HIGH COURT OF MADHYA PRADESH BENCH AT INDORE
(D.B. HON'BLE JUSTICE SHRI S.C. SHARMA & HON'BLE JUSTICE SHRI SHAILENDRA SHUKLA)

CRRFC. No.12/2019
State of M.P.
Through – Police Station – Dwarkapuri,
Distt. Indore.
V/s.
Honey @ Kakku S/o. Rajesh Atwal,
Age – 23 years, Occup. Labour,
Permanent Address :- Atwal Mohalla,
Malhargarh, Plice Thana Malhargarh,
Distt. Mandsaur (M.P.)
Present Address – 3608, Sudamanagar,
Sector – E Police Thana Dwarkapuri,
Distt. Indore.
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Shri Shri R.S. Chhabra, learned Addl. Advocate General with Shri L.S. Chandiramani, learned Public Prosecutor for the Appellant/State.

Shri Avinash Sirpurkar, learned Senior Advocate with Shri B. Patel, Advocate for the respondent, as *amicus curiae*.

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CRA. No.8818/2019
Honey @ Kakku S/o. Rajesh Atwal,
Age – 23 years, Occup. Labour,
Permanent Address :- Atwal Mohalla,
Malhargarh, Plice Thana Malhargarh,
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Present Address – 3608, Sudamanagar,
Sector – E Police Thana Dwarkapuri,
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V/s.
State of M.P.
Through – Police Station – Dwarkapuri,
Distt. Indore.
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Shri Avinash Sirpurkar, learned Senior Advocate with Shri B. Patel, Advocate for the appellant (CRA.No.8818/2019) as *amicus curiae*.

Shri R.S. Chhabra, learned Addl. Advocate General with Shri L.S. Chandiramani, Advocate for the respondent/State.

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(JUDGMENT)
(Indore Dt.03.3.2020)

Per Shailendra Shukla, J:-

The present reference and appeal arise out of judgment dated 30.9.2019, pronounced in Special Case No.2147/2018 by the 15th A.S.J. and Special Judge, Indore whereby,

appellant – Honey @ Kakku has been convicted for the offence punishable under Sections 363, 366, 376AB, 302, 201, 376A of IPC and under Section 5(n) read with Section 6 of POCSO Act. The accused has not been sentenced separately under Section 5(n) read with Section 6 of POCSO Act, in view of Section 42 of POCSO Act which provides for sentencing under the provisions of IPC, if such provision provides for stiffer sentence and therefore was sentenced under Section 376AB in place of Section 5(n) read with Section (6) of POCSO Act. Ultimately, the appellant has been sentenced under various provisions as under :-

Provision of IPC	Sentence
Section 363 IPC	5 years RI with fine of Rs.2000/-. In default of payment of fine 2 months additional RI.
Section 366 of IPC	7 years RI with fine of Rs.3000/-. In default of payment of fine 2 months additional RI.
Section 376 AB of IPC	Life Imprisonment till natural death with fine of Rs.4000/-. In default of payment of fine 3 months additional RI.
Section 5(n) read with Section 6 of POCSO Act.	Life Imprisonment with fine of Rs.4000/-. In default of payment of fine 3 months additional RI.
Section 302 of IPC	Life Imprisonment with fine of Rs.4000/-. In default of payment of fine 3 months additional RI.
201 of IPC	3 years RI with fine of Rs.2000/-. In default of payment of fine 2 months additional RI.
376A of IPC	Capital punishment with fine of Rs.5000/-. In default of payment of fine 4 months additional RI.

2. The prosecution story in short was that on 25.10.2018 Ashu (PW2) had left his daughter 'A' aged about 4 ½ years to the coaching classes run by Anamika (PW7) at Sudama Nagar, Indore at about 5.00 PM and when he came back to fetch his daughter he was told by Anamika (PW7) that

appellant – Honey has already taken his daughter half hour back. Ashu (PW2) came back and he along with his wife Nitika (PW1) searched for their daughter but when they could not find her, a missing person report Ex.P/2 and FIR Ex.P/1 were lodged. The FIR was registered as Crime No.539/2018 under Section 363 of IPC. Next day, ie., 26.10.2018 witness Premnath (PW12) discovered body of a girl child at a spot where Premnath (PW12) had gone to relieve himself. Premnath (PW12) gave an intimation, in M.G. Road Police Station which is Ex.P/24. Police arrived at the spot and prepared spot map Ex.P/25. The body of the girl child was found in naked condition. Its hands and legs were visible but trunk was covered with stones. Merg was registered. On receiving such information, the scientific officer Dr. B.L. Mandloi (PW30) arrived at the spot along with photographer and prepared a report Ex.P/70 and photographs of the spot and the deceased were taken. The identification proceedings were initiated and the father Ashu (PW2) identified the body as that of his daughter. The identification memo was drawn and a panel of doctors performed postmortem in order to determine the cause of death. As per their report, the death was on account of culpable homicide and the girl child was found to have been sexually violated. Appellant – Honey was nabbed on the basis of statements of Anamika (PW7). He was arrested on 29.10.2018 and his memorandum statements were recorded on the basis of which his clothes, clothes of the deceased girl child and the stone piece which was allegedly used by the

appellant to bludgeon the girl child to death were recovered. Further evidence was collected which involves CCTV footages showing appellant along with the deceased girl child at about the time when the deceased went missing. The investigating agency thereafter went on to establish as to whether the clothes of deceased contained DNAs of appellant and whether other specimen of the deceased also contained the DNAs of appellant. For this purpose the blood sample of appellant was taken and its DNA was isolated in FSL and the same was sought to be matched with DNAs present in the source of the deceased and it was revealed that the clothes of the deceased and her specimen samples show presence of DNA of appellant. The age of the deceased was also determined by the prosecution. Her school bag was also recovered by the prosecution. After investigation charge sheet was filed under the provisions of Section 363, 366, 366A, 367A, 376AB, 376E, 376(3), 302, 201 of IPC as also under Section 3/4, 5(n) read with Section 6, 5(m) read with Section 6, 5i and 5t of POCSO Act. The presiding officer framed the charges under the provisions of Section 363, 366, 376AB of IPC, Section 5(n) read with Section 6, Section 5(m) of POCSO Act, Section 302, 201 and Section 376A of IPC,

3. The accused abjured his guilt and pleaded innocence in his accused statement and showed inclination to lead defence evidence. However, no defence evidence has been led by him.

4. The appellant in his appeal filed under Section 374(2) of Cr.P.C has controverted the impugned judgment passed by

the learned trial court and has stated that the appellant has no nexus with the aforesaid alleged offence and he has been falsely implicated, that there was a time gap between the last seen and the recovery of dead body and on this ground itself the judgment passed by the learned trial court deserves to be set aside. It is further stated that even though the body of the prosecutrix was recovered on 27.10.2018, the police while seizing the school bag of the deceased girl child one day earlier, ie., 26.10.2018 has written all these sections such as Section 376, 302 of IPC etc. thereby pointing out that the police already knew that the girl child had been raped and murdered one day prior to the discovery of her body and this itself shows false implication of appellant, that the motive for killing the prosecutrix has not been established by the investigators, that the prosecution story is not corroborated with the medical evidence, that the prosecution did not prove the memorandum statements and seizure memo of the appellant, that the prosecution did not examine any independent witness residing near the place of incident and the material omissions and contradictions have not been considered by the learned trial court while convicting the appellant. It is stated that the witnesses are interested witnesses and no independent witnesses have been examined and on these grounds judgment of conviction and sentence has been challenged and it is prayed that the appellant be given the benefit of doubt and be set at liberty.

5. The questions for consideration are whether in view of the ground contained in the appeal, the appellant deserves to be acquitted.

6. There are various stages of investigation which though considered by the trial court will have to be perused and deliberated upon by us in order to see as to whether the conclusion arrived at by the trial court in respect of each of these stages are appropriate or not.

7. The first question is whether the girl child was below 12 years or not. The prosecution has examined parents of the girl child Ashu (PW2) and Nitika (PW1). Both of whom have stated that the daughter was 4 ½ years old. Her date of birth has been shown as 27.6.2014 by Nitika (PW1). The prosecution has also examined Pratibha (PW6) who was the principal of Prime Academy School, Vidur Nagar, Indore on 5.11.2018. She states that daughter 'A' of Ashu (PW2) was got admitted in her school on 21.6.2018 in KG-I Class by her father Ashu (PW2) only and the date of birth was recorded as 27.6.2014 and she has also brought scholar register along with herself showing that at Serial No.A 1074, the date of birth of 'A' has been recorded. The concerned entry is Ex.P/14. The birth certificate is Ex.P/15. This witness further states that the police had seized these documents from her and had also sought the date of birth of the deceased in writing from her which she had given to police on her letter pad which is Ex.P/13. These documents have been seized by investigating officer by Sunil Sharma (PW36) and the seizure memo is Ex.P/16. Dr. A.K. Langewar (PW16) who had

conducted the postmortem has also found the deceased to be of 4 years old. There are no discrepancies or contradictions found in the cross examination of Pratibha (PW6), Nitika (PW1) and Ashu (PW2) regarding the age of the deceased 'A' at the time of incident and thus, it was rightly found proved by the trial court that the deceased was below 12 years of age at the time of incident.

8. The next question is whether the daughter 'A' of Nikita (PW1) and Ashu (PW2) had gone missing and was taken out of the lawful guardianship of her parents by the appellant. Ashu (PW2) has stated that his daughter used to study in the coaching class of Anamika Madam (PW7) and on 25.10.2018, he had left his daughter at the house of Anamika Madam (PW7) at around 5.00 PM and time of coaching was from 5.00 PM t o 7.00 PM and when he came to fetch his daughter at 7.00 PM, he was told by Anamika Madam (PW7) that 'A' had already been taken away by the appellant – Honey at about 6.30 PM. Ashu (PW2) states that Anamika knew appellant who used to bring his daughter to the coaching classes and used to take her back also from the classes. Anamika (PW7) has corroborated these statements of Ashu (PW2). She states that on 25.10.2018, Ashu (PW2) had brought his daughter 'A' to her house for coaching at 5.00 PM and thereafter at 5.30 PM, appellant came to fetch the daughter of Ashu (PW2) to which the witness refused saying that the daughter had come just now and the appellant left her house and then came again at 6.30 PM and at that point of time Anamika sent the daughter of Ashu with appellant and

thereafter Ashu (PW2) came at 7.00 PM and Anamika (PW7) told him that appellant Honey had already taken his daughter. This witness has been cross examined and asked question as to why she did not call the parents of 'A' when appellant had come to fetch her at 5.30 PM. The witness responds that appellant – Honey usually would bring 'A' to the coaching class and take her back as well and therefore, she did not inform. The explanation of witness Anamika (PW7) have not been found to be unreliable by the trial court and correctly so. The question as to why Ashu (PW2) himself brought his daughter to the coaching class of Anamika and came back to fetch her as well when this task was usually performed by the appellant only, has been answered by Nitika (PW1). She states that the appellant earlier used to stay in her house only and used to work with her husband and was also used to run errands such as carrying her daughter to the coaching and fetching her from there but on the morning of the incident, ie., 25.10.2018, appellant – Honey had come in inebriated condition and had cast an evil eye upon her which disturbed the witness and the witness then told her husband to take the appellant out of the house and then her husband took appellant to the house of the sister of the appellant namely Bhoomi. Although these statements have not been recorded in FIR Ex.P/1 but as has already been laid down by the Apex court in various judgments, FIR is not an encyclopedia of facts and is barely a means to initiate investigation. The prosecution has not examined the sister – Bhoomi of the appellant. As far as Ashu (PW2) is concerned, he has also

corroborated the statements of his wife Nitika (PW1). Ashu (PW2) states that on 25.10.2018 appellant – Honey had come to his house in inebriated condition and did not exhibit hon'ble intentions towards his wife which trend was being displayed by him since last 2-3 days and his wife told him that the appellant should be made to leave the house and then the witness took the appellant and left him at the house of his sister – Bhoomi. The witness also states that prior to this the appellant was residing in the house of the witness. As per this witness also, the appellant used to perform house hold chores which also involved carrying the daughter of witness to the coaching class and school and bringing her back from there. The reason for keeping appellant in the house of the witness was that appellant belonged to the community of the witness (both were Sweepers) and used to work with him because the appellant had been turned out by his Aunt. These statements of the appellant have not been controverted in cross examination. In para 14, the witness has been cross – examined as to whether the witness has received any complaint against the appellant during the period appellant stayed with him. The witness has given the answer in negative.

9. Thus, from the evidence of Ashu (PW2) and Nitika (PW1), it is proved that the reason for Ashu (PW2) to leave his daughter at the coaching class and also coming back to fetch her was due to the reason that the appellant had been turned out by Ashu (PW2) due to dishonorable intention of the appellant towards Nitika (PW1).

10. Thus, it is proved that on the date of the incident there was a bad blood created between the appellant and the parents of the deceased 'A' and despite such circumstances, the appellant had come to fetch 'A' not once but twice ie., at 5.30 P.M. and at 6.30 PM which again points out at some ominous planning of appellant.

11. As already pointed out, when Ashu (PW2) came to know that his daughter had been taken away by appellant and after searching he could not found her, Ashu (PW2) and Nitika (PW1) got panicked and lodged missing person report as also FIR. The missing person report Ex.P/2 and FIR Ex.P/1 were recorded by Ankit Sharma (PW33). A perusal of FIR Ex.P/1 shows that it contains the name of the appellant as person who had taken the daughter 'A' from the coaching class. Thus from the very inception the appellant has become the chief suspect. The missing person report carries the photograph of minor daughter of Ashu. In cross examination this witness admits that the missing person report has not been typed by him but by computer operator and also admits that missing persons report generally carries the scanned photo of the person in question whereas in Ex.P/2 the original passport photograph of the daughter 'A' has been affixed. However, these discrepancies are very unsubstantial in nature. It can be seen that the missing person report was lodged soon after the daughter went missing and time record in Ex.P/2 and Ex.P/1 is 9.17 PM and 9.23 PM on 25.10.2018 respectively. The statements of these witnesses have already been corroborated by Anamika (PW7) whose statements are

to the effect that the appellant had come to fetch 'A' at 5.30 PM and then at 6.30 PM and that on the second occasion 'A' was allowed to be taken by the appellant by the witness and such statements have not been challenged and thus, it is found proved that the appellant had taken 'A' out of lawful guardianship of her parents on 25.10.2018 and thereby kidnapped her. The fact of appellant taking 'A' from the coaching classes has been verified by corroborative evidence in the form of CCTV footage showing deceased 'A' accompanying appellant from near the coaching class in the evening of 25.10.2018. The witness to this effect is Nilesh Patidar (PW5) who had CCTV cameras installed in his office situated above his house. During investigation it was found that the CCTV footage has depicted appellant accompanying 'A' at the relevant point of time and the police sought these CCTV footages from the witness and the witness asked Shekhar Patidar (PW4) to prepare DVDR from DVD and the CCTV footages were given to the investigating officer vide seizure memo Ex.P/8 and Ex/P/9. Ex.P/10 is the certificate under Section 65-B and CCTV footages were seized by Sunil Sharma (IO) (PW36) whose signatures are on Ex.P/9 from 'd' to 'd'. Witness Shekhar Patidar (PW4) though admits that the DVDR was prepared from the pen drive in which the CCTV footages were first uploaded from DVR and he also admits that the aforesaid pen drive has not been seized. However, the lapse on the part of the prosecution in not seizing the pen drive has been admitted to be not major lapse by the trial court in view of the evidence of Ashu (PW2) and Nitika

(PW1) who, in their depositions have stated that they saw the CCTV footage from the shop of Nilesh Patidar (PW5). Such conclusion arrived at by the trial court is appropriate and calls for no interference. The witnesses of CCTV footage have ofcourse stated that the when the footage was recorded it was evening time but Nilesh Patidar (PW5) denies the suggestions that the faces of two persons shown in the CCTV footage could not been seen. He states that on zooming one could see the faces of both. He again is asked in para 7 that on zooming also both the faces cannot be identified clearly. The witness responds in affirmative but again states that one can make out that it was the appellant and 'A' only. (Ashu PW2) and Nitika (PW1) have also stated that they have identified both in CCTV footage. Nitika (PW1) denies that she could not identify both and no question in cross examination has been posed to Ashu (PW2).

12. It is clear that while Nilesh Patidar (PW5) did not know 'A' and appellant, both Ashu (PW2) and Nitika (PW1) had already known the appellant and 'A' was their daughter only. Hence, they would have immediately identified these two shown in CCTV footage which may not have been possible for Nilesh Patidar (PW5). Hence, apart from previous evidence of Ashu (PW2) and Anamika (PW7), appellant was also seen along with 'A' in CCTV footages which corroborates the prosecution story that Ashu (PW2) only had kidnapped 'A'.

13. After the daughter 'A' of Ashu (PW2) went missing and it was found that she was taken away by the accused Honey, her search continued.

14. The next day ie., on 26.10.2018 the school bag which was seen in the CCTV footage carried by the girl child was discovered from Kanji compound. SHO police station Dwarkapuri Ram Narayan Bhadoriya (PW34) states that he had been searching for girl child along with her parents and on 26.10.2018 when they reached Kanji compound they found school bag of daughter 'A' which has been identified by his father. Inside the bag there was handbook on which name of 'A' was written and her photograph along with photograph of her parents was also found in the handbook. The seizure memo of the same was made in presence of Ashu (PW2) and Nitin (PW8) which carry the signatures of the witnesses. Nitin (PW8) has corroborated this statement and has identified his signatures on Ex.P/12 from B to B part. Ashu (PW2) has also identified his signatures of Ex.P/12 from A to A part. Ex.P/12 contains mention of Section 302, 376 and 201 of IPC whereas the body of the child was discovered on 27.10.2018. The witness has been asked as to how he could write these section on 26.10.2018 when there was no knowledge that the girl child has been murdered. No proper explanation has been afforded by the witness.

15. While Ram Narayan Bhadoriya (PW34) states in examination – in – chief that the bag was discovered when he along with the parents of the deceased were searching for

daughter 'A' but in para 12 he states that father of 'A' had called him on telephone and stated that he had found the bag.

16. Whereas Ram Narayan Bhadoriya (PW34) has stated in cross examination that Ashu (PW2) informed him on phone that the bag of 'A' has been found, Ashu (PW2) himself has stated in para 18 that the bag of 'A' was found by the police and then he was called. Nitin (PW8) also states that it was police who had intimated Ashu (Pw2) that the bag was found.

17. Thus, there are discrepancies between the statements of Ashu (PW2) and Ram Narayan Bhadoriya (PW34) as to whether Ashu (PW2) first found the bag or police found the bag in the first place. Further, it has not been explained as to how seizure memo Ex.P/12 contained the particulars of provision of IPC a day prior to the discovery of the body of the deceased. Due to these discrepancies, evidence pertaining to finding of bag of deceased is not found proved.

18. The next piece of evidence is the recovery of body of the deceased. On 27.10.2018, Premnath (PW12) saw hands and legs of a girl child, whose trunk was covered with stones. Such sighting was a chance discovery by witness when he had gone to relieve himself at a *'Bogda'* which is a cave like place below a culvert. Witness Premnath (PW12) states that he intimated police at M.G. Road police station which is Ex.P/24. This witness states that police thereafter came and prepared spot map Ex.P/25 which also carries his signatures. Ex. P/24 was recorded by ASI Jaiprakash Choubey (PW24). Shri R.K. Chaturvedi (PW35) SHO, Indore states that it was he who had prepared the spot map Ex. P/25. After recording

of merg which is Ex.P/24, Suryaprakash Sharma (PW27) who was posted as a Head Constable in control room at Indore and was assigned the job of photography reached the spot along with Dr. B.L. Mandloi (PW30) who was a scientific officer posted at scene of crime mobile unit. This witness states that he found a naked body of a girl child and he took the photographs which are Ex.P/54 to Ex.P/57. He has also exhibited the certificate under Section 65 of the Evidence Act, which is Ex. P/58. Dr. B.L. Mandloi (PW30) has corroborated these statements. He states that on inspection of the dead body, he found that blood like liquid had emitted from the private part of the deceased and a piece of stone (*'Pharsi'*) was lying besides the private part on which a spot likely that of semen was visible. There was a deep gash on the right cheek extending up to chin through which jaw bone was visible. Blood also oozed out of nostrils. As per this witness, signs of sexual assault followed by murder were visible and an attempt had been made to hide the body with stones. The report is Ex.P/70. This witness also prepared a spot map Ex. P/71. He also drew the outlines of the *'Bogda'* on a paper which is Ex.P/72. The instructions which he passed on to S.I. were recorded vide Ex.P/73. This witness further states that later on he prepared draft of the seized items to be sent to FSL which is Ex. P/57. He also had prepared a draft in relation to the items seized from the accused for being sent to FSL as per Ex.P/74. This witness admits that no blood trail was found on way to *'Bogda'* No.19 where the body was found and no foot prints of animals were

also found in the vicinity of the body. Such statements in cross examination show that a child was done to death at *'Bogda'* No.19 only as there was no blood trail.

19. What followed next was the identification of the body. R.K. Chaturvedi (PW35) who was S.I. at M.G. Road on 27.10.2018 states that he issued Safina Form Ex.P/4 and the body was identified by Ashu (PW2). Such identification memo is Ex.P/3. Ashu (PW2) states that he identified the body of his daughter and has appended his signature from A to A part in Ex.P/3. His signatures on Safina Form which is in fact the notice for identification ie., Ex.P/4 from A to A part has also been admitted by Ashu (PW2).

20. R.K.Chaturvedi (PW35) states that a Naksha Panchnama of the body intending to note injuries and status of body was then carried out by him. This is Ex.P/5. In this document the injuries on body as described by Dr. B.L. Mandloi (PW30) have been noted. This witness further states that he prepared an application for conducting postmortem of the body which is Ex.P/34 which carries his signatures and then the body was sent to M.Y. Hospital, Indore through constable Ramkrishna (PW19). Ramkrishna (PW19) states that on application Ex.P/34 his signatures are from A to A part and he had brought the dead body to M.Y. Hospital as per instructions received.

21. Dr. A.K. Lanjewar (PW16) states that he was posted in MGM Medical College at Indore in Department of Forensic Medicine as a guide on 27.10.2018 and on that day constable Ramkrishna had brought the body of 'A' D/o. Ashu (PW2)

aged 4 years for postmortem. The body was identified by Ashu (PW2) and Ramkrishna (PW19). The postmortem was conducted by a penal consisting of the witness Dr. S.K. Soni (PW17) and Dr. Swati Bhargava. The outer examination show that the rigor mortis had passed off and there was hypo-stasis on the back of the body. There was coagulated blood on the whole body and the face and soil particles were also visible and red blood had oozed out of the nostrils and the right eye had turned black. Following injuries were noted on the body vide Ex.P/35 :-

> "1. Contused lacerated wound of size 9.0 x 3.5 cm x bone deep present over right side of chin situated 1.7 cm below the mid of lower lip & 4.2 cm front of right ear.
> 2. Contused lacerated wound of size 1.5 x 1.2 cm present over root of nose situated 3.0 cm below to the glabella, just below the mentioned injury nasal cartilage was found crushed, flattened & exposed.
> 3. Contused lacerated wound of size 1.0 x 0.5 cm present over lateral side of upper eyelid of right eye.
> 4. Reddish colour Contusion of size 6.4 x 6.0 cm present in and around right eye.
> 5. Contused abrasion of size 3.0 x 1.5. cm present over right shoulder joint, situated 3.0 cm front of tip of right shoulder joint.
> 6. Contused abrasion of size 1.4 x 0.7. cm present over antero-lateral aspect of right shoulder joint, situated 3.5 cm from tip of right shoulder joint.
> 7. Contused abrasion of size 3.5 x 1.7 cm present over right side of chest over anterior axillary line, situated 10.0 cm below to the right axilla.
> 8. Contused abrasion of size 3.0 x 0.9. cm present over extensor aspect of right forearm situated 10.0 cm below right elbow joint.
> 9. Lacerated wound of size 5.7 x 1.6 cm x bone deep present over postero-medial aspect of left elbow joint.
> 10. Reddish abrasion of size 2.3 x 1.0 cm present over anterior aspect of right side of abdomen, situated just above to the right anterior superior iliac spine.
> 11. Contused abrasion of size 4.0 x 2.2 cm present over anterior aspect of left thigh situated 4.0 cm above left knee joint.

12. Multiple abrasion present over back of chest on right side in an area of 5.5 x 4.0 cm of size varying from 1.8. x 1.0 cm to 0.7 x 0.5 cm.
13. Reddish contused abrasion of size 4.5 x 0.8 cm placed obliquely situated 8.5. cm below to the C6 vertebrae & 5.5 cm right lateral to midline.
14. Multiple scratch mark as abrasion (04 in number) present over lateral aspect of right arm nearly horizontal line in an area of 3.5 x 3.0 cm varying from 0.5 to 0.1 cm to 0.3 to 0.1 cm curvilinear in shape with concavity upward appeared to be nail marks.
15. Contused abrasion of size 6.0 x 0.5 cm present over right side of neck situated 5.0 cm below to tip of right mastoid process.
16. Contused abrasion of size 2.0 x 1.0 cm present over right side of neck situated 5.2. cm anterior to the above mentioned injury no.15.
17. Scratch mark contused abrasion of size 0.7 x 0.1 cm present over left side of neck situated 2.7 cm below to tip of left mastoid process, curvilinear in shape with concavity downward obliquely appeared to be nail mark.
18. Scratch mark contused abrasion of size 0.8. x 0.1 cm present over left side of neck situated 1.8 cm back to the above mentioned (injury No.17) wound, curvilinear in shape with concavity downward obliquely placed, appeared to be nail mark.
19. Scratch mark contused abrasion of size 0.3 x 0.1 cm present over left side of neck situated 9.0 cm below to tip of left mastoid process, horizontal idented mark appeared to be nail mark.
20. Scratch mark contused abrasion of size 0.7 x 0.1 cm situated 7.4 cm below tot he mid of chin, obliquely placed indented mark appeared to be nail mark.
21. Lacerated wound of size 2.0 x 2.3 cm present over left side of forehead situated 4.0 cm above lateral canthus of left eye, underneath contusion of size 4.0 x 2.0 cm was found.
22. Contusion of size 4.0 x 4.0 cm present over left parietal region of scalp situated just left lateral to midline.
23. Meninges was found tense & congested, on opening the meninges, SDH & SAH present all over brain at places. Brain was found soft.
24. Compound fracture of size 3.0 x 1.7 cm present over left parieto-occipital junction situated 4.2 cm left lateral to midline, effusion of blood present surrounding the fracture.
25. Contusion of size 6.0 x 2.0 present over right side of anterior peritoneal fold near urinary bladder, surrounding perineal muscles & tissue was found ecchymosed.

> 26. Multiple reddish colour abrasion present over back in an area of 21.0 x 17.5 cm situated 10.0 cm below to the C6 vertebrae, on cut ecchymosis was found.
> 27. Pale multiple abrasion present over buttock region & over upper part of sacrum in an area of 25.0 x 19.0 cm, appeared to be ant bite mark, margins of wounds and base found irregular & crenated at places. Injury was postmortem in nature.
> 28. Pale abrasion of size 3.7 x 2.5 cm present over left shoulder joint situated 3.0 cm below to the tip of left shoulder joint. Injury was postmortem in nature.
> 29. Pale abrasion of size 10.0 x 4.0 cm present over left shoulder joint situated 8.5 cm below to the tip of left shoulder joint. Injury was postmortem in nature.
> 30. Pale lacerated wound of size 1.8 x 1.0 cm present over antero-medial aspect of left forearm situated 4.0 cm below to the left elbow joint. Injury was postmortem in nature."

22. Witness states that he also conducted examination of vagina of the body and found that :-

> "31. Vagina:- In whole of the vaginal opening circumference reddish colour contusion of size 4.0 x 2.0 cm was found with torned hymen, edema was found surrounding the tissue, contused abrasion with bruise present over posterior fouchette and posterior junction of labia majora and labia minora. Tearing of skin present over right perineal region. Vaginal opening was widened & patuluos, hymen was found torn and destructed in posterior half & remnant on anterior part visible. Urethral orifice displaced upward. Dust particle found adherent all over the perineal region at places."

23. He also examined anus of the body and found that :-

> "Anus:- In whole of circumference of anus reddish colour contusion of size 3.6 x 3.0 cm was found with torn anal sphincter. Tearing of skin present over anal region, anal opening was widened & patulous, dust particle found adherent all over the anal region at places."

24. The witness states that he conducted internal examination of the body and gave his opinion as follows :-

Opinion :-

1. Death was due to shock and hemorrhage as a result of head injury.
2. Evidence of penetrative sexual assault present.
3. Evidence of throttling present.
4. injuries which are found on body of deceased are homicidal in nature and can cause death in ordinary course of nature.
5. Duration of death was within 24-48 hours since post mortem examination.

25. The report Ex.P/35 carry the signatures of the members of the penal doctors including that of the witness. His evidence has been corroborated by doctor Sunil Kumar Soni (PW17) who has made identical statements.

26. Dr. A.K. Lanjewar (PW16) states that the internal organs of the body called viscera were preserved in two bottles. The vaginal smear swab and 3 vaginal smear slides were also preserved. The swab of the internal thighs were also preserved for histological examination. These items were sealed and labelled and given to constable Ramkrishna (PW19). It is thus proved from the evidence of Dr. A.K. Lanjewar (PW16) and Dr. Sunil Kumar Soni (PW17) opined that death of daughter 'A' of Ashu (PW2) was a result of culpable homicide. It was also proved that 'A' had been subjected to penetrative sexual assault.

27. Ramkrishna (PW19) states that sealed and labelled items were given to him by doctor at M.Y. Hospital which he handed over to Head Constable Shri Brajmohan Singh Bais (PW21) who drew the seizure memo Ex.P/35 which carries his signature from A to A part. Brajmohan Singh Bais (PW21) states that after seizure memo Ex. P/39, he had handed over the same to ASI Malkhana. Sham Sunder Tiwari (PW31)

states that while he was posted as Head constable in police station Rajendra Nagar, he received a sealed packet containing the internal organs of the deceased along with letters Ex.P/74 and Ex.P/75 and he deposited these at FSL Rau, Indore and receipt of which Ex.P/76 and Ex.P/77.

28. Having found proved that daughter 'A' was kidnapped by the appellant and also having found proved that her death was on account of culpable homicide and was subjected to penetrative sexual assault, the next question was identification of the person responsible for committing such ghastly act. The needle of suspicion was already on the appellant. The investigating agencies were collecting further evidence and the agency came by such evidence against the appellant in the form of last seen evidence, memorandum statements of the appellant on the basis of which the clothes of the daughter 'A' were recovered and lastly on the basis of DNA examination and matching of body fluids of the deceased with that of the appellant.

29. As far as last seen evidence is concerned, the witnesses are Deepak Yadav (PW22) and Indu (PW11). Deepak Yadav (PW22) states that on 25.10.2018 at about 6.30 PM while he was carrying the passengers in his Magic vehicle, a person accompanied by a small girl aged about 4 to 5 years boarded his vehicle and these passengers disembarked at Municipality at about 7.30 PM and he had charged them Rs.15. The witness states that 4 to 5 days later, he read in the news-paper about the incident of kidnapping and murder of a girl child. He saw the photograph of the child and found that it was the

same child who had boarded his vehicle along with the person and the person's photo in the news paper also was same as that of the appellant. The witness has been shown the appellant via video conferencing and has identified him to be the same person. The witness has been shown the news paper cutting Ex.P/41 and states that he had read this news paper cutting as well. The witness has been cross examined and he admits that on a given date he transports 100 to 150 passengers and he does not recollect the facial features of such passengers. Regarding appellant he states that he had seen him when the appellant was sitting in his vehicle and further when appellant given him the fare.

30. It is true that in general a passenger is not likely to be recognized by such a person who carries 100 to 150 passengers every day. However, the witness was able to recollect the appellant and the deceased girl child as having sat in his vehicle. When he saw the news-paper report 4 to 5 days afterwards, he could place them. It cannot be stated that Deepak Yadav (PW22) is a planted witness. He also states that he knows police posted at Dwarkapuri police station, but he is not shown as pocket witness of police. There is no reason to discredit this witness who is having no enmity with the appellant.

31. Dinesh Sharma (PW3) states that he knows appellant – Honey as appellant works as a sweeper at Surya Center situated nearby his restaurant which he runs in the name of Mauji Hot Food. He states that on 25.10.2018 at about 10.00 PM to 10.30 PM, appellant – Honey had come to his shop

along with a girl child who was about 4 to 5 years old and had purchased a *'Samosa'* and then went towards Municipality and 4 to 5 days later he read in news paper that appellant – Honey had murdered a girl after committing rape upon her and has thrown the body in the *'Bogda'*. He states that police has come to his shop and had shown him the photo of the girl child and he had recognized the child's photo as the same who had been brought by appellant – Honey to his shop. The identification memo was drawn by police which is Ex.P/8 which carries his signatures. The photograph Article A/1 has also been identified by this witness. In cross examination this witness states that he knows Honey as he had come to his shop 4 to 5 times and he used to come alone to his shop. He admits that he did not himself go to the police station but police had come to his shop. He states that police had been carrying the photograph of the girl child and were asking persons about her whereabouts from number of persons from the locality. Sunil Sharma (PW36) states in para 14 that he had shown the photograph of the girl child to Dinesh Sharma (PW3) and Dinesh Sharma (PW3) after seeing this photograph, told him that sweeper Honey had come with a girl child to his shop on 25.10.2018 and the photograph is of the same girl child. Witness states that thereafter, he executed an identification memo in the presence of Kapil and Manoj. Kapil Kadam (PW14) has corroborated the statements of Sunil Sharma (PW36) and states that he has appended his signatures on the Ex.P/8 from B to B part. In para 16 he denies the suggestion that he and the police men

never went to Mauji Food run by Dinesh Sharma (PW3) and also denies that Ex.P/8 was made in police station.

32. There is no cause of suspicion on the statement of Dinesh Sharma (PW3), Sunil Sharma (PW36) and Kapil Kadam (PW14).

33. Thus, the trail of accused being seen with deceased from 5.30. PM to 6.30 PM to 10.00 PM has been found proved from the above statements. It was within specific knowledge of the appellant as to what happened to girl child 'A'. Thus, onus was upon him under Section 106 of the Evidence Act.

34. Indu (PW11) states that she resides in a *'Bogda'* along with a husband Premnath and on the date of incident at about 11.00 PM, she saw appellant – Honey roaming with a girl child aged about 4 to 4 ½ years. She asked the appellant as to where he was roaming and appellant did not give any reply and went towards the petrol pump. The witness states that appellant – Honey used to sell socks at Sanjay Sethu Bridge about a year and a half ago and therefore, she knows him. She states that the child is body was found by her husband Premnath (PW12). In her cross – examination she admits that appellant – Honey used to work as sweeper but had started selling socks about a year and half ago. She denies the suggestion that it was dark in the night when she saw appellant – Honey. She states that she could see in light. A perusal of the evidence shows that she knew appellant from before and her statements to have seen appellant and 4 to 5 years girl child in the night of the date of the incident has not

been challenged successfully in cross examination. The prosecution story is that somewhere in the intervening night between 25.10.2018 and 26.10.2018 a girl child 'A' was done to death. Witness Indu (PW11) can thus be credited as witness of last seen. As already found that few hours earlier Deepak Yadav (PW22) has also found the appellant and 4 to 5 years old girl child in his magic van as passengers and so has Dinesh Sharma (PW3).

35. A sequence of evidence is found to be proved which pertains to appellant moving along with the deceased girl child from the evening of 25.10.2018.

36. As far as the evidence pertaining to memorandum and seizure from memorandum of the appellant and seizure of items in pursuance to such disclosure are concerned, Sunil Sharma (PW36) is relevant witness. He states that on 28.10.2018, he was posted as SHO in police station Rajendra Nagar and he was assigned to conduct investigation of the case on 28.10.2018. The then Superintendent of Police constituted a team to look into the investigation. He states that accused – Honey was arrested by Shri R.N.S. Bhadoriya and then he questioned the appellant in presence of the witness Vikas Kadam and Nikhil Haade.

37. The accused – Honey was arrested by Ramnarayan Singh Bhadoriya (PW34) whose arrest memo is Ex.P/35. Sunil Sharma (PW36) states that Honey told him that on the date of the incident the clothes which he had been wearing were the same clothes he was wearing on the date of incident also. His memorandum Ex.P/19 was recorded which carries

signatures of Sunil Sharma (PW36) from B to B part. The clothes of appellant – Honey were thereafter seized. The seizure of T-shirt and pants carrying some stains is as per seizure memo Ex.P/20 carrying the signatures of Sunil Sharma (PW36) from B to B part and both Ex. P/19 and Ex.P/20 also carries signatures of appellant – Honey. The witness states that Honey revealed that he had committed the offence and identified the place where such offence was committed. The place was *'Bogda'* No.9. On the basis of this information a Tasdik Panchnama Ex.P/22 was prepared and a spot map Ex.P/23 was also prepared by the witness. Witness further states that thereafter appellant – Honey was sent for medical examination to District Hospital at Indore and the medical report Ex.P/18 was received thereafter. Witness further states that the police remand of appellant – Honey was sought from the court and on 30.10.2018 appellant – Honey was questioned further. He thereafter gave information regarding the place where the clothes of girl child were hidden by him. The memorandum statements are Ex.P/27 carrying signatures by the witness and on the basis of such memorandum a light pink color T-shirt, a black capri, a violet underwear and a pair of sandals blue color were taken out from below the stones and soil inside *'Bogda'* No.9 by appellant – Honey in presence of the witnesses. The same was seized as per Ex.P/28 and the appellant signatures were also taken by the witness. The witness Sunil Sharma (PW36) states that he prepared the spot map of '*Bogda'* No.9 which is Ex.P/29. He thereafter wrote a letter to SDM Rau for

conducting identification of the clothes of the deceased. Witness Vikas Kadam (PW10) and Kapil Kadam (PW14) have corroborated the statements of Sunil Sharma (PW36). They have appended their signatures on Ex.P/27, Ex.P/28 and Ex/P29. These witnesses have been extensively examined and there are no statements in their cross examination which would impeach their credibility. Sunil Sharma (PW36) has also been cross examined. He states in para 45 that when appellant – Honey took out his clothes, he was given other clothes to wear. Although he admits that no bill showing purchase of other clothes has been presented by him, but he states that in seizure memo, it has been mentioned that he was given other clothes to wear. This witness has already stated that as per this witness the clothes of the deceased were subjected to identification.

38. Manish Shrivastava (PW13) states that he, in his capacity as Naib Tehsildar, had received a letter sent by SHO Rajendra Nagar, Indore requesting for identification of certain items and such letter is Ex.P/26. Witness states that thereafter he conducted identification proceedings on 31.10.2018 at Prashaskiya Sankul Bhawan Indore in room No.G-7 and in the identification proceedings, Ashu S/o. Gopi Krishna has identified the clothes, ie., T-shirt, black capri, underwear and sandals as those of his daughter. The identification memo is Ex.P/7. In cross examination Manish Shrivastava (PW13) states that he had called other clothes from his Reader for the purpose of mixing them along with the clothes sent to him. Ex.P/7 contains remark that seized

clothes were mixed with similar looking other clothes and sandals and that Ashu (PW2) had identified correctly by picking up his daughter's clothes. There are no discrepancies in these statements of Manish Shrivastava (PW13). Ashu (PW2) has also corroborated these statements and has also admitted his signatures on Ex.P/7 at A to A part. In para 22, he has been given a suggestion that the police had shown him the clothes of his daughter even before the identification proceedings were conducted. Such suggestions have been denied by him.

39. It is thus found proved that on the basis of the memorandum of the appellant the clothes of daughter 'A' hidden beneath soil and stones were recovered and this would amount to discovery of fact under Section 27 of the Evidence Act.

40. In the case of ***Pulukuri Kottaya vs King-Emperor***, *AIR 1947 PC 67*, it has been observed as under :-

> "It is fallacious to treat the 'fact discovered' within the section as equivalent to the object produced; the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. "

41. As already stated, Sunil Sharma (PW36) had sent appellant – Honey for his medical examination to the District Hospital at Indore, Dr. Prabodh Joshi (PW32) stated that while he was posted in District Hospital on 29.10.2018, appellant – Honey S/o. Rajesh Atwal was brought before him for medical examination by constable K.C. Sharma and he conducted examination of appellant – Honey and found him capable of performing intercourse. His pubic hairs were

sealed and his underwear was also sealed. MLC report is Ex.P/78. He admits that he could not collect the semen from appellant as he has not been able to ejaculate and in cross examination he states that a person affected with anxiety neurosis may not be able to ejaculate.

42. From the evidence of this witness it is found proved that the appellant was capable of performing sexual intercourse. Sunil Sharma (PW36) states that on 30.10.2018, S.P. West Indore sent a letter to ADG, Indore seeking permission to conduct DNA examination of the appellant and the permission was given vide letter which is Ex. P/91. The witness states that thereafter the police remand of accused – Honey was again taken and he was sent to M.Y. Hospital for conducting DNA examination. Dr. R.S. Chouhan (PW15) stated that on 1.1.2018, he was posted as CMO in M.Y. Hospital at Indore and had received a letter sent by SHO Rajendra Nagar for taking blood samples of accused Honey Atwal for conducting his DNA examination. The letter's carbon copy is Ex.P/30. As per this witness, an OPD Ticket was drawn (Ex.P/31) in order to conduct blood sampling of accused – Honey who had been produced by the constable Krishna Chandra and SHO Sunil Sharma. Thereafter 3 Ml. Blood of accused – Honey was drawn and was collected in E.D.T.A. Tube and Identification Form Ex.P/32 was filled up which carried the photograph of accused – Honey, verified by the witness, signed by the witnesses and thumb impressions of both the hands of accused – Honey were taken on it along with his signatures. The blood sample was then preserved in

Ice Thermal Box and a seizure memo of the same was drawn by SHO Sunil Sharma, which is Ex.P/33 which carries signatures. The Identification Form Ex.P/32 also carries signatures of Sunil Sharma (PW36) from F to F part so also the seizure memo Ex.P/33, which shows that EDTA vial was sealed.

43. Witness Pradeep Singh (PW26) states that while he was posted as constable in police station Rajendra Nagar on 1.11.2018. T.I. Sunil Sharma (PW36) had taken accused – Honey to M.Y. Hospital for conducting DNA sampling and in hospital CMO Dr. Chouhan collected the blood sample of accused – Honey and had prepared Identification Form Ex.P/32 on which the signature of the witnesses are from E to E part. This witness further states that the blood sample was seized vide seizure memo Ex.P/33 and it was stored in Thermocol Ice Box.

44. Sunil Sharma (PW36) has stated that DNA analysis report was received from State Forensic Science Laboratory, Sagar which is Ex.P/99 and the same was submitted before the court vide letter of SHO Dwarkapuri Ex.P/98. This DNA analysis report runs into 8 pages and the ultimate analysis is recorded in last page which is as follows :-

(i) The DNA profile of male 'Y' chromosome developed from the vaginal smear swab of the victim (Article 'F') was found to be consistent with DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(ii) The DNA profile of male 'y' chromosome developed from the anal smear swab and slide of the victim

(Article 'G') was found to be consistent with DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(iii) The DNA profile of male 'y' chromosome developed from the thigh smear swab and slide of the victim (Article 'H') was found to be consistent with DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(iv) The DNA profile of male 'Y' chromosome developed from the underwear smear swab and slide of the victim (Article 'P') was found to be consistent with DNA profile of male 'Y' chromosome found in blood sample of accused (Article 'Q').

(v) The autosomal STR DNA profile was found to be done in victim clothes and blood sample of the accused.

(vi) The autosomal STR DNA profile was found to be same in the T-shirt of accused ('L') and victim source (Article 'R').

(vii) The DNA profile of victim developed from the T-shirt of the appellant matched with DNA profile of victim developed from the blood soil.

45. Summarily speaking, the vaginal smear swab, anal smear swab, thigh swab and underwear swab of the victim contained DNA of a male and the DNA profile of 'Y' chromosome found in these items were found to have matched with the DNA profile of the appellant drawn from his blood sample. Thus, the DNA profile of the appellant was found on the clothes of the victim and that the DNA profile of

the victim found on the T-shirt of the accused had matched with the DNA profile of the blood soil.

46. The Hon'ble Supreme Court in the case of ***Mukesh & Anr. vs. State for NCT of Delhi & Ors.***, *2017 (6) SCC 1*, discussed about the efficacy of DNA examination has quoted a judgment of the Supreme Court of United States in the following para :-

> "212. After the above judgment, the DNA Test has been frequently applied in the United States of America. In District Attorney's Office for the Third Judicial District et al. v. William G. Osborne[86], Chief Justice Roberts of the Supreme Court of United States, while referring to the DNA Test, stated as follows: -
>
> > "DNA testing has an unparalleled ability both to exonerate the wrongly convicted and to identify the guilty. It has the potential to significantly improve both the criminal justice system and police investigative practices. The Federal Government and the States have recognized this, and have developed special approaches to ensure that this evidentiary tool can be effectively incorporated into established criminal procedure- usually but not always through legislation.
> >
> > … … ….
> >
> > Modern DNA testing can provide powerful new evidence unlike anything known before. Since its first use in criminal investigations in the mid-1980s, there have been several major advances in DNA technology, culminating in STR technology. It is now often possible to determine whether a biological tissue matches a suspect with near certainty. While of course many criminal trials proceed without any forensic and scientific testing at all, there is no technology comparable to DNA testing for matching tissues when such evidence is at issue."

47. The Apex court in the case of ***Mukesh & Anr.*** (supra) has further observed as under :-

> "213. DNA technology as a part of Forensic Science and scientific discipline not only provides guidance to investigation but also supplies the Court accrued information about the tending features of identification of criminals. The recent advancement in modern biological research has regularized Forensic Science resulting in radical help in the administration of justice. In our country also like several other developed and developing countries, DNA evidence is being increasingly

> relied upon by courts. After the amendment in the Criminal Procedure Code by the insertion of Section 53A by Act 25 of 2005, DNA profiling has now become a part of the statutory scheme. Section 53A relates to the examination of a person accused of rape by a medical practitioner."

48. As far as the FSL report is concerned, Rama Shankar Singh Tomar (PW28) has stated that while posted as constable in police station – Dwarkapuri, he had deposited various articles concerning Crime No.539/2018 registered in police station – Dwarkapuri draft copy of which is Ex.P/59 and he had been given receipt Ex.P/60 and Ex.P/61 from FSL Sagar. This witness further submits that he deposited these receipts in police station and his Roznamchasana is Ex.P/82. Witness Sunil Sharma (PW36) submits that the report which has been received from FSL Sagar was received on 30.11.2018 and this report is Ex.P/81. In this report, it has been found that Article F/1, which is the slide drawn from the victim's fluids, contained sperms and the same was the situation in the underwear of the deceased which is Article P. The piece of stone which is Article D was also found to have contained human blood. This FSL report is Report No.1776/18. The same witness states that he also received analysis report from FSL Rau, Indore on 26.12.2018 which is report No.269/18 which is Ex.P/83. As per this report, in the underwear of accused – Honey, semen and sperms were found.

49. Thus, FSL report Ex.P/81 substantiates the evidence of doctor Dr. A.K. Lanjewar (PW16) who had stated that the deceased was subjected to sexual assault. The DNA report

conclusively proves that it was the accused only who had committed penetrated sexual assault on the deceased.

50. In this case, which is based on circumstantial evidence, following circumstances have been found proved against the appellant :-

(i) Existence of motive :- On the date of incident itself there was a spat between the parents of the deceased 'A' and the accused – Honey on account of behavioral complaint against the appellant and the appellant was turned out by complainant from his house.

(ii) It has been found proved that the appellant went to the coaching class where 'A' used to study and took her away from the coaching class at 6.30 PM and the evidence of Anamika (PW7) and CCTV footage is important in this regard.

(iii) Appellant and 'A' were seen together at 6.30 PM, 10.00 PM and 11.00 PM by witnesses which has been found proved.

(iv) The onus under Section 106 of Evidence Act was not discharged by the accused who needed to explain the whereabouts of 'A' whom he had accompanied from 6.30 PM onwards on 25.10.2018.

(v) The body of the deceased was found absolutely naked and the clothes of daughter 'A' identified by her father were recovered at the instance of appellant which amounts to discovery of fact.

(vi) The blood stained stone was also recovered at the instance of the appellant which as per FSL report was found to have contained human blood.

(ix) The deceased was found to been raped and the DNA of her fluids containing male 'Y' chromosomes were found to be those of the appellant.

(x) From the clothes of the appellant, DNA of deceased were isolated and these DNA also matched with blood soil at the spot where the body of 'A' was found. All these circumstantial evidence have rightly been found to be forming a complete chain which only pointed to the guilt of the accused.

51. The judgment passed in the case of ***Sharad Birdhi Chand Sarda vs. State of Maharashtra***, *1984 (4) SCC 116* is relevant for the purpose. It has also been found that the accused in his statement recorded under Section 313 of Cr.P.C has barely stated “do not know” to number of questions regarding which he had specific knowledge. In the case of ***Nagraj vs. State of (Tamil Nadu)***; *(2015) 4 SCC 739*, the Supreme Court has observed that if the accused give evasive and untrustworthy answers under Section 313 of Cr.P.C then it would be a factor indicating his guilt. In the case of ***Munna Kumar Upadhyay @ Munna Upadhyay vs. State of Andhra Pradesh***; *AIR 2012 SC 2470*, it has been laid down that false denial made by the accused of established facts can be used as incriminating evidence against him. Thus, the manner in which the appellant has answered the

questions post to him under Section 313 of Cr.P.C also raises adverse inference against him.

52. It has already been found that the death of deceased 'A' was on account of culpable homicide. Dr. A.K. Langewar (PW16) has found that the injuries were sufficient in the ordinary course of nature to cause death. The case squarely falls in the purview of "Murder" as defined in Section 300 of IPC. Consequently, the offence under Section 302 of IPC is found to be proved beyond reasonable doubt.

53. Section 5(n) read with Section 6 of POCSO Act reads as under :-

> "**Section 5 (n)** :- whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or **who is living in the same or shared household with the child,** commits penetrative sexual assault on such child; or"
>
> **Section 6. - Punishment for aggravated penetrative sexual assault. -** Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to imprisonment for life and shall also be liable to fine."

54. In view of the evidence found proved the ingredients of the aforesaid sections are also attracted and thus offence is also found proved.

55. Section 376A of IPC has already been quoted. Section 376AB of IPC is reproduced as under :-

> **Section 376 AB of IPC** :- Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death."

56. All the ingredients of the aforesaid section is also found to be proved in the present case.

57. Thus, after due consideration of the evidence and the material on record, it is found that the trial court had rightly convicted the appellant under Sections 363, 366, 376 AB, 302, 201 and 376A of IPC and under Sections 5(n) read with Section 6 of POCSO Act.

58. Coming to the question of reference send under Section 366 of Cr.P.C, it is to be seen by this court as to whether the death sentence imposed upon the appellant was proper in the given circumstances or not. It has already been seen that the punishment of death of sentence has to be given only in rarest of rare circumstances.

59. In the case of **Bachan Singh vs. State of Punjab, 1980 (2) SCC 684,** the Apex Court has observed as under :-

> "(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> (b) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

60. The aggravating circumstances suggested by the counsel read as follows:

> "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 Code of Criminal Procedure, 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." After reproducing the same, the Court opined:
>
> "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."

61. Thereafter, the Court referred to the suggestions pertaining to mitigating circumstances:

> "Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances: (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (6) That the accused acted under the duress or domination of another person.
>
> (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct." The Court then observed:
>
> "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."

In the said case, the Court has also held thus:

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

62. The aforesaid case pertained to circumstances where murder had been committed and therefore, in tabulating aggravating circumstances, the word "murder" has been used. However, in the present case, only life imprisonment has been imposed by the Trial Court while convicting the appellant under Section 302 of IPC. Thus, clearly, the Trial Court has not found it to be rarest of rare case in respect of charge under

Section 302 of IPC. The Court has found it to be rarest of rare case while imposing sentence under Section 376A of IPC. It is pertinent to note that under Section 376A of IPC, sentence of death can be imposed even though murder has not been committed. It would be appropriate to reproduce Section 376A of IPC as under :-

> **376A Punishment for causing death or resulting in persistent vegetative state of victim ---** Whoever, commits an offence punishable under sub-section (l) or sub¬section (2) of section 376 and in the course of such commission inflicts an injury which causes the death of the woman or causes the woman to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, or with death.

63. The Three-Judge Bench judgment of the Apex Court in the case of ***Ravishankar @ Baba Vishwakarma vs. State of Madhya Pradesh*, *2019 (4) JLJ 258*** has observed as under :-

> "..... a bare perusal of Section 376A of IPC shows that only factum of death of the victim during the offence of rape is required and such death need not be with any guilty intention or be a natural consequence of the act of rape only. It is worded broadly enough to include death by any act committed by the accused if done contemporaneously with the crime of rape. Any other interpretation would defeat the object of ensuring safety of women and would perpetuate the earlier loophole of the rapists claiming lack of intention to cause death to seek a reduced charge under Section 304 of I.P.C. as noted in the Report of the Committee on Amendments to Criminal Law, headed by Justice J.S. Verma, former Chief Justice of India....."

64. Thus, even though murder may not have been proved, sentence of death can still be imposed if the impugned act falls under Section 376A of IPC. A bare perusal of this provision

itself shows that sentence of death has been mentioned in the last, which is preceded by sentence of "not less than 20 years", followed by "imprisonment for life" which shall mean "imprisonment for the remaining part of person's natural life" and lastly with "death". The principles of "rarest of rare" for awarding death sentence as evolved in **Bachan Singh's** case would be attracted in respect of Section 376A of IPC as well.

65. The case of **Bachan Singh (supra)** was followed by yet another important judgement of **Macchi Singh vs. State of Punjab, 1983 (1) SCC 470.** The law laid down in **Macchi Singh (supra)** has been succinctly reflected upon by the Apex Court in the much talked about **Nirbhaya case** judgement, which is titled as ***Mukesh & another vs. State (NCT of Delhi) & others; 2017 (6) SCC* 1,** as under :-

> 335. In the case of **Machhi Singh (supra)**, a three-Judge Bench has explained the concept of 'rarest of rare' by observing thus:
>
> "The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection."
>
> 336. Thereafter, the Court has adverted to the aspects of the feeling of the community and its

desire for self-preservation and opined that the community may well withdraw the protection by sanctioning the death penalty. What has been ruled in this regard is worth reproducing: "But the community will not do so in every case. It may do so 'in the rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty."

337. It is apt to state here that in the said case, stress was laid on certain aspects, namely, the manner of commission of the murder, the motive for commission of the murder, anti-social or socially abhorrent nature of the crime, magnitude of the crime and personality of the victim of murder.

338. After so enumerating, the propositions that emerged from Bachan Singh (supra) were culled out which are as follows:

"The following propositions emerge from Bachan Singh case:

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

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

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

> 339. The three-Judge Bench further opined that to apply the said guidelines, the following questions are required to be answered: "(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?
>
> (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?" In the said case, the Court upheld the extreme penalty of death in respect of three accused persons.

66. The Apex Court, in the **Nirbhaya's case** thereafter referred to yet another judgement of the Apex Court in the case of **Haresh Mohandas Rajput vs. State of Maharashtra, 129 SC Reported 2308** in the following manner :-

> 340. "while dealing with the situation where the death sentence is warranted, referred to the guidelines laid down in Bachan Singh (supra) and the principles culled out in Machhi Singh (supra) and opined as follows:
>
> "19. In Machhi Singh v. State of Punjab this Court expanded the "rarest of rare" formulation beyond the aggravating factors listed in Bachan Singh to cases where the "collective conscience" of the community is so shocked that it will expect the holders of the judicial power centre to inflict the death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, such a penalty can be inflicted. But the Bench in this case underlined that full weightage must be accorded to the mitigating circumstances in a case and a just balance had to be struck between the aggravating and the mitigating circumstances." After so stating, the Court ruled thus:
>
> "20. The rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case". There must be no reason to believe that the

> accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the- moment provocation and indulges himself in a deliberately planned crime and [pic]meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded. (See C. Muniappan v. State of T.N[172]., Dara Singh v. Republic of India[173], Surendra Koli v. State of U.P.[174], Mohd. Mannan[175] and Sudam v. State of Maharashtra[176].)
>
> 21. Thus, it is evident that for awarding the death sentence, there must be existence of aggravating circumstances and the consequential absence of mitigating circumstances. As to whether the death sentence should be awarded, would depend upon the factual scenario of the case in hand."

67. Thus, when it comes to deciding as to whether the sentence of death, be inflicted or not, principles as enunciated in the two judgements above have to be kept in mind and the interest of society vis-a-vis interest of individual also need to be weighed.

68. Needless to say, appropriate sentence does become a vexed question in such matters.

69. The Apex court in the case of ***Shankar Kisan Rao Khade*** *vs.* ***State of Maharashtra***, *2013 (5) SCC 546*, has held that for awarding death penalty, the Crime Test, Criminal Test and R.R. Test have to be satisfied. Crime Test has to be 100%, Criminal Test 0% and R.R. Test, ie., Rarest of Rare Test is also required to be proven. Crime Test is 100% when no iota of doubt remains regarding commission of offence by the accused. Criminal Test is 0% when there are no such mitigating circumstances in favour of the accused, which may call for a lenient view in his favour.

70. The following excerpts from ***Shankar Kisan Rao Khade's*** (supra) are relevant :-

> **50.....** In my considered view that the tests that we have to apply, while awarding death sentence, are “crime test”, “criminal test” and the R-R Test and not “balancing test”. To award death sentence, the “crime test” has to be fully satisfied, that is 100% and “criminal test” 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, the 'crime test' made favoured the accused to avoid the capital punishment. Even if both the test are satisfied, ie., the aggravating circumstances, fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is “society centric” and not “Judge centric” that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges.

71. The Apex court in the case of **Shankar Kisan Rao Khade** (supra) took into account a number of Apex court judgments in which the offence of rape and murder of children had been committed by the accused and in some of which the extreme penalty of death was imposed and in others life imprisonment had been imposed and observed that the reason for such variance was not considering the mitigating circumstances, ie., Criminal Test. The Apex Court in para 47 has observed as under :-

> "47. Bachan Singh is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in Santosh Kumar Satishbhushan Bariya v/s. State of Maharashtra, (2009) 6 SCC 498) and even in some of the cases referred to above. It is this individualized sentencing that
> has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mentioned below."

72. In the case in hand, the appellant was driven by twin feelings of revenge and lust and perpetrated acts of murder and rape in extremely brutal manner. This case is fully satisfied on the aspect of crime test, which is 100%, meaning thereby, that the aggravating circumstances of murder involves exceptional depravity. There are as many as 30 injuries on the small frame of the girl-child which include crushing of her skull bone and throttling her as well. The question regarding the "criminal test" now remains to be deliberated upon. For the criminal test

to be 0%, it has to be shown that there are no mitigating circumstances in favour of the criminal i.e. the appellant. The mitigating circumstance would encompass his criminal background and if there is no criminal background, it would be a mitigating circumstance. The prosecution has filed newspaper cutting, which is Exhibit-P/41 exhibited by Deepak Yadav (PW22). As per this report, the appellant had earlier committed rape and murder of a seven year old girl-child and had spend three years in jail. Sunil Sharma (PW36) in para-11 of his statement has also exhibited paper cutting of daily "Patrika" and "Dainik Bhaskar", which are Exhibits-P/89 and P/90, in which it has been mentioned that appellant Honey had spent three years in jail as a juvenile. However, the prosecution was required to establish the factum of appellant's criminal background by submitting relevant substantive pieces of evidence which has not been done.

73. The Apex Court in the case of **Bachan Singh (supra)** has held that the State was required to prove that the accused would not commit criminal acts of violence as would constitute a continuing threat to society and that there is no probability that the accused can be reformed and rehabilitated by leading evidence to that effect.

74. In the case in hand, the prosecution has failed to prove the criminal antecedents of the appellant for which Investigating Officer Sunil Sharma (PW36) and Ram Narayan Bhadoriya (PW34) are responsible. Hence, in absence of such proof, as ordained in the case of ***Bachan Singh*** (supra)**,** it cannot be

proved that the appellant had criminal antecedents and therefore, the present case fails to achieve the yardstick of 0% criminal test, as formulated in the Apex Court judgment of ***Shankar Kisan Rao Khade*** (supra).

75. Moreover, recently the three-Judge Bench judgment of the Apex Court, in the case of ***Ravishankar*** (supra) has laid down that before awarding death sentence, the Court has to record its satisfaction that there are no residual doubt as to the culpability of the appellant, which is stiffer standard than "proof beyond reasonable doubt". In the aforesaid case, the Apex Court has observed as under :-

> 55..... This Court has increasingly become cognizant of `residual doubt' in many recent cases which effectively create a higher standard of proof over and above the `beyond reasonable doubt' standard used at the stage of conviction, as a safeguard against routine capital sentencing, keeping in mind the irreversibility of death.
>
> 56. In Rameshbhai Chandubhai Rathod vs. State of Gujarat,12 this 12 (2011) 2 SCC 764 Court noted that reliance on merely 'plausible' evidences to prove a circumstantial chain and award death penalty would be "in defiance of any reasoning which brings a case within the category of the "rarest of rare cases"." Further, various discrepancies in other important links in the circumstantial chain as well as lack of any cogent reason by the High Court for not accepting the retraction of the confession statement of the accused was noted. Acting upon such various gaps in the prosecution evidence as well as in light of other mitigating circumstances, like the possibility that there were
>
> others involved in the crime, this Court refused to confirm the sentence of death despite upholding conviction.
>
> 57. Such imposition of a higher standard of proof for purposes of death sentencing over and above 'beyond reasonable doubt' necessary for criminal conviction is similar to the "residual doubt" metric adopted by this Court in Ashok

Debbarma vs. State of Tripura13 wherein it was noted that:

> "in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt."

> 58. Ashok Debbarma (supra) drew a distinction between a 'residual doubt', which is any remaining or lingering doubt about the defendant's 13 (2014) 4 SCC 747 guilt which might remain at the sentencing stage despite satisfaction of the 'beyond a reasonable doubt' standard during conviction, and reasonable doubts which as defined in Krishan v. State14 are "actual and substantive, and not merely imaginary, trivial or merely possible". These 'residual doubts' although not relevant for conviction, would tilt towards mitigating circumstance to be taken note of whilst considering whether the case falls under the 'rarest of rare' category.

> 59. This theory is also recognised in other jurisdictions like the United States, where some state courts like the Supreme Court of Tennessey in State vs. McKinney15 have explained that residual doubt of guilt is a valid non-statutory mitigating circumstance during the sentencing stage and have allowed for new evidence during sentencing proceedings related to defendant's character, background history, physical condition etc.

76. In the aforesaid case of ***Ravishankar*** (supra), facts were quite akin to the case in hand. The Trial Court had convicted and sentenced the accused under Section 302 and 201 of IPC as also under Sections, 363, 366, 376(2(i), 376 (2)(n), 376 (2)(j), 376 (2)(na) and 376A of IPC. The appellant was sentenced to death in respect of Section 376A of IPC. The case was based

on circumstantial evidence such as, last seen theory, recovery of incriminating articles on the basis of memorandum of accused as also DNA analysis etc. The various circumstances were found to be forming a complete chain in arriving at the conclusion of conviction. However, when it came to sentencing the accused, the Court observed as under :-

> 61. In the present case, there are some residual doubts in our mind. A crucial witness for constructing the last seen theory, P.W.5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other. Two other witnesses, P.W.6 and P.W.7 had seen the appellant feeding biscuits to the deceased one year before the incident and their long delay in reporting the same fails to inspire confidence. The mother of the deceased has deposed that the wife and daughter of the appellant came to her house and demanded the return of the money which she had borrowed from them but failed to mention that she suspected the appellant of committing the crime initially. Ligature marks on the neck evidencing throttling were noted by P.W.20 and P.W.12 and in the postmortem report, but find no mention in the panchnama prepared by the police. Viscera samples sent for chemical testing were spoilt and hence remained unexamined. Although nails' scrappings of the accused were collected, no report has been produced to show that DNA of the deceased was present. Another initial suspect, Baba alias Ashok Kaurav absconded during investigation, hence, gave rise to the possibility of involvement of more than one person. All these factors of course have no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal.
>
> 62. We are cognizant of the fact that use of such 'residual doubt' as a mitigating factor would effectively raise the standard of proof for imposing the death sentence, the benefit of which would be availed of not by the innocent only. However, it would be a misconception to make a cost-benefit

> comparison between cost to society owing to acquittal of one guilty versus loss of life of a perceived innocent. This is because the alternative to death does not necessarily imply setting the convict free.
>
> **63.** As noted by the United States Supreme Court in Herrera v. Collins,16 "it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible." However, death being irrevocable, there lies a greater degree of responsibility on the Court for an in-depth scrutiny of the entire material on record. Still further, qualitatively, the penalty imposed by awarding death is much different than in incarceration, both for the convict and for the state. Hence, a corresponding distinction in requisite standards of proof by taking note of 'residual doubt' during sentencing would not be unwarranted.
>
> 64. We are thus of the considered view that the present case falls short of the 'rarest of rare' cases where the death sentence alone deserves to be awarded to the appellant. It appears to us in the light of all the cumulative circumstances that the cause of justice will be effectively served by invoking the concept of special sentencing theory as evolved by this Court in Swamy Shraddananda (supra) and approved in Sriharan case (supra).

77. Applying the principles and the law laid down in the aforesaid judgment of **Ravishankar (supra)** as also other judgments, it shall now be considered as to whether there are any residual doubts in the case in hand.

78. On revisiting the evidence available on record, it appears that there are few lapses in the evidence gathered by the prosecution and the circumstances obtained in the case and these are as follows :-

> a) While sending the appellant for his examination, a query was made to the concerning physician to see as to whether

> there are any injuries on the person of the appellant or not. It was necessary to enquire because sexually violating a four year old girl-child would probably have caused injuries to the appellant at specific places, which would have further substantiated the prosecution case. However, the concerning physician Dr. Prabodh Joshi (PW32) has not answered the aforesaid query.
>
> b) It can be seen that the last seen theory hinges upon the statement of witness Indu (PW11). It is quite strange that this witness is the wife of Premnath (PW12) who on the next day has seen body of the girl-child. Such coincidence is quite providential and a lingering doubt arises as to whether the last seen witness has been roped in by the Investigating Officer in order to substantiate prosecution case.
>
> c) The Trial Court has not considered the factum of murder of the girl-child as rarest of rare case and only imposed life imprisonment and no appeal has been preferred by the State seeking enhancement of sentence to that of death.
>
> d) As already stated, the prosecution has failed to substantiate the newspaper cuttings regarding the criminal antecedents of the appellant by submitting proper proof thereof.

79. In view of the above, “standards of residual doubt” has not been satisfied by the prosecution although, the prosecution has been able to prove the case “beyond reasonable doubt”. Hence, we are of the opinion that 0% criminal test has not been satisfied and there are residual doubts as indicated above and these factors consequently, would result in the case falling short of “rarest of rare” category. The sentence of death imposed upon the appellant is thereby reduced from death sentence to imprisonment for life, which shall mean, imprisonment for the remainder of appellant's natural life for committing offence under Section 376A of IPC. The sentences imposed in respect

of rest of other proved penal provisions stand affirmed and consequently, the sentences as imposed against the appellant in final analysis would be as under :-

Provisions of IPC	**Sentence**
Section 363 of IPC	5 years RI with fine of Rs.2,000/-. In default on payment of fine, 2 months additional RI.
Section 366 of IPC	7 years RI with fine of Rs.3,000/-. In default on payment of fine, 2 months additional RI.
Section 376-AB of IPC	Life imprisonment till natural death with fine of Rs.4,000/-. In default of payment of fine, 3 months additional RI.
Section 5(n) r/w Section 6 of the POCSO Act	Life imprisonment with fine of Rs.4,000/-/ In default of payment of fine, 3 months additional RI.
Section 302 of IPC	Life imprisonment with fine of Rs.4,000/-. In default of payment of fine, 3 months additional RI.
Section 201 of IPC	3 years RI with fine of Rs.2,000/-. In default of payment of fine, 2 months additional RI.
Section 376-A of IPC	Life imprisonment for the remainder of his natural life.

80. All jail sentences to run concurrently.

81. The appeal filed by the appellant/accused consequently, stands dismissed on the point of conviction. However, the appeal is partly allowed on the quantum of sentence only in respect of Section 376-A of IPC. The reference is answered in above terms.

82. The order of the trial court regarding disposal of the property is maintained.

83. Let a copy of this judgment be retained in the record of Criminal Appeal No.8818/2019.

84. Office is directed to send a copy of this judgment immediately to the concerned trial court along with the record of trial court to take appropriate steps as per law.

(S.C. SHARMA) **(SHAILENDRA SHUKLA)**
JUDGE **JUDGE**

SS/-

THE HIGH COURT OF MADHYA PRADESH : BENCH AT INDORE

BEFORE DIVISION BENCH: JUSTICE S.C. SHARMA AND JUSTICE SHRI SHAILENDRA SHUKLA

Case No.	:	**CRRFC.No.12/2019 and CRA. No.8818/2019**
Parties name	:	**State of M.P. *vs.* Honey @ Kakku (CRRFC.No.12/2019) &** **Honey @ Kakku *vs.* State of M.P. (CRA. No.8818/2019).**
Date of Judgement	:	03/03/20
Bench constituted of	:	Hon'ble Justice Shri S.C. Sharma and Hon'ble Justice Shri Shailendra Shukla
Judgement delivered by	:	Hon'ble Justice Shri Shailendra Shukla
Whether approved for reporting	:	Yes
Name of counsels for the parties	:	Shri R.S. Chhabra, learned Addl. Advocate General with L.S. Chandiramani, Advocate for the Appellant/State. Shri Avinash Sirpurkar, learned Senior Advocate with Shri B. Patel, Advocate for the respondent, as *amicus curiae*.
Law laid down	:	Rape and murder of 4 ½ years of girl child by the appellant. - Sentence of death imposed by the trial Court under Section 376A of IPC. - Reference answered. Rarest of rare case :- **(i)** Standard of 100% crime test although satisfied, criminal test of 0% was not satisfied as mandated in (***Shankar Kisan Rao Khade*** *vs.* ***State of Maharashtra***, *2013 (5) SCC 546)*. **(ii)** In order to impose sentence of death the prosecution not

		only has to prove the case "beyond reasonable doubt" but also "beyond residual doubt" (***Ravishankar @ Baba Vishwakarma vs. State of Madhya Pradesh*, *2019 (4) JLJ 258***) (pronounced by 3 Judges Bench of Supreme Court). Para 69, 70, 71, 74, 73, 74 although prosecution had proved its case beyond reasonable doubt, but could not prove it beyond residual doubt. Held – Death sentence commuted to life imprisonment for reminder of appellant's natural life.
Significant paragraph numbers	:	75, 76, 77, 78 and 79