

**Neutral Citation No. - 2024:AHC:30366-DB**

**Judgement Reserved on 12.12.2023**

**Judgement Delivered on 21.02.2024**

**Case :- CAPITAL CASE No. - 4 of 2022**

With

Reference No.4 of 2022

**Appellant :- Dinesh Paswan**

**Respondent :- State of U.P.**

**Counsel for Appellant :-** From Jail, Pradeep Kumar Mishra, Tanisha Jahangir Monir

**Counsel for Respondent :-** A.G.A., Arvind Agrawal, Harsh Vardhan Deshwar

**Hon'ble Ashwani Kumar Mishra, J.**

**Hon'ble Syed Aftab Husain Rizvi, J.**

**(Delivered by Hon'ble Syed Aftab Husain Rizvi, J.)**

1. Heard Sri Vinay Saran, learned Senior Counsel, the amicus curiae assisted by Sri Pradeep Kumar Mishra and Ms Tanisha Jahangir Monir and Sri Arvind Agrawal, assisted by Sri Anuj Agrawal, learned counsel for the informant as well as Mrs Archana Singh and Sri Amit Sinha, learned A.G.A. for the State.

2. This capital criminal appeal has been filed against the judgment and order dated 18.01.2022, passed by Special Judge (POCSO Act)/Additional Session Judge, Fatehpur in Special Session Trial No.767 of 2021 (State Versus Dinesh Paswan) arising out of Case Crime No.0351 of 2021 under Sections 364, 302, 376AB, 377, 201 I.P.C. and 6 of The Protection of Children From Sexual Offences Act, Police Station Khaga, District Fatehpur. The appellant has been convicted and sentenced to death for the offence under Section 6 of The Protection of Children From Sexual Offences Act, 2012 and 302 I.P.C. besides other sentences with default stipulation.

3. Since the criminal capital case and the reference arise out of the same judgement and order, hence they are being decided together by this common judgement.

4. The first informant gave an application dated 15.10.2021, scribed by Aftab Alam, at Police Station Khaga, District Fatehpur, alleging therein that she is resident of Village Harchandpur, Police Station Khakhreru, District Fatehpur and presently residing at her maternal home at Village Sujrahi, Police Station Khaga, District Fatehpur. Dinesh Paswan lives in the neighbourhood of the informant. Today on 15.10.2021 Dinesh Paswan was trying to take three year old daughter of the informant to his room on the pretext of offering apple to her, but she refused to send her daughter with him. Taking advantage of crowd, during idol immersion at about 12 noon, the accused enticed away innocent child of the informant and took her to his room and brutally committed her murder after sexually assaulting her and concealed her dead body. The informant thoroughly searched her and also inquired from Dinesh, who said that he had not seen her daughter. When the informant could not find her daughter, then the parents of the informant and Abhai Pratap Singh the neighbour and others got the door of the accused Dinesh forcibly opened, made a search and after removing beddings kept beside the cot, they found the deadbody of the victim. On the aforesaid written information, Case Crime No. 0351 of 2021 under Sections 302, 376A, 201 I.P.C. and 5/6 of Protection of Children From Sexual Offences Act was registered on 15.10.2021 at 21.49 hours.

5. Station House Officer, Santosh Kumar Sharma (PW-11) took up the investigation. He recorded the statement of chik writer. The case was amended from 376 (Ka) I.P.C. to 376AB I.P.C. Field Unit was called. The Investigating Officer along with Field Unit reached at the place of occurrence. One cloth bedding (green red yellow in colour), one male underwear (Macho 85cm), and one small female underwear (red and green floral design) were recovered from the scene of occurrence by the Field Unit. The Investigating Officer recorded the statement of the informant and constituted a team for arrest of the accused. The accused was arrested on

15.10.2021 at about 23.30 hours from Sujrahi turn. Arrest memo was prepared and his statement was also recorded. The Field Unit also collected one jeans pant worn by the accused and his nail scrappings. A composite challan memo of above five articles was prepared. The accused was brought to the Community Health Centre, Hardon Khaga for medical examination on 16.10.2021. For DNA sampling he was referred to the District Hospital, Fatehpur, where blood sample of the accused was collected by Dr Rajesh Kumar Srivastava (PW-14). On the same day, the Investigating Officer inspected the place of occurrence and prepared the site-plan, recorded the statement of mother of the informant, sent the case property for forensic examination. The Investigating Officer took other steps and after completing all the formalities, concluded the investigation and submitted charge-sheet on 22.10.2021.

6. Special Judge took the cognizance and framed charges against the accused under Sections 364, 376AB, 377, 302, 201 I.P.C. and Section 6 of The Protection of Children From Sexual Offences Act. The accused pleaded not guilty and claimed for trial.

7. The prosecution has produced 17 witnesses in oral evidence who have proved 26 prosecution papers, Ext. Ka-1 to Ka-26 and 42 material exhibits.

8. The statement of the accused under Section 313 Cr.P.C. was recorded and incriminating evidence was put to him. The accused denied the prosecution story and stated that the witnesses have given false statement, nothing has been recovered from his room and false report has been lodged against him. Ante-time documents have been prepared. The accused has also stated that he is resident of other place, he is innocent and has been falsely implicated as he belongs to other place. However, no evidence oral or documentary has been produced in defence. Learned trial court, after hearing submissions of the parties, has held the appellant-accused guilty and sentenced him as above.

9. Dr Prabhat Dwivedi (PW-9) has proved the postmortem report Ext. Ka-9. Postmortem was conducted on 16.10.2021, at 1.30 a.m. The age of

the deceased was about three years, height 87 cm, weight 14 kg. One red frock, one green underwear, two black thread and two amulet were found on the body. Rigor mortis was present in both upper and lower extremities. Eyes closed, mouth partially open, teeth 10/12, nails and lips cyanosed. Oozing of blood surrounding vagina and anal canal. Following antemortem injuries were found on the body of the deceased:

1. *Contused swelling of size 3x2 cm present on right side forehead, 1cm above from right eye-brow (smoothing).*
2. *Contused swelling of size 3x2cm present on right cheek, 2 cm from right side angle of mouth (smoothing).*
3. *Contused swelling of size 3x2 cm present on left side face, 0.5 cm from left ala of nose.*
4. *Contusion present on B/L ala of nose and contusion present above upper lip and just below both the nares, frenulum of upper lip is torn.*
5. *Vaginal tear size 3x3cm associated with complete hymenal tear and associated with parivaginal skin abrasion. Laceration present on lateral wall of right of lower pole of vagina. Vaginal penetration upto depth of 3.5 cm.*
6. *Anal tear of size 3x3.5 cm associated with perianal abrasion and swelling around anal verge of size 4x4 cm and anal canal perforated at 4.5 cm from and verge and anovaginal fistula is present.*

Blood vessels and arteries were lacerated.

In internal examination, the brain was congested. Tongue partially protruded, both lungs and pleura congested, right chamber of heart was full while left was empty. About 250 ml semi-digested food material was found in the stomach. Small intestine was filled with gases and pasty material while large intestine was partially filled with gases and faecal matter at places. Liver, spleen, both kidneys were congested. Gall bladder half full while urinary bladder was empty.

In the opinion of doctor, the cause of death was asphyxia as a result of ante-mortem smothering. The time of death was about half a day.

During postmortem, two vaginal slides, vaginal swab, two anal slides, anal swab, oral swab, nail wax and nail scrapping preserved for further investigation and also supportive evidence. Vaginal swab, anal swab, cut-piece of underwear and foreign particles present were also collected for DNA examination.

10. The blood sample of the accused was collected on 16.10.2021 by Dr Rajesh Kumar Srivastava (PW-14), EMO, District Hospital, Fatehpur who has proved the DNA examination form Ext.Ka-23. The witness has stated that he collected blood sample of the accused in two separate vials and handed over it to Investigating Officer, Santosh Kumar Sharma. The witness has proved material exhibits, 33, 34, 35, 36, 41 and 42.

11. Four public witnesses were examined. PW-1 is the informant and mother of the deceased. In her examination-in-chief, the witness has stated that her maternal house is at Village Sujrahi, Police Station Khaga, District Fatehpur. The accused Dinesh Pasi is resident of Taranagar, Police Station Kadagaon, District Kaushambi. He was living in rented room on the ground floor of the house of Sumer Singh, in front of her maternal house since last 8-9 years and well known to the witness and her family members. She had come to her maternal house three days prior to the incident which has occurred on 15.10.2021. The deceased was living there since last one month. It was Dashhara festival on the day of the incident. She and her parents were at home. In the morning, at about 6.00 a.m. the accused came at her door and was calling the deceased on the pretext of offering apple to her. The witness heard this and refused to send the deceased with him. On account of Dashhara festival the idols were being carried through the village. There was hustle-bustle and noise. The victim came out of the house to watch the festivities. The witness asked her mother to take care of the deceased. Her mother came out to look the deceased but she was not found. Thereafter her parents and others started to search her. Her mother also inquired about the deceased from Dinesh. The accused told that the deceased is neither with him nor in his room. He also offered to search his room. Earlier on several occasions, the accused has tried to lure the victim offering her chocolate, toffee, etc. At about 6 p.m. the room of Dinesh was got forcibly opened, the dead body of her daughter was found inside the layers of the bedding. Her mother carried the dead body at the door of her house. Several persons also assembled there, Dinesh was also present. There were mark of injuries on the forehead, nose, mouth, vagina and anus

of the deceased. The frock of the deceased was wholly torn and blood-stained and undergarment was not on her body. It was found inside the room and was blood-stained. Someone has informed the police. The police came and conducted the inquest proceedings at about 8-9 p.m. She got the report scribed by Aftab Alam, accompanying her mother, she presented it at the Police Station and on its basis F.I.R. was lodged. The witness has proved written report, Ext. Ka-1.

12. PW-2 is the maternal grand mother of the deceased. She has reiterated the statement of PW-1. She has also stated that when she and her husband were searching the deceased, Mohar Ali met them and told that he had seen the accused Dinesh Paswan carrying the deceased to his room holding her finger.

13. Mohar Ali has been examined as PW-3. The witness has stated that he lives near the house of maternal grand parents of the deceased. On 15.10.2021 at about 12-12.15 noon, he was going to Khaga Market, he saw accused Dinesh Paswan carrying the deceased in his room. He thought that he is taking the victim to play with her, and went to the market. The accused Dinesh Paswan was known to him as he lived in a rented room on the ground floor of the house of Sumer Singh. The witness has further stated that when he returned at about 5-5.30 p.m. from the market and reached at the house of maternal grand parents of the deceased, several persons were assembled there. It came to his notice that the deceased was missing. Then he told the family members that he had seen the accused carrying the deceased to his room at 12 noon. Thereafter he went to his house and after parking his cycle and keeping the articles there he came back at the house of the grand parents of the deceased. The dead body of the deceased was carried from the room of accused, then he became sure that Dinesh Paswan has committed the murder of the deceased. The witness has also identified the accused in dock identification.

14. Abhay Pratap Singh, PW-4 is another public witness. He has stated that his house is near the house of informant's parents. It was Dashhara festival on 15.10.2021 and idol immersion was also taking place. He was

sleeping and taking rest at his house. At about 5.00 p.m., his neighbour, maternal grand father of the deceased came to his house and informed that his three year old grand daughter is missing since 12 noon and they are searching her. He also asked the witness as to whether he has seen the deceased. He also told that Dinesh Paswan who lives in a rented room on the ground floor of the house of Sumer Singh, in the morning, at 6.00 a.m., had come and tried to carry his grand daughter on the pretext of offering apple. The witness has further stated that at about 5.30 p.m., Mohar Ali came and told that about 12-12.15 noon when he was going to market, he saw the accused carrying the deceased holding her finger. Then the witness with informant and 20-25 other persons got the door of the room of accused Dinesh Paswan, open which was bolted from inside. Room was searched, the dead body of the victim was found wrapped inside the cloth bedding kept beside the cot. The maternal grand mother (PW-2) of the victim carried the dead body in her arms to the door of her house. The accused is well-known to him. This witness has also identified the accused in dock identification. The witness has also stated that inquest proceeding on the dead body was conducted before him and he has put his signature on it.

15. Lady Constable, Suchita Tiwari, PW-5 is the chik writer and she has proved the chick report as Ext. Ka-2. The witness has also stated that chick was registered on the basis of written report submitted by the informant.

16. Constable, Ashwani Kumar, PW-6 is the G.D. writer who has proved copy of the G.D. entry as Ext. Ka-3 and the copy of the G.D. entry with regard to the arrest of the accused as Ext. Ka-4.

17. S.I., Bansh Bahadur, PW-7 has stated that he was posted as Sub-Inspector at Police Station Khaga on 19.10.2021. Constable, Satish Chandra Bharti was sent to Lucknow with case property for forensic examination at Forensic Science Laboratory, Lucknow. He came back and informed that the material will have to be sent to Forensic Science Laboratory, Bhopal. The entry was made in the G.D. which has been proved by the witness as Ext. Ka-5. The witness has also proved G.D. entry Ext. Ka-6, by which Section 376AB I.P.C. was added. The witness has also

proved the G.D. entry by which the case property was sent to Forensic Science Laboratory, Bhopal as Ext. Ka-7.

18. S.I., Prakash Singh Parihar, PW-8 has stated that on 22.10.2021, Head Constable, Satish Chandra Bharti came back to the police station after depositing case property at Forensic Science Laboratory, Bhopal. The witness has proved relevant entry of G.D. as Ext. Ka-8.

19. S.I., Krishna Swaroop, PW-10 had conducted the inquest proceeding, prepared the relevant papers and has proved all these documents as Ext. Ka-11 to Ka-14.

20. Head Constable, Krishna Kumar Yadav, PW-12 has stated that on 15.10.2021 he was posted as Incharge Field Unit, Fatehpur. At about 07.45 p.m., he received information from Police Station Khaga that a minor girl has been done to death after sexual assault. He reached at the Police Station Khaga at 20-47 hours and made entry in the G.D. Thereafter, he along with Station House Officer, Santosh Kumar Sharma came at the place of incident and collected one cloth bedding, one male underwear (Macho 85 cm blue colour) and one small female underwear (green-red in colour with floral design) from the room of the accused, sealed it and prepared fard challan. He came back at Police Station and on the same day after arrest of the accused collected his nail scrappings, sealed it in an envelope, and also seized one blue jeans worn by the accused, sealed it and made entry in the fard challan. The witness has proved the G.D. entry and fard challan as Ext. Ka-18 and Ka-19 and material exhibits 1 to 39.

21. Dr Uday Prakash Kushwaha, PW-13 has stated that he was posted as Superintendent, Community Health Centre, Khaga on 14.08.2018. On that date, the informant was admitted for delivery in Female Hospital. The witness has proved the entries of birth of the victim and birth certificate as Ext. Ka-21 and Ka-22.

22. Head Constable, Satish Chandra Bharti, PW-15 has stated that on 16.10.2021, he was posted as Head Constable at Police Station Khaga, Fatehpur. Vide G.D. entry dated 16.10.2021 at 20-05 hours, he proceeded to Lucknow to deposit the case property at Forensic Science Laboratory.



The witness has proved the G.D. entry as Ext. Ka-25. The witness has further stated that on 19.10.2021 he was informed by the competent authorities that as the case property is related to heinous offence, hence it will have to be examined at Bhopal. On this, he came back to the Police Station on 19.10.2021 itself and deposited the case property at the Police Station and again after receiving the case property proceeded for Bhopal. The witness has proved the relevant G.D. entries as Ext.Ka-5 and Ka-7. The witness has further stated that he deposited the case property at Forensic Science Laboratory, Bhopal got acknowledgement and handed it over to the Investigating Officer.

23. Constable Pushendra Singh, PW-16 has stated that on 21.11.2021 he was deputed, vide G.D. NO.31, 5.27 O'clock to bring the case property and forensic science laboratory report from Bhopal. He came back on 23.11.2021 at 10-26 hours and deposited the case property kept in cartoon and CFL report at the Police Station Khaga. The witness has proved relevant G.D. entries as Ext. Ka-25 and Ka-26.

24. Inspector, Santosh Kumar Sharma, PW-11 is the Investigating Officer. The witness has stated that on 15.10.2021 at 21.49 hours, the case was registered at his direction and investigation commenced. He recorded statements of chik writer, G.D.writer, informed the Field Unit, Fatehpur and reached at the place of the incident with Field Unit which collected five articles i.e. one cloth bedding, one male underwear Macho 85 cm blue colour, one small female underwear red-green with floral design, nail scrapping of the accused and one blue colour jeans of the accused and handed over him, after preparing the fard challan. The inquest proceeding was conducted on his direction. He also recorded statement of informant. At about 23.30 hours he arrested the accused, prepared the arrest memo and recorded his statement. On 16.10.2021 the accused was brought to Community Health Centre, Hardon for medical examination. For DNA sample collection the accused was referred to District Hospital, Fatehpur. On 16.10.2021 he came at the spot and inspected the place of occurrence and prepared the site-plan, recorded the statement of the mother of the

informant, sent the case property to Forensic Science Laboratory for examination. Thereafter on different dates he recorded statements of other witnesses and took other steps necessary for investigation and after concluding the investigation, submitted charge-sheet on 22.10.2021. The witness has proved it as Ext. Ka-17.

25. Inspector Anand Prakash Shukla, PW-17 has stated that on 23.11.2021 the case property and FSL report was brought by Constable, Pushendra Singh from Forensic Science Laboratory, Bhopal and it was sent to the Superintendent of Police, Fatehpur on the same day. On his direction he prepared supplementary case diary and sent the report to the court.

26. (a) The learned counsel for the appellant submitted that the appellant has been falsely implicated merely on the basis of suspicion. The genesis of the incident has been suppressed by the prosecution. There is no motive but only suspicion. The case is of circumstantial evidence, the chain of which is incomplete. It is further contended that the place of incident is not fixed as the body of the deceased was not found at the alleged place of occurrence (the rented room of the appellant), admittedly the body was found at her maternal grandparents' house, where the inquest was conducted. The alleged recovery of one cloth bedding, one male underwear and one small female underwear from inside the room of the appellant is highly doubtful. No recovery memo duly signed by the independent witnesses was prepared nor it was shown in the site plan and the inspection note. Only *fard challan* (Ext. Ka-18) was prepared. Further, the *fard challan* contains two additional items nail scrapings and blue jeans of the accused while it is established from the evidence that the accused was arrested after completion of the investigation proceedings of 15/10/2021 as recorded in the C.D.-1. The accused was brought to the police station in the wee hours of the night on 16/10/2021 and a description of his arrest is mentioned in CD-2 dated 16/10/2021. H.C. Krishna Kumar Yadav, PW-12 has tried to explain it that after collecting the three items from the room he came to the police station, it came to his knowledge that accused has been arrested so

he waited for his arrival at police station and after collecting his nail scrapings and blue jeans he completed the *fard challan* Ext. Ka-18 and sealed the materials. He has admitted that he did not seal any material on the spot. In postmortem one green colour half pant has been found on the body of the deceased. All these facts and evidence clearly establish that Ext. Ka-18 is a bogus and fabricated document and not reliable.

(b) It is further contended that prosecution has tried to improve its case and introduce Mohar Ali PW-3 as a witness of last scene. His name is not mentioned in the FIR and his statement has been recorded under Section 161 Cr.P.C. after three days. The informant has not stated about the fact of last seen by Mohar Ali PW-3, so this evidence is concocted and wholly unreliable. It is next contended that FIR is the result of deliberation and consultation written at the instruction of the police. The FIR has been lodged on 15/10/21 at 9:49 PM whereas PW-1 has admitted that soon after the body was recovered at about 6 PM the police came on the information of the villagers, the inquest on the body was conducted and it was sent for autopsy thereafter the informant went to lodge the FIR. H.C. Krishna Kumar Yadav, PW-12 has also stated that he received the information at 7:45 PM and reached the police station at 8:47 PM, his arrival at the police station was entered in the GD. The first information of the incident received by SHO has deliberately been concealed. The chik FIR has reached to concerned Magistrate after an unexplained delay of three days.

(c) It is also contended that the arrest of the appellant and recovery of his jeans and collection of nail scrapings are fabricated. The prosecution witnesses has stated about the presence of the accused at the time the dead body was carried at the door of the house of the PW-2, but according to the Investigating Officer the accused was arrested at about 11:30 P.M. on 15.10.2021. It is also highly improbable and unnatural that an accused of such a heinous offence should have been spared by the public without any thrashing. There is no statement before the trial court that the accused absconded and further no sign of injury was found on his body in his medical examination.

(d) It is also contended that the case material was sent to FSL, Lucknow on 16.10.2021 where it was not received and directed for examination at Bhopal. P.W.15 returned to P.S., Khaga on 19.10.2021 and again proceeded to Bhopal on the same date. On 21.10.2021 the material was received at FSL Bhopal. Therefore it transpires from the record that the material was in hands of P.W.15 for about four days during transit from Fatehpur to Lucknow and thereafter about three days during transit from Fatehpur to Bhopal. The handling of material during transit was also not proper which is established from the testimony of P.W.-15. It is apparent that the collection, sampling and handling of the material is against the mandate and guidelines issued by the Central Forensic Science Laboratory, there is inordinate delay in sending the material for examination and in such circumstances the FSL report exhibit Ka 27 is not reliable. The learned counsel in support of all his above contentions relied upon the following case laws:

- (i) **Arjun Malik Vs. State of Bihar, 1994 LawSuit (SC), 290**
- (ii) **Chotkau Vs. State of Uttar Pradesh, 2022 LawSuit (SC), 804**
- (iii) **Naveen Alias Ajay Vs. State of Madhya Pradesh, 2023 Supreme (SC), 1070**
- (iv) **Prakash Nishad @ Kewat Zinal Nishd Vs. State of Maharashtra in Criminal Appeal No. 1636-1637 of 2023, decided on 19.05.2023**

27.(a) Per contra the learned counsel for the respondents contended that the first information report discloses the previous conduct of the accused, he was attempting to lure the victim since morning on the pretext of offering apple and it was noticed by the informant. The appellant taking advantage of the crowd due to Dashhara and Idol immersion succeeded in his evil intention. The appellant just to show that he is not involved remain present outside his room. However on suspicion when the door of his room was got opened at 6 PM the appellant was inside his room and on search the dead body was found wrapped in the bedding kept beside the cot in the room. The dead body was carried at the door of the house of the maternal

grandparents by the maternal grandmother, because of this the police did not find the dead body in the room. One cloth bedding, one male underwear, one small female underwear were recovered from inside the room which fixes the place of occurrence. Memo of it is exhibit Ka-18. The accused was arrested at 11.30 p.m. on the same day and was brought to police station where his nail scraping and jeans were also collected however the entry of these two items were made in the same Fard Challan. The description of the arrest of the accused in CD 2 is because CD 1 was of 15.10.2021 and the case diary in fact is prepared by the investigating officer on day to day basis, so there is no discrepancy. Further it may be a mere lapse of investigation and appellant could not get any benefit of it.

(b) The learned counsel also contended that P.W.-3 Mohar Ali has proved the last seen. He is an independent witness and there is no serious infirmity in his testimony. Abhay Pratap, P.W.-4, is another independent witness who has proved the recovery of the dead body from the room of the deceased. All the public witnesses are consistent throughout their examination and all of them have supported the prosecution case.

(c) It is further contended that the most important piece of evidence is the DNA profiling report. The semen analysis report establishes that the semen was detected on the red frock, green pant of the victim, jeans and male underwear of the accused, anal swab, vaginal swab and cloth bedding. 13 sealed parcels were sent for DNA test. A DNA profile of the accused was created from blood sample while the DNA profile of the victim was also created from the blood stains and other fluids found on the materials. From the report it is evident that the alleles present in the DNA profile of the accused are consistently present in the anal swab collected from the victim. This conclusively proves that the offence has been committed by the appellant accused and none else. It is also contended that minor discrepancies or lapses in the investigation will not benefit the accused. There is cogent evidence on the record to prove the complicity of the accused. There is no reason to falsely implicate an innocent person sparing the real culprit. The trial court has correctly appreciated the evidence on

record and conclusion drawn by it does not suffer from any infirmity. There is no perversity or illegality in the finding of guilt returned by the trial court.

28. The prosecution case is based on circumstantial evidence. In **Sharad Birdhichand Sarda versus State of Maharashtra, AIR, 1984, SC 1622**, the Apex Court has laid down the following five golden principles to prove a case based on circumstantial evidence:-

*"(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.*

*(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.*

*(3) The circumstances should be of a conclusive nature and unerringly point towards the guilt of the accused.*

*(4) They should exclude every possible hypothesis except the one to be proved, and*

*(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*

29. In the case of **Haresh Mohandas Rajput v. State of Maharashtra 2011 (12) SCC 56** following its earlier decisions, the Apex Court held that,

*"when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:-*

*(i) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

*(ii) those circumstances should be of a definite tendency unerringly pointing toward the guilt of the accused.*

*(iii) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*

*(iv) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."*

30. The prosecution has relied on the following circumstances:

i) The conduct of the accused was doubtful. He was attempting to lure the victim and took her on different pretexts with evil intention. In

the morning of the day of the incident, he attempted to lure the victim which was noticed by the first informant;

- ii) The deceased was last seen in the company of the accused;
- iii) The dead body of the victim was recovered from the room of the accused concealed in cloth-bedding;
- iv) The cloth bedding, one male underwear (of the accused) and one female underwear (of the victim) were recovered from the room occupied by the accused;
- v) All the materials recovered from the room and nail scrapping and jeans of the accused and other articles belonging to the victim collected by the autopsy surgeon and the blood sample of the accused were sent for forensic examination. DNA report confirms the presence of blood-stains and semens on clothes of the victim as well as accused and DNA profile generated from the articles belonging to the deceased and the articles belonging to accused, matched.

31. The first informant, PW-1 and her mother, PW-2 have supported the allegations of the F.I.R. that the accused was attempting to lure the victim on different pretext. In the morning of the day of the incident, the accused came at the house of the informant and attempted to lure the victim offering apple. However, it was noticed by the informant and she refused to send the victim with the accused. So the above testimony establishes that the accused had an evil intention and his conduct was doubtful. He had an evil eye upon the victim and was trying to take her. All the three public witnesses, first informant, PW-1 and her mother, PW-2 and Abhay Pratap Singh, PW-4, have also corroborated the allegations of the F.I.R. that it was Dashhara festival on the day of the incident and idol immersion was taking place. The first informant, PW-1 and her mother, PW-2 have further corroborated the allegations of the F.I.R. that the victim, was present at her house, she went outside the house to see the festivities. At 12 noon, the first informant asked her mother, PW-2 to take care of the victim. PW-2 came

out of her house to look for the victim but was unable to find her. Thereafter a search was made but the victim could not be found.

32. Abhay Pratap Singh, PW-4 has also stated that at about 5.00 P.M. his neighbour, the maternal grand father of the victim came to his house and told that the victim is missing and inquired about her. He also told that at about 6.00 A.M., the accused came at his house and attempted to lure the victim on the pretext of offering apple to her. All the aforesaid three witnesses have further corroborated that when the victim could not be found after a thorough search and the accused was suspected, the door of his room which was bolted from inside, was got opened and his room was searched. The dead body of the deceased was found wrapped inside cloth-bedding kept beside the cot in his room. The witnesses have further stated that PW-2, the maternal grandmother of the victim lifted the dead body from the spot and kept it at the door of her house. All these three witnesses have been cross-examined at length but there is nothing in their cross-examination which makes their testimony unreliable.

33. It is correct that the police found the dead body at the door of the house of PW-2 and inquest was conducted there. The police did not find the dead body inside the room. However, this circumstance is fully explained by the prosecution witnesses. All the three public witnesses have stated that when the dead body was found inside the cloth-bedding, maternal grand mother of the victim (PW-2) took it in her arms and brought it at the door of her house. This act of PW-2 is natural and probable. All the witnesses have consistently stated that the dead body was found inside the room. There is no contradiction or discrepancy in the oral testimony of the witnesses and there is no reason to disbelieve that the dead body was not found inside the room. So from the oral testimony of the witnesses it stands proved that the dead body was found inside the room wrapped in a cloth-bedding. In such circumstance Section 106 of Evidence Act will be attracted. Accused has to explain as to under what circumstances the dead body was found in his room but there is no explanation except mere denial.



34. Prosecution case is also that one cloth-bedding, one male underwear and one female underwear were recovered from the room of the accused. Head Constable, Krishna Kumar Yadav, Incharge Field Unit, PW-12 and Station House Officer, Santosh Kumar Sharma, PW-11 (I.O.) have corroborated the aforesaid facts. The first informant, PW-1 and her mother, PW-2 have also stated that blood-stained underwear of the victim was lying inside the room and her frock was also blood-stained and torn.

35. It is correct that there is some discrepancy in the prosecution evidence regarding the recovery and preparation of Ext. Ka-18. S.H.O., Santosh Kumar Sharma, PW-11 has stated that five articles, one cloth-bedding, one male underwear, one small female underwear, nail scrappings of the accused and one jeans pant were handed over to him by the Forensic Team after he reached the place of occurrence. Further the Fard Challan, Ext. Ka-18 contains description of all five articles, three recovered from the place of occurrence and two collected from the accused, while the accused was arrested in the night at 11.30 P.M. and was brought to the Police Station at 1.15 A.M. on 16.10.2021. Head Constable, Krishna Kumar Yadav, PW-12 has tried to explain this discrepancy. He has stated that after recovery of three articles from the place of occurrence, he came at the police station, he got the information that the accused has been arrested, so he waited for his arrival and when the accused came at the police station, he collected his jeans pant and nail scrappings and made entry in the same Fard Challan (Ext. Ka-18). He has also stated that he sealed all the articles at the police station. It appears that Incharge Field Unit, Krishna Kumar Yadav PW-12 and Investigating Officer, Santosh Kumar Sharma PW-11 have not acted diligently and as per rules. What was required was to prepare separate recovery memos of the articles recovered from the place of occurrence and articles seized from the accused. Instead of it, a composite Fard Challan (Ext. Ka-18) has been prepared which is not signed by any witness. In Fard Challan (Ext. Ka-18), simply the name of the items without any further description have been mentioned. There is no description that male underwear, the female underwear and cloth-beddings

recovered from the spot and the jeans pant collected from the accused have any kind of stains on it. So it appears that both the Police Officers have acted in a very casual manner. The discrepancies noted above is in the nature of investigational lapses.

36. From oral testimony of public witnesses, informant-PW-1, her mother PW-2 and Abhay Pratap Singh, PW-4, it stands proved that the dead body was found wrapped in a cloth-bedding inside the room of the accused. It proves that incident has occurred inside the room of the accused. There was no occasion of any blood-stains or other stains on the floor of the room as the body was wrapped in cloth-bedding.

37. The prosecution has also produced the evidence of last seen. Mohar Ali, PW-3 has been produced to prove the fact of last seen but his testimony is not inspiring and trustworthy. The witness has stated that on 15.10.2021 at about 12-12.15 noon, he was going to the market, he saw the accused taking the deceased to his room holding her finger. When he returned from the market at about 5.00 p.m., he saw the commotion at the door of PW-2. It came to his notice that the victim is missing, then he told the family members of PW-2 about the fact of last seen. But this important fact is missing from the F.I.R. The first informant, PW-1 has also not stated this fact in her oral testimony. Only PW-2 and PW-4 have stated this fact in their oral testimony. The statement of Mohar Ali, PW-3 under Section 161 Cr.P.C. has also been recorded after three days. From analysis of cross-examination of Mohar Ali, PW-3, it appears that his oral testimony is not inspiring, So this piece of evidence is not reliable.

38. The autopsy report (Ext. Ka-9) proves that the victim was subjected to brutal sexual assault causing injuries on her body including her private parts and during the course of commission of sexual assault the victim had died due to smothering. DNA report also confirms that the deceased was subjected to sexual assault as semen has been detected from various articles collected from the body of the victim as well as her clothes.

39. Prosecution witnesses have stated that the dead body was recovered in presence of the accused, but what transpired thereafter is not clear.

According to the prosecution the accused was arrested at 11.30 P.M. It is correct that no injury has been found on the body of the accused in his medico-legal examination. The discrepancy in the Fard Challan, Ext. Ka-18 and seizure of jeans pant and nail scrapping of he accused indicate that Investigating Officer has manipulated the arrest of the accused to show good work and take credit. But on this ground alone the entire prosecution evidence cannot be disbelieved.

40. The most important piece of evidence is the report of Central Forensic Science Laboratory, Bhopal, Ext. Ka-27. 13 sealed parcels were sent for forensic examination. According to the FSL report, it were found intact and sealed which was tallying with specimen seal. The thirteen articles collected during investigation and post mortem are as below:

1. Ex-1-One red frock with brownish stains, one green half pant with brown stains
2. Ex-2-Kathari (cloth-bedding) red-green-blue-yellow coloured with red brown stains.
3. Ex-3-One jeans pant, faded blue in colour with some brown stains, said to be that of accused-Dinesh Kumar
4. Ex-4-One blue coloured underwear from crime scene, having few reddish brown stains.
5. Ex-5-One peach coloured underwear with green colour flower prints.
6. Ex-6. Nail scrapping of accused on two wooden sticks.
7. Ex-7. Blood sample: Two vials having reddish brown fluid, said to be blood sample of Dinesh Kumar). Blood Sample Authentication form Annexure-I).
8. Ex-8. Anal Swab: One plastic bottle having cotton swab with brownish stains.
9. Ex-9. Vaginal Swab: One plastic bottle having cotton swab with brownish stains.
10. Ex-10. Mouth Swab: One plastic bottle having cotton swab with light brown stains.

11. Ex-11. Anal Slides: One paper envelope having two anal slides with some light cream stains.
12. Ex-12. Vaginal Slides: One paper envelope having two vaginal slides with some light cream stains.
13. Ex-13(i): One paper envelope having nail cuttings of victim.  
Ex-13(ii). One plastic bottle having one vaginal swab and one anal swab with brownish stains.
41. In para no.1 of serial no.14 of the report, result of the examination is mentioned which is extracted below:

*“The portions of Ex-1- (i)[Red frock of victim], Ex-1(ii)[Green half pant of victim], Ex-2 [Kathari (cloth bedding)], Ex-3 (one jeans pant collected from accused), Ex-4 (one blue underwear of accused), Ex-5 (one underwear from crime scene), Ex-8 (anal swab), Ex-9 (Vaginal swab), Ex-10 (mouth swab), Ex-11 (anal slides), Ex-12(vaginal slides), and Ex-13(ii) [vaginal swab and anal swab] were subjected to Acid Phosphatase Test, PSA Test and microscopic examination for the detection of semen. Human semen could be detected in Ex-1(i) (ii), Ex-2, Ex-3, Ex-4, Ex-8, Ex-9 and Ex-13(ii). However, no semen could be detected on Ex-5, Ex-10, Ex-11 and Ex-12.”*

42. The forensic report further mentions that from the result of DNA profiling it is observed that:

*(i) “The alleles in the DNA profile from Ex-1 ((i): Red frock of victim & (ii): Green half pant of victim), Ex-2 [Kathari (Cloth bedding)], Ex-3 (One jeans pant collected from accused), Ex-4 (One blue coloured male underwear), Ex-5 (One small underwear from crime scene), Ex-6 (Nail scrapping of accused), Ex-7 (Blood of accused Mr. Dinesh Kumar), Ex-8 (Anal swab), and Ex-13(i) (Nail cuttings of victim] have been generated. However, DNA profile from Ex-9 (Vaginal Swab), and Ex-13(ii) (Vaginal swab and anal swab were partially generated which could not be compared.*

*(ii) The alleles in the DNA profile of Ex-1 and Ex-13(i) are similar and belong to a female individual.*

*(iii) The alleles in the DNA profile of Ex-2 is consistent with the alleles in the DNA profiles of Ex-1 and Ex-13(i). (iv).*

*(iv) The alleles in the DNA profiles generated from Ex-3, Ex-5 and Ex-6 are contributed by more than one individual, which are consistent with respective alleles in the profiles of Ex-7 and Ex-13(i), at all the amplified loci.*

*(v) The alleles in the DNA profile of Ex-4 is contributed by more than one individual, which are consistent with the profiles of Ex-7 and Ex-13(i), at all the amplified loci.*

*(vi) That alleles in the DNA profile of Ex-8 is consistent with the DNA profile of Ex-7 at most of the amplified loci except at 3.”*

43. On the basis of DNA profiling result of examined exhibits;

*“1. The human semen was detected in Exhibit-1 (i): Red frock of victim & (ii): Green half pant of victim), Exhibit-2 [Kathari(Cloth bedding)), Exhibit-3(One jeans pant collected from accused), Exhibit-4 (One blue coloured male underwear), Exhibit-8 (Anal swab), Exhibit-9 (Vaginal Swab) and Exhibit-13(ii) [Vaginal swab & anal swab].”*

*2. The DNA profile of post-mortem clothes of Victim Girl (Source of Exhibit-1 (i): Red frock of victim & (ii): Green half pant of victim), and nail cuttings of Victim Girl [Source of Exhibit-13)] are similar at all the amplified loci and belong to a single female individual, therefore it is taken as reference DNA profile of Victim Girl.*

*3. The DNA profile of Mr. Dinesh Kumar (Source of Exhibit-7: Blood Sample) belong to a single male individual, taken as reference DNA profile of accused Mr. Dinesh Kumar.*

*4. The DNA profile generated from blood stains on Kathari (Cloth bedding) [Source of Exhibit-2), is consistent with the DNA profile of Victim Girl (Source of Exhibit-13(i))*

*5. The alleles in the DNA of accused (Source of Exhibit 7: Blood Sample), are consistently present in the DNA profiles generated from anal swab (source of Exhibit-8).*

*6. The alleles in DNA profiles generated from stains on Jeans Pant of Mr. Dinesh Kumar (Source of Exhibit-3), one blue coloured male underwear from crime scene (Source of Exhibit-4), one small underwear from crime scene (Source of Exhibit-5), and Nail scrapping of accused (Source of Exhibit-6), are contributed by more than one individuals.*

*7. The alleles in the DNA profile of accused (Source of Exhibit 7: Blood Sample), are consistently present in the DNA profiles generated from stains on Jeans Pant of Mr. Dinesh Kumar (Source of Exhibit-3), one small underwear from crime scene (Source of Exhibit-5), and nail scrappings of accused (Source of Exhibit-6), at all the amplified loci respectively.*

*8. All the alleles in the DNA profile of victim girl are consistently present in the DNA profiles generated from stains on Jeans Pant of Mr. Dinesh Kumar (Source of Exhibit-3), one blue coloured male underwear from crime scene (Source of Exhibit-4), one small underwear from crime scene (Source of Exhibit-5), and nail scrappings of accused (Source of Exhibit-6), at all the amplified loci respectively.*

44. DNA report, Ext.-27, fully corroborates prosecution story. It proves followings facts:

(i) The human semen was found on red frock and green half pant of the victim, cloth bedding, jeans pant and male underwear of the accused, anal swab and vaginal swab (Ext. 13(ii)) collected from the dead body.

(ii) DNA profile of accused collected from his blood sample are consistently present in DNA profiles generated from anal swab.

(iii) The DNA profile of the accused source of which is his blood sample are consistently present in DNA profile generated from stains on jeans pant of the accused, small underwear of the victim from crime scene, nail scrappings of the accused.

(iv) All the alleles of DNA profile of the victim are consistently present in the DNA profile generated from stains of jeans pant of the accused, male underwear from the crime scene and nail scrappings of the accused.

45. It is established from the evidence that when the dead body of the victim was recovered inside the room and carried to the door of the house of the informant, it was naked in the lower part and one female small underwear was found inside the room. However, at the time of postmortem one green half pant was found on the body of the deceased. It may be because of the family members putting on the half pant on the body of the deceased to cover her lower part. It is highly natural and probable. The discrepancy in Fard Challan Ext. Ka-18 regarding the collection of jeans pant and nail scrappings of the accused has been considered above and it has been observed that the Investigating Officer has manipulated the arrest of the accused which has resulted into this discrepancy. All the samples have been sent to Forensic Science Laboratory without any delay but as it were returned from Lucknow, it could be deposited at FSL, Bhopal after five days. The report of FSL clearly establishes that parcels were intact and sealed. So there is no good reason to presume that the sample was contaminated or not handled properly at any stage.

46. Even if the discrepancy in Fard Challan relating to collection of jeans pant and nail scrappings and presence of half pant on the dead body of the victim at the time of postmortem are taken into consideration, even then matching of DNA profile of accused, generated from his blood sample

which is the purest form, collected by Dr. Rajesh Kumar Srivastava, PW-14 with DNA profiles generated from anal swab collected during postmortem by Dr. Prabhat Dwivedi, PW-9 proves the involvement of the accused in the offence. It conclusively proves the involvement of the accused in the offence. The DNA report corroborates the oral testimony of public witnesses and other circumstantial evidence on record.

47. From the prosecution evidence following circumstances stand proved:

1) The accused with evil intention was attempting to lure the victim and took her, before the incident showing his ill-intention;

2) The deadbody of the victim was found in the room occupied by the accused, and at that time the accused was also present in the room, bolting it from inside, and it was forcibly got opened.

3) Postmortem report confirms that the victim was subjected to brutal sexual assault. She received several injuries on her body including her private parts, and her death has occurred due to smothering.

4) Forensic examination report, Ext-Ka-27 confirms that the offence has been committed by the accused. The DNA of the accused from his blood sample matches with DNA profile from anal swab of the victim collected during postmortem.

48. Even if the evidence of last seen is discarded, a complete chain of circumstances is established from the other evidence on record which proves the guilt of the accused and excludes his innocence or involvement of any other person in the incident. The prosecution evidence is consistent and reliable except evidence of last seen. Applying the proposition of law as propounded by Apex Court in **Sharad Birdhichand Sarda (supra)** on the present set of facts and evidence, we are of the opinion that the prosecution has succeeded in proving its case beyond reasonable doubt.

49. We have gone through the judgement of the trial court. While analysing the evidence on record the trial court has only committed mistake of relying on evidence of last seen, the analysis of rest evidence and the conclusion drawn by the trial court is just and proper. There is no

illegality or perversity in the finding of guilt recorded by the trial court. We are in agreement with finding of guilt recorded by the trial court which is liable to be upheld.

50. The trial court has imposed maximum sentence of death penalty under Section 6 of The Protection of Children From Sexual Offences Act and 302 I.P.C. with fine and default sentence.

51. Learned counsel for the appellant-accused submitted that the aggravating circumstances mentioned in the judgement are wholly unfounded and based on conjecture and surmises. Learned trial court should have called for report to evaluate the mental status of the accused. Learned trial court has not followed the guidelines framed by the Apex Court in following cases:

- 1) *Rajesh Kumar Versus State through Govt. of NCT, Delhi 2011 (6) (Supreme), 514 para-62 onwards;*
- 2) *Accused X Versus State of Maharashtra, 2019 (4) (Supreme), 454*
- 3). *In Re Framing Guidelines regarding Potential Mitigating Circumstances to be considered while imposing death sentences 2022 (8) (Supreme) 689.*

52. Learned counsel for the opposite parties submitted that the offence is of heinous nature and committed in diabolical manner in pre-planned way. Three years' old girl has been subjected to brutal sexual assault and done to death in helpless manner. The learned trial court has given opportunity of placing any material before passing the sentence. Learned trial court has considered all aggravating and mitigating circumstances and with a detailed and reasoned order has come to the conclusion that the case falls in the category of rarest of the rare cases and has imposed death penalty. In the facts of this case, the sentence imposed by the trial court is just and proper.

53. It is settled law that punishment should always be proportionate to the gravity of the offence. The imposition of appropriate punishment is the manner in which the Courts respond to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime.



The Court has to decide the punishment after considering all aggravating and mitigating factors and the circumstances in which the crime has been committed. The conduct and state of mind of the accused, age of the victim and the gravity of the criminal act are the factors of paramount importance. The Court must exercise its discretion in imposing the punishment objectively considering the facts and circumstances of the case. It is also settled law that death penalty is an exception which is to be awarded in the rarest of rare cases.

54. The victim of this case is an innocent and helpless child of tender age who has been subjected to brutal sexual assault and done to death in the process of satisfying the lust of the accused. The offence is of a very heinous nature and committed in a gruesome manner. These are all the aggravating circumstances.

55. The age of the accused, as recorded in his statement under Section 313 Cr.P.C. on 08.12.2021, was 25 years, so the accused is a young person. It is also established from the evidence on record that the accused is married, having a child. There is neither any criminal history to the credit of the appellant-accused nor he is a previous convict so chances of his reformation cannot be ruled out. These are the mitigating circumstances.

56. The apex court in the recent judgement of **Kashi Nath Singh alias Kallu Singh Versus State of Jharkhand (2023) 7 SCC 317**, wherein a 14 years' old girl was subjected to rape and murder in a brutal manner and death penalty was imposed by the trial court which was commuted to sentence of life imprisonment for the whole of biological life without any benefit of remission by the High Court, has modified it to fixed term sentence for a period of 30 years without any benefit of remission, considering the fact that the appellant was 26 years of age and there may be chances of his reformation. The relevant paras-6,7,10 and 11 of the judgement, are extracted below:

*“6. The argument raised by the learned counsel for the appellant was that there is no reasoning given by the High Court that there are no chances of his reformation. As there is no criminal history of the appellant, there are chances of his reformation. Therefore, this Court may modify the sentence*

*awarded to the appellant while granting him benefit of remission, to whatever he is entitled to. He has further submitted that if the benefit of remission cannot be granted, the sentence awarded to the appellant may be reduced to certain limited period instead of whole of his biological life.*

*Reference*

*was made to the decision of this Court in **Shiva Kumar alias Shivamurthy v. State of Karnataka (2023) 9 SCC 817.***

*7. On the other hand, learned counsel for the respondent submitted that it is a case of brutal rape and murder of a 14 year old girl. The appellant, after committing the rape, was in the process of killing her by hitting her head and body with stone. He was trying to deface her face so that she could not be recognised. He was seen doing so by family members of the deceased when they went out for search. Keeping in view the mindset of the appellant, he does not deserve any further leniency in sentencing as the High Court had already commuted the death sentence to life imprisonment.*

*10. Though notice was issued only to consider whether the appellant could be extended the benefit of remission, however, considering the severity of the offence committed by the appellant, we do not find any merit in that submission. However, still considering the fact that the appellant was 26 years of age when the offence was committed and there may be chances of his reformation, but still undue leniency in sentencing shakes public confidence in the criminal justice system, the deterrent effect may not be there. The rights of the victim and his family members are also to be considered.*

*11. Keeping in view the totality of circumstances, the sentence of life imprisonment for the whole of the biological life of the appellant, without any benefit of remission deserves to be modified to the fixed term sentence for a period of 30 years without any benefit of remission so that prime period of his life is spent in jail. The appellant shall be released from jail only after undergoing full sentence of 30 years, excluding the period of imprisonment already undergone.”*

57. In view of principle applied by the apex court and considering the totality of facts and circumstances of present case, we are of the view that a fixed term sentence for a period of 30 years without any benefit of remission will serve the purpose of justice.

58. This capital criminal appeal is partly allowed. The conviction of the accused-appellant is sustained. However, the sentence of death penalty is commuted to the fixed term sentence for a period of 30 years without any benefit of remission. However, the fine and the default sentence imposed by the trial court is maintained.

59. Criminal reference is disposed of accordingly.

60. We appreciate the *pro bono* assistance provided by amicus curiae Sri Vinay Saran, learned Senior Counsel and his assisting counsels, Sri Pradeep Kumar Mishra and Ms Tanisha Jahangir Monir, appearing for the appellant.

**Order Date :-21.02.2024**

MN/-