

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/CRIMINAL CONFIRMATION CASE NO. 2 of 2021****With****R/CRIMINAL APPEAL NO. 1690 of 2023****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE ILESH J. VORA****and****HONOURABLE MR. JUSTICE R. T. VACHHANI**

Approved for Reporting		
Yes	No	
	✓	

STATE OF GUJARAT

Versus

GUDDUKUMAR MADHESH YADAV

Appearance:

MR RONAK RAVAL APP for the Appellant(s) No. 1

MR NEERAJ SONI NOTICE SERVED for the Respondent(s) No. 1

CORAM: HONOURABLE MR. JUSTICE ILESH J. VORA**and****HONOURABLE MR. JUSTICE R. T. VACHHANI****Date : 18/02/2026****ORAL JUDGMENT****(PER : HONOURABLE MR. JUSTICE R. T. VACHHANI)**

Criminal Confirmation Case No.2 of 2021 is filed seeking confirmation of the death sentence awarded to the accused by the judgment and order dated 07/12/2021 passed in Special (POCSO) Case No. 278 of 2021 by learned Special Judge (POCSO), Surat. The accused has been convicted and sentenced as under:

- I. For the offences punishable under Sections 302, 376(A), and 376(AB) of the Indian Penal Code, the accused is sentenced to death by hanging till he is dead, and is also imposed a fine of ₹500/-, and in default thereof, to undergo further imprisonment for two years.
- II. For the offence punishable under Section 363 of the Indian Penal Code, the accused is sentenced to simple imprisonment for 7 (seven) years and a fine of ₹1,000/-, and in default thereof, to undergo further imprisonment for one year.
- III. For the offence punishable under Section 366 of the Indian Penal Code, the accused is sentenced to simple imprisonment for 10 (ten) years and a fine of ₹1,000/-, and in default thereof, to undergo further imprisonment for one year.
- IV. For the offence punishable under Section 376(2)(j)(1) of the Indian Penal Code, the accused is sentenced to imprisonment for life for the remainder of his natural life and a fine of ₹500/-, and in default thereof, to undergo further imprisonment for two years.
- V. For the offence punishable under Section 376(3) of the Indian Penal Code, the accused is sentenced to imprisonment for life for the remainder of his natural life and a fine of ₹500/-, and in default thereof, to undergo further imprisonment for two years.
- VI. For the offence punishable under Section 342 of the Indian Penal Code, the accused is sentenced to simple imprisonment for one year and a fine of ₹500/-, and in default thereof, to undergo further imprisonment for four

months.

VII. Considering the provisions of Section 42 of the POCSO Act, for the offences under Sections 4, 5(i)(k)(m), 6, 8, 9(m) and 10 of the said Act, since the offences under the Indian Penal Code have already been proved against the accused in the present case and the punishment for those offences is maximum, no separate punishment under the POCSO Act shall be imposed.

2. The convict has also preferred Criminal Appeal No.1690 of 2023 against said judgment and order of conviction and sentence and therefore, the Criminal Confirmation Case and the said appeal of the convict is heard and decided together by this common judgment.

Case of the Prosecution:-

3. The complainant in the present case has been residing along with his family for the last four years in a rented room situated on the ground floor of a building located at Bhagwati Nagar Society, Plot Nos. 34 and 35. As the accused was also residing for the last one year in a rented room situated on the third floor of the same building along with his friend/co-accused Pankaj Pitambar Yadav, he was acquainted with the victim - deceased child and was aware that she was a minor and the daughter of the complainant. On 04.11.2021, at around 8:30 p.m., when the victim was playing near her house in front of Bhagwati Nagar Society, Plot No. 63, the accused, with the intention of committing a wrongful act and having sexual intercourse, enticed and allured the victim on the pretext of giving her chocolate, abducted her, and took her to an open place with

bushes situated behind Pandesara GIDC, Armo (Synthetics) Dyeing Mill, where he removed the jeans pant and underwear worn by her and committed rape upon her. As the victim could not bear the pain and started crying, the accused pressed her mouth and nose with his hands, and despite having knowledge that by doing so the victim would die, with the intention of causing her death, he continued to press her mouth and nose, thereby strangulating her and caused her death. Further, despite knowing that the victim was a minor, he committed penetrative sexual assault and aggravated penetrative sexual assault upon her, causing her death. During investigation, on the basis of video footage of the CCTV camera installed outside a shop named Patel Repairing and Electronics, in which the accused is seen taking the victim child, investigation was carried out, and on the basis of eye-witnesses, electronic evidence, and the articles recovered from the accused, the involvement of the accused was established, whereupon the accused was arrested.

4. Thus, the accused is alleged to have committed offences punishable under Sections 363, 302, 376(2)(j)(l), 376(3), 376(A), 376(AB), 342 of the Indian Penal Code and Sections 4, 5(i)(k)(m), 6, 8, 9(m) and 10 of the Protection of Children from Sexual Offences Act, 2012, and on the basis of the complaint lodged by the complainant, the Investigating Officer recorded statements of relevant witnesses, and finding sufficient evidence against the present accused, filed a charge-sheet on 15.11.2021 before this Hon'ble Court. The same was registered as a Special Case (POCSO) No. 278/2021, and was committed to this Special Court for further judicial proceedings.

5. Thereafter, the learned Sessions Judge transferred the case against the accused to the Special POCSO Court for the purpose of conducting the judicial proceedings having jurisdiction to try the case. After ensuring that the accused was provided with copies of the police investigation papers, the charge was framed against him at Exhibit 6 for offences under Sections 363, 302, 376(2)(j)(1), 376(3), 376(A), 376(AB), 342 of the Indian Penal Code and Sections 4, 5(i)(k)(m), 6, 8, 9(m) and 10 of the Protection of Children from Sexual Offences Act, 2012. Upon taking the statement of the accused, the accused denied the offence and consequently, the prosecution's evidence was taken.

6. The prosecution has produced the following oral and documentary evidence:

-::Oral Evidence ::-

Sr. No.	Name of Witness	Particulars	Exhibit
1.	Dr. Nishaben Vinodbhai Chandra	Evidence of the Medical Officer	08
2.	Dr. Rinkal Chandreshbhai Paghdar	Evidence of the Medical Officer who performed the Post-mortem	13
3.	Maheshbhai Chhaganbhai Rabari	Evidence of Panch Witness	20
4.	Vikramkumar Sanjivbhai Patel	Evidence of Panch Witness	27

Sr. No.	Name of Witness	Particulars	Exhibit
5.	Sangeetadevi Vijayrambaran Shahu	Evidence of Panch Witness	31
6.	Vinodkumar Kamalaprasad Yadav	Evidence of Panch Witness	33
7.	Yogesh Bholenath Mishra	Evidence of Panch Witness	41
8.	Hareshkumar Meghraj Chaudhary	Evidence of Panch Witness	45
9.	Kaushikkumar Dilipkumar Asari	Evidence of Panch Witness	47
10.	Vimalkumar Mithalal Shah	Evidence of Panch Witness	51
11.	Pankaj Lalluram Shahu	Evidence of Independent Witness	55
12.	Devprakash Ganori Mistry	Evidence of the Complainant	93
13.	Babubhai Govanbhai Patel	Evidence of Panch Witness	—
14.	Tejaskumar Rajnikant Patel	Evidence of Panch Witness	65
15.	Gitadevi Rakeshkumar Kushwah	Evidence of Independent Witness	58
16.	Pushkarlal Bhagulal	Evidence of Independent	SE

Sr. No.	Name of Witness	Particulars	Exhibit
	Mewada	Witness	
17.	Bimlesh Muneshwar Yadav	Evidence of Independent Witness	71
18.	Santosh Arvind Patel	Evidence of Independent Witness	73
19.	Lucky Vijay Shahu	Evidence of Independent Witness	75
20.	Hitesh Hasmukhbhai Patel	Evidence of Independent Witness	77
21.	Bharat Devidas Patel	Evidence of Independent Witness	80
22.	Pankaj Lalataprasad Mishra	Evidence of Independent Witness	81
23.	Ashok Mithalesh Yadav	Evidence of Independent Witness	82
24.	Dr. Umesh Baldevbhai Chaudhary	Evidence of Medical Officer	84
25.	Pankaj Pitambar Yadav	Evidence of Independent Witness	95
26.	Bhagwandas Ramlal Vishwakarma	Evidence of Independent Witness	ES
27.	Uditnarayan Maiyyaji	Evidence of Independent	87

Sr. No.	Name of Witness	Particulars	Exhibit
	Sharma	Witness	
28.	Dipak Anil Sharma	Evidence of Independent Witness	E8
29.	Harpalsinh Dipsinh Sindhav	Evidence of Police Witness	GE
30.	Digvijaysinh Ajitsinh Gohil	Evidence of Police Witness	102
31.	Harishchandra Vanabhai Pawar	Evidence of Police Witness	104
32.	Ashishkumar Ghemarabhai Rabari	Evidence of Police Officer	105
33.	Shivlubhai Somalbhai Gavit	Evidence of Additional Executive Magistrate	110
34.	Ajay Govindbhai Kulkarni	Evidence of PSO	113
35.	Vijaykumar Nathabhai Singarkhiya	Evidence of Investigating Officer (IO)	115
36.	Jignesh Lalitchandra Kamdar	Evidence of Circle Officer	124
37.	Anurag Bavbhai Kalsariya	Evidence of Police Officer	128
38.	Hardipsinh Pradyuman Jhala	Evidence of Police Witness	131

Sr. No.	Name of Witness	Particulars	Exhibit
39.	Pritiben Vishnubhai Patel	Evidence of Woman Police Witness	132
40.	Vijaybhai Kantilal Shrimali	Evidence of Police Witness	133
41.	Somnath Gamjibhai Naik	Evidence of Police Witness	134
42.	Alpeshkumar Pethubhai Chaudhary	Evidence of Investigating Officer (IO)	135

--:: Documentary Evidence ::--

Sr. No.	Particulars of Document	Exhibit
1.	Medical treatment certificate of the accused	—
2.	Memo regarding medical examination of the accused and collection of necessary samples and issuance of medical certificate	10
3.	Original MLC case papers of the accused	—
4.	Form No. 2B with samples of the accused	12
5.	Memo regarding conducting post-mortem of the dead body and issuing cause of death certificate and PM note	14
6.	Post-mortem report of the deceased/victim minor girl	15

Sr. No.	Particulars of Document	Exhibit
7.	Carbon copy of inquest panchnama	15
8.	Form with samples of the victim/deceased	17
9.	Cause of Death Certificate	18
10.	Police report (Form-2B) sent to the Medical Officer along with the dead body for post-mortem	19
11.	Panchnama of bodily condition of the accused	21
12.	Panchnama of seizure of pen-drive of reconstruction panchnama	28
13.	Inquest panchnama	32
14.	Panchnama of the scene of offence	34
15.	Panchnama of clothes seized after post-mortem of the deceased	42
16.	Reconstruction panchnama	45
17.	Panchnama of gait analysis of the accused	48
18.	Panchnama of CCTV footage of Bapunagar Society and Krishnanagar Society	—
19.	Certificate under Section 65-B regarding CCTV footage produced by witness Pankajbhai	56
20.	Certificate under Section 65-B regarding gait analysis produced by witness Pankajbhai	57
21.	Complaint	—

Sr. No.	Particulars of Document	Exhibit
22.	Xerox copy of Aadhaar Card of the complainant	51
23.	Panchnama regarding tallying of accounts written in diary found from the accused at the scene of offence	64
24.	Panchnama of diary recovered from the scene of offence	99
25.	Original statement of witness Pushkarlal Bhagulal Mewada under Section 164 of CrPC	70
26.	Original statement of witness Bimlesh Muneshwar Yadav under Section 164 of CrPC	72
27.	Certificate under Section 65-B regarding CCTV footage produced by witness Santoshbhai	74
28.	Certificate under Section 65-B produced by witness Hiteshbhai (videographer)	78
29.	Bill produced by witness Hiteshbhai (videographer)	78
30.	Memo addressed to Medical Officer for collection of DNA samples of the accused	85
31.	MLC case papers of the accused	85
32.	Form with DNA samples of the accused	87
33.	Memo addressed to the Medical Officer for collection of DNA samples of the victim/deceased minor girl	88
34.	Original MLC case papers of the complainant	86
35.	Original MLC case papers of the complainant's wife	—

Sr. No.	Particulars of Document	Exhibit
36.	Form with DNA samples of the complainant's wife	—
37.	Form with DNA samples of the complainant	E2
38.	Original MLC case papers regarding DNA of the complainant	E3
39.	Original MLC case papers regarding DNA of the complainant's wife	94
40.	Certificate under Section 65-B issued by U.H.Co. Harpalsinh	100
41.	Report submitted by U.H.Co. to PSI regarding custody of pen-drive containing CCTV footage	101
42.	Certificate under Section 65-B issued by U.H.Co. Mr.Digvijaysinh	103
43.	Report submitted by U.H.Co. to PI regarding custody of the clothes, articles and cause of death certificate handed over by the doctor who performed the post-mortem	105
44.	Report submitted by PSI Rabari to PI regarding action taken	107
45.	Panchnama of Identification parade	—
46.	Extract of station diary regarding registration of offence	114

Sr. No.	Particulars of Document	Exhibit
47.	Extract of page No. 1 of the station diary	115
48.	Memo sent to DCB Branch (Missing Squad), Surat, for keeping record and investigation regarding the victim minor girl	117
49.	Memo sent to DCB Branch, Surat City, for keeping record and investigation regarding the victim minor girl	118
50.	Memo sent to all Police Stations of Surat City for keeping record and investigation regarding the victim minor girl	119
51.	Memo for publication in daily newspapers/TV regarding missing victim minor girl along with details	120
52.	Memo sent to Chairperson, Nari Sanrakshan Gruh, for keeping record and investigation regarding the victim minor girl	121
53.	Memo for entry in station diary and for wireless message through police control room to all police stations regarding missing victim minor girl	122
54.	Dog Squad report	123
55.	Letter addressed to Mamlatdar, Majura for preparation of the map of scene of offence	125
56.	Memo sent by PI to City Mamlatdar for preparation of	126

Sr. No.	Particulars of Document	Exhibit
	the map of scene of offence	
57.	Map of scene of offence forwarded with covering letter	127
58.	Report regarding birth certificate of the victim minor girl	129
59.	Statement of Dr. Kudan Kumar Balmansingh Kushwah	130
60.	Extract of Muddamal Register of Police Station	135
61.	Examination report issued by FSL Officer after on-site examination	137
62.	Dispatch note sent to FSL Officer with the forwarding letter	138
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64.	Result received from Biology Division of FSL	140
65.	Receipt issued by FSL for muddamal received (total 20 articles)	141
66.	Receipt issued by Toxicology Division of FSL	142
67.	Receipt issued by DNA Division of FSL	143
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69.	Receipt of muddamal received for gait analysis by	145

Sr. No.	Particulars of Document	Exhibit
	Computer Science Division of FSL	
70.	Serology report of FSL	147
71.	Opinion received from Toxicology Division of FSL	148
72.	Opinion received from DNA Division of FSL	149
73.	Opinion regarding porn clip found from mobile phone of the accused	150
74.	Opinion of gait analysis issued by FSL	151
75.	Copies of statements under Section 164 CrPC of witnesses Pushkarlal and Bimlesh along with consent forms	152
76.	Call details of the accused	153
77.	FIR registered against the shopkeeper from whom the accused purchased memory card containing porn videos	154
78.	Report regarding addition of sections of the Indian Penal Code	155
79.	Certificate of photographer under Section 65-B of the Evidence Act	156

7. Other than the above, the prosecution has neither produced any documentary evidence nor examined any further oral evidence. The prosecution has submitted a *pursis* confirming that their evidence has

been completed. Upon the completion of the prosecution's evidence, the further statement of the accused under Section 313 of the Criminal Procedure Code was recorded. In the said statement, the accused primarily stated that the prosecution's evidence was false, that a false case had been filed against him and that he is innocent. Upon completion of the arguments from each side, the learned Special Court has recorded the conviction and sentence of the convict-accused as stated in paragraph 1 of this judgment.

8. Heard the learned APP Mr. Ronak Raval appearing for the respondent – State and learned Advocate Mr. Neeraj Soni appearing for the convict – accused in the captioned matter.

9. Before examining the case on hand considering the evidence adduced before the learned Special Court and dealing with the rival submissions made by the respective parties, it would be apt to refer the provisions of Criminal Law (Amendment) Ordinance, 2018 by which Section 376-AB was inserted after Section 376-A, which reads as under :

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

Provided further that any fine imposed under this section shall be paid to the victim.”

With the aforementioned insertion of new Section 376-AB, the provision has been made to an effect that whoever commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death. The proviso reads that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim. Thus, by the aforesaid new provision in a case of rape on a woman under twelve years of age, minimum sentence of rigorous imprisonment is not less than twenty years, but the same may extend to imprisonment for life would mean natural life of the accused. Thus, in such cases the rigorous imprisonment would not be less than twenty years and the same would be coupled with fine or the court may award death sentence.

10. Learned APP Mr.Ronak Raval appearing for the State would submit that in light of aforementioned amendment, the accused has rightly been convicted and sentence of death penalty for committing rape on a minor girl aged two and half years and committed her murder. He has further submitted that evidence so adduced before the learned Special Court is proved and on the basis thereof, the convict has rightly been imposed a death penalty and hence this Court may confirm the said death penalty and dismissed the appeal preferred by the convict.

11. Whereas, learned counsel appearing for the convict has argued that

in the facts of the present case, the conviction of death sentence awarded to the accused is not sustainable. It is submitted that the manner in which the alleged offence is committed is not barbaric and brutal and hence present case does not fall within 'rarest of rare case' to award death sentence. In support of his contentions, learned Advocate for the convict has relied upon various decisions of the Hon'ble Supreme Court in the cases of *Bachan Singh Versus State of Punjab* reported in *AIR 1980 SC 898* and *Machhi Singh & Others Versus State of Punjab* reported in *AIR 1983 SC 957*.

12. Reliance is also placed upon the decision of the Hon'ble the Supreme Court in the case of *Amit Versus State of Uttar Pradesh reported in AIR 2012 SC 1433* to contend that in absence of having any evidence that the accused may repeat a similar crime in future, the possibility of his reform cannot be ruled out in the coming years looking to the age and under such circumstances, the Hon'ble Supreme Court in the said case relying upon the judgment of *Rameshbhai Chandubhai Rathod Versus State of Gujarat reported in AIR 2011 SC 803* converted the death penalty into the imprisonment for life for the remaining term. Reliance is also placed on the judgment of Hon'ble the Supreme Court in *the case of Panchhi & Another Versus State of U.P reported in (1998) 7 SCC 177* to explain the circumstance as to when the death penalty is not justified.

13. By making the above submissions, learned advocate for the convict would submit to allow this appeal.

14. At the outset, if the newly inserted Section 376-AB of the IPC is seen, it provides that in a case of rape where the age of woman is under 12 years of age, minimum rigorous imprisonment is provided not less than twenty years which may extend to imprisonment for life which shall mean natural life and with fine. Therefore, the ratio and the test to award the death penalty in the case of committing rape on a woman below 12 years of age shall be the same as has been laid down in the plethora of decisions prior to the amendment i.e. 'rarest of rare case.'

15. It would be relevant to note that the learned Special Judge has recorded the evidence of the witnesses produced by the prosecution before the Court and after evaluating the same, including the scientific and medical evidence has convicted and imposed the death penalty. Therefore, evidence of the complainant and other relevant witnesses is required to have a glance through.

Evidence of Date of Birth of the Victim – Minor:-

16. It would be apt to note the complainant is father of the victim/deceased. The complaint has been lodged on 05.11.2021. In the complaint, the complainant has stated that he has two daughters, out of whom the elder daughter is the victim and the younger daughter is one year old. In the said complaint, the height of the victim is stated to be approximately two and a half feet, and a passport size photograph of the victim has also been produced. However, during his deposition at Exhibit-59, the complainant has not produced any document to prove the

age of the victim. Further, he has stated that the birth of his victim daughter had taken place at their native place in Bihar at home and that no registration of her birth was done at any place. Thereafter, during further investigation, it is stated that birth of his victim daughter had taken place on 11.04.2019 at Supriya Children Hospital in Bihar, but no proof thereof is available with them. In the cross-examination conducted by the defence, it is stated that his marriage had taken place in the year 2017 and the said marriage had taken place in Bihar. Except this, no cross-examination has been conducted by the defence with regard to the age of the victim.

On behalf of the prosecution, as Witness No.37, PSI of Pandesara Police Station, viz., Mr.Anurag Bavbhai Kalsariya, has been examined at Exhibit-128. In his examination-in-chief, he has stated that on 10.11.2021, upon being instructed by the PI to go to the native place of the complainant and conduct inquiry regarding the date of birth of the deceased child in the rape case, he departed from Surat by train on 11.11.2021 and on 12.11.2021 reached Bandupur Village, Post-Terakhana Karpi, District Arwal, Bihar, and there he recorded the statement of the Manager, Kundan Kumar, son of Rajya Balam Singh Kushwaha, with regard to the birth of the victim child having taken place at Supriya Children Hospital, Motha, Arwal, and submitted the same to the PI along with his report. His report has been produced at Exhibit-129 and the statement of Kundan Kumar Kushwaha has been produced at Exhibit-130. During cross-examination, he has denied suggestion that he had not gone anywhere and that he had remained in Surat and falsely prepared and produced the certificate. Upon perusal of the deposition of

this witness and the documents produced by him, it is proved that the date of birth of the victim was 11.04.2019. No other fact contrary thereto is proved.

17. Prosecution Witness No.2- Dr.Rinkal Chandreshbhai Paghdal is examined at Exhibit-13 who is one of the panel doctors conducted the post-mortem of the dead body of the victim. In her examination-in-chief, during investigation, she has stated that upon conducting external examination of the dead body, the dead body was of a female child aged 2 years and 9 months. During cross-examination conducted by the defence, no question has been put with regard to the age. In the present case, considering the CCTV footage produced by the Prosecution, wherein the child is seen in the camera installed outside Patel Repairing and Electronics Shop as well as in the CCTV camera installed outside the house of Witness No.11, Shri Pankaj Lalluram Shahu, situated at Plot No. 351 of Bapunagar Society, and further considering the inquest panchnama and post-mortem form, it is clearly proved beyond reasonable doubt by the Prosecution that at the time of the incident, i.e., on 05.11.2021, the age of the deceased victim child was 2 years and 6 months.

Medical Evidence:-

18. Prosecution Witness No. 2-Dr. Rinkal Chandreshbhai Paghadar, has been examined at Exhibit-13. In her deposition, during examination-in-chief, she has stated that on 07/11/2021, in the afternoon, when she was on duty as a Tutor in the Department of Forensic Medicine at Surat Government Medical College, during that time, A.S.I. Harishbhai B.

Patil, B.K. No. 745, Pandesara Police Station, Surat City brought the dead body of a female child for post-mortem examination at 2:30 p.m., along with the police yadi of P.I. Mr. A.P. Chaudhary of Pandesara Police Station, *Marnottar* report, and copy of the inquest panchnama. The post-mortem examination of the said dead body was conducted by a panel, in which the other doctor was Dr. P.M. Modi, with her. The examination of the dead body commenced at 2:45 p.m. on 07/11/2021 and was completed at 4:15 p.m. on the same date. As per the statement of this doctor, Injury No. 1 was an abrasion with contusion, measuring 1.5 x 1 cm, red in colour, present over the nostril and on the tip of the nose. Injury No. 2 was an abrasion with contusion around the mouth and lips, having a maximum measurement of 1 cm, present on the left side of the mouth, with minimum width ranging between 0.5 to 0.8 cm, and was red in colour. Upon internal examination of the mouth, red-coloured contusions were present on the gums on both sides. Red-coloured blood was oozing from the tip of the tongue. Injury No. 3 was an abrasion with contusion measuring 2 x 1 cm, red in colour, present on the left cheek, and another abrasion measuring 1.5 cm was present extending from the left side of the mouth. According to the opinion of both the doctors, all the aforesaid injuries were ante-mortem in nature. On internal examination of the body, no injury or fracture was found on the head. As per the opinion of both the doctors, the death of the said female child had occurred 36 to 72 hours prior to the commencement of the post-mortem examination. According to them, the cause of death of the said deceased child was died asphyxia due to smothering by pressing the mouth and nose. It has been further stated that death can occur in the ordinary course of nature due to such injuries caused by pressing the mouth and nose,

resulting in asphyxia.

In the cross-examination conducted by the defence, the witness has denied that the abrasions mentioned in Column No. 17 could have been caused to the victim due to scratching by nails while children play with each other. She has denied that such injuries could have been self-inflicted by the child. She has admitted that marks of hands on the neck have not been noted in the post-mortem note. She has denied that the abrasions found on the body of the victim were simple injuries. She has admitted that bleeding from the nose can occur if the nostril is ruptured. In further cross-examination, she has stated that the cause of death was not due to accidental blocking of the mouth and nose, but due to deliberate pressing of the mouth and nose. She has denied that death due to asphyxia could occur if the child fell down or collided while playing. She has denied that the injuries found on the body of the victim could have been caused by any animal after the child had become unconscious.

Thus, as per evidence deposition this doctor and the documents produced by her, namely the Post-Mortem Note at Exhibit-15 and the Cause of Death Certificate at Exhibit-18, it is clearly proved that the death of the deceased female child was a culpable homicide.

19. Prosecution Witness No. 1, Dr. Nishaben Vinodbhai Chandra, has been examined at Exhibit-8. In her deposition, during examination-in-chief, she has stated that she holds an MBBS degree and has been serving as CMO at the New Civil Hospital, Surat, since 2004. On 08/11/2021 at

10:35 PM, H.C. Rajeshbhai B.No. 2393 of Pandesara Police Station, brought the accused Guddakumar Madhesh Yadav, aged 34 years, resident of Pandesara, for medical examination along with a police yadi from Pandesara Police Station. Further, the doctor stated that the accused voluntarily gave his history that, on 04/11/2021 at approximately 8:15 PM, he took the victim a short distance away from Bhagwatinagar, Pandesara, to an open area, removed her underwear, and forcibly engaged in sexual intercourse with her after removing his own clothes. Subsequently, he did not return to his room and hid in a room at Shastrinagar, Pandesara, belonging to his relatives. On 08/11/2021 in the evening, he was arrested by the police. The accused had provided this history in Hindi, which was recorded by her in English in the certificate.

Additionally, it has been stated that upon examining the accused, identifiable marks on his body were noted, including old injury marks below the abdomen and old injury mark on the back of the left arm. On local examination, his penis was normal, and he had no hernia or other congenital ailments. Both knees showed dark brown abrasions measuring 0.25 x 0.25 mm. Samples of blood, saliva, nails, pubic hair, and semen were collected from the accused for FSL testing, and they were sealed and handed over to the police personnel. Further, the said doctor opined that the accused cannot be said to be incapable of engaging in sexual intercourse, i.e., the accused was capable of performing sexual intercourse. The certificate issued by this doctor in this regard is produced at Exhibit-9, the police yadi is produced at Exhibit-10, the original case papers of the accused are produced at Exhibit-11, and the copy of the form sent with the samples is produced at Exhibit-12.

The doctor further stated that the injuries observed on the knees of the accused occurred 3–4 days ago, which could occur if one forcibly engages in sexual intercourse with a girl while bending on the knees on hard ground. The abrasions on on knees of the accused suggest that more than one such injury was present, indicating use of considerable force during sexual intercourse, resulting in such abrasions.

In the cross-examination conducted by the defence, the witness admitted that she had read the police yadi. She denied that the report was prepared solely based on the police yadi. She denied that the accused had not given any history. She denied that the notes were recorded based on the statements of male staff. She denied that the accused was physically examined by the staff alone. She stated further that both male and female staff were present during the examination of the accused. She and the male staff jointly examined the accused. Other staff members were present but remained outside. Further, she stated that there was no fracture on the knees of the accused. She denied that the knee injuries were recent. She denied that the accused was incapable of engaging in sexual intercourse. She denied that she had prepared false document and given false deposition at the behest of the police.

Consequently, based on the doctor's deposition and the documents submitted by her, it is clearly established that the accused was capable of engaging in sexual intercourse and that there were injuries on both knees while committing rape with the victim child.

20. Prosecution Witness No.2-Dr. Rinkal Chandreshbhai Paghdar is examined at Exhibit – 13. In her deposition, she stated during examination-in-chief that she holds an MBBS degree and has been performing her duties as a tutor in the Forensic Medicine Department at Surat Government Medical College for the past one and a half months. Her duties include handling medico-legal cases and conducting post-mortems, and during her tenure, she has conducted approximately 10 to 15 post-mortems. Further, this doctor stated that, on 07/11/2021, in the afternoon, when she was present on duty at Surat Government Medical College, A.S.I. Harishbhai B. Patil, B.K. No. 745, Pandesara Police Station, Surat City, brought the body of a female child for post-mortem at 2:30 PM along with the police yadi of P.I. Mr. A.P. Chaudhary, Pandesara Police Station, *Marnottar* report, and copy of the inquest panchnama. The postmortem of the said body was conducted by the panel, in which Dr. P.M. Modi, holding an MD degree in Forensic Medicine and serving as Assistant Professor, were present. The post-mortem of this body commenced at 2:45 PM on 07/11/2021 and was completed at 4:15 PM on the same date.

Moreover, this doctor stated that the body was identified, and according to the police yadi, the deceased child had succumbed to death following a sexual assault. Further, this doctor stated that upon external examination, the body was of a female child, aged 2 years and 9 months. The body was on a bed sheet of red color with a silver design and covered with a white cloth. The child worn a white half-sleeve T-shirt with a Mickey Mouse picture and writing. There was a white metal ring on the left ankle. A black-colored plastic bangle with white beads was on both wrists. A black thread, adorned with a white metallic *ghungri*, an orange

bead, two black coloured beads, a black coloured metallic ring, and a white cowrie shell wound twice around the waist, was worn. On the left side of this thread, the above-mentioned beads and other items were attached. A black thread wound twice contained a grey-colored talisman and a black coloured metal pendant of Lord Hanuman was around the neck. A red and yellow coloured beaded necklace was around the neck. Red nail polish was applied to the fingernails of both hands and toes of both feet, which was eroded. Dry wood pieces and tree leaves were attached to the body, which were present on both the anterior and posterior parts of the body. All the garments were stained with the fluid of the decomposing body, mud, and soil. The entire body was smeared with the fluid of the decomposed body, mud, and soil.

Further, this doctor stated that the body was cold, and it could not be determined due to decomposition. The process of rigor mortis had completely passed throughout the body, and the body was in a state of decomposition emitting odour, which prevented confirmation of post-mortem lividity. Skin slippage, decomposition-related blisters, marbling, and red and black discoloration of the skin were present all over the body. The abdominal region was distended due to gases produced as a result of decomposition. Loops of intestines were protruding through the vaginal canal. The hair of the body could be easily pulled out. White maggots (larvae), measuring 0.5 to 0.7 cm in length, were present throughout the body.

Further, the witness stated that the face was scratched and swollen, making identification impossible. Both eyes had no cornea. The mouth was half-open. The tongue was soft and decomposed. Red-colored decomposition fluid was oozing from the nose and mouth. Cyanotic

discoloration was present on the fingernails and toenails. Further, the doctor stated that upon examination of the private parts, the examination of the external genitals revealed that the upper part was rotted and decomposed, with maggots emerging from the vaginal and anal canals. Examination of the vaginal canal showed the labia minora were in the condition corresponding to approximately 11:00 to 3:00 hours in a normal clock, with a width of one centimeter and they were red in color. Contusions were also observed on the clitoral frenulum. Loops of intestines were emerging from the lower part. The posterior commissure, fourchette and vagina were soft and in a state of decomposition.

Following external injuries were noticed by this witness on the body:

- Injury No. 1 – Abrasion with scratch measuring 1.5 x 1 cm, red in color, on the dorsum of the nose tip.
- Injury No. 2 – abrasion with scratch around the mouth and lips, maximum 1 cm, on the left side of the mouth, minimum width 0.5 to 0.8 cm, red in color. Internal examination of the mouth revealed red abrasions on gums of the both sides. Blood oozed from the tip of the tongue.
- Injury No. 3 – Abrasion with scratch measuring 2 x 1 cm, red in color, on the left cheek, extending 1.5 cm from the left side of the mouth to the left side of the face.

Further, she stated that no fractures were observed on external palpation. All these injuries were ante-mortem, and the injury mentioned

in column no. 17 of the post-mortem note, were caused by pressing the mouth and nose, and the injury mentioned in column no. 15 of the post-mortem note were ante-mortem and occurred due to penetration in the vaginal canal. All injuries were ante-mortem and recent.

In her further examination-in-chief, the doctor stated that no injury or fracture was observed in the head during internal examination. The dura mater of the brain was intact. The brain was decomposed and soft, and was transformed into a grey and white paste-like substance. The throat was decomposed and soft on internal examination, with no injuries or fluid discharge. The chest was soft and decomposing, with nothing unusual. Both lungs were soft and decomposing. The heart was soft, flabby, and decomposed. All four chambers of the heart were empty.

Further, the doctor stated that the peritoneum, cavity, oral cavity, teeth, tongue, pharynx, and esophagus were soft and decomposing. The stomach was empty. The mucosa was soft, flabby, and decomposing. The stomach emitted decomposition odour and no other abnormal odour was there. A yellowish paste-like substance was present in the small intestine. The mucosa of the intestines was soft and decomposed, and there was no other abnormal odour except that of decomposition. The large intestine contained fecal matter and gas. The gallbladder, pancreas, spleen, ureter, and genitalia were soft and decomposed. The urinary bladder was empty.

In further examination-in-chief, the witness stated that superficial vaginal swabs and slides, vaginal introitus swabs and slides, deep vaginal swabs and slides, and anal swabs and slides were taken from the corpse and handed over in a sealed condition to the police officer present for FSL examination. From this corpse, nail clippings of the left and right

hands were taken for DNA containing biological substances; molar teeth were taken for blood group and cross-matching, and these were handed over in a sealed condition to the police personnel for FSL examination. For chemical analysis, a part of stomach and intestine, a piece of liver, and both kidneys were placed in a glass jar with saline water for preservation and handed over in a sealed condition to the arriving police personnel. There was no injury or fracture in the spinal cord.

This medical witness further stated that, based on the post-mortem conducted by both of the doctors, they have given an opinion that the death of this female child had occurred 36 to 72 hours prior to the commencement of the P.M. Upon examination of the private parts, namely the vagina and anus of this corpse, considering the external and internal injuries observed therein as well as the abrasion injuries found on the body, it appeared that forcible sexual intercourse was made with the victim child before death. According to the opinion of both of the doctors, the cause of death of the person of this corpse was due to asphyxia resulting from the pressing of the mouth and nose.

Further, this witness stated that if a person has forcible physical relations with a young female child aged two to three years, such injuries can occur which the child cannot bear, and death can occur in the ordinary course of nature due to such injuries resulting from asphyxia by pressing the mouth and nose. Among the injuries mentioned in columns No. 15 and 17 of the P.M. note, the injury in column No. 15 where the child's intestines have come out, is an injury caused by a male adult performing sexual intercourse by force; likewise, the injury shown on the nose in injury No. 01 of column No. 17 is an injury that can be caused by another person pressing the child's mouth and nose with hands. The

injury shown in injury No. 02 can also be caused by pressing the mouth.

Upon looking at both hands of the accused present in the Court, this doctor stated that this accused, using one or both hands, can cause the death of the victim by pressing her nose and mouth.

In the cross-examination, she stated that she had read the police yadi. She admitted that the inquest panchnama was also provided along with the said police yadi, and that she had read it. She denied the fact that the post-mortem was conducted according to the police yadi. She denied that the abrasions mentioned in column no. 17 could have been occurred when children play and scratch each other's nails. She denied that these injuries could have been caused by the child herself. She admitted that their post-mortem note does not mention any hand marks on the neck region. She denied that the abrasions on the body of the victim were ordinary injuries. Further, she stated that no sample of the skin from the neck region of the victim was collected. She admitted that bleeding from the nose can occur due to rupture of nostril. In further cross-examination, she denied that the said post-mortem examination was conducted by the assistant staff with them. Moreover, she stated that Wardboy Shashikant was also present with them during the post-mortem examination. She admitted that in the post-mortem room, no one else was present except the three of them. She denied the fact that Dr. Modi conducted the post-mortem alone. She admitted that prior to the post-mortem, some papers were prepared by them. Further, she stated that the cause of death was not due to accidental pressing of the nose and mouth but due to deliberately pressing the nose and mouth. In cross-examination, she denied the fact that she cannot say whether the rape on the victim was committed before or after death. She denied the fact that injuries were noted in the post-

mortem note merely on the basis of the police yadi even though the body was decomposed and no injury could be determined. She admitted that penetration in the vaginal region of the victim could have occurred for reasons other than sexual intercourse. She admitted that she cannot say with certainty that the present accused caused the death of the victim. She denied the fact that the victim could have died due to asphyxia from falling or colliding while playing. She denied that the injuries on the body of the victim could have been caused by an animal after she became unconscious. She denied that she prepared the papers merely based on reading of the police yadi, and that she gives a false deposition today in the Court at behest of the police.

Thus, considering the deposition of the said doctor and the documents she has produced, it is clearly established that the deceased victim child was forcibly and extremely brutally raped before death, and thereafter her mouth and nose were pressed, causing asphyxia which resulted in her death.

21. Prosecution Witness No. 24 Dr. Umesh Baldevbhai Chaudhari has been examined at Exhibit-84. Upon considering his deposition and the documents produced by him at Exhibits-85 to 92, it is proved that blood samples were collected for DNA profiling of the accused of the present case, the complainant, and the complainant's wife. In the cross-examination conducted by the defence, no material fact emerges. It is also not proved that there was any tampering with the said samples.

PANCH WITNESS :-

22. PW 3 - Maheshbhai Chhaganbhai Rabari is examined at Exhibit – 20. He is employed as a clerk in the Assessment Department of Surat Municipal Corporation. He supports the panchnama of the accused's physical condition produced at Exhibit - 21, the panchnama of seizure of the clothes worn at the time of the incident, and the panchnama of the seized mobile phone. He identifies another panch, Jayeshkumar, who was with him. He identifies his and Jayeshkumar's signatures on the panch slips of Muddamal Article No.10 to 13 produced at Exhibit – 22 to 24. In his examination-in-chief, this witness stated that both legs of the accused had abrasion marks. He identifies the accused before the Court.

During cross-examination no contradictions appear and nothing adverse to the case of prosecution has come on record.

23. PW 6 - Vinodkumar Kamalaprasad Yadav is examined at Exhibit-33. He identifies his and another panch, Amitbhai's, signatures in the panchnama of the crime scene, exhibited at serial no. 34, and in the panch slips of the muddamal article No. 2 to 7, exhibited at Exhibit nos. 35 to 39. During examination-in-chief, the first page of the pocket diary of Article No.5 is shown to him, he stated that the word "Guddu" is written in Hindi, which is produced at Exhibit no. 37. Photographs of the crime scene have been produced at Exhibit no. 40. During cross-examination, the said witness denies that this panchnama was not prepared in his presence. He denied that it did not happen that any article was seized in their presence from the place of the offence after drawing the panchnama. He denied that he did not dictate the panchnama and he

signed the panchnama prepared by the police. He denies that he gave false deposition at the behest of the police. He further stated that he was called by PSI Singrakhiya to be a panch witness. He denies that no one else was with him at that time. He stated that he remained at the place of the panchnama for approximately one to one and a half hours. He denies that he did not go anywhere, and he signed the panchnama prepared at the police station.

Having regard to the deposition of the aforesaid panch witness, it is proved that on 07.11.2021 the said panch witness was called to an open bush-covered area situated behind Armor Dyeing Mill, Ambedkar Chowk Road, Pandesara G.I.D.C., and from there muddamal Articles Nos. 2 and 3, being blood-stained soil and sample soil, Article No. 4 being a ball pen, Article No. 5 being a pocket diary, Article No. 6 being a jeans pant, and Article No.7 being an underwear were seized. No material contradiction is brought on record during the cross-examination conducted by the defence.

24. PW 7 - Yogesh Bholenath Mishra is examined at Exhibit 41. In his deposition during examination-in-chief, he supports the seizure panchnama of the clothes and other articles taken into possession from the dead body of the deceased victim child at the time of post-mortem, as produced at Exhibit 42, which were handed over to the police. Article No. 8, (01) a white-coloured, short-sleeved, round-neck T-shirt emitting foul smell and smeared with human bodily fluids, having a Mickey Mouse cartoon design on the front portion; (02) a black-coloured waist thread

worn around the waist, fitted with a bell-like silver-coloured metal ornament, cowrie shell and a saffron-coloured bead; (03) one anklet of silver-like metal worn on the leg; (04) one red-coloured beads necklace; (05) a black-coloured thread worn around the neck having a black pendant and an amulet. He identifies them as the same which were seized in his presence. He identifies his signature and the signature of the other panch, Malkhan, on the panch slips at Exhibits 43 and 44.

During cross-examination by the defence, he stated that while he was passing from near the police station, the police called him. He admits that he does not know how to read or write Gujarati. It is not true that no muddamal was seized in his presence. It is not true that no one else was present when he signed. He denied that except the police, no one else was present with him. He admits that it did not happen that he dictated and the police wrote it down. He denied that his signature was obtained on blank papers or slips. He denied that any panchnama was drawn in his presence.

Thus, considering the aforesaid deposition of this panch witness, it is proved that on 07/11/2021 ASI Hareshbhai Sonvanabhai of Pandesara Police Station was handed over the clothes and other articles of the victim, which were removed from the dead body by the Medical Officer at the time of post-mortem, and that the said articles were brought to the police station and produced. No contradiction appeared in the cross-examination conducted by the defence.

25. Prosecution Witness No.8-Hareshkumar Chaudhary has been

examined at Exhibit-45. Evidence of this witness corroborates the reconstruction panchnama at Exhibit 46 and stated that as per the videography contained in the pen drive at Exhibit 29, a panchnama of the videography was prepared, and he identifies the accused. However, it is not proved that any article was recovered from the place shown by the accused during this panchnama. Further, the panchnama records a confession-statement made by the accused before the police when he was in police custody, and therefore, in view of Section 26 of the Evidence Act, such panchnama is not admissible in evidence.

26. Prosecution Witness No. 9-Kaushikkumar Dilipkumar Assari has been examined at Exhibit 47. Evidence of this witness corroborates the panchnama of the gait analysis of the accused produced at Exhibit 48, as well as the fact that the CCTV camera footage was taken by the Head Constable in a pen drive. Further, He corroborated the said fact. When muddamal Article No. 16, the pen drive, was played on a laptop and the footage therein was shown, he identified that the same had been seized in his presence and identified his signature and the signature of the other panch, Vijaybhai, on the panch slip at Exhibit 49. The said muddamal Article No. 16 was assigned Exhibit 50. He identifies the accused before the Court. During cross-examination by the defence, he stated that they received a call from the police at about 6:00 p.m. The police staff included P.I. A.P. Chaudhary and F.S.L. Officer V.K. Raval. He stated that he was employed in the Forest Department. He admits that he acted as panch witness at the instance of his superior officer. He admits that the number of the vehicle in which he had travelled with the police is not mentioned in the panchnama. He denied that except the police no other

persons were present with them. He denies that consent of the house owner was not obtained for taking the CCTV footage. He denies that the police prepared the panchnama by intimidating the accused and making him stand and walk accordingly. He denies that, being a government servant, he was deposing falsely out of fear that inquiry would be initiated against him if he does not corroborate the panchnama.

Thus, considering the entire evidence of this panch witness, it is proved that on 11.11.2021 the accused was brought on the internal road of Vadod Bapunagar Society, made to walk while carrying a child on his shoulder, and that copies of footage from two CCTV cameras installed outside the house near Plot No. 351 were taken in the pen drive at Exhibit 50. In the cross-examination conducted by the defence, it is not proved that the accused was not brought to this place or that the gait analysis was not conducted.

27. Prosecution Witness No. 10-Vimalkumar Mithalal Shah, was examined at Exhibit 51. In his evidence, he supports the panchnama of seizure of CCTV camera footage of different locations produced at Exhibit 52, which were produced by Head Constable Harpalsinh Dipsinh and seized for the purpose of investigation, and he identifies his signature thereon. He also supports that another panch, Bharatkumar, was present with him. When the pen drive is played on a laptop and shown to him, he stated that a man is seen carrying a girl child of about two and a half years on his shoulder. The said pen drive is marked at Exhibit 53, and the panch slip affixed thereon is marked at Exhibit 54, on which the witness

identifies his signature and that of the other panch. In his further Examination-in-chief, the witness stated that in the CCTV footage shown to him in the pen drive, although a man is seen carrying the victim child on his shoulder, the face of the said person is not clearly visible. During cross-examination by the defence, he admits that in the CCTV footage only the backside of the person is visible and that the front portion or face is not visible. He also admits that upon considering the CCTV footage, he is unable to identify who the person is.

Thus, considering the evidence of this panch witness, it is proved that the pen drive at Exhibit 53 was seized in his presence.

Evidence of the Complainant :-

28. Prosecution Witness No.12-Dev Prakash Ganori Mistry is examined at Exhibit 59, who is the complainant and the father of the deceased victim. In his evidence, he stated that and corroborate his complaint at Exhibit 60 and identifies his signature thereon. He further stated that after lodging the complaint, on 06.11.2021, he was called to Pandesara Police Station, where the PSI showed him on a computer the CCTV video footage of Patel Repairing and Electronics located in Krishnanagar Society and the CCTV cameras installed outside Plot No. 351, Bapunagar Society. In the CCTV footage of the shop named Patel Repairing and Electronics, a person was seen at night carrying a small child on his shoulder and proceeding towards Bapunagar. As only the back portion of the person was visible in the said footage, his identity could not be ascertained, and as the face of the child carried on his shoulder was also not visible, the identity of the child could not be

established. However, out of the two CCTV cameras installed outside Plot No. 351 of Bapunagar Society, in one camera, the said person was seen approaching from the front while carrying the child on his shoulder. The said person had worn blue-coloured pants and a white-coloured shirt. His face was not clearly visible, and therefore his identity could not be established. However, the child carried on his shoulder had worn blue-coloured pants and a white T-shirt with black designs, which were the same clothes worn by his victim daughter at the time she went missing, and therefore he identified the child as my deceased victim daughter.

He further stated that thereafter he was called to Pandesara Police Station by the Police Inspector, and that the police carried out investigation at various places regarding the person seen in the CCTV footage and his victim daughter. He further stated that on 07.11.2021, while he was at his residence, he came to know that the dead body of a girl child had been found from a bushy area behind Armor Dyeing Mill, and as the dead body was in a decomposed condition, its identity could not be established. When he was preparing to go to see the dead body, police personnel came to his house and informed him that a dead body of a girl child had been found and taken to the Civil Hospital, and that he had to come to the Civil Hospital for identification. Thereafter, him and his wife went along with police personnel to New Civil Hospital, Surat, where the police showed them the decomposed dead body of a girl child kept in the post-mortem room. As the dead body was highly decomposed, identification was not possible; however, on the basis of the T-shirt worn by the child, the necklace worn around the neck, the black-coloured thread, and the silver anklet worn on the left leg, they identified the dead body as their victim daughter. He further stated that the private parts of

his victim daughter were swollen and intestines had come out, and that her face was decomposed. After completion of the post-mortem, the police handed over the custody of the dead body to them for performing the last rites. After the post-mortem of the dead body, it came to their knowledge, as informed by the police, that someone had committed sexual assault upon her and caused her death by suffocating her by pressing her mouth and nose.

Further, the complainant stated in his evidence that he does not know the accused Guddukumar Madhesh Yadav. He came to know, after the police arrested the accused, that the said accused Guddukumar Yadav was residing on rent on the upper floor of our room. The police informed that the said accused Guddukumar had kidnapped his victim daughter, committed sexual assault upon her, and murdered her. The complainant further stated that blood samples of himself and his wife were given for DNA test, and he identifies his signature and thumb impression as well as those of his wife on the MLC papers at Marks 59/1 and 59/2. He stated that he was present at the time when the pen drive containing CCTV footage was brought and produced and a panchnama thereof was prepared, and that he had seen the footage. Further, upon being shown Muddamal Article No. 6 – pant, Article No. 7 – underwear, Article No. 8 – T-shirt, Article No. 9 – black-coloured thread having silver-like metallic ghughri, kodi and saffron-coloured bead, as well as one silver anklet worn on the foot, one necklace of red beads, and a black-coloured thread worn around the neck having a black pendant and *tabeez*, he stated that all these articles and clothes belonged to his victim daughter. Upon being shown photograph No. 14 kept with the inquest panchnama, the complainant stated that the said photographs are of his victim daughter.

The complainant was cross-examined by the defence, wherein he stated that he was engaged in dyeing and printing work and he came to Surat five to six years ago. He admits that he came to Surat for labour work. He admits that his marriage was solemnized in the year 2017 and that the marriage took place in Bihar. He admits that at the time when his victim daughter went missing, he had gone to watch a DJ program. He admits that he came to know that the accused was residing above our room only on being told by the police. He admits that he has been residing at his present place for the last four years. He admits that from the time he has been residing there, he has never seen the present accused. He denies the existence of any prior altercation with the accused. He admits that he did not know who had abducted his victim daughter. He stated that he came to know about his daughter got missing at about 9:00 p.m.. He stated that the police station is situated at a distance of about one kilometer from his house. He admits that when he went to the police station, his room owner and friends accompanied him. He admits that he has not named any person as a suspect in his complaint. He admits that he does not know how to read or write Gujarati. He admits that he was called to the police station two to three days after lodging the complaint. He admits that he identified the child in the CCTV footage on the basis of the clothes worn by the girl, and inferred that she was his victim daughter. He admits that in all the CCTV footages shown to him, the face of the accused as well as the face of the girl was not clearly visible. He admits that he came to know about the accused on being informed by the police. He admits that he saw the accused for the first time when the police showed him the accused at the police station, and that he had never seen him earlier. He admits that he has no personal

knowledge regarding the sexual assault and murder of his victim daughter. He admits that he came to know all the facts only as informed by the police.

Considering the aforesaid evidence of complainant, it emerges that, on the basis of the clothes worn on the body of the child visible in the CCTV camera installed outside Plot No. 351 of Bapunagar Society, the complainant identified the said child as his victim daughter. Thereafter, when the complainant went to see the dead body of the child in the post-mortem room of the New Civil Hospital, he identified the said dead body as that of his victim daughter on the basis of the clothes and articles found on the body. The description of the clothes worn by the victim girl as seen in the CCTV camera, as well as the clothes recovered from the dead body, has also been given by the complainant in the complaint. The complaint regarding the disappearance of the victim was lodged on 05/11/2021, whereas the dead body of the victim was recovered on 07/11/2021. Therefore, the fact that the description in the complaint was written after seeing the dead body is not proved. It is also not proved that, prior to the incident, the complainant had any quarrel or animosity with the accused and due to such reason, the accused has been falsely implicated. Further, the Medical Officer collected the molar tooth from the dead body and blood samples of the complainant and his wife were taken for DNA testing. The FSL opinion in this regard has been produced at Exhibit-149, wherein it is proved that the DNA profiles of the tooth recovered from the dead body matched with the DNA profiles of the complainant and his wife, thereby establishing that the biological parents of the deceased child are the complainant and his wife.

Thus, it is proved beyond doubt that the dead body recovered from

the place of occurrence was that of the complainant's victim daughter. The DNA report is admissible in evidence under Section 45 of the Evidence Act and Section 293 of the CrPC. Though the defence had raised no objection so as to summon the expert who prepared the DNA profile for cross-examination. Hence, the said report is liable to be considered in evidence. Although the accused was residing as a tenant in the room situated on the upper portion of the complainant's house, the complainant had never seen him earlier. The complainant has stated that he came to know, as told by the police, that the present accused had kidnapped his victim daughter, committed rape upon her and murdered her. The complainant has not mentioned the name of the accused in his complaint or in his further statement. Thus, from the lodging of the complaint till the recovery of the dead body of the victim child, the fact that the present accused kidnapped the victim child, took her away, committed rape upon her and caused her death is known only on the basis of hearsay. It is also not proved that there was any delay on the part of the complainant in lodging the complaint.

Evidence of Independent Witness:-

29. Prosecution Witness No. 11-Pankaj Lalluram Shahu was examined at Exhibit 55. In his deposition, he stated that he resides with his family at Plot No. 381, Bapunagar, behind Kailas Cinema, Vadodgam, Taluka Choriyasi, Surat, and that he carries on the business of groceries and food grains on the ground floor of his house. He further stated that there are two small shops adjacent to his shop, one of which carries on gas refilling business and the other deals in the sale of mobile accessories. He stated

that two CCTV cameras facing north-south are installed outside his shop, and that the DVR is kept in the gas refilling shop. He further stated that he has studied up to B.Com. at G.M. Pandya College, Bhestan, and therefore he is able to read and write Gujarati and Hindi. The witness further stated that on 06.11.2021, late at night, when he was sleeping at his residence, Head Constable Harpalsinh Dipsinh of Pandesara Police Station came to his house and got opened his shop and checked the CCTV cameras. Upon checking the footage of Camera No. 01 between 8:59:30 p.m. to 9:00:01 p.m. on 04.11.2021, a person worn a white-coloured shirt and blue-coloured pants was seen walking while carrying a small child on his shoulder in a sleeping condition. Further, in Camera No. 02 between 8:59:30 p.m. to 9:00:02 p.m., the said person was seen walking while carrying a small child on his shoulder, coming from the side of Krishnanagar Society. In the said video footage, the child was seen wearing a white-coloured T-shirt and blue-coloured pants. As the witness had no knowledge regarding copying of footage, Head Constable Harpalsinh copied the footage into his pen drive, and the witness issued a certificate stating that no tampering had been done. Thereafter, the accused was again brought for the purpose of observing his walk, appearance, and gait analysis, which was also recorded in the witness's CCTV cameras, and the said footage was also handed over to the police. He further issued certificates stating that no tampering was done, and he identifies his signatures on Exhibits 56 and 57. When the pen drives at Exhibits 50 and 53 were played on a laptop and shown to him, he identified the footage therein as the copied footage of his CCTV cameras.

During cross-examination by the defence, he admits that his house

and shop are located at different places. He further stated that the police first came to him at around 12:00 midnight. He denies that no CCTV footage was seized in his presence. He denies that he falsely stated about providing footage to assist the police despite his cameras being non-functional. He denies that he merely made sign a pre-written certificate brought by the police and that he had no other knowledge thereof. He admits that he had no knowledge about Section 65-B of the Evidence Act.

Thus, considering the deposition of this witness, it is proved that the CCTV footage installed outside the witness's shop was copied into a pen drive by Head Constable Harpalsinh, and that the witness issued a certificate in that regard. No sort of material is surfaced to show that the said CCTV footage was tampered with. When the accused was again brought for gait analysis, the CCTV footage of this witness was once again seized in the presence of the FSL officer, and therefore no doubt can be raised regarding the same. The defence has also failed to bring on record or prove any contrary fact showing tampering of the CCTV footage.

30. PW No.21 – Bharat Devidas Patel, who produced the said notebook, has been examined at Exhibit-80. In his deposition, he has supported the fact that the present accused, Guddu Yadav, was working as a Marker man at Armor dyeing Mill. He has identified his own handwriting in the notebook at Exhibit-67. He has stated that the diary at Exhibit-37 belonged to accused Guddu and that, in his presence, accused Guddu used to make entries regarding his work. He has also identified the

accused in Court. In the cross-examination conducted by the defence, he has admitted that the diary which he refers to as Guddu's diary is easily available in the market. He has further stated that, in their department, entries regarding grey material received from outside parties are made on computer. However, he has denied that work entries of every worker are made on computer. He stated that it is not true that at the instance of the police, false evidence has been created and that he is giving false deposition at the instance of the police despite the fact that accused Guddu Yadav was not working with them. He has admitted that no documentary proof has been produced to show that salary was credited every month in Guddu's bank account. He has denied having knowledge about the language in which Guddu used to make entries.

Thus, from the deposition of this witness, it has been identified and shown that the accused was employed as a Marker Man in Armor Dyeing Mill and that he used to maintain a record of the work performed by him in his pocket diary, which pocket diary is the same diary recovered from the scene of offence at Exhibit-37, and the same has been identified by this witness. The entries regarding the work of the accused made in this pocket diary, when compared with the entries of the work of accused recorded in the notebook at Exhibit-67, were found to be corresponding, and accordingly the witness has identified the same as relating to such work. Hence, by the evidence of this witness, it stands proved that the diary recovered from the scene of offence belongs to the accused.

31. Prosecution Witness No. 22-Pankaj Lalataprasad Mishra has been

examined at Exhibit-81. This witness has stated that the accused Guddu used to come to his tea and snacks stall for tea and snacks on credit and that he used to make entries in the diary maintained by him regarding the same. He has further stated that in the diary at Exhibit-37, the name "Guddu Kumar" is written in Hindi and the figures written below the same are in his own handwriting, and that the said diary was returned by him to the accused Guddu Kumar. He has identified the accused before the Court. In the cross-examination conducted by the defence, he has stated that he has known Guddu Kumar for the last eight to ten years. He admits that the diary at Exhibit-37 does not bear his signature. He denies that there is no writing in the said diary except figures, and denies that no entries were made in the diary as stated by him and that a false diary has been fabricated at the instance of the police. Upon considering the deposition of this witness, it is proved that the pocket diary recovered from the scene of offence at Exhibit-37 belongs to the accused.

32. Prosecution Witness No. 26-Bhagwandas Ramlal Vishwakarma has examined at Exhibits-96. In his deposition, he has stated that during the investigation, he was working as a Marker Man in the Grey Folding Department of Armor Dyeing Mill and that the accused Guddu Kumar was also working along with him as a Marker Man. This witness has further stated that he used to make entries of the work assigned to him in his diary, and similarly other workers also used to make entries in their respective diaries. He has stated that he had known the accused Guddu for about one and a half months. He has further stated that from 04/11/2021 to 12/11/2021, the mill was closed due to the Diwali festival. This witness has also identified that the diary at Exhibit-37 belongs to

Guddu and has also identified the accused. In the cross-examination, he admits that he and Guddu are good friends. He denies that he and Guddu used to come and go together wherever they went. He admits that his native place is different from that of Guddu. He denies that at the instance of the police he has stated and identified that Guddu used to write in the diary. Thus, considering the evidence of this witness also, it is proved beyond doubt that the diary at Exhibit-37 recovered from the scene of offence belongs to the accused. The defence has raised a contention that the opinion of a handwriting expert had not been obtained in respect of the handwriting in the diary. However, the aforesaid witnesses have supported the fact that the accused used to write entries himself in the diary at Exhibit-37 and the witnesses have identified the figures relating to tea and snacks in the diary. Thus, it is proved beyond doubt that the diary at Exhibit-37 belongs to the accused.

33. Prosecution Witness No. 27 - Uditnarayan Maiyaji Sharma has been examined at Exhibits-97. He is a trader of pan, gutkha and ball pens, and he has identified the accused Guddu Yadav of this case as a person who used to come to his shop to purchase tobacco, gutkha, pan and ball pens, and has identified that the ball pen at Muddamal Article No. 4 was purchased by Guddu from his shop for rupees three.

In the cross-examination, he admits that there is no specific mark on the ball pen at Muddamal Article No. 4. He admits that such ball pens may also be available at other places. He stated that it not true that Guddu did not come to him to purchase the ball pen or that he did not give it to

him and that he is giving false deposition at the instance of the police. He admits that many persons come to his shop to purchase ball pens. Thus, considering the evidence of this witness, it is proved beyond doubt by his evidence that the ball pen recovered from the scene of offence as Muddamal Article No. 4 belongs to the accused Guddu Madhesh Yadav.

34. Prosecution Witness No. 15-Gitadevi Rakeshkumar Kushwaha has been examined at Exhibits-68. In her examination-in-chief, she has stated that she is residing on rent along with her husband and children in House No. 352, Bapunagar Society, in the room of Lalan Shukla, and that at a short distance from her residence, her husband runs a handcart and carries on the business of selling vegetables, and that she also assists her husband in the business of selling vegetables. She has further stated in her examination-in-chief that Bhagwati Nagar Vadod, Gokuldharm is situated very close to their residence. On 04/11/2021, as it was the Diwali festival, she had placed a cot in front of her house and was selling coconuts, garlands and crackers for small children, etc., and at that time, at about 9:15 p.m., she saw a man carrying a small girl on his shoulder passing in front of her and walking towards the main road. The girl had worn a white coloured T-shirt on the upper part of her body and blue coloured pants on the lower part. The man was of medium build and appeared stout. He had worn a white coloured shirt and blue coloured pants. She has further stated that if the man whom she had seen carrying the girl on his shoulder is present in the Court today, she would be able to identify him, and upon seeing the accused, she has identified him as the same person whom she had seen carrying the girl on his shoulder. She has also stated that her statement was recorded by the police on 05/11/2021. She

has further supported the fact that on 09/11/2021 she had identified the accused in the identification parade.

In the cross-examination, she admits that since they are engaged in the business of selling vegetables, many persons known as well as unknown come to them. She has further stated that at that time there were customers, but fewer persons. She had denied that she was called to the police station and shown the accused who is present in Court today. She has denied that as stated by her, she had not actually seen any man taking a girl, but due to many customers being present, the police showed her photographs and, in order to collect evidence and pressurize her to give deposition as a witness, she gave her statement accordingly. She has denied that she was called by the police on 09.11.2021. She admits that prior to the identification parade she had seen the accused. The witness voluntarily stated that she had seen the man taking the victim girl. She denies that since the police had shown her the accused at the police station, she identified him in the identification parade. She further denied that though she had not identified the accused and though no proceedings were carried out in her presence, she is giving false deposition.

Considering the deposition of this witness, her statement was recorded by the police on 05/11/2021 prior to the arrest of the accused, and prior to the recovery of the dead body of the victim girl and therefore, the fact that her statement was recorded as a result of any arrangement made later on to establish the identity of the accused does not stand proved. The fact that this witness identified the accused in the identification parade on 09/11/2021 is also clearly proved. Thus, from the

evidence of this witness, it is proved that on 04/11/2021 between 9:00 p.m. and 9:15 p.m., when the victim went missing, she was accompanied by the accused, and thereafter she was found dead at the scene of offence, and therefore, the theory of “last seen together” is proved by the deposition of this witness.

35. Prosecution Witness No. 17-Bimlesh Muneshwar Yadav was examined at Exhibits-71. In his deposition, during examination-in-chief, he has stated that on 05/11/2021 the police came to him and, upon showing him a photograph of the victim girl, made inquiries. He stated to the police that on 04/11/2021, as it was a Diwali holiday, he was present in his room, and at about 7:30 p.m. Since DJ music was being played in the society at a short distance ahead of his building went there to watch, and as people were dancing, he stood there to watch them. At about 8:30 p.m., while returning from there towards his room, he saw an unknown man had lifted the complainant's victim daughter, who was residing below his room, and carrying her on his shoulder while walking towards Krishna Nagar. He thought that the man might be some relative and therefore did not make any inquiry. Thereafter, he went upstairs to the room, had dinner, and went to sleep at about 10:00 p.m. On the next day morning at about 9:00 a.m., when he came down from the room, upon seeing everyone searching, he came to know that the complainant's victim daughter had gone missing. The man whom he had seen carrying the victim girl on his shoulder had abducted her. That man has worn a white coloured shirt and was stoutly built. Further, in his examination-in-chief, the witness has stated that he identified the accused in the identification parade and has also identified the accused before the Court,

and that he had given his statement before the Court under Section-164 of the Cr.P.C., and he has identified his signature on his statement at Exhibit-72.

Witness has been cross-examined by the other side however no material contradiction was found therefrom, and the fact that he identified the accused at the instance of the police is not proved. Thus, from the deposition of this witness also, the fact that the accused and the victim girl were last seen together is proved.

36. Prosecution Witness No. 18-Santosh Arvind Patel has examined at Exhibits-73. In his deposition, he has stated that he handed over the footage of the CCTV camera installed outside his shop to Head Constable Harpalsingh and issued a certificate in that regard, and he has identified his signature on the same at Exhibit-74. In the cross-examination conducted by the defence, he admits that his residence and shop are situated at different places. He further stated that the police came to him for the first time at about 12:00 midnight. He denied that no CCTV footage was seized in his presence. He denied that though his camera was not functioning, he has falsely stated that he gave footage to help the police. It is not true that he merely signed a prepared certificate brought by the police in writing and knowing nothing else. He admits that he has no knowledge regarding Section-65-B of the Indian Evidence Act. Thus, from the deposition of this witness, it is proved that on 04/11/2021 at about 9:13:56 p.m., the accused was walking while carrying the victim girl on his shoulder towards Bapunagar.

37. Prosecution Witness No. 19-Lucky Vijay Shah has been examined at Exhibits-75. In his examination-in-chief, he has stated that, the accused purchased a memory card from his shop, and the said memory card has been produced at Exhibit-76. In the cross-examination nothing contrary has come on record. Thus, considering the deposition of this witness, it is proved that the present accused Guddu Kumar purchased a memory card for Rs.300/- and that the said memory card contained Bhojpuri songs and porn video clips.

38. Prosecution Witness No. 23-Ashok Mithilesh Yadav has been examined at Exhibits-82. In his deposition, he has stated that for the last six years he has been residing alone on rent in the room of Omprakash Pandey at Shastrinagar, Plot No.442, third floor, Room No.6, at Vadodgam, Pandesara, Surat. He has further stated that the present accused Guddu Yadav came to his room on the night of 04/11/2021 at about 10:30 p.m. to 10:45 p.m. and told him that he had a quarrel with his landlord and was asked to vacate the room, and therefore he requested to stay in the witness's room till he found another room. As the witness had given consent, it is proved that the accused stayed there from the night of 04/11/2021 from about 10:30 p.m. to 10:45 p.m. till 06/11/2021. On 07/11/2021, Guddu Kumar Yadav telephoned and stated that he had received a call from Pankaj, who was residing with him, and therefore he had to go to the room, and accordingly he went to Bhagwati Nagar in the evening. On 10/11/2021, he came to know about the incident through the police. This witness has identified the accused before the Court. In the cross-examination, he denies that he had any quarrel with Guddu Kumar at his native place in past. He denies that he owns any land at native

place. He denies that due to any dispute regarding ancestral property with the accused, he is giving false deposition in order to falsely implicate him.

39. Prosecution Witness No. 25 Pankaj Pitambar Yadav has been examined at Exhibit-95. Considering the deposition of this witness who has been cross-examined at length, it is proved that till about 8:30 p.m. on 04/11/2021, the accused Guddu was present in the room with this witness, and thereafter he did not return to the room, and that he returned to the room only on the evening of 07/11/2021 between about 4:30 p.m. and 5:00 p.m. It is proved from the deposition of this witness that the diary at Exhibit-37 recovered from the scene of offence belonged to the accused. Thus, it is proved that after committing the offence, due to fear of being apprehended, the accused did not return to the room where he was residing with this witness. The conduct of the accused is relevant under Section-8 of the Evidence Act. This witness is neither a relative nor a friend of the complainant, whereas he belongs to the same village as the accused and is his relative. Therefore, there is no reason for him to give false evidence.

40. Prosecution Witness No. 28, Deepak Anil Sharma was examined at Exhibit-98. Considering the evidence of this witness who has been cross-examined at length, it is proved that the accused was residing as a tenant along with witness Pankaj Kumar in the rented premises belonging to this witness, and that the complainant was residing as a tenant in the premises belonging to this witness's brother. It is also proved that the complainant

and this witness jointly searched for the complainant's victim daughter, and upon failing to find her, went together to the police station, where a missing complaint was lodged.

41. Prosecution Witness No. 33-Shivlubhai Somalbai Gavit, Executive Magistrate is examined at Exhibit-110. From the evidence of this witness, the panchnama of the identification parade at Exhibit-111 stands proved. The accused has been identified before the Court. No further material contradictions have emerged in further cross-examination. Thus, from the evidence of this witness, it is proved that the accused was identified by witnesses Gitadevi Rakeshkumar Kushwah, Bimlesh Muneshwar Yadav, and Pushkarlal Bhagullal Mewada. Although the identification parade panchnama by itself is not substantive evidence, on the basis of CCTV footage and gait analysis of the accused, it is proved that the accused abducted the victim girl, committed rape upon her and caused her death, and that the accused was last seen in the company of the victim prior to the incident.

42. In light of the aforesaid re-appreciation of evidence adduced by the prosecution and believed by the learned Special Court, the prosecution has proved that the victim minor girl aged two and half years has been raped by the accused and thereafter committed her murder which constitutes an act falling under under Sections 363, 366, 302, 376(2)(j)(l), 376(3), 376(A), 376(AB), 342 of the Indian Penal Code and Sections 4, 5(i)(k)(m), 6, 8, 9(m), and 10 of the Protection of Children from Sexual Offences Act, 2012.

43. Now, the questions comes for consideration as to whether the case on hand in light of the evidence produced by the prosecution and believed by the learned Special Court falls under the category of '*rarest of rare case*' wherein the sentence of death penalty may be confirmed on account of aggravating circumstances or any alternative punishment which otherwise is of greater in degree due to having some mitigating circumstances may be imposed?

Legal position / Case Law On the aspect of Awarding Sentence in Rarest of Rare Case:-

44. The Supreme Court in the case of **Machhi Singh (supra)**, relying upon the guidelines drawn by the Apex Court in **Bachan Singh (supra)** laid down the test on the individual facts while pronouncing the sentence. In Paragraph Nos.37,38,39, the Apex Court has observed as under:-

37. *In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:*

(i) *the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;*

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

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

having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

38. *In order to apply these guidelines inter-alia the following questions may be asked and answered:*

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?

39. *If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.”*

45. In the case of ***Mofil Khan Versus State of Jharkhand reported in (2015) 1 SCC 67***, the Hon’ble Apex Court has explained the meaning of “***the rarest of rare case***”. The relevant portion of Paragraph No.64 is reproduced as under:-

“The rarest of the rare case” exits when an accused would be a menace, threat and antithetical to harmony in the society. Especially in cases where an accused does not act on provocation, acting on the spur of the moment but meticulously executes a deliberately planned crime in spite of understanding the probable consequence of his act, the death sentence may be the most appropriate punishment.”

46. In the case of ***Haresh Mohandas Rajput Versus State of Maharashtra reported in (2011) 12 SCC 56***, the Apex Court has emphasized the connotation “the rarest of the rare”. The relevant portion of Paragraph No.56 is reproduced as under:-

“The rarest of the rare case comes when a convict would be menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of “the rarest of the rare case.”

47. In the case of ***Santosh Kumar Versus State Through C.B.I reported in (2010) 9 SCC 747***, the Apex Court has explained the philosophy behind “the rarest of the rare case”. The relevant portion of in Paragraph No.98 is reproduced as under:-

“Undoubtedly, the sentencing part is a difficult one and often exercises the mind of the Court but where the option is between a life sentence and a death sentence, the options are indeed extremely limited and if the Court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind “the rarest of the rare” principle.”

48. In the case of ***Rameshbhai Chandubhai Rathod (supra)***, the Apex Court has held that it is now well settled that as on today the broad principle is that the death sentence is to be awarded only in exceptional cases. The Court deciding the issue has accepted the view by one of the Judge whereby in a similar case of rape and murder of a minor girl below the age of 12 years, the Court has given weightage to the fact that the

appellant was a young man only 27 years of age. It was obligatory on the Trial Court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of the society in case he was given a change to do so. The Apex Court while relying upon the judgment of *Ramraj Versus State of Chhattisgarh reported in (2010) 1 SCC 573 and Mulla & Another Versus State of Uttar Pradesh reported in (2010) 3 SCC 508*, has observed that the term “imprisonment for life” which is found in Section 302 of the I.P.C, would mean “imprisonment for the natural life” of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure, however, converted the capital punishment into the punishment for imprisonment of life. In **Mulla's case (supra)**, the Apex Court has said: “*We are in complete agreement with the above dictum of this Court. It is open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the length of imprisonment which will suffice the offence committed. Thus, we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.*” Therefore, the Apex Court has given the punishment of life sentence, which may extend to their full life subject to any remission

by the Government for good reasons. Thus, relying upon the ratio of *Ramraj (supra) and Mulla (supra)*, the Apex Court in the case of *Rameshbhai Chandubhai Rathod (supra)* maintained the same sentence in the similar terms. Therefore, by the three Judges Bench, the Apex Court recognized that it is obligatory on the Trial Court to have given a finding as to a possible rehabilitation and reformation and the possibility cannot be ruled out that he may be a useful member of the society in case he is given a chance.

49. 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". It was held that the nature, motive, impact of crime, culpability, quality of evidence, socioeconomic circumstances, impossibility of rehabilitation are some of the factors, the Court may take into consideration while commuting the death sentence into imprisonment for life.

50. A useful reference is also made to a decision in case of *Bhaggi @ Bhagirath @ Naran vs. State of Madhya Pradesh [2024 (0) AIR (SC) 938]* wherein the Hon'ble Apex Court in similar such circumstances; where the age of the victim was aged seven years and accused was aged forty years committed rape on victim aged seven

years wherein the accused was convicted for the offences punishable under Sections 376 AB of the IPC, as also under Sections 3 and 4 and 5(m) and 6 of the POCSO Act and sentenced to undergo death penalty under Section 376 AB of the IPC by the learned Sessions Court concerned which has been modified by the High Court to the imprisonment for life which shall mean imprisonment for natural life and the Apex Court has modified to a sentence of rigorous imprisonment for a term of 30 years which also includes the period of sentence already undergone and the period of set off if ordered by the learned trial Court. Relevant observations made by the Hon'ble Apex Court while discussing the case laws is quoted hereunder:

“8. Evidently, the decision in *Mulla's case (supra)* and a catena of decisions where death sentence was commuted to the imprisonment for life including the decisions in *Bantu alias Naresh Giri v. State of M.P.*², *Amrit Singh v. State of Punjab*³ and *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*⁴ were considered by the High Court while commuting capital sentence to imprisonment for life. A bare perusal of all those decisions would reveal that those are cases involving rape and murder of young girls aged between 4 to 12 years. It is true that after referring to those decisions the High Court, in the instant case held in paragraph 34 of the impugned judgment thus:-

xxx

xxx

xxx

11. In the circumstances obtained in this case there can be no doubt regarding the requirement of deterrent punishment for the conviction under Section 376 AB, IPC. The only question is whether the commutation of capital punishment to sentence of life imprisonment requires further interference. There can be no doubt with respect

to the position that on such commutation of sentence for the conviction under Section 376 AB, IPC, the other alternative available is only imprisonment for a period not less than 20 years with fine. This position is clear from the provision under Section 376 AB, IPC which reads thus:-

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

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:

Provided further that any fine imposed under this section shall be paid to the victim.”

12. Thus, a bare perusal of Section 376 AB, IPC would reveal that imprisonment for life thereunder means imprisonment for the remainder of the convict's natural life and the minimum term of imprisonment under the Section is 20 years. Now, while considering the question whether further interference with the sentence handed down for the conviction of the offence under Section 376 AB, IPC is warranted, it is only appropriate to refer to a decision of this Court in **Shiva Kumar @ Shiva @ Shivamurthy v. State of Karnataka**⁵. In **Shiva Kumar's** case (*supra*) this Court referred to the decision of a Constitution Bench of this Court in **Union of India v. V. Sriharan alias Murugan and Ors.**⁶ and also the decision in **Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka**⁷. Evidently, this Court in **V. Sriharan's** case (*supra*), upon considering the question whether

*imprisonment for life in terms of Section 53 read with Section 45 IPC means imprisonment for rest of life of the prisoner or a convict undergoing life imprisonment has a right to claim remission, held after referring to the decision in **Swamy Shraddananda (2)** (supra) that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for any specified offence could only be exercised by the High Court and in the event of further appeal only by the Supreme Court. Furthermore, in paragraph 105 of the said decision it was held:- “to put it differently, the power to impose modified punishment providing for any specific term of incarceration or till the end of the convict’s life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior Court.” In **Shiva Kumar’s** case (supra) this Court further took note of what was held by the Constitution Bench in **V. Sriharan’s** case (supra) paragraph 104 as well, which reads thus: -*

“104. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years,

say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.”

13. After referring to the relevant paragraphs from the said decisions in **Shiva Kumar** this Court held as follows: -

“13.Hence, we have no manner of doubt that even in a case where capital punishment is not imposed or is not proposed, the Constitutional Courts can always exercise the power of imposing a modified or fixed-term sentence by directing that a life sentence, as contemplated by “secondly” in Section 53 of the IPC, shall be of a fixed period of more than fourteen years, for example, of twenty years, thirty years and so on. The fixed punishment cannot be for a period less than 14 years in view of the mandate of Section 433A of Cr.P.C.”

14. In view of the decisions referred (*supra*) and taking note of the position that when once the conviction is sustained under Section 376 AB, IPC the fixed term punishment could not be for a period of less than 20 years. Evidently, the High Court had referred, in paragraph 33 of the impugned judgment, to decisions where minor girls were raped and murdered, but did not pointedly consider whether for the conviction under Section 376 AB, IPC involving commission of rape of victim, aged 7 years not coupled with murder what would be the comeuppance, after deciding to commute the capital sentence.

15. We have taken note of the hapless situation of the victim after being taken to a temple by the petitioner-convict. The evidence would reveal that unmindful of the holiness of the place he disrobed her and himself and raped her. When such an act was done by the petitioner, who was then aged 40

years and X who was then aged only 7 years and the evidence that when PW-2 and PW- 14 reached the place of occurrence, blood was found oozing from the private parts of the disrobed child. The High Court had rightly considered the aggravating and mitigating circumstances while commuting the capital sentence into life imprisonment which going by the provisions under Section 376 AB, IPC means rest of the convict's natural life. For effecting such commutation, the High Court also considered the question whether there is possibility for reformation and rehabilitation of the petitioner and opined that it is not a case in which the alternative punishment would not be sufficient in the facts of the case. But then, it is noted that if the victim is religious every visit to any temple may hark back to her the unfortunate, barbaric action to which she was subjected to. So also, the incident may haunt her and adversely impact in her future married life.

16. Then, we are also to take into account the present age of the petitioner and the fact that he has already undergone the incarceration. On consideration of all such aspects, we are of the considered view that a fixed term of sentence of 30 years, which shall include the period already undergone, must be the modified sentence of imprisonment.

17. We have already taken note of the fact that while commuting the capital sentence to life imprisonment, the High Court had lost sight of the fact that despite conviction under Section 376 (2) (i) and under Sections 3/4, Sections 5(d)/6 of the POCSO Act, no separate sentences were imposed on the petitioner for the offence under Section 3/4 and 5(m)/6 of the POCSO Act by the Trial Court, evidently, only on the ground that capital sentence is imposed on the petitioner for the offence under

Section 376 AB, IPC. However, it is a fact that the said aspect escaped the attention of the High Court. That apart, in terms of the provisions under Section 376 AB, IPC when a sentence of imprisonment for a term not less than 20 years which may extend upto life imprisonment is imposed, the convict is also liable to suffer a sentence of fine which shall be just and reasonable to meet the medical expenses and rehabilitation of the victim which we quantify as Rupees One Lakh and the same shall be paid to the victim with respect to the conviction under Section 363, IPC. In that regard also, there is absolutely no consideration in the impugned judgment.”

(emphasis supplied)

51. Yet in the recent decision, the Hon’ble Apex Court in case of *Baluru Thippaiah @ Byaluru Thippaiah @ Nayakara Thippaiah vs. State of Karnatak [2025 INSC 862]* after referring to *Bachan Singh (supra)* on the aspect of applying the test to be applied while sentencing the convict and considering the decision in case of *Ramesh A. Naika vs. Registrar General [2025 SCC OnLine SC 575]* whereby the factors to be elucidated that *(a) lack of criminal antecedents; (b) satisfactory conduct in prison; (c) possibility of reformation*; as a criteria, apply to the case like on hand, and partly allowed the appeal by altering the death penalty into life imprisonment till the last breath in prison; without remission. Relevant observations made in paragraph No.11 to 17 are quoted hereunder:

“11. On the aspect of sentencing, the test to be applied is as to whether the conduct of the Appellant-convict meets the standard of ‘rarest of rare cases’. This has been the consistent position in confirmation of sentences of death

*imposed by the trial courts, ever since **Bachan Singh v. State of Punjab**¹⁸. **Swami Shradhanand v. State of Karnataka**¹⁹, introduced a new position wherein the Courts were able to impose sentences that fall short of death but at the same time, keeping in mind the heinousness of the crime by the accused persons, ensure that the society is not put in danger with the possibility of such an accused walking free. In para 10 thereof, it was observed: “The absolute irrevocability of the death penalty renders it completely incompatible to the slightest hesitation on the part of the Court.”*

*With the judgment in **Manoj v. State of M.P.**²⁰ came a watershed moment in the criteria of sentencing. This judgment ensured that if and when a person is finally sent to the gallows he is only so sent after due consideration of the entire background of facts and circumstances that have landed the accused person at the precipice of death. Under the direction issued therein, the Court is required to call for reports that detail the social and psychological backdrop of the Appellant-convict. It was held by the three-Judge Bench as follows :*

*“249. To do this, the trial court must elicit information from the accused and the State, both. The State, must—for an offence carrying capital punishment—at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in **Bachan Singh** [**Bachan Singh v. State of Punjab**, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] . Even for the other factors of (3) and (4)—an onus placed squarely on the State—conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison i.e. to evaluate the progress of the*

accused towards reformation, achieved during the incarceration period.

250. *Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:*

(a) Age

(b) Early family background (siblings, protection of parents, any history of violence or neglect)

(c) Present family background (surviving family members, whether married, has children, etc.)

(d) Type and level of education

(e) Socio-economic background (including conditions of poverty or deprivation, if any)

(f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

(g) Income and the kind of employment (whether none, or temporary or permanent, etc.);

(h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any), etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

251. *Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be — a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in*

the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformatory progress, and reveal post-conviction mental illness, if any.”

12. *The High Court did, in accordance with **Manoj** (supra), call for the reports. However, we are of the considered view, that the said reports have not been considered to their full extent. The Probation Report reveals that the Appellant-convict has no antecedents; there is mixed opinion on whether he is suitable for reformation or not. The “Conduct and Behavioural Report” submitted by the Government of Karnataka, Prisons and Correctional Services records that he has “good moral character” and “good conduct” with co-prisoners and prison officials. He has also attempted to mend one of the gaps in the fabric of his life i.e., literacy by participating in the Basic Literacy Program organized by the Zilla Lok Shiksha Samiti and passing the same with good rank.*

13. *The mitigation report reveals difficulties throughout-lack of paternal/maternal love and care which later became extreme protectiveness after the death of his brother, difficulties in learning in school leading to him dropping out, making impulsive decisions in business often leading to losses, breakdown of the marriage with his first wife for the reason that neither quite comprehended issues with substance dependence.*

14. *Once incarcerated, it appears that mental health struggles have been a constant and unwelcome companion. He considered making an attempt to take his own life on two occasions, one when he found out about the deaths of his entire family and two, when he himself was sentenced to death.*

15. *The report further concludes that:*

(a) the Appellant-convict has the ability to adapt, engage in constructive activities, pursue an education despite past difficulty, continued worry about his daughter (Rajeshwari's) future, shows a notable capacity for reform and personal growth;

(b) the Appellant-convict's continued incarceration has had a negative impact on Rajeshwari, who is really struggling to cope with life. Interactions with her, threw light on a gentle, loving side of the Appellant- convict. She has also reported experiencing auditory hallucinations which is a direct impact of loneliness she has been enduring."

52. In view of the proposition and law laid down by the Hon'ble Apex Court as discussed in the foregoing paragraphs on the aspect of category of the "rarest of rare case" whereby, it has been held that if the convict would be a menace and threat to the harmonious and peaceful coexistence of the society, it would come under the category of rarest of rare case; irrespective of the fact that crime may be a heinous or brutal in nature. Thus, keeping in mind the aforesaid legal aspect equating with the facts of the case on hand, undoubtedly the sentencing part is a difficult one and requires to undertake such exercise by the Court concerned having jurisdiction to award the sentence; where the option is between a life sentence and a death sentence and the Court concerned finds it difficulty in awarding the sentence, then the appropriate recourse would be to impose the lesser sentence.

53. Thus, in light of the aforementioned legal position, it is implicit clear that the death sentence is to be awarded only in exceptional cases as it is obligatory on the part of the learned Court

concerned to give a finding on the aspect of reformation and the possibility that the convict will become a useful member to the society in case he will be given a chance to do so. In nutshell, as per the guidelines indicated in *Bachan Singh's case (supra)* which otherwise applies to the facts of each individual case while imposing the death sentence, the Court concerned has to consider the gravity of extreme culpability, the mitigating circumstances, the social economic condition of the offender equating the way and the circumstances in which the crime has been committed; so also the victimisation of the person involved in the crime and the adverse societal impact of the crime in question. All these aspects require to be examined by calling for appropriate report/s and after recording such subjective satisfaction that there appears such extreme and exceptional circumstances leaving no room for the Court except to impose the death penalty.

54. In context to the above discussion, if the facts of the present case is examined, it would appear that with the intention of committing a wrongful act and having sexual intercourse, enticed and allured the victim on the pretext of giving her chocolate, abducted her, and took her to an open place with bushes situated behind Pandesara GIDC, Armo (Synthetics) Dyeing Mill, where he removed the jeans pant and underwear worn by her and committed rape upon her. As the victim could not bear the pain and started crying, the accused pressed her mouth and nose with his hands, and despite having knowledge that by doing so the victim would die, with the intention of causing her death, he continued to press her mouth and nose, thereby strangulating her and causing her death. Further, despite knowing that the victim

was a minor, he committed penetrative sexual assault and aggravated penetrative sexual assault upon her, causing her death. Thus, considering the evidence adduced before the learned Special Court, the learned Special Court awarded the death penalty; however while awarding the sentence of death penalty has not taken into consideration the several factors as deliberated in the foregoing paragraphs with any possibility of reformative measures and therefore in absence of any antecedents, the imposition of death penalty deserves to be interfered with as nothing sort of any such material emerges from the record; nor seems to have been pointed out to us from the material which may constrain us to affirm the conclusion arrived at by the learned Special Court.

55. Furthermore, the jail record also shows that convict is not involved in any offence; except the present offence and therefore the test to be applied for while awarding death penalty in such heinous offence as discussed herein above after referring to the catena of decisions of the Hon'ble Apex Court is to observe that there is no criminal antecedents; convict is having good behaviour in prison and there would be chances of reformation. In view of the jail report, no such antecedents are reported and conduct of the convict in the jail is reported to be good; however learned Special Court has not undertaken any such exercise to verify the aspect leading towards reformative measures. Thus, in such circumstance, the proposition laid down by the Apex Court does warrant to be considered while sentencing which in case requires to be altered to the punishment of imprisonment of life till the remainder of the life.

56. Accordingly, the Criminal Confirmation Case No.2 of 2021 seeking confirmation of the death sentence awarded to the convict - accused by the judgment and order dated 07/12/2021 passed in Special (POCSO) Case No. 278 of 2021 by learned Special Judge (POCSO), Surat is answered; however the death penalty / capital punishment imposed upon the convict for the offence punishable under Sections 302, 376(A), and 376(AB) of the Indian Penal Code is commuted to the imprisonment of life which shall mean the imprisonment for remainder of life. Rest of the conviction and sentence as awarded by the learned Special Court shall remain unaltered.

57. Criminal Appeal No.1690 of 2023 preferred by the convict – accused is disposed of in above terms.

58. Office is directed to forward the copy of this Judgment to the learned Sessions Court concerned to take appropriate steps in accordance with the law.

(ILESH J. VORA,J)

(R. T. VACHHANI, J)

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