

**HIGH COURT OF MADHYA PRADESH BENCH AT INDORE**  
**DIVISION BENCH : HON.SHRI JUSTICE P.K.JAISWAL &**  
**HON.SHRI JUSTICE S.K.AWASTHI**

Cr.Appeal No. 4379/2018

Karan @ Fatiya S/o Bharat  
Versus  
State of Madhya Pradesh

&

**CRRFC No.4/2018**

The State of Madhya Pradesh

**Versus**

Karan @ Fatiya S/o Bharat

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Shri Amit Dube, learned counsel for the  
accused/Karan.

Shri Bhuwan Gautam, learned Govt.Advocate for  
the State.

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**J U D G M E N T**

( /11/2018)

**Per: Justice S.K. Awasthi**

The Additional Sessions Judge, Manawar District Dhar has awarded the sentence of death to accused Karan @ Fatia and has made a reference of the proceedings to this Court for confirmation of the death penalty passed by the impugned judgment.

2. Appellant-Karan @ Fatia S/o Bharat has preferred the Appeal against the conviction and sentence of death and other sentences awarded to him by the trial court.

3. Since the reference and the Appeal is arising out of

the same impugned judgment, therefore both are being disposed of by this common judgment.

4. The appellant has challenged the judgment dated 17.5.2018 passed by ASJ, Manawar, District Dhar in Spl.S.T.No.15/2018 convicting him under the following sections :-

Offence under section	Sentence	Fine
363 IPC	5 years RI	Rs.1,000/-
376(2)(i) IPC	Life imprisonment	Rs.5,000/-
5(m)/6 of POCSO Act	Life imprisonment	Rs.5,000/-
302 IPC	Death sentence	Rs.5,000/-
201 IPC	5 years RI	Rs.5,000/-

5. The prosecution case is that complainant Munna was residing at Jagannathpura, Manawar, District Dhar. He lodged an FIR (Ex.P/1) on 16.12.2017 at 10.00 PM alleging that on 15.12.2017 at about 5.30 p.m. he came to his house. He brought Kachori for his children. After giving them Kachori, at 6.30 PM he went to market for purchasing Gutka. At that time his daughter(victim) aged 4 years was eating snacks rice-puffs(Sev-Parmal) in front of his house. At about 7.00 p.m. he returned back and standing in front of house of his elder maternal uncle, her mother Kakkubai informed him that victim is missing, then he along with wife-Ranjubai, mother-Kakkubai, brothers-Om and Ajay searched the victim in the village and nearby places, but she could not be traced. Next

morning i.e. 16.12.2017, Mangilal informed him on mobile phone that victim is lying at the bank of Man river in a dead condition. After receiving this information he reached on the spot and found that the head of his daughter was crushed and she was naked. He observed injuries on her thigh and redishness in private parts. Blood was also present on her body and one blood stained stone was lying near the deadbody of his daughter. He did not know the person who committed this offence. On the basis of aforesaid information, police registered Dehati Nalishi (Ex.P/1) for the offence under section 363, 376(2) (i) and 302 of the IPC and sec.3/4 and 5(m)/6 of POCSO Act. Marg intimation under section 174 Cr.P.C. was also registered. On the basis of aforesaid, FIR was registered bearing crime No.750/2017 at Police Station-Manawar, District- Dhar.

6. Police reached the spot and prepared Lash Panchnama of the deceased. Her deadbody was sent for its postmortem to the community health center, Manawar from where the dead body of the deceased/ prosecutrix was referred to Forensic Science and Toxicology Department, M.G. Medical College, Indore. Dr. Kirti Borasi along with team of Doctors performed the postmortem on the deadbody of the deceased and submitted the report (Ex.P/26). Scientific Officer, FSL Unit, Dhar-Pinki Mehrade (PW-18) visited on the place of crime and submitted her report (Ex.P/29) wherein it was mentioned that prima facie the incident appears to be murder after committing rape. The statements of the

father of the prosecutrix-Munna as well as Durga and Kajal were recorded by the police in which they had narrated that on 15.12.2017 at about 6.30 p.m., the accused/appellant was roaming the victim and she was last seen together with the company of the accused. On the basis of aforesaid statement, appellant-Karan was arrested at 9.00 p.m. on 16.12.2017 and he was sent for medical examination. On 17.12.2017 police recorded memorandum of accused under section 27 of the Evidence Act (Ex.P/8) and on that basis police recovered his blood stained cotton jeans pant and full shirt. On the same day police also seized blood stained cotton jeans of blue colour of prosecutrix, one pair plastic sleeper of appellant, one blood stained stone of 11x5x6 inch weighing approximately 10 kg. and one green polythene containing rice-puffs and prepared seizure memo(Ex.P/10) in the presence of witnesses Mangilal and Mukesh. Police also took sample of plain soil, blood stained soil, blood stained solid stone and recovered it by seizure memo (Ex.P/12) and the same were sent for chemical analysis and DNA test.

7. After postmortem of prosecutrix, police received one plastic box from M.Y. Hospital containing viscera, pieces of small intestine and bunch of hairs which were found in the left handful of victim and seizure memo (Ex.P/15) was prepared. On 18.12.2017, the statement of witnesses Durga, Kajal, Santoshi and on 22.12.2017 statements of seizure witnesses Mangilal and Mukesh were recorded under section 164 of Cr.P.C. before the

JMFC, Kukshi. On 28.12.2017 police sent the accused to community Health center, Manawar for collecting blood sample and this regard identification form Ex.P/22 was prepared. For ascertaining the age of prosecutrix, Block Medical Officer, requisitioned the Death and Birth Register from community Health center, Manawar, according to which the date of birth of the prosecutrix is 28.11.2013. After completing the necessary formalities, police filed challan against the appellant for the offence under sections 363, 366(2)(i), 302, 201 of the IPC and sec.3/4 and 5(m)/6 of POCSO Act before the JMFC, who committed the case to the Sessions Court, which is ultimately transferred to Additional Sessions Judge, Manawar, District Dhar.

8. Appellant abjured his guilt. He took a plea that he is innocent and has falsely been implicated in the crime, however he has not produced any evidence in his defence.

9. The prosecution examined 21 witnesses and exhibited 42 documents.

10. Upon appreciation of the evidence adduced in the Court, learned Additional Sessions Judge awarded the conviction and sentence as mentioned above which is subject matter of challenge before this Court.

11. It is submitted on behalf of the appellant that no eye witness is available against the appellant, on the basis of which it can be found proved that the appellant is the person who committed rape and murder of the deceased. The prosecution case rests only upon circumstantial evidence and theory of last seen, itself is not a conclusive

proof for the guilt of the appellant/accused. The trial court has erred while relying the statement of the witnesses who were close relative and interested witnesses. The prosecution has not produced any document to establish that at the time of incident the deceased was aged about 4 years. The police has recovered the clothes, sleepers, blood stained stone and polythene containing rice-puffs from the open place which is easily accessible to any person, therefore this recovery does not connect the appellant with the present crime. FSL and DNA profile is also suspicious. Trial court has not considered this fact that where the incident has taken place, is a populated area and it does not seem natural that nobody heard the hue and cry of the deceased. The investigation done by the police is also defective and was wholly unreliable. In these circumstances the trial court has wrongly held the appellant/accused guilty for the alleged offence. In such circumstances, counsel prays that appeal be allowed and appellant be acquitted.

12. Learned Public Prosecutor for the State supported the conclusion recorded by the trial court and submitted that testimony of the prosecution witnesses is wholly reliable. Even if there had been some discrepancy in their statement, they could not be discredited. He further submits that there was sufficient material on record to indicate that appellant was the person who has committed the crime and thus the trial court was fully justified in convicting the appellant and imposing death penalty for commission of rape and brutal murder of innocent girl

aged about 4 years.

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

14. The SHO, Manawar- Sanjay Rawat(PW-21) stated that on 16.12.2017 complainant Munna lodged a report in respect of missing of his 4 years daughter between 6.30 p.m. to 7.00 p.m. on 15.12.2017. In the FIR it was stated that he has 3 children, one son and two daughters. On the date of incident, he had gone to market for taking the gutka. At that time his daughter was eating Parmal in front of the house. At about 7.00 p.m. when he came back his mother Kakkubai informed him that his daughter (prosecutrix) has got missing. He tried to locate the daughter along with his wife-Ranjubai, mother-Kakkubai, brothers-Om and Ajay however they were not successful in locating the child. Today in the morning Mangilal, son of his maternal uncle, informed him on phone that deadbody of his daughter is lying near the Man River. Then he reached there and found that his daughter was died. Her head was crushed. She was not having any clothes on her body and there was some sign of injury on her private part and thigh. Blood was present on the spot. One stone was also lying near the deadbody and he was apprehending that his daughter has been kidnapped by some unknown person and after committing rape he murdered her by hitting stone on her head. On the basis of aforesaid report, Dehati Nalish was lodged at crime No. 00/2017 for the offence under sections 363, 366 and 302

of the IPC and sec.3/4, 5m/6 of POCSO Act. The said Dehati Nalishi was sent to P.S. Manawar for registration of FIR in original number.

15. Sajay Rawat(PW-21) further deposed that he prepared the deadbody Panchanama of deceased in presence of witnesses Munna, Om, Mahesh, Dilip, Bablu and Ranjubai. After that deadbody was sent to Community Health Center, Manawar for postmortem

16. Dr. Kirti Borasi (PW-18), Medical Officer of Community Health Center, Manawar who conducted the postmortem of the deceased along with team of Dr. A.K.Rastogi, Dr. Nandip Kushwaha, Dr. Malti Solanki, Dr. Bhutal Rathore and P.S.C. Singhana on 16.12.2017, found the following injuries on the body of the deceased :-

- (1) Abraded contusion of varying size from 2.0x0.5 to 1.0x0.5 cm. Present in an area of 9.0x2.0 cm vertically placed over anterior part of chest situated 7.0 cm below from sternal notch and 6.2 cm left lateral to midline.
- (2) Multiple abrasion of varying size from 2.0x12.0-0.5x0.5 cm in an area of 15.0x12.0 cm present over left lateral and anterior abdominal area.
- (3) Multiple abrasion of varying size from 0.5x0.1cm – 0.2x0.1cm in an area of 10.0x8.0cm present over pubis symphysis region.
- (4) Grazed abrasion of varying size from 1.0x0.5cm – 0.5x0.5cm in an area of 6.0x1.0cm present over anterior part of chest wall 3.0cm right lateral to mid line and 5.0cm below xyphi-sternum.
- (5) Multiple abrasion of varying size from 1.0x0.2 to 0.5x0.1 cm present in area of 7.0x6.0 cm placed over

lower part of right abdominal area just right lateral to midline.

(6) Linear abrasion of size 3.0x2.0 cm vertically placed present over anterior part of right thigh situated 12cm below anterior superior iliac spine.

(7) Multiple abraded contusion of varying size from 1.5x0.6 cm to 1.5x0.6 cm in an area of 5.0x3.0 cm present over right upper part of neck just below mandible.

(8) Grazed abrasion of size 3.5x1.0 cm present over right side of cheek going posteriorly.

(9) Grazed abrasion of size 3.0x1.5 cm present over the right lateral side of face situated just lateral to outer angle of right eye.

(10) Abrasion of size 1.5x0.5cm present over the chin area.

(11) Contused abrasion of size 6.0x5.0 cm present over left cheek over zygomatic bone just below left eye.

(12) Split skin of size 2.0x1.0 cm present over anterior part of left middle finger distal phalanx.

(13) Linear abrasion of size 8.0x0.1 cm present over the upper part of back of chest obliquely placed on the midline at C6 vertebra level

(14) Linear abrasion of size 1.0x 0.1 cm obliquely placed 4.5cm just left lateral to midline and 10.0cm below C6 vertebra.

(15) Linear abrasion of size 1.5x0.1cm present over back of chest situated 3.0 cm right lateral to midline and 13.0cm below C6 vertebra.

(16) Lacerated wound of size 3.0x1.0 cm present over posterior part of right pinna at the base.

**Head injuries:-**

(17) Lacerated wound of size 13.0x8.0cm, coronally placed, present over the scalp involving both anterior side

of parietal and frontal area.

(18) Brain cavity opened skull found in multiple pieces, scanty amount of brain matter present at places in skull cavity. Meninges found lacerated at places.

(19) Skull bone of size 13.0x11.0cm of left side of frontal and parietal area found fractured and separated out.

(20) Skull bone of size 13.0x13.0cm of right side of posterior part of parietal and occipital area found fractured and separated out.

(21) Skull bone of size 7.0x4.0cm of right side of temporal area found fractured and separated out.

(22) Skull bone of size 4.5x4.0cm of right side of temporal area found fractured and separated out.

(23) Base of skull found fractured length 12cm mid line.

(24) Contusion of size 14.0x12.0cm present over frontal and both parietal area of scalp.

On internal examination, they found that -

(i) contusion was present over labia minora 4 to 6 o'clock position and 7 to 9 o'clock position.

(ii) contusion over vaginal wall anteriorly and right side present. contusion were reddish in colour.

(iii) anal opening was widely open, rugosity lost, sphincter lax, multiple radial linear recently and old healed scar were present round the anal opening.

17. In the opinion of Doctors, the death of the deceased was caused due to cranio-cerebral damage as a result of blunt force trauma to the head region and injuries present over the head region were sufficient to cause death in ordinary course of nature and was homicidal. Evidence of recent sexual assault was present and old repeated sexual assault on anal was also present. The duration of death

was within 18-36 hours since postmortem examination.

18. It is true that there is no named FIR and incident has not been seen by anyone, hence case of the prosecution rests upon the circumstantial evidence. In the case of **Sharad Birdhichand Sarda Vs. State of Maharashtra, 1984 AIR 1622**, the Supreme Court laid down that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. For a conviction in murder case on circumstantial evidence the following condition must be fulfilled -

- (i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- (ii) the facts so established should be consistent only with the hypotheses of the guilt of the accused, this is, they should not be explainable on any other hypothesis except that the accused is guilty.
- (iii) the circumstances should be of a conclusive nature and tendency.
- (iv) they should exclude every possible hypothesis, except the one to be proved.
- (v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and it must show that in all human

probability, the act must have been done by the accused and the accused alone.

19. Keeping in view the ratio laid down by the Hon'ble Supreme Court, we shall examine the evidence on which reliance is placed by the prosecution.

20. Munna (PW-1) deposed that the deceased was her daughter who was aged about 4 years and the age of the prosecutrix has not been challenged in his cross-examination, therefore there is no reason to disbelieve the fact that deceased was aged about 4 years.

21. Munna(PW-1)/informant, father of the victim stated that on 15.12.2017 at about 5.30 p.m. he returned back to his house from Manawar Mandi. He brought Kachori for the kids and after giving them Kachori, he went to market to purchase Gutka. When he was going to market he saw that his daughter was eating rice-puffs which were kept in plastic carry bag. After taking gutka when he came back, his mother Kukkubai informed him that victim is missing then he along with his brother Om, Ajay, Mukesh, wife-Rajjubai and mother-Kakkubai searched her nearby places but she was not traced. Next day morning they again started searching of the victim. When he along with Vinod reached Gopalpura dam, his cousin-Mangilal intimated him on mobile phone that the victim was lying near the bank of Man river in dead condition. Then he reached there and found her deadbody. Her head was crushed and she was naked. There was injury on her body parts and one shirt was hanging in her hand. One blood

stained big stone was lying there and somebody had killed the victim after committing rape with her. Then he informed the police regarding the incident. Police came to the spot and lodged Dehati Nalishi (Ex.P/1). Police also prepared the deadbody Panchnama of the deceased and sketched the spot map (Ex.P/5). Next day, his sister Durga and cousin Kajal told him that when victim was eating rice-puffs, at that time appellant Karan was playing with her and then he took her to the bank of river.

22. Durga (PW-2) testified that on 15.12.2017 function of 'Jalvay' for the new born son was organised in the house of her maternal uncle and that function was concluded at 4.30 p.m.. On that day there was market of Manawar and she purchased rice-puffs and other articles for the children. She gave rice-puffs to the kids of her brother-Munna and her four years niece was also eating rice-puffs. She was playing in the courtyard and at the same time accused was there and he was playing with the victim. At about 6.00 p.m. she saw that appellant was taking the victim towards well. After that deceased was not seen. They searched her but could not find. Next day morning, her deadbody in naked condition was found near the bank of Man river. The appellant was last seen with the deceased, therefore he is the person who committed rape with the victim and after that killed her.

23. Kajal (PW-3) stated that on 15.12.2017 her maternal cousin was blessed with a son therefore the programme of Jalvay was organised at his residence in which approximately 15-20 guests had come. The aforesaid

programme was over at 4.30 p.m.. Her cousin Durgabai was also in the function and she brought rice-puffs and other articles for the kids from the market. She gave rice-puffs to kids for eating. Victim was also eating rice-puffs kept in the plastic carry bag. At that time accused was feeding rice-puffs to the victim and playing with her. After that victim was not seen to anybody. She along with Om, Ranjubai and Kakkubai searched the victim but she was not found. Next day morning her deadbody was found near the bank of Man river in naked condition. Her head was crushed and one stone was lying near the deadbody. The victim was last seen together with the appellant, therefore he is the person who committed rape with her and then killed her. Durgabai and Kajal explained in their cross-examination that on the date of incident everybody was busy in searching the victim, therefore they could not inform to anybody that appellant had taken the deceased. They strongly denied the suggestion given by the counsel for the defence that they had not seen the deceased with the appellant before she was missing.

24. Santoshi (PW-4)-child witness who is elder sister of the deceased, her statement was recorded in question-answer form in which she narrated that on the date of incident she was playing with her sister. Then appellant-Fatia took her sister and after that her deadbody was found near the river. However in her cross-examination she admitted that her grand parents and Advocate tuted her that what is to be narrated before the court. In these

circumstances the statement of this witness cannot be reliable.

25. Mukesh (PW-5) and Mangilal(PW-6) testified that they are neighbour of appellant. On 15.12.2017 there was a function of 'Jalvay' in the house of Mangilal in which guests and villagers came to attend the function. At about 6.00 P.M. deceased was playing in the courtyard of her house with the appellant. After that she was missing. They searched the victim in the village. During the search, at about 9.00 p.m. they reached to the house of Besarbai, where appellant was sleeping. They sprinkle water on his mouth and asked about the victim. Then he replied – “**ठोक दिया ठोक दिया**” (Killed her) and was pointing towards the bank of Man river. In the evening the victim was not traced. Next day morning, the deadbody of the victim was found near the bank of Man river. They saw that deadbody of victim was lying in a naked condition, her head was crushed and one big blood stained stone was found near the deadbody and one shirt was also hanging in the hand of the deceased.

26. Mukesh further deposed that Police came to the spot and arrested the accused. Police also seized one old jeans pant at the instance of the appellant in which there was blood stain present on the right and left leg. One blood stained grey colour shirt was seized in which button was missing. On the disclosure statement of the accused/appellant, police also recovered sky blue cotton jeans of the deceased, one pair plastic sleeper in which blood was present on the sole of the sleeper. Police also

seized one blood stained stone and plastic carry bag of green colour containing 10 grams rice-puffs and prepared seizure memo Ex.P/10. In the cross-examination he accepted that when accused was playing with the victim, he was not present on the spot. In the evening when they were searching the victim, Durga, Kajal and Santoshi did not inform him that victim was playing with the appellant. When deadbody of the deceased was traced, then Durgabai told that appellant was playing with the deceased and after that he had taken the victim.

27. Lokesh(PW-7) and Om(PW-8) deposed that prosecutrix was their niece aged about 4 years. On 15.12.2017 function of 'Jalvay' was organised at the residence of his maternal uncle in which 22-25 guests were present. Accused was also there. The aforesaid function ended about 4.30 p.m.. At that time prosecutrix was playing with Santoshi and was eating rice-puffs. Accused was moving around her. After that she was not seen. They tried to locate her. At about 8-9 p.m. they along with Munna, Mukesh, Mangilal, Durga and Kajal went to the house of Besarbai where the appellant/accused Fatia was sleeping. They woke up the accused. When he did not wake up then some water was sprinkled on him. Then he woke up and said "ढोक दिया ढोक दिया". Thereafter he fell asleep again. After that they again started to search the prosecutrix. Next morning their mother Kakkubai went towards river where she found the deadbody of the prosecutrix. After receiving the information regarding recovery of the deadbody, they

reached on the spot and saw that prosecutrix was naked. One shirt was hanging in her right hand. Her head was crushed. Blood was present on the stone. The accused has committed rape with the prosecutrix and then murdered her.

28. Investigation Officer Sajay Rawat (PW-21) deposed that during the investigation he prepared the site plan (Ex.P/5). He collected plain soil and blood stained soil from the spot and seized the aforesaid article along with one solid stone measuring 10x7x7 inch weighing 8 kg. and prepared the seizure memo Ex.P/11. He also recorded the statement of the witnesses Munna, Kajal and Durga Bai. On 16.12.2017 at about 9.00 p.m. he arrested accused Karan @ Fatia by arrest memo Ex.P/5 and sent him to Community Health Center, Manawar for medical examination. He interrogated the accused and recorded his memorandum(Ex.P/17) under section 27 of the Evidence Act and at the instance of accused, he recovered one pair sleeper, one polythene of rice-puffs, stone, blood stained shirt and jeans pant of the accused and prepared the seizure memo Ex.P/9. On 17.12.2017 he reached to the spot along with accused and on the basis of information given by accused, he recovered blood stained cotton jeans of deceased in which LUFAR was written. He also seized one pair plastic sleeper of nine number of the accused and blood was present on the sole of the sleepers. One stone measuring 10 kg. and one polythene of green colour in which 10 grams of rice-puffs were kept, were also seized under the seizure memo Ex.P/10.

He recorded the statement of the witnesses Santoshi, Kakkubai, Mangilal, Mukesh, Lokesh, Om, Ajay, Ranjubai, Besarbai, Nanbhu, Pappu, Mahadev, Vinod Dharji and Sohanlal. The statement of the witnesses Durga, Kajal and Santoshi were also recorded under section 164 of Cr.P.C. before the JMFC, Kukshi. The blood sample of the appellant was collected and sample of the blood and seized articles were sent for DNA test. The finger prints of accused were also taken and they were sent for Forensic Science Laboratory Sagar for DNA finger print. Other articles were sent to FSL Rau, District Indore for chemical analysis.

29. The witnesses of the recovery memo have supported the disclosure statement and the recovery made in pursuance of such disclosure statement of the accused. The Supreme Court in the case of **Madansingh Vs. State of Rajasthan, 1978(4) SCC 915** has held that if the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not to be rejected on the ground that seizure witnesses do not support the prosecution version. Although in the present case, the seizure witnesses have supported the prosecution story completely.

30. From the testimony of Durga(PW-2) and Kajal(PW-3), it transpires that the accused was seen with the deceased soon before her missing. These witnesses were present at the place where the deceased was playing with the appellant. From the statement of Mangilal(PW-6), Lokesh (PW-7) and Om(PW-8) it appears that when

they reached in the house of Besarbai where accused was sleeping. When they enquired about the victim, he told "ढोक दिया ढोक दिया" (Killed her) and was pointing towards Man River.

31. Shri Amit Dubey, learned amicus curiae submitted that accused was found at the night of 15.12.2017 and he informed about the location of the place of incidence then why the complainant did not lodge the FIR on the same day against the applicant. On the next day when deadbody of the deceased was found near the bank of Man river and police came to the spot, then Dehati Nalishi was lodged against the unidentified person. If the complainants were knowing that the victim was last seen in the company of the appellant and appellant also disclosed that he killed the victim then why this fact has not found place in the Dehati Nalishi. This clearly indicates that appellant is falsely implicated in the present matter.

32. In the context of the aforesaid submission made by learned Amicus Curiae from the perusal of Dehati- Nalisi it appears that it was registered at 10.00 am on 16/12/2017 in which it is not mentioned that the deceased was last seen with company of the appellant on 15/12/2017, still further F.I.R is an information putting the police in order to investigate the matter. Therefore, the same was required to be confronted if the statement of the witnesses on oath had a variance with the statement made earlier, but no such suggestion has been made in the cross-examination of Munna (P.W.1), who lodged the

F.I.R. Therefore, the statement of oath in Court given by Munna (P.W.1) would be relevant to appreciate the evidence of the prosecution. Thus, the aforesaid contention of the learned amicus curiae has no force.

33. The last seen theory comes to play when the deceased was seen last alone and when the deceased is found dead, small possibility of any other person other than to the author of crime become impossible. It would be condition in some cases to positively that the deceased was last seen with the accused when there is lying gap and possibility of some other person comes in the way in the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to conclusion that guilt in other cases in the present case there is consistent and positive evidence that the deceased was seen together with the applicant by the witnesses Munna, Dugabai, Kakkubai and Om.

34. Apart from such witnesses, in respect of last seen it is also worth to note that the residence of the Besarbai W/o Amarsingh is situated near to the place of recovery of dead body and as per statement of Munna, Lokesh Om and Mangilal the appellant was found in the house of Besarbai on 15.12.2017. The aforesaid statement of these witnesses could not be shattered in their cross-examination. The prosecution has led the scientific evidence as well. The postmortem report has disclosed that victim was molested in a brutal manner and there was sign of disbandment outside the genital part of the

deceased. Medical report and testimonies of Dr. Kirti Borasi clearly establishes brutal manner for commission of rape with the deceased who was an infant child as the internal organ of the deceased were damaged in a most savage and inhuman manner. She has sustained 24 injuries on her body and bunch of hair was found in the fist of her left hand. The acts of the accused demonstrated mental perversion and inconceivable brutality.

35. The accused was produced before the Doctor in the Community Health Centre, Manawar and his blood sample was drawn for DNA profile of accused. The blood sample for D.N.A profile was sent to the F.S.L, Sagar and the report is Ex.P/40.

36. The clothes of the deceased and accused were sent to DNA examination. Genetic marker from 21 DNA profile has matched with the DNA profile from the undergarments of the deceased and pant of the accused. The genetic markers of the accused have also matched with the bunch of hairs found on the fist of the deceased. The conclusion of the FSL is that it is the accused who has committed offence against the victim.

37. Learned counsel for appellant submits that report of DNA is not credible so as to link the appellant with the crime. However, we do not find any material in the arguments. FSL Expert, Dr. Anil Kumar Singh (PW-22) who has given a report Ex.P/40 opined that DNA profile of the appellant was matched with the DNA profiles found on the seized articles of the prosecutirx.

38. Supreme Court in the case of *Dharam Deo Yadav*

*Vs. State of Haryana, (2014) 5 SCC 539* has held that many a times, reliable, trustworthy, credible witnesses to the crime **seldom come** forward to depose before the **court** and even the hardened criminals get away from the clutches of law. Even the reliable witnesses for the prosecution turn hostile due to intimidation, fear and host of other reasons. Investigating agency has, therefore, to look for other ways and means to improve the quality of investigation, which can only be through the collection of scientific evidence. In this age of science, we have to build legal foundations that are sound in science as well as in law. Practices and principles that served in the past, now people think, must give way to innovative and creative methods, if we want to save our criminal justice system. Emerging new types of crimes and their level of sophistication, the traditional methods and tools have become outdated, hence the necessity to strengthen the forensic science for crime detection. Oral evidence depends on several facts, like power of observation, humiliation, external influence, forgetfulness etc., whereas forensic evidence is free from those infirmities.

39. Hon'ble Apex Court in the case of *Santosh Kumar Singh Vs. State through CBI (2010) 9 SCC 747* has held that DNA report must be accepted as scientifically accurate and is an exact science. It is further held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert. The Court cannot usurp the

function of an expert.

40. A larger Bench of Hon'ble Judges of the Supreme Court in the case of **Sunil v. State of Madhya Pradesh, (2017) 4 SCC 393**, has held that a positive result of the DNA test would constitute clinching evidence against the accused, however, if result of the test is in the negative, i.e. favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still has to be considered. Therefore the opinion of Forsensic Science expert that genetic marker of the appellant/accused matches with the DNA profile from the clothes of victim and hair of the accused found in the first of victim and the above is conclusive proof against the appellant that he is the person who violated 4 years girl.

41. Learned counsel for appellant submits that investigation conducted by Sanjay Rawat is defective, therefore the appellant cannot be convicted for the aforesaid offence on the basis of such defective investigation. However, during the argument he has failed to point out such lapses in the investigation conducted by station house officer Sanjay Rawat (PW-21) which causes prejudice to the appellant therefore, we are not agree with the aforesaid contention of learned counsel for the appellant in the light of the judgment passed by Hon'ble Apex Court in the case of **State of Uttar Pradesh Vs. Hari Mohan reported in 2001 SC 142** held that the defective investigation cannot be made a basis for acquitting the accused if despite such defects and failures

of the investigation, a case is made out against all the accused or anyone of them. In the case of **Hema Vs. State Tr.Insp. of Police Madras, (2013) 10 SCC 192** , Hon'ble Apex Court has held that it is settled law that for certain defects in investigation the accused cannot be acquitted. This aspect has been considered in various decision. In the case of **C.Muniappan Vs. State of Tamilnadu, 2010(9) SCC 617** it has been concluded by the Hon'ble Apex Court that 'there may be highly defective investigation in a case. However, it is to be examined as to whether there is any lapse by the I.O. and whether due to such lapse any benefit should be given to the accused. The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence de hors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth. Therefore, the investigation is not the solitary area for judicial scrutiny in a criminal trial. The conclusion of the trial in the case cannot be allowed to depend solely on the probity of investigation.

42. Learned counsel for the appellant as well as the amicus curiae has also submitted that most of the witnesses are interested witnesses and so it would be unsafe to rely on them. In this regard we may say that 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 witnesses to implicate a person falsely leaving aside the actual culprit. It is pertinent to note that only interested witnesses want to see that real culprit is brought to book. Therefore, we are unable to accept the aforesaid arguments.

43. Learned amicus curiae has also submitted that there are certain discrepancies in the testimonies of the prosecution witnesses and such discrepancies should be considered in favour of accused. The Hon'ble Apex Court in a decision reported in 2002 Criminal Law Journal Page 2645 held “ in a case of discrepancies pointed out or in the relation of pebbles the court should treated upon it but the same are boulders the court should not attempt to jump over the same.” In the present case, there is a very minor discrepancy so we can tread upon it. We are not at all interested to allow the truth to be sacrificed at the altar of hyper technicality by making the society a casualty. Normal phenomenon, robust common sense are the guiding factors to arrive at a conclusion.

44. After carefully going through the record and in the

light of the arguments advanced, we find the following clinching circumstances which lead the accused/appellant to commit the offence of kidnapping a minor girl and committed rape in a brutal manner and with an intent to disappearance of the evidence the accused gave a blow of stone on the mouth of the deceased due to which she had died. These circumstances are as follows :-

(i) The deceased was last seen in his company on 15/12/2017.

(ii) She was not seen with any body last between 15/12/2017 and 16/12/2017.

(iii) Appellant made an extra judicial confession before Munna (P.W.1), Mangilal (P.W.6) and Lokesh (P.W.7).

(iv) Deceased was found missing in the evening of 15/12/2017, on search her dead body was found in the bank of Man river on 16/12/2017, in a naked condition with injuries on her private parts and her head was smashed with stone lying nearby.

(v) Appellant made a disclosure statement lead to recovery of his blood stained clothes.

(vi) D.N.A profile of the appellant is matched with the D.N.A profile from the undergarments of the deceased. Genetic marker of the appellant also matched with the bunch of hairs found in the fist of the deceased.

(vii) No explanation was given by the appellant about the events of 15/12/2017 when he was playing with the deceased at her house in the evening of 15/12/2017.

(viii) When the victim was playing with the appellant, she was having '*rice-puffs*' in green colour polythene carry bag, which the appellant was feeding her and the same article was found near the dead body of the deceased.

45. In our opinion, last seen together itself is sufficient to connect the applicant with the crime. The other circumstances are corroborative in nature and they provide strength to the reliability of the main evidence. We, therefore held that accused is the person who has kidnapped the deceased from her house and after committing rape on her, he killed the deceased in a brutal manner, therefore in our view the trial court has properly appreciated the evidence and arrived at correct findings as against the accused, hence, we affirm the findings of conviction awarded under sections 363, 376(2)(i), 302 and 201 of IPC and sec.5(m)/6 of POCSO Act and hold the appellant guilty for the offence punishable under the aforesaid offences.

46. Question now arises is whether the sentence awarded by the learned trial Court upon the appellant of death by hanging warrants confirmation or not?

47. This Court is of the view that it is a horrendous

crime when the child of 4 years is violated by a person who is living in a close vicinity of the child and thus was knowing of the child, took her to nearby Man river and then violated and killed her.

48. In the case of *Vasanta Sampat Durpare vs. State of Maharashtra 2017(6) SCC 631* the Hon'ble Apex Court while upholding the death sentence awarded by the Division Bench of Bombay High Court, Bench Nagpur in a case where a 47 years old man allured a minor girl of 4 years and subjected her to rape and battered to death, held that -he was a history-sheeter. There was no possibility of his reformation and he was likely to remain menace to the society. it was observed 'The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a "tsunami" of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of sensitive polity".

49. In the case of **Purushottam Dashrath Borate and another Vs. State of Maharashtra 2015 (6) SCC 652** the Apex Court while upholding the death sentence awarded by the Division Bench of Bombay High Court for rape and murder of a young girl, has held in para 41 as under :-

"15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate

punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

The Apex Court also made it clear that lack of criminal antecedents also cannot be considered as mitigating circumstances, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

50. In the case of **B.A Umesh Vs. High Court of Karnataka, (2011) 3 SCC 85**, the appellant was accused of a brutal rape and murder of a lady. It was found, by medical evidence, that the deceased therein was a victim of a violent rape prior to death and the death was caused due to as asphyxiation. Further, the medical report found that the body of the deceased has several abrasions and lacerations. Apex Court, noticing the brutal and violent manner of commission of the offences confirmed the death sentence to the accused therein. It was held that;

“84. As has been indicated by the courts below, the antecedents of the appellant and his subsequent conduct indicates that he is a a menace to the society and incapable of rehabilitation. The offences committed by the appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape on the victim..... in the *Sevaka Perumal* case (supra), the counsel for the appellants therein contended that considering the young age of the accused, the same would be a strong mitigating factor in favour of commutation of death sentence. It was contended

therein that the accused were the breadwinners of their family which consisted of a young wife, minor child and aged parents. However, this court, finding no force in the said contention, observed that such compassionate grounds are present in most cases and are not relevant for interference in awarding death sentence. The principle that when the offence is gruesome and was committed in a calculated and diabolical manner, the age of the accused may not be a relevant factor, was further affirmed by a three judges Bench of this Court in Mofil Khan case (Supra)

51. The death sentence was also maintained by the Supreme Court in the case of *Bantu vs. State of U.P.*, (2008)11 SCC 113; *Ankush Maruti Shinde & Ors vs State Of Maharashtra* (2009)6 SCC 667; *Shabnam vs. State of Uttar Pradesh*, (2015)6 SCC 231.

52. In the light of the offence and the judgments referred to herein above, we find that there is no mitigation in favour of the appellant, although the appellant is a young unmarried boy aged about 19 years at the time of commission of offence, however, he violated the victim and took her life. The manner in which the commission of offence was so meticulously and carefully planned coupled with the sheer brutality and apathy for humanity in the execution of the offence, in every probability he has potency to commit similar offence in future and there is no possibility that he can be reformed or rehabilitated. The crime against the girl child are on raise, therefore, this Court is of the view that extreme

punishment should be awarded in such crime. Therefore, we find that the capital punishment awarded to the appellant is one of the rarest of rare case where the aforesaid sentence is warranted.

53. In view whereof, we affirm the death sentence awarded by the Additional Sessions Judge, Manawar in Sessions Trial No.15/2018, while dismissing the appeal preferred by the accused/appellant against conviction and sentence.

54. Let a copy of the judgment be retained in the file of connected criminal appeal No.4379/2018 and a copy of the judgment along with record be sent to the trial Court for taking appropriate action in accordance with law.

**(P.K. Jaiswal)**  
**Judge**

**(S.K. Awasthi)**  
**Judge**

**mk**