HIGH COURT OF MADHYA PRADESH
BENCH AT GWALIOR

DIVISION BENCH:

BEFORE: G.S. AHLUWALIA

AND

RAJEEV KUMAR SHRIVASTAVA, JJ.

CRIMINAL REFERENCE CASE NO. 05/2020

In Reference (Suo Moto)

Vs.

Yogesh Nath @ Jogesh Nath

Shri Rajesh Shukla along with Shri Rajiv Upadhyay, counsel for the State.

Shri Vivek Jain along with Shri S.S. Kushwah, counsel for the respondent.

CRIMINAL APPEAL NO. 4965/2020

Yogesh Nath @ Jogesh Nath

Vs.

The State of Madhya Pradesh

Shri Vivek Jain along with Shri S.S. Kushwah, counsel for the appellant.

Shri Rajesh Shukla along with Shri Rajiv Upadhyay, counsel for the respondent/State.

Reserved on : 26th August, 2021.

Whether approved for reporting : Yes.

JUDGMENT

(Passed on 08/09/2021)

***Per* Rajeev Kumar Shrivastava, J.:**

This judgment shall govern the disposal of Criminal Reference Case No. 05/2020 as well as Criminal Appeal No. 4965/2020, as both arise out of judgment dated 16.09.2020 passed by Fifth Additional Sessions Judge & Special Judge (Protection of Children from Sexual Offences Act, 2012), Gwalior (MP) in Special Sessions Trial No. 122/2017.

2. As per Criminal Reference Case No.05/2020, Fifth Additional Sessions Judge & Special Judge (Protection of Children from Sexual Offences Act, 2012), Gwalior (MP) vide judgment dated 16.09.2020 in Special Sessions Trial No. 122/2017, having found the accused guilty under Sections 363, 377, 302, 201 (Part-1) of IPC and under Section 3/4 of Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as the 'POCSO Act'), has inflicted penalty of death sentence and has submitted the matter for confirmation under Section 366 of Cr.P.C.

3. Criminal Appeal No.4965/2020 has been filed by the accused from jail against the aforesaid judgment, whereby he has been convicted and sentenced as under :-

Convicted under Sections	**Act**	**Imprisonment**	**Fine**	**In default, punishment**
363	IPC	07 Years RI	Rs.2,000/-	01 month RI
3/ 4	POCSO	10 Years RI	Rs.2,000/-	01 month RI
302	IPC	Death Sentence	-	-
201 Part-I	IPC	07 Years RI	Rs.2,000/-	01 month RI
377	IPC	As per para 101 of trial Court's judgment		

It was also directed in the judgment that all the punishments of imprisonment shall run concurrently.

4. The short facts of the case are that on 28.04.2017, Ashok Adiwasi along with his family members, his wife Jasoda, daughters Pooja, Arti and sons Daulat & deceased 'A', attended the marriage ceremony of Varsha, who is the daughter of Dharmendra. Deceased 'A' was aged around 10 years. After attending the marriage function Ashok Aadiwasi returned back home with his family members excluding deceased 'A'. As deceased 'A' was missing, hence Ashok Aadiwasi tried to search the deceased 'A' but his efforts left in vain. On the next day morning, he was informed that dead body of deceased 'A' is found in the dug of village Bara and the body of deceased 'A' is nude. This information was furnished to the Police Station Bahodapur. On account of that, Hemlata, Sub-Inspector of Police Station Bahodapur reached on the spot and recorded Dehati Nalishi. On the basis of Dehati Nalishi, thereafter FIR was set into motion at

Crime No. 260/2017 and offence was registered under Sections 377, 302, 201 of IPC and under Section 3/4 of POCSO Act, on 29.04.2017, i.e., Ex.P/15.

5. After registration of FIR, investigation was set into the motion and blood-stained soil, plain soil, one check design light blue coloured shirt, one black pant, one towel (safi) were seized and two packets of Chuski from the pant-pocket were seized vide Ex.P/2 by Hemlata Jatav (PW-13). Lash Panchnama (Ex.P/3) was prepared in the presence of witnesses Ashok Aadiwasi, Mohd. Jamiluddin, Sharif Khan, Gagan Singh and Kallu. Spot map was prepared on 29.04.2017, i.e., Ex.P/4. Post-mortem was done wherein the doctor had opined that death was homicidal in nature. Ante-mortem injuries were found over the body caused by hard and blunt object. There was evidence of penetrative anal assault (anal injury was evident). Accused was arrested by Ex.P/11. Viscera of the deceased was collected and sent for forensic examination. DNA were collected. Accused was medically examined by Ex.P/9, wherein the doctor had opined that the accused was young, healthy male person, his secondary sexual characters were well developed. Nothing was suggestive that the accused was unable to perform sexual intercourse. One reddish

gray coloured underwear was taken from the body of accused. Pubic hairs were collected. Two semen slides were prepared and all the aforesaid were seized & sealed and were handed over to the respective Constables. FIR is Ex.P/15. As per memorandum, statement of accused is Ex.P/17. The dead body of deceased 'A' was recovered from the dug situated behind a dilapidated house as shown in spot map and blood-stained shirt and pant were also seized from the bathroom of Kuldeep, who is the brother of the accused. One 3Kg stone was seized from the place of incident. As per Ex.P/18, DNA sample of accused was collected. By Ex. P/19, one sealed packet containing one jacket of deceased 'A', one sealed packet containing nail-mud of deceased, and one sealed packet containing salt packet were seized. One sealed packet containing DVD of recording of post-mortem conduction was seized. Anal swab of deceased, one sealed container containing viscera of stomach and one another sealed packet containing viscera of liver, spleen and kidney and one sealed packet of seal sample were seized. By Ex.P/21, one sealed packet of pubic hair of accused, one sealed packet of semen slide of Yogesh Nath @ Jogesh, clothes and one sample of seal were seized. The collected viscera of deceased 'A' and one packet of salt were sent by the

Superintendent of Police, Gwalior, for forensic examination on 05.05.2017. Superintendent of Police, Gwalior had also forwarded a letter to Joint Director, Regional Forensic Science Laboratory, Gwalior, whereby one sealed packet containing blood stained soil i.e. exhibit A, one sealed packet containing plain soil i.e. exhibit B, one sealed packet containing Shirt, Pant & Saafi of deceased 'A' i.e. exhibit C, one sealed packet containing nail mud finger of the deceased i.e. exhibit D, one sealed plastic box containing anal swab of deceased 'A', i.e. exhibit E, one sealed packet containing pubic hair of accused Yogesh Nath, i.e. exhibit F, one sealed packet containing two semen slides of Yogesh Nath i.e. exhibit G, one sealed packet containing clothes of accused Yogesh Nath, i.e. exhibit H, one sealed packet containing blood stained pant and shirt of accused Yogesh Nath i.e. exhibit I, one sealed packet containing stone weighing around 3 KG, i.e. exhibit J, were sent. A special note was endorsed in the letter that all the articles shall be kept secured for DNA testing.

Superintendent of Police had called the detailed opinion with regard to following :-

(i) Whether Ex. 'A', 'C', 'D', 'I' and 'J' were containing human blood ?

(ii) Whether Ex. 'C', 'E', 'F', 'D', 'H' and 'I' were

containing human semen. If yes, detailed opinion ?

(iii) Whether, Ex. 'D' is containing part of skin ?

6. Superintendent of Police, Gwalior also forwarded the seized articles to Director, State Forensic Science Laboratory, Sagar (M.P.) vide letter No. पु.अ. / ग्वा. / एफ.एस.एल./D-394A/2017 dated 04.08.2017, i.e. Ex.P/24, having one packet of sealed clothes of deceased containing one shirt, one pant and one Saafi, i.e. exhibit C, one sealed packet containing clothes of accused Yogesh Nath i.e. exhibit H, one sealed packet containing blood stained Pant and Shirt of accused i.e. exhibit I and one sealed stone around 3 KG, i.e. exhibit J.

7. After completion of investigation, charge sheet was filed. The trial Court framed the charges under Sections 377, 302, 201 (Part-I), 363 of IPC and under Section 4 read with Section 3 of POCSO Act. The accused abjured his guilt and sought trial.

8. The Trial Court vide impugned judgment convicted and sentenced the appellant/accused as under :-

Convicted under Sections	**Act**	**Imprisonment**	**Fine**	**In default, punishment**
363	IPC	07 Years RI	Rs.2,000/-	01 month RI
3/ 4	POCSO	10 Years RI	Rs.2,000/-	01 month RI
302	IPC	Death Sentence	-	-
201 Part-I	IPC	07 Years RI	Rs.2,000/-	01 month RI
377	IPC	As per para 101 of trial Court's judgment		

9. Learned counsel for the appellant/accused has submitted that there is no any direct evidence in the case, rather the case is based on circumstantial evidence and the chain of circumstances is incomplete. There are various material contradictions and omissions in the statements of prosecution witnesses. No witness has proved last seen evidence. DNA samples were not collected properly for forensic test. It is also submitted that the collected samples were sent with considerable delay. Pubic hairs of the accused were collected by cutting them with the help of razor, therefore, prosecution cannot rely upon the DNA report of accused/appellant. It is further submitted that impugned judgment and order of conviction passed is erroneous, contrary to law and against the evidence available on record. The chain of circumstantial evidence is incomplete. Conduct of witnesses is absolutely unnatural and suspicious, especially the conduct of Nathu Singh Rajawat (PW-8) and Mohd. Jamiluddin (PW-11). During the course of examination of witnesses when Dr. J.P. Sonkar (PW-6) and Dr. Hiralal Manjhi (PW-7) categorically stated that they are unable to form any opinion with respect to DNA report (Ex.P/24) then re-examination of scientist namely Dr. A.K.Singh (PW-28) was done, who has not proved the DNA report

(Ex.P/24). For DNA profiling, hair should be uprooted otherwise no DNA could be obtained. The DNA profile is based on shaved hair, which is serious dent on the DNA report and that could not be relied upon. The Judgment based on circumstantial evidence as well as DNA report is contrary to basic principles of analyzing of circumstantial evidence.

10. It is further submitted that while sentencing the trial Court has erred in awarding sentence of death. In **Bachan Singh vs. State of Punjab [AIR 1980 SC 898]**, Hon'ble Apex Court has specified the rarest of the rare cases, and the present case does not fall in aforesaid category. Therefore, death sentence cannot be awarded. While passing the judgment the trial Court in para 11 of the judgment presumed 18 points for determination and for connecting the chain of circumstances and tried to justify the judgment on the basis of analysis on aforesaid points but the trial Court has committed gross error of law by ignoring the facts and prosecution remained failed to prove the chain of circumstances. The statement given by Ku. Puja (PW-4) is totally suspicious, therefore, on the basis of evidence given by Ku. Puja (PW-4), the trial Court has erred in passing the judgment of conviction. The fact of marriage of Varsha remained unproved. The prosecution

witnesses were not trustworthy. The conduct of father of deceased and his family members was also suspicious.

11. Learned counsel for the appellant has also submitted that in the present case, 'blood stained stone' was not seized from the place of incident, despite 'blood' is detected on the stone by Regional Forensic Science Laboratory. This indicates that the stone was planted later on. This also reflects from the fracture found on the skull, that was cracked fracture and not a depressed fracture. There was no external bleeding from skull. Therefore, the stone could not contain blood. The pant worn by accused during crime was seized on 04.05.2017 and was not containing any blood-stains, but RFSL Gwalior has found blood on the pant of the accused. All the articles excluding the blood sample of the accused, were opened at RFSL Gwalior, therefore there is possibility of contamination in the sample. It is also submitted that as per record, it reflects that all the articles, excluding clothes were sent to Sagar Lab for DNA test vide Art. 'D' on 24.06.2017. Hence, clothes were called by CFSL Sagar vide Art. 'D' dated 28.07.2017. Clothes were sent on 04.08.2017. The concerned Malkhana register was not proved before the Court. Semen sample was not tested for DNA. The DNA found on clothes is not having any

evidential value because clothes were washed and hung to dry together. They were washed with common water, therefore, secondary transfer of another person's DNA is also possible. Clothes also contain dead skin cells in summer months due to profused sweating. The DNA report of anal swab is also suspicious. It is also submitted that DNA report of nail mud finger of victim is not supporting the prosecution case. The entire prosecution story is concocted as no ante-mortem injury was found over the body of the victim. On these premises, learned counsel for the appellant prays for setting aside the judgment of death sentence and for acquittal of the appellant. In support of his submissions, learned counsel for the appellant relied upon the judgments passed by Hon'ble Apex Court in the cases of **Amar Singh vs. State (NCT of Delhi)** [CRA No.335/2015]**, Inderjeet Singh vs. State (NCT of Delhi)** [CRA No.336/2015]**, Chanturam vs. State of Chhattisgarh** [CRA No. 1392/2011]**, Salveraj vs. State of TN** [CRA 92/1976]**, Antar Singh vs. State of Rajasthan** [CRA No. 1105/1997]**, Saleem Akhtar vs. State of UP** [CRA No. 685/2001]**, Rajiv Singh vs. State of Bihar and another** [CRA No. 1708/2015]**, Anwar Ali and another vs. State of HP** [CRA No. 1121/2016]**, Machindra vs. Sajjangalfa** [CRA

No. 1794/2013].

12. Per Contra, learned State Counsel opposed the submissions and has submitted that judgment of conviction and sentence is in accordance with law. In the present case, unnatural offence has been committed with a minor. The witnesses relating to last seen evidence have specifically stated the prosecution case and despite being relatives of the deceased there is no any dent over the prosecution story. The spot map prepared reflects the *modus operandi* of the accused and also reflects the intention of commission of offence. DNA testing has been done by following each and every precautions and has chosen the best way for finalizing the liability as per the norms. Dr. Anil Kumar Singh has proved the DNA profiling and has given specific finding regarding involvement of accused on the basis of DNA testing. It is further submitted that after committing the offence under Section 377 of IPC, the accused tried to disappear the evidence of commission of offence by throwing the dead body of deceased in a mud dug which also reflects the intention of commission of offence. The accused has committed heinous offence in a gruesome manner. Even after committing the heinous offence under Section 377 of IPC (unnatural offence) with a minor and murdered him after

commission of offence by crushing his head by stone. Keeping such type of accused alive will be a danger to the Society. The state of mind of accused also reflects that there is no possibility of reformation, therefore, trial Court has rightly convicted and sentenced accused appellant. Hence, prayed to confirm the death sentence awarded to accused appellant. In support of his arguments, learned State counsel has placed reliance on the judgments passed by Hon'ble Apex Court in the cases of **Sahadevan alias Saga Devan vs. State of Chennai represented by Inspector of Police Chennai** [2003 (1) SCC (Cr) 382], **Jagroop Singh vs. State of Punjab** [2013 (1) SCC (Cr) 1136], **State of Rajasthan vs. Kashiram** [2007 (1) SCC (Cr) 688], **Shyamlal Ghosh vs. State of West Bengal** [2012 (3) SCC (Cr.) 685], **Shambhu Das Alias Bijoy Das and others vs. State of Assam** [2010 (3) SCC (Cri) 1301], **State of UP vs. Krishna Master and others** [2010 (12) SCC 324], **Ajay Koi and others vs State of MP** [2018 (1) ILR Short Note 2 (DB)], **Santosh Kumar Singh vs. State through CBI** [2010 (3) SCC (Cr.) 1469], **State of M.P. vs. Dayal Sahu** [2005 (2) SCC (Cr) 1988], **Machhi Singh and others vs. State of Punjab** [1983 SCC (Cri.) Para 39], **Mukesh and others vs. State (NCT of Delhi)**, [2017 (2) SCC

(Cri) 673], **Manoharam vs. State by Inspector of Police Variety Hall Police Station Coimbatore** [2019 (3) SCC (Cr.) 337].

13. Heard learned counsel for the rival parties and perused the record.

14. In the present case, the following questions emerge for consideration :

> "(i) Whether, on the date of incident the deceased was below 18 years of age ?
>
> (ii) Whether, the accused committed voluntarily carnal intercourse against the order of nature with the deceased during 28/29-4-2017 near Laxminarayan Crasher, Badagaon ?
>
> (iii) Whether the accused committed culpable homicide of the deceased ?
>
> (iv) Whether the aforesaid culpable homicide amounts to murder ?
>
> (v) Whether the accused intentionally disappeared the evidence of commission of aforesaid offence to screen the offence committed ?
>
> (vi) Whether the accused abducted the minor boy from the custody of lawful guardian ?

15. Present case is lacking of direct evidence, therefore the case has to be considered on the basis of circumstantial evidence produced before the trial Court.

16. The prosecution has examined Ashok Adiwasi (PW-1), Jasoda (PW-2), Rajni (PW-3), Ku. Pooja (PW-4), Ramkatori (PW-5), Dr. J.P. Sonkar (PW-6), Dr. Hiralal Manji (PW-7), Nathu Singh Rajawat (PW-8), Preetam Prajapati (PW-9), Sunil Adiwasi (PW-10), Mohd. Jamiluddin (PW-11), Kallu Adiwasi (PW-12), Hemlata Singh (PW-13), SI R.P. Bunkar (PW-14), Radheshyam Yadav (PW-15), Ramlakhan Singh Bhadoriya (PW-16), Jaswant Singh (PW-17), Raghvendra Singh (PW-18), Vijay Saxena (PW-19), Rambabu Nagar (PW-20), Jagdish Rana (PW-21), Surendra (PW-22), Sagar Singh (PW-23), Sarvesh Singh (PW-24), Lokendra Singh (PW-25), Kaushlesh Sharma (PW-26), Mahesh Singh (PW-27), Dr. A.K.Singh (PW-28) and Sunita Gupta (PW-29) as prosecution witnesses.

17. As, the present case is based on circumstantial evidence and there is no eye-witness of the incident, the Court is required to be more cautious while analyzing the evidence produced before it. Whenever any case is decided only on the basis of circumstantial evidence, following conditions are required to be fulfilled :-

(i) The guilt of the accused must be proved beyond reasonable doubt;

(ii) The chain of circumstantial evidence should be so connected that only establishes the guilt of the

accused, and the guilt hold must be conclusive in nature and tendency.

18. Circumstantial evidence is a very important part of criminal cases since in criminal cases it is to prove the probable *Actus Reus*, along with *Mens Rea.* The intention or the guilty-mind of the accused is required to be proved with the help of circumstantial evidence. As of now the whole world is vitalizing and offences are also committed in a way so as to hide the evidence regarding commission of offence with the help of various advance technology in this field. Therefore, more advance and scientific investigation is required for the investigation.

Law laid down relating to circumstantial evidence:-

19. In the case of **Ali Jishan @ Jishan Chawhan vs. State of Kerala [2003 (2) KLT 922],** it has been observed as under:-

> "23. There can be no dispute regarding the fact that the case is built on circumstantial evidence. In a case built on circumstantial evidence, direct proof of the culpability of the accused is often lacking. When the case rests on circumstantial evidence, the circumstance must be cogently and firmly established. The circumstance must point inescapably towards the guilt of the accused and the accused only, forming an unbroken chain of evidence ruling out a reasonable likelihood of the innocence of the accused. Where any link in the chain is missing, the accused is entitled to benefit of doubt. In a case of circumstantial evidence, the prosecution must establish different circumstances beyond

> reasonable doubt and all those circumstances taken together must lead to no other inference except the guilt of the accused. When the circumstances lead to two equally possible inferences, the inference that goes in favour of the accused is usually accepted. The graver the offence, stricter the proof. When a case rests on circumstantial evidence, such evidence must satisfy the following tests:
>
> (1) the circumstances from which an inference of guilt is sought to be drawn must be cogently and firmly established;
>
> (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
>
> (3) the circumstances, taken cumulatively, must form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else, in other words the circumstances must be incapable of explanation on any reasonable hypothesis other than that of the guilt of the accused; and
>
> (4) such evidence must not only be consistent with the guilt of the accused but must be inconsistent with his innocence."

20. In **Padala Veera Reddy vs State Of Andhra Pradesh And Others [AIR 1990 SC 79],** it has been observed as under :-

> "10. Before adverting to the arguments advanced by the learned Counsel we shall at the threshold point out that in the present case here is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. this Court in a

> series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests :
>
> > (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;
> >
> > (2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;
> >
> > (3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See **Gambhir v. State of Maharashtra**).
>
> 11. See also **Rama Nand and Ors. v. State of Himachal Pradesh**, **Prem Thakur v. State of Punjab**, **Earabhadrapa alias Krishappa v. State of Karnataka Gian Singh v. State of Punjab 1986 Suppl. SCC 676,** **Balvinder Singh v. State of Punjab**."

21. When the case fully resists upon the circumstantial evidence then it is the settled principle of law that all the circumstances available against the accused should be so connecting that only inference can be drawn that it is the appellant/accused who is the

author of the crime concerned. For this proposition, reliance can be placed on a leading case of the Hon'ble Apex Court reported in **Sharad Birdhichand Sarda v. State of Maharashtra (AIR 1984 SC 1622)**, wherein the Hon'ble Apex Court after discussing the entire law on the point case to the conclusion as under:-

> “The following conditions must be fulfilled before a case against an accused based on circumstantial evidence can be said to be fully established;
>
> (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must or should' and not 'may be' established.
>
> (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.”

On perusal of the aforesaid case laws on the point, we are of the considered opinion that the prosecution has failed to prove the chain of circumstances available.

22. In the case of **Ramreddy Rajeshkhanna Reddy vs. State of A.P. [(2006) 10 SCC 172],** it has been held in placing reliance on the judgment in the case of **Anil Kumar Singh v. State of Bihar (2003) 9 SCC 67** and **Reddy Sampath Kumar v. State of A.P. (2005) 7 SCC 603**:-

> "It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances can not be on any other hypothesis. It is also well-settled that suspicion, however, grave may be, cannot be substitute for a proof and the Courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence."

For the sake of convenience, the relevant provisions of law relating to Sections 363 & 377 of IPC are hereby reiterated:-

23. Sections 363 and 377 of IPC define as under :-

> "363. Punishment for kidnapping,.-- Whoever kidnaps any person from India or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to

seven years, and shall also be liable to fine.

377. Unnatural offences.- Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Explanation.--Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section."

24. Before considering the merits of the case, it would be appropriate to throw light on relevant provisions of Sections 299 and 300 of Indian Penal Code.

Law relating to Sections 299 & 300 of IPC:-

25. The Law Commission of United Kingdom in its 11th Report proposed the following test :

> "The standard test of 'knowledge' is, Did the person whose conduct is in issue, either knows of the relevant circumstances or has no substantial doubt of their existence?"

[See Text Book of Criminal Law by Glanville Wiliams (p.125)]

> "Therefore, having regard to the meaning assigned in criminal law the word "knowledge" occurring in clause Secondly of Section 300 IPC imports some kind of certainty and not merely a probability. Consequently, it cannot be

> held that the appellant caused the injury with the intention of causing such bodily injury as the appellant knew to be likely to cause the death of Shri Ahirwar. So, clause Secondly of Section 300 IPC will also not apply."

26. The enquiry is then limited to the question whether the offence is covered by clause Thirdly of Section 300 IPC. This clause, namely, clause Thirdly of Section 300 IPC reads as under:-

> "Culpable homicide is murder, if the act by which the death is caused is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

27. The argument that the accused had no intention to cause death is wholly fallacious for judging the scope of clause Thirdly of Section 300 IPC as the words "intention of causing death" occur in clause Firstly and not in clause Thirdly. An offence would still fall within clause Thirdly even though the offender did not intend to cause death so long as the death ensues from the intentional bodily injury and the injuries are sufficient to cause death in the ordinary course of nature. This is also borne out from illustration (c) to Section 300 IPC which is being reproduced below: -

> "(c) A intentionally gives Z a sword-cut or club-wound sufficient to cause the death of a man in the ordinary course of nature. Z dies in consequence. Here A is guilty of murder, although

he may not have intended to cause Z's death."

28. Therefore, the contention advanced in the present case and which is frequently advanced that the accused had no intention of causing death is wholly irrelevant for deciding whether the case falls in clause Thirdly of Section 300 IPC.

29. The scope and ambit of clause Thirdly of Section 300 IPC was considered in the decision in **Virsa Singh vs. State of Punjab**, [**AIR 1958 SC 465]**, and the principle enunciated therein explains the legal position succinctly. The accused Virsa Singh was alleged to have given a single spear blow and the injury sustained by the deceased was "a punctured wound 2" x =" transverse in direction on the left side of the abdominal wall in the lower part of the iliac region just above the inguinal canal. Three coils of intestines were coming out of the wound." After analysis of the clause Thirdly, it was held: -

> "The prosecution must prove the following facts before it can bring a case under S. 300 "Thirdly"; First, it must establish, quite objectively, that a bodily injury is present; Secondly, the nature of the injury must be proved. These are purely objective investigations. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended.

> Once these three elements are proved to be present, the enquiry proceeds further and, Fourthly, it must be proved that the injury of the type, just described, made up of the three elements set out above, is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution (and, of course, the burden is on the prosecution throughout), the offence is murder under S. 300 "Thirdly". It does not matter that there was no intention to cause death, or that there was no intention even to cause an injury of a kind that is sufficient to cause death in the ordinary course of nature (there is no real distinction between the two), or even that there is no knowledge that an act of that kind will be likely to cause death. Once the intention to cause the bodily injury actually found to be present is proved, the rest of the enquiry is purely objective and the only question is whether, as a matter of purely objective inference, the injury is sufficient in the ordinary course of nature to cause death."

30. In **Arun Nivalaji More vs. State of Maharashtra (Case No. Appeal (Cri.) 1078-1079 of 2005)**, it has been observed as under :-

> "11. First it has to be seen whether the offence falls within the ambit of Section 299 IPC. If the offence falls under Section 299 IPC, a further enquiry has to be made whether it falls in any of the clauses, namely, clauses 'Firstly' to 'Fourthly' of Section 300 IPC. If the offence falls in any one of these clauses, it will be murder as defined in Section 300IPC, which

will be punishable under Section 302 IPC. The offence may fall in any one of the four clauses of Section 300 IPC yet if it is covered by any one of the five exceptions mentioned therein, the culpable homicide committed by the offender would not be murder and the offender would not be liable for conviction under Section 302 IPC. A plain reading of Section 299 IPC will show that it contains three clauses, in two clauses it is the intention of the offender which is relevant and is the dominant factor and in the third clause the knowledge of the offender which is relevant and is the dominant factor. Analyzing Section 299 as aforesaid, it becomes clear that a person commits culpable homicide if the act by which the death is caused is done

(i) with the intention of causing death; or

(ii) with the intention of causing such bodily injury as is likely to cause death; or

(iii) with the knowledge that the act is likely to cause death."

If the offence is such which is covered by any one of the clauses enumerated above, but does not fall within the ambit of clauses Firstly to Fourthly of Section 300 IPC, it will not be murder and the offender would not be liable to be convicted under Section 302 IPC. In such a case if the offence is such which is covered by clauses (i) or (ii) mentioned above, the offender would be liable to be convicted under Section 304 Part I IPC as it uses the expression "if the act by which the death is caused is done with the intention of causing death, or of causing such bodily injury as is likely to cause death" where intention is the dominant factor. However, if the offence is such which is covered by clause (iii) mentioned above, the offender would be liable to be convicted under

Section 304 Part II IPC because of the use of the expression "if the act is done with the knowledge that it is likely to cause death, but without any intention to cause death, or to cause such bodily injury as is likely to cause death" where knowledge is the dominant factor.

12. What is required to be considered here is whether the offence committed by the appellant falls within any of the clauses of Section 300 IPC.

13. Having regard to the facts of the case it can legitimately be urged that clauses Firstly and Fourthly of Section 300 IPC were not attracted. The expression "the offender knows to be likely to cause death" occurring in clause Secondly of Section 300 IPC lays emphasis on knowledge. The dictionary meaning of the word 'knowledge' is the fact or condition of being cognizant, conscious or aware of something; to be assured or being acquainted with. In the context of criminal law the meaning of the word in Black's Law Dictionary is as under: -

> "An awareness or understanding of a fact or circumstances; a state of mind in which a person has no substantial doubt about the existence of a fact. It is necessary ... to distinguish between producing a result intentionally and producing it knowingly. Intention and knowledge commonly go together, for he who intends a result usually knows that it will follow, and he who knows the consequences of his act usually intends them. But there may be intention without knowledge, the consequence being desired but not foreknown as certain or even probable. Conversely, there may be knowledge without intention, the consequence being

> foreknown as the inevitable concomitant of that which is desired, but being itself an object of repugnance rather than desire, and therefore not intended."

In Blackstone's Criminal Practice the import of the word 'knowledge' has been described as under: -

> "'Knowledge' can be seen in many ways as playing the same role in relation to circumstances as intention plays in relation to consequences. One knows something if one is absolutely sure that it is so although, unlike intention, it is of no relevance whether one wants or desires the thing to be so. Since it is difficult ever to be absolutely certain of anything, it has to be accepted that a person who feels 'virtually certain' about something can equally be regarded as knowing it."

31. Section 299 of Indian Penal Code runs as under :-

> "299. Culpable homicide.-- Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

32. Section 299 of IPC says, whoever causes death by doing an act with the bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide. Culpable homicide is the first kind of unlawful homicide. It is the causing of death by doing :

(i) an act with the intention of causing death;
(ii) an act with the intention of causing such bodily injury as is likely to cause death; or
(iii) an act with the knowledge that it is was likely to cause death.

33. Without one of these elements, an act, though it may be by its nature criminal and may occasion death, will not amount to the offence of culpable homicide. 'Intent and knowledge' as the ingredients of Section 299 postulate, the existence of a positive mental attitude and the mental condition is the special *mens rea* necessary for the offence. The knowledge of third condition contemplates knowledge of the likelihood of the death of the person. Culpable homicide is of two kinds : one, culpable homicide amounting to murder, and another, culpable homicide not amounting to murder. In the scheme of the Indian Penal Code, culpable homicide is genus and murder is species. All murders are culpable homicide, but not *vice versa*. Generally speaking, culpable homicide *sans* the special characteristics of murder is culpable homicide not amounting to murder. In this section, both the expressions 'intent' and 'knowledge' postulate the existence of a positive mental attitude which is of different degrees.

34. Section 300 of Indian Penal Code runs as under :-

"300. Murder.-- Except in the cases hereinafter

> excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--
>
> *Secondly*.-- If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--
>
> *Thirdly*.-- If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--
>
> *Fourthly*.-- If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

35. 'Culpable Homicide' is the first kind of unlawful homicide. It is the causing of death by doing ; (i) an act with the intention to cause death; (ii) an act with the intention of causing such bodily injury as is likely to cause death; or, (iii) an act with the knowledge that it was likely to cause death.

36. Indian Penal Code reconizes two kinds of homicides : (1) Culpable homicide, dealt with between Sections 299 and 304 of IPC (2) Not-culpable homicide, dealt with by Section 304-A of IPC. There are two kinds of culpable homicide; (i) Culpable homicide amounting to murder (Section 300 read with Section 302 of IPC), and (ii) Culpable homicide not amounting to murder

(Section 304 of IPC).

37. A bare perusal of the section makes it crystal clear that the first and the second clauses of the section refer to intention apart from the knowledge and the third clause refers to knowledge alone and not the intention. Both the expression "intent" and "knowledge" postulate the existence of a positive mental attitude which is of different degrees. The mental element in culpable homicide i.e., mental attitude towards the consequences of conduct is one of intention and knowledge. If that is caused in any of the aforesaid three circumstances, the offence of culpable homicide is said to have been committed.

38. There are three species of mens rea in culpable homicide. (1) An intention to cause death; (2) An intention to cause a dangerous injury; (3) Knowledge that death is likely to happen.

39. The fact that the death of a human being is caused is not enough unless one of the mental states mentioned in ingredient of the Section is present. An act is said to cause death results either from the act directly or results from some consequences necessarily or naturally flowing from such act and reasonably contemplated as its result. Nature of offence does not only depend upon the location of injury by the accused, this intention is to be

gathered from all facts and circumstances of the case. If injury is on the vital part, i.e., chest or head, according to medical evidence this injury proved fatal. It is relevant to mention here that intention is question of fact which is to be gathered from the act of the party. Along with the aforesaid, ingredient of Section 300 of IPC are also required to be fulfilled for commission of offence of murder.

40. In the scheme of Indian Penal Code, "Culpable homicide" is genus and "murder" is its specie. All "Murder" is "culpable homicide" but not vice versa. Speaking generally 'culpable homicide sans special characteristics of murder' if culpable homicide is not amounting to murder.

41. In **Anda vs. State of Rajasthan [1966 CrLJ 171),** while considering "third" clause of Section 300 of IPC, it has been observed as follows :-

> "It speaks of an intention to cause bodily injury which is sufficient in the ordinary course of nature to cause death. The emphasis here is on sufficiency of injury in the ordinary course of nature to cause death. The sufficiency is the high probability of death in the ordinary way of nature and when this exists and death ensues and causing of such injury was intended, the offence is murder. Sometimes the nature of the weapon used, sometimes the part of the body on which the injury is caused, and sometimes both are relevant. The determinant factor is the intentional injury which must be sufficient to cause death in the ordinary course of nature."

42. In **Mahesh Balmiki vs. State of M.P. [(2000) 1 SCC 319,** while deciding whether a single blow with a knife on the chest of the deceased would attract Section 302 of IPC, it has been held thus :-

> "There is no principle that in all cases of single blow Section 302 I.P.C. is not attracted. Single blow may, in some cases, entail conviction under Section 302 I.P.C., in some cases under Section 304 I.P.C and in some other cases under Section 326 I.P.C. The question with regard to the nature of offence has to be determined on the facts and in the circumstances of each case. The nature of the injury, whether it is on the vital or non-vital part of the body, the weapon used, the circumstances in which the injury is caused and the manner in which the injury is inflicted are all relevant factors which may go to determine the required intention or knowledge of the offender and the offence committed by him. In the instant case, the deceased was disabled from saving himself because he was held by the associates of the appellant who inflicted though a single yet a fatal blow of the description noted above. These facts clearly establish that the appellant had intention to kill the deceased. In any event, he can safely be attributed knowledge that the knife blow given by him is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death."

43. In **Dhirajbhai Gorakhbhai Nayak vs. State of Gujarat [(2003) 9 SCC 322**, it has been observed as under :-

> "The Fourth Exception of Section 300, IPC covers acts done in a sudden fight. The said exception deals with a case of prosecution not covered by the first exception, after which its

place would have been more appropriate. The exception is founded upon the same principle, for in both there is absence of premeditation. But, while in the case of Exception 1 there is total deprivation of self-control, in case of Exception 4, there is only that heat of passion which clouds men's sober reason and urges them to deeds which they would not otherwise do. There is provocation in Exception 4 as in Exception 1; but the injury done is not the direct consequence of that provocation. In fact Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon equal footing. A 'sudden fight' implies mutual provocation and blows on each side. The homicide committed is then clearly not traceable to unilateral provocation, nor in such cases could the whole blame be placed on one side. For if it were so, the Exception more appropriately applicable would be Exception 1. There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn it did. There is then mutual provocation and aggravation, and it is difficult to apportion the share of blame which attaches to each fighter. The help of Exception 4 can be invoked if death is caused (a) without premeditation, (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel or unusual manner; and (d) the fight must have been with the person killed. To bring a case within Exception 4 all the ingredients mentioned in it must be found. It is to be noted that the 'fight' occurring in Exception 4 to Section 300, IPC is not defined in the IPC. It

> takes two to make a fight. Heat of passion requires that there must be no time for the passions to cool down and in this case, the parties have worked themselves into a fury on account of the verbal altercation in the beginning. A fight is a combat between two and more persons whether with or without weapons. It is not possible to enunciate any general rule as to what shall be deemed to be a sudden quarrel. It is a question of fact and whether a quarrel is sudden or not must necessarily depend upon the proved facts of each case. For the application of Exception 4, it is not sufficient to show that there was a sudden quarrel and there was no premeditation. It must further be shown that the offender has not taken undue advantage or acted in cruel or unusual manner. The expression 'undue advantage' as used in the provision means 'unfair advantage'.

44. In **Pulicherla Nagaraju @ Nagaraja vs. State of AP [(2006) 11 SCC 444**, while deciding whether a case falls under Section 302 or 304 Part-I or 304 Part-II, IPC, it was held thus :-

> "Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under Section 302 or 304 Part I or 304 Part II. Many petty or insignificant matters plucking of a fruit, straying of a cattle, quarrel of children, utterance of a rude word or even an objectionable glance, may lead to altercations and group clashes culminating in deaths. Usual motives like revenge, greed, jealousy or suspicion may be totally absent in such cases. There may be no intention. There may be no pre-meditation. In fact, there may not even be criminality. At the other end of the spectrum, there may be cases of murder where the accused attempts to avoid the penalty for murder by attempting to put forth a

case that there was no intention to cause death. It is for the courts to ensure that the cases of murder punishable under section 302, are not converted into offences punishable under section 304 Part I/II, or cases of culpable homicide not amounting to murder, are treated as murder punishable under section 302. The intention to cause death can be gathered generally from a combination of a few or several of the following, among other, circumstances : (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) whether the incident occurs by chance or whether there was any pre- meditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. The above list of circumstances is, of course, not exhaustive and there may be several other special circumstances with reference to individual cases which may throw light on the question of intention. Be that as it may."

45. In **Sangapagu Anjaiah v. State of A.P. (2010) 9 SCC 799**, Hon'ble Apex Court while deciding the question whether a blow on the skull of the deceased with a crowbar would attract Section 302 IPC, held thus:

"16. In our opinion, as nobody can enter into the

> mind of the accused, his intention has to be gathered from the weapon used, the part of the body chosen for the assault and the nature of the injuries caused. Here, the appellant had chosen a crowbar as the weapon of offence. He has further chosen a vital part of the body i.e. the head for causing the injury which had caused multiple fractures of skull. This clearly shows the force with which the appellant had used the weapon. The cumulative effect of all these factors irresistibly leads to one and the only conclusion that the appellant intended to cause death of the deceased."

46. In **State of Rajasthan v. Kanhaiyalal (2019) 5 SCC 639,** this it has been held as follows:

> "7.3 In **Arun Raj v. Union of India, (2010) 6 SCC 457 : (2010) 3 SCC (Cri) 155** this Court observed and held that there is no fixed rule that whenever a single blow is inflicted, Section 302 would not be attracted. It is observed and held by this Court in the aforesaid decision that nature of weapon used and vital part of the body where blow was struck, prove beyond reasonable doubt the intention of the accused to cause death of the deceased. It is further observed and held by this Court that once these ingredients are proved, it is irrelevant whether there was a single blow struck or multiple blows.
>
> 7.4 In **Ashokkumar Magabhai Vankar v. State of Gujarat, (2011) 10 SCC 604 : (2012) 1 SCC (Cri) 397**, the death was caused by single blow on head of the deceased with a wooden pestle. It was found that the accused used pestle with such force that head of the deceased was broken into pieces. This Court considered whether the case would fall under Section 302 or Exception 4 to Section 300 IPC. It is held by this Court that the injury sustained by the deceased, not only

> exhibits intention of the accused in causing death of victim, but also knowledge of the accused in that regard. It is further observed by this Court that such attack could be none other than for causing death of victim. It is observed that any reasonable person, with any stretch of imagination can come to conclusion that such injury on such a vital part of the body, with such a weapon, would cause death.
>
> 7.5 A similar view is taken by this Court in the recent decision in Leela Ram (supra) and after considering catena of decisions of this Court on the issue on hand i.e. in case of a single blow, whether case falls under Section 302 or Section 304 Part I or Section 304 Part II, this Court reversed the judgment and convicted the accused for the offence under Section 302 IPC. In the same decision, this Court also considered Exception 4 of Section 300 IPC and observed in para 21 as under: (SCC para 21)
>
> > "21. Under Exception 4, culpable homicide is not murder if the stipulations contained in that provision are fulfilled. They are: (i) that the act was committed without premeditation; (ii) that there was a sudden fight; (iii) the act must be in the heat of passion upon a sudden quarrel; and (iv) the offender should not have taken undue advantage or acted in a cruel or unusual manner."

47. In the case of **Bavisetti Kameswara Rao v. State of A.P. (2008) 15 SCC 725** , it is observed in paragraphs 13 and 14 as under:

> "13. It is seen that where in the murder case there is only a single injury, there is always a

tendency to advance an argument that the offence would invariably be covered under Section 304 Part II IPC. The nature of offence where there is a single injury could not be decided merely on the basis of the single injury and thus in a mechanical fashion. The nature of the offence would certainly depend upon the other attendant circumstances which would help the court to find out definitely about the intention on the part of the accused. Such attendant circumstances could be very many, they being (i) whether the act was premeditated; (ii) the nature of weapon used; (iii) the nature of assault on the accused. This is certainly not an exhaustive list and every case has to necessarily depend upon the evidence available. As regards the user of screwdriver, the learned counsel urged that it was only an accidental use on the spur of the moment and, therefore, there could be no intention to either cause death or cause such bodily injury as would be sufficient to cause death. Merely because the screwdriver was a usual tool used by the accused in his business, it could not be as if its user would be innocuous.

14. In **State of Karnataka v. Vedanayagam [(1995) 1 SCC 326 : 1995 SCC (Cri) 231]** this Court considered the usual argument of a single injury not being sufficient to invite a conviction under Section 302 IPC. In that case the injury was caused by a knife. The medical evidence supported the version of the prosecution that the injury was sufficient, in the ordinary course of nature to cause death. The High Court had convicted the accused for the offence under Section 304 Part II IPC relying on the fact that there is only a single injury. However, after a detailed discussion regarding the nature of injury, the part of the body chosen by the accused to inflict the same and other attendant circumstances and after discussing clause Thirdly of Section 300 IPC and further relying on the

decision in **Virsa Singh vs. State of Punjab [AIR 1958 SC 465]** , the Court set aside the acquittal under Section 302 IPC and convicted the accused for that offence. The Court in **Vedanayagam case [(1995) 1 SCC 326 : 1995 SCC (Cri) 231] , SCC p. 330, para 4)** relied on the observation by Bose, J. in Virsa Singh case **[AIR 1958 SC 465]** to suggest that: **(Virsa Singh case [AIR 1958 SC 465], AIR p. 468, para 16)**

> "16. With due respect to the learned Judge he has linked up the intent required with the seriousness of the injury, and that, as we have shown, is not what the section requires. The two matters are quite separate and distinct, though the evidence about them may sometimes overlap."

The further observation in the above case were: **(Virsa Singh case [AIR 1958 SC 465]** , AIR p. 468, paras 16 & 17)

> "16. The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present. If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question;

and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.

17. … It is true that in a given case the enquiry may be linked up with the seriousness of the injury. For example, if it can be proved, or if the totality of the circumstances justify an inference, that the prisoner only intended a superficial scratch and that by accident his victim stumbled and fell on the sword or spear that was used, then of course the offence is not murder. But that is not because the prisoner did not intend the injury that he intended to inflict to be as serious as it turned out to be but because he did not intend to inflict the injury in question at all. His intention in such a case would be to inflict a totally different injury. The difference is not one of law but one of fact."

48. Section 201 of IPC runs as under:-

201. Causing disappearance of evidence of offence, or giving false information to screen offender.—Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that

> offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false; if a capital offence.—shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine; if punishable with imprisonment for life.—and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; if punishable with less than ten years' imprisonment.—and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment of the description provided for the offence, for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence, or with fine, or with both."

49. Under Section 2 of the Protection of Children from Sexual Offences Act, 2012, "child" means any person below the age of eighteen years.

50. Sections 3 & 4 of POCSO Act run as under:-

> **3. Penetrative sexual assault.—**A person is said to commit "penetrative sexual assault" if—
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or
> (b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or
> (c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or
> (d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.
>
> **4. Punishment for penetrative sexual assault-** Whoever commits penetrative sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to imprisonment for life, and shall also be liable to fine.

51. Now, first of all, it has to be seen whether on the date of incident the deceased was minor and the offence committed against him comes within the purview of Sections 3/4 of POCSO Act.

52. Vijay Saxena (PW-19) has specifically stated that as per original admission register, the date of birth of the deceased is 28.6.2008. The original admission register is Ex.P/30 and the contents of this register have been proved by the aforesaid witnesses and his statement remains unrebutted in his cross-examination. That means, on the date of incident the deceased was minor as the date of incident is 28.4.2017 and date of birth is 28.6.2008. The statements given by this witness remains unrebutted in his cross-examination, therefore, it is proved that on the date of incident the deceased was minor.

53. Dr. Hiralal Manjhi (PW-7) and Dr. Sarthak Duglan had jointly conducted post-mortem of the deceased. Dr. Hiralal Manjhi (PW-7) has stated in his statement that on 29.04.2017 he was posted in Forensic Medicine and Toscology Department of Gajra Raja Medical College, Gwalior. On the said date Constable Surendra Singh brought the dead body of deceased 'A' who was identified by aforesaid Constable and father of the deceased.

Thereafter, post-mortem was conducted wherein he found that the deceased died due to asphyxia as a result of compression of neck by ligature. Ligature mark appears to be of strangulation. Ante-mortem injuries over the head was also evident which were caused by hard and blunt object. The death is homicidal in nature. Duration of death is within 24 hours till post-mortem examination. There is evidence of penetrative anal assault. Aforesaid statement of this witness remains unchanged in his cross-examination. This witness has also stated that on examination of the dead body of male child he found that the body of the deceased was necked. He was wearing one Tabeej in his neck. Stool was coming out from the anus. Blood and soil was found over the face and body of the deceased. Both the eyes were closed and mouth was open. Rigor mortis were present all over the body, hypostasiseri dent on back and following injuries were found :-

1. Abrasion present along margins of upper and lower eye lid along entire perimeter.
2. Abrasion present along lateral 1/3 of upper lip including at joining area of left lateral angle of mouth size 3.2 x 1.6cm.
3. Lacerated wound over floor of mouth size 3.5 x 1.5 cm.
4. Multiple abrasion present over chest various in

size 0.5 x 0.5 cm to 1 x 1 cm
5. Contusion present over left iliac crest size 3.5 x 2.5cm
6. Multiple abrasion present over back of body various in size 0.2 x 0.1 cm to 1.5 x 1 cm.
7. Abrasion present in left shoulder size 3x2cm.
8. Abrasion (graze) present over posterior trunk over left of mid line in lumber region in an area 8 x 6.5cm. There are small size, superficial laceration skin present.
9. Two bruise present over anterior abdominal wall above pubic bone size 1x1cm each 2 cm apart.

54. This witness was re-examined on 16.10.2019 in the light of order passed by High Court, wherein in cross-examination he has admitted that if any heavy weight stone is hit on the head of the deceased, such injury can be caused.

55. Now other circumstances of the case are required to be considered. It is the prosecution case that the deceased was abducted, thereafter unnatural offence was done with the deceased and was murdered. Ashok (PW-1), Jasoda (PW-2), Rajni (PW-3), Puja (PW-4), Ramkatori (PW-5), Nathu Singh Rajawat (PW-8), Preetam Prajapati (PW-9) and Sunil Aadiwasi (PW-10) have stated that on the date of incident there was a marriage in their relation and they were busy in marriage function. Ashok (PW-1) has stated

in his statement that in the aforesaid marriage he along with his daughters Arti and Puja and sons Daulat and deceased 'A' and wife Jasoda attended the marriage. Jasoda (PW-2) has stated in her statement that from the marriage except deceased 'A' all family members were returned back. This statement has been affirmed by Puja (PW-4) and Ramkatori (PW-5) and their statement remain unchanged in their cross-examination. That means, on the date of incident there was a marriage and the deceased was also attending the marriage.

56. Learned counsel for the appellant has submitted that in support of marriage of Varsha, the daughter of Dharmendra, no any proof had been produced with regard to solemnization of the marriage of Varsha and has also submitted that witnesses had not disclosed name of Varsha, whose marriage was solemnized which creates doubt over the prosecution case.

57. The aforesaid arguments are baseless as the aforesaid facts were not challenged by the defence at the time of cross-examination of the aforesaid witnesses.

58. Now it has to be seen whether the accused/appellant had also attended the marriage of Varsha. In this regard, Puja (PW-4), Preetam Prajapati (PW-9) and Sunil Aadiwasi (PW-10) have

specifically stated that the accused/appellant had also attended the marriage of Varsha. Puja (PW-4) has specifically stated in her statement that her sister Arti, brother Daulat and deceased 'A' also went to attend the marriage. After finishing dinner, deceased 'A' asked for water at that time accused Yogesh reached there and had given Rs.5/- to the deceased to purchase popcorn. Preetam Prajapati (PW-9) has stated that on 28.4.2017 accused had asked for the clothes of Preetam, but he denied. However, while attending marriage he saw that accused/appellant Yogesh was wearing his shirt. That means, the accused/ appellant Yogesh also attended the marriage.

59. Learned counsel for the appellant has objected that no any question was asked by Pritam Prajapati to the accused with regard to wearing of his shirt by the accused/appellant, this again creates doubt over the prosecution story. But this fact does not adversely affect the prosecution case as it is not an exceptional phenomena. All the aforesaid prosecution witnesses have identified the accused/appellant Yogesh as he was doing the work of waste-collection in the area. That means, on the date of incident there was marriage of Varsha and the deceased as well as accused attended the marriage. Puja (PW-4) has specifically stated in her

statement that when deceased 'A' asked for water, accused/appellant Yogesh came there and had given Rs.5/- to the deceased 'A' to purchase popcorn. This witness has specifically stated that deceased denied to receive the money despite accused/appellant forcefully given the money and abducted the deceased 'A'.

60. In the present case, Ashok Adiwasi is the father of the deceased. He has stated that his both sons, both daughters and his wife had gone to attend the marriage. Name of her daughters are Aarti and Puja. Except deceased “A”, remaining persons came back home from the marriage in the night. He has also stated that the accused is very well known to him as he collects the waste from his area. He has also stated that his daughter Puja had seen that accused/ appellant was carrying deceased “A” with him. He has also stated that in the night, they tried to search for his son but efforts went in vain. In the morning of the next day at 7:00 AM, it was informed that the dead body of his son deceased “A” is lying in mud dug. So, he went to the place where he saw his son was lying naked and the body was blood stained. He has proved the contents of Exhibits P-1, P-2, P-3, P-4, P-5, P-6, P-7 and P-8. Statements given in respect of last seen evidence remained un-

rebutted in his cross-examination.

61. Yasodhara (PW-2) and Rajni (PW-3) have stated in their statements that Puja had informed that she had seen the accused/ appellant took away the deceased with him. Puja (PW-4) is the witness of last seen evidence.

62. Ku. Puja (PW-4) has stated in her statement that after dinner, deceased "A" asked for water, at that time, accused/ appellant reached there and had given five rupees to deceased "A" for purchase of popcorn and also asked the deceased to come with him. Present witness denied to send deceased "A" along with accused/ appellant but the accused/ appellant compelled the deceased to go with him. After some time, deceased returned back alone. When she asked the accused that where is deceased "A", he said that some persons came by a jeep and they abducted the deceased. He also said that he tried to stop them but he was unable to do so. When the present witness along with her family members, her sister Aarti and brother Daulat came back home, she informed about the the incident to her father and mother. As deceased "A" did not return to home, they started searching for him. In the morning, Rajni came to their house and informed that the dead body of the deceased was found in mud dug.

63. In the case of **Ramreddy Rajeshkhanna Reddy** {**(2006) 10 SCC 172**}, placing reliance on the judgment in the case of **Anil Kumar Singh v. State of Bihar (2003) 9 SCC 67 and Reddy Sampath Kumar v. State of A.P. (2005) 7 SCC 603**, Hon'ble Supreme Court has also considered the last seen theory and held that-

> "The last seen theory, furthermore, comes into play, where the time-gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case Courts should look for some corroboration. [**Held in the case of State of U.P. v. Satish (2005) 3 SCC 1141.**]"

64. Hon'ble Apex Court in case of **Hatti Singh vs. State of Haryana,** reported in **2007(2) CCSC 802 (SC**), relying on the earlier decision of **Ramreddy Rajesh Khanna Reddy vs. State of A.P.**, reported in {**(2006) 10 SCC 172**}, held here as under:-

> "27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last-seen alive and the deceased is found dead is so small that possibility of any person other than

> the accused being the author of the crime becomes impossible. Even in such a case Courts should look for some corroboration."

65. Similarly, in another decision of **State of U.P. v. Satish**, reported in **{(2005) 3 SCC 114},** again held as under :-

> "22. The last-seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the 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 the accused and the deceased were last seen together. It would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses P.Ws. 3 and 5."

66. Learned counsel for the appellant has raised objection that the present witness Ku. Puja is an interested witness and is the real sister of deceased "A".

67. It is settled law that merely because the witnesses may be related to the victim or the complainant, their testimonies may not be rejected. There is no legal canon that only unrelated witnesses shall be considered credible. On the contrary, we are of the view that it is not natural for the related witness to implicate a person falsely leaving aside the actual culprit. It is pertinent to note that only interested witnesses want to see the real culprit is brought to book. In this regard, Hon'ble Supreme Court in the case of **Jayabalan v. UT of Pondicherry, (2010) 1 SCC 199,** has held in the following manner:

> "23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim."

68. In another Judgment by Hon'ble Supreme Court in the case of **Seeman v. State, (2005) 11 SCC 142**, following has been observed:

> "4. It is now well settled that the evidence of

> witness cannot be discarded merely on the ground that he is a related witness or the sole witness, or both, if otherwise the same is found credible. The witness could be a relative but that does not mean to reject his statement in totality. In such a case, it is the paramount duty of the court to be more careful in the matter of scrutiny of evidence of the interested witness, and if, on such scrutiny it is found that the evidence on record of such interested sole witness is worth credence, the same would not be discarded merely on the ground that the witness is an interested witness. Caution is to be applied by the court while scrutinising the evidence of the interested sole witness. The prosecution's non-production of one independent witness who has been named in the FIR by itself cannot be taken to be a circumstance to discredit the evidence of the interested witness and disbelieve the prosecution case. It is well settled that it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement."

69. In another Judgment by Hon'ble Supreme Court in the case of **Jodhan v. State of M.P.**, **(2015) 11 SCC 52**, it has been observed that: -

> "28. Tested on the backdrop of the aforesaid enunciation of law, we are unable to accept the submission of the learned counsel for the appellant that the High Court has fallen into error by placing reliance on the evidence of the said prosecution witnesses. The submission that when other witnesses have turned hostile, the version of these witnesses also should have been discredited does not commend acceptance, for there is no rule of evidence that the testimony of the interested witnesses is to be

rejected solely because other independent witnesses who have been cited by the prosecution have turned hostile. Additionally, we may note with profit that these witnesses had sustained injuries and their evidence as we find is cogent and reliable. A testimony of an injured witness stands on a higher pedestal than other witnesses. In **Abdul Sayeed v. State of M.P. [Abdul Sayeed v. State of M.P., (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262]**, it has been observed that: (SCC p. 271, para 28)

> "28. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone."

It has been also reiterated that convincing evidence is required to discredit an injured witness. Be it stated, the opinion was expressed by placing reliance upon **Ramlagan Singh v. State of Bihar, (1973) 3 SCC 881 : 1973 SCC (Cri) 563**, **Malkhan Singh v. State of U.P., (1975) 3 SCC 311 : 1974 SCC (Cri) 919, Vishnu v. State of Rajasthan, (2009) 10 SCC 477 : (2010) 1 SCC (Cri) 302, Balraje v. State of Maharashtra, (2010) 6 SCC 673 : (2010) 3 SCC (Cri) 211 and Jarnail Singh v. State of Punjab, (2009) 9 SCC 719 : (2010) 1 SCC (Cri) 107**.

29. From the aforesaid summarisation of the legal principles, it is beyond doubt that the testimony of the injured witness has its own

> significance and it has to be placed reliance upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and inconsistencies. As has been stated, the injured witness has been conferred special status in law and the injury sustained by him is an inbuilt guarantee of his presence at the place of occurrence. Thus perceived, we really do not find any substance in the submission of the learned counsel for the appellant that the evidence of the injured witnesses have been appositely discarded being treated as untrustworthy by the learned trial Judge."

70. It is also submitted by learned counsel for the appellant that there are various contradictions & omissions in the statements recorded under Section 161 of Cr.P.C, therefore the prosecution witnesses are unreliable.

71. 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."

72. In the case of **Rajender Singh Vs. State of Bihar [(2000) 4 SCC 298]**, Hon'ble Apex Court 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)

73. On the basis of aforesaid annunciation of law, it is settled that during trial, witness is required to be contradicted from his statement recorded under Section 161 of Cr.P.C. It is also required that the statement recorded under Section 161 of Cr.P.C. should be properly proved by the investigating officer who recorded the statement under Section 161 of Cr.P.C. Unless the statements recorded under Section 161 of Cr.P.C are proved, the contradictions and omissions came on record should not be considered.

74. Section 145 of Evidence Act specifically provisions that the former statement has to put to the witness in his cross-examination

and if attention is not drawn, the statements could not be utilized and the veracity of witness could not be impeached.

75. On the basis of above, it is apparent as per the settled principle of law as the testimony had not been challenged at the stage of cross-examination of aforesaid witness, the prosecution case is not affected adversely. It is also settled principle of law whenever evidence of a witness is appreciated, the entire evidence of the witnesses should be considered as a whole.

76. Learned counsel for the appellant has also submitted that there is delay in recording of statement under Section 161 CrPC which is fatal to the case.

77. 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.

78. 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."

79. Along with the aforesaid circumstantial evidence, scientific evidence is also very relevant circumstantial evidence in this case. As per prosecution, unnatural offence has been committed by the accused appellant and for disappearing evidence of commission of offence, murder was committed of the deceased A with the help of

stone. Crushed fracture has been found over the head of the deceased A. While considering aforesaid evidence, it would be relevant to reiterate the DNA analysis procedure.

80. In the present case, the most important and reliable scientific evidence has to be analyzed i.e. DNA profiling of various seized articles.

DNA Profiling:-

81. In the year 1984, first time DNA profiling was proposed by Sir Alec Jeffreys. He found that individual could be differentiated by others on the basis of detectable differences in their DNA. DNA profiling was first used in a criminal case during investigation in the United Kingdom in the year 1983 and 1986 in the case of rapes and murders of Lynda Mann and Dawn Ashworth. In this case, the accused Richard Buckland was acquitted on the basis of DNA analysis and Colin Pitchfork was convicted. For the development and refinement of DNA technologies, various inventions have been done. Now-a-days, considering the advancement of DNA analysis, the DNA profiling is one of the most reliable technologies to identify the culprit. Now, it has to be considered what is DNA.

82. DNA is the abbreviation of "Deoxyribonucleic Acid" which

is found in abundance in each cell of each living organism and each other characteristic of living organism is designed and shaped by DNA profiling of that particular living organism. The interpretation of a DNA profile from a single individual's sample is straightforward and can provide powerful trustworthy scientific evidence either to include or to exclude any one individual from his involvement in commission or non-commission of offence. Various Softwares have been evolved for calculating and presenting the match possibility and the results of such softwares disclose the truth of the case. As the DNA itself is a very stable substance, therefore, DNA profiling is and will be in future the most dependable advanced science for investigating the offence. It is the demand of time that State should start DNA testing labs as many as possible.

83. DNA is a complex of four chemical constituents (labeled A, T, C and G), known as bases, attached to a sugar backbone which form a strand millions of bases long. There are two strands in DNA which run in opposite direction. The bases pair up to form a twisted ladder. Each base pairs have the chemical constituents A to T and other G to C. That means, each strands can act as a template to produce the other precisely wherein the linear sequence of bases

can act a code, providing the instructions for many biological functions. Each DNA contains paired strands which are naturally twisted into a double helix structure. As per various reports of scientific invention, the human body contains 6,500,000,000 pairs of bases and the full complement, 3 meters, in length is termed as genome. In human being, it is packaged into 23 different pairs of chromosomes. This number always differs from one living organism to another living organism rather we can say that one can presume about the creature by counting the pairs of chromosomes in its cell. During the process of formation of sperms or eggs, the chromosome pairs are separated with one member of each pair randomly allocated to each sperm or egg. When an egg and sperm fuse during fertilization, in human being, the full set of 23 pairs is re-established. That means, 50% of child's DNA comes from the mother and 50% comes from the father.

84. Forensic DNA analysis is focused on examining specific sections of DNA that are known to be particularly variable between individuals in order to create a DNA profile. The part of the DNA that is examined is called a locus or loci as per the condition of the case which is always a unique site along-with the DNA of a chromosome characterized by a specific sequence of

bases. As discussed above, the genome is normally 3 meter in length and is having numerous DNAs. Presently, in ordinary course entire genome is not analyzed to create a DNA profile. Therefore, the statistical analysis of forensic DNA data focuses on establishing the weight of evidence that shall be attracted to the similarity between the DNA profile of a person involved and DNA taken from a scene of crime.

85. Only small sections of an individual's DNA are analyzed for forensic evidence. The parts analyzed are called Short Tandem Parts (STRs). Mutations that affect the number of repeats are relatively common so within a population there are several different versions of the DNA at an STR locus with different repeat lengths. Such various versions are called as alleles. The frequency of occurrence of special allele (i.e. a specific number of repeating units) at the specific locus in a specific population has to be counted and calculated. This information is essential for calculating match probabilities. If only one STR were analyzed, there would be many people with the same allele, purely by chance. It is, therefore, necessary to analyze a number of different STR loci to ensure that the chance of two unrelated persons having matching DNA profiles is very less.

86. While considering the male DNA profiling, the role of Y-chromosome is very important. Y-chromosome in DNA is inherited by sons from their father with little change between the generations. As a result, the profiles generated from Y-chromosome DNA are very similar between males shared directly from ancestor. Analysis of Y-chromosome, STRs is helpful where there is a mixture of DNA from male and female contributors, for example, in a sexual assault case.

87. It is always disputed that the hair shaved from pubic area does not contain DNA. This thought is baseless as if we go through the structure of hair, we will find that hair follicle is having numerous DNAs and the upper shaft of hair contains comparatively less DNAs but one cannot say that the hair shaft contains no DNA. Shaft of hair is made up of cutin that is a hard substance along-with old dead cells and if cell is there then definitely there will be DNA and the life of DNA has established scientifically is more than one thousand year, therefore, the defence taken that the DNA profiling done by extracting DNA from the shaft of pubic hair is baseless. As in hair shaft the number of DNA is comparatively less, therefore, there is specific test required to be conducted for such DNA profiling that is called

"mitochondrial DNA testing". Each cell contains mitochondria that is the powerhouse of a cell. The DNA is found inside of a cell nucleus. The mitochondrial genome consists of only 16,500 bases, arranged in a circle, there are thousands of copies of mitochondrial DNA in the same cell. Both males and females have mitochondrial DNA, but it is exclusively inherited from the mother. This analysis method is useful when there is minute amount of DNA present or when the DNA sample is very old and has broken down. STR profiling and mitochondrial DNA/ Y-chromosome analysis are totally different.

88. In the case of **Ravi S/o Ashok Ghumare Vs. State of Maharashtra [(2019) 9 SCC 622],** Hon'ble Apex Court has held as under:-

> "33. Shrikant Hanamant Lade (PW 11) Assistant Director in Forensic Science Laboratory, Mumbai, who got training in CDFD Institute, Hyderabad also, has authored about 30 papers on DNA, besides a well known book Forensic Biology. He has testified that they conducted the DNA test as per the guidelines issued by the Director of Forensic Science, Ministry of Home Affairs, New Delhi. Their office received the sealed muddemal from Kadim, Jalna Police Station sent vide letter

dated 11.03.2012 as also the blood sample of the appellant sent vide letter dated 13.03.2012 (Exbt. P-52). The blood sample of the victim was received on 12.03.2012 along with samples of oral swabs and other articles. P.W.11 analysed the oral swabs and other articles of the victim, nasal swabs, superficial vaginal swab, deep vaginal smear on slide, superficial vaginal smear on slide, anus swab, skin scraping of blood on thigh and abdomen, nails as also other blood samples. P.W.11 has further deposed that,

> "I have extracted DNA from blood sample of Accused Ravi Ghumare, Superficial vaginal swab on Exhibit No.3, deep vaginal swab Exhibit No.4, Deep vaginal swab on slide Exhibit No.5 superficial vaginal swab on slide Exhibit No.6, anal swab Exhibit No.7, skin scrapping of blood on thigh and abdomen Exhibit No.8, blood & semen detected on Exhibit No.3 Jeans pant. This DNA was amplified by using Y-chromosome specific marker, Y-chromosome short tandem repeat polymorphism [YSTR] and by using Polymerase Change Reaction [for short PCR] amplification technique. DNA profile was generated. I analyzed all these DNA profiles. My interpretation is male

haplotypes of semen detected on Exhibit No.3 Superficial vaginal swab Exhibit No.4 deep vaginal sway Exhibit No.3 Superfinal vaginal swab Exhibit No.4 deep vaginal sway Exhibit No.5 deep vaginal smear on slide, Exhibit No.6 superficial vaginal smear on slide, Exhibit No.7 anal swab, Exhibit No.8 skin scrapings of blood on thigh and abdomen and blood and semen detected on Exhibit No.3, jeans pant of F.S X. ML Case No.DNA 951/12 matched with the male haplotypes of blood sample of Exhibit No.1, Ravi Ashok Ghumare of F.S.L. ML Case No.DNA-209/12.

My opinion is DNA profile of semen detected on Exhibit No.3 superficial vaginal swab, Exhibit 4 deep vaginal swab, Exhibit No.5 deep vaginal smear on slid Exhibit No.6 superficial vaginal smear on slide, Exhibit No.7 anal swab, Exhibit No.8, skin scrapings of blood on thigh and abdomen, blood and semen detected on Exhibit No.3 jeans pant of F.S.L ML Case No.DNA- 951/112 and blood sample of Exhibit No.1 Ravi Ashok Ghumare of F.S.LML Case No.DNA-209/12 is from the same paternal progeny.

> Accordingly, I prepared examination report filed with list Exhibit No.71 bear my signature, Contents are correct. It is at Exhibit No.75. Analysis of all above DNA profiles is shorn in table in the same report. Blue jeans pant and shirt of Accused Exhibit No.3 & 4 were referred by biological section of our office. I extracted DNA from blood and semen detected Exhibit No.3, full jeans pant, blood detected on Exhibit No.4 full bush shirt, and sample of Ravi Ghumare. Then this DNA was amplified by using 15 STR Loci using PCR amplification technique. My interpretation is DNA profile of blood and semen detected on Exhibit No.3 full jeans pant, blood detected on Exhibit No.4 full bush shirt [torn] of F.S.l. ML. Case No.DNA-951/12 and blood sample of Ravi Ashok Ghumare is identical and from one and same source of male origin. DNA profiles match with the maternal and paternal alleles in the source of blood."

34. Shrikant Lade (P.W.11) accordingly prepared the DNA report which is duly attested by the Assistant Chemical Analyser also. On seeing the contents of his report, P.W.11 has pertinently deposed that *"I can opine on going through the*

reports Exbts. 75-76 that there were sexual intercourse and unnatural intercourse on the victim by the accused Ravi." [emphasis supplied]

35. The unshakable scientific evidence which nails the appellant from all sides, is sought to be impeached on the premise that the method of DNA analysis "Y-STR" followed in the instant case is unreliable. It is suggested that the said method does not accurately identify the accused as the perpetrator; and unlike other methods say autosomal-STR analysis, it cannot distinguish between male members in the same lineage.

36. We are, however, not swayed by the submission. The globally acknowledged medical literature coupled with the statement of P.W.11 – Assistant Director, Forensic Science Laboratory leaves nothing mootable that in cases of sexual assault, DNA of the victim and the perpetrator are often mixed. Traditional DNA analysis techniques like "autosomal- STR" are not possible in such cases. Y-STR method provides a unique way of isolating only the male DNA by comparing the Y-Chromosome which is found only in males. It is no longer a matter of scientific debate that Y-STR screening is manifestly useful for corroboration in sexual assault cases and it can be well used as exculpatory evidence and is extensively relied upon in various jurisdictions throughout the world.

> Science and Researches have emphatically established that chances of degradation of the "Loci" in samples are lesser by this method and it can be more effective than other traditional methods of DNA analysis. Although Y-STR does not distinguish between the males of same lineage, it can, nevertheless, may be used as a strong circumstantial evidence to support the prosecution case. Y-STR techniques of DNA analysis are both regularly used in various jurisdictions for identification of offender in cases of sexual assault and also as a method to identify suspects in unsolved cases. Considering the perfect match of the samples and there being nothing to discredit the DNA analysis process, the probative value of the forensic report as well as the statement of P.W.11 are very high. Still further, it is not the case of the appellant that crime was committed by some other close relative of him. Importantly, no other person was found present in the house except the appellant."

89. In examination report exhibit P/25, Dr. Anil Kumar Singh has submitted that in compliance of letter of Superintendent of Police, Gwalior, various articles were received for conducting DNA test in relation to crime No. 260/2017 registered at police station Bahodapur, Distt. Gwalior, for offence under Sections 377,

302, 201, 363 and 366 of IPC and Section 3/4 of POCSO Act. It is further submitted in his report that he received five packets (E, D, F, G & K) from Mahesh Singh constable No.2023 of police station Bahodapur, Gwalior on 30.06.2017 and four packets (C, H, I & J) from Deepak Chauhan constable No.1429 of police station Bahodapur, Gwalior on 29.08.2017. He received the aforesaid packets properly sealed. Inside of aforesaid packets he found the articles as under:-

S.No	Packet	Articles found	Whose/ Seized from	Entry as
1	E	Anal swab	Deceased "A"	A/R-7757
2	D	Nails	Deceased "A"	A/R-7758
3	F	Pubic hair	Accused Yogesh Nath	A/R-7759
4	G	Semen slide	Accused Yogesh Nath	A/R-7760
5	K	Blood sample	Accused Yogesh Nath	A/R-7761
6	C	Clothes- Shirt, Pant & Saafi	Deceased "A"	A/R-8625
7	H	Cloth- Underwear	Accused Yogesh Nath	A/R-8626
8	I	Clothes- Pant &Shirt	Seized as per information given by Accused Yogesh Nath	A/R-8627
9	J	Stone	Seized from the place of incident as per information given by Accused Yogesh Nath	A/R-8628

90. Dr. Anil Kumar Singh in its report has submitted that from

the aforesaid exhibits, DNA were extracted by observing organic extraction process. From the DNA profile found, 24 genetic marker (21 Autosomal STR marker, 1 Amylogenin marker, 1 Y Chromosome STR marker and 1 Y Indel Marker) were amplified by adopting amplification Multiplex PCR process using Global Filer kit and amplification of desired Y-Chromosome genetic marker was done using Y Filer @ Plus kit. In this way, Genotyping profile of amplified DNA was found through Genetic Analyser. It is further submitted that the results were analyzed with the help of Genemapper Software ID- X 1.5.

91. Male Y Chromosome STR DNA Profile of various articles of the case are as under:-

Y-STR Genetic Markers	Exhibit E &D DNA profile found from source anal swab and nails of deceased "A". (A/R-7757 &7758)	Exhibit F Male DNA profile found from source pubic hair of accused Yogesh Nath. (A/R-7759)	Exhibit K Male DNA profile found from source blood sample of accused Yogesh Nath. (A/R-7761)
DYS576	20	16, 20	16
DYS369I	13	13, 14	14
DYS635	23	23, 24	24
DYS389II	32	29, 32	29
DYS627	18	18, 20	20
DYS460	11	10, 11	10
DYS458	17	17, 18	18
DYS19	18	14, 16	14
YGATAH4	12	12, 13	13
DYS448	20	20	20

DYS391	11	10, 11	10
DYS456	15	15, 16	16
DYS390	25	23, 25	23
DYS438	11	11, 12	12
DYS392	11	10, 11	10
DYS518	40	40, 41	41
DYS570	19	17, 19	17
DYS437	14	14, 16	16
DYS385	12,15	12, 13, 15, 20	13, 20
DYS449	32	30, 32	30
DYS393	13	13	13
DYS439	10	10, 12	12
DYS481	23	23, 26	25
DYF387S1	37, 41	37, 40, 41	37, 40
DYS633	13	11, 12	11

92. It is also submitted in the report that exhibit G (A/R-7760) was not examined as it was not essential. It is further opined as per above table that same male Y Chromosome STR DNA profile was found from the source anal swab of deceased "A" i.e. exhibit E (A/R-7757) and nails exhibit D (A/R-7758) and from the source pubic hair of accused Yogesh Nath exhibit F (A/R-7759) mixed Y chromosome STR DNA profile was found. It is further opined by Doctor that on mixed male Y chromosome STR DNA profile found from the source pubic hair of accused Yogesh Nath i.e. exhibit F (A/R-7759), alleles found on each genetic marker were black bold and similar alleles were also found from the anal swab of the deceased "A" exhibit E (A/R-7757) and exhibit D (A/R-

7758).

93. The details of Autosomal STR DNA profile found from various articles of the case are as follows:-

Genetic Marker	Exhibit E &D DNA profile found from source anal swab and nails of deceased "A". (A/R-7757 &7758)	Exhibit F Male DNA profile found from source pubic hair of accused Yogesh Nath. (A/R-7759)	Exhibit K Male DNA profile found from source blood sample of accused Yogesh Nath. (A/R-7761)
D3S1358	15, 17	15, 16, 17	15, 16
vWA	14, 18	14, 18	14, 18
D16S539	12, 13	10, 11, 12, 13	10, 11
CSF1PO	12, 12	11, 12	10, 11
TPOX	8, 11	8, 11, 12	11, 12
D8S1179	11, 16	10, 11, 14, 16	10, 14
D21S11	28, 28	28, 31	31, 31
D18S51	16, 19	13, 16, 19	13, 13
D2S441	10, 11	10, 11, 11.3	11, 11.3
D19S433	13, 14	13, 14, 15.2	14, 15.2
THO1	9, 9	7, 9, 9.3	7, 9.3
FGA	22.2, 23	21, 22.2, 23	21, 23
D22S1045	11, 15	11, 15	15, 15
D5S818	11, 13	11, 13	11, 13
D13S317	8, 12	8, 11, 12	8, 11
D7S820	8, 8	8, 12	8, 12
SE33	19, 30.2	19, 21, 30.2	21, 21
D10S1248	13, 14	13, 14, 15, 16	15, 16
D1S1656	15, 16	14, 15, 16	14, 16
D12S391	18, 20	18, 20	18, 18
D2S1338	17, 20	17, 20	17, 19
AMELOGENIN	XY	XY	XY
DYS391	11	10, 11	10
Y INDEL	2	2	2

94. On the basis of above table, Dr. Anil Kumar Singh has opined as under:-

- Same male Autosomal STR DNA profile was found from anal swab of deceased "A" exhibit E (A/R-7757) and from nails exhibit D (A/R-7758).
- Mixed Autosomal STR DNA profile was found in the source pubic hair of accused Yogesh Nath exhibit F (A/R-7759).
- Alleles with black bold marker were found on each genetic marker of mixed Autosomal STR DNA profile of pubic hair of accused Yogesh Nath exhibit F (A/R-7759) and same alleles were found on the anal swab exhibit E (A/R-7757) and nails exhibit D (A/R-7758) of deceased "A".

95. The Autosomal STR DNA Profile of different articles of this case are as follows:-

Genetic Marker	Exhibit C DNA profile found from source clothes- Shirt, Pant &Saafi of deceased "A". (A/id-8625)	Exhibit H Male DNA profile found from source Underwear of accused Yogesh Nath. (A/id-8626)	Exhibit I Male DNA profile found from source clothes- Shirt of accused Yogesh Nath. (A/id-8627)	Exhibit J Male DNA profile found from source of seized stone from the place of incident. (A/id-8628)
D3S1358	15, 17	15, 16	15, 16, 17, 18	15, 17
vWA	14, 18	14, 18	14, 16, 17, 18	14, 18
D16S539	12, 13	10, 11	9, 11, 12, 13	12, 13

CSF1PO	12, 12	10, 11	9, 10, 11, 12	12, 12
TPOX	8, 11	11, 12	8, 10, 11	8, 11
D8S1179	11, 16	10, 11, 13, 14	10, 11, 13, 14, 15, 16	11, 16
D21S11	28, 28	31, 31	28, 31, 32.2, 33.2, 34.2	28, 28
D18S51	16, 19	13, 13	13, 14, 16, 19	16, 19
D2S441	10, 11	10, 11, 11.3	10, 11, 12, 13, 14	10, 11
D19S433	13, 14	13, 14, 15.2	13, 14, 15.2	13, 14
THO1	9, 9	7, 9.3	6, 7, 8, 9, 9.3	9, 9
FGA	22.2, 23	20, 21, 23	21, 22.2, 23, 24, 26	22.2, 23
D22S1045	11, 15	15, 15	9, 11, 13, 15, 16, 17	11, 15
D5S818	11, 13	11, 13	10, 11, 12, 13	11, 13
D13S317	8, 12	8, 11	8, 11, 12	8, 12
D7S820	8, 8	8, 12	8, 10, 11	8, 8
SE33	19, 30.2	21, 21	19, 20, 21, 30.2	19, 30.2
D10S1248	13, 14	14, 15, 16	13, 14, 15, 16	13, 14
D1S1656	15, 16	14, 15, 16	11, 14, 15, 16	15, 16
D12S391	18, 20	18, 18	18, 20	18, 20
D2S1338	17, 20	17, 18, 19, 20	17, 19, 20, 22, 23	17, 20
AMELOGENIN	XY	XY	XY	XY
DYS391	11	10	10, 11	11
Y INDEL	2	2	2, 1	2

96. Accordingly, Dr. Anil Kumar Singh has opined on the basis of above table as under:-

- Similar male Autosomal STR DNA Profile was found from the anal swab exhibit E (A/R-7757)

and nails exhibit D (A/R-7758) of deceased “A”, as was found of male Autosomal STR DNA Profile from the clothes- Pant, Shirt & Saafi of deceased “A”, i.e. exhibit C (A/id-8625).

- From the underwear of the accused Yogesh Nath, i.e. exhibit H (A/id-8626), mixed Autosomal STR DNA profile was found.
- Mixed Autosomal STR DNA profile was found from the shirt i.e. exhibit I (A/id-8627) of accused Yogesh Nath.
- Similar mixed Autosomal STR DNA profile with genetic markers having black, bold mark alleles were found from the source of deceased “A” i.e. exhibit C (A/id-8625), exhibit D (A/R-7758) and exhibit E (A/R-7757), as found from exhibit I (A/id-8627), i.e. shirt of accused Yogesh Nath.
- Male Autosomal STR DNA profile was found from the stone seized from the place of incident, i.e. exhibit J (A/id-8628).
- Mixed male Autosomal STR DNA Profile found from the seized stone exhibit J (A/id-8628) with same genetic markers alleles couples were found from the clothes, i.e. shirt, pant & Saafi exhibit C (A/id-8625), exhibit D (A/R-7758) and exhibit E (A/R-7757) of the deceased “A” respectively.

97. On the basis of DNA testing, following conclusive findings have been given by Dr. Anil Kumar Singh:-

- **In male Y chromosome STR DNA profile of source exhibit F (A/R-7759) of accused Yogesh Nath, male Y chromosome STR DNA profile of source exhibit E (A/R-7757) and exhibit D (A/R-7758) of deceased "A", was found.**
- **In mixed Autosomal STR DNA profile of source exhibit F (A/R-7759) of accused Yogesh Nath, Autosomal STR DNA profile of source exhibit E (A/R-7757) and exhibit D (A/R-7758) of deceased "A", was found.**
- **In mixed Autosomal STR DNA profile of source exhibit I (A/id-8627) of accused Yogesh Nath, Autosomal STR DNA profile of source exhibit C (A/id-8625), exhibit D (A/R-7758) & exhibit E (A/R-7757) of deceased "A", was found.**
- **The DNA profile found from the seized stone exhibit J (A/id-8628), was of exhibit C (A/id-8625), exhibit D (A/R-7758) & exhibit E (A/R-7757) of deceased "A".**

98. On the basis of above, it is apparent that scientific evidence is corroborated with the evidence given by the witnesses to the last seen theory. It is also apparent that same Y chromosome STR DNA profile has been found on the source Exhibits F, E & D. It is relevant to mention here that source Exhibit F is of accused Yogendra Nath and the deceased "A" is the source of Exhibits D

& E. Similarly the same mixed Autosomal STR profile is found on the aforesaid exhibits. This witness has also proved that mixed Autosomal STR DNA profile has been found at source Exhibit I and source Exhibits C, D & E. Accused Yogesh Nath is the source of Exhibit I and deceased "A" is source of Exhibits C, D & E. It is also stated by Dr. A.K. Singh that on the stone seized from the place of incident, i.e. Exhibit J, same DNA profile was found as found on Exhibits C, D, E & I.

99. From the aforesaid discussion, it is clear that the same Y chromosome STR, mixed Autosomal STR and same DNA profile have been found from the source collected from accused Yogesh Nath, from deceased "A" and from the stone seized from the place of incident, which reflects that the deceased had committed all the alleged offences and could be defined as initially committed unnatural offence with deceased, thereafter when the deceased revolted, the accused murdered the deceased "A" with the help of stone Exhibit J seized from the place of incident. As immediately after the commission of offence under Section 377 of IPC, the accused committed murder using aforesaid stone seized from the place of incident, therefore, that is the only reason of availability of

same DNA profile on the stone. As present scientific evidence is very well corroborated with the evidence given by the aforesaid witnesses which very well prove that the accused has committed the alleged offences.

100. Learned counsel for the accused/appellant has submitted that from the accused appellant, one T-shirt of Pritam Prajapati has been recovered that reflects that Pritam Prajapati was involved in the incident and prosecution has fabricated the case.

101. The aforesaid arguments advanced by learned counsel for the accused/appellant has no force as prosecution witnesses of theory of last seen together as well as witness relating to scientific evidence has very well proved the prosecution case and the same DNA profile has been found on the articles seized. If same DNA profile as discussed above is found, then it rule out the possibility of commission of offence by any other person.

102. Learned counsel for the appellant has also submitted that in the present case, there was no motive of committing offence, therefore trial Court has erred in convicting the accused-appellant.

103. In various decisions, it has been observed that lack of motive would not be fatal to the case of prosecution as some times a person behaves irrationally and at the spur of the moment,

commits the offence. In the present case, the statements of witnesses relating to last seen theory is corroborated by scientific evidence as Dr. A.K. Singh has specifically opined as mentioned above. Therefore, considering the aforesaid evidence, which is supported by DNA test report, does not require the definite determination of the motive of the appellant behind the commission of gruesome crime.

104. Therefore, considering the aforesaid evidence along with above mentioned discussions, we are of considered opinion that the prosecution has proved its case beyond doubt and trial Court has rightly convicted the appellant - accused under Sections 363 of IPC, 3/4 of POCSO Act/ 377 of IPC, 302, 201 (Part-1) of IPC. Hence, the conviction of the accused - appellant is hereby affirmed.

Whether the present case is one of the rarest of rare case wherein death sentence is only remedy?

105. Learned counsel for the appellant submitted that the present case does not fall within the category of rarest of rare case. The act done is spontaneous and rather was satisfaction of "lust" and there was no motive behind it to commit murder. It is further submitted that there is no any aggravating circumstance on record that

accused-appellant has brutality committed the offence which comes within the purview of "inhuman act done". Therefore, prayed to consider the mitigating circumstances of case, prayed not to approve the death penalty.

106. *Per contra*, learned counsel for the State vehemently opposed and submitted that in the present case accused appellant has committed offences which reflects the *mens rea* of accused-appellant. The accused- appellant has broken the belief of the deceased by committing offence with him despite the fact the deceased always addressed accused as uncle and commission of aforesaid offence along with the fact that the accused-appellant brutally murdered the deceased 'A' by crushing his head using around 3 KG weighed stone and thereafter tried to disappear the proof of commission of offence by throwing the dead body of deceased in a mud dug situated at isolated place. Therefore, the trial Court has rightly awarded the death sentence.

107. While considering the arguments advanced by the counsel for the State as well as for accused-appellant, it would be relevant to discuss the various landmark judgments on this point to consider the present case judiciously.

108. In the case of **Bachan Singh vs. State of Punjab [AIR 1980 SC 898],** Hon'ble Apex Court has held as under:-

> “3. Bachan Singh's appeal by special leave, came up for hearing before a Bench of this Court (consisting of Sarkaria and Kailasam, JJ.). The only question for consideration in the appeal was, whether the facts found by the courts below would be "special reasons" for awarding, the death sentence as required under Section 354(3) of the CrPC, 1973.
>
> 4. Shri H. K. Puri, appearing as amicus curiae on behalf of the appellant, Bachan Singh, in Criminal Appeal No. 273 of 1979, contended that in view of the ratio of **Rajendra Prasad v. State of U. P. (1979) 3 SCR 646**, the courts below were not competent to impose the extreme penalty of death on the appellant It was submitted that neither the circumstance that the appellant was previously convicted for murder and committed these murders after he had served out the life sentence in the earlier case, nor the fact that these three murders were extremely heinous and inhuman, constitutes a "special reason" for imposing the death sentence within the meaning of Section 354(3) of the CrPC, 1974. Reliance for this argument was placed on Rajendra Prasad (ibid) which, according to the counsel, was on facts very similar, if not identical, to that case.
>
> 17. The principal questions that fall to be considered in this case are:
>
> (i) Whether death penalty provided for the offence of murder in Section 302, Penal Code is unconstitutional.
>
> (ii) If the answer to the foregoing question be in the negative, whether the sentencing procedure provided in Sec, 354(3) of the CrPC, 1973 (Act 2 of 1974) is unconstitutional on the ground that it invests the Court with unguided and untrammeled discretion and allows death sentence to be

arbitrarily or freakishly imposed on a person found guilty of murder or any other capital offence punishable under the Indian Penal Code with death or, in the alternative, with imprisonment for life.

18. We will first take up Question No. (I) relating to the constitutional validity of Section 302, Penal Code.

Question No. (I):

19. Before dealing with the contentions canvassed, it will be useful to have a short survey of the legislative history of the provisions of the Penal Code which permit the imposition "of death penalty toe certain offences.

20. The Indian Penal Code was drafted by the First Indian Law Commission presided over by Mr. Macaulay. The draft underwent further revision at the hands of well-known jurists, tike Sir Barnes Peacock, and was completed in 1850. The Indian Penal Code was passed by the then Legislature on October 6, 1860 and was enacted as Act No. XLV of 1860.

21. Section 33 of the Penal Code enumerates punishments to which offenders are liable under the provisions of this Code. Clause Firstly of the section mentions 'Death' at one of such punishments. Regarding 'death' as a punishment, the authors of the Code say: "We are convinced that it ought to be very sparingly inflicted, and we propose to employ it only in cases where either murder or the highest offence against the State has been committed." Accordingly, under the Code, death is the punishment that must be awarded for murder by a person under sentence of imprisonment for life (Sec. 303). This apart, the Penal Code prescribed 'death' as an alternative punishment to which the offenders may be sentenced, for the following seven offences:

(1) Waging was against the Government of India. (S. 121) (2) Abetting mutiny actually committed

(S. 132) (3) Giving or fabricating false evidence upon which an innocent person suffers death. (S. 194) (4) Murder which may be punished with death or life imprisonment (S. 302) (5) Abetment of suicide of a minor on insane, or intoxicated person. (S. 305) (6) Dacoity accompanied with murder. (S. 396) (7) Attempt to murder by a person under sentence of imprisonment for life if hurt is caused. (S. 307)

22. In the instant cases, the impugned provision of the Indian Penal Code is Section 302 which says: "Whoever commits murder shall be punished with death, or imprisonment for life, and also be liable to fine". The related provisions are contained in Sections 299 and 300. Section 299 defines 'culpable homicide'. Section 300 defines 'murder'. Its material part runs as follows:

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, of Secondly, - If it is done with me intention of causing such bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused, or Thirdly, - If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or Fourthly, - If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

23. The first contention of Shri Garg is that the provision of death penalty in Section 302, Penal Code offends Article 19 of the Constitution. It ii submitted that the right to live is basic to the enjoyment of all the six freedoms guaranteed in Clauses (a) to (e) and (g) of Article 19(1) of the Constitution and death penalty puts an end to all

these freedoms; that since death penalty serves no social purpose and its value as a deterrent remains unproven and it defiles the dignity of the individual so solemnly vouchsafed in the Preamble of the Constitution, its imposition must be regarded as an 'unreasonable restriction' amounting to total prohibition, on the six freedoms guaranteed in Article 19(1).

24. Article 19, as in force today, reads as under:

> 19(1). All citizens shall have the right-
>
> (a) to freedom of speech and expression;
>
> (b) to assemble peaceably and without arms;
>
> (c) to form associations or unions;
>
> (d) to move freely throughout the territory of India;
>
> (e) to reside and settle in any part of the territory of India;
>
> (f) ...;
>
> (g) to practise any profession, or to carry on any occupation, trade or business.
>
> (2) Nothing in Sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.
>
> (3) Nothing in Sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order,

reasonable restriction! on the exercise of the right conferred by the said sub-clause.

(4) Nothing in Sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(5) Nothing fan Sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in Sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and in particular, nothing in the said sub-clause, shall affect me operation of any existing law in so far as it relates to, or prevent the State from-making any law relating to,-

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or sex-vice, whether to the exclusion, complete

on partial, of citizens or otherwise.

25. It will be seen that the first part of the Article declares the rights in Clause (1) comprising of six Sub-clauses namely, (a) to (e) and (g). The second part of the Article hi its five Cls. (2) to (6) specifies the limits up to which the abridgment of the rights declared in one or more of the Sub-clauses of Clause (1), may be permitted. Broadly speaking, Article 19 is intended to protect the rights to the freedoms specifically enumerated in the six Sub-clauses of Clause (1) against State action, other than in the legitimate exercise of its power to regulate these rights in the public interest relating to heads specified in Clauses (2) to (6). The six fundamental freedoms guaranteed under Article 19(1) are not absolute rights. Firstly, they are subject to inherent restraints stemming from the reciprocal obligation of one member of a civil society to so use his rights as not to infringe or injure similar rights of another. This is on the principle sic uteri tuo ut alienum non laedas. Secondly, under Cls. (2) to (6) these rights have been expressly made subject to the power of the State to impose reasonable restrictions, which may even extend to prohibition, on the exercise of those rights.

26. The power, if properly exercised, is itself a safe-guard of the freedoms guaranteed in Clause (1). The conferment of this power is founded on the fundamental truth mat uncontrolled liberty entirely freed from restraint, degenerates into a license, leading to anarchy and chaos; that libertine pursuit of liberty, absolutely free, and free for all, may mean liberticide for all. "Liberty has, therefore," as Justice Patanjali Sastri put it, "to be limited in order to be effectively possessed.

27. It is important to note that whereas Article 21 expressly deals with the right to life and personal liberty, Article 19 does not The right to life is not one of the rights mentioned in Article 19(1).

28. The first point under Question (1) to be

considered is whether Article 19 is at all applicable for judging the validity of the impugned provision in Section 302, Penal Code.

29. As rightly pointed out by Shri Soli Sorabji, the condition precedent for the applicability of Article 19 is that the activity which the impugned law prohibits and penalises, must be within the purview and protection of Article 19(1). Thus considered, can any one say that he has a legal right of fundamental freedom under Article 19(1) to practise the profession of a hired assassin or to form associations or unions or engage in a conspiracy with the object of committing murders or dacoities? The argument that the provisions of the Penal Code, prescribing death sentence as an alternative penalty for murder have to be tested on the ground of Article 19, appears to proceed on the fallacy that the freedoms guaranteed by Article 19(1) are absolute freedoms and they cannot be curtailed by law imposing reasonable restrictions, which may amount to total prohibition. Such an argument was advanced before the Constitution Bench in the **State of Bombay v. R.M.D. Chamarbaugwala 1957 SCR 874 at p. 920**. In that case the constitutional validity of certain provisions of the Bombay Lotteries and Prim Competition Control Act, 1952, as amended by Bombay Act No. XXX of 1952, was challenged on the ground, inter alia, that it infringes the fundamental rights of the promoters of such competitions under Article 19(1)(g), to carry on their trade of business and that the restrictions imposed by the said Act cannot possibly be supported at reasonable restrictions in the interest of the general public permissible under Article 19(b). It was contended that the words "trade" of "business" or "commerce" in Sub-clause (g) of Article 19(a) should be read in their widest amplitude as any activity which is undertaken or carried on with a view to earning profit, since there is nothing in Article 19(1)(g) which may qualify or cut down

the meaning of the critical words; that there is no justification for excluding from the meaning of those words activities which may be looked upon with disfavour by the State or the Court as injurious to public morality or public interest. Speaking for the Constitution Bench, S. R. Das, C. J. repelled this contention, in these terms:

On this argument it will follow that criminal activities undertaken and carried on with a view to earning profit will be protected as fundamental rights until they are restricted by law. Thus there will be a guaranteed right to carry on a business of hiring out goondas to commit assault or even murder, or house-breaking, or selling obscene pictures, or trafficking in women and so on until the law curbs or stops such activities. This appears to us to be completely unrealistic and incongruous. We have no doubt that there are certain activities which can under no circumstance be regarded as trade or business or commerce although the usual forms and instruments are employed therein. To exclude those activities from the meaning of those words is not to cut down their meaning at all but to say only that they are not within the true meaning of those words.

This approach to the problem still holds the field. The observations in Chamarbaugwala, extracted above, were recently quoted with approval by V.R. Krishna Iyer, J., while delivering the judgment of the Bench in Fatehchand Himmatlal v. State of Maharashtra .

40. In applying the above test, which was the same as adopted by Kania, C. J., Fazal Ali, J. reached a conclusion contrary to that reached by the Chief Justice, on the following reasoning:

Punitive detention is however essentially different from preventive detention. A person is punitively detained only after trial for committing a crime and after his guilt has been established in a competent court of justice. A person so convicted

can take his case to the State High Court and sometimes bring it to this Court also; and he can in the course of the proceedings connected with his trial take all pleas available to him to-eluding the plea of want of jurisdiction of the Court of trial and the invalidity of the law under which he has been prosecuted. The final judgment in the criminal trial will thus constitute a serious obstacle in his way if he chooses to assert even after his conviction that his right under Article 19(1)(d) has been violated. But a person who is preventively detained has not to face such an obstacle whatever other obstacle may be in his way.(Page 146)

41. We have copiously extracted from the judgments in A.K. Gopalan's case, to show that all the propositions propounded, arguments and reasons employed or approaches adopted by the learned Judges in that case, in reaching the conclusion that the Indian Penal Code, particularly those of its provisions which do not have a direct impact on the rights conferred by Article 19(1), is not a law imposing restrictions on those rights, have not been overruled or rendered bad by the subsequent pronouncements of this Court in Bank Nationalization case or in Menaka Gandhi's case . For instance, the proposition laid down by Kania, C. J., Fazal Ali, Patanjali Sastri and S.R. Das, JJ. that the Indian Penal Code particularly those of its provisions which cannot be justified on the ground of reasonableness with reference to any of the specified heads, such as "public order" in Clauses (2), (3) and (4), is not a law imposing restrictions on any of the rights conferred by Article 19(1), still holds the field. Indeed, the reasoning, explicit or implicit, in the judgments of Kania, C. J., Patanjali Sastri and S. R. Das JJ. that such a construction which treats every section of the Indian Penal Code as a law imposing 'restriction' on the rights in Article 19(1), will lead to absurdity is unassailable. There are several offences under the Penal Code, such as

theft, cheating, ordinary assault, which do not violate or affect 'public order,' but only 'law and order'. These offences injure only specific individuals as distinguished from the public at large. It is by now settled that 'public order' means 'even tempo of the life of the community'. That being so, even as murders do not disturb or affect 'public order''. Some murders may be of purely private significance and the injury or harm resulting therefrom affects only specific individuals, and, consequently, such murders may not be covered by "public order" within the contemplation of Clauses (2), (3) and (4) of Article 19. Such murders do not lead to public disorder but to disorder simpliciter. Yet, no rational being can say that punishment of such murderers is not in the general public interest. It may be noted that genera] public interest is not specified as a head in Clauses (2) to (4) on which restriction on the rights mentioned in Clause (1) of the Article may be justified.

72. The Law Commission of India, after making an intensive and extensive study of the subject of death penalty in India, published and submitted its 36th Report in 1967 to the Government. After examining, a wealth of evidential material and considering the arguments for and against its retention, that high-powered Body summed up its conclusions at page 354 of its Report, as follows:

The issue of abolition or retention has to be decided on a balancing of the various arguments for and against retention. No single argument for abolition or retention can decide the issue. In arriving at any conclusion on the subject, the need for protecting society in general and individual human beings must be borne in mind.

It is difficult to rule out the validity of the strength behind many of the arguments for abolition nor does the Commission treat lightly the argument based on the irrevocability of the sentence of death, the need for a modern approach, the

severity of capital punishment and the strong feeling shown by certain sections of public opinion in stressing deeper questions of human values.

Having regard, however, to the conditions in India, to the variety of the social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to diversity of its population and to the paramount need for maintaining law and order in the country at the present Juncture, India cannot risk the experiment of abolition of capital punishment.

73. This Report was, also, considered by the Constitution Bench of this Court in Jagmohan. It was the main piece of evidence on the basis of which the challenge to the constitutional validity of Section 302 of the Penal Code, op the ground of its being violative of Article 19, was repelled. Parliament must be presumed to have considered these views of the Law Commission and the judgment of this Court in Jagmohan, and must also have been aware of the principles crystallised by judicial precedents in the matter of sentencing when it took up revision of the CrPC in 1972-73. and inserted in it, Section 354(3) which indicates that death penalty can be awarded in exceptional cases for murder and for some other offences under the Penal Code for special reasons to be recorded.

74. Death penalty has been the sue-Jeet of an age-old debate between Abolitionists and Retentionists, although recently the controversy has come in sharp focus. Both the groups are deeply anchored in their antagonistic views. Both firmly and sincerely believe in the righteousness of their respective stands, with overtones of sentiment and emotion. Both the camps can claim among them eminent thinkers, penologists, sociologists, Jurists, Judges, legislators, administrators and law enforcement officials.

75. The chief arguments of the Abolitionists, which have been substantially adopted by the learned Counsel for the petitioners, are as under:

(a) The death penalty is irreversible. Decided upon according to fallible processes of law by fallible human beings, it can be- and actually has been- inflicted upon people innocent of any crime.

(b) There is no convincing evidence to show that death penalty serves any penological purpose:

(i) Its deterrent effect remains unproven. It has not been shown that incidence of murder has increased in countries where death penalty has been abolished, after its abolition.

(ii) Retribution in the sense of vengeance, is no longer an acceptable end of punishment.

(iii) On the contrary, reformation of the criminal and his rehabilitation is the primary purpose of punishment. Imposition of death penalty nullifies that purpose.

(c) Execution by whatever means and for whatever offence is a cruel, inhuman and degrading punishment.

77. Firstly, in most of the countries in the world, including India, a very large segment of the population, including notable penologists, judges, jurists, legislators and other enlightened people still believe that death penalty for murder and certain other capital offences does serve as a deterrent, and a greater deterrent than life imprisonment. We will set out very briefly, by way of sample, opinions of some of these distinguished persons.

79. In **Paras Ram v. State of Punjab S.L.P. (Crl.) Nos. 698 & 678 of 1973, decided on October 9, 1973**, the facts were that Paras Ram, who was a fanatic devotee of the Devi, used to hold Satsangs at which bhajjans were sung in praise of the Goddess. Paras Ram ceremonially beheaded his four year old boy at the crescendo of

the morning bhajan. He was tried, convicted and sentenced to death for the murder. His death sentence was confirmed by the High Court. He filed a petition for grant of special leave to appeal to this Court under Article 136 of the Constitution. It was contended on behalf of Paras Ram that the very monstrosity of the crime provided proof of his insanity sufficient to exculpate the offender under Section 84, Indian Penal Code, or material for mitigation of the sentence of death. V.R. Krishna Iyer, J., speaking for the Bench, to which one of us (Sarkaria, J.) was a party, refused to grant special leave and summarily dismissed the petition with these observations:

The poignantly pathological grip of macabre superstitions on some crude Indian minds in the shape of desire to do human and animal sacrifice, in defiance of the scientific ethos of our cultural heritage and the scientific impact of our technological century, shows up in crimes of primitive horror such as the one we are dealing with now, where a bloodcurdling butchery of one's own beloved son was perpetrated, aided by other 'nious' criminals, to propitiate some blood-thirsty deity. Secular India, speaking through the Court, must administer shock therapy to such anti-social 'piety', when the manifestation is in terms of inhuman and criminal violence. When the disease is social, deterrence through court sentence must, perforce, operate through the individual culprit coming up before court. Social justice has many facets and Judges have a sensitive, secular and civilsing role in suppressing grievous injustice to humanist values by inflicting condign punishment on dangerous deviants.

(emphasis added)

80. In Jagmohan, also, this Court took due note of the fact that for certain types of murders, death penalty alone is considered an adequate deterrent:

A large number of murders is undoubtedly of the

common type. But some at least are diabolical in conception and cruel in execution. In some others where the victim is a person of high standing in the country society is liable to be rocked to its very foundation. Such murders cannot simply be wished away by finding alibis in the social maladjustment of the murderer. Prevalence of such crimes speaks, in the opinion of many, for the inevitability of death penalty not only by way of deterrence but as a token of emphatic disapproval of the society." Examining whether life imprisonment was an adequate substitute for death penalty, the Court observed:

In the context of our criminal law which punishes murder, one cannot ignore the fact that life imprisonment works out in most cases to a dozen years of punishment, and it may be seriously questioned whether that sole alternative will be an adequate substitute for the death penalty.

81. In **Ediga Anamma v. State of Andhra Prades**h, V.R. Krishna Iyer, J., speaking for the Bench to which one of us (Sarkaria, J.) was a party, observed that "deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime." It was further observed that "horrendous features of the crime and the hapless and helpless state of the victim steel the heart of law for the sterner sentence.

82. In **Shiv Mohan Singh v. State (Delhi Administration) (1977) 3 SCR 172** the same learned Judge, speaking for the Court, reiterated the deterrent effect of death penalty by referring to his earlier judgment in Ediga Annamma's case, as follows:

In Ediga Annamma this Court, while noticing the social and personal circumstances possessing an extenuating impact, has equally clearly highlighted that in India under present conditions deterrence through death penalty may not be a time-barred punishment in some frightful areas of barbarous murder.

83. Again, in **Charles Sobraj v. The Superintendent, Central Jail, Tihar, New Delhi**, the same learned Judge, speaking for a Bench of three learned Judges of this Court reiterated that deterrence was one of the vital considerations of punishment.

98. The Law Commission of India in its 35th Report, after carefully sifting all the materials collected by them, recorded their views regarding the deterrent effect of capital punishment as follows: "In our view capital punishment does act as a deterrent. We have already discussed in detail several aspects of this topic. We state below, very briefly, the main points that have weighed with us in arriving at this conclusion:

(a) Basically, every human being dreads death.

(b) Death, as a penalty, stands on a totally different level from imprisonment for life or any other punishment. The difference is one of quality, and not merely of degree.

(c) Those who are specifically qualified to express an opinion on the subject, including particularly the majority of the replies received from State Governments, Judges, Members of Parliament and Legislatures and Members of the Bar and police officers - are definitely of the view that the deterrent object of capital punishment is achieved in a fair measure in India.

(d) As to conduct of prisoners released from jail (after undergoing imprisonment for life), it would be difficult to come to a conclusion, without studies extending over a long period of years.

(e) Whether any other punishment can possess all the advantages of Capital punishment is a matter of doubt.

(f) Statistics of other countries are in conclusive on the subject. If they are not regarded as proving the deterrent effect, neither can they be regarded as conclusively disproving it.

168. Now, remains the question whether this Court can lay down standards or norms restricting the area of the imposition of death penalty to a narrow category of murders.

169. Dr. Chitale contends that the wide observations in Jagmohan as to the impossibility of laying down standards or norms in the matter of sentencing are too sweeping. It is submitted that soon after the decision in Furman, several States in U.S.A. amended their penal statutes and brought them in conformity with the requirements of Furman. Support has also been sought for this argument from Greg v. Georgia wherein the Supreme Court of the United States held that the concerns expressed in Furman decision that death penalty may not be imposed in as arbitrary or capricious manner could be met by a carefully drafted statute ensuring that the sentencing authority was given adequate guidance and information for determining the appropriate sentence, a bifurcated sentencing proceeding being preferable as a general proposition.

170. If by "laying down standards", it is meant that 'murder' should be categorised beforehand according to the degree of its culpability and all the aggravating and mitigating circumstances should be exhaustively and rigidly enumerated so as to exclude all free-play of discretion, the argument merits rejection.

171. As pointed out in Jagmohan. such "standardisation" is well-nigh impossible.

172. Firstly, there is little agreement among penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment for person convicted of a particular offence. According to Cessare Beccaria, who is supposed to be the intellectual progenitor of today's fixed sentencing movement, 'crimes are only to be measured by the Injury done to society'. But the 20th Century sociologists do not wholly agree

with this view. In the opinion of Von Hirsch, the "seriousness of a crime depends both on the harm done for risked) by the act and degree of the actor's culpability". But how is the degree of that culpability to be measured ? Can any thermometer be devised to measure its degree ? This is very baffling, difficult and intricate problem.

173. Secondly, criminal cases do not fall into set-behavioristic patterns. Even within a single-category offence there are Infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. Each case presents its own distinctive features, its peculiar combinations of events and its unique configuration of facts. "Simply in terms of blame-worthiness or desert criminal cases are different from one another in ways that legislatures cannot anticipate, and limitations of language prevent the precise description of differences that can be anticipated".*(Messenger and Bittner) This is particularly true of murder. "There is probably no offence'. observed Sir Ernest Gowers, Chairman of the Royal Commission, "that varies so widely both in character and in moral guilt as that which falls within the legal definition of murder". The futility of attempting to lay down exhaustive standards was demonstrated by this Court in Jagmohan by citing the instance of the Model Penal Code which was presented to the American Supreme Court in Me Goutha.

174. Thirdly, a standardisation of the sentencing process which leaves little room for judicial discretion to take account of variations in culpability within single-offence category ceases to be Judicial. It tends to sacrifice justice at the altar of blind uniformity. Indeed, there Is a real danger of such mechanical standardisation degenerating into a bed of Procrustean cruelty.

175. Fourthly, standardisation or sentencing

discretion is a policy matter which belongs to the sphere of legislation. When Parliament as a matter of sound legislative policy, did not deliberately restrict, control or standardise the sentencing discretion any further than that is encompassed by the broad contours delineated in Section 354(3), the Court would not by over-leaping its bounds rush to do what Parliament, in its wisdom, warily did not do,

176. We must leave unto the legislature, the things that are Legislature's. "The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits." As Judges, we have to resist the temptation to substitute our own value choices for the will of the people. Since substituted. judicial "made-to-order* standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones and green belts designedly marked out and left open by Parliament in its legislative planning for fair-play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting; down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the Community ethic. The perception of 'community' standards or ethics may very from Judge to Judge. In this sensitive, highly controversial area of death penalty, with all its complexity, vast implications and manifold

ramifications, even all the Judges sitting cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament, particularly when Judges have no divining rod to divine accurately the will of the people. In Furman, the Hon'ble Judges claimed to articulate the contemporary standards of morality among the American people. But speaking through public referenda, Gallup polls and the state legislatures, the American people sharply rebuffed them. We must draw a lesson from the same.

177. What the learned Chief Justice, who is amongst us in this case, has said recently in **Gurbaksh Singh Sibbia v. State of Punjab Criminal Appeals Nos. 335 etc. of 1977 and 81 and 82 of 1978**, to the context of laying down standards In the discretionary area of anticipatory bail, comes in as a timely reminder. In principle, these observations aptly apply to the desirability and feasibility of laying down standards in the area of sentencing discretion, also. Let us therefore, hark to the same:

Generalisations on matters which rest on discretion and the attempt to discover formulae of universal application when facts are bound to differ from case to case frustrate the very purpose of conferring discretion. No two cases are alike on facts and therefore, Courts have to be allowed a little free play in the joints if the conferment of discretionary power Is to be meaningful. There Is no risk involved in entrusting a wide discretion to the Court of Session and the High Court in granting anticipatory bail because, firstly, these are higher courts manned by experienced persons, secondly, their orders are not final but are open to appellate or revisional scrutiny and above all because, discretion has always to be exercised by courts judicially and not according to whim, caprice or fancy. On the other hand, there is a risk in foreclosing categories of cases in which

anticipatory bail may be allowed because life throws up unforeseen possibilities and offers new challenges. Judicial discretion has to be free enough to be able to take these possibilities in its stride and to meet these challenges. While dealing with the necessity for preserving judicial discretion unhampered by rules of general application. Earl Loreburn L. C. said in Hyman v. Rose 1912 AC 623:

I desire in the first instance to point out that the discretion given by the section is very wide.... Now it seems to me that when the Act is so express to provide a wide discretion,...it is not advisable to lay down any rigid rules for guiding that discretion. I do not doubt that the rules enunciated by the Master of the Rolls in the present case are useful maxims in general, and that in general they reflect the point of view from which judges would regard an application for relief. But I think it ought to be distinctly understood that there may be cases in which any or all of them may be disregarded. If it were otherwise, the free discretion given by the statute would be fettered by limitations which have nowhere been enacted. It is one thing to decide what is the true meaning of the language contained in an Act of Parliament, It is quite a different thing to place conditions upon a free discretion entrusted by statute to the Court where the conditions are not based upon statutory enactment at all. It is not safe, I think, to say that the Court must and will always insist upon certain things when the Act does not require them, and the facts of some unforeseen case may make the Court wish it had kept a free hand.

Judges have to decide cases as they come before them, mindful of the need to keep passions and prejudices out of their decisions. And it will be strange if, by employing judicial artifices and techniques, we cut down the discretion so wisely conferred upon the Courts, by devising a formula which will confine the power to grant anticipatory

bail within a strait-jacket. While laying down cast-iron rules in a matter like granting anticipatory bail, as the High Court has done, it is apt to be overlooked that even Judges can have but an imperfect awareness of the needs of new situations. Life is never static and every situation has to be assessed in the context of emerging concerns as and when it arises.

Therefore, even if we were to frame a 'Code for the grant of anticipatory bail'. which really is the business of the legislature, it can at best furnish broad guidelines and cannot compel blind adherence.

196. We will first notice some of the aggravating circumstances which. In the absence of any mitigating circumstances, have been regarded as an indication for imposition of the extreme penalty.

197. Pre-planned, calculated, cold blooded murder has always been regarded as one of an aggravated kind. In Jagmohan, it was reiterated by this Court that if a murder is "diabolically conceived and cruelly executed", it would justify the imposition of the death penalty on the murderer. The same principle was substantially reiterated by V.R. Krishna Iyer, J., speaking for the Bench, in Ediga Anamma, in these terms:

The weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence.

198. It may be noted that this indicator for imposing the death sentence was crystallised in that case after paying due regard to the shift in legislative policy embodied in Section 354(3) of the CrPC, 1973, although on the date of that decision (February 11, 1974), this provision had not come into force. In Paras Ham's case, also, to which a reference has been made earlier, it was emphatically stated that a person who in a fit of

anti-social piety commits "bloodcurdling butchery" of his child, fully deserves to be punished with death. In Rajendra Prasad, however, the majority (of 2:1) has completely reversed the view that had been taken in Ediga Anamma regarding the application of Section 354(3) on this point. According to it, after the enactment of Section 354(3), 'murder most foul' is not the test. The shocking nature of the crime or the number of murders committed is also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. "Special reasons" necessary for imposing death penalty "must relate not to the crime as such but to the criminal".

199. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the Court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the 'man'. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist.

200. Drawing upon the penal statutes of the States

in U.S.A. framed after Furman v, Georgia, in general, and Clauses 2(a), (b), (c), and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances":

Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if. the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

201. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other,

202. In Rajendra Prasad, the majority said: "It is

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

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

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

204. Dr. Chitaley has suggested these mitigating factors:

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

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

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

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

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

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

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

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

205. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence. Some of these factors like extreme youth can instead be of compelling importance. In

several States of India, there are in force special enactments, according to which a 'child' that is, 'a person who at the date of murder was less than 16 years of age', cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according to the same criminal procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

206. According to some Indian decisions, the post-murder remorse, penitence or renentence by the murderer is not a factor which may induce the Court to pass the lesser penalty (e.g. Mominuddin Sardar). But those decisions can no longer be held to be good law in view of the current penological trends and the sentencing policy outlined in Sections 235(2) and 354(3). We have already extracted the views of Messenger and Bittner (ibid), which are in point.

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207. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of

> their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

109. On perusal of trial Court's judgment, it is apparent that the trial Court while passing the judgment on 16/09/2020, convicted the accused-appellant for offences as mentioned above. Thereafter, on the same day after hearing the counsel for the parties, awarded the accused appellant death punishment along with other punishments.

110. 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."

111. 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.

112. 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, emphasizing 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.

113. On perusal of record, it is apparent that no sufficient opportunity was given to the accused-appellant for placing relevant mitigating circumstances supported with affidavit on record. The appellant-accused is aged around 25 years of age. The trial Court has not considered regarding alternative punishment to the appellant-accused and there is no any finding that in the

absence of death sentence, the appellant accused would continue to be a threat to the Society. And also not answered that there is no possibility of reformation.

114. 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 accused has been denied an effective hearing.

115. Therefore, considering the aforesaid mitigating circumstances in the present case, we are of the considered view that in the case at hand verdict given by Hon'ble Apex Court in the case of **Mulla & Anr. Vs. State of U.P. [AIR 2010 SC 942]** followed for just decision of this case.

116. In the case of **Mulla (supra)**, it is held 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.

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

(emphasis supplied)

117. 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.

118. For the above reasons, we are of the view that the present appeal is one of such cases where we would be justified in holding that confinement till natural life of the appellant-accused shall fulfill the requisite criteria of punishment considering the peculiar facts and circumstances of the present case.

119. Accordingly, the death sentence awarded by the trial court to the appellant-accused is commuted to **"life imprisonment" till his natural death**. The appellant-accused shall not be entitled for any remission.

120. Before parting with this judgment, this Court would like to record its appreciation for the assistance rendered by Shri Vivek Jain and Shri S.S. Kushwaha, 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 appellant-accused.

121. With aforesaid modification in sentence, the judgment dated 16/09/2020 passed by Fifth Additional Sessions Judge & Special Judge (POCSO Act), Gwalior in Special Sessions Trial No.122/2017 is hereby affirmed.

122. The appellant-accused in Cr.A. No.4965/2020, namely, Yogesh Nath @ Jogesh Nath, is in jail. He shall undergo the remaining jail sentence till his natural death.

123. A copy of this Judgment be immediately sent to the accused-appellant in Cr.A. No.4965/2020, Yogesh Nath @ Jogesh Nath, free of cost.

124. The CRRFC No.5/2020 is answered accordingly and Cr.A. No.4965/2020 is **Partly Allowed** to the extent mentioned above.

(G.S. Ahluwalia)
Judge

(Rajeev Kumar Shrivastava)
Judge

*Shubhankar**