucleic acid, the nucleoprotein

> of chromosomes. The double-helix structure in cell nuclei that carries the genetic information of most living organisms. The material in a cell that makes up the genes and controls the cell. (Biological Term)
>
> DNA finger printing – A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)"

In the same Law Lexicon, learned author refers to DNA identification as under:

> DNA identification. A method of comparing a person's deoxyribonucleic acid (DNA) – a patterned chemical structure of genetic information – with the DNA in a biological specimen (such as blood, tissue, or hair) to determine if the person is the source of the specimen. – Also termed DNA finger printing; genetic finger printing (Black, 7th Edition, 1999)

457. DNA evidence is now a predominant forensic technique for identifying criminals when biological tissues are left at the scene of crime or for identifying the source of blood found on any articles or clothes etc. recovered from the accused or from witnesses. DNA testing on samples such as saliva, skin, blood, hair or semen not only helps to convict the accused but also serves to exonerate. The sophisticated technology of DNA finger printing makes it possible to obtain conclusive results. Section 53-A Cr.P.C. is added by the Code of Criminal Procedure (Amendment) Act, 2005. It provides for a detailed medical examination of accused for an offence of rape or attempt to commit rape by the registered medical practitioners employed in a hospital run by the Government or by a local authority or in the absence of such a practitioner within the radius of 16 kms. from the place where the offence has been committed by any other registered medical practitioner.

458. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in **Santosh Kumar Singh** v. **State through CBI (2010) 9 SCC 747**, the Court held as under:-

> "65. We now come to the circumstance with regard to the comparison of the semen stains with the blood taken from the appellant. The trial court had found against the prosecution on this aspect. In this

connection, we must emphasise that the court cannot substitute its own opinion for that of an expert, more particularly in a science such as DNA profiling which is a recent development.

66. Dr. Lalji Singh in his examination-in-chief deposed that he had been involved with the DNA technology ever since the year 1974 and he had returned to India from the UK in 1987 and joined CCMB, Hyderabad and had developed indigenous methods and techniques for DNA finger printing which were now being used in this country. We also see that the expertise and experience of Dr. Lalji Singh in his field has been recognised by this Court in **Kamalanantha** v. **State of T.N. (2005) 5 SCC 194**. We further notice that CW 1 Dr. G.V. Rao was a scientist of equal repute and he had in fact conducted the tests under the supervision of Dr. Lalji Singh. It was not even disputed before us during the course of arguments that these two scientists were persons of eminence and that the laboratory in question was also held in the highest esteem in India.

67. The statements of Dr. Lalji Singh and Dr. G.V. Rao reveal that the samples had been tested as per the procedure developed by the laboratory, that the samples were sufficient for the purposes of comparison and that there was no possibility of the samples having been contaminated or tampered with. The two scientists gave very comprehensive statements supported by documents that DNA of the semen stains on the swabs and slides and the underwear of the deceased and the blood samples of the appellant was from a single source and that source was the appellant.

68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In **Bhagwan Das** v. **State of Rajasthan AIR 1957 SC 589** it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that

subject without such text being put to the expert.

71. We feel 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 (2001) 5 SCC 311**. 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." [emphasis added].

459. From the evidence of PW-45 and the details given in the above tabular form, it is seen that the DNA profile generated from blood-stained clothes of the accused namely, A-1 Ram Singh (dead); A-2 Mukesh; A-3 Akshay; A-4 Vinay; and A-5 Pawan Gupta @ Kalu are found consistent with the DNA profile of the prosecutrix. Also as noted above, two sets of DNA profile were generated from the black colour sweater of the accused Pawan. One set of DNA profile found to be female in origin, consistent with the DNA profile of the prosecutrix; other set found to be male in origin, consistent with the DNA profile of PW-1. Likewise, two sets of DNA profile were generated from the black colour sports jacket of accused Vinay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of PW-1. Likewise, two sets of DNA profile were generated from the jeans pant of accused Akshay, one of which matched the DNA profile of the prosecutrix and another one matched the DNA profile of PW-1. The result of DNA analysis and that of the DNA profile generated from blood-stained clothes of the accused found consistent with that of the victim is a strong piece of evidence incriminating the accused in the offence.

460. DNA profile generated from the blood samples of accused Ram Singh matched with the DNA profile generated from the rectal swab of the victim. Blood as well as human spermatozoa was detected in the underwear of the accused Ram Singh (dead) and DNA profile generated therefrom was found to be female in

origin, consistent with that of the victim. Likewise, the DNA profile generated from the breast swab of the victim was found consistent with the DNA profile of the accused Akshay.

461. As discussed earlier, identification by DNA genetic finger print is almost hundred per cent precise and accurate. The DNA profile generated from the blood-stained clothes of the accused and other articles are found consistent with the DNA profile of the victim and DNA profile of PW-1; this is a strong piece of evidence against the accused. In his evidence, PW-45 Dr. B.K. Mohapatra has stated that once DNA profile is generated and found consistent with another DNA profile, the accuracy is hundred per cent and we find no reason to doubt his evidence. As pointed out by the Courts below, the counsel for the defence did not raise any substantive ground to rebut the findings of DNA analysis and the findings through the examination of PW-45. The DNA report and the findings thereon, being scientifically accurate clearly establish the link involving the accused persons in the incident."

45. In the case of **Sunil** v. **State of Madhya Pradesh** reported in **(2017) 4 SCC 393**, the Apex Court while considering the argument that if DNA testing is not proved by the prosecution, therefore, it has failed to prove its case beyond reasonable doubt. Hon'ble Apex Court held that positive result of DNA test would constitute clinching evidence against the accused. If, however, result of test is in the negative, the weight of other material, evidence on record will still have to be considered. Relevant paragraph No.4 of the decision reads, as under: -

"4. From the provisions of Section 53A of the Code and the decision of this Court in **Krishan Kumar Malik** v. **State of Haryana** [**(2011) 7 SCC 130**] it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report

> of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in Krishan Kumar (para 44) Section 53A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e. favoring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to."

46. Therefore, the opinion of the forensic science expert that Y-Chromosom DNA profile of the appellant matches with the DNA profile from the underwear of the victim and the vaginal smear slide is conclusive prove that the accused is the person who violated three months old girl.

47. In the instant case, Sonubai (PW-1) and Rekhabai (PW-2) on watching CCTV footage had confirmed to the Investigating Officer that the appellant is the person who took the victim. CCTV footage is very vital piece of evidence in the armour of the prosecution and a connecting link in the chain of circumstances to establish the case of the prosecution.

48. It is trite law point out that the prosecution is supposed to base before the Court all the relevant CCTV footage based on which the case is developed in the culpability of the accused for the commission of the crime. In the case on hand, it is evident from the

record that Investigating Agency collected CCTV footage from several places nearby to the place of incident and from these footage, the prosecution can get the clue to the identity of the accused, therefore, the said CCTV footage can be taken as the clinching evidence collected against the accused. To prove the evidence against the appellant / accused, although due to poor visibility and clarity, there is blaring in the picture, even then, the CCTV footage has given the clue or broad idea for the prosecution to commence the investigation in a proper direction and to fix the culpability on the accused. Further there are other circumstances also to show that the appellant is the person, who committed this heinous crime. In CCTV footage it is seen that the accused moved with a little girl in one hand and with bicycle in another hand at the relevant point of time, therefore, CCTV footage is also corroborated and in conformity of the involvement of the appellant in the present crime.

49. During hearing of the case, we noticed that the trial Court has played Grand View Research (GVR) and seen CCTV footage in presence of the counsel for the prosecution as well as the accused and has relied on CCTV footage received by the Investigating Agency from the CCTV Cameras installed nearby place of occurrence. In CCTV footage, there is relevant

material to suggest that the appellant / accused came to Rajwada Platform where the victim was sleeping with her mother; and he took her with him, therefore, trial Court relied upon on these electronic evidence.

50. It is well settled that electronic documents in *stricto sensu* are admitted as material evidence with the amendment to the Indian Evidence Act 1872. Section 65-A and 65-B were introduced in Chapter 5 relating to documentary evidence. Section 65-A of the Indian Evidence Act, 1872 provides that the contents of electronic records may be admitted as evidence with the criteria provided in Section 65-B is complied with. Computer electronic record in evidence are admissible at a trial, if proved in the manner specified by Section 65-A of the Indian Evidence Act, 1872. Sub Section (1) of Section 65-B of the Indian Evidence Act, 1872 makes admissibility as a document regarding any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer, subject to fulfillment of conditions specified in Section (2) of Section 65-B of the Indian Evidence Act, 1872.

51. Shri Amit Dubey, learned amicus curiae has submitted that the prosecution has failed to prove compliance of Section 65-B of the Indian Evidence Act 1872 regarding the conditions referred to admissibility

of the electronic evidence, therefore, CCTV footage is not acceptable evidence, but we are not agree the argument advanced by the learned Senior Counsel for the appellant / accused. Because certificate of compliance of Section 65-B of the Indian Evidence Act, 1872 is enclosed with the CCTV footage produced by the prosecution as Ex.P/49; and no objection was taken when the CDRs of CCTV footage were adduced in evidence before the trial Court. Therefore, this objection cannot be raised at the appellate stage. Although in the certificate, it is not specifically mentioned that from where these CCTV footage have been taken. No detail particulars have been mentioned which require the admissibility of the electronic record / evidence.

52. In the case of **Sonu @ Amar** v. **State of Haryana** reported in **AIR 2017 SC 3441** Hon'ble Apex Court while considering the admissibility of the electronic evidence without accompanied by certificate as contemplated under Section 65-B (4) of the Indian Evidence Act, 1872 has held in paragraphs No.26 and 27, as under: -

> "26. That an electronic record is not admissible unless it is accompanied by a certificate as contemplated under Section 65B (4) of the Indian Evidence Act is no more res integra. The question that falls for our consideration in this case is the permissibility of an objection regarding inadmissibility at this stage. Admittedly, no objection

was taken when the CDRs were adduced in evidence before the Trial Court. It does not appear from the record that any such objection was taken even at the appellate stage before the High Court. In Gopal Das v. Sri Thakurji, **AIR 1943 PC 83**, it was held that:

"Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof." In RVE Venkatachala Gounder, this Court held as follows:

> "Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence; and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce

> its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court."
>
> [Emphasis supplied]

It would be relevant to refer to another case decided by this Court in PC Purshothama Reddiar v. S Perumal, (1972) 1 SCC 9. The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that:

> "Before leaving this case it is necessary to refer to one of the contentions taken by Mr. Ramamurthi, learned Counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility."

27. It is nobody's case that CDRs which are a form of electronic record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a

> certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr. P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof."

53. Thus, this Court is of the view that the CCTV footage received by the prosecution agency from the CCTV camera's installed nearby places of occurrence clearly established that the appellant/accused is the one who has kidnapped the victim and then violated her.

54. After carefully going through the evidence adduced by the prosecution and in the light of arguments advanced by the learned counsel for the parties, we find that the following clinching circumstances which lead the appellant / accused to commit the offence of kidnapping of a three months minor girl and

committed rape in a brutal manner; and with an intent to brutally murder. These circumstances are as follows: -

> A few hours prior to the offence, the appellant / accused came to the platform of Rajwada and demanded money from grandmother of the deceased for purchasing liquor and when she refused, the appellant quarreled with her.
>
> The deceased was found missing in the morning at about 05.00 AM on 20th April, 2018; on search, her dead body was found in the basement of Shreenath Complex situated near Rajwada Indore (MP) at about 12.30 PM on the same day with injuries on her private part and other parts of the body.
>
> Vicinity to place of occurrence, in CCTV footage, it is found that the appellant / accused had come at the platform of Rajwada where little baby was sleeping with her parents and at that time, the accused took her to the place of occurrence.
>
> DNA profile of the appellant / accused prepared from his blood sample matched with the DNA profile of clothes and vaginal smear slide of the deceased.

55. Although the exhaustive cross examination has been tested of the prosecution witnesses namely Sonubai (PW-1), Rekhabai (PW-2), Dhannobai (PW-3), Sunil (PW-4), Dipak Jain (PW-5) and other material prosecution witnesses inspite of this their, their statement remained unchallegned. The statement of these witnesses does not reflect any discrepancy or inconsistency of facts, and therefore, must be

considered as cogent, reliable and incontrovertible evidence, therefore, the trial court has rightly relied upon the testimony of these witnesses and on the basis of the prosecution evidence, consistency of CCTV footage near vicinity of place of crime as well as report of the DNA has rightly concluded that it is the appellant who has violated the victim and then killed her.

56. The question arises as to whether the sentence ordered by trial Court upon the appellant / accused by hanging over the appellant's head warrants confirmation or nor. In this regard, the guidance can be taken from the various judgments of Hon'ble the Supreme Court.

57. The constitutional validity of the provision of Section 302 of the I.P.C and Section 354 (2) of the Cr.P.C was put to challenge before Hon'ble the Supreme Court in the case of **Bachan Singh** v. **State of Punjab** reported in **(1980) 2 SCC 684 = AIR 1980 SC 898**. The Supreme Court by the majority view has declined to interfere into the matter but drawn the guidelines on the "aggravating circumstances" and "mitigating circumstances" and directed that the Court has to decide each case in their own facts looking to those circumstances. The "aggravating circumstances" suggested in **Bachan**

Singh (supra) are reproduced as under:-

> "**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 Cr.P.C, 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."

The mitigating circumstances explained in **Bachan Singh (supra)** are reproduced as under:-

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

58. In the case of **Bachan Singh (supra),** the Apex Court referring both "aggravating circumstances" and "mitigating circumstances" has further observed that these are undoubtedly relevant circumstances must be given great weight in determination of the sentence but there may be 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 astrologically imponderables in an imperfect and undulating society. The scope and concept mitigating factors in the area of death penalty must receive a liberal and expensive construction by the Court in accord with sentencing policy. The Judges should never be bloodthirsty. Hanging of the murderers has never been too good for them. It is imperative of voice the concerned that the Courts aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with ever more scrupulous care and humane concern directed along the highroad of legislative policy outlined in Section 354(3) of the Criminal Procedure Code. For a person convicted of

murder, life imprisonment is rule and the death sentence is 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 alternative option is unquestionably foreclosed".

59. Relying upon the guidelines drawn by the Apex Court in **Bachan Singh (supra)** laid down the test on the individual facts while pronouncing the sentence. The Hon'ble Supreme Court in the case of **Machhi Singh and others Vs. State of Punjab reported in AIR 1983 SC 957** justified capital sentence in "rarest of rare case". It was observed that death sentence can be awarded when the collective conscience of the community 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. In paragraphs 32, 34, 35, 36 and 37 of the judgment various circumstances were stated where the community may entertain such sentiments. They are: -

> "(i) 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.
>
> (ii) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or cold-blooded murder for gains of a person vis-a-vis whom the

murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(iii) When murder of member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath;

or in cases of 'bride burning' or '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) 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) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

60. In the case of **Anil @ Anthony Arik-swamy Joseph** v. **State of Maharashtra** reported in **(2014) 4 SCC 69**, the Apex Court has clarified the real test of "rarest of rate case", which is reproduced, as under: -

"**27. R-R Test**, we have already held in Shankar Kisanrao Khade' case (supra), depends upon the perception of the society that is "society- centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy of certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women."

61. In the case of **Dhananjay Chatterjee**

Alias Dhana v. **State of West Bengal** reported in **(1994) 2 SCC 220**, the accused committed rape and murder of a girl of about 18 years in the society, where he was working as a Security Guard, the Hon'ble Supreme Court observed that major punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The Hon'ble Supreme Court further observed that the courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

62. In the present case, it is atrocious crime when a child of only three months is violated by a person, who is innocent and he took her when she was sleeping with her parents; then violated and killed her.

63. From the statement of the appellant, although he is aged about 26 years, however, as per the statement of Rekhabai (PW-2), it reveals that she lived with the appellant as his wife, clearly alleged that the

appellant is a drug addict and he was also cruel with her. It is also pertinent to note that prior to the incident, appellant came to Dhannobai (PW-3) grandmother of the deceased with two bottles of liquor and he stated her to consume liquor and when she thrown the bottle, he was making demand of money for purchasing liquor. When Dhannobai refused to pay the amount, he made a quarrel with grandmother of the deceased; and due to this small dispute, he committed such a grave offence in diabolic and cold blooded manner. Further that the manner of commission of offence couple with subsequent diabolic act of the appellant, there is no guarantee that the accused would not commit similar offence, if he is released.

64. In the case of **Molai and another** v. **State of Madhya Pradesh** reported in **(1999) 9 SCC 581** Hon'ble Apex Court justifying the death sentence of the accused held, as under: -

> "36. We have very carefully considered the contentions raised on behalf of the parties. We have also gone through various decisions of this Court relied upon by the parties in the courts below as well as before us and in our opinion the present case squarely falls in the category of one of the rarest of rare cases, and if this be so, the courts below have committed no error in awarding capital punishment to each of the accused. It cannot be overlooked that Naveen, a 16-year-old girl, was preparing for her Class 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most

shameful act of rape. The accused did not stop there but they strangulated her by using her undergarment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp-edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned counsel for the accused (appellants) could not point any mitigating circumstance from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

65. In the case of **State of Uttar Pradesh** v. **Satish** reported in **(2005) 3 SCC 114**, Hon'ble Supreme Court held that the rape is one of the most depraved acts. Such iniquitous, flagitious act becomes abominable, when the victim is a child. The diabolic act reaches the lowest level of humanity when the rape is followed by brutal murder. Under these circumstances, their Lordships have held that present case falls in the "rarest of rare" category and death sentence awarded by the trial court was appropriate. Relevant paragraphs of the judgment read, as under:-

"24. There is no embargo on the appellate Court reviewing the evidence upon which an order of acquittal is based. Generally, the order of acquittal shall not be interfered with because the presumption of innocence of the accused is further strengthened by acquittal. The golden thread which runs through the web of administration of justice in criminal cases is that if two views are possible on the evidence adduced in the

case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. The paramount consideration of the Court is to ensure that miscarriage of justice is prevented. A miscarriage of justice which may arise from acquittal of the guilty is no less than from the conviction of an innocent. In a case where admissible evidence is ignored, a duty is cast upon the appellate Court to re- appreciate the evidence where the accused has been acquitted, for the purpose of ascertaining as to whether any of the accused really committed any offence or not. [See **Bhagwan Singh & others** v. **State of Madhya Pradesh**, **(2002) 2 Supreme 567**]. The principle to be followed by appellate Court considering the appeal against the judgment of acquittal is to interfere only when there are compelling and substantial reasons for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing materials have been unjustifiably eliminated in the process, it is a compelling reason for interference. These aspects were highlighted by this Court in **Shivaji Sahabrao Bobade & another** v. **State of Maharashtra**, AIR (1973) SC 2622, **Ramesh Babulal Doshi** v. **State of Gujarat**, (1996) 4 Supreme 167, **Jaswant Singh** v. **State of Harayana**, (2000) 3 Supreme 320, **Raj Kishore Jha** v. **State of Bihar & others**, (2003) 7 Supreme 152. **State of Punjab** v. **Karnail Singh**, (2003) 5 Supreme 508 and **State of Punjab** v. **Pohla Singh and another**, (2003) 7 Supreme 17.

25. In **Bachan Singh** v. **State of Punjab**, [1980] 3 SCC 684 and **Machhi Singh & others** v. **State of Punjab**, [1983] 3 SCC 470 the guidelines which are to be kept in view when considering the question whether the case belongs to the rarest of the rare category for awarding death sentence were indicated.

26. In Machhi Singh's case supra it was observed:

> "The following questions may be asked and answered as a test to determine the "rarest of the rare" case in which death sentence can be inflicted:-
>
> (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentences?
>
> (b) Are the circumstance 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?

The following guidelines which emerge from Bachan Singh case (supra) will have to be applied to the facts of each individual case where the question of imposition of death sentence arises: (SCC p. 489, para 38):-

(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. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstance of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

In rarest of rare cases when collective conscience of the community 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, death sentence can be awarded. The community may entertain such sentiment in the following circumstances :

(1) When the murder is committed in an extremely brutal, grotesque, disbolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or a cold- blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust, or murder is committed in the course for betrayal of the motherland.

(3) 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, or in cases of `bride burning' or `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.

(4) 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.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in dominating position or a public figure generally loved and respected by the community.

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 by way of the test for the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

27. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the judge that leads to determination of the lis.

28. The principle of proportion between crime and punishment is a principle of just desert that servers as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

29. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal

conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each cases, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

30. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

31. Considering the view expressed by this Court in Bachan Singh's case (supra) and Machhi Singh's case (supra) we have no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial Court was appropriate. The acquittal of the respondent-accused is clearly unsustainable and is set aside. In the ultimate result, the judgment of the High Court is set aside and that of the trial Court is restored. The appeals are allowed."

66. Hon'ble Apex Court in the judgment rendered in the case of **Shankar Kisanrao Khade** v. **State of Maharashtra** reported in **(2013) 5 SCC 546**, examining the entire case law where penalty for death sentence was set aside in the case for offence punishable under Section 376 of the Indian Penal

Code, 1860; the Apex Court laid down in this case aggravating circumstances, called, “crime test” and mitigating circumstances called “criminal test” and rarest of the rare case called “society centric”.

67. In the case of **Mofil Khan and another** v. **State of Jharkhand** reported in **(2015) 1 SCC 67**, Hon'ble Supreme Court has explained the meaning of “rarest of rare case” in paragraph No.64, as under: -

> “**64.** In our considered view, the "rarest of the rare" case exists when an accused would be a menace, threat and antithetical to harmony in the society. Especially in cases where an accused does not act on provocation, acting in spur of the moment but meticulously executes a deliberately planned crime in spite of understanding the probable consequence of his act, the death sentence may be the most appropriate punishment. We are mindful that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society. Keeping in view the said principle of proportionality of sentence or what it termed as "just-desert" for the vile act of slaughtering eight lives including four innocent minors and a physically infirm child whereby an entire family is exterminated, we cannot resist from concluding that the depravity of the Appellant's offence would attract no lesser sentence than the death penalty.”

68. In the context of the aforesaid decisions of the Hon'ble Apex Court, we find that in the present case, the gullibility and vulnerability of the three months girl, who could not have nurtured any idea about the maladroitly designed biological desires of

this nature, kidnapped by the appellant / accused and after committing rape on her, she was murdered. The barbaric act of the appellant does not remotely show any concern for the precious life of a very small infant, who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society.

69. The rape of a infant is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed. It was not committed by accused under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed and rehabilitated. The act of the appellant / accused meets the test of "rarest of the rare case".

70. On careful consideration of the testimony of the prosecution witnesses together with the medical evidence, it appears that the prosecution has been able to prove its case beyond reasonable doubt, that the appellant / accused took the deceased on 20.04.2018 from OTLA in front of Rajwada in the morning at about 05.00 AM and sexually abused her and then, he killed her. It further appears that the learned 5th Additional Sessions Judge, Indore, after taking into consid-

eration the entire facts and circumstance of the case as well as the evidence on record, has held that the appellant guilty for the offence of murder with rape of a minor girl.

71. In our opinion, in the facts and circumstances of the present case referred to herein above, we find that the appellant / accused has violated the victim and took her life; and looking to the act of the appellant, there is no possibility of his rehabilitation. Crime against girl child are on rise, therefore, this Court is of the view that major punishment should be awarded in this crime. Hence, we find that the capital punishment is one of the "rarest of the rare case" where the aforesaid sentence is awarded.

72. In view whereof, we affirm the death sentence awarded by the trial Court, while dismissing the appeal preferred by the appellant / accused against his conviction and sentence.

73. Let a copy of the judgment be retained in the file of Criminal Appeal No.3830/2018; and a copy of the judgment with record of the case be sent to the trial Court for taking appropriate action, in accordance with law.

(P.K. Jaiswal)
Judge

(S.K. Awasthi)
Judge

Pithawe RC