

HIGH COURT OF MADHYA PRADESH: JABALPUR**(Division Bench)****Criminal Reference No. 01 of 2018****In Reference**

[Received from Special Judge, Court of
Protection of Children from Sexual Offences Act,
District Shahdol (M.P.)]

- V/s -

Vinod alias Rahul Chouhtha.....**Respondent/Accused***With***Criminal Appeal No. 2151 of 2018****Vinod alias Rahul Chouhtha**.....**Appellant**

- V/s -

State of Madhya Pradesh
P.S. Kotwali, Shahdol (M.P.)

.....**Respondent****CORAM :**

Hon'ble Shri Justice Hemant Gupta, Chief Justice
Hon'ble Shri Justice Vijay Kumar Shukla, Judge

Present:

Shri Albert Anthony and Shri S.K. Mukerjee, Advocates for the
Appellant.

Shri Vishal Daniel, Advocate as *Amicus Curiae*.

Smt. Namrata Agrawal, Government Advocate for the respondent/
State.

Whether Approved for Reporting: Yes**Law Laid Down:**

- ✓ The opinion of an expert is admissible in evidence u/S 293 of the CrPC and therefore, cannot be discarded on the basis of books on Medical Jurisprudence unless the passages which are sought to be discredited in the opinion of the expert are put to him - *Judgments relied - AIR 1975 SC 905 (Phool Kumar vs.*

Delhi Administration) and AIR 1957 SC 589 (*Bhagwan Das and another vs. State of Rajasthan*).

- ✓ A DNA report must be accepted as scientifically accurate and is an exact science. It would be a dangerous doctrine to lay down that report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert. The Court cannot usurp the function of an expert. - *Judgment Relied - (2010) 9 SCC 747 (Santosh Kumar Singh vs. State through CBI)*.
- ✓ A positive result of DNA test would constitute clinching evidence against the accused. If, however, result of test is negative, the weight of other material evidence on record will still have to be considered. - *Judgment Relied - (2017) 4 SCC 393 (Sunil vs. State of Madhya Pradesh)*.
- ✓ The report of the doctors is based upon approximate time gap between the death and the postmortem. Therefore, the approximation of time of death is not approximation of the hours of the day as well.
- ✓ *Marg* intimation (Ex.P-3) is a prior statement given by the witness. If it was at variance with the statement made on oath, the witness was required to be confronted but in absence thereof, the statement on oath in Court would be relevant to appreciate the evidence of the prosecution.
- ✓ The prosecution evidence consisting of last seen at the time when child went missing; last seen near the vicinity of the place of crime; recovery of dead body on the basis of disclosure statement of the accused; injuries on the person of the accused as well as report of DNA, conclusively proves that it is the appellant, who has violated the victim and then killed her.
- ✓ It is an act of extreme depravity when the appellant prompted a child of four years whose only fault was that she believed the appellant to be her well-wisher. The crime against the girl child are on rise. The Court has the social responsibility to make the citizen of this country know that law cannot come to the rescue of such person on the basis of humanity. The extreme punishment may convey a message to these predators that it is not a soft State where the criminals committing such serious crimes may get reprieve in the guise of humanity. The humanity is more in danger in the hands of the persons like the appellant. In these circumstances, it is one of the rarest of rare cases where the extreme capital punishment is warranted. - *Death sentence affirmed*.

Judgements relied upon:

1. Review Petition (Crl.) No.570/2017 (Mukesh v. State of NCT of Delhi) decided on 9.7.2018.
2. (2017) 6 SCC 631 (*Vasanta Sampat Dupare vs. State of Maharashtra*)
3. (2017) 6 SCC 1 (*Mukesh and another vs. State (NCT of Delhi) and others*)
4. (2017) 4 SCC 393 (*Sunil vs. State of Madhya Pradesh*)
5. (2017) 4 SCC 124 (*B.A. Umesh vs. Registrar General, High Court of Karnataka*).
6. (2015) 6 SCC 632 (*Shabnam etc. vs. State of Uttar Pradesh*)
7. (2015) 1 SCC 253 (*Vasanta Sampat Dupare vs. State of Maharashtra*)
8. (2014) 5 SCC 509 (*Dharam Deo Yadav vs. State of Uttar Pradesh*)
9. (2014) 2 SCC 576 (*Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another*)
10. (2013) 10 SCC 421 (*Deepak Rai v. State of Bihar*)
11. (2013) 5 SCC 546 (*Shankar Kisanrao Khade vs. State of Maharashtra*)
12. (2011) 3 SCC 85 (*B.A. Umesh vs. Registrar General, High Court of Karnataka*)
13. (2010) 9 SCC 747 (*Santosh Kumar Singh vs. State through CBI*).
14. (2009) 6 SCC 667 (*Ankush Maruti Shinde v. State of Maharashtra*)
15. (2008) 11 SCC 113 (*Bantu v. State of Uttar Pradesh*)
16. (2002) 8 SCC 45 (*Bodhraj alias Bodha vs. State of Jammu and Kashmir*)
17. (1978) 4 SCC 435 (*Madan Singh vs. State of Rajasthan*)
18. AIR 1975 SC 905 (*Phool Kumar vs. Delhi Administration*)
19. AIR 1957 SC 589 (*Bhagwan Das and another vs. State of Rajasthan*)

Judgements referred to:

1. Division Bench judgment of this Court in **Criminal Reference No. 05/2015 (In Reference received from the First Additional Sessions Judge, Maihar v. Sachin Kumar Singhraha)** decided on 03.03.2016;
2. Division Bench judgment of this Court in **CRRFC No.5/2017 (In Reference Received from District & Sessions Judge, Dindori vs. Bhagwani and another)** delivered on 09.05.2018

Significant Paragraphs: 3, 6 to 10, 19 to 22, 25, 26, 28, 30, 36 to 67

Reserved on : 19.07.2018

J U D G M E N T

(Delivered on this 8th day of August, 2018)

Per : Hemant Gupta, Chief Justice:

The present Reference arises out of a judgment of conviction and order of sentence passed by the learned Special Judge (Under the Prevention of Children from Sexual Offences Act, 2012), Shahdol (M.P.) on 28.02.2018 thereby convicting respondent Vinod alias Rahul Chouhtha for an offence under Section 302 of the Indian Penal Code, 1860 (for short "the IPC") and sentencing him to death by hanging. The said respondent has been further convicted under Section 376A of IPC and sentenced to imprisonment for life and also convicted under Section 5/6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to undergo life imprisonment. All sentences were ordered to run concurrently.

2. The convict has filed Criminal Appeal No.2151/2018 against the said judgment. Therefore, both the reference and appeal are taken up for final hearing together.

3. The first information report (Ex.P-1) was lodged at 1.59 a.m. on 14.05.2017 in respect of missing of the daughter of Kallu Kahar between 9 a.m. to 9.10 a.m. on 13.05.2017. The statement is that he has two children; one girl aged four years and a boy aged two years. He had gone to work in village Jaithari but at about 11 a.m. on 13.05.2017 his wife Smt. Geeta Kahar phoned him to say that his daughter has gone missing at about 9 a.m. He came back and tried to locate their daughter along with his wife.

Since they were not successful in locating the child, it was apprehended that she has been kidnapped by alluring. She was wearing a frock of blue colour; knew the name of her parents; her face is round; whitish colour and hair small. Such report was recorded by Shri Vedmani Sharma, Head Constable.

4. On the basis of such report, a missing person report (Ex.P-2) was lodged at about 2.14 a.m. PW-19 Rakesh Mishra is the person who was working as Assistant Sub-Inspector in Police Station Kotwali, Shahdol. He, in witness box, deposed that at about 23.30 hours, Kallu Kahar reported the missing report of his daughter but such report was typed and uploaded on computer, therefore, time of lodging of report is mentioned as 1.59 a.m., but, in fact, it was received at 23.30 hours. On the basis of such report (Ex.P-1) in *Rojnamcha*, a missing person report was lodged on computer, which is Ex.P-2. The entry in *Rojnamcha Sanha* is at Serial No.74 whereas the computer printout is Ex.P-23. Copy of Ex.P-1 was sent to the concerned Court, which stands acknowledged.

5. PW-21 is Rajni Nagbhire, Sub-Inspector, Police Station Kotwali, Shahdol, who was entrusted with the investigation. She started investigation at 9.30 a.m. on 14.05.2017 and joined the parents of the girl in investigation. She prepared the site plan (Ex.P-10) as per the statement of Geeta Kahar, mother of the girl. On the same day, she recorded the statement of the landlady Beti Bai, where the parents of the girl were tenants. On her statement, it was found that there is one person by the name of Vinod, who offered chocolate biscuit etc. to the girl and took her with him. It was also found that a boy called Kailash has seen the girl and

the said person walking together. The boy Kailash was searched in the area of bus stand and it was found that he was working on the shop of a shoemaker. He disclosed that he can identify the person with whom he has seen the girl. Kailash also informed her that he had asked the girl as to where she was going. The said person was taking the girl towards the petrol pump.

6. During the investigations, it was found that the person with whom the girl has gone is Vinod, who can be identified by Kailash. She went to the house of Vinod on 14.05.2017 but came to know that he has gone out. On 15.05.2017, she went to the house of the accused with Kailash but was informed that he can be found out near the petrol pump. She came towards the petrol pump along with her staff and witness Kailash. They found that accused was standing in front of the house of Nagendra Singh. Kailash identified him that he is the same person who had accompanied the girl. The accused was arrested and investigated. Near the petrol pump is a place called *Gheebada* and that occurrence has taken place in the said *Gheebada*. On investigation, he informed the complete sequence of events and that he has purchased a biscuit and toffee from a shop and then taken the girl to bus stand. He informed that he has concealed the dead body of the girl near the wall of *Chheula* shrub and that he can get it recovered. Memorandum Ex.P-13 was recorded in the presence of witnesses Munna Kahar and Deepbahadur. The accused took the team to the place where he had kept the dead body concealed. He removed the leaves of *Chheula* and then they could see the dead body of the girl. The dead body was taken in possession vide Ex.P-14. She called the parents of the deceased, who identified the

dead body of their daughter. She prepared the identification memo of dead body in the presence of Deepak Gupta and Raja Choudhary, which is Ex.P-6. She recorded the information of death Ex.P-3. The distance of petrol pump to *Gheebada* is about 100-200 meters.

7. Kamlendra Singh Karchuli (PW-22) is the Station House Officer of Police Station Kotwali, Shahdol. He reached the place of occurrence at around 12.00 noon on 15.05.2017. He stated that Rajni Nagbhire (PW-21) has interrogated the accused in his presence. He has prepared the site plan (Ex.P-7). The dead body was taken in possession after giving notice Ex.P-4. He found that the eyes of the deceased were protruding and there were injuries on her neck. The genital area of the victim was seriously injured and had maggots. From the dead body it transpired that the child was killed in the process of rape. The dead body was sent for postmortem examination vide memo Ex.P-16. The accused was arrested vide memo Ex.P-15 and was sent for medical examination vide request Ex.P-24. He also requested for a sample for DNA profile of the accused vide Ex.P-25. On 16.05.2017, he sent request for DNA profile of the accused to the Superintendent of Police, Shahdol vide Ex.P-26, which was granted by the Director General of Police, Shahdol vide Ex.P-27. The accused was produced before the doctor in the Civil Hospital. The technician has drawn blood sample of Vinod alias Rahul Chouhtha after identifying him. The identification form is Ex.P-12. The blood sample for DNA profile was sent to the Superintendent of Police, Shahdol vide Ex.P-28, which bears the signature of Shri Shivkumar Varma, In-charge Superintendent of Police, who has signed in his presence. The pubic hair of the accused was sent to

Forensic Science Laboratory, Sagar; the report is Ex.P-29. Apart from the blood sample of the accused, the underwear of deceased, vaginal slide of deceased, underwear and semen slide of the accused and blood sample of the accused were sent vide Ex.P-21 to the Forensic Science Laboratory, Sagar. The report is Ex.P-30. Ex.P-31 is request to Patwari to prepare the site plan. During the investigation, the statements of Munna Kumar, Amit Gole, Satyavandan Kushwaha, Smt. Seeta Bai, Smt. Beti Bai, Suresh Kumar Dubey and Sonu alias Harun Rashid Khan were recorded under Section 161 of the Criminal Procedure Code, 1973 (in short "the CrPC").

8. The postmortem on the dead body of the victim was conducted by Dr. B.R. Prajapati (PW-9) and Dr. Nisha Chaturvedi (PW-10). As per the postmortem report (Ex.P-16A), the following injuries were found on the body of the deceased:

- "(i) Rigor Mortis passed off.
- (ii) Body is in stage of decomposition, with whole body swollen and decomposition.
- (iii) Bullous eruption present over the body.
- (iv) Epidermal layer of skin peeled off at places.
- (v) Eyes are protruding and maggots crawling over the body. Foul smelling present.
- (vi) Two deep lacerated wound seen, one in the anterior aspect of neck below.
- (vii) The mandible 5 x 3 x 2 cm trachea is exposed. Muscles torn. Maggots crawling over the wound, another wound behind the right side pinna 4 x 2 x 1 cm. Maggots present & crawling over the wound.
- (viii) Vaginal orifice wide open with early decomposition changes with swollen vulva with maggots present inside the vagina.

On internal and external examination of private part, it was observed as under:-

"Vaginal orifice wide open, vagina admitting two finger. Hymen completely torn, maggots present in vaginal cavity. Skin around vulva is in early stage of decomposition. However, two slide prepared from vaginal secretion sealed packet and handed over to police constable for chemical analysis. Black coloured underwear with white strips also sealed packed and handed over to police constable for chemical analysis. Opinion - signs of hyminal penetration present."

According to the doctors, a black coloured underwear with white strips and two slides prepared from vaginal secretions in sealed packets were handed over to the constable for chemical analysis. In the opinion of Dr. B.R. Prajapati (PW-9) and Dr. Nisha Chaturvedi (PW-10), the cause of death is injury to the anterior cervical structure (trachea) leading to asphyxia resulting into death. The duration elapsed after death is 2-3 days.

9. Ex.P-18 is the seizure memo of semen slide of the accused received from hospital in sealed packet; underwear of the accused in a sealed packet; pubic hair of the accused in a sealed packet; the blood sample of the accused in a sealed packet along with sample seal of Dr. S.D. Kanwar. Ex.P-19 is the seizure memo of the articles of the victim including the underwear of the deceased in a sealed packet; vaginal slide of the deceased; and sample seal of Dr. Nisha Chaturvedi. The requests were sent by the Superintendent of Police, Shahdol vide Ex.P-20 and Ex.P-21 for forensic science examination. Ex.P-29 is the report of State Forensic Science Laboratory, Sagar. The pubic hair of the accused were not found with any traces of semen whereas the DNA report is Ex.P-30. The report has been prepared on the basis of organic and automated DNA extraction

method. Out of the DNA received for the purposes of examination, amplification of required 24 autosomal genetic marker was done with Global Filer Kit through Multiplex PCR process and amplification of required Y Chromosome Genetic marker was done with Y Filer Plus Kit. In this manner, Genotyping profile of amplified DNA was prepared with Genetic Analyzer. The results were prepared by GeneMapper Software ID-X 1.5. Articles 'A' and 'B' are underwear and vaginal slide of the deceased whereas articles 'C' and 'D' are blood sample and underwear of the accused. Out of 24 classifications of DNA sample of the accused, there was corresponding matching of 10 allelomorph on the underwear of the girl whereas 10 allelomorph on the vaginal slide were matching from the DNA blood sample of the accused. The notes on such report are that semen slide of the accused was not taken for consideration; male mixed autosomal STR DNA profile was not detected from the source of Article 'A' and 'B'; mixed autosomal STR DNA profile was not detected from the source of Article 'D'; and that highly decomposed materials were found on the source of Article 'A' which was not a suitable exhibit for DNA examination.

10. On the basis of the report as mentioned above, it was concluded that underwear and vaginal slide of the deceased has male DNA profile whereas Y-chromosome was found on the underwear and blood sample of the same person. It was, thus, concluded that on the basis of underwear marked 'A' and vaginal slide marked 'B' and the partial male chromosome found in the DNA profile of the accused Article 'C' and DNA profile on account of similarity in the allele, the accused cannot be absolved of the allegations.

11. The Investigating Officer completed the investigation by recording the statement of witnesses under Section 161 of the CrPC and after completion of the other formalities made the accused to stand trial.

12. In the course of trial, the prosecution examined Beti Bai as PW-13, the landlady of the house of the parents of the deceased; PW-8 Amit Gole aged 17 years; and PW-2 Kailash - a child of 9 years, as the witnesses, who have seen the deceased in the company of the accused going from her house around 9 a.m. on 13.05.2017. The prosecution also relied upon recovery of dead body on the basis of disclosure statement of the accused Ex.P-13 recorded at 11.50 a.m. whereas dead body was recovered at 12.10 noon vide memo Ex.P-14.

13. The prosecution also relies upon statement of PW-5 Munna Kumar Gupta, PW-11 Harun Rashid alias Sonu Khan, PW-12 Satyavandan Kushwaha, as the witnesses who have seen the deceased with the appellant near the petrol pump going towards *Gheebada* i.e. the place of occurrence. The prosecution also relies upon DNA matching vide report Ex.P-30. The prosecution also relies upon injuries on the person of the accused as per medico-legal report Ex.P-11 proved by Dr. S.D. Kanwar (PW-4), who examined the accused on 16.05.2017. The report is that smegma was present on the glans penis; there were multiple abrasions present on the penis of the accused which were between 1 to 4 days old and that his both the knees have abrasion 2 cm x 1 cm.

14. The prosecution also examined Kallu Kahar, father of the girl as PW-1 and Geeta Kahar, mother of the girl as PW-3.

15. The *marg* intimation in terms of Section 174 of the CrPC was recorded on 15.05.2017 at 12.35 p.m. on the statement of Kallu Kahar (PW-1). The statement is that he is the resident of Ward No.18, Balpurva and that his four years old daughter went missing on 13.05.2017. He has lodged a report in Police Station Kotwali. He and his wife reached *Gheebada* and there, under the tree of *Chheula* (a shrub having big leaves) they found dead body of their daughter. The dead body had maggots and that it was lying under the tree of *Chheula*. On the basis of such statement, a report was recorded.

16. With this background, the argument of the learned counsel for the appellant/accused is as under:-

- (i) That, the *marg* intimation (Ex.P-3) is recorded at 12.35 p.m. in respect of the occurrence which is said to have taken place between 13.05.2017 from 9.00 a.m. till 12.10 p.m. on 15.05.2017. A reading of such statement would show that dead body was not recovered on the statement of the accused as there is no indication that the police or the accused led them to the place of occurrence but the statement is that they reached *Gheebada* while searching for their daughter. Therefore, the document Ex.P-3 creates doubt on the correctness of prosecution story of recovery of dead body on the statement of accused vide memo Ex.P-13.
- (ii) Rajni Nagbhire (PW-21) has stated in her cross-examination that the accused was evasive but when she asked with force (जोर जबरदस्ती), the accused gave the entire sequence of events.

It is argued that the use of force by the police means only one thing that he was beaten, which probably led to disclosure statement. Therefore, disclosure statement is not a voluntary act but is a statement extracted from him.

- (iii) It is argued that the entire story of the prosecution is based upon circumstantial evidence but the circumstances do not conclusively lead to sexual assault and murder by the appellant. The prosecution has based its conclusion on presumptions, which are not leading conclusively to the commission of crime by the appellant.
- (iv) It is also argued that last seen evidence of the prosecution of accused having been seen near the place of residence of parents of the deceased is a weak type of evidence, as somebody else had the opportunity to take the girl and to commit the crime. Similarly, the statement of the witnesses who have seen the deceased with the accused near the place of occurrence suffer from same infirmity.
- (v) It is contended that Note 2 on the DNA Report (Ex.P-30) is that male mixed autosomal STR DNA profile was not detected from the underwear and vaginal slide of the deceased. Such STR DNA profile was not detected from the underwear of the accused as well. Therefore, the conclusion drawn by the expert that recovery of partial male Y-Chromosome on the underwear and vaginal slide of the deceased and Y-Chromosome from the blood sample of the accused is proved

to be of same allele group, does not lead to the commission of crime by the appellant.

- (vi) Lastly, the learned counsel for the appellant has argued that as per postmortem examination report Ex.P-16(A), duration elapsed after death is 2-3 days. The postmortem was conducted on 15.05.2017 at about 2.10 p.m., therefore, the time of occurrence is afternoon of 13th of May, 2017 whereas, the prosecution evidence is that the child went missing at about 9 a.m. Therefore, timing of death does not correlate with the time of missing of the child.

17. On the other hand, learned counsel for the State argued that the *marg* intimation (Ex.P-3) was recorded on 15.05.2017 at 12.35 p.m. whereas the dead body was already recovered on the basis of disclosure statement (Ex.P-13) recorded at 11.50 a.m. Since the statement is of an illiterate person, who was in shock on account of missing of her daughter, therefore, the fact that he has stated that he and his wife reached *Gheebada* trying to search their daughter, does not mean that the dead body was found out by the father of the girl. It is also pointed out that the prosecution case is based upon last seen evidence of PW-13 Beti Bai - the landlady of the house of the parents of the girl, PW-8 Amit Gole - a boy aged 17 years, PW-2 Kailash Singh Paraste - a child of 9 years. Such witnesses have deposed that they have seen the deceased in the company of the accused at around 9 a.m. The second set of last seen evidence is of PW-5 Munna Kumar Gupta and PW-12 Satyavandan Kushwaha, who have seen the deceased along with the appellant near *Gheebada* opposite Dadhibal Petrol

Pump whereas another witness PW-11 Harun Rashid alias Sonu Khan has seen the deceased in the company of accused in the waiting room of New Bus Stand. The witnesses have also deposed about the clothes worn by the child at that time. The prosecution has also proved the recovery of the dead body on the statement of the accused (Ex.P-13) whereas the memo of recovery of dead body is Ex.P-14 recorded on 15.05.2017 at 12.10 p.m. The dead body was concealed under the leaves of *Chheula*. It was explained that shrubs of *Chheula* have big leaves which are used for serving food as well. Since the dead body was concealed under the leaves, therefore, such body could not be recovered by chance except on the pointing out by the person, who has kept it concealed. Apart from the said fact, the accused has injuries on his person including on penis and knees. Even Smegma was present. It is argued that the accused was not married, therefore, presence of Smegma is indicative of the fact that the accused has involved himself into sexual intercourse. Y-chromosome was found on the underwear of the deceased and her vaginal slide and such Y-chromosome matches with Y-chromosome found on the blood sample and underwear of the accused. Still further, the accused in his statement recorded under Section 313 of the CrPC, in respect of question No.145 has stated that he had gone to attend a wedding at Naurajobad and that he was not present in the village. He has not committed any crime. On account of enmity the false case has been registered. Earlier in respect of question No.143, the answer is that on account of dispute relating to use of water, the witnesses have enmity against him. It is argued that there is no suggestion that any of the witnesses have any enmity on account of water dispute nor has the

accused produced evidence that he went to Naurajobad for attending the wedding.

18. In this background, we consider the evidence produced by the prosecution.

19. Beti Bai (PW-13) is the landlady of the house in which the parents of the deceased were residing. She has deposed that a month before giving of the statement on 06.07.2017, the parents of the deceased had gone to work at Anooppur leaving the child with her. The child had a tea and biscuit and was playing in the courtyard. At 9.00 a.m., she has seen Vinod sitting on the steps of house of Guptaji, which is opposite her house. The child was playing outside at that time. She went inside and started washing clothes. At about 9.30 a.m. when she came out, she did not find the child. She found that two boys were standing there and one of them told her that the child was taken by Vinod. She tried to locate the child towards *Aanganwadi* but remained unsuccessful. At about 11.00 a.m. mother of the child came back from work and they tried to locate the child but were unable to do so. In her cross-examination, no question was put that two boys have not informed her about the fact that the girl was seen with appellant Vinod. Such two boys have been examined by the prosecution as well.

20. PW-8 is Amit Gole, aged 17 years. The Court has satisfied itself about the capacity of the child to be a competent witness. He deposed that at about 8.30 a.m., he was at his house. The house of the accused is at about 10 steps from his house. He has seen the accused going towards the

house of child. The child used to stay in the house of Beti Bai along with her parents on rent. At about 9.30 a.m., Beti Bai came and they unsuccessfully tried to locate the child. In cross-examination, he admitted that the street in front of his house is used by the accused as well as other persons of the locality. He told the police that Beti Bai came to his house to find out the child. He stated that he cannot give the reasons as to why such fact is not mentioned in his statement under Section 161 of the CrPC.

21. PW-2 is Kailash Singh Paraste, aged 9 years. After recording satisfaction that he is competent to be a witness, his statement was recorded. He deposed that about one month back he was riding his bicycle near the bus stand. He saw the deceased with the accused. Both were sitting on a platform. He asked the child as to where is she going. She stated that she is going to the house of *Nanna*. At that stage, the accused and the child went away. The accused had caught hold of the child and had gone towards *Gheebada*. He then followed him up to the petrol pump. He heard that child was crying for mother and that accused was pulling her towards *Gheebada*. Such occurrence has taken place at about 11 a.m. when he has seen the accused with the girl going towards *Gheebada*. In cross-examination, he denied the suggestion that he knew the accused for 2-3 years and that he has not told anybody that the accused has taken the child towards *Gheebada*. He stated that he told the parents of the child when they came searching for her. On his information, the parents have gone half way towards *Gheebada*. He deposed that the police prompted him to give statement and that he is giving the statement as prompted by the police. He denied the suggestion that he has not seen the accused going along with the

child and that he cannot identify the person who has taken the child with him.

22. The argument of the learned counsel for the appellant was that PW-2 Kailash is a tutored witness, as admitted by him; therefore, his testimony is not of a reliable and truthful witness. But, we find that the testimony of the witness has not been shattered in cross-examination, which is a potent method of discrediting a witness. Therefore, the statement that he is deposing as such as told by the police, is not of material consequence. His presence near the residence of the accused and the child is not disputed. He denied the suggestion that he knows the accused for 2-3 years but another suggestion is that he does not identify the person, who has taken the child with him. It, thus, transpires that the cross-examination is not in a coherent manner to discredit the testimony of the witness.

23. Ex.P-8 is the site plan prepared by Patwari, Shri Satyanarayan Mishra who has been examined as PW-23. Such site plan is attested by Kallu Kahar (PW-1) and Munna Kumar (PW-5), apart from Kallu Kushwaha, Ganga Gupta and Bhimsen Sahu. Ex.P-10 is the site plan prepared by PW-21 Rajni Nagbhire in respect of the house of the victim, landlady Beti Bai and house of Shankar Gole, father of Amit Gole (PW-8). All the houses are in the near vicinity.

24. Ex.P-13 is the disclosure statement recorded by PW-21 Rajni Nagbhire, Sub-Inspector, Police Station Kotwali, District Shahdol on 15.05.2017 at 11.50 a.m. in the presence of Munna Kumar (PW-5) and Deepbahadur Singh (PW-6). The accused stated that he can get the dead

body recovered. On the basis of such statement, the dead body was recovered vide Memo Ex.P-14 again in the presence of Munna Kumar and Deepbahadur at 12.10 p.m. Such statements are proved by PW-21 Rajni Nagbhire and also by PW-5 Munna Kumar Gupta and PW-6 Deepbahadur Singh.

25. The witnesses of recovery memo have supported the disclosure statement and the recovery made in pursuance of such disclosure statement. The Supreme Court in a judgment reported as **(1978) 4 SCC 435 (Madan Singh vs. State of Rajasthan)**, held that if the evidence of the investigating officer who recovered the material objects is convincing, the evidence as to recovery need not be rejected on the ground that seizure witnesses do not support the prosecution version. In the case in hand, the witnesses of the seizure memos have supported the prosecution story completely.

26. Munna Kumar Gupta (PW-5) has stated that he has an auto repairing shop opposite Dadhibal Petrol Pump. At about 11 to 12 noon on 13.05.2017, he went to ease himself in an open park called *Gheebada*. At that time, he saw the accused present in the court along with child of about four years roaming around near *Mahua* tree. He did not find it suspicious as he thought that somebody along with his child must be roaming about. On 15.05.2017, police came with the accused in *Gheebada* near the *Mahua* tree. At that time, the accused told the police that he has kept the dead body concealed under the *Chheula* tree near boundary wall. He is a witness to such disclosure statement. He deposed that a foul smell was coming from the dead body and that the child was wearing T-shirt and underwear. Her

eyes were protruding and there was injury in her thigh. He deposed that photographs article A-2 to A-5 are the photographs of the child, who was found with the injuries at the instance of the accused. In cross-examination he deposed that police has recorded his statement after two days of the occurrence i.e. on the day when the dead body was recovered. He admitted that on 13.05.2017 when the accused was seen in the company of the child, he had no idea about the name of the accused. He deposed that the place where he went to ease himself is about 200 meters from the tree of *Mahua*. He deposed that there was no test identification. He identified the accused when he was brought to the place of occurrence. He again disclosed that the age of the boy, who was with the child could be 25-26 years. The police and the accused were present in *Gheebada* on 15.05.2017 and in their presence some other people came. He denied that police knew that the dead body is lying there and that police has already recovered the dead body. He denied about the information of location of Sarkar Petrol Pump. The petrol pump which is in front of his shop is called Dadhibal Petrol Pump. The other petrol pump behind the bus stand is about half-a-kilometer. He denied that he knows any Sarkar Petrol Pump. He denied the suggestion that the police has taken out the dead body by themselves. He asserted that the accused has removed the leaves to take out the dead body.

27. PW-6 is Deepbahadur Singh, the other witness of last seen and of recovery of the dead body. He deposed that the accused gave statement that he has kept the dead body concealed near the wall under the tree of *Chheula*. The police had taken the accused near the tree of *Chheula* and the accused removed the leaves to take out the dead body. He deposed that the

arrest memo Ex.P-15 was prepared in his presence. He also identified the photographs A-2 to A-5 as the photographs, which were taken at the time of recovery of the dead body. In the cross-examination, he stated that he was not familiar with the accused and that he was getting his auto-repaired from a shop of auto-mechanic at a distance of 20-25 steps from the place of recovery of dead body. When he reached there, 10-20 people were already present. He denied the suggestion that the police have taken the dead body before he reached the place of occurrence. Sarkar Petrol Pump is at a distance of 200 meters. He stated that the dead body was like a burnt body and this was of a girl.

28. PW-11 is Harun Rashid alias Sonu Khan. He is familiar with the accused and also with the deceased. He deposed that on 13.05.2017, he has gone to new bus stand at about 10.30 - 11.00 a.m. He works for a newspaper and that he has gone for coverage of news. He has seen the accused along with a girl child in the waiting room of the bus stand where. Child was eating something. The accused wished him but he went to his work. On 15.05.2017, at about 12.00 noon he came to know that in Shahdol near *Gheebada*, dead body of a child has been recovered. He has seen the accused standing with the police officials. After seeing the accused and the dead body he could identify that the accused and the child are the same whom he has seen on 13.05.2017 in the waiting room of the new bus stand. He stated that he does not remember exactly but the T-shirt on the dead body was the same, which was worn by the child while sitting in the waiting room. In cross-examination, he stated that he did not know the child before 13.05.2017. He denied the suggestion that he has not seen

the child on 13.05.2017 and that he was not familiar with the accused. He has taken the photographs of the dead body. He denied the suggestion that from the smell emanating from the dead body; anybody could find out that there is a dead body. The photographs taken by him could make out that it was a dead body of a girl child. He denied the suggestion that he has not gone to *Gheebada* on 15.05.2017 and that he has not seen the child on 13.05.2017 at the new bus stand. He has also denied the suggestion that he has not taken the photographs.

29. PW-12 Satyavandan Kushwaha is a car mechanic whose workshop is near the bus stand. He knows the appellant/accused present in court. He deposed that on 13.05.2017 when he was standing with one of his friend at about 10.30 - 11.00 a.m. he saw the accused roaming about with one child aged about 4-5 years in *Gheebada* near Dadhibal Petrol Pump. On 15.05.2017, the people had gathered near *Mahua* tree in *Gheebada* where the police force was also there. When he reached near the place of occurrence, he saw the accused was standing with the police and was pointing out the place of dead body of the child. He saw that the dead body of the child was near the wall and the accused himself led them to that place. He deposed that the dead body was of the same child, who was seen in the company of the accused on 13.05.2017 as the child was wearing the same clothes as were on the dead body when the accused was roaming about with the same girl child. In cross-examination, he denied that he has seen the accused and the deceased from a distance. As per the witness, he has seen from a distance of 40-50 feet and the age of the boy who was seen at that time must be around 22-24 years. He denied the suggestion that he

has not seen the girl with the accused near *Mahua* tree and that accused has not pointed out the place of the dead body being kept in concealed position.

30. From the testimony of Satyavandan Kushwaha (PW-12) it transpires that the accused was seen with the deceased near the place of occurrence. The deceased was wearing the same clothes in which her dead body was found. All the witnesses have their work place close to the place of occurrence and their presence is natural. It has not been suggested that any of the witness was not present near the place of occurrence or had some other motive to depose against the appellant. Thus, the evidence that the deceased was seen with the appellant near her place of residence at about 9.00 a.m. and later near the place of occurrence, at around 10.30 - 11.00 a.m. by three other witnesses, namely, Munna Kumar Gupta (PW-5), Harun Rashid alias Sonu Khan (PW-11) and Satyavandan Kushwaha (PW-12) wearing the same clothes, which were on the dead body, shows that the deceased remained in the company of the accused till her death from the time she was allured near the place of her residence. In this regard, reference may be made to a Supreme Court judgment rendered in **Bodhraj alias Bodha and others vs. State of Jammu and Kashmir, (2002) 8 SCC 45**, wherein, it has been held that circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed. It is apt to reproduce the relevant extracts of the said judgment, which read, thus:

"9. Before analyzing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or *factum probandum* may be proved indirectly by means of certain inferences drawn from *factum probans*, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the existence of the principal fact can be legally inferred or presumed.

14. Sir Alfred Wills in his admirable book *Wills' Circumstantial Evidence* (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the *factum probandum*, (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability, (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits, (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

31. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that accused and deceased were last seen together, it would be hazardous to come to a

conclusion of guilt in those cases. In this case there is positive evidence that deceased, A-1 and A-2 were seen together by witnesses. i.e. PWs 14, 15 and 18; in addition to the evidence of PWs 1 and 2."

31. Apart from such eye witnesses account in respect of last seen near the place of residence of the victim and then near the place of recovery of dead body, the veracity of which could not be shattered in the cross-examination, the prosecution has led the scientific evidence as well.

32. Dr. B.R. Prajapati (PW-9) and Dr. Nisha Chaturvedi (PW-10), who conducted the postmortem examination on the person of the deceased, have deposed that the child was molested in a brutal manner. The hymen was completely ruptured and there was sign of disbandment outside the genital part of the deceased. Medical report and testimonies of these two doctors have clearly established the brutal manner for commission of rape with the deceased, who was an infant child, as the internal organ of the deceased was damaged in a most savage and inhuman manner, that caused grave injuries, which ultimately annihilated her life. The acts of the accused *per se* demonstrate mental perversion and inconceivable brutality. The samples of the blood, vaginal slide and the clothes of the deceased were taken in possession by the said doctors.

33. Kamlendra Singh Karchuli (PW-22) is the Station House Officer of Police Station Kotwali, Shahdol. He reached the place of occurrence at around 12.00 noon on 15.05.2017. He stated that Rajni Nagbhire (PW-21) has interrogated the accused in his presence. He has prepared the site plan (Ex.P-7). The dead body was taken in possession after giving notice Ex.P-4. He found that the eyes of the deceased were protruding and there were

injuries on her neck. The genital area of the victim was seriously injured and had maggots. From the dead body it transpired that the child was killed in the process of rape. The dead body was sent for postmortem examination vide memo Ex.P-16. The accused was arrested vide memo Ex.P-15 and was sent for medical examination vide request Ex.P-24. The pubic hair were sent to FSL Sagar vide Ex P-20 on 20.5.2017; sealed packet of underwear of the deceased, sealed packet of vaginal slide, sample blood of the accused, underwear of the accused and semen slide of the accused were sent to FSL, Sagar vide Ex P-21. Ex P-22 is the receipt dated 17.5.2017 by the FSL, Sagar of the Articles sent on 16.5.2017. The pubic hair of the accused were sent to Forensic Science Laboratory, Sagar; the report is Ex.P-29. Such report is that no semen was found in the samples sent.

34. PW-22, Kamlendra Singh Karchuli, also requested for a sample for DNA profile of the accused vide Ex.P-25 on 16.5.2017. The witness also sought permission of the Superintendent of Police, Shahdol on 16.05.2017 vide Ex.P-26 for DNA profile of the accused. Such request was forwarded to Director General of Police on 16.5.2017 itself by the Superintendent of Police, Shahdol vide Ex.P-27.

35. The accused was produced before the doctor in the Civil Hospital for blood sample. The identification form is Ex.P-12., which bears signatures, thumb impressions and photograph of the accused. Such form has two witnesses one of them is PW-22. The technician has drawn blood sample of Vinod alias Rahul Chouhtha after identifying him. The blood sample for DNA profile was sent after certification by the Superintendent

of Police, Shahdol vide Ex.P-28 on 16.5.2017 bearing the signature of Shri Shiv Kumar Varma, In-charge Superintendent of Police. The report is Ex.P-30.

36. The clothes of the deceased and the underwear and the blood sample of the accused were subjected to DNA examination. The Y-Chromosome from 24 DNA profile of the accused have matched with 10 DNA profile from the underwear of the deceased and 10 alleles have matched with the Y-Chromosomes found on the blood sample of the appellant. The conclusion of the Forensic Science Laboratory is that it is the accused who has committed offence against the victim.

37. The argument of the learned counsel for the appellant is that the report of DNA is not categorical so as to link the appellant with the crime. We do not find any merit in such argument. Forensic Science Experts, Dr. Hirak Ranjan Dash and Dr. Anil Kumar Singh who have given the report Ex.P-30 were not called as witness to stand the cross-examination, therefore, in terms of Section 293 of the CrPC, the report is not open to question as the defence had the opportunity to cross-examine the expert. However, the argument of the learned counsel for the appellant proceeds on the basis that even the report does not prove that the crime has been committed by the appellant. We have examined the argument raised by the learned counsel for the appellant.

38. The Supreme Court in **Phool Kumar vs. Delhi Administration**, AIR 1975 SC 905, has held that the report of an expert is admissible in evidence under Section 293 of the CrPC and can be doubted only by cross-

examination of the witness. In a judgment reported as **Bhagwan Das and another vs. State of Rajasthan, AIR 1957 SC 589**, the Supreme Court held that the opinion of an expert cannot be discarded on the basis of books on Medical Jurisprudence unless the passages which are sought to be discredited in the opinion of the expert are put to him. The Court held as under:-

"13. The learned Sessions Judge was of the opinion that the evidence of the doctor P. W. 11 made the story that Shivilal could walk for a little distance upto the Khala of Hukma or was able to talk so as to make a dying declaration, improbable. But the learned Judges of the High Court disposed of this matter by saying that the doctor was comparatively young and that his statement was not in accord with the opinion expressed in books on Medical Jurisprudence by authors like Modi and Lyon. But it cannot be said that the opinions of these authors were given in regard to circumstances exactly similar to those which arose in the case now before us nor is this a satisfactory way of disposing of the evidence of an expert unless, the passages which are sought to discredit his opinion are put to him. This Court in *Sundarlal v. State of Madhya Pradesh, A.I.R. 1954 S.C. 28(A)*, disapproved of Judges drawing conclusions adverse to the accused by relying upon such passages in the absence of their being put to medical witnesses. The learned Judges of the High Court were, therefore, in error in accepting the testimony of these witnesses in support of the correctness of the two dying declarations nor could the statement of the deceased alleged to have been made in the circumstances of this case be considered sufficient to support the conviction of the accused. The recovery of the kassi is a wholly neutral circumstance because it has not been proved that it belonged to Bhagwandas."

39. The Supreme Court in the case of **Dharam Deo Yadav vs. State of Uttar Pradesh, (2014) 5 SCC 509** noticed the dilemma that many a times reliable, trustworthy, credible witnesses to the crime seldom come forward to depose before the court and even the hardened criminals get away from

the clutches of law. Therefore, the Judiciary should be equipped to understand and deal with the forensic science which is free from the infirmities. The Court held as under:-

"Expert scientific evidence:

31. Scientific evidence encompasses the so-called hard science, such as physics, chemistry, mathematics, biology and soft science, such as economics, psychology and sociology. Opinions are gathered from persons with scientific, technical or other specialized knowledge, whose skill, experience, training or education may assist the Court to understand the evidence or determine the fact in issue. Many a times, the Court has to deal with circumstantial evidence and scientific and technical evidence often plays a pivotal role. Sir Francis Bacon, Lord Chancellor of England, in his *Magnum Opus* put forth the first theory of scientific method. Bacon's view was that a scientist should be disinterested observer of nature, collecting observations with a mind cleansed of harmful preconceptions, that might cause error to creep into the scientific record. Distancing themselves from the theory of Bacon, the US Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 125 L Ed 2d 469::509 U.S. 579 (1993), held as follows:-

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

DNA and identity of skeleton

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

36. The DNA stands for deoxyribonucleic acid, which is the biological blueprint of every life. DNA is made-up of a double standard structure consisting of a deoxyribose sugar and phosphate backbone, cross-linked with two types of nucleic acids referred to as adenine and guanine, purines and thymine and cytosine pyrimidines. The most important role of DNA profile is in the identification, such as an individual and his blood relations such as mother, father, brother, and so on. Successful identification of skeleton remains can also be performed by DNA profiling. DNA usually can be obtained from any biological material such as blood, semen, saliva, hair, skin, bones, etc. The question as to whether DNA tests are virtually infallible may be a moot question, but the fact remains that such test has come to stay and is being used extensively in the investigation of crimes and the Court often accepts the views of the experts, especially when cases rest on circumstantial evidence. More than half a century, samples of human DNA began to be used in the criminal justice system. Of course, debate lingers over the safeguards that should be required in testing samples and in presenting the evidence in Court. DNA profile, however, is consistently held to be valid and reliable, but of course, it depends on the quality control and quality assurance procedures in the laboratory. Close relatives have more genes in common than individuals and various procedures have been proposed for dealing with a possibility that true source of forensic DNA is of close relative. So far as this case is concerned, the DNA sample got from the skeleton matched with the blood sample of the father of the deceased and all the sampling and testing have been done by experts whose scientific knowledge and experience have not been doubted in these proceedings. We have, therefore, no reason to discard the evidence of PW19, PW20 and PW21. Prosecution has, therefore, succeeded in showing that the skeleton recovered from the house of the accused was that of Diana daughter of Allen Jack Routley and it was none other than the accused, who had strangulated Diana to death and buried the dead body in his house.

37. The accused, in his examination under Section 313 CrPC, had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in Section 313 CrPC statement may

offer an additional link in the chain of circumstances to complete the chain. See *Anthony D'souza v. State of Karnataka (2003) 1 SCC 259*. We are, therefore, of the considered view that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence in this case and correctly recorded the conviction and we are now on sentence. "

40. The Supreme Court in a judgment reported as **(2010) 9 SCC 747 (Santosh Kumar Singh vs. State through CBI)** has held that DNA report must be accepted as scientifically accurate and is an exact science. It is further held that it would be a dangerous doctrine to lay down that report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert. The court cannot usurp the function of an expert. The relevant extracts of the said decision are reproduced as under:-

"68. It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of textbooks and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In *Bhagwan Das vs. State of Rajasthan AIR 1957 SC 589* it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text being put to the expert.

71. We feel that the trial court was not justified in rejecting the DNA Report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in *Smt. Kamti Devi v. Poshi Ram, (2001) 5 SCC 311*. In

arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on Circumstance 9."

41. Still further, in a judgment reported as **(2014) 2 SCC 576 (Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another)**, the Supreme Court explained what exactly the DNA test is. In the said case, the appellant disputed the claim of the wife for maintenance of daughter on the ground that she is not his daughter. The Court held as under:-

"13. Before we proceed to consider the rival submissions, we deem it necessary to understand what exactly DNA test is and ultimately its accuracy. All living beings are composed of cells which are the smallest and basic unit of life. An average human body has trillion of cells of different sizes. DNA (Deoxyribonucleic Acid), which is found in the chromosomes of the cells of living beings, is the blueprint of an individual. Human cells contain 46 chromosomes and those 46 chromosomes contain a total of six billion base pair in 46 duplex threads of DNA. DNA consists of four nitrogenous bases – adenine, thymine, cytosine, guanine and phosphoric acid arranged in a regular structure. When two unrelated people possessing the same DNA pattern have been compared, the chances of complete similarity are 1 in 30 billion to 300 billion. Given that the Earth's population is about 5 billion, this test shall have accurate result. It has been recognized by this Court in the case of Kamti Devi (supra) that the result of a genuine DNA test is scientifically accurate. It is nobody's case that the result of the DNA test is not genuine and, therefore, we have to proceed on an assumption that the result of the DNA test is accurate. The DNA test reports show that the appellant is not the biological father of the girl-child.

19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a

child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

42. In the case of **Mukesh and another vs. State (NCT of Delhi) and others, (2017) 6 SCC 1**, the Supreme Court was examining the gruesome murder of a young Nirbhaya who was raped and killed in a moving bus. In respect of DNA profile, the Court held as under:-

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

456. We may usefully refer to Advanced Law Lexicon, 3rd Edition Reprint 2009 by P. Ramanatha Aiyar which explains DNA as under:-

“DNA.- Deoxyribonucleic acid, the nucleoprotein of chromosomes. The double-helix structure in cell nuclei that carries the genetic information of most living organisms. The material in a cell that makes up the genes and controls the cell. (Biological Term)

DNA finger printing- A method of identification especially for evidentiary purposes by analyzing and comparing the DNA from tissue samples. (Merriam Webster)”

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

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

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

458. Observing that DNA is scientifically accurate and exact science and that the trial court was not justified in rejecting DNA report, in

Santosh Kumar Singh v. State (2010) 9 SCC 747, the Court held as under:

* * *

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

43. A three Judge Bench of the Supreme Court in **Sunil vs. State of Madhya Pradesh, (2017) 4 SCC 393** has considered an argument that if DNA testing is not proved by the prosecution; therefore, it has failed to prove its case beyond reasonable doubt. It was held that positive result of DNA test would constitute clinching evidence against the accused. If, however, result of test is negative the weight of other material evidence on record will still have to be considered. The relevant extract of the decision reads as under:-

"4. From the provisions of Section 53-A of the Code and the decision of this Court in *Krishan Kumar Malik v. State of Haryana (2011) 7 SCC 130* it does not follow that failure to conduct the DNA test of the samples taken from the accused or prove the report of DNA profiling as in the present case would necessarily result in the failure of the prosecution case. As held in *Krishan Kumar* (para 44), Section 53-A really "facilitates the prosecution to prove its case". A positive result of the DNA test would constitute clinching evidence against the accused if, however, the result of the test is in the negative i.e.

favouring the accused or if DNA profiling had not been done in a given case, the weight of the other materials and evidence on record will still have to be considered. It is to the other materials brought on record by the prosecution that we may now turn to."

44. Therefore, the opinion of the Forensic Science Expert that Y-Chromosome of DNA profile of the appellant matches with the DNA profile from the underwear of the victim and the vaginal slide is conclusive proof that the accused is the one who violated four years old girl.

45. The argument of the learned counsel for the appellant that as per the opinion of Dr. B.R. Prajapati (PW-9) and Dr. Nisha Chaturvedi (PW-10) the time elapsed between the death of the deceased and postmortem was 2-3 days and that since the postmortem was conducted around 2.10 p.m. on 15.05.2017, therefore, the statement of the witnesses that they have seen the accused with the victim around 11.30 a.m. - 12.00 noon on 13.05.2017 is not supported by medical evidence as the time of death will be around 2.00 p.m. on 13.05.2017. We do not find any merit in the said argument. The approximation of time of death is not approximation of the hours of the day as well. The report of the doctors is based upon approximate time gap between the death and the postmortem. Since the very nature of the opinion of the time is approximate, therefore, it cannot be said with certainty that the death has occurred around 2.00 p.m. and not as per the statement of last seen evidence of the witnesses.

46. In respect of an argument that in the *marg* (death) intimation, the father of the girl has stated that they reached *Gheebada* while searching for their daughter. Such statement is recorded at 12.35 p.m. whereas the dead body was recovered at 12.10 p.m. in pursuance to disclosure statement

made at 11.50 a.m. Such statement of the father of the girl that they reached the place of occurrence while searching for their daughter cannot be inferred to mean that they reached the place of occurrence uninformed by the police, more so, when the statement of the father as PW-1 has not been questioned in this respect.

47. In the light of the evidence discussed above, the *marg* intimation (Ex.P-3) is not the intimation of recovery of dead body but the statement of the father of the victim that they have reached *Gheebada* in search of the dead body. It is of no inference that the dead body was already known to the father of the victim. In the statement of Kallu Kahar (PW-1) on oath, the witness is categorical that the dead body was recovered in pursuance to the disclosure statement given by the appellant. Still further, *marg* intimation (Ex.P-3) is a prior statement given by the witness. Therefore, the same was required to be confronted if the statement of the witness on oath was at a variance with the statement made earlier but no such attempt as been made. Therefore, the statement on oath in Court would be relevant to appreciate the evidence of the prosecution.

48. Kallu Kahar, father of the girl appeared as PW-1. He has proved the missing report Ex.P-1 on the basis of which the report Ex.P-2 was registered. He has given photograph of his daughter wearing frock. He deposed that on 15.05.2017, he got information from the police station that a dead body is lying behind the bus stand. Then, he and his wife reached *Gheebada* behind the bus stand. He reached the place of occurrence and found the dead body and after removal of the leaves etc. he found a maggot infected dead body of his daughter. His daughter was wearing T-shirt and

underwear. Entire body was swollen and both eyes were protruding. He further deposed that *marg* intimation (Ex.P-3) was recorded at the place of occurrence and that he is a witness of *panchnama* (Ex.P-4). He identified the dead body of his daughter in the hospital as well. In cross-examination, he deposed that he came to reside in the house in his occupation about two months back. He denied the suggestion that there are 15 rooms which are given on rent. The witness has deposed that there are only three rooms which are given by the landlady on rent. He deposed that he went to Police Station Shahdol at about 9 to 12 p.m. on 13.05.2017 when his report was lodged. Till then he was unable to locate his daughter. Prior to the house in question, he was residing near bus stand in the house of Kishan doctor. He studied up to Class-5th and signs in English and Hindi. He denied the suggestion that he has gone to *Gheebada* a day earlier than the day on which the dead body was recovered from *Gheebada*. He further denied the suggestion that he has given report to the police after recovery of dead body. He deposed that they must have reached *Gheebada* at around 11.00 a.m. He denied the suggestion that dead body was taken out by the police before he reached the place of occurrence. The police informed him on phone that the dead body is lying there. He went to the place of occurrence on bicycle whereas he sent his wife on an auto.

49. Geeta Kahar, the mother of the victim, has appeared as PW-3. She deposed that her husband came at 3.30 p.m. on 13.05.2017 and she along with her husband went to the house of the accused, who was trembling. He stated that he does not know the child. On 15.05.2017, she has gone to *Gheebada* along with police officials where she has seen her daughter

lying dead, eyes protruding and limbs swollen. From the sight of the dead body she could make out that she has been raped. Her genitals were completely torn. In cross-examination, she deposed that she had gone to Jaithari and came back by a train at around 10.30 a.m. She deposed that the child was left with the landlady only for a day and that the child was never left with the landlady earlier. The girl would go to *Aanganwadi* which is near the place of her house by herself. She denied the suggestion that she and her husband have seen the dead body at *Gheebada* earlier. She deposed that she went to *Gheebada* along with the police alone.

50. From the testimony of the father and mother of the child (deceased), it has unequivocally come on record that they have gone to *Gheebada*, the place where the dead body was kept concealed, after the dead body was pointed out by the accused and not earlier. The dead body came to the notice of the police or to the near relations only after the same was disclosed to have been kept concealed in the manner disclosed by the appellant.

51. In respect of an argument that Rajni Nagbhire (PW-21) has extracted the statement from the accused under coercion is again not made out. The expression in the statement that she asked with force does not necessarily mean the extraction of statement after thrashing the witness but when the witness was confronted, the witness gave the disclosure statement. Still further, Rajni Nagbhire (PW-21) has not been cross-examined on the question that what she meant by use of words "जोर जबरदस्ती".

52. Still further, several injuries on the private parts of the accused and presence of Smegma on the private part of the appellant shows that appellant had intercourse with child and that too forcibly. Dr. S.D. Kanwar (PW-4) has denied that the injuries on the private part of the accused could be by scratching by the person. Therefore, the non-explanation of the injuries on the private part of the appellant and on his person shows that the appellant has subjected the young child of four years to his brute force and lust.

53. The accused in his statement under Section 313 of the CrPC has admitted his photograph on Ex.P-12 though denied the signature on the said document. In response to question No.92 that the blood of the accused was taken for DNA profiling in the presence of Kamendra Singh, Station House Officer and Technician Pandey, he admitted that his blood sample was taken. In respect of question No.128, that Ex.P-25 which is a request to the Medical Officer, District Hospital, Shahdol for DNA profiling bears his signature, he admitted that his blood sample was taken. In respect of another question No.131, regarding identification form Ex.P-12, he admitted his photograph on the document. In respect of question No.143 as to why the witnesses are deposing against him, the answer is that on account of enmity over taking water. In respect of question No.145 as to whether he would like to say anything, the answer is that he had gone to Narouja in a marriage and that he was not present in the area. He has not committed any crime and has been implicated on account of enmity.

Thus, the statement of the accused is of alibi that he was not at the place of occurrence. However, the accused has not produced any evidence

as to who was getting married at Narouja and that he was, in fact, at Narouja. Therefore, on the basis of the prosecution evidence consisting of last seen at the time when child went missing in the morning around 9 O'clock; last seen near the vicinity of the place of crime; recovery of dead body on the basis of disclosure statement of the accused; injuries on the person of the accused as well as the report of DNA, all this evidence conclusively proves that it is the appellant, who has violated the victim and then killed her.

54. The question now arises as to whether the sentence ordered by the learned Trial Court upon the appellant of death by hanging warrants confirmation or not.

55. It is a horrendous crime when a child of four years is violated by a person, who is living in the close vicinity of the family of the child and thus, was known to the child. He prompted the child to come with him so as to take her to her father and then violated and killed her. The Supreme Court in a judgment rendered in **Shankar Kisanrao Khade vs. State of Maharashtra, (2013) 5 SCC 546**, examined the entire case law where the penalty of death sentence was set aside in the case of an offence under Section 376 of IPC. The Court laid down the aggravating circumstances called "crime test", mitigating circumstances called "criminal test" and "the rarest of rare cases test". The Court noticed that total 7112 cases of child rape were reported in the country during 2011. The State of Madhya Pradesh has reported highest number of cases i.e. 1262. However, the situation has not improved even after more than five years, A report on "Crime in India" in the year 2016 published by National Crime Records

Bureau, Government of India, provides information about all the FIRs registered under the Indian Penal Code and Special & Local Laws (SLL) by the police of 36 States/UTs. As per such report, 19765 are the cases of child rape under Section 376 of IPC and Section 4 and 6 of POCSO Act. The highest number of cases in this category was again in State of Madhya Pradesh being 2467. The relevant extract from the report reads as under:-

TABLE 4A.2(ii)
SLL Crimes Against Children – 2016

S. No.	State/UT	Protection of Children from Sexual Offences Act (POCSO) r/w Section 376, 354, 509 IPC								
		Protection of Children from Sexual Offences Act (Total)			Child Rape (Sec 4 & 6 of POCSO Act)/Section 376 IPC			Sexual Assault of Children (Section 8 & 10 of POCSO Act)/Section 354 IPC)		
		I	V	R	I	V	R	I	V	R
		39	40	41	39A	40A	41A	39B	40B	41B
STATES:										
1.....		--	--	--	--	--	--	--	--	--
14. Madhya Pradesh		4717	4732	15.7	2467	2479	8.1	2106	2109	6.8
15. Maharashtra		4815	4885	12.7	2292	2333	6.1	2370	2396	6.3
.....		--	--	--	--	--	--	--	--	--
27. Uttar Pradesh		4954	4954	5.6	2115	2115	2.4	2652	2652	3.0
.....		--	--	---	--	--	--	--	--	--
Total (All India)		36022	36321	8.1	19765	19920	4.4	12226	12329	2.7

56. In view of the above, the issue is required to be examined as to whether the imposition of death penalty will deter the prospecting offenders from indulging in horrendous offence of rape and/or murder.

57. In a Judgment reported as **(2011) 3 SCC 85 (B.A. Umesh vs. Registrar General, High Court of Karnataka)** the imposition of death sentence was maintained recording the following findings:

"83. On the question of sentence we are satisfied that the extreme depravity with which the offences were committed and the merciless manner in which death was inflicted on the victim, brings it within the category of the rarest of rare cases which merits the death penalty, as

awarded by the Trial Court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in *Bachan Singh v. State of Punjab (1980) 2 SCC 684* or in *Machhi Singh v. State of Punjab, (1983) 3 SCC 470* are present in the facts of the instant case. The appellant even made up a story as to his presence in the house on seeing P.W.2 Suresh, who had come there in the meantime. Apart from the above, it is clear from the recoveries made from his house that this was not the first time that he had committed crimes in other premises also, before he was finally caught by the public two days after the present incident, while trying to escape from the house of one Seeba where he made a similar attempt to rob and assault her and in the process causing injuries to her."

58. Review petition was dismissed by circulation vide order dated 07.09.2011. Subsequently, another review petitions were filed, which were decided vide order dated 3rd October, 2016 in judgment reported as **(2017) 4 SCC 124 (B.A. Umesh vs. Registrar General, High Court of Karnataka)**. The Court held as under:-

"23. Therefore, on careful comparison of aggravating and mitigating circumstances in the present case, as above, and keeping in view the principle of law laid down by this Court on the point, we are of the firm opinion that the aggravating circumstances are grave and far more serious as against the mitigating circumstances pointed out on behalf of the petitioner. As such, even after open hearing, we are not inclined to allow the review petitions or modify the judgment and order passed by this Court in *B.A. Umesh v. High Court of Karnataka (2011) 3 SCC 85* dismissed by this Court on 1-2-2011. Accordingly, Review Petitions (Criminal) Nos. 135-36 of 2011 stand dismissed. The criminal miscellaneous petitions stand disposed of."

59. A three Judge Bench of the Supreme Court in a judgment reported as **(2015) 1 SCC 253 (Vasanta Sampat Dupare vs. State of Maharashtra)** maintained the death sentence when it was held as under:-

"58. Presently, we shall proceed to dwell upon the manner in which

the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had the insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.

59. In this context, we may fruitfully refer to a passage from *Shyam Narain V. State (NCT of Delhi)*, (2013) 7 SCC 77, wherein it has been observed as follows:

"1. The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a "tsunami" of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of

sensitive polity".

In the said case, while describing the rape on an eight year old girl, the Court observed: (*Shyam Narain Case, SCC p.88, para 26*)

"26.... Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers."

60. In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.

61. We are absolutely conscious that mitigating circumstances are to be taken into consideration. Learned counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there

has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not pre-meditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. Learned counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no mitigating circumstances.

62. As we perceive, this case deserves to fall in the category of rarest of the rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven make a four year minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of rarest of the rare case and we unhesitatingly so hold."

60. The review petition against the said order was dismissed on 3rd May, 2017 in a judgment reported as **(2017) 6 SCC 631 (Vasanta Sampat Dupare vs. State of Maharashtra)**, wherein, the Court observed as under:-

"20. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and it may not be very appropriate for the

Court to decide the most significant aspect of sentencing policy with reference to one of the classes completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition.

21. The material placed on record shows that after the Judgment under review, the petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in *Bachan Singh vs. State of Punjab (1980) 2 SCC 684* but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the Judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present review petitions."

61. On 05.05.2017, another three Judge Bench judgment in **Mukesh and another (supra)** maintained the death sentence on the four accused.

The relevant extracts of the said decision are reproduced as under:-

"508. In the same judgment in *Shankar Kisanrao Khade v. State of Maharashtra* (2013) 5 SCC 546, Madan B. Lokur, J. (concurring) while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and murder of a minor, discussed the sentencing policy of India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the prima facie difference in the standard of yardsticks adopted by two organs of the government viz. Judiciary and the Executive in treating the life of convicts convicted of an offence punishable with death and recommended consideration of Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under: (SCC p.614, para 148)

“148. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.”

In *Shankar Kisanrao's* case (2013) 5 SCC 546), it was observed by Madan B. Lokur, J. that *Dhananjay Chatterjee's* case [*Dhananjaoy Chatterjee V. State of W.B.* (1994) 2 SCC 220] was perhaps the only case where death sentence imposed on the accused, who was convicted for rape was executed.

509. Another significant development in the sentencing policy of India is the ‘victim-centric’ approach, clearly recognised in *Machhi Singh* (*Supra*) [*Machhi Singh v. State of Punjab* (1983) 3 SCC 470]

and re-emphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: *Gurvail Singh @ Gala and Anr. v. State of Punjab* (2013) 2 SCC 713; *Mohfil Khan and Anr. v. State of Jharkhand* (2015) 1 SCC 67; *Purushottam Dashrath Borate and Anr. v. State of Maharashtra* (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In *Mohfil Khan* (supra), this Court specifically observed that ‘it would be the paramount duty of the Court to provide justice to the incidental victims of the crime – the family members of the deceased persons.

510. The law laid down above, clearly sets forth the sentencing policy evolved over a period of time. I now proceed to analyse the facts and circumstances of the present case on the anvil of above-stated principles. To be very precise, the nature and the manner of the act committed by the accused, and the effect it cast on the society and on the victim’s family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case- ‘death sentence’, life sentence commutable to 14 years’ or ‘life imprisonment for the rest of the life’.

515. In *Purushottam Dashrath Borate and Anr. v. State of Maharashtra* (2015) 6 SCC 652, this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

516. Society’s reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system.

As held in *Om Prakash v. State of Haryana* (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

517. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "*the rarest of rare cases*". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

520. The statistics of the National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper.

521. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "the best thermometer to the progress of a nation is its treatment of its women." Crime against women not only affects women's self esteem and

dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye-opener for a mass movement “*to end violence against women*” and “*respect for women and her dignity*” and sensitizing public at large on gender justice. Every individual, irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other proactive steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same."

62. The review against the said judgment bearing **Review Petition (Crl.) No.570 of 2017 (Mukesh vs. State of NCT of Delhi)** stand dismissed on 09.07.2018.

63. In **Deepak Rai etc. vs. State of Bihar, (2013) 10 SCC 421**, the Supreme Court held that the young age of the accused is not a mitigating circumstance for commutation to life.

64. The death sentence was also maintained by the Supreme Court in the judgments reported as **(2008) 11 SCC 113 (Bantu vs. State of Uttar Pradesh)** and **(2009) 6 SCC 667 (Ankush Maruti Shinde and others vs. State of Maharashtra)** and **(2015) 6 SCC 632 (Shabnam etc. vs. State of Uttar Pradesh)**.

65. Within this Court, a Division Bench in **Criminal Reference No. 05/2015 (in Reference received from the First Addl. Sessions Judge, Maihar v. Sachin Kumar Singhraha)** vide judgment delivered on 03.03.2016 has affirmed the death sentence in case of rape of a victim aged

near-about five years. Another Division Bench of this Court in **CRRFC No.5/2017 (In Reference Received from District & Sessions Judge, Dindori vs. Bhagwani and another)** vide judgment delivered on 09.05.2018 has also affirmed the capital punishment awarded to two accused persons by the Trial Court. In the said case also a girl aged about 11 years was victimized and murdered and the Court expressed concern over the alarming increase in the recent incidents of child rapes coupled with the rising anger of the society over rape of minors across the country.

66. In the light of the evidence and the judgments referred to hereinabove, we find that there is no mitigating circumstance in favour of the appellant in the present case. The appellant was young unmarried boy aged 22 years at the time of commission of offence but he breached the trust of a girl child of four years when he tempted her by offering biscuit to accompany him to meet her father. He violated her and took her life within 3-4 hours of taking her with him. It is an act of extreme depravity when the appellant prompted a young child whose only fault was that she believed the appellant to be her well-wisher. The crime against the girl child are on rise, therefore, extreme punishment may deter the other criminals indulging in such crime. Such crime sends shock wave in the society when it is committed against a girl child. This Court has the social responsibility to make the citizen of this country know that law cannot come to the rescue of such person on the basis of humanity. The extreme punishment may convey a message to these predators that it is not a soft State where the criminals committing such serious crimes may get reprieve in the guise of humanity. The humanity is more in danger in the hands of the persons like

the appellant. Therefore, we find that the capital punishment awarded to the appellant is one of the rarest of rare cases where the extreme capital punishment is warranted.

67. In view of the foregoing reasons, we affirm the death sentence awarded to the appellant by the Trial Court while dismissing the appeal preferred by the accused against his conviction and sentence. We **order accordingly**.

68. Let a copy of this judgment be retained in the file of the connected criminal appeal.

69. The office is further directed to send a copy of the judgment forthwith to the Trial Court for taking appropriate action in accordance with law.

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE

S/