IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

MRC-6-2024
Date of Decision: 02.04.2025

STATE OF PUNJAB

... Appellant(s)

Versus

...Respondent

CRA-D-1730-2024

... Appellant(s)

Versus

STATE OF PUNJAB

...Respondent

CORAM: HON'BLE MR. JUSTICE GURVINDER SINGH GILL

HON'BLE MR. JUSTICE JASJIT SINGH BEDI

Present: Mr. Prabhdeep Singh Dhaliwal, Asstt. A.G., Punjab
for the appellant-State.

Mr. Pradeep Prakash Chahar, Legal Aid Counsel,
for the respondent/accused in MR-6-2024 and
for the appellant in CRA-D-1730-2024.

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JASJIT SINGH BEDI, J.

This judgment shall dispose of MRC-06-2024 sent by the District and Sessions Judge, Amritsar titled as State of Punjab Versus and CRA-D-1730-2024 titled as Versus State of Punjab as the same are arising out of the same FIR. However, for the sake of convenience the facts have been taken from CRA-D-1730-2024.

2. The present appeal has been filed against the judgment of conviction and order of sentence dated 22/29.08.2024 passed by the District and Sessions Judge, Amritsar.

3. The FIR was registered on 05.01.2020, the judgment of conviction and order of sentence passed by the District and Sessions Judge, Amritsar is dated 22/29.08.2024, the appeal was filed on 09.12.2024 and the matter is being taken up for hearing now i.e. after a period of more than 05 years from the date of registration of the FIR.

4. The prosecution version is that the FIR was registered on the basis of information provided by complainant R. Kaur, on the averments that her marriage was solemnized with Partap Singh son of Darbara Singh, resident of Lakhuwal Road, Tehsil Baba Bakala Sahib, District Amritsar 13 years back. She had three children namely H. Kaur, J. Kaur and Y. Singh. She along with her children was living at her parental house at Village Bhattike, for the last one year, as her husband used to beat her under the influence of liquor. Her husband sometimes used to take her daughter, namely H. Kaur from village Bhattike and would drop her back. But she always remained apprehensive that her husband Partap Singh would harm her minor daughter. On 04.01.2020, at about 3:00/4:00 PM her husband came to her house at Bhattike and took her daughter H.Kaur, forcibly. On 05.01.2020, at about 8:00/9:00, her husband rang up on phone No.98765-74729 of her brother Rachpal Singh and stated that he had killed his daughter H. Kaur. She along with her mother went to the house of her husband at Village Baba Bakala

Sahib where she came to know that her husband used to work at Rayya and when they reached near the canal bridge of village Rayya, they came to about one dead body having been found hanging on the tree, near the bridge of village Dhianpur. On reaching there, they found that said dead body was of her daughter H. Kaur. She firmly believed that her daughter H.Kaur had been killed by her husband, by hanging/strangulation. After registration of the case, investigation was conducted and the accused was arrested. On completion of investigation, challan against the accused was presented in the court.

5. On commitment, finding a prima facie case punishable under sections 302 of Indian Penal Code, charge was made out against accused and he was charge sheeted accordingly. The contents of the charge were read over and explained to him in simple Punjabi language to which he pleaded not guilty and claimed trial. Thereafter, on the receipt of the medical report, amended charge under section 302 of Indian Penal Code & 376-A IPC and in the alternative, section 6 of Protection of Children from Sexual Offence Act was framed against the accused, vide order dated 07.02.2023.

6. In order to prove its case, the prosecution examined PW1 R. Kaur, complainant, PW2 Harjit Kaur, PW3 Kulwant Singh, PW4 Rashpal Singh, PW5 Dr. Neha Chaudhary, PW6 Gurwinder Singh, Forest Range Officer, PW7 S Sukhbaj Singh, PW8 Lachhman Singh, Tehsildar, Pathankot, PW9 Gurjant Singh, PW10 Joga Singh, PW11 Paramjit Singh, PW12 SI Simarjit Kaur, PW13 ASI Baljinder Singh, PW14 Sarabjeet Singh, PW15 Jagjit Kaur, MPHWF, PW16 ASI Hira Lal, PW17 LCT Manpreet Kaur, PW18

ASI Ram Singh, PW19 SCT. Yadwinder Singh and PW20 CT. Shamsher Singh.

7. The gist of the prosecution evidence is as under:-

Complainant-R. Kaur was examined as PW1. She stated that her marriage had been solemnised with Partap Singh 13 years back. Three children were born from the wedlock namely the deceased aged 06 years, Jaismeen Kaur aged about 07 months and Yuvraj Singh aged about 03 years. Her husband used to give beatings to her under the influence of alcohol because of which she along with her children started living at her parental house at Village Bhattike. Her husband used to take their deceased daughter with him from Village Bhattike and would drop her back. On 04.01.2020 at about 03.00/4.00 PM her husband came to her parents house and forcibly took away the deceased. On 05.01.2020 at about 08.00/9.00 AM her husband made a call on Mobile No.98765-74729 of her brother Rashpal Singh stating that he had killed their daughter. She narrated the incident to her mother Harjit Kaur after which they both went to the house of her husband at Baba Bakala Sahib where they came to know that her husband used to work at Rayya. When they reached near the Canal Bridge Rayya, they came to know that one dead body was hanging on the tree near the bridge of village Dhianpur. She along with her mother saw that one dead body was hanging on the tree belonging to their daughter. She was confident that her daughter had been murdered by hanging/strangulation. She had given the information of the same to the Investigating Agency who recorded her statement Ex.P1 which is the basis of

the FIR. She stated that her daughter had been murdered by her husband Partap Singh. In cross-examination she stated that she did not know from which number her husband had made a call. She admitted that the Mobile No. 98765-74729 was not in her name but might have been in the name of her mother Harjit Kaur. She further admitted that her husband had great love for their children and it was correct that he could not have commited the act of rape and murder and that she had never seen her husband beating or torturing their children or keeping a bad eye on them. She denied the suggestion that her husband had not taken away their daughter on 04.01.2020 at 03.00/04.00 PM from her parental home from Village Bhattike or that he had not called her up and informed her that he had killed their daughter.

Harjit Kaur (mother of the complainant) was examined as PW2 and made a statement in similar lines to that of her daughter. In cross-examination, she stated that the Mobile No.98765-74729 was in the name of her son Rashpal Singh.

Kulwant Singh was examined as PW3. He stated that he was a Night Watcher in the Forest Department, Forest Range Office Rayya-II on daily-wages. On 05.01.2020 as per the directions of the Forest Range Officer, during the day time at about 09.30 AM while he was on his rounds from Rayya towards Dhianpur in order to check trees, he found the dead body of a female child hanging from a rope on the tree. In further examination-in-chief he stated that a short hair person was roaming around the dead body in a perplexed state. However, he did not know the name of that person as Partap

Singh or as to whether he had committed the murder and hung the body. He identified Partap Singh as the same person whom he had seen on 05.01.2020 near the dead body. He was declared hostile and on being cross-examined by the APP, he stated that Partap Singh was the only person who was present at the place where the dead body of a female child was hanging with the tree and was the same person whom he had seen in a perplexed state. He also stated that the accused seem to be intoxicated. In cross-examination by the counsel for the accused he stated that he neither knew the complainant nor the deceased nor the accused. He stated he had not informed the police regarding the occurrence but some other persons did at about 09.30 AM and thereafter the police came to the spot at about 10.30 AM. Many persons came to the spot along with accused Partap Singh after the reaching of the police. The police party also met Partap Singh at the spot. Thereafter, he along with Partap Singh went to the police Chowk Rayya and remained there for about half an hour where his statement was recorded. The police told him the name of the accused as Partap Singh. He stated that no identification parade of the accused was got conducted by the police from him.

Rashpal Singh aged about 15 years, the brother of the complainant was examined as PW4 and made a statement on similar lines as made by PW1-R. Kaur. In cross-examination he stated that the Mobile No.98765-74729 was in the name of his sister.

Dr. Neha Chaudhary, who was then posted at GMC Amritsar as a Sr. Resident was examined as PW5. She stated that she along with Dr.

Sukhdeep Singh conducted the postmortem examination of the deceased on 07.01.2020 at 01.20 PM who was of the age of 06 years. The lower half of the body was naked. Cyanosis was present on the finger nails, lips and face. The mouth and eyes were opened. A rope was tied all around with a running noose knot on front of the neck on its right side. During the postmortem, the following injuries were observed:-

> *1. Abraded bruise reddish brown in colour of size 2 cm in width completely encircling the neck above the thyroid cartilage. The ligature mark was circular on left side and was extending obliquely upwards on the light lateral side. Underneath soft structures were showing infiltration of blood. Base was pale, hard and parchment like.*
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> *2. Reddish brown abraded bruise of size 2.3 x 1.2 cm present on the right side of face at angle of mandible, 6.5 cm below right ear lobule.*
>
> *3. Reddish colour abrasion of size 1 x 0.5 cm present on the base of index finger of right hand on dorsal aspect.*
>
> *4. Reddish colour bruise of size 3 x 2 cm was present on front of right thigh 8 cm from right iliac crest.*
>
> *5. Reddish colour bruise of size 3.1 x 2.5 cm present on the inner side of right leg. 5 cm medial to right knee joint.*
>
> *6. Reddish bruise of size 1.3 x 0.9 cm present on the left side of labia majora in its lower part at 6.00 o'clock position. Labia minora was roomy. Creamish white colour bloodstained fluid was coming out. On retraction of labia minora, vaginal orifice is visible. Hymen is torn posteriorly. On further examination, reddish brown colour abrasion in vagina is present.*

All the injuries were ante-mortem in nature. The probable duration between the injury and death was within a few minutes and between the death and postmortem examination was 2-3 days. After the postmortem examination, a sealed envelope and a box containing viscera for histopathological examination was given, addressed to the Professor and Head Department of Pathology, GMC, Amritsar. The sealed envelope and box containing viscera for chemical examination was given addressed to the Chemical Examiner, Govt. of Punjab, Kharar. The sealed envelope and a box containing two vaginal swabs with two slides and two para vaginal swab was sent to the Chemical Examiner, Govt. of Punjab, Kharar for spermatozoa examination. The PMR Ex.PW5/B contained her signatures as also that of Dr. Sukhdeep Singh. The histopathological report was Ex.PW5/C and the report of the Chemical Examiner Report Ex.PW5/D. She gave her opinion Ex.PW5/E that after going through the postmortem findings, the Chemical Examiner Report and the histopathological examination, the cause of death in this case was asphyxia as a result of constriction of the neck due to injury No.1 which was sufficient to cause death in the ordinary course of nature. The said opinion regarding rape was given after the receipt of the Report of the Chemical Examiner. In further examination-in-chief, she stated that vide Ex.PW5/F she had stated that the opinion regarding penetrative sexual assault would be given after the receipt of the Chemical Examiner's Report. On 11.06.2020, on the request of the police Ex.PW5/G, as she was on leave, one of the board members namely Dr. Sukhdeep Singh gave an opinion that there

were signs suggestive of forceful vaginal intercourse on the basis of the Report of the Chemical Examiner. The opinion of Dr. Sukhdeep Singh was Ex.PW5/H whose signatures she identified.

Gurwinder Singh, Forest Range Officer, Rayya-II, Baba Bakala Sahib, Amritsar was examined as PW6 and stated that Kulwant Singh had gone for field work from Village Dhianpur to Wadala side on his instructions.

Sukhbaj Singh was examined as PW7. He stated that he had tried to develop the fingerprints from the Bhujia Packet (Haldiram) and cold drink bottle (coca-cola) but the fingerprints could not be recovered. Incidentally, these two articles were found next to the body and were recovered therefrom.

Lachhman Singh, Tehsildar was examined as PW8. He stated that on 05.01.2020, he received information from SI Simarjit Kaur to reach near the pavement of the Canal of Dhianpur. When he reached there, he spotted the body of the female child hanging from a small tree. IO/SI Simarjit Kaur had called a photographer to take pictures. After the photographs were taken the dead body was removed from the tree. In cross-examination, he stated that he had reached the spot at about 09.00 AM and remained there 15-20 minutes.

Gurjant Singh S/o Gurdev Singh was examined as PW9. He stated that he was working as a Mason and Partap Singh accused was also working with him. On 05.01.2020 at about 07.00 AM he had seen Partap Singh along with one small child who was wrapped by him in his Loi (shawl) and was carried by him whom he had met at the Bus Stand Rayya. On inquiry, Partap Singh stated that he was going to leave his daughter at Village

Bhattike to his in-laws house. Later, he came to know that a dead body was recovered by the police from near the bushes near the canal of Dhianpur. He identified the Loi and other clothes and shoes before the police vide memo Ex.PW9/A which he thereafter identified in Court. He also identified accused Partap Singh. He identified the girl child in photograph Ex.PW8/4 who was present with Partap Singh on 05.01.2020 when he met them. He also identified the Loi and the photograph Ex.PW8/8. In cross-examination, he stated that he had identified the Loi (gents shawl) of the accused on 05.01.2020 but did not identify the body of the deceased but only her clothes.

Joga Singh S/o Mangal Singh was examined as PW10. He stated that the complainant was his niece who was married to the accused. In the night of 05.01.2020 at about 08.00/09.00 PM, the accused had come to his house and made an extra-judicial confessional statement admitting to have committed the rape and murder of his daughter. He had tried to catch-hold of the accused but he managed to flee away.

Paramjit Singh was examined as PW11. He stated that he was a Granthi at Gurdwara Singh Sahab, Saidpur. He identified the marriage photographs of the complainant and the accused along with his own self in the photographs.

SI Simarjit Kaur was examined as PW12. She stated that on 05.01.2020 while she along with the police party was patrolling duty near GT Road Bhinder, the complainant came present and got recorded her statement Ex.P1 on the basis of which the formal FIR was registered. She along with

complainant party and the policy party reached the place of the occurrence i.e. in the bushes alongside the pavement of the canal of the Village Dhianpur. She asked Lacchman Singh, Tehsildar, SI Sukhbaj Singh, Incharge Mobile Forensic Police, Amritsar and ASI Heera Heera Lal, Govt. Photographer to reach at the spot. ASI Heera Lal clicked photographs whereas SI Sukhbaj Singh tried to locate fingerprints by checking the Bhujia packet and cold drink bottle. Both were recovered and converted into a parcel. A number of persons came to the spot. Gurjant Singh S/o Gurdev Singh also came to the spot and claimed himself to be a colleague of the accused. From the spot one male shawl (Loi) and black coloured shoes were recovered which were taken into police possession. The said articles were identified by Gurjant Singh who stated that Partap Singh had met him on the same day in the morning at about 07.00 AM and he had wrapped that Loi and he was carrying his daughter at that time which he identified at the spot. The identification memo were prepared accordingly. She also got conducted inquest proceedings. On 06.01.2020, Partap Singh accused was arrested. On the same day, Kulwant Singh S/o Kashmir Singh identified accused Partap Singh as the person whom he had seen at about 09.30 Am on 05.01.2020 in a perplexed state roaming here and there near the body of the child hanging on the tree. She got conducted the postmortem on the body of the deceased and investigated the matter. In cross-examination, she stated that during her investigation no mobile number from which the alleged phone call was made by the accused on the mobile number of the brother of the complainant Rashpal Singh was

traced or found. Neither the complainant nor her brother Rashpal ever disclosed the number from which they had received a call. She also did not verify the ownership of Mobile No.98765-74729 or collected any customer application form with respect to the said number. She further stated in her cross-examination that the complainant alone had come to her at about 05.30 PM on 05.01.2020 and it was only thereafter that she along with the complainant went to the spot at about 07.00 PM. Many people had gathered at the spot at that time namely Rashpal Singh i.e. brother of the complainant, Joga Singh S/o Mangal Singh, Gurjant Singh S/o Gurdev Singh, Kulwant Singh S/o Kashmir Singh etc. She had recorded the statement of Joga Singh at the spot on 05.01.2020. However, no such statement was found on the file. She admitted that during her investigation it had come on record that the accused used to take his daughter from the house of the complainant with her consent and used to drop her back to the house of the complainant. No evidence had come on the record that the accused ever had given beatings to the complainant or that he had strained relations with the children. She admitted that she had not taken the mobile phones of the complainant or her brother during investigation.

ASI Baljinder Singh was examined as PW13. His statement is similar to that of PW12-Simarjit Kaur. In cross-examination, he stated that they had reached the spot at about 06.30/6.45 PM where they remained present for 03 ½ hours to 4 hours. He stated that no other person except the complainant and her mother were present at that time.

Sarabjeet Singh S/o Piara Singh was examined as PW14 with respect to the dispute between the complainant and her husband. He had handed over the original birth certificate of the deceased along with photographs of the marriage of the accused with the complainant to the Investigating Agency.

Jagjit Kaur, MPHWF, Baba Bakala Sahib, Amritsar was examined as PW15. She brought the original birth certificate of the deceased as per which she was born on 26.04.2014.

ASI Hira Lal, Photographer was examined as PW16. He stated that he had taken photographs of the place of occurrence. In cross-examination, he stated that he had been called by SI Simarjit Kaur by making a phone call at about 10.30 AM and within half an hour he had reached village Khalchian.

LCT-Manpreet Kaur was examined as PW17. She partly investigated the matter along with IO/SI Simarjit Kaur. On 04.02.2020, MHC Sandeep Singh had handed over to her one parcel of viscera sealed with 16 seals of FMASR along with one envelope containing documents which she deposited with the Chemical Examiner, Kharar in an intact condition and on return handed over the receipt to the MHC. On 28.02.2020, Sandeep MHC had handed over to her one parcel of a swab sealed with 16 seals of FMASR alongwith an envelope sealed with 6 seals of FMASR containing documents which she deposited with the Chemical Examiner, Kharar in an intact condition and on return handed over the receipt to the MHC. In cross-

examination, she stated that on getting information she alongwith the police party had gone to Village Dhianpur at about 09.00 AM. The postmortem was done on 06.01.2020. The doctor had handed over to her one parcel of a rope and one parcel of the viscera was handed over to Constable Shamsher Singh on 07.01.2020. She had gone to the office of the Chemical Examiner, Kharar on 04.02.2020 along with the aforesaid two parcels i.e. the rope and viscera but the objection was raised by the said office in which in one parcel although the doctor had written that the parcel contained swabs but actually there were no swabs and this objection came to her knowledge when they made a phone call that there was no swab contained in the parcel. Later, on 28.02.2020, the doctor gave her another parcel having the swab which she got deposited in the office of the Chemical Examiner, Kharar. She admitted that no statement of her's was recorded under Section 161 Cr.P.C. regarding receiving the parcel of the swab from the doctor or the deposit of the same in the office of the Chemical Examiner, Kharar on 28.02.2020.

ASI Ram Singh was examined as PW18. He handed over the call details of Mobile No.98765-74729. In cross-examination, he stated that he had not obtained a customer application form in the present case and there was no document to show to whom the said number belonged to.

SCT-Yadwinder Singh was examined as PW19. He stated that as per Road Certificate No.19/21/2020 dated 29.01.2020, one parcel sealed with one sealed of FMASR containing the viscera along with one envelope containing documents sealed with 6 seals of FMASR were handed over to

Constable Shamsher Singh and he deposited them in the department of Pathology, GMC, Amritsar. As per record, the Road Certificate No.30/21/2020 dated 04.02.2020, one parcel sealed with 16 seals of FMASR containing the viscera along with one envelope containing documents was handed over to LCT Manpreet Kaur and she deposited with the Chemical Examiner, Kharar. One Road Certificate No.50/21/2020 dated 28.02.2020, containing one parcel of swabs sealed of with 16 seals of FMASR along with one envelope containing documents sealed with 06 seals of FMASR was handed over to LCT Manpreet Kaur which she deposited in the office of the Chemical Examiner, Kharar. He identified the signatures of MHC Sandeep Singh who had gone abroad.

Constable Shamsher Singh was examined as PW20. He partly investigated the matter and referred to different aspects of investigation.

8. On closure of the prosecution evidence, statement of the accused was recorded under Section 313 Cr.P.C. in which all the incriminating circumstances appearing in the prosecution evidence were put to him. He denied the same and pleaded that he was innocent and had been falsely implicated. Accused stated that his wife has been living separately on account of strained relations. He never gave any beatings nor he turned out his wife from the matrimonial home. On account of strained relations, his wife was not talking terms with him. He had great love and affection for his children. His wife or mother in law, never moved any application or complaint against him regarding any kind of maltreatment prior to the alleged occurrence. His wife

had got registered false case against him, at the instance of her family. He opted to lead evidence in his defence but closed the same, without examining any witness in his defence.

9. Based on the evidence led, the appellant came to be convicted and sentenced by the Court of Addl. Sessions Judge, Amritsar vide judgment and order of sentence dated 22/29.08.2024 as under:-

Offence under Section	**Sentence RI/SI**	**Fine**	**RI/SI in default of payment of fine**
302 IPC	Death sentence	Rs.1,00,000/-	--
06 POCSO Act	RI for the remainder of his natural life	Rs.50,000/-	--

Both the sentences were ordered to run concurrently.

10. It is the aforementioned judgment, which is under challenge, in the present appeal.

11. The learned counsel for the accused/appellant contends that there is no evidence of the ownership of Mobile No.98765-74729 as the customer application form was never brought on record. The witnesses have deposed inconsistently regarding in whose name the said number stood. Further, there is absolutely no evidence as to from which number the accused is stated to have called on Mobile No.98765-74729. As per the prosecution case, the body was discovered at Canal Bridge of Village Rayya at about 09.00 AM, the statement was made by the complainant to the police at 06.20 PM and the special report reached the Illaqa Magistrate at 05.00 PM on 05.01.2020. This delay in the registration of the FIR is fatal to the case of the prosecution.

PW3-Kulwant Singh, PW8-Lachhman Singh, Tehsildar, PW16-ASI Heera Lal and PW17-LCT Manpreet Kaur stated that they had reached the place where the dead body had been hung in the morning hours of 05.01.2020 i.e. between 09.00-11.00 AM. The photographs of the spot would show that they were taken during day light hours. This assumes importance in view of the fact that the FIR was registered on 05.01.2020 at 06.20 PM and therefore, had the investigation begun after the registration of the FIR then, if nothing else, the photographs would have depicted darkness. He, further contends that the evidence of 'last seen' was only of interested witnesses i.e. the complainant (PW1), her mother (PW2) and her brother (PW4) all of whom resided in the same house. The said evidence cannot be accepted without corroboration. As per the prosecution case, the accused forcibly took the deceased with him on 04.01.2020 between 03.00/04.00 PM but no complaint was ever made in that regard. The complainant, her mother and her brother have all deposed that the accused was a good father and did not have an evil eye on his children. PW3-Kulwant Singh purportedly saw the accused in a perplexed state near the body in the morning of 05.01.2020 but did not report the matter to the police making his presence at the spot doubtful. There were certain discrepancies in his statement as well regarding knowing the accused earlier. There is a discrepancy regarding the sending of the vaginal swabs to the FSL. PW17-LCT Manpreet Kaur stated that two parcels namely one of a rope and one of the viscera were both sent to the FSL on 04.02.2020. A third parcel of the vaginal swabs was sent on 28.02.2020. However, the FSL report only refers to

the sample sent on 04.02.2020 which did not contain the vaginal swabs but interestingly refers to the receipt of the swabs which were found to contain spermatozoa. Be that as it may, samples of the spermatozoa were not matched with the DNA samples of the accused. The prosecution did not examine Dr. Sukhdeep Singh who had opined that there were signs suggestive of forcible vaginal intercourse on the basis of the report of the Chemical Examiner. However, this opinion was tendered into evidence by Dr. Neha Chaudhary (PW5). Also, no medical examination of the accused was conducted to ascertain his capacity to perform sexual intercourse. Packets of namkeen and a cold-drink were recovered from the spot but the fingerprints on the same could not be matched with those of the accused. He further contends that the evidence of PW10-Joga Singh who was the witness of the extra-judicial confessional of the accused cannot be believed because the complainant was his real niece and it was not believable that the accused would made an extra-judicial confession before a person who is related to the complainant and not in any position of any authority on whom the accused repose faith. He thus contends that the judgment of conviction was liable to be set aside and the accused acquitted of the charges framed against him.

12. On the other hand, the learned State counsel contends that the complainant-Ramanjit Kaur (PW1), her mother Harjit Kaur (PW2) and her brother Rashpal Singh (PW4) categorically stated that the accused had taken away the deceased daughter on the evening of 04.01.2020 between 03.00/04.00 PM. Thereafter, Gurwinder Singh (PW6), the Forest Range

Officer, Raiya-II, Raiya, Baba Bakala Sahib, Amritsar was examined who stated that he had seen the deceased hung on a tree and the accused roaming around nearby in an intoxicated state. Further, the statement of Gurjant Singh a co-worker of the accused was recorded as PW9 who stated that he had seen the accused with a body wrapped in a shawl on the morning of 05.01.2020 at Bus Stand, Rayya. On asking, the accused had stated that he was going to drop his daughter to the house of her mother. Thus, the evidence of 'last seen' stands established beyond reasonable doubt. He further, contends that the medical evidence also supports the prosecution version regarding rape having been committed. Semen was detected in the vaginal swabs which also corroborates the prosecution case of rape and murder. Mere absence of the evidence of a phone call would not weaken the prosecution case in view of the categoric depositions of the prosecution witnesses. As regards the delay in the registration of the FIR and the investigation having begun prior to the registration on the same, he contends that this is the minor discrepancy, if any and would not have any material bearing on the case of the prosecution. He thus contends that the present appeal was liable to be dismissed.

13. We have heard the learned counsel for the parties and gone through the record.

14. The present case is based on circumstantial evidence and the Hon'ble Supreme Court in the context of circumstantial of evidence in the case of ***Sharad Biridhichand Sarda Vs. State of Maharashtra, 1984 AIR Supreme Court 1622*** held as under:-

> *"152. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:-*
>
> *(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*
>
> *It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahebrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 where the following observations were made :-*
>
> *"certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."*
>
> *(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*
>
> *(3) the circumstances should be of a conclusive nature and tendency.*
>
> *(4) they should exclude every possible hypothesis except the one to be proved, and*
>
> *(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*
>
> *153. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence. "*

(emphasis supplied)

15. In the present case, it has been established beyond any doubt from the depositions of the complainant PW1 R. Kaur, the mother of the

deceased, PW2 H. Kaur, the maternal grandmother of the deceased, PW14 Sarabjeet Singh, maternal uncle of the deceased and PW9 Gurjant Singh a co-worker of the accused that victim H. Kaur was taken away by accused Partap Singh and she was never seen alive thereafter. In fact, merely because the accused had been good to his children earlier or did not keep an evil eye on them as stated by PW1 R. Kaur, PW2 H. Kaur and PW3 Kulwant Singh in their respective cross-examinations would not create any doubt whatsoever in the case of the prosecution. The accused has furnished absolutely no explanation for what happened to the deceased, who is none other than his daughter, after she went with him on the evening of 04.01.2020. In similar circumstances, the Hon'ble Supreme Court upheld the conviction in a case titled as ***Nagesh Vs State of Karnataka 2012 AIR (SC) 1965*** because the accused did not offer any explanation in his statement under Section 313 Cr.P.C., and took up the stand of complete denial of his involvement in the crime. It held that law required the accused to furnish some explanation as he was ‘last seen’ with the deceased.

16. The evidence of material witnesses, such as PW3-Kulwant Singh, who found the dead body of the victim hanging on the tree and saw accused Partap Singh near the dead body in a perplexed and intoxicated state, coupled with the testimony of PW9 Gurjant Singh, who saw the accused Partap Singh carrying the minor victim wrapped in his "Loi" on 05.01.2020 at about 7.00 AM i.e. few hours before the victim was found dead near the bushes, near the pavement of the Canal, Dhianpur, is sufficient to come to the

conclusion that the accused raped his own minor daughter H. Kaur and thereafter committed her murder by strangulation and hanged her dead body on a tree in order to mislead the investigation. Merely, because PW3-Kulwant Singh did not report the matter to the police earlier in the morning will not create a doubt in the prosecution case, moreso, when his statement under Section 161 Cr.P.C. was recorded on 05.01.2020 itself. Similarly, PW9-Gurjant Singh a co-worker of the accused duly identified the shawl/apparel and shoes of the deceased whom he saw with the accused in the morning of 05.01.2020 and his memo of identification Ex.PW9/A was recorded on 05.01.2020 as well.

17. With respect to the ‘last seen theory’ of evidence, the Hon’ble Supreme Court in ***Veerendra Versus State of Madhya Pradesh, 2022 AIR Supreme Court 2396***, has held as under:-

> *“32. The case unfolded by the prosecution through the witnesses to fix the culpability on the appellant constitute a chain of circumstances, including the "last seen theory". The deceased was lastly seen with the appellant by PW-2 and PW-4. `Last seen theory' is certainly applicable in a crime like the one on hand which was carried out on sly and in secrecy during night, in the absence of availability of any eye-witnesses.*
>
> *32.1 In the decision in Nizam and Anr. v. State of Rajasthan [(2016) 1 SCC 550] this Court held that it would not be prudent to base conviction solely on `last seen theory'. This Court, obviously, sounded a caution that where time gap between `last seen' and `time of occurrence' is long it would be unsafe to base the conviction solely on the `last seen theory' and held that in such*

circumstances, it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution.

32.2 In State of Rajasthan v. Kashi Ram reported in (2006) 12 SCC 254, at paragraph 23 this Court held :

"23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., AIR 1960 Mad 218:1960 Crl LJ 620."

32.3 In Arabindra Mukherjee v. State of West Bengal [(2011) 14 SCC 352], while dismissing the appeal by the convict who stood sentenced for offences punishable under Section 302, 364, 120B and 201 of IPC, this Court held: "once the

appellant was last seen with the deceased, the onus is upon him to show that either he was not involved in the occurrence at all or that he had left the deceased at her home or at any other reasonable place. To rebut the evidence of last seen and its consequence in law, the onus was upon the accused to lead evidence in order to prove his innocence."

32.4 In Pattu Rajan v. State of Tamil Nadu [(2019) 4 SCC 771] this Court held in paragraph 63 thus :-

"It is needless to observe that it has been established through a catena of judgment of this court that the doctrine of last seen, if proved, shifts the burden of proof on to the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last seen with him. Failure on the part of the accused to furnish any explanation in this regard, as in the case on hand, or furnishing false explanation would give rise to strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances."

(Emphasis supplied)

32.5 The various aspects relating to the `last seen theory', derived from the aforementioned decisions, are well-settled and hence, we do not think it necessary to burden this judgment with further authorities on the subject.

(Emphasis supplied)

18. As has already been discussed above, once it has been established beyond doubt that the accused was seen in the company of the deceased having taken her from her mother the previous evening, the burden lay on him to explain as to how she came to be raped and murdered in terms of Section 106 of the Evidence Act and he has not been able to discharge the

said burden not having furnished any explanation either in his statement under Section 313 Cr.P.C. or by way of leading any evidence in defence.

19. The aforesaid evidence is duly corroborated by the medical evidence led in the shape of the testimony of PW5 Dr. Neha Chaudary, who conducted the postmortem of the deceased H. Kaur. The details and nature of injuries on the person and private parts of the deceased have been duly described by her in her testimony. She has clearly and specifically stated that the cause of death of the victim was asphyxia as a result of constriction of the neck due to injury no.1, which was sufficient to cause death in the ordinary course of nature. She further opined that after the receipt of the chemical examiner's report Ex.PW5/D, it was apparent that spermatozoa was present on the vaginal swabs of the deceased and signs were suggestive of forceful vaginal course and penetrative sexual assault upon the deceased. Minor discrepancies as to which the vaginal swabs were sent to the chemical examiner cannot dislodge the case of the prosecution in its entirety.

20. As regards the argument that the accused was not medically examined with respect to ascertaining his capacity to perform sexual intercourse and that the spermatozoa recovered from the swabs was not compared with the DNA of the accused thereby creating a dent in the prosecution case, it would be apposite to first refer to Section 53A Cr.P.C. and the same reads as under:-

> *"53A.* ***Examination of person accused of rape by medical practitioner****.-(1) When a person is arrested on a charge of*

committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose.

(2) The registered medical practitioner conducting such examination shall, without delay, examine such person and prepare a report of his examination giving the following particulars, namely;

(i) the name and address of the accused and of the person by whom he was brought,

(ii) the age of the accused,

(iii) marks of injury, if any, on the person of the accused,

(iv) the description of material taken from the person of the accused for DNA profiling, and

(v) other material particulars in reasonable detail.

(3) The report shall state precisely the reasons for each conclusion arrived at.

(4) The exact time of commencement and completion of the examination shall also be noted in the report.

(5) The registered medical practitioner shall, without delay, forward the report of the investigating officer, who shall forward it

to the Magistrate referred to in section 173 as part of the documents referred to in clause (a) of Sub-Section (5) of that section."

21. While examining the aforementioned provision, the Hon'ble Supreme Court in ***Veerendra*** (supra) held as under:-

"21. Obviously, both the trial Court and the High Court answered the question as to who is the author of the crimes by relying on the circumstantial evidence. We have already taken note of the various circumstances relied on by the trial Court and subsequently by the High Court, to fix culpability on the appellant. Though the Courts concurrently found him guilty of the offences of rape and murder there is lack of concomitancy in respect of conclusions/findings on certain aspects and circumstances, as noted above. Before adverting to the said issue, it is only proper to deal with a crucial contention of the appellant founded on Section 53A of the Code of Criminal Procedure, which was added to the Code by Cr.P.C. (Amendment) Act, 2005 (Act 25 of 2005). The relevant portion of Section 53A(1) reads thus :-

"[53A. Examination of person accused of rape by medical practitioner.-(1) When a person is arrested on a charge of committing an offence of rape or an attempt to commit rape and there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of such offence, it shall be lawful for a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of sixteen kilometers from the place where the offence has been committed by any other registered medical practitioner acting at the request of a police officer not below the rank of a sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the

arrested person and to use such force as is reasonably necessary for that purpose."

22. The above extracted provision under Section 53A(1) Cr.P.C. would go to show that it provides for a detailed examination, (which term has been explained under Explanation (a) to Section 53A Cr.P.C.), of a person accused of an offence of rape or attempt to commit rape, by a registered medical practitioner employed in a hospital run by the Government or by a local authority and in the absence of such a practitioner within the radius of 16 kilometers from the place where the offence has been committed, by any other registered medical practitioner. It is the said legal provision and the undisputed factual position of non-conduct of DNA profiling of the samples of the appellant that made him to take up the contention of violation of Section 53A Cr.P.C. In the said circumstances, he would further contend that there is absence of conclusive evidence to connect him with the samples taken from the body of the deceased. Certainly, non-conduct of DNA profiling in terms of the provisions under Section 53A Cr.P.C., is a flaw in the investigation. But then, the question emerged from the aforesaid indisputable position of not holding DNA profiling is whether the conviction of the appellant for the said offences, is liable to be set aside on that sole score.

23. There can be no doubt with respect to the position that a fair investigation is necessary for a fair trial. Hence, it is the duty of the investigating agency to protect the rights of both the accused and the victim by adhering to the prescribed procedures in the matter of investigation and thereby to ensure a fair, competent and effective investigation. Even while holding so, we cannot be oblivious of the well-nigh settled position that solely on account of defects or shortcomings in investigation an accused is not entitled to get acquitted. In other words, it also cannot be the sole reason for

interference with a judgment of conviction if rest of the evidence are cogent enough to sustain the same.

24. In the decision in Mir Mohammad Omar's case (supra), this Court held :-

> *"In our perception it is almost impossible to come across a single case wherein the investigation was conducted completely flawless or absolutely foolproof. The function of the criminal courts should not be wasted in picking out the lapses in investigation and by expressing unsavoury criticism against investigating officers. If offenders are acquitted only on account of flaws or defects in investigation, the cause of criminal justice becomes the victim. Effort should be made by courts to see that criminal justice is salvaged despite such defects in investigation."*
>
> *(Emphasis added)*

25. In the context of the contentions it is more appropriate to refer to the decision of this Court in Sunil v. State of Madhya Pradesh [(2017) 4 SCC 393]. It was a case of rape and murder of a four (4) year old child. A three-Judge Bench held herein thus :

> *"3. At the very outset, we deal with the arguments advanced on behalf of the appellant that in the present case the report of DNA testing of the samples of blood and spermatozoa under Section 53A of the Code of Criminal Procedure, 1973 has not been proved by the prosecution. The prosecution has, therefore, failed to prove its case beyond reasonable doubt. Reliance in this regard has been placed on the decision of this Court in Krishan Kumar Malik v. State of Haryana [(2011) 7 SCC 130].*
>
> *4. From the provisions of Section 53A of the Code and the decision of this Court in Krishan Kumar 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 53A 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."

26. Krishna Kumar Malik's case (referred supra) was rendered by a two-Judge Bench of this Court, wherein at paragraph 43 with respect to the matching of the semen, the following passage from Taylor's Principles and Practice of Medical Jurisprudence, 2nd Edn. (1965) was extracted thus :-

"Spermatozoa may retain vitality (or free motion) in the body of a woman for a long period, and movement should always be looked for in wet specimens. The actual time that spermatozoa may remain alive after ejaculation cannot be precisely defined, but is usually a matter of hours. Seymour claimed to have seen movement in a fluid as much as 5 days old. The detection of dead spermatozoa in stains may be made at long periods of 5 years. Nonmotile spermatozoa were found in the vagina after a lapse of time which must have been 3 and could have been 4 months."

In paragraph 43 of Krishna Kumar Malik's case, after extracting the above, it was further held :

"Had such a procedure been adopted by the prosecution, then it would have been a foolproof case for it and against the appellant."

This Court went on to hold thus in Paragraph 44 therein :-

> *"Now, after the incorporation of Section 53A in the Criminal Procedure Code w.e.f. 23.6.2006, brought to our notice by the learned counsel for the respondent State, it has become necessary for the prosecution to go in for DNA test in such type of cases, facilitating the prosecution to prove its case against the accused."*

27. Evidently, the three Judge Bench in Sunil's case (supra) considered Krishna Kumar Malik's case carrying such observations and finding before coming to the conclusion that `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'.

28. In view of the nature of the provision under Section 53A Cr.P.C and the decisions referred (supra) we are also of the considered view that the lapse or omission (purposeful or otherwise) to carry out DNA profiling, by itself, cannot be permitted to decide the fate of a trial for the offence of rape especially, when it is combined with the commission of the offence of murder as in case of acquittal only on account of such a flaw or defect in the investigation the cause of criminal justice would become the victim. The upshot of this discussion is that even if such a flaw had occurred in the investigation in a given case, the Court has still a duty to consider whether the materials and evidence available on record before it, is enough and cogent to prove the case of the prosecution. In a case which rests on circumstantial evidence, the Court has to consider whether, despite such a lapse, the various links in the chain of circumstances forms a complete chain pointing to the guilt of the

accused alone in exclusion of all hypothesis of innocence in his favour.

29. As a matter of fact, the decision in Rajendra Pralhadrao Wasnik's case (supra), would also fortify our view. The Bench was considering review petitions in Criminal Appeal Nos.145-146 of 2011. That was a case involving rape and murder of a three (3) year old girl where the case was held as proved on the basis of circumstantial evidence. So also, in that case DNA evidence was not produced before the Court, in spite of samples being taken. Obviously, taking note of the unerring nature of the circumstantial evidence pointing only to the guilt of the accused and the other circumstances the trial Court convicted and awarded him capital punishment. The High Court confirmed not only the conviction but also the award of capital sentence. Originally, this Court dismissed the appeals and thereafter, the dismissed review petitions were restored for consideration solely in view of a Constitution Bench decision of this Court in Mohd. Arif v. Supreme Court of India reported in (2014) 9 SCC 737. In paragraph 79, this Court in Rajendra Pralhadrao Wasnik's case held therein thus :-

> *"Insofar as the present petition is concerned, we are of opinion that for the purposes of sentencing, the Sessions Judge, the High Court as well as this Court did not take into consideration the probability of reformation, rehabilitation and social re-integration of the appellant into society. Indeed, no material or evidence was placed before the courts to arrive at any conclusion in this regard one way or the other and for whatever it is worth on the facts of this case. The prosecution was remiss in not producing the available DNA evidence and the failure to produce material evidence must lead to an adverse presumption against the prosecution and in favour of the appellant for the purposes of sentencing. The Trial Court was also in error in taking into consideration, for the purposes of sentencing, the pendency of*

two similar cases against the appellant which it could not, in law, consider. However, we also cannot overlook subsequent developments with regard to the two (actually three) similar cases against the appellant."

30. In the light of the above referred decisions, the contentions of the appellant founded on the factum of non-holding of DNA profiling and the provision under Section 53A, is only to be repelled. As held in Sunil's case (supra), a positive result of DNA test would constitute clinching evidence against the accused. But, a negative result of DNA test or DNA profiling having not been done would not and could not, for that sole reason, result in failure of prosecution case. So much so, even in such circumstances, the Court has a duty to weigh the other materials and evidence on record to come to the conclusion on guilt or otherwise of the appellant herein and that exactly what was done by the trial Court and then by the High Court, in the instant case."

(Emphasis supplied)

22. Thus, it is a settled proposition of law that merely because the potency test of an accused has not been conducted and his DNA profiling has not been done cannot be a basis for the acquittal of the accused once there is sufficient other material for the Court to reach a conclusion of the guilt of the accused. On the other hand, a positive result of a DNA test would certainly constitute clinching evidence against an accused, we must also add here that as per the complainant and the accused had children, the deceased H. Kaur aged 06 years, a son Y. Singh aged 03 years and a daughter J. Kaur aged 07 months which would establish the potency of the accused.

23. As regards the extra-judicial confession purportedly made by the accused before Joga Singh (PW10), we find that the witness is a close relative of the complainant and it was highly unlikely that the accused would have made the said confession before such a witness who was not in any position of authority so as to help him in any manner. Therefore, his testimony would not further the case of the prosecution.

24. Though, there are some discrepancies in the statements of witnesses as to when the police party had reached the spot, the same are not fatal to the prosecution case which otherwise stands established from the evidence on record. Further, merely because the prosecution was not able to produce evidence regarding the ownership of Mobile No.98765-74729 or any evidence to show from which phone the accused had made a call to Mobile No.98765-74729 would not create any doubt in the prosecution version in view of the clear and consistence evidence of the PWs having ‘last seen’ the accused with the deceased.

25. Thus, from the discussion hereinabove, it is apparent that the prosecution has been able to clearly, cogently and categorically establish that the chain of circumstantial evidence is complete so as to leave no doubt whatsoever that the deceased aged 06 years, who was none other than the daughter of the accused had been taken away by him on the evening of 04.01.2020 between 03.00/04.00 PM. She was found raped and murdered the next morning and the accused has not been able to furnish any explanation

whatsoever as to what had transpired with his deceased daughter after he had taken her away with him.

26. Therefore, finding no merit in the present appeal, the same stands dismissed.

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27. As regards the question as to whether the death sentence awarded by the Trial Court under Section 302 IPC ought to be maintained or substituted, it would be apposite to refer to the decision in ***Veerendra*** (supra) where the convict had raped and murdered his 08 years old niece and his sentence of death was set aside. The relevant paragraphs of the said judgment are as under:-

> *"52. The next question is whether death sentence awarded by the trial Court and confirmed by the High Court for the conviction of the offence of murder be maintained or substituted? This penalty is awardable to a culprit only the category of the case falls under `rarest of rare cases', the culprit has become a threat to the society at large and beyond reformation and his elimination is the only way for eradication of the threat. For deciding the said question various aspects have to be considered. On a careful scanning of the consideration made by the trial Court as also the High Court for awarding the sentence for the conviction under Section 300 IPC, punishable under section 302 IPC, we are of the view that the question regarding the correctness of the death sentence awarded to the appellant requires further consideration, taking into account the statutory requirements under Section 354(3) Cr.P.C. For awarding termination of natural life, a*

careful scrutiny is required. The statutory requirements under Section 354(3) Cr.P.C. are as under :

> *"When the conviction for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such offence."*

53. On the aforesaid subject this Court has already enunciated the principles. A careful survey of such decisions was made by this very three-Judge Bench in the decision in Pappu v. The State of Uttar Pradesh (Criminal Appeal Nos.1097-1098/2018, pronounced on 9.2.2022. Paragraph 49 of the decision in Shankar Kishanrao Khade v. State of Maharashtra reported in (2013) 5 SCC 546, highlighting the requirement of application of `crime test', `criminal test' and `rarest of rate test' was referred therein. In the said paragraph, with reference to the previous decisions, the aggravating circumstances (crime test) and the mitigating circumstances (criminal test) were narrated as hereunder :

> *"49. In Bachan Singh and Machhi Singh cases, this Court laid down various principles for awarding sentence: (Rajendra Pralhadrao case, SCC pp. 47-48, para 33)*
>
> *"`Aggravating circumstances - (Crime test)*
>
> *(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.*
>
> *(2) The offence was committed while the offender was engaged in the commission of another serious offence.*

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, 90 murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances - (Criminal test)

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.'"

This Court further said: -

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the perception of the society that is "society-centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges."

54. After taking into account the same and such other decisions specifically referred to therein, in Pappu's case (supra) it was held thus:-

> *"41. It could readily be seen that while this Court has found it justified to have capital punishment on the statute to serve as deterrent as also in due response to the society's call for appropriate punishment in appropriate cases but at the same time, the principles of penology have evolved to balance the other obligations of the society, i.e., of preserving the human life, be it of accused, unless termination thereof is inevitable and is to serve the other societal causes and collective conscience of society. This has led to the evolution of `rarest of rare test' and then, its appropriate operation with reference to `crime test' and `criminal test'. The delicate balance expected of the judicial process has also led to another mid-way approach, in curtailing the rights of remission or premature release while awarding imprisonment for life, particularly when dealing with crimes of heinous nature like the present one."*

55. On going through the judgment of the trial Court and the High Court, we are of the considered view that in handing down capital sentence what had weighed with the Courts are the horrendous feature of commission of crime and the hapless state of the victim. The trial Court considered the question of sentence and awarded the same on the very same day on which the appellant was convicted. We shall not be understood to have held that this is absolutely illegal and impermissible. Ultimately, what is required is consideration of the aggravating and mitigating circumstances with application of mind. They were not given the proper attention while considering the question of awarding the sentence for conviction under Section 302 IPC, in the case on hand. In the said circumstances, we will proceed to consider the question of sentence in the present case bearing in mind the

principles enunciated by this Court in the matter of awarding the capital sentence. The trial Court as also the High Court arrived at the conclusion that the act of the appellant herein invited the extreme indignation of the community and therefore, it deserves a deterrent sentence so as to give a message to the society that such crimes should not be repeated by anyone. In short, we are of the considered view that the `crime test' and the `criminal test' require to be followed before awarding capital sentence, did not gather the required attention of the trial Court as also the High Court.

56. It is true that all murders are inhuman. For imposing capital sentence, the crime must be uncommon in nature where even after taking into account the mitigating circumstances the Court must be of the opinion that the sentence of imprisonment for life is inadequate and there is no alternative but to impose death sentence. The heinous and brutal nature of the commission of crime, viz., brutal rape and murder of an eight-year old girl child who is none other than the daughter of his own cousin, that too in a hapless situation, is definitely an aggravating circumstance. The nature of the injuries caused on the private parts of the victim as is evident from the evidence of PW10 with Ext.P17 report would definitely shock the conscience. At the same time, the principles enunciated by this Court in the matter of awarding of death sentence and in such circumstances, the undisputed and indisputable fact that the appellant had no criminal antecedents and he hails from a poor socio-economic background and also his unblemished conduct inside the jail cannot go unnoticed. So also, it is a fact that at the time of commission of the offence the appellant was aged 25 years. Hence, viewing the issue taking into account the aforesaid aspects, we do not find any reason to rule out the possibility and the probability of the reformation and rehabilitation of the appellant. The long and short of the

discussion is that the present case cannot be considered as one falling in the category of `rarest of rare cases' in which there is no alternative but to impose death sentence.

57. In the aforesaid circumstances, the next question is what is the comeuppance for the conviction for offence of murder in this case. In the decision in Swamy Shraddananda v. State of Karnataka [(2008) 13 SCC 767], taking into account the tenets of penology and with a view to have a just, reasonable and proper course in a case where the Court is of the opinion that sentence for life is inadequate but imposition of death sentence is unwarranted this Court adopted the course of awarding life imprisonment without application of the provisions of premature release/remission before an actual imprisonment for a definite period of time. This position was iterated with agreement in the decision in Union of India v. Sriharan [(2016) 7 SCC 1], thus :

> *"We hold that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative.*

58. Thus, taking into account the fact that in the case on hand a hapless 8 year old girl child, who is none other than the daughter of appellant's cousin sister raped and murdered and that too, in an extremely brutal manner revealed from the evidence on record, we are of the considered view that course adopted in the decision in Swamy Shraddananda's case (supra) and reiterated in Sriharan's case (supra)has to be adopted in this case. In other words, even while commuting capital punishment, the appellant has to be awarded life imprisonment without application of the provisions of premature release/remission for

a substantial length of period. On such consideration we are of the view that it would be just and proper to award punishment of imprisonment for life to the appellant for the offence punishable under Section 302 IPC, by providing for an actual imprisonment for a period of 30 (thirty) years without application of the provisions of premature release/remission.

59. In the circumstances, these appeals are partly allowed as hereunder:

(i) The conviction of the appellant for the offences punishable under Section 302 and 376(2)(i), IPC and conviction for the offence punishable under Section 6 of POCSO Act is upheld and the sentences awarded to him for the conviction therefor, are confirmed, for the offence under Section 302 IPC;

(ii) However, the death sentence awarded to the appellant for the offence under Section 300, IPC punishable under Section 302, IPC is commuted to that of imprisonment for life with the stipulation that he shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of thirty (30) years;

(iii) The other terms of sentences awarded to the appellant including fine amount and default stipulations also stand confirmed. All the substantive sentences awarded to the appellant shall run concurrently."

(Emphasis supplied)

28. Whether the sentence of life imprisonment without remission could be imposed in a case where death sentence was being converted to life

imprisonment, the Hon'ble Supreme Court in ***Union of India Versus V. Sriharan @ Murugan & others, 2016(7) SCC 1*** held as under:-

> "*Answers to the questions referred in seriatim*
>
> *Question 52.1 Whether imprisonment for life in terms of Section 53 read with section 45 of the Penal Code meant imprisonment for rest of the life of the prisoner or a convict undergoing life imprisonment has a right to claim remission and whether as per the principles enunciated in paras 91 to 93 of Swamy Shraddananda (2), a special category of sentence may be made for the very few cases where the death penalty might be substituted by the punishment of imprisonment for life or imprisonment for a term in excess of fourteen years and to put that category beyond application of remission?*
>
> *Ans. Imprisonment for life in terms of Section 53 read with section 45 of the Penal Code only means imprisonment for rest of life of the convict. The right to claim remission, commutation, reprieve etc. as provided under Article 72 or Article 161 of the Constitution will always be available being Constitutional Remedies untouchable by the Court .*
>
> *We hold that the ratio laid down in Swamy Shraddananda (supra) that a special category of sentence; instead of death can be substituted by the punishment of imprisonment for life or for a term exceeding 14 years and put that category beyond application of remission is well-founded and we answer the said question in the affirmative."*

(Emphasis supplied)

29. While there is no doubt about the brutal and heinous nature of the crime committed by the accused who is none other than the father of the

deceased, the fact remains that he has no criminal antecedents, hails from a poor socio-economic background and his conduct inside the Jail has been satisfactory. Further, at the time of the crime, he was of the age of 35 years. Therefore, the instant case cannot be said to be falling in the category of 'rarest of rare cases' in which there is no alternative but to impose the death sentence. Therefore, we are of the view that it would be just and expedient to award punishment of imprisonment for life to the accused/appellant for the offence punishable under Section 302 IPC which would mean for an actual imprisonment for the remainder of his natural life without application of the provisions of premature release/remission.

30. In these circumstances, the appeal is partly allowed as under:-

(i) The conviction of the appellant for the offences punishable under Section 302 of the IPC and Section 06 of the POCSO Act is upheld and the sentence awarded to him for conviction under Section 06 of the POCSO Act as imposed by the Trial Court is affirmed;

(ii) However, the sentence awarded to the appellant for the offence punishable under Section 302 IPC is commuted to that of imprisonment for life which would mean imprisonment for the remainder of his natural life without the application of the provisions of premature release/remission;

(iii) The other terms of sentences awarded to the appellant including the fine amount and default stipulations also stand confirmed. The substantive sentences awarded to the appellant shall run concurrently.

(JASJIT SINGH BEDI)
JUDGE

(GURVINDER SINGH GILL)
JUDGE

02.04.2025
JITESH

Whether speaking/reasoned:- Yes/No
Whether reportable:- Yes/No