HIGH COURT OF MADHYA PRADESH
BENCH GWALIOR

DIVISION BENCH

G.S. Ahluwalia and Rajeev Kumar Shrivastava J.J.

(CRRFC No.8 of 2019)
In Reference (Suo Moto) Vs. Manoj

&

(Cr.A. No.4554 of 2019)
Manoj Vs. State of M.P.

Shri Rajesh Shukla, Deputy Advocate General for the State.
Shri Padam Singh and Shri Vijay Dutt Sharma, Counsels for the respondent in CRRFC No.8 of 2019 and for appellant in Cr.A. No. 4554 of 2019). Both the Counsels were provided to the accused by Legal Aid.

Date of Hearing : 23-July-2021
Date of Judgment : 28-July-2021
Whether approved for reporting : Yes

Heard through Video Conferencing

JUDGMENT

28-July-2021

Per G.S. Ahluwalia J.

CRRFC No.8 of 2019 is a reference under Section 366 of Cr.P.C. for confirmation of death sentence passed by Xth Additional Sessions Judge/Special Judge (POCSO Act) Gwalior on 8-5-2019 in Special Sessions Trial No.130/2017 and Cr.A. No.4554 of 2019 has been filed by the appellant Manoj against the same judgment and sentence.

2. By this common judgment, the CRRFC No.8 of 2019 and Cr.A. No.4554 of 2019 shall be decided.

3. The prosecution story in short is that on 5-7-2017 at 2:00 A.M. in the night, FIR No.64 of 2017 was lodged by Hariram Prajapati, to the effect that his minor daughter "X" aged about 7-8 years had left her house on 4-7-2017 at about 10 A.M. for attending her school. She is the student of class 2 in Nayagaon Govt. Primary School. In the evening, she did not return back from the school. At about 17:15, the complainant and other villagers saw from the window of the school that the bag and water bottle of "X" is kept in the school. Thereafter, the complainant and villagers tried to find out the whereabouts of "X" in the nearby forest area and in the bushes, but her whereabouts could not be traced. Accordingly, it was alleged that some unknown person has kidnapped his minor daughter "X". Accordingly on 5-7-2017 at 2:30 A.M. in the morning, Missing Person Registration was done. The complainant thereafter noticed the dead body of "X" and accordingly on 5-7-2017 at 6:00 A.M., Dehati Nalishi was recorded. Notice under Section 175 of Cr.P.C. was given to the witnesses and *Naksha Panchnama* was prepared. Spot map was prepared on 5-7-2017 at 6:40 A.M. The dead body of "X" was sent for postmortem. The Scene of Crime Mobile Unit of Gwalior carried out the spot inspection on 5-7-2017 in between 8:30 A.M. To 9:50 A.M. One plastic bag of white colour which was stained with blood, the hairs found on the said white coloured plastic bag and from the nearby

places, plain earth from inside the *Pator* (room), earth containing the spit, one empty packet of Rajshri Gutka and one empty packet of tobacco, one button of a shirt of white colour with broken pieces of thread were seized from the spot on 5-7-2017 at about 9:10 A.M. On 5-7-2017 at about 9:30 A.M., the plain earth from the place where the dead body of "X" was lying and the earth having saliva of the deceased were also seized. The postmortem was conducted on 5-7-2017 itself, and the dead body was handed over to the father of the deceased "X" on 5-7-2017 itself. Viscera, Vaginal slide and swab of the deceased "X", cloths of the deceased, nail clippings of the deceased, specimen of seal were also seized on 5-7-2017 at 14:35. Unnatural death was registered under Section 174 of Cr.P.C. The respondent/accused was arrested on 6-7-2017 at 12:30 P.M. His memorandum under Section 27 of Evidence Act was recorded. He was got medically examined and his pubic hairs, undergarments, skull hairs, semen slide and outer garments were sealed and were handed over to the Police Constable which were seized on 6-7-2017 at 14:30. The school record of the deceased "X" was seized. The birth certificate of the deceased "X" was also obtained from the school according to which the date of birth was 19-10-2009. The attendance register was also seized. On 10-7-2017, the plastic white coloured bag, hairs collected from white coloured plastic bag and from the surrounding areas, Viscera of the deceased, one sealed packet of salt, cloths of the deceased, vaginal slide and swab of the

deceased, nail clippings of the deceased, the **outer** garments of the respondent/accused, underwear of respondent/accused, semen slide of respondent/accused, pubic hairs of respondent/accused, Saliva mixed earth, and the plain earth were sent to F.S.L. Gwalior to find out as to whether Human Blood is present and if so, its group, Whether the hairs are human hairs, Whether poison is present in the viscera or not, whether the articles F,G,I,J,K and L contains human semen/sperms and whether human skin is present in the nail clippings or not. The report dated 20-7-2017 was received from F.S.L. Gwalior. The blood sample of the respondent/accused was taken on 29-7-2017. By draft dated 31-7-2017, DNA report was also sought from F.S.L. Sagar. The police also recorded the statements of the witnesses. The photographs of the dead body and spot were taken and after completing the investigation, the police filed the charge-sheet against the respondent/accused for offence under Sections 363, 366, 376(2), 302, 201 of I.P.C. and under Section 5/6 of Protection Of Children From Sexual Offences Act, 2012 (In Short "POCSO Act").

4. The Trial Court by order dated 14-2-2018 framed charges under Sections 366, 376-A, 302, 201 of I.P.C., and under Section 5(L) read with Section 6 of POCSO Act.

5. The respondent/accused abjured his guilt and pleaded not guilty.

6. The prosecution in order to prove its case, examined Hariram Prajapati (P.W.1), Ramsewak Prajapati (P.W.2), Hari Singh Batham

(P.W.3), Bheem (P.W.4), Pappu (P.W.5), Ramesh Prajapati (P.W.6), Smt. Sagun (P.W.7), Smt. Ramdehi (P.W.8), Motiram Rajouriya (P.W.9), Ajeet Agrawal (P.W.10), Dr. Ajay Gupta (P.W.11), Dr. Ajeet Kumar Minz (P.W.12), Devlal Koli (P.W. 13), H.K. Tiwari (P.W.14), Dr. Anand Kumar Pandey (P.W. 15), Daini Kumar (P.W. 16), Dr. Vinod Kumar Doneriya (P.W. 17), Jugal Kishore Dubey (P.W. 18), Ashok Kumar (P.W. 19), Sayara Bano (P.W. 20), Dharmendra Singh Jat (P.W. 21), Ashok Singh (P.W. 22), Shishram (P.W. 23), Dr. Pankaj Shrivastava (P.W. 24), Dr. Neha Dodiya (P.W. 25), Dr. M.K. Dudhariya (P.W.26), Dr. Sandeep Tomar (P.W. 27), and Alok Singh (P.W. 28).

7. The respondent/accused examined Poonam (D.W.1) and Neetu (D.W.2) in his defence.

8. The Trial Court by judgment and sentence dated 8-5-2019 convicted and sentenced the respondent/accused as under :

Conviction under Section	**Sentence**	**Fine**
366 of I.P.C.	10 Years R.I.	Rs. 2,000/- in default 1 month R.I.
376-A of I.P.C.	Death Sentence	----
302 of I.P.C.	Death Sentence	----
201 of I.P.C.	7 years R.I.	Rs. 2,000/- in default 1 month R.I.
5(L) R/w 6 of POCSO Act	No separate sentence in the light of Section 42 of POCSO Act.	

9. Accordingly, this reference under Section 366 of Cr.P.C. has

been made for confirmation of death sentence and Cr.A. No.4554 of 2019 has been filed by the respondent/accused against the same judgment and sentence.

10. Challenging the judgment and sentence awarded by the Trial Court, it is submitted by the Counsel for the respondent/accused that the case is based on circumstantial evidence and the chain is not complete. The respondent/accused is the cousin brother of the deceased "X". There are material omissions and contradictions in the F.I.R. and the statements of the witnesses. In fact, nobody had witnessed the deceased "X" in the company of the respondent/accused for the last time. In the FIR, it is mentioned that the deceased is the student of Class 2, whereas according to the school record, she was the student of Class 3. Although it is the case of the prosecution that the deceased "X" had left her house for the school, and her bag and bottle were noticed in the school, but as per the attendance register, the deceased "X" was absent on 4-7-2017. The school bag and bottle of the deceased were not seized at all. There is a considerable delay in sending the blood sample and other articles to F.S.L., Sagar, therefore, DNA report is not reliable. Further, there is a discrepancy in A/RM code given to blood sample of the respondent/accused, which makes the DNA report unreliable. There is material difference in the *Naksha Panchayatnama* and the postmortem report as no injury was noticed on the head of the deceased at the time of preparation of *Naksha Panchayatnama.* The

F.I.R. is ante dated and ante timed. There is a material discrepancy as to in which container the internal organs of the deceased were stored, because in the post-mortem report, it has been mentioned that the internal organs were kept in a bottle, whereas in the seizure memo it is mentioned that boxes were seized. Arguments on the question of framing charge were advanced by a Counsel who was never engaged by the respondent/accused, thereby causing serious prejudice to the respondent/accused. The investigation is faulty and the arrest of the respondent/accused was the result of public agitation. The Trial Court has wrongly discarded the evidence of defence witnesses. The blood sample of the respondent/accused was not taken in accordance with law. No injury was found on the genital organs of the respondent/accused, which is indicative of fact that no forceful intercourse was done by him. It is further submitted that the diameter and thickness of the button seized from the spot and that of the button of the shirt of the respondent/accused was not similar. Grandmother of the deceased was not examined in order to prove that the deceased had left the house at 10:00 A.M. Further, the scalp hairs of the respondent/accused were collected, but they were not compared with the hairs found on the spot. Independent witnesses of the locality have not been examined by the prosecution. It is further submitted that in the alternative, the death sentence awarded by the Court below is excessive and is liable to be annulled and the appellant may be awarded Life Imprisonment. To buttress their contentions, the

Counsels for the respondent/accused relied upon the judgments passed by the Supreme Court in the case of **M.A. Antony alias Antappan v. State of Kerala** reported in **AIR 2019 SC 194, Rajendra Pralhadrao Wasnik v. State of Maharashtra** reported in **AIR 2019 SC 1, Vijay Raikwar Vs. State of M.P.** reported in **(2019) 4 SCC 210, Parsuram Vs. State of M.P.** reported in **(2019) 8 SCC 382, Chhannu Lal Verma v. State of Chhattisgarh** reported in **AIR 2019 SC 243, Bachan Singh Vs. State of Punjab** reported in **(1980) 2 SCC 684, Machhi Singh Vs. State of Punjab** reported in **(1983) 3 SCC 470, Kamti Devi Vs. Poshi Ram** reported in **(2001) 5 SCC 311, Mohd. Aman Vs. State of Rajasthan** reported in **(1997) 10 SCC 44, Bodhraj Vs. State of J&K** reported in **(2002) 8 SCC 45, Naneethakrishnan Vs. State by Inspector of Police** reported in **(2018) 16 SCC 161, Ganpat Singh Vs. State of M.P.** reported in **(2017) 16 SCC 353, Digamber Vaishnav and Anr. v. State of Chhattisgarh** reported in **AIR 2019 SC 1367, Hanumant Govind Nargundkar and another v. State of Madhya Pradesh** reported in **AIR 1952 SC 343, Sharad Birdhichand Sarda Vs. State of Maharashtra** reported in **(1984) 4 SCC 116, Raj Kumar Singh @ Raju @ Batya Vs. State of Rajasthan** reported in **AIR 2013 SC 3150, Madhu Vs. State of Kerala** reported in **(2012) 2 SCC 399, Sujit Biswas Vs. State of Assam** reported in **(2013) 12 SCC 406, State of Rajasthan Vs. Mahesh Kumar** reported in **(2019) 7 SCC**

678, and **Kumar Vs. State represented by Inspector of Police** reported in **(2018) 7 SCC 536.**

11. *Per contra,* the State Counsel has supported the judgment and sentence. It is submitted that a minor girl was raped and was killed by smothering. It is submitted that it is incorrect to suggest that non-examination of independent witnesses has given any dent to the prosecution story. It is submitted that social thread in the villages is to be understood. If the spot map is seen, then it is clear that the incident took place in the colony of persons belonging to Prajapati community. Generally the members of one community do not come forward to depose against the member of the same community. Further, the contention that since, the grandmother of the deceased was not examined and therefore, it is not prove that the deceased had left the house at 10 A.M. is concerned, it is submitted that in the present case, the deceased and the accused both are the grandchildren of the mother of the complainant. She must be in a fix as to whether to speak against the accused or not. It is further submitted that so far as the discrepancy in A/RM code of Article R in the DNA report is concerned, it is merely a typographical error. Article Q which was given A/RM 8279 code, was never opened which is clear from the DNA report itself. Further, it is submitted that no question in this regard was put to Dr. Pankaj Shrivastava (P.W.24) otherwise, he would have certainly clarified the anomaly. It is further submitted that it is incorrect to say that there was any difference in the button of the

shirt recovered from the spot and the button found on the shirt of the respondent/accused. The engraving, number of holes, material, colour were same. However, there was some difference in the measurement of diameter and thickness of the button which too was in fraction of millimeters. It is submitted that this difference can happen during manufacturing process. So far as non-comparison of hairs of the respondent/accused from the hairs found on the spot is concerned, it is submitted that since, the DNA profile of the respondent/accused was already found on the incriminating articles including the vaginal slide and swab of the deceased, therefore, it is proved beyond reasonable doubt, that the applicant was the perpetrator of offence. It is further submitted that non-seizure of school bag and bottle by the investigating officer from the school might be a lapse on his part, but it has also come on record, that after the recovery of dead body of the deceased, there was an uproar in the village, and agitating villagers had blocked the road, as a result, the investigating officer was immediately required to rush to the main road with police force, in order to calm down the agitating villagers. It is further submitted that the surrounding circumstances under which the investigating officer was conducting the investigation should be kept in mind while appreciating the evidence. It is further submitted that even the father of the respondent/accused did not come forward to depose in favor of his son. It is further submitted that the evidence of Last Seen Together has been duly proved beyond reasonable doubt. The

respondent/accused is cousin brother of the deceased and he has committed a heinous offence in a gruesome manner. Even after committing the heinous offence of committing rape and murder of his minor cousin sister, he did not show any remorse and was trying to project that he is an innocent person. Thus, it is clear that there is no possibility of his improvement. The applicant is a danger for civil society and therefore, the death sentence awarded to him should be confirmed and the appeal filed by the respondent/accused may be dismissed. To buttress his contentions, the Counsel for the State has relied upon the judgment passed by the Supreme Court in the case of **State of H.P. Vs. Gian Chand** reported in **(2001) 6 SCC 71, Sahadevan Vs. State represented by Inspector of Police, Chennai** reported in **(2003) 1 SCC 534, State of Rajasthan Vs. Kashiram** reported in **(2006) 12 SCC 254, Jagroop Singh Vs. State of Punjab** reported in **(2012) 11 SCC 768** and **Mahavir Singh Vs. State of Haryana** reported in **(0214) 6 SCC 716.**

12. Heard the learned Counsel for the parties.

13. Before considering the merits of the case, it would be appropriate to find out as to whether the deceased “X” had died a homicidal death or not?

14. The Postmortem of the deceased “X” was conducted by Dr. Ajay Gupta (P.W.11). As per the Postmortem report Ex. P.18, following injuries were found :

Ante-mortem Ecchymosis over Occipital Area 8x6 cm size and subdural and Subarachnoid hemorrhage present all over the brain.

(i) Red Abrasion on right side of mandible 0.3 x .2 cm size.
(ii) Red Abrasion anterior to right external ear 0.4 x . 3 cm.
(iii) Upper lip reddish blue contused 3x2 cm size.
(iv) Lower Lip contused reddish blue 4x1.5 cm.
(v) Red Abrasion left leg lower end anterio laterally 3x1.5 cm.
(vi) Contusion right Nostril 2 x 1 cm Reddish blue.
(vii) Both cheeks diffusely swollen and bluish coloured

A bundle of clothings, nail clippings, two vaginal slides and two vaginal swab, viscera in saturated salt solution, stomach and its contents and pieces of liver, spleen and kidney were sealed. Salt sample and seal specimen were also handed over to the police Constable.

It was found that the death was due to Asphyxia as a result of smothering.

Signs of Head Injury were also evident which were sufficient to cause death in ordinary course of action.

Nature of death was homicidal.

Signs of Physical violence were present.

Signs of forceful vaginal penetration were evident.

Duration of death was within 12 to 36 hours.

15. Dr. Ajay Gupta (P.W.11) was cross examined and he accepted that at the time of conducting postmortem, the police had not provided the copy of F.I.R. He also admitted that ID proof of the deceased "X" and of her father was not provided to him. He denied that postmortem report was prepared as per the instructions of the police and also denied that he is giving false evidence in the Court. Thus, it is clear that in fact no cross-examination was done with regard to the findings recorded by this witness in the postmortem report, Ex. P.18.

16. Therefore, it is held that the deceased "X" died due to smothering and she was subjected to rape and multiple injuries were also found on her body.

17. Now, the moot question for consideration is that whether the prosecution has succeeded in establishing the guilt of the respondent/accused beyond reasonable doubt or not?

18. The case is based on circumstantial evidence. Before appreciating the material available on record, this Court thinks it apposite to consider the law governing the field of Circumstantial Evidence. Although various judgments have been cited by the Counsel for the respondent/accused, but instead of burdening this judgment by considering each and every judgment cited, this Court thinks it apposite to consider few judgments covering the field of Circumstantial Evidence.

19. The Supreme Court in the case of **Sharad Birdhichandra Sarda Vs. State of Maharashtra** reported in **AIR 1985 SC 1622** has held as under :

> **152**. 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 Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made :
> "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.
> **153**. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.
> **154**. It may be interesting to note that as regards the mode of proof in a criminal case depending on circumstantial evidence, in the absence of a corpus delicti, the statement of law as to proof of the same was laid down by Gresson, J. (and concurred by 3 more Judges) in The King v. Horry, (1952) NZLR 111, thus :
> "Before he can be convicted, the fact of death should be

proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt : the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."

155. Lord Goddard slightly modified the expression 'morally certain' by 'such circumstances as render the commission of the crime certain'.

156. This indicates the cardinal principle of criminal jurisprudence that a case can be said to be proved only when there is certain and explicit evidence and no person can be convicted on pure moral conviction. Horry's case (supra) was approved by this Court in Anant Chintaman Lagu v. State of Bombay, (1960) 2 SCR 460 : (AIR 1960 SC 500). Lagu's case as also the principles enunciated by this Court in Hanumant's case (supra) have been uniformly and consistently followed in all later decisions of this Court without any single exception. To quote a few cases -Tufail's case (1969 (3) SCC 198) (supra). Ramgopal's case (AIR 1972 SC 656) (supra). Chandrakant Nyalchand Seth v. State of Bombay (Criminal Appeal No. 120 of 1957 decided on 19-2-1958), Charambir Singh v. State of Punjab (Criminal Appeal No. 98 of 1958 decided on 4-11-1958). There are a number of other cases where although Hanumant's case has not been expressly noticed but the same principles have been expounded and reiterated, as in Naseem Ahmed v. Delhi Administration, (1974) 2 SCR 694(696): (AIR 1974 SC 691 at p. 693), Mohan Lal Pangasa v. State of U. P., AIR 1974 SC 1144 (1146), Shankarlal Gyarasilal Dixit v. State of Maharashtra, (1981) 2 SCR 384 (390) : (AIR 1981 SC 765 at p. 767) and M. G. Agarwal v. State of Maharashtra, (1963) 2 SCR 405 (419) : (AIR 1963 SC 200 at p. 206) a five-Judge Bench decision

157. It may be necessary here to notice a very forceful argument submitted by the Additional Solicitor-General relying on a decision of this Court in Deonandan Mishra v. State of Bihar, (1955) 2 SCR 570 (582): (AIR 1955 SC 801 at p. 806), to supplement his argument that if the defence case is false it would constitute an additional link so as to fortify the prosecution case. With due respect to the learned Additional Solicitor General we are unable to agree with the interpretation given by him of the aforesaid case, the relevant portion of which may be extracted thus :

"But in a case like this where the various links as stated above have been satisfactorily made out and the circumstances point to the appellant as the probable

assailant, with reasonable definiteness and in proximity to the deceased as regards time and situation ... ... such absence of explanation or false explanation would itself be an additional link which completes the chain."

20. The present case is based on following Circumstances :

(i) The deceased, a minor girl aged about 8 years, went to school on 4-7-2017 and thereafter, she left the school after leaving her bag and bottle in the school.

(ii) As the deceased did not come back from School at 4 :00 P.M., therefore, her father started searching for her. The school bag and bottle of the deceased was seen lying in the School.

(iii) F.I.R. regarding missing of deceased was lodged on 5-7-2017 at 2:00 A.M. in the night.

(iv) The dead body of the deceased was recovered on 5-7-2017 at 6:00 A.M. which was lying in front of the *Pator* of Ram Prasad Prajapati.

(v) There were signs of dragging the dead body from inside the *Pator* of Ram Prasad Prajapati, till the door of the *Pator*.

(vi) Blood stained plastic bag, hairs, button, saliva mixed earth, spit, empty packet of Rajshree and Tobacco etc. were seized from the spot.

(vii) Abrasion was found on the nose of the respondent/accused.

(viii) Human skin was found in the nail clippings of the deceased.

(ix) Last Seen Together.

(x) The respondent/accused was seen coming from the *Pator* of Ramprasad in the afternoon of 4-7-2017.

(xi) The respondent was seen in a frightened condition in the afternoon of 4-7-2017 and respondent was seen all alone at 4:00 A.M. on 5-7-2017.

(xii) As per post-mortem report, multiple injuries were found on the dead body of the deceased and there were signs of forceful vaginal penetration.

(xiii) Hymen of the deceased was found torn.

(xiv) Injuries on private parts of the deceased were found.

(xv) Blood sample of the respondent/accused was collected.

(xvi) DNA profile of the respondent/accused was found in the cloths, vaginal slide and swab of the deceased.

(xvii) DNA profile of the deceased was found on the cloths of the respondent/accused.

(xviii)Button with broken pieces of thread seized from the spot was found to be that of the shirt of the respondent/accused.

Last Seen Together

21. Hariram Prajapati (P.W.1) has stated that the deceased "X" is his daughter and was a student of Class 2 and was studying in a Govt. School, and was aged about 8 years. On 4-7-2017, he went to his work at 8 A.M. and came back at 3-3:00 P.M. After having his meals, he went to bed and woke up at 5:00 P.M. He was informed by his mother that the deceased "X" has not returned back from the school. Thereafter, he searched for the deceased in neighborhood. He also went to the house of Bheem (P.W.4). Bheem (P.W.4) told him that he had seen the deceased "X" along with the respondent/accused at about 1 P.M. near the *pator* (room) of Ramprasad. Thereafter, Bheem (P.W.4) informed this witness that he has to go to Gwalior on the next morning and whether this witness can arrange for one more person. When this witness went to look for the another labourer, then he found that respondent/accused, Ramsewak Prajapati, Jitendra Parihar, Ashok Kushwaha were sitting on a trolley. When he enquired from the respondent/accused, that whether he would like to go to Gwalior or not, then he agreed for the same. Thereafter, he came back to his house. He was informed by his mother, that the deceased "X" has not returned back. Thereafter, all the villagers gathered and started searching for the deceased "X". Thereafter, they went to the school of the deceased and from the window they noticed that the bag and bottle of the deceased were lying in the school. When they could not search out the deceased, then F.I.R., Ex.P.1 was lodged and thereafter,

the police also started searching for the deceased. At about 3 A.M., the police personell told that they have already searched extensively and this witness must also be tired therefore, they would search after the sunrise. Thereafter, this witness came back to his house, and some of the villagers were sitting there. At about 5-6 A.M., he again went in search of the deceased. At that time, he heard the noise of cries of his *Bhabhi* Gayatri. They went to the *Pator* of Jaikishan. The dead body of his daughter was lying behind a trolley and was in a very bad shape. Her cloths were stained with blood. The police also reached there and Dehati Nalishi Ex. P.3 was written and spot map Ex. P.4 was prepared. *Safina form* Ex.P.5 was prepared and *Naksha Panchayatnama* Ex. P.6 was prepared. After the postmortem, the dead body of the deceased "X" was handed over to him vide supurdaginama Ex. P.7. The report under Section 174 of Cr.P.C. is Ex. P.8. It was further stated that since, there was *Kanya Bhoj* on account of *Dev Uthani Gyaras*, therefore, her daughter after leaving her bag and bottle in the school, went to have *Kanya Bhoj*. Bheem (P.W.4) had told that he had seen the deceased in the company of the respondent/accused at about 1 P.M. When he was searching for his daughter, then Hari Singh Batham had also told him that he had seen the deceased in the company of the respondent/accused. The statement of this witness recorded under Section 164 of Cr.P.C. is Ex. P.9. This witness was cross-examined. In cross-examination, this witness admitted that the respondent/accused is his real nephew, and

resides in his neighborhood. The respondent/accused is also a labourer. At the time of incident, this witness had gone for labour work. He had not seen the respondent/accused entering inside the *Pator*. He was interrogated by the police on the very same day. His statements were recorded at about 6 to 6:30 A.M. on the same day, when the dead body of his daughter was recovered. He denied the suggestion that the police had obtained his signatures on Ex. P.1 to P.8 in the police station. He clarified on his own, that some documents were signed in the police station and some were signed on the spot. He further denied that he is having any enmity with his brother Jagdish or his son (respondent/accused). He further stated that his daughter was studying in Govt. School Nayagaon. She used to go to school at 10:00 in the morning and used to come back at 4:00 in the afternoon. He denied that the police had not recorded his statement. He further denied that the respondent/ accused has been falsely implicated due to enmity. He further denied that he was not told by anybody that his daughter was seen for the last time in the company of the respondent/accused. He further denied that he is giving a false evidence before the Court.

22. Thus, it is clear that this witness was not cross-examined effectively. No omissions or contradictions in his F.I.R. Ex. P.1 or police statement Ex. D.1 were pointed out.

23. Ram Sewak Prajapati (P.W.2) is the witness of last seen together. He has stated that on 4-7-2017, at about 1 P.M., he was

sitting in front of the door of his house. He saw that the respondent/ accused was going towards the *Pator* of Ramprasad Prajapati along with the deceased. Since, both were cousin brother and sister, therefore he did not notice it seriously. Thereafter, he took his goats and came back to house in the evening. He further stated that on 5-7-2017 at about 6 A.M., he heard the noise of crying. He came out of his house and found that lot of persons had gathered near the *Pator* of Ramprasad and the dead body of the deceased "X" was lying behind the trolley. The police was informed. The police also reached there after some time, and written work was done, and the dead body was sent for postmortem. He further stated that in the afternoon, he was interrogated by the police and he accordingly informed that he had seen the respondent/accused going along with the deceased "X" at about 1 P.M. and his Court Statement (Under Section 164 of Cr.P.C.) is Ex. P.10. This witness was cross-examined. He admitted that he know Jagdish who is the father of respondent/accused. He is brother being of same Gotra. He further admitted that he has been brought by the Police to the Court for recording of his evidence, but denied that he was tutored by Police. He further clarified that whatever was seen by him has been deposed by him. He further clarified that the statement was recorded by the police at about 10-11 A.M. He further denied that he is deposing falsely against the respondent/accused due to enmity.

24. Bheem (P.W. 4) is also a witness of last seen together, who has

stated that on 4-7-2017, Hariram (P.W.1) had come to him and enquired about his daughter "X". He further stated that accordingly, he had informed Hariram (P.W.1) that at 1 P.M., he had seen his daughter "X" along with the respondent/accused. Thereafter, the deceased was searched but could not be traced. However, at about 5-6 A.M., her dead body was found lying near the trolley. Her cloths were stained with blood. The police had recovered one plastic bag, another blood stained plastic bag, hairs, plain earth, spit, packet of Rajshree Tobacco, empty packet of tobacco, one button of a shirt, from inside the *pator* vide seizure memo Ex. P.12. The plain earth from the place where the dead body of the deceased was lying and saliva mixed earth was also seized vide seizure memo Ex. P.13. His statements under Section 164 of Cr.P.C. are Ex. P.14. This witness was cross examined. He stated that on the date of incident, he was doing the labour work in the village itself. When he came back to his house for having his lunch then, in the afternoon, he had seen the deceased in the school and thereafter did not see her.

25. Challenging the evidence of Last Seen Together, it is submitted by the Counsel for the respondent/accused that Ram Sewak Prajapati (P.W.2) and Bheem (P.W. 4) as well as Hariram (P.W.1) have stated that much prior to lodging of F.I.R, Hariram (P.W.1) was already informed by Ram Sewak Prajapati (P.W.2) and Bheem (P.W.4) about the fact that the deceased was seen along with the respondent/ accused, but the said fact is missing in F.I.R. Ex. P.1. Therefore, it is

clear that the witnesses of last seen together are unreliable and thus liable to be disbelieved.

26. However, the Counsel for the respondent/accused fairly conceded that the omission in the F.I.R. regarding information given to Hariram (P.W.1) by Ram Sewak Prajapati (P.W.2) and Bheem (P.W.4) about the last seen together was not confronted and the attention of Harirram (P.W.1) was not drawn towards the omission.

27. It is a trite law that if the attention of the witness is not drawn towards the omissions in his previous statement, then the accused cannot take advantage of such omissions and contradictions.

28. Section 145 of Evidence Act, reads as under :

> **145. Cross-examination as to previous statements in writing.**—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

29. Thus, it is clear that if a party intends to contradict a witness, then his attention must be called to those parts of it which are to be used for the purpose of contradicting him.

30. The Supreme Court in the case of **Rajender Singh Vs. State of Bihar** reported in **(2000) 4 SCC 298** has held as under :

> 6.....But if the witness during trial is intended to be contradicted by his former statement then his attention has to be drawn to those parts of the statement which are required to be used for the purpose of contradicting him before the said statement in question can be proved as

provided under Section 145 of the Evidence Act. Mr Mishra, learned Senior Counsel appearing for the appellant relying upon the decision of this Court in *Bhagwan Singh* v. *State of Punjab* contended before us that if there has been substantial compliance with Section 145 of the Evidence Act and if the necessary particulars of the former statement has been put to the witness in cross-examination then notwithstanding the fact that the provisions of Section 145 of the Evidence Act is not complied with in letter i.e. by not drawing the attention of the witness to that part of the former statement yet the statement could be utilised and the veracity of the witness could be impeached. According to Mr Mishra the former statement of PW 8 which has been exhibited as Exhibit B was to the effect that Kameshwar was assaulted with a bhala by Rajender and Surender and he did not see whether any other person had been assaulted or not, whereas in the course of trial the substantive evidence of the witness is that it is Rajender and Triloki who assaulted the deceased and, therefore, it belies the entire prosecution case. The question of contradicting evidence and the requirements of compliance with Section 145 of the Evidence Act has been considered by this Court in the Constitution Bench decision in the case of *Tahsildar Singh* v. *State of U.P.* The Court in the aforesaid case was examining the question as to when an omission in the former statement can be held to be a contradiction and it has also been indicated as to how a witness can be contradicted in respect of his former statement by drawing particular attention to that portion of the former statement. This question has been recently considered in the case of *Binay Kumar Singh* v. *State of Bihar* and the Court has taken note of the earlier decision in *Bhagwan Singh* and explained away the same with the observation that on the facts of that case there cannot be a dispute with the proposition laid down therein. But in elaborating the second limb of Section 145 of the Evidence Act it was held that if it is intended to contradict him by the writing his attention must be called to those parts of it which are to be used for the purpose for contradicting him. It has been further held that if the witness disowns to have made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross-examiner proceeds to comply with the procedure prescribed in the second limb of Section 145 of the Evidence Act.....

(Underline supplied)

The Supreme Court in the case of **Raj Kishore Jha Vs. State of Bihar** reported in **(2003) 11 SCC 519** has also held the same proposition of law.

31. Thus, it is held that since, the attention of Hariram (P.W. 1) was not drawn towards the omission regarding information of last seen together in his F.I.R., Ex. P.1, therefore, the evidence of Last Seen Together cannot be held to be vitiated as the second limb of Section 145 of Cr.P.C. has not been complied with by the respondent/accused.

32. The next question for consideration is that whether Ram Sewak Prajapati (P.W.2) and Bheem (P.W.4), who have claimed that they had seen the deceased in the company of the respondent/accused are reliable witnesses or not?

33. Challenging the reliability and credibility of Ram Sewak Prajapati (P.W.2), it is submitted by the Counsel for the respondent/accused that since, this witness was Kotwar of the village, therefore, his statement should have been recorded by the police at the earliest, whereas according to Alok Singh (P.W. 28), the statement of Ram Sewak Prajapati (P.W. 2) was recorded on 10-7-2018. It is submitted that thus, the delayed recording of statement of Ram Sewak Prajapati (P.W.2) makes his evidence suspicious.

34. Considered the submissions made by the Counsel for the respondent/accused.

35. It is a trite law that every delay in recording of police statement is not fatal. If a plausible explanation is given for delayed recording

of statements, then it would not give any dent to the prosecution story. However, the investigating officer and the witnesses are to be questioned regarding delay. Unless and until, the investigating officer is asked about the delay, the delayed recording of statements by itself would not make the evidence of the witnesses suspicious.

The Supreme Court in the case of **Vijay Kumar Arora v. State (NCT of Delhi)** reported in **(2010) 2 SCC 353** has held as under :

> **55.** On reappraisal of the evidence, this Court finds that it is true that the police statements of the abovenamed three witnesses were recorded after one month from the date of the death of the deceased. However, neither an explanation was sought from any of the witnesses as to why their police statements were recorded after a delay of one month nor the investigating officer was questioned about the delay in recording statements of those witnesses. The law on the point is well settled. Unless the investigating officer is asked questions about delay in recording statements and an explanation is sought from the witnesses as to why their statements were recorded late, the statements by themselves did not become suspicious or concocted.

The Supreme Court in the case of **V.K. Mishra v. State of Uttarakhand,** reported in **(2015) 9 SCC 588** has held as under :

> **27**.....It is pertinent to point out that on the delayed examination of PW 2, no question was put to the investigating officer (PW 14) by the defence. Had such question been put to PW 14, he would have certainly explained the reason for not examining PW 2 from 15-8-1997 to 17-8-1997. Having not done so, the appellants are not right in contending that there was delay in recording the statement of PW 2.
>
> **26.** It cannot be held as a rule of universal application that the testimony of a witness becomes unreliable merely because there is delay in examination of a particular witness. In *Sunil Kumar* v. *State of Rajasthan*, it was held that the question of delay in examining a witness during

investigation is material only if it is indicative and suggestive of some unfair practice by the investigating agency for the purpose of introducing a core of witness to falsely support the prosecution case. As such there was no delay in recording the statement of PW 2 and even assuming that there was delay in questioning PW 2, that by itself cannot amount to any infirmity in the prosecution case.

The Supreme Court in the case of **Shyamal Ghosh v. State of W.B.,** reported in **(2012) 7 SCC 646** has held as under :

51. On the contra, the submission on behalf of the State is that the delay has been explained and though the investigating officer was cross-examined at length, not even a suggestion was put to him as to the reason for such delay and, thus, the accused cannot take any benefit thereof at this stage. Reliance in this regard on behalf of the State is placed on *Brathi* v. *State of Punjab*, *Banti* v. *State of M.P.* and *State of U.P.* v. *Satish*.

52. These are the issues which are no more res integra. The consistent view of this Court has been that if the explanation offered for the delayed examination of a particular witness is plausible and acceptable and the Court accepts the same as plausible, there is no reason to interfere with the conclusion arrived at by the courts. This is the view expressed in *Banti*. Furthermore, this Court has also taken the view that no doubt when the Court has to appreciate the evidence given by the witnesses who are closely related to the deceased, it has to be very careful in evaluating such evidence but the mechanical rejection of the evidence on the sole ground that it is that of an interested witness would inevitably relate to failure of justice (*Brathi*). In *Satish*, this Court further held that the explanation offered by the investigating officer on being questioned on the aspect of delayed examination by the accused has to be tested by the Court on the touchstone of credibility. It may not have any effect on the credibility of the prosecution evidence tendered by other witnesses.

53. The delay in examination of witnesses is a variable factor. It would depend upon a number of circumstances. For example, non-availability of witnesses, the investigating officer being preoccupied in serious matters, the investigating officer spending his time in arresting the

> accused who are absconding, being occupied in other spheres of investigation of the same case which may require his attention urgently and importantly, etc.
>
> **54.** In the present case, it has come in evidence that the accused persons were absconding and the investigating officer had to make serious effort and even go to various places for arresting the accused, including coming from West Bengal to Delhi. The investigating officer has specifically stated, that too voluntarily, that he had attempted raiding the houses of the accused even after cornering the area, but of no avail. He had ensured that the mutilated body parts of the deceased reached the hospital and also effected recovery of various items at the behest of the arrested accused. Furthermore, the witnesses whose statements were recorded themselves belonged to the poor strata, who must be moving from one place to another to earn their livelihood. The statement of the available witnesses like PW 2, PW 4, PW 6, and the doctor, PW 16, another material witness, had been recorded at the earliest. The investigating officer recorded the statements of nearly 28 witnesses. Some delay was bound to occur in recording the statements of the witnesses whose names came to light after certain investigation had been carried out by the investigating officer.

36. Alok Singh (P.W. 28) has stated in his examination-in-chief, that after the recovery of dead body of the deceased “X”, there was an uproar in the society, and roads were blocked and he was required to go to the place of agitation along with police force. Further, it is not the case of the respondent/accused, that the investigating officer was not investigating the matter at all. While appreciating the evidence, this Court cannot lose sight of surrounding circumstances which were present at the time of investigation. The Supreme Court in the case of **V.K. Mishra (Supra)** has held that the fact that the investigating officer was preoccupied in arresting accused, or other spheres of investigation, then this aspect cannot be lost sight of.

After the dead body of the deceased minor girl was recovered, there was an unrest in the Society, and the people had started agitating the matter, and question of law and order situation had arisen, requiring the investigating officer, to immediately go to the place of agitation along with police force, in order to calm down and defuse the agitation. Therefore, this Court is of the considered opinion, that the unrest in the Society must have diverted the attention of the investigating officer, and thus, it cannot be said that the delayed recording of statement of Ram Sevak Prajapati (P.W.2) was an outcome of creation of evidence. Further, the statement of another witness of Last Seen Together, Bheem (P.W. 4) was recorded on 5-7-2017 itself. Thus, it is held that in absence of any question to the investigating officer regarding the delay in recording the statement of Ram Sewak Prajapati (P.W.2) on 5-7-2017, it cannot be said that the evidence of Ram Sewak Prajapati (P.W.2) is not reliable.

37. It is next contended by the Counsel for the respondent/accused, that Bheem (P.W.4) has admitted in his cross-examination that in the afternoon he had seen the deceased “X” in the school and thereafter, he had never seen her.

38. It is a trite law that while appreciating the evidence of witnesses, the entire evidence is to be seen as a whole and stray sentence from one place to another cannot be picked up. Hariram (P.W.1) has stated that in the evening, when he went to the house of Bheem (P.W.4) in order to trace out the whereabouts of his daughter,

then he was informed by Bheem (P.W.4) that he had seen his daughter along with the respondent/accused. Bheem (P.W.4) has also stated in his examination-in-chief that he had seen the deceased in the company of the respondent/accused for the last time in the afternoon. It is the case of the prosecution itself, that the *Pator* of Ramprasad Prajapati is situated at a distance of 200 Mts. from the house of Hariram (P.W.1) whereas School is situated quite nearer to the *Pator* of Ram Prasad i.e., the place of incident, as it is evident from the spot map Ex. P.4. Therefore, the statement of this witness in his cross-examination that in the afternoon he had seen the deceased in the school cannot be given much importance so as to discard the entire prosecution story, specifically in the light of the evidence of Motiram Rajoria (P.W. 9) that even in the afternoon, the deceased "X" was not seen in the school.

39. It is next contended by the Counsel for the respondent/accused that since, Ram Sewak Prajapati (P.W.2) and Bheem (P.W. 4) have stated that the deceased and respondent/accused were going back and forth, therefore, it cannot be said that the deceased was seen in the company of the respondent/accused for the last time.

40. The *Pator* of Ram Prasad Prajapati is situated at a rough place and is not connected with any road except a footpath, as it is evident from the spot map, Ex. P.4. There was no occasion for the deceased "X" to go to a rough place on her own. It appears that since, the respondent/accused is the cousin brother of the deceased "X",

therefore, she must have faith in him, and taking advantage of said faith, the respondent/accused took her to a lonely room. If the deceased was following the respondent/accused out of faith, then it cannot be said that she was not in the company of the respondent/accused.

41. Now the next question for consideration is that whether the evidence of Last Seen Together indicates towards the culpability of the respondent/accused or not?

42. The Supreme Court in the case of **Shailendra Rajdev Pasvan v. State of Gujarat,** reported in **(2020) 14 SCC 750** has held as under :

> **15.** Another important aspect to be considered in a case resting on circumstantial evidence is the lapse of time between the point when the accused and deceased were seen together and when the deceased is found dead. It ought to be so minimal so as to exclude the possibility of any intervening event involving the death at the hands of some other person. In *Bodhraj* v. *State of J&K*, *Rambraksh* v. *State of Chhattisgarh*, *Anjan Kumar Sarma* v. *State of Assam* following principle of law, in this regard, has been enunciated: (*Shailendra Rajdev Pasvan case*, SCC OnLine Guj para 16)
>
> > "*16*. …The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases."

The Supreme Court in the case of **Ashok v. State of Maharashtra,** reported in **(2015) 4 SCC 393** has held as under :

> **12.** From the study of abovestated judgments and many others delivered by this Court over a period of years, the rule can be summarised as that the initial burden of proof is on the prosecution to bring sufficient evidence pointing towards guilt of the accused. However, in case of last seen together, the prosecution is exempted to prove exact happening of the incident as the accused himself would have special knowledge of the incident and thus, would have burden of proof as per Section 106 of the Evidence Act. Therefore, last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, like relations between the accused and the deceased, enmity between them, previous history of hostility, recovery of weapon from the accused, etc. non-explanation of death of the deceased, may lead to a presumption of guilt.
> 13. Here another judgment in *Harivadan Babubhai Patel* v. *State of Gujarat*, would be relevant. In this case, this Court found that the time-gap between the death of the deceased and the time when he was last seen with the accused may also be relevant.

The Supreme Court in the case of **Mahavir Singh (Supra)** has held as under :

> **12.** Undoubtedly, it is a settled legal proposition that the last seen theory comes into play only in a case where the time-gap between the point of time when the accused and the deceased were seen alive and when the deceased was found dead (*sic* is small). Since the gap is very small there may not be any possibility that any person other than the accused may be the author of the crime.....

The Supreme Court in the case of **Jagroop Singh (Supra)** has held as under :

> **27.** Quite apart from the above, what is argued is that there is a long gap between the last seen and recovery of the dead body of the deceased. As per the material on record, the informant searched for his son in the village in the late evening and next day in the morning he went to the fields

> and the dead body was found. The post-mortem report indicates that the death had occurred within 24 hours. Thus, the duration is not so long as to defeat or frustrate the version of the prosecution. Therefore, there can be no trace of doubt that the deceased was last seen in the company of the accused persons.

43. According, to the witnesses, they had seen the deceased for the last time in the company of the respondent/accused at about 1 P.M. The deceased did not come back to her house, whereas she was supposed to come back from School at 4 P.M. Thereafter, from 5 P.M., Hariram (P.W.1) started searching for the deceased and ultimately, her dead body was found at 6:00 A.M. on 5-7-2017. As per the postmortem report the duration of her death was also in between 12 to 36 hours. Therefore, it is held that the prosecution has succeeded in establishing that there was minimum time gap between the time when she was seen in the company of the respondent/accused for the last time and when the death took place and the dead body of the deceased was recovered. Accordingly, it is held that the deceased was seen for the last time in the company of the respondent/accused and thereafter, she was never seen alive. Thus, the burden had shifted onto the respondent/accused, to explain as to when he parted away with the company of the deceased, but that burden has not been discharged by the respondent/accused.

Respondent/accused was seen at 4:00 A.M. on 5-7-2017

44. Ramesh Prajapati (P.W. 6) has stated that on 5-7-2017 at about 4:00 A.M., he had noticed that respondent/accused was going

towards the house of Hariram (P.W1), and he had identified him from his back, style of walking and body buildup. This witness was cross examined, and in the cross examination also, this witness reiterated that he had seen the respondent/accused at 4 A.M. and he was all alone.

45. Challenging the evidence of this witness, it is submitted by the Counsel for the respondent/accused, that since, this witness had not seen the face of the person, therefore, the claim of this witness regarding identifying the said person from his back as respondent/accused, cannot be relied upon.

46. Considered the submission made by the Counsel for the respondent/accused.

47. It is a matter of common knowledge, that the villagers have the ability of identifying the things even in the poor light. Villages have limited number of inhabitants and are closely watched by each and every resident of the village. The evidence of this witness is that he had identified the said person from his back, style of walking, and body buildup, then it cannot be said that such witness is unreliable or he cannot identify the resident of the village from his back, or style of walking or body buildup, as the eyes of the villagers are conditioned to identify the villagers in poor light or from their walking style, or body build up etc.

48. The Supreme Court in the case of **Ramesh Vs. State** reported in **(2010) 15 SCC 49** has held as under ;

> **15.** As stated earlier, the appellant and these two witnesses (PWs 3 and 4) are neighbours and, therefore, knew the appellant well and their claim of identification cannot be rejected only on the ground that they have identified him in the evening, when there was less light. It has to be borne in mind that the capacity of the witnesses living in rural areas cannot be compared with that of urban people who are acclimatised to fluorescent light. Visible (*sic* visual) capacity of the witnesses coming from the village is conditioned and their evidence cannot be discarded on the ground that there was meagre light in the evening. There is nothing on record to show that these two witnesses are in any way interested and inimical to the appellant. Their evidence clearly shows that the deceased was last seen with the appellant and the High Court did not err in relying on their evidence.

Conduct of respondent/accused

49. Hari Singh Batham (P.W. 3) has stated that the dead body of the deceased "X" was recovered at about 5:30-6 AM. One day prior to the recovery of dead body, he had seen the respondent/accused near the *pator* of Ramprasad Prajapti and was in a frightened condition. He further stated that the deceased "X" was raped and was killed by smothering. On cross examination, he denied that he had not seen the respondent/accused on the date of incident.

50. Thus, it is clear that the prosecution has succeeded in establishing that the respondent/accused was seen in a frightened condition in the afternoon of 4-7-2017.

51. After considering the evidence of last seen together coupled with the fact that not only he was seen near the *pator* of Ram Prasad in the afternoon of 4-7-2017, but he was in a frightened condition, this Court is of the considered opinion, that the deceased was never

seen alive, after she was seen in the company of the respondent/accused and due to minimum time gap between the last seen together and the time of death and recovery of dead body, it cannot be said that the respondent/accused is not the perpetrator of the offence.

Whether the deceased went missing from School or She had not attended the School at all

52. Smt. Sagun (P.W. 7) has stated that she is working as a cook as well as also do the work of mopping and cleaning in the school. On 4-7-2017, she had seen that the daughter of Hariram (P.W.1) was coming to the school along with her school bag and bottle. After some time, she went outside the school after keeping her school bag and bottle in the class room. she was cross examined by the respondent/accused. In cross examination, this witness clarified that after about half an hour of coming to school, the deceased had gone out. She further clarified that there is no guard on the gate of the school and any child may come to school at any time and may go out.

53. Smt. Ramdehi (P.W. 8) who is also working in the school as a cook and also do work of mopping and dusting has stated that she had seen the deceased “X” coming to the school at 10 A.M. This witness was cross-examined, however, she denied that she had not seen the deceased coming to school.

54. Motiram Rajoria (P.W. 9) is the Head Master of the school. He has stated that in the prayer session of 4-7-2017, the deceased “X”

was not present. Thereafter, he had taken the attendance of Class 3 students, and the deceased "X" was not present. It was further stated that the absence of the deceased "X" is also mentioned in the attendance register. The date of birth of the deceased "X" is 19-10-2009. The original admission register is Ex. P.15 and the photocopy of the same is Ex. P. 15C. The date of birth certificate issued on the basis of admission register is Ex. P.16 and the attendance register of Class 3 is Ex. P.17, in which the absence of the deceased "X" is marked. In cross-examination, this witness has stated that there is a boundary around the school building and if a student is required to leave the school, then he can do so with his permission. He further denied that Ex. P.15, P.16 and P.17 have been falsely prepared on the instructions of the police.

55. By referring to the evidence of Motiram Rajoria (P.W. 9), it is submitted by the Counsel for the respondent/accused that since, the deceased "X" had not come to the school, therefore, the prosecution has failed to prove that the deceased had left her house at 10 A.M. for attending the school. It is further submitted that the evidence of grand mother of the deceased was not recorded to prove that the deceased had left the house at 10:00 A.M. for attending the school. It is further submitted that although it is the case of the prosecution that the school bag and bottle of the deceased was lying in the school, but the same was not seized by the investigating officer.

56. Considered the submissions made by the Counsel for the

parties.

57. Hariram (P.W.1) has stated that since, there was *Kanya Bhoj* on account of *Dev Uthani Gyaras*, therefore, his daughter had left the school after leaving her school bag and bottle in the school. Smt. Sagun (P.W.7) and Ramdehi (P.W.8) had seen the deceased "X" coming to the school and thereafter leaving the school. If the evidence of Hariram (P.W.1), Smt. Sagun (P.W. 7), Ramdehi (P.W.8) and Motiram Rajoria (P.W.9) are read together, then it is clear that the deceased "X" left her house at 10 A.M. for attending the school. In fact she came to school and after leaving her school bag and bottle in the class room, she left the school for attending *Kanya Bhoj*. It is clear that the deceased "X" did not attend the prayer session and also did not attend the classes, therefore, she must have left the school prior to prayer session. According to Hariram (P.W.1), he had seen from the window that the school bag and bottle of the deceased were lying in the school. This fact is also mentioned in the F.I.R., Ex. P.1. Although the Investigating Officer, did not seize the school bag and bottle, but at the most, it can be said to be a lapse in the investigation and the accused would not get the advantage of the same in the light of other clinching evidence available on record. Furthermore, this Court cannot lose sight of the fact that immediately after recovery of dead body of the deceased, there was an unrest in the locality and the people had started agitating and Chinnor Road was blocked and therefore, the investigating officer was compelled to rush towards the

place of agitation along with police force, and some part of investigation was done by Devlal Koli (P.W. 13), like preparation of *Naksha Panchayatnama,* Ex. P.6, preparation of requisition for post-mortem, Ex. P.22 as well as issuing notice under Section 175 of Cr.P.C. Therefore, when the attention of the investigating officer was completely diverted due to aggressive agitation by the residents of the locality, then this Court cannot lose sight of the said surrounding circumstance. Further, the fact that the school bag and bottle of the deceased were lying in the school had already come in the F.I.R. Ex.P.1, therefore, it cannot be said that the non-seizure of School Bag and Bottle of the deceased from the school would belie the prosecution case.

58. Under these facts and circumstances of the case, this Court is of the considered opinion that since, the investigating officer was required to maintain the law and order situation apart from doing investigation, therefore, the non-seizure of school bag and bottle of the deceased cannot be said to be even a faulty investigation.

59. Furthermore, mere non-seizure of school bag and bottle of the deceased would not wash out the other reliable and trustworthy evidence.

60. The Supreme Court in the case of **Babu and another v. State represented by Inspector of Police, Chennai,** reported in **(2013) 4 SCC 448** has held as under :

> 18.....If a defect in the investigation does not create a

> reasonable doubt on the guilt of the accused, the court cannot discard the prosecution case on the ground that there was some defect in the investigation.

The Supreme Court in the case of **Ganga Singh Vs. State of M.P.** reported in **(2013) 7 SCC 278** has held as under :

> **17.** We are also unable to accept the submission of Mr Mehrotra that the investigation by the police is shoddy and hasty and there are defects in the investigation and therefore benefit of doubt should be given to the appellant and he should be acquitted of the charge of rape. The settled position of law is that the prosecution is required to establish the guilt of the accused beyond reasonable doubt by adducing evidence. Hence, if the prosecution in a given case adduces evidence to establish the guilt of the accused beyond reasonable doubt, the court cannot acquit the accused on the ground that there are some defects in the investigation, but if the defects in the investigation are such as to cast a reasonable doubt in the prosecution case, then of course the accused is entitled to acquittal because of such doubt. In the present case, as we have seen, the evidence of PW 5 as corroborated by the evidence of PW 2 and the FIR establish beyond reasonable doubt that the appellant has committed rape on PW 5 and thus the appellant is not entitled to acquittal.

The Supreme Court in the case of **Gargi v. State of Haryana,** reported in **(2019) 9 SCC 738** has held as under :

> **20.7.** The abovementioned unexplained shortcomings, perforce, indicate that in this case, the investigation was carried out either with preconceived notions or with a particular result in view. It is difficult to accept that the investigation in this case had been fair and impartial. From another viewpoint, on the facts and in the circumstances of this case, the omissions on the part of investigating agency cannot be ignored as mere oversight. These omissions, perforce, give rise to adverse inferences against the prosecution.

Thus, every faulty investigation would not make the prosecution unreliable. But the faulty investigation must lead to an

inference that the investigation was being done with a preconceived notions. If the prosecution, otherwise, succeeds in establishing the guilt of the accused beyond reasonable doubt, then some minor omissions on the part of the investigating officer, would not give any dent to the prosecution case.

61. It is next contended by the Counsel for the respondent/accused that since, the grandmother of the deceased was not examined, therefore, it cannot be said that on 4-7-2017, the prosecution has proved that the deceased had left her house for attending the school at 10:00 A.M..

62. Considered the submissions made by the Counsel for the parties.

63. It is well established principle of law that it is the quality and not the quantity of the witnesses which decides the fate of a trial. Further, the social scenario of the village cannot be lose sight of. In the present case, the unfortunate part is that the deceased and the accused are the grandchildren of the mother of Hariram (P.W.1). If the grandmother could not collect the courage to depose against the respondent/accused, then it cannot be said that non-examination of mother of Hariram (P.W.1) would give any dent to the prosecution case. It is once again pointed out that in the FIR, Ex. P.1 itself, it was mentioned that the deceased had left her house at 10 A.M. Further, Smt. Sagun (P.W. 7) and Smt. Ramdehi (P.W.8) had seen the deceased in the school at 10:00 A.M. According to Smt. Sagun (P.W. 7), the

deceased left the school after half an hour. Thus, non-examination of grandmother of the deceased would not make the evidence of the prosecution witnesses unreliable.

64. The Supreme Court in the case of **Sarwan Singh Vs. State of Punjab** reported in **(1976) 4 SCC 369** has held as under :

> The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well-settled that the prosecution is bound to produce only such witnesses as are essential for unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than the quantity of the evidence that matters. In the instant case, the evidence of the eyewitnesses does not suffer from any infirmity or any manifest defect on its intrinsic merit. Secondly, there is nothing to show that at the time when the deceased was assaulted a large crowd had gathered and some of the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and then withheld. We must not forget that in our country there is a general tendency amongst the witnesses in mofussil to shun giving evidence in courts because of the cumbersome and dilatory procedure of our courts, the harassment to which they are subjected by the police and the searching cross-examination which they have to face before the courts.

The Supreme Court in the case of **State of M.P. Vs. Laakhan**

reported in **(2009) 14 SCC 433** has held as under :

> 10. Even the evidence of a solitary witness can be sufficient to record conviction if the same is wholly reliable. No particular number of witnesses is necessary to prove any fact, as statutorily provided in Section 134 of the Evidence Act, 1872 (in short "the Evidence Act"). It is the quality and not the quantity of the evidence that matters. The court cannot take a closed view in such matters.

The Supreme Court in the case of **S.P.S. Rathore Vs. CBI** reported in **(2017) 5 SCC 817** has held as under :

> **53.** No particular number of witnesses is required for proving a certain fact. It is the quality and not the quantity of the witnesses that matters. Evidence is weighed and not counted. Evidence of even a single eyewitness, truthful, consistent and inspiring confidence is sufficient for maintaining conviction. It is not necessary that all those persons who were present at the spot must be examined by the prosecution in order to prove the guilt of the accused. Having examined all the witnesses, even if other persons present nearby are not examined, the evidence of eyewitness cannot be discarded.

65. The evidence is to be weighed and not counted. Each and every possible witness is not required to be examined. It is for the prosecution to decide that on which witness, it would like to rely. If the evidence of the witnesses so examined by the prosecution are found to be trustworthy and reliable, then their evidence cannot be discarded only on the ground that some more witnesses should have been examined in order to corroborate the prosecution witnesses. Thus, it is held that the prosecution has succeeded in establishing that on 4-7-2017, the deceased "X" left her house at 10 A.M., for attending the school. She came to school and after leaving her school bag and bottle, went away.

D.N.A.

(i) DNA Profile of respondent/accused in the vaginal slide, swab and cloths of deceased "X"

66. It is submitted by the Counsel for the respondent/accused that as per DNA report, Ex. P.29, DNA profile of the respondent/accused was found on Article F i.e., cloths of deceased and G i.e., Vaginal Slide and Swab of the deceased. However, it is submitted that it is clear that the blood sample of the respondent/accused was marked as Article R and was given A/RM code 7280. However, it is fairly conceded that looking to the A/RM codes given to the other articles, A/RM-7280 appears to be a typographical error and it should have been A/RM 8280. However, it is submitted that on the second page of report, A/RM code of Article R is mentioned as 8279 whereas A/RM 8279 code was given to Article Q which was Scalp Hair of accused. Therefore, it is submitted that it is incorrect to say that the DNA profile found on the cloths and Vaginal Slide and Swab of the deceased was containing the DNA profile of the respondent/accused, because it is for the prosecution to prove the guilt of the accused beyond reasonable doubt, and since, the DNA report itself creates doubt on its correctness, therefore, the circumstance of presence of DNA profile of respondent/accused on the cloths and Vaginal Slide and Swab of the deceased cannot be relied upon.

67. It is not out of place to mention here that inspite of the

provisions of Section 293 of Cr.P.C., as well as even in absence of any application for cross-examination of Scientific Officer, the Scientific Officer Dr. Pankaj Shrivastava (P.W.24) was examined. However, no question with regard to the above mentioned anomaly was asked. But, it is submitted by the Counsel for the respondent/accused, that the prosecution has to stand on its own legs and cannot take advantage of the weakness of the accused. Therefore, it was incumbent upon the prosecution to prove beyond reasonable doubt that the DNA of the respondent/accused was extracted from the blood sample of the respondent/accused, but having failed to do so, it is submitted that the DNA report, Ex. P. 29 has no evidentiary value.

68. Undisputedly, Dr. Pankaj Shrivastava (P.W. 24) was not asked any question with regard to the above mentioned anomaly in A/RM code of Article R. Whether there is typographical error in mentioning the A/RM code of Article R in the DNA report, Ex. P.29 or it is fatal to the prosecution story?

69. From the DNA report, Ex. P.29, it is clear that Article Q was given A/RM code 8279. In the DNA report, Ex. P.29 itself, it is mentioned that Article Q was not opened and it was returned back unopened. When Article Q was not opened at all, then there is no question of extracting the DNA profile of the respondent/accused from Article Q having A/RM code 8279 i.e., scalp hair of respondent/accused. Thus, it is clear that A/RM code of Article R mentioned on 2nd page of DNA report, Ex. P.29 is a typographical

error and nothing more. Further, Dr. Pankaj Shrivastava (P.W.24) has stated that the DNA of the respondent/accused was extracted from his blood sample (Article R) and this evidence of Dr. Pankaj Shrivastava (P.W. 24) was not controverted by respondent/accused by putting any question in the cross-examination. Therefore, in the light of the fact that Article Q which was given A/RM 8279 was never opened, therefore, there is no question of any confusion regarding the Article from which the DNA of the respondent/accused was extracted. Thus, it is clear that DNA profile of the respondent/accused was extracted from his blood sample only.

70. The DNA report, Ex. P.29 can be seen from another point of view. Article I and J are cloths of respondent/accused. It is not out of place to mention here that seizure of cloths of the respondent/accused vide seizure memo Ex. P.24 has not been challenged. Further, no question was put to Ashok Kumar (P.W. 19) to make his evidence unreliable. Similar female DNA profile was detected on the source of article A (Plastic Bag), Article F Stain 2 (Cloths of deceased), Article G (Vaginal slide of deceased), Article I and J (Cloths of respondent/accused). Thus, it is clear that the DNA profile of the deceased was also found on the cloths of the respondent/accused. For ascertaining the DNA profile of the deceased, the blood sample of the respondent/accused was not required. Thus, the presence of DNA profile of the deceased on the cloths of the respondent/accused, clearly indicates the involvement of the respondent/accused in the

crime.

71. Thus, even if anomaly in A/RM code of Article R is seen in the light of the presence of DNA profile of the deceased on the cloths of the respondent/accused, then it can be safely held that discrepancy in A/RM of Article R is a result of typographical error only. Further, had the accused put any question to Dr. Pankaj Shrivastava (P.W. 24) in this regard, then he could have explained the discrepancy.

72. So far as the contention of the Counsel for the respondent/accused that the prosecution has to stand on its own legs is concerned, it is true that the burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt. However, when there is any discrepancy which does not go to the root of the matter, thereby making it inadmissible or unreliable, then the prosecution witness should also get an opportunity to explain such discrepancy. Without asking any question, the prosecution cannot be taken by surprise and if the discrepancy does not go to the root of the evidentiary value and admissibility of evidence, then the prosecution cannot be thrown overboard only on account of some typographical errors in the A/RM code of the Articles, specifically when, apart from mentioning the A/RM code, Article R is also mentioned in the DNA report Ex. P.29.

73. Under these circumstances, no importance can be given to discrepancy in A/RM of Article R.

74. As per the DNA report, Ex. P.29, all the alleles observed in the

DNA profile of respondent/accused were observed in the male mixed DNA profile generated on F (Stain1) and same male DNA profile was detected on Article F (Cloths of the deceased) Article G (Vaginal Slide and Swab) of the deceased.

75. Further, as per the postmortem report, Ex. P.18, signs of forceful vaginal penetration were found. With regard to reproductive organ, external genitalia was found diffusely swollen and reddening, labia majora was reddened and swollen. Labia Minora was swollen. Hymen Tear was irregular and circumferentialy from 4 O'Clock to 8 O'clock position. Hymen tear was extending upto posterior vaginal wall and also involving anal blood stained Mucosa Vulva. Thus, it is clear that the deceased was raped, and not only injuries were found on labia majora and labia minora, but hymen was also found torn.

76. It is next contended by the Counsel for the respondent/accused that although, the respondent/accused was in custody, but no permission from the Court of competent jurisdiction was obtained before collecting the blood sample of the respondent/accused.

77. The submission made by the Counsel for the respondent/accused is misconceived and is contrary to record.

78. It is clear from the order sheets of the Magistrate that an application for collecting blood sample was made on 27-7-2017 and the said application was allowed by order dated 29-7-2017, after hearing the respondent/accused. As the respondent/accused was in custody, and no objection was raised by respondent/accused,

therefore, permission was granted. Thus, it is clear that the blood sample of the respondent/accused was collected, after obtaining due permission from the Court of competent jurisdiction.

79. It is next contended by the Counsel for the respondent/accused that since, there is nothing on record to show that the blood sample was preserved and stored in a proper condition, therefore, there is a every chance that the blood sample of the respondent/accused might have got spoiled.

80. Considered the submissions made by the Counsel for the respondent/accused.

81. There is no suggestion either to Dr. Ajeet Kumar Minz (P.W.12), Dr. Pankaj Shrivastava (P.W. 24) or to Alok Singh (P.W. 28) in this regard. There is no scientific material on record to show that unless and until the blood sample is preserved in a particular manner, the same would get spoiled and it would not be possible to extract DNA from the said sample.

82. The Counsel for the respondent/accused could not point out the life of DNA. According to medical science, the DNA has a half life of 521 years i.e., after 521 years, half of the bonds between nucleotides in the backbone of a sample would break and after another 521 years, half of the remaining bonds would break and so on. Thus, it cannot be said that if the blood sample is not kept properly, then it would result in loss of DNA. Accordingly it is held that even in absence of material to show that the blood sample was kept in a hygienic

condition, still it would not result in loss of DNA. Further, the seal of the container was found intact at the time of receipt of blood sample in the F.S.L., Sagar.

83. There is another aspect of the matter. The blood sample of the deceased was collected on 29-7-2017, and the blood sampling form is Ex. P.20 and sealed blood sample was seized vide seizure memo Ex. P.21. The blood sample was sent for DNA test to F.S.L. Sagar on 31-7-2017 and it was received in the Laboratory on 2-8-2017. Thus, even otherwise, there is no delay in dispatch and receipt of blood sample by FSL Sagar.

84. Thus, it is held that DNA profile of the respondent/accused was found in the Cloths, Vaginal Slide and Swab of the deceased and the female DNA profile of the deceased was found on the cloths of the respondent/accused.

Recovery of Button of the shirt of respondent/accused from the spot

85. It is submitted by the Counsel for the respondent/accused that the thickness and diameter of the button seized from the spot was different from the button recovered from the T-Shirt of the respondent/accused therefore, it cannot be said that the button seized from the spot was that of the shirt of the respondent/accused.

86. Considered the submissions made by the Counsel for the parties.

87. On 5-7-2017 at 9:10 A.M., apart from other articles, one button

with broken threads was also seized from the spot vide seizure memo Ex. P.12. Bheem (P.W. 4) and Pappu Prajapati (P.W. 5) have proved the seizure of button from the spot.

88. T-Shirt of respondent/accused was marked as Article I1, whereas lower of respondent/accused was marked as I2. The button seized from the spot was marked as Article S1 and broken threads were marked as Article S2. In the T-Shirt, it was found that it had three places for stitching buttons. Button at serial no.1 was broken, whereas button at serial no.3 was intact and button at serial no. 2 was missing.

89. Dr. Neha Dodia (P.W.25), after comparing the button with threads seized from the spot with the button and thread of the T-Shirt of respondent/accused, gave the following findings :

Comparison Point	Button stitched on T-Shirt Article I1	Article S1
Material and Size	Circular and plastic like	Circular and plastic like
Colour and design	White, Translucent, Depth of holes, Upper surface *paravartak* and lower surface white.	White, Translucent, Depth of holes, Upper surface *paravartak* and lower surface white.
No. of holes	4	4
Diameter	0.274 Cm	0.288 Cm
Thickness	0.108 Cm	1.118 Cm
Engraving	SCHOTT	SCHOTT

The following findings were given by Dr. Neha Dodia (P.W. 25) after comparing the threads of the T-Shirt and threads found

along with button seized from spot. The findings are as under :

Comparison point	Threads taken from T-Shirt Article I1	Pieces of thread S2
Colour	White	White
No. of Strands	2	2
Type of Twist	Z type	Z type
Burning point of fiber	Fiber form bead by sticking together	Fiber form bead by sticking together
Nature of fiber	Synthesized Cylindrical Nature	Synthesized Cylindrical Nature

Accordingly, it was found that the button seized from the spot and the button found on the T-Shirt of the respondent/accused were almost same and the broken pieces of thread found along with button seized from the spot and the threads found on the T-Shirt of the respondent/accused were same.

90. It is submitted by the Counsel for the respondent/accused, that since, the thickness and diameter of the button seized from the spot was different from the button found on the T-Shirt of the respondent/accused, therefore, it is incorrect to say that both were almost same.

91. Considered the submissions.

92. It is not out of place to mention here that no question with regard to difference in thickness and diameter of the button seized from the spot and the button found on the T-Shrit of respondent/accused was asked to Dr. Neha Dodia (P.W. 25). Further, if the comparison chart prepared by Dr. Neha Dodia (P.W. 25) is seen,

then it is clear that Colour and Design, No. of Holes, Material and Size as well as Engraving on the button seized from the spot and button found on the T-Shirt of respondent/accused were same. There is a difference of fraction of Millimeters in thickness and diameter of both the buttons. This difference may take place during manufacturing process. As no question was put to Dr. Neha Dodia (P.W. 25) in this regard, therefore, considering the fact that difference of fraction of Millimeters in thickness and diameter of buttons may occur during manufacturing process, this Court is of the considered opinion that after considering the remaining readings including that of Engraving, the findings given by Dr. Neha Dodia (P.W. 25) that both the buttons are almost same cannot be said to be incorrect. Furthermore, this Court cannot lose sight of the fact, that broken thread was also found with the button seized from the spot. The pieces of thread found with the button seized from the spot, and the thread of T-Shirt of respondent/accused were identically same. Therefore, it is held that the button with broken pieces of thread which was seized from the spot, was that of the T-Shirt of the respondent/accused.

Presence of injuries on the nose of the respondent/accused

93. The respondent/accused Manoj was got medically examined on 5-7-2017 and as per M.LC. Report, Ex. P.25, Dr. Vinod Kumar Doneriya (P.W. 17) found the following injuries on the body of the respondent/accused :

(5) No injury seen on genital organ.

(7) Abrasion 1x1/2 cm on nose simple in nature caused by human nails duration 24-48 hours.

94. It is submitted by the Counsel for the respondent/accused that in the nail clippings of the deceased, although human skin was found, but the source of the said skin was not ascertained, therefore, it cannot be said that the skin found in the nail clippings of the deceased was that of the respondent/accused.

95. Considered the submissions made by the Counsel for the respondent/accused.

96. As per FSL report Ex. P.31, human skin was found in the nail clippings of the deceased and it was found insufficient for further examination.

97. It is true that the source of human skin could not be ascertained due to insufficient quantity for examination, but if the circumstance of presence of human skin in the nail clippings of the deceased is considered in the light of the other circumstances, then the non-ascertainment of source of human skin would not be fatal to the prosecution story. Undisputedly, abrasion was found on the nose of the respondent/accused as per his M.L.C., Ex. P.25. The photographs, Ex. A.34 and A.35 of respondent/accused also shows the presence of abrasion on his nose. Further, the presence of the respondent/accused on the spot and his involvement in the offence is proved beyond reasonable doubt in the light of the presence of his DNA profile in the

cloths and vaginal slide and swab of the deceased, therefore, it is held that the human skin found in the nail clippings of the deceased was that of the respondent/accused.

98. Further, a suggestion was given to Dr. Vinod Kumar Doneriya (P.W. 17) that due to itching, if some one scratches his nose, then abrasion may be caused, which was denied by this witness. Thus, the possibility of self inflicted abrasion was ruled out by this witness. Thus, it is held that the respondent/accused must have suffered abrasion on the nose due to resistance offered by the deceased.

Absence of injuries on genitals of the respondent/accused.

99. It is submitted that if a forcible intercourse is done with a virgin minor girl, then there should be some injuries on the genitals of the accused. However, in the present case, it is clear that no injury was found on the genitals of the respondent/accused, therefore, the possibility of committing rape on the minor prosecutrix is ruled out.

100. Considered the submissions made by the Counsel for the respondent/accused.

101. Presence of injuries on male organ of the accused is not necessary in all cases.

102. The Supreme Court after considering the Modi's jurisprudence, has held in the case of **State of H.P. v. Gian Chand,** reported in **(2001) 6 SCC 71,** as under :

> **15.** The observations made and noted by Dr Mudita Gupta during the medico-legal examination of PW 7 clearly make

> out the prosecutrix having been subjected to rape. The prosecutrix has spoken of "penetration" in her statement. The discovery of spermatozoa in the private parts of the victim is not a must to establish penetration. There are several factors which may negative the presence of spermatozoa (see *Narayanamma* v. *State of Karnataka*). Slightest penetration of penis into vagina without rupturing the hymen would constitute rape (see *Madan Gopal Kakkad* v. *Naval Dubey*). The suggestion made in the cross-examination of Dr Mudita Gupta that injury of the nature found on hymen of the prosecutrix could be caused by a fall does not lead us anywhere. Firstly, no such suggestion was given to the prosecutrix or her mother during cross-examination. Secondly, why would the girl or her mother implicate the accused, charging him with rape, if the injury was caused by a fall? There is nothing to draw such an inference, not even a suggestion, to be found on record. The answer to the suggestion made to Dr Gupta cannot discredit the prosecution case in the absence of any other material to support the suggestion. So is the case with the absence of external marks of violence on the body of the victim. In case of children who are incapable of offering any resistance external marks of violence may not be found. (See *Modi's Medical Jurisprudence*, 22nd Edn., p. 502.) It is true that marks of external injury have not been found on the person of the accused but that by itself does not negate the prosecution case. Modi has opined (see *Modi*, ibid, p. 509) that even in the case of a child victim being ravished by a grown-up person it is not necessary that there should always be marks of injuries on the penis in such cases. Further, it is to be noted that about two days had elapsed between the time of the incident and medical examination of the accused within which time minor injuries, even if caused, might have healed.

103. In the present case, the offence was committed on 4-7-2017 and the respondent/accused was medically examined on 6-7-2017 at 2:00 P.M. i.e., after 48 hours of incident. Therefore, the possibility of healing of any minor injury on the genital organs of the respondent/accused is also not ruled out. Further, it is clear from Modi's Jurisprudence that it is not necessary that there should always

be mark of injuries on the penis of the accused.

104. Therefore, the absence of any injury on the penis of the respondent/accused, would not belie the prosecution case.

Non-Examination of Gayatri

105. Hariram (P.W.1) has stated that after hearing the cries of *Bhabhi* Gayatri, they found that the dead body of the deceased was lying behind the trolley which was parked in front of the *Pator* of Jai Kishan Prajapati. It is submitted that in fact the dead body of the deceased was found in front of the *Pator* of Ram Prasad Prajapati. It is submitted that *Bhabhi* Gayatri was the best witness as she had noticed the dead body for the first time but she has not been examined, therefore, the recovery of the dead body of the deceased itself becomes doubtful.

106. Considered the submissions made by the Counsel for the parties.

107. The respondent/accused has not disputed the fact that the dead body of deceased "X" was found in front of the *Pator* of Ramprasad Prajapti. The photographs of the deceased and the spot were taken by Jugal Kishore Dubey (P.W. 18) which have been marked as Article 1 to Article 26. Even from the spot map, Ex. P.4, as well as photographs Article 1 to 26, it is clear that the dead body was found in front of the *Pator* of Ramprasad Prajapati. Under these circumstances, the non-examination of *Bhabhi* Gayatri would not give any dent to the prosecution story. Further, it is the submission of

the Counsel for the State that in the village where the population is scanty and each and every person knows each other, then generally they do not come forward in order to save their relationship with the family of the accused. It is not known as to whether Gayatri is the mother of the respondent/accused or She was called *Bhabhi* by Hariram (P.W.1) being the resident of the same village. Even if it is presumed that Gayatri was called *Bhabhi* by Hariram (P.W.1) being the resident of same village, but this Court cannot lose sight of the social thread running through the residents of the village. She might not be interested in coming into picture in order to save her contacts/relationship with the family of the respondent/accused. Further, an independent witness may hesitate in coming forward in order to avoid becoming part of police investigation or attending the Court. Further, the Supreme Court in the case of **Gian Singh (Supra)** has held as under :

> **14.** So far as non-examination of other witnesses and an adverse inference drawn by the High Court therefrom is concerned, here again we find ourselves not persuaded to subscribe to the view taken by the High Court. The prosecutrix, PW 7 has stated that soon before the incident she was playing with three girl-children of the same age as hers and they were present when the accused committed rape on her. One of the girls picked up a broom and had tried to scare away the accused by striking the broom on him. This little friend of the victim had also raised a hue and cry but none from the neighbourhood came to the spot. These girls were none else than daughters of her uncle. What the High Court has failed to see is that these girls were of tender age and could hardly be expected to describe the act of forcible sexual intercourse committed by the accused on PW 7. Secondly, these girls would obviously be under the influence of their parents. We have already noted

the co-sister of PW 1 turning hostile and not supporting the prosecution version. How could these little girls be expected to be away from the influence of their parents and depose freely and truthfully in the court? Non-examination of a material witness is again not a mathematical formula for discarding the weight of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court and were yet withheld by the prosecution. The court has first to assess the trustworthiness of the evidence adduced and available on record. If the court finds the evidence adduced worthy of being relied on then the testimony has to be accepted and acted on though there may be other witnesses available who could also have been examined but were not examined. However, if the available evidence suffers from some infirmity or cannot be accepted in the absence of other evidence, which though available has been withheld from the court, then the question of drawing an adverse inference against the prosecution for non-examination of such witnesses may arise. It is now well settled that conviction for an offence of rape can be based on the sole testimony of the prosecutrix corroborated by medical evidence and other circumstances such as the report of chemical examination etc. if the same is found to be natural, trustworthy and worth being relied on.

The Supreme Court in the case of **Mahesh v. State of Maharashtra,** reported in **(2008) 13 SCC 271** has held as under :

55. As regards non-examination of the independent witnesses who probably witnessed the occurrence on the roadside, suffice it to say that testimony of PW Sanjay, an eyewitness, who received injuries in the occurrence, if found to be trustworthy of belief, cannot be discarded merely for non-examination of the independent witnesses. The High Court has held in its judgment and, in our view, rightly that the reasons given by the learned trial Judge for discarding and disbelieving the testimony of PWs 4, 5, 6 and 8 were wholly unreasonable, untenable and perverse. The occurrence of the incident, as noticed earlier, is not in serious dispute. PW Prakash Deshkar has also admitted that he had lodged complaint to the police about the incident on

the basis of which FIR came to be registered and this witness has supported in his deposition the contents of the complaint to some extent. It is well settled that in such cases many a times, independent witnesses do not come forward to depose in favour of the prosecution. There are many reasons that persons sometimes are not inclined to become witnesses in the case for a variety of reasons. It is well settled that merely because the witnesses examined by the prosecution are relatives of the victim, that fact by itself will not be sufficient to discard and discredit the evidence of the relative witnesses, if otherwise they are found to be truthful witnesses and rule of caution is that the evidence of the relative witnesses has to be reliable evidence which has to be accepted after deep and thorough scrutiny.

The Supreme Court in the case of **Vijendra Singh v. State of U.P., (2017) 11 SCC 129** has held as under :

35. The next plank of argument of Mr Giri is that since Nepal Singh who had been stated to have accompanied PW 2 and PW 3 has not been examined and similarly, Ram Kala and Bansa who had been stated to have arrived at the tubewell as per the testimony of PW 2, have not been examined, the prosecution's version has to be discarded, for it has deliberately not cited the independent material witnesses. It is noticeable from the decision of the trial court and the High Court, that reliance has been placed on the testimony of PWs 1 to 3 and their version has been accepted. They have treated PW 2 and PW 3 as natural witnesses who have testified that the accused persons were leaving the place after commission of the offence and they had seen them quite closely. The contention that they were interested witnesses and their implication is due to inimical disposition towards accused persons has not been accepted and we have concurred with the said finding. It has come out in evidence that witnesses and the accused persons belong to the same village. The submission of Mr Giri is that non-examination of Nepal Singh, Ramlal and Kalsa is quite critical for the case of the prosecution and as put forth by him, their non-examination crucially affects the prosecution version and creates a sense of doubt. According to Mr Giri, Nepal Singh is a material witness. In this regard we may refer to the authority in *State of H.P.* v. *Gian Chand* wherein it has been held that: (SCC p. 81, para 14)

"*14*. Non-examination of a material witness is again not a mathematical formula for discarding the weight

> of the testimony available on record howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court levelled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses were available for being examined in the court and were yet withheld by the prosecution."

The Court after so holding further ruled that it is the duty of the court to first assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on and deserves acceptance, then non-examination of any other witnesses available who could also have been examined but were not examined, does not affect the case of the prosecution.

36. In *Takhaji Hiraji* v. *Thakore Kubersing Chamansing*, it has been held that: (SCC p. 155, para 19)

> "*19*. … if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand, if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. … If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable, the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

37. In *Dahari* v. *State of U.P.*, while discussing about the non-examination of material witness, the Court expressed the view that when he was not the only competent witness who would have been fully capable of explaining the factual situation correctly and the prosecution case stood fully corroborated by the medical evidence and the testimony of other reliable witnesses, no adverse inference could be drawn against the prosecution. Similar view has

been expressed in *Manjit Singh* v. *State of Punjab* and *Joginder Singh* v. *State of Haryana*.

108. Thus, it is held that non-examination of Gayatri would not give any blow to the prosecution much less a fatal blow.

109. As there is no dispute regarding the place from where the dead body of the deceased "X" was found, it is held that non-examination of Gayatri is not fatal to the prosecution case.

Non-examination of Jitendra Parihar and Ashok Kushwaha

110. By referring to Examination-in-chief of Hariram (P.W.1), it is submitted by the Counsel for the respondent/accused that when Hariram (P.W.1) asked the respondent/accused, as to whether he would like to go to Gwalior for labour work or not, at that time Jitendra Parihar and Ashok Kushwaha were also sitting there, and they have not been examined.

111. The submission made by the Counsel for the respondent/accused is liable to be rejected only on the ground that it is the quality and not quantity which decides the fate of a trial. The evidence is to be weighed and not calculated. Further, it has already been held that generally independent witnesses do not want to come forward and specifically when the social thread running in the residents of villages is so strong, therefore, it is difficult that every independent witness would come forward to depose against the accused.

Discrepancy in *Naksha Panchayatnama*, Ex.P.6 and the Post-

mortem report, Ex.P.18

112. It is submitted by the Counsel for the respondent/accused that as per *Naksha Panchayatnama,* Ex. P.6, the witnesses had not found any injury on the head of the deceased "X" whereas in the Post-mortem report, head injury was found and it was also opined by Dr. Ajay Gupta (P.W. 11) that head injury might also be the cause of death.

113. Considered the submissions made by the Counsel for the respondent/accused.

114. As per the post-mortem report, Ex. P.18, Ante-mortem Ecchymosis over Occipital area of 8X6 cm with subdural and Subarachnoid hemorrhage was found all over the brain. Thus, it is clear that only internal injury in the head was found with no corresponding external injury. Under these circumstances, if the witnesses could not notice any injury on the head of the deceased "X", then it cannot be said that there was any discrepancy in the *Naksha Panchayanama,* Ex. P.6 and post-mortem report, Ex. P.18.

115. It is next contended by the Counsel for the respondent/accused that in the *Naksha Panchayatnama,* Ex P.6, it has not been mentioned that the private part of the deceased was seen by the lady constable. Further, in the *Naksha Panchayatnama,* Ex. P.6, no external injury was found on the private part of the deceased, whereas in the post-mortem report, Ex. P.18, injuries were found on the private part of the deceased, therefore, there is a discrepancy on this aspect.

116. Considered the submissions made by the Counsel for the respondent/accused.

117. *Naksha Panchayatnama* Ex.P.6 was prepared in the presence of 6 witnesses including Head Constable Syara Bano. Syara Bano (P.W. 20) has stated that she had seen the private part of the deceased and since, stool had come out, therefore, it was not clearly visible. Further, it is well known that while conducting post-mortem, the autopsy surgeon inspects the body more meticulously. In the post-mortem report, Ex. P.18, it is specifically mentioned that stool had come out. Further, when one of the witness of *Naksha Panchayatnama* Ex.P.6 was a lady, then it is not necessary to mention that the private part of the deceased was seen by the lady and not by all the witnesses. Under these circumstances, it cannot be said that there was any discrepancy in the *Naksha Panchayatnama,* Ex.P.6 and the Post-mortem report,Ex. P.18.

Discrepancy regarding bottle and box

118. It is submitted by the Counsel for the respondent/accused that in the post-mortem report, Ex. P.18, it is mentioned that nail clippings of both hands of the deceased, two vaginal slides and two vaginal swabs of deceased were sealed in a bottle. Similarly, Viscera was sealed in two bottles with saturated salt solution. Similarly one Bottle contains stomach and its content and another bottle contains pieces of liver, spleen and kidney. The above mentioned articles were handed over to the police constable accompanying the body. It is submitted

that these articles were seized from Constable Dharmendra vide seizure memo Ex. P.26 and from the seizure memo, Ex. P.26, it is clear that Bottles became Box (डिब्बा), therefore, it is clear that the internal organs which were handed over by the hospital were changed and the internal organs which were sealed in boxes were seized.

119. Considered the submissions made by the Counsel for the respondent/accused.

120. Bottle, box (डिब्बा) are some words which are used to describe the container. Bottle means a container having narrow neck, whereas internal organs of the deceased cannot be kept in a bottle having narrow neck. They are to be preserved and sealed in a bottle having broad neck which is known as "Jar". Thus Dr. Ajay Gupta (P.W. 11) did not use the correct word for the container by describing as bottle, but in fact more appropriate word i.e., "Jar" should have been used. Since, the internal organs cannot be given in a bottle with narrow neck, therefore, the internal organs must have been given in a container having broad neck, therefore, if a constable described the said container as box (डिब्बा), then it cannot be said that the sealed container given by the hospital was tempered. The use of word bottle or box (डिब्बा) is nothing but description of "Jar" or bottle with broad neck, and would not make any difference in the matter. Further, the seal of the hospital was found intact by the F.S.L. Sagar. Further, Dharmendra Jat (P.W.21) had taken the dead body for post-mortem,

and the sealed articles were handed over to him. No question was put to Dharmendra Jat (P.W. 21) about "bottle" and "box". Dharmendra Jat (P.W.21) has specifically stated in his cross examination that he had not seen the sealed articles by opening the same. Therefore, the submissions made by the Counsel for the respondent/accused that bottle became box is nothing but an attempt to make a mountain out of a molehill.

Medical Examination of respondent/accused was not conducted as per Section 53-A of Cr.P.C.

121. Section 53-A of Cr.P.C. reads as under :

> **53-A. Examination of person accused of rape by medical practitioner**.—(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed, by any other registered medical practitioner, acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.
>
> (2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely:—
>
> (*i*) the name and address of the accused and of the person by whom he was brought,
>
> (*ii*) the age of the accused,
>
> (*iii*) marks of injury, if any, on the person of the accused,
>
> (*iv*) the description of material taken from the person

> of the accused for DNA profiling, and
> (*v*) other material particulars in reasonable detail.
> (3) The report shall state precisely the reasons for each conclusion arrived at.
> (4) The exact time of commencement and completion of the examination shall also be noted in the report.
> (5) The registered medical practitioner shall, without delay, forward the report to the investigating officer, who shall forward it to the Magistrate referred to in Section 173 as part of the documents referred to in clause (*a*) of sub-section (5) of that section.

122. The accused was medically examined by Dr. Vinod Kumar Doneriya (P.W. 17) and M.L.C. report of the respondent/accused is Ex. P.25 and it was seized vide seizure memo Ex. P.24. It is true that the prosecution has not produced the copy of requisition for conducting M.L.C. of the respondent/accused but has examined Daini Kumar (P.W. 16) who had taken the respondent/accused for medical examination. In the cross-examination, a suggestion was given to this witness that he had taken the respondent/accused for medical examination on the instructions of his senior police officers, which was accepted by this witness.

123. It also appears that even the Public Prosecutor was not vigilant at the time of recording of evidence. Part “B” of Trial Court's record contain an un-exhibited requisition form given by investigating officer, for medical examination of respondent/accused. However, it is well settled principle of law that un-exhibited document(s) cannot be read in favor of the prosecution.

124. But, no suggestion was given to Dr. Vinod Kumar Doneriya

(P.W.17) that he had conducted the medical examination of the respondent/accused without there being any requisition by the investigating officer.

125. However, in view of suggestion given to Daini Kumar (P.W.16), that he had taken the respondent/accused for medical examination of respondent/accused on the instructions of his senior police officers, it is held that the respondent/ accused was medically examined at the request of the investigating officer.

Whether F.I.R., Ex. P.1 is an ante-dated and ante-timed document

126. It is submitted by the Counsel for the respondent/accused that F.I.R., Ex.P.1 is an ante-dated and ante-timed document, because if the F.I.R., Ex. P.1 was already lodged at 2:00 A.M. on 5-7-2017, then there was no necessity of Missing Person Registration, Ex. P.2, which was prepared at 2:30 A.M. on 5-7-2017.

127. Considered the submissions made by the Counsel for the respondent/accused.

128. Section 19 of POCSO Act, reads as under :

> **19. Reporting of offences**.—(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to,—
>
> (*a*) the Special Juvenile Police Unit; or
>
> (*b*) the local police.
>
> (2) Every report given under sub-section (1) shall be—
>
> (*a*) ascribed an entry number and recorded in writing;
>
> (*b*) be read over to the informant;
>
> (*c*) shall be entered in a book to be kept by the Police Unit.

> (3) Where the report under sub-section (1) is given by a child, the same shall be recorded under sub-section (2) in a simple language so that the child understands contents being recorded.
>
> (4) In case contents are being recorded in the language not understood by the child or wherever it is deemed necessary, a translator or an interpreter, having such qualifications, experience and on payment of such fees as may be prescribed, shall be provided to the child if he fails to understand the same.
>
> (5) Where the Special Juvenile Police Unit or local police is satisfied that the child against whom an offence has been committed is in need of care and protection, then, it shall, after recording the reasons in writing, make immediate arrangement to give him such care and protection (including admitting the child into shelter home or to the nearest hospital) within twenty-four hours of the report, as may be prescribed.
>
> (6) The Special Juvenile Police Unit or local police shall, without unnecessary delay but within a period of twenty-four hours, report the matter to the Child Welfare Committee and the Special Court or where no Special Court has been designated, to the Court of Session, including need of the child for care and protection and steps taken in this regard.
>
> (7) No person shall incur any liability, whether civil or criminal, for giving the information in good faith for the purpose of sub-section (1).

129. Thus, it is clear that when an information was given to the police regarding the missing of a minor girl and a clear apprehension was expressed by Hariram (P.W.1) in the F.I.R., Ex. P.1 that his daughter has been kidnapped by some unknown person, then the police did the right thing in lodging the F.I.R. Since, it was not clear as to whether the minor daughter of the complainant was kidnapped or any other offence has been committed or she is lost for any other reason, therefore, the police also registered under the category missing person. Further, this aspect of the matter could have been

clarified by Alok Singh (P.W. 28), the investigating officer, but no question in this regard was put to him.

130. Further, a copy of the F.I.R. was forwarded to the concerning Magistrate on 5-7-2017 and the acknowledgment of receipt of the same is Ex. P.28. Thus, it is clear that the provisions of Section 157 of Cr.P.C. were also followed. Accordingly, this Court is of the considered opinion, that it is incorrect to say that F.I.R., Ex. P.1 is an ante-dated and ante-timed document.

Whether arguments on the question of framing of charges were advanced by a Counsel not engaged by the respondent/accused and if so, its effect

131. It is submitted by Shri Vijay Dutt Sharma, that the order-sheets of the Trial Court, indicate that on 10-8-2017, the charge sheet was filed and on 5-9-2017, time was granted to engage Counsel and to argue on the question of framing of charge. On 4-10-2017, one Shri Ashwani, Advocate filed his Vakalatnama on behalf of the respondent/accused and prayed for time to argue on the question of framing of charge. Again on 27-10-2017, time was granted to argue on the question of framing of charge. On 10-11-2017, Shri Ashwani, Advocate, withdrew his Vakalatnama and accordingly, Shri O.P. Sharma (wrongly mentioned as Chaturvedi in the order sheet) was appointed as Counsel for the respondent/accused from Legal Aid and time was granted to argue on the question of framing of charge. Again on 28-11-2017 and 14-12-2017, time was granted at the

request of Shri O.P. Sharma, Counsel for respondent/accused. On 12-1-2018, Shri Arvind Chouhan, Advocate appeared on behalf of respondent/accused and prayed for time and accordingly time was granted and case was adjourned to 14-2-2018. On 14-2-2018, Shri Arvind Chouhan, Advocate argued on behalf of the respondent/accused on the question of framing of charges and accordingly, charges were framed.

132. It is submitted by Shri Vijay Dutt Sharma, Advocate, that Shri Arvind Chouhan, Advocate was never engaged by the respondent/accused, nor was provided by the Court, and therefore, the Court should not have heard Shri Arvind Chouhan, Advocate, on the question of framing of charges.

133. Heard the learned Counsel for the respondent/accused.

134. From Part “B” of Trial Court's record, it is clear that earlier Shri Ashwani, had filed his Vakalatnama on behalf of the respondent/accused, but the same does not contain the signatures of respondent/accused. Thereafter, Shri O.P. Sharma, Advocate was provided to the respondent/accused from Legal Aid. From the Vakalatnama of Shri O.P. Sharma, it is clear that it does not contain the signatures or name of any other Lawyer.

135. The Vakalatnama of Shri Arvind Chouhan is not available on record. Thus, it appears that Shri Arvind Chouhan might have appeared as a proxy Counsel on behalf of Shri O.P. Sharma, Advocate.

136. From the order sheet dated 14-2-2018 it is clear that Shri Arvind Chouhan, Advocate was heard on the question of framing of charges. Thus, it is held that Shri Arvind Chouhan, Advocate, in absence of any authority of law, was not competent to argue on behalf of respondent/accused on the question of framing of charges.

137. The next question for consideration is that what would be effect of this mistake which remained unnoticed by the Trial Court.

138. Section 461 of Cr.P.C. deals with certain infringements or irregularities, which would vitiate the trial. Section 461 of Cr.P.C. reads as under :

> **461. Irregularities which vitiate proceedings**.— If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:—
>
> (*a*) attaches and sells property under Section 83;
>
> (*b*) issues a search warrant for a document, parcel or other thing in the custody of a postal or telegraph authority;
>
> (*c*) demands security to keep the peace;
>
> (*d*) demands security for good behaviour;
>
> (*e*) discharges a person lawfully bound to be of good behaviour;
>
> (*f*) cancels a bond to keep the peace;
>
> (*g*) makes an order for maintenance;
>
> (*h*) makes an order under Section 133 as to a local nuisance;
>
> (*i*) prohibits, under Section 143, the repetition or continuance of a public nuisance;
>
> (*j*) makes an order under Part C or Part D of Chapter X;
>
> (*k*) takes cognizance of an offence under clause (*c*) of sub-section (1) of Section 190;
>
> (*l*) tries an offender;
>
> (*m*) tries an offender summarily;
>
> (*n*) passes a sentence, under Section 325, on proceedings recorded by another Magistrate;

(*o*) decides an appeal;
(*p*) calls, under Section 397, for proceedings; or
(*q*) revises an order passed under Section 446,

139. Thus, if any irregularity or infringement falling under Section 461 of Cr.P.C. is committed by the Court below, only then such irregularity would vitiate the trial.

140. Section 464 of Cr.P.C. reads as under :

> **464. Effect of omission to frame, or absence of, or error in, charge**.— (1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.
> (2) If the Court of appeal, confirmation or revision is of opinion that a failure of justice has in fact been occasioned, it may—
> *(a)* in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommenced from the point immediately after the framing of the charge;
> *(b)* in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit:
> Provided that if the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

141. In order to consider the fact as to whether any failure of justice was caused to the respondent/accused or not, it is necessary to consider the scope of interference at the stage of framing of charges. The Supreme Court in the case of **Atma ram Vs. State of Rajasthan** reported in **(2019) 20 SCC 481** has held as under :

> **19.** The emphasis was laid by Dr Manish Singhvi, learned

> Senior Advocate for the State on the articles relied upon by him to submit that the theory of "harmless error" which has been recognised in criminal jurisprudence and that there must be a remedial approach. Again, we need not go into these broader concepts as the provisions of the Code, in our considered view, are clearly indicative and lay down with clarity as to which infringements per se, would result in vitiation of proceedings. Chapter XXXV of the Code deals with "Irregular Proceedings", and Section 461 stipulates certain infringements or irregularities which vitiate proceedings. Barring those stipulated in Section 461, the thrust of the Chapter is that any infringement or irregularity would not vitiate the proceedings unless, as a result of such infringement or irregularity, great prejudice had occasioned to the accused.....

142. Thus, in order to consider the submissions made by the Counsel for the respondent/accused, it is necessary to find out as to whether any "failure of justice" has occasioned to the respondent/ accused or not?

143. The Supreme Court in the case of **Dilawar Balu Kurane v. State of Maharashtra,** reported in **(2002) 2 SCC 135** has held as under :

> **12.** Now the next question is whether a prima facie case has been made out against the appellant. In exercising powers under Section 227 of the Code of Criminal Procedure, the settled position of law is that the Judge while considering the question of framing the charges under the said section has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out; where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial; by and large if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully justified to discharge the accused, and in exercising jurisdiction under Section 227 of the Code of Criminal

Procedure, the Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court but should not make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was conducting a trial (see *Union of India* v. *Prafulla Kumar Samal*).

The Supreme Court in the case of **Sheoraj Singh Ahlawat Vs. State of U.P.** reported in **(2013) 11 SCC 476** has held as under :

20. To the same effect is the decision of this Court in *Union of India* v. *Prafulla Kumar Samal* where this Court was examining a similar question in the context of Section 227 of the Code of Criminal Procedure. The legal position was summed up as under: (SCC p. 9, para 10)

"*10*. Thus, on a consideration of the authorities mentioned above, the following principles emerge:

(*1*) That the Judge while considering the question of framing the charges under Section 227 of the Code has the undoubted power to sift and weigh the evidence for the limited purpose of finding out whether or not a prima facie case against the accused has been made out.

(*2*) Where the materials placed before the court disclose grave suspicion against the accused which has not been properly explained the court will be fully justified in framing a charge and proceeding with the trial.

(*3*) The test to determine a prima facie case would naturally depend upon the facts of each case and it is difficult to lay down a rule of universal application. By and large however if two views are equally possible and the Judge is satisfied that the evidence produced before him while giving rise to some suspicion but not grave suspicion against the accused, he will be fully within his right to discharge the accused.

(*4*) That in exercising his jurisdiction under Section 227 of the Code the Judge which under the present Code is a senior and experienced Judge cannot act merely as a post office or a mouthpiece of the prosecution, but has to consider the broad probabilities of the case, the total effect of the evidence and the documents produced before the court, any basic infirmities appearing in the case and so on. This however does not mean that the Judge should make a roving enquiry into the pros and cons of the matter and weigh the evidence as if he was

conducting a trial."

> **21.** Coming then to the case at hand, the allegations made against the appellants are specific not only against the husband but also against the parents-in-law of the complainant wife. Whether or not those allegations are true is a matter which cannot be determined at the stage of framing of charges. Any such determination can take place only at the conclusion of the trial. This may at times put an innocent party, falsely accused of commission of an offence to avoidable harassment but so long as the legal requirement and the settled principles do not permit a discharge the court would find it difficult to do much, conceding that legal process at times is abused by unscrupulous litigants especially in matrimonial cases where the tendency has been to involve as many members of the family of the opposite party as possible. While such tendency needs to be curbed, the court will not be able to speculate whether the allegations made against the accused are true or false at the preliminary stage to be able to direct a discharge. Two of the appellants in this case happen to be the parents-in-law of the complainant who are senior citizens. Appellant 1 who happens to be the father-in-law of the complainant wife has been a Major General, by all means, a respectable position in the Army. But the nature of the allegations made against the couple and those against the husband, appear to be much too specific to be ignored at least at the stage of framing of charges. The courts below, therefore, did not commit any mistake in refusing a discharge.

The Supreme Court in the case of **State of Orissa Vs. Debendranath Padhi** reported in **(2005) 1 SCC 568** has held as under :

> **18.** We are unable to accept the aforesaid contention. The reliance on Articles 14 and 21 is misplaced. The scheme of the Code and object with which Section 227 was incorporated and Sections 207 and 207-A omitted have already been noticed. Further, at the stage of framing of charge roving and fishing inquiry is impermissible. If the contention of the accused is accepted, there would be a mini-trial at the stage of framing of charge. That would defeat the object of the Code. It is well settled that at the stage of framing of charge the defence of the accused

> cannot be put forth. The acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. By way of illustration, it may be noted that the plea of alibi taken by the accused may have to be examined at the stage of framing of charge if the contention of the accused is accepted despite the well-settled proposition that it is for the accused to lead evidence at the trial to sustain such a plea. The accused would be entitled to produce materials and documents in proof of such a plea at the stage of framing of the charge, in case we accept the contention put forth on behalf of the accused. That has never been the intention of the law well settled for over one hundred years now. It is in this light that the provision about hearing the submissions of the accused as postulated by Section 227 is to be understood. It only means hearing the submissions of the accused on the record of the case as filed by the prosecution and documents submitted therewith and nothing more. The expression "hearing the submissions of the accused" cannot mean opportunity to file material to be granted to the accused and thereby changing the settled law. At the stage of framing of charge hearing the submissions of the accused has to be confined to the material produced by the police.

144. In the present case, the police had filed the charge sheet on 10-8-2017 on the basis of circumstantial evidence of Last Seen Together, Injury on the nose of the respondent/accused, F.S.L., Ex. P.31 according to which human skin was found in nail clippings of the deceased as well as human semen and sperms were found on cloths, and vaginal slide of the deceased, blood was found on the cloths, vaginal slide and swab, articles seized from the spot, nail clippings of the deceased, saliva mixed earth etc., another F.S.L. report Ex. P.32, F.S.L. report Ex. P.33 according to which the hairs were human hairs, and F.S.L. report, Ex. P.34 according to which no poison was found

in the viscera of the deceased as well as the post-mortem report, Ex. P.18 of the deceased, according to which not only she was raped but the death was homicidal in nature. The blood sample and cloths, vaginal slide / swab of the deceased etc were already sent for DNA test. Accordingly, Shri Vijay Dutt Sharma, Advocate was requested to point out as to whether the Documentary and Ocular evidence filed along with the charge-sheet was not sufficient to raise a grave suspicion against the respondent/accused, warranting his trial, or there was no grave suspicion against the respondent/accused ? It was replied by Shri Sharma, that he cannot say that whether the Counsel for the respondent/accused could have succeeded in persuading the Trial Court to discharge the accused or not.

145. If the documentary and ocular evidence filed by the prosecution along with the charge sheet is considered in the light of the well established law regarding scope of enquiry on the question of framing of charges, this Court is of the considered opinion, that no "prejudice resulting in failure of justice" was caused to the respondent/accused warranting re-trial from the stage of framing of charge. There was sufficient material available on record to raise a grave suspicion against the respondent/accused, that he might have committed the offence warranting his trial.

146. Accordingly, with a word of advice to the Trial Court, that it should ensure that only the Counsel engaged by the accused or Counsel provided to the accused by Legal Aid, must appear on behalf

of the accused, it is held that since, no "prejudice" much less then "prejudice causing failure of justice" was caused to the respondent/ accused, therefore, there is no need to send the respondent/accused for re-trial from the stage of framing of charge.

Whether the arrest of the respondent/accused was illegal or not?

147. It is submitted by the Counsel for the respondent/accused, that the accused was arrested on 6-7-2017 at 12:30 P.M. However, till that time, no material was available against him, therefore, it is clear that the arrest of the respondent/accused was illegal and was made under the pressure of general public.

148. Considered the submissions made by the Counsel for the respondent/accused.

149. Alok Singh (P.W.20) has stated that he had recorded the statement of Bheem (P.W. 4) on 5-7-2017. Thus, it is clear that the evidence of Last Seen Together was already available against the respondent/accused warranting his arrest him. Thus, it cannot be said that the respondent/accused was arrested by the police, without there being any material against him.

150. The Privy Council in the case of **Parbhu Vs. King Emperor** reported in **AIR 1944 PC 73** has held that irregularity and illegality of arrest would not affect the culpability of the offence if the same is proved by cogent evidence.

Whether the deceased was student of Class 2 or Class 3

151. It is submitted by the Counsel for the respondent/accused, that

according to Hariram (P.W.1) the deceased was the student of Class 2, whereas according to Motiram Rajouriya (P.W.9), she was the student of Class 3.

152. It is clear from the birth certificate, Ex. P.16, that the deceased was admitted in class 1 on 16-6-2015. Thus, it is clear that she must have passed Class 2 in the year 2017 itself, and since, the incident took place on 4-7-2017, therefore, if Hariram (P.W.1) has stated that the deceased was student of Class 2, then it cannot be said that it was such a mistake which would make the prosecution case untrustworthy. Further, the pivotal question in the present case is that whether the deceased was a student of Govt. Primary School, Nayagaon, or not? This fact has been proved by Motiram Rajouriya (P.W.9) by producing the school record of the deceased i.e., admission register, Ex. P.15C, Birth Certificate, Ex. P.16, Attendance register, Ex. P.17. Accordingly, it is held that evidence of Hariram (P.W.1) that the deceased was the student of Class 2 would not make any difference in the matter.

Effect of non-comparison of scalp hairs of the respondent/accused with the hairs found on the spot.

153. So far as the contention of the Counsel for the respondent/accused that since, scalp hairs of the respondent/accused were not compared with the hairs found on the spot is concerned, it is suffice to mention here that the DNA profile of the respondent/accused has been found on the cloths and vaginal slide

and swab of the deceased. Even the DNA profile of the deceased was found on the cloths of the respondent/accused. The button found on the spot, has been found to be that of the shirt of the respondent/accused. It is once again clarified that it is the quality of evidence and not quantity of evidence, which decides the fate of a trial. DNA test is one of the authentic tests to find out the presence of DNA profile of the accused on incriminating articles. Further, the scalp hairs of the respondent/accused were sent to F.S.L., Sagar, but the same were returned back unopened. No question has been put to Dr. Pankaj Shrivastava (P.W. 24) in this regard. Under these circumstances, non-comparison of scalp hairs of the respondent/accused, with the hairs found on the spot, would not belie the prosecution case.

Whether defence witnesses examined by respondent/accused are reliable witnesses, and whether the respondent/accused has proved his plea of alibi?

154. It is submitted by the Counsel for the respondent/accused that he had examined Ms. Poonam (D.W.1) and Neetu (D.W.2), but their evidence has been discarded for no valid reason.

155. Heard the learned Counsel for the respondent/accused.

156. It is true that the evidence of a defence witness is also required to be appreciated in the same manner, in which the evidence of prosecution is appreciated.

157. If the evidence of Poonam (D.W.1) is considered, then it is

clear that she has stated that on 4-7-2017 at about 10:30 A.M., the respondent/accused had come to her house at Gwalior by Tempo. On 4-7-2017 itself, she and her younger sister went to Quila along with the respondent/accused. The respondent/accused was having mobile with him but he did not receive any call and also did not talk to any body on his mobile. She further stated that she does not have any mobile. She further stated that even her family members were not knowing that the respondent/accused had gone with her for a walk. She further admitted that the brother of the respondent/accused had informed her that she has to come to Court for giving evidence. She further admitted that the fact of walking with respondent/accused was never disclosed by her to any body including her family members.

158. Neetu (D.W.2) has stated that respondent/accused had come on a Tempo and her house is at a distance of 10-15 minutes of walking from the place where the Tempos stop. She further admitted that Tempo stand is not visible from her house. She further stated that her sister namely Poonam (D.W.1) was having her mobile with her whereas respondent/accused was having his mobile. He was continuously using his mobile and was talking to various persons on mobile. She further admitted that the fact that respondent/accused had come to her house was not disclosed by her to any body. This witness on her own also clarified that this was not even informed to her mother.

159. Thus, if the evidence of Poonam (D.W.1) and Neetu (D.W.2)

are considered, then it is clear that there are material contradictions in their evidence. Poonam (D.W.1) has stated that she does not have mobile, whereas Neetu (D.W.2) has stated that Poonam (D.W.1) was having mobile with her. Further, Neetu (D.W.2) has admitted that the place where the Tempos stop is not visible from her house and is at a distance of 10-15 minutes of walking, therefore, it was not possible for these witnesses to claim that respondent/accused had come on a Tempo. Further, Neetu (D.W.2) on her own has said that the fact of visit of respondent/accused in the house of these two witnesses was not known even to her mother. They have also admitted that the fact of going on walk to Quila was also not disclosed to any body and for the first time, they are making such statement before the Court. Poonam (D.W.1) has also stated that they have come to depose on the instructions of brother of the respondent/accused. Accordingly in the light of the material contradictions in the evidence of Poonam (D.W.1) and Neetu (D.W.2), it is held that both the defence witnesses are not reliable and accordingly they are disbelieved.

160. Further, the burden to prove the plea of alibi is on the accused to dislodge the prosecution evidence. The Supreme Court in the case of **Jitender Kumar Vs. State of Haryana** reported in **(2012) 6 SCC 204** has held as under :

> 71.....The plea of alibi in fact is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the place of occurrence and in the house which was the home of their relatives. (Ref. *Sk. Sattar* v. *State of Maharashtra)*

The Supreme Court in the case of **Mukesh v. State (NCT of Delhi),** reported in **(2017) 6 SCC 1** has held as under :

> **257.** While weighing the plea of "*alibi*", the same has to be weighed against the positive evidence led by the prosecution i.e. not only the substantive evidence of PW 1 and the dying declarations, Ext. PW-27/A and Ext. PW-30/D-1, but also against the scientific evidence viz. the DNA analysis, fingerprint analysis and bite marks analysis, the accuracy of which is scientifically acclaimed.....

The Supreme Court in the case of **Binay Kumar Singh Vs. State of Bihar** reported in **(1997) 1 SCC 283** has held as under :

> **22.** We must bear in mind that an alibi is not an exception (special or general) envisaged in the Indian Penal Code or any other law. It is only a rule of evidence recognised in Section 11 of the Evidence Act that facts which are inconsistent with the fact in issue are relevant. Illustration (*a*) given under the provision is worth reproducing in this context:
>
> > "The question is whether *A* committed a crime at Calcutta on a certain date; the fact that on that date, *A* was at Lahore is relevant."
>
> **23.** The Latin word alibi means "elsewhere" and that word is used for convenience when an accused takes recourse to a defence line that when the occurrence took place he was so far away from the place of occurrence that it is extremely improbable that he would have participated in the crime. It is a basic law that in a criminal case, in which the accused is alleged to have inflicted physical injury to another person, the burden is on the prosecution to prove that the accused was present at the scene and has participated in the crime. The burden would not be lessened by the mere fact that the accused has adopted the defence of alibi. The plea of the accused in such cases need be considered only when the burden has been discharged by the prosecution satisfactorily. But once the prosecution succeeds in discharging the burden it is incumbent on the accused, who adopts the plea of alibi, to prove it with absolute certainty so as to exclude the possibility of his presence at the place of occurrence. When the presence of the accused at the scene of occurrence has been established satisfactorily by the prosecution through reliable evidence, normally the

> court would be slow to believe any counter-evidence to the effect that he was elsewhere when the occurrence happened. But if the evidence adduced by the accused is of such a quality and of such a standard that the court may entertain some reasonable doubt regarding his presence at the scene when the occurrence took place, the accused would, no doubt, be entitled to the benefit of that reasonable doubt. For that purpose, it would be a sound proposition to be laid down that, in such circumstances, the burden on the accused is rather heavy. It follows, therefore, that strict proof is required for establishing the plea of alibi. This Court has observed so on earlier occasions (vide *Dudh Nath Pandey* v. *State of U.P.*; *State of Maharashtra* v. *Narsingrao Gangaram Pimple*.

161. Since, it has already been held that Poonam (D.W.1) and Neetu (D.W.2) are unreliable and untrustworthy witnesses, therefore, it is held that the respondent/accused has failed in discharging his burden to prove "plea of alibi".

162. Thus, in view of the above mentioned discussion, this Court is of the considered opinion, that the prosecution has succeeded in establishing the guilt of the respondent/accused for offence under Section 366, 376-A, 302, 201 of I.P.C. and under Section 5(L) read with Section 6 of POCSO Act and therefore, the conviction of the respondent/accused by the Trial Court, for the above mentioned offences is hereby **affirmed.**

Whether death sentence is liable to be confirmed or not?

163. It is submitted by the Counsel for the respondent/accused, that the case in hand does not fall within the category of "rarest of rare" cases. It appears that while committing rape, the respondent/accused might have gagged the mouth of the deceased, so that she may not

raise an alarm, which unfortunately resulted in smothering. It is submitted that there is nothing on record to suggest that there is no possibility of improvement on the part of the respondent/accused. The Trial Court did not consider the aggravating and mitigating circumstances to decide the question of sentence. It is further submitted that the Trial Court must have been swayed by the public opinion, which cannot be approved.

164. *Per contra*, the Counsel for the State supported the death sentence awarded to the respondent/accused. It is submitted that the respondent/accused is the cousin brother of the minor deceased aged about 8 years. By committing rape on her, he has not only broken the brother and sister relationship but also sent a wave of shivering in the Society because now even a small girl aged about 7-8 years is not secure in the Society and cannot live her childhood freely and without any fear. Even the cousin brother has not hesitated in committing rape and thereafter brutally murdering his cousin sister. It is further submitted that even after committing rape, the respondent / accused did not show remorse and all the time, was trying to project himself as an innocent person, by projecting to search the minor deceased along with other residents of the village. It is submitted that such persons are danger/threat to the Civilized Society, therefore, the Trial Court has rightly awarded the death sentence.

165. Considered the submissions made by the Counsel for the parties.

166. First of all, this Court would like to find out as to whether a proper opportunity of hearing was given to the respondent/accused on the question sentence or not?

167. Order sheet dated 8-5-2019 passed by the Trial Court reads as under :

8.05.2019 राज्य की ओर से श्री मनोज जैन विशेष लोक अभियोजक।

आरोपी मनोज प्रजापति न्यायिक अभिरक्षा मे जेल से पेश सहित श्री ओ.पी. शर्मा अधिवक्ता।

प्रकरण निर्णय हेतु नियत है।

प्रकरण मे निर्णय पृथक से टंकित कराया जाकर खुले न्यायालय मे धोषित, हस्ताक्षरित एवं दिनांकित किया गया । निर्णयानुसार आरोपी मनोज प्रजापति को भा.द.सं. की धारा 366,376क,302 एवं 201 तथा धारा 5एल सहपठित धारा 6 लैंगिक अपराधों से बालकों का संरक्षण अधिनियम 2012 के आरोप मे दोषसिद्व ठहराया गया।

1. आरोपी मनोज प्रजापति को धारा **366 भा.दं.सं** के आरोप के लिए **10 वर्ष (दस वर्ष)** के सश्रम कारावास एवं **2000 /– (दो हजार रूपये)** अर्थदंड से दंडित किया जाता है। अर्थदण्ड के व्यतिक्रम की दशा मे आरोपी को 01 माह **(एक माह)** का अतिरिक्त सश्रम कारावास भुगताया जावे।

2. आरोपी मनोज प्रजापति को धारा **376(क) संशोधन अधिनियम 2013 कमांक 2013 प्रकाशन तिथि 02/04/2013 (भूललक्षी प्रभाव से)** के आरोप मे "**मृत्युदण्ड"** से दंडित किया जाता है और इसके लिए आरोपी को **गर्दन मे फांसी लगाकर तब तक लटकाया जाए, जब तक कि उसकी मृत्यु न हो जाए।** इस संबंध मे यह उल्लेख किया जाता है कि मृत्युदण्ड की सजा का क्रियान्वयन तब तक न किया जाए जब तक कि माननीय उच्च न्यायालय द्वारा इसकी पुष्टि न कर दी जावे।

3. आरोपी मनोज प्रजापति को **धारा 302 भा.दं.सं.** के आरोप मे "**मृत्युदण्ड"** से दंडित किया जाता है और इसके लिए आरोपी को **गर्दन मे फांसी लगाकर तब तक लटकाया जाए, जब तक कि उसकी मृत्यु न हो जाए।** इस संबंध मे यह उल्लेख किया जाता है कि मृत्युदण्ड की सजा का क्रियान्वयन तब तक न किया जाए जब तक कि माननीय उच्च न्यायालय द्वारा इसकी पुष्टि न कर दी जावे।

4. आरोपी मनोज प्रजापति को धारा **201 भा.दं.सं.** के आरोप के लिए **07 वर्ष (सात वर्ष)** के सश्रम कारावास एवं **2000 /– (दो हजार रूपये)** अर्थदंड से दंडित किया जाता है। अर्थदण्ड के व्यतिक्रम की दशा मे आरोपी को **01 माह (एक माह)** का अतिरिक्त सश्रम कारावास से दण्डित किया गया।.....

168. From the above order sheet, it is clear that there is no mention

of the fact that after holding the respondent/accused guilty of offence under Sections 366, 376-A, 302, 201 of I.P.C. and under Section 5(L) read with Section 6 of POCSO Act, the further proceedings were deferred for hearing on the question of sentence. Although from the judgment, it appears that the case was deferred for hearing on the question of sentence.

169. In absence of any such observation in the order sheet, it appears that no effective hearing was given to the respondent/accused on the question of sentence. Further, in order to give an opportunity of effective hearing to the accused, the Trial Court, must express its intentions to award Death Sentence, so that the accused may also argue on the question of sentence in the light of "Aggravating" and "Mitigating" Circumstances.

170. Although the sentence was also imposed on the very same day, on which the respondent/accused was held guilty, but there is no impediment in law in doing so. The Supreme Court in the case of **Mohd. Mannan v. State of Bihar,** reported in **(2019) 16 SCC 584** has held as under :

> **77.** Imposition of death sentence on the same day after pronouncement of the judgment and order of conviction may not, in itself, vitiate the sentence, provided the convict is given a meaningful and effective hearing on the question of sentence under Section 235(2) CrPC with opportunity to bring on record mitigating factors.

It has been further held in the case of **Mohd. Mannan (Supra)** that :

39. For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The trial court made no attempt to elicit relevant facts. Nor did the trial court give any opportunity to the petitioner the opportunity to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective hearing.

The Supreme Court in the case of **Dattatraya v. State of Maharashtra,** reported in **(2020) 14 SCC 290** has held as under :

123. There can be no doubt that rape and murder of a 5-year-old girl shocks the conscience. It is barbaric. There is, however, no evidence to support the finding that the murder was pre-meditated. The petitioner did not carry any weapon. The possibility that the appellant-accused might not have realised that his act could lead to death cannot altogether be ruled out. Moreover, the trial court has apparently not considered the question of whether the crime is the rarest of rare crimes as mandated by the Supreme Court in *Bachan Singh*.

124. In *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra* the Court commuted the death sentence, in a case of rape and murder of a three-year-old child to life imprisonment, inter alia, observing that the case did not fall in the category of the rarest of the rare.

125. As argued by the learned counsel appearing on behalf of the petitioner, the High Court found the offence to be in the category of the rarest of rare cases, having regard to the nature of the offence and the age of the victim.

126. The counsel for the appellant-accused submitted that the brutality of the crime and age of the victim was not ground enough to inflict death sentence. The learned counsel submitted that the petitioner had been convicted on circumstantial evidence, based on faulty investigation.

127. However, as observed above, the forensic evidence construed in the light of the evidence of PW 18, Asha, wife of the appellant-accused, that the appellant-accused had confessed to the crime to her, establishes the guilt of the appellant-accused and death sentence can be imposed even

where conviction is based on circumstantial evidence, provided the case falls in the category of the rarest of rare and there are no mitigating circumstances and no possibility of reform or rehabilitation of the convict.

128. On analogy of the reasoning in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*, this Court is constrained to hold that this case does not fall in the category of the rarest of rare cases. Moreover, the appellant-accused was not defended effectively. The lawyer representing the appellant-accused only pleaded not guilty, emphasising that there was no eyewitness to the incident and sought leniency only on the ground of the age of the appellant-accused which was 53 years.

129. The appellant-accused neither sought nor was given the opportunity to file any affidavit placing on record relevant mitigating circumstances. The legal assistance availed by the appellant-accused was patently not satisfactory and he was not accompanied by a social worker. No attempt was made to place on record mitigating circumstances. No argument was advanced to the effect that there was no similar case against the appellant-accused. In the absence of any arguments, the trial court did not consider the question of whether the appellant-accused could be reformed.

130. Considering the nature of the crime against a five-year-old child, the trial court imposed the extreme penalty of death without deciding the question of whether there was no alternative to imposing death sentence on the appellant-accused. There is no finding that in the absence of death sentence, the appellant-accused would continue to be a threat to the society. The question of whether the appellant-accused could be reformed, had not at all been considered.

131. As held in *Dagdu* irrespective of whether these issues were raised on behalf of the accused, the Court is obliged on its own to elicit facts relevant to the question of existence of mitigating circumstances. The Court made no attempt to elicit any facts relevant to the sentence.

132. For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The trial court made no attempt to elicit relevant facts, nor did the trial court give any opportunity to the petitioner to file an affidavit placing on record mitigating factors. As

such the petitioner has been denied an effective hearing.

133. Contrary to the dictum of this Court, inter alia, in *Dagdu* and *Santa Singh* the petitioner was not given a real, effective and meaningful hearing on the question of sentence under Section 235(2) CrPC. The death sentence imposed on the petitioner is liable to be commuted to life imprisonment on this ground.

(Underline supplied)

134. There can be no doubt that the rape and murder of a five years old child is absolutely heinous and barbaric, but as observed above, it cannot be said to be in the category of rarest of rare cases.

(Underline supplied)

135. In *Mulla* v. *State of U.P.*, this Court has affirmed that it is open to the Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by the life imprisonment. This Court observed: (SCC p. 538, para 85)

> "*85. ... The court should be free to determine the length of imprisonment which will suffice the offence committed*."

(emphasis supplied)

136. Even though life imprisonment means imprisonment for entire life, convicts are often granted reprieve and/or remission of sentence after imprisonment of not less than 14 years. In this case, considering the heinous, revolting, abhorrent and despicable nature of the crime committed by the appellant, we feel that the appellant should undergo imprisonment for life, till his natural death and no remission of sentence be granted to him.

(Underline supplied)

137. For the above reasons, we are of the view that the present appeals are one of such cases where we would be justified in holding that confinement till natural life of the appellant-accused shall fulfil the requisite criteria of punishment considering the peculiar facts and circumstances of the present case. Accordingly, the death sentence awarded by the trial court is hereby modified to "life imprisonment" i.e. imprisonment for the natural life of the appellant herein. The appeals are allowed accordingly to the extent indicated above.

171. If the order sheet dated 8-5-2019 is considered, then it is clear

that no effective hearing on the question of sentence as required under Section 235(2) of Cr.P.C. was given to the respondent/accused. No suggestion was given to the respondent/accused, that the Trial Court is intending to award Death Sentence, so as to give an opportunity to the respondent/accused to argue in the light of "Aggravating" and "Mitigating" circumstances. Even the Trial Court has not considered the "Mitigating" circumstances.

172. Under these circumstances, this Court finds it difficult to confirm the Death Sentence awarded to the respondent/accused.

173. If the allegations, which have been found proved against the respondent/accused are considered, then it is clear that not only he has violated the pious relationship of brother and sister, but also committed rape on his 8 years old minor cousin sister and also killed her. Thereafter, in order to project himself as an innocent person, he was projecting that he is also trying to search for the deceased.

174. The Supreme Court in the case of **Dattatraya (Supra)** after considering the effect of non-grant of effective opportunity of hearing on the question of sentence and in the case of **Mohd. Mannan (Supra)**, has awarded Life Imprisonment till the natural death.

175. Therefore, the death sentence awarded by the Trial Court to the respondent/accused is hereby commuted to Life Imprisonment till his natural death. The respondent/accused shall not be entitled for any remission.

176. Before parting with this judgment, this Court would like to record its appreciation for the assistance rendered by Shri Padam Singh and Shri Vijay Dutt Sharma, Advocates, who tried their level best to point out each and every minor discrepancy in the evidence of the prosecution in order to effectively put forward the case of the respondent/ accused.

177. With aforesaid modification in sentence, the judgment dated 8-5-2019 passed by Xth Additional Sessions Judge/Special Judge (POCSO Act), Gwalior in Special Sessions Trial No.130/2017 is hereby **affirmed.**

178. The respondent/accused/appellant in Cr.A. No.4554/2019 namely Manoj Prajapati, is in jail. He shall undergo the remaining jail sentence till his natural death.

179. A copy of this Judgment be immediately sent to the respondent/accused/Appellant in Cr.A. No.4554/2019, Manoj Prajapati, free of cost.

180. The CRRFC No.8/2019 is **answered accordingly** and Cr.A. No.4554/2019 is **Partly Allowed** to the extent mentioned above.

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

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