Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
(CIRCUIT BENCH AT PORT BLAIR)

Present:
Hon'ble Justice Dipankar Datta,
And
Hon'ble Justice R. K. Bag.

CRA No.13 of 2013
WITH
D.R. No.01 of 2013
AND
CRA No.15 of 2013

Shri R. P. Raj
V.
The State

For the Appellant : Mr. Krishna Rao,

For the Respondents : Mr. S. K. Mandal,
Mr. S. C. Mishra,

Heard on : 10.04.2015, 16.04.2015,
17.04.2015.

Judgment on : June 26, 2015

R. K. Bag, J.

The appellant, R. P. Raj was sentenced to death for kidnapping, rape and murder of a minor girl by Learned Sessions Judge, Andaman & Nicobar Islands in Sessions Case No.26 of 2008. The appellant was also sentenced to imprisonment for life for kidnapping and murder of another minor girl by Learned Sessions Judge, Andaman & Nicobar Islands in Sessions Case No.27 of 2008. Learned Sessions Judge submitted the proceedings of Sessions Case No.26 of 2008 to the High Court for confirmation of death sentence of

the appellant and the same was registered as D.R. No.01 of 2013. The appellant has challenged the judgment and order of sentence of Sessions Case No.26 of 2008 and Sessions Case No.27 of 2008 by preferring Criminal Appeal No.13 of 2013 and Criminal Appeal No.15 of 2013 respectively. We have heard both the appeals and death reference and decided to dispose of the same by one common judgment, as major portion of the evidence is common in both the Sessions Cases.

2. **Recapitulation of brief facts:** The appellant was running a coaching centre along with his wife, Smt. Tulsi Devi in the house of his father-in-law at Diglipur in Andaman & Nicobar Islands. One Sunita Lal Das, aged about 14 years and one Papri Biswas aged about 14 years were the students of the said coaching centre. Mohammed Ashraf, Mohammed Naushad, C. Shiva Kumar and many others were the students of the said coaching centre. On 26.03.2008 at about 6 A.M. Sunita Lal Das (hereinafter referred to as Sunita) went to the coaching centre along with her step father, but did not return. A missing diary was lodged, but the girl could not be traced out. On 24.04.2008 at about 3 P.M. Papri Biswas (hereinafter referred to as Papri) also left home for the coaching centre, but did not return to home. The elder sister of Papri saw some messages in the cell phone kept in the house on 24.04.2008. Those messages were sent from the cell phone used by Papri. On 24.04.2008, a missing diary was lodged in the police station. On 26.04.2008 another message was received from the cell phone used by Papri, which indicated that she was in

danger and one Manas was responsible for the same. The uncle of Papri lodged specific complaint in the police station alleging kidnapping of Papri and thereby a specific criminal case was started on 26.04.2008. The step father of Sunita also made complaint in the police station alleging kidnapping of Sunita on 26.04.2008.

2.1. The police collected the call details of cell phone taken away by Papri from her house at the time of leaving the house for coaching centre. It transpired from the call details of the said cell phone that there were exchange of calls from two other cell numbers with the cell phone taken away by Papri. One of those two cell phones belonged to one Arjun Tigga, the driver of Maruti Omni Car bearing no.AN01D8956 (hereinafter referred to as Omni Car). On interrogation of Arjun Tigga it was found that on 24.04.2008 one person by disclosing his identity as RX NGO hired the said Omni car for use of some guests of NGO coming from Port Blair. The other cell phone bearing Airtel SIM No.9933247383 stood in the name of one K. Mohammed, but the same was used by the appellant. The appellant was taken into custody by the police. On thorough interrogation the appellant disclosed that the dead body of both Sunita and Papri were buried near the creek at Keralapuram. The appellant also disclosed the names of three of his students of the coaching centre, viz, Md. Naushad, Md. Ashraf and C. Shiva Kumar who also participated with the appellant in concealing the dead bodies of two minor girls. Ultimately, the appellant and those three juveniles led the

police party and the witnesses to the place where the dead bodies were buried in a place near the house of one Sushila Nair at Keralapuram. The dead bodies of Papri and Sunita were recovered by digging the earth. The dead body of Sunita was found in several parts in a decomposed state inside the plastic gunny bag. The school bag of Sunita was also discovered from the bush near the place where the dead body was buried on the basis of the statement of the appellant. The bag contained the book and geometry box belonging to Sunita. The step-father of Sunita identified the school bag and the dead body of Sunita from her wearing apparels. The dead body of Papri was identified by her uncle. Both the dead bodies were sent for Post Mortem Examination to the Community Health Centre at Diglipur.

2.2. The cause of death of the deceased Sunita could not be ascertained by way of Post Mortem Examination. However, the cause of death of Papri was found to be asphyxia by strangulation after forceful sexual intercourse. The ornaments worn by Sunita and the gold ornaments worn by Papri and the cell phone kept in custody of Papri were recovered from the coaching centre of the appellant on the basis of his statement. The knife and rope used in the commission of crime were recovered from the rented house of the appellant at Keralapuram on the basis of his statement. Ultimately, the police submitted two charge sheets against the appellant in connection with kidnapping, rape and murder of Sunita and Papri. Three juveniles – Naushad, Ashraf and Shiva Kumar

faced enquiry before the Juvenile Justice Board for kidnapping, rape and murder of both Sunita and Papri.

2.3. The appellant faced the trial in Sessions Case No.27 of 2008 (case of Sunita) on the allegation of committing offence under Section 364/302/376/201/404/34 of the Indian Penal Code. Similarly, the appellant faced the trial in Sessions Case No.26 of 2008 (case of Papri) on the allegation of committing offence under Section 364/302/376/201/404/34 of the Indian Penal Code. While the appellant was found to be guilty of all the charges in Sessions Case No.26 of 2008, he was found to be guilty of all the charges in Sessions Case No.27 of 2008, except the offence under Section 376 of the Indian Penal Code due to lack of evidence. In Sessions Case No.26 of 2008, Learned Sessions Judge convicted the appellant under Section 364/302/201/404/34 of Indian Penal Code and sentenced him to suffer rigorous imprisonment for ten years and fine of Rs.3,000/- for the offence under Section 364 of Indian Penal Code, life imprisonment and fine of Rs.5,000/- for the offence under Section 376 of Indian Penal Code, rigorous imprisonment for seven years and fine of Rs.2,000/- for offence under Section 201 of Indian Penal Code, rigorous imprisonment for three years and fine of Rs.1,000/- for the offence under Section 404 of Indian Penal Code and death sentence and fine of Rs.10,000/- for the offence under Section 302 of Indian Penal Code. The proceedings have been submitted to the High Court for confirmation of sentence of death of the appellant under Section 366 of the Code of

Criminal Procedure. In Sessions Case No.27 of 2008, Learned Sessions Judge convicted the appellant under Section 364/302/201/404/34 of Indian Penal Code and sentenced him to suffer rigorous imprisonment for ten years and fine of Rs.3,000/- for the offence under Section 364 of Indian Penal Code, rigorous imprisonment for seven years and fine of Rs.2,000/- for offence under Section 201 of Indian Penal Code, rigorous imprisonment for three years and fine of Rs.1,000/- for offence under Section 404 of Indian Penal Code, imprisonment for life and fine of Rs.10,000/- for the offence under Section 302 of Indian Penal Code. The conviction and sentence of the appellant in both the Sessions Cases is under challenge in both the appeals, which are being decided along with the death reference of the appellant.

3. **Evaluation of evidence:** The majority of the evidence is common in both Sessions Case No.26 of 2008 and Sessions Case No.27 of 2008 and as such the same is evaluated simultaneously for convenience of discussion.

4. **FIR and commencement of investigation:** Papri was found missing after leaving the house for coaching centre on 24.04.2008 at about 3 P.M. The first information report was registered on 26.04.2008 on the basis of written complaint given by Nirmal Biswas, uncle of Papri. Similarly, Sunita was found missing after her father dropped her in the coaching centre on 26.03.2008 at 6 A.M. The police started specific case by registration of FIR on 26.04.2008 on the basis of written complaint given by Nitai Chandra Das, step father of

Sunita. Mr. Krishna Rao, Learned Counsel appearing on behalf of the appellant contends that there is delay of two days in registration of FIR No.124 of 2008 dated 26.04.2008 under Section 363/34 of the Indian Penal Code (Exhibit-1 of SC 26/2008) in connection with missing of Papri and the said delay has not been explained properly by the prosecution. Mr. Rao further submits that there is delay of almost one month in starting specific criminal case by registration of FIR No.125 of 2008 dated 26.04.2008 under Section 363 of the Indian Penal Code (Exhibit-1 of SC 27/2008) in connection with missing of Sunita and the said delay has not been explained. Mr. Rao also submits that copies of both the FIRs were not forwarded to the Court of Learned Magistrate within 24 hours. The specific submission made by Mr. Rao is that the appellant was arrested on 27.04.2008 in connection with both the cases, but he was produced before the Court of Learned Magistrate only on 30.04.2008. According to Mr. Rao, the unexplained delay in registration of FIR, delay in forwarding copy of FIR to Learned Magistrate and illegal detention of the appellant exceeding 24 hours from the date of arrest till the date of production of the appellant before the Court of Learned Magistrate, will render the investigation illegal and defective. It transpires from the evidence of Nirmal Biswas (PW 1 of S.C. 26/2008) and other members of the family of Papri (PW 5 to 9 of S.C. 26/2008) that Papri was missing after 3 P.M. on 24.04.2008, when Papri left the house for coaching centre. Nirmal Biswas lodged missing diary (Exhibit-2 of S.C. 26 of

2008) in Diglipur police station on 24.04.2008 at 9.45 p.m., as no foul play with regard to missing of Papri was suspected till that time. On 26.04.2008 in the morning at about 6.39 A.M. Nirmal Biswas and other members of the family including elder sister of Papri received SMS from the cell phone taken away by Papri that she was in danger and one Manas was responsible for the same. Thereafter, Nirmal Biswas and other members of the family suspected kidnapping of Papri and FIR was lodged on 26.04.2008 in Diglipur police station (Exhibit-1 of S.C. 26 of 2008). So the delay of two days in registration of FIR in connection with kidnapping of Papri is explained properly to the satisfaction of the Court.

4.1. Nitai Chandra Das, step father of Sunita (PW 1 of S.C. 27 of 2008) lodged missing diary in Diglipur police station on 26.03.2008 at 9.30 p.m. (Exhibit-26 of S.C. 27 of 2008), when Sunita could not be traced out on 26.03.2008. It transpires from the evidence of Nitai Chandra Das that he dropped Sunita in the coaching centre of the appellant on 26.03.2008 in the morning at about 6 O'clock, but Sunita was not available in the coaching at 12 noon when Nitai Chandra Das went there to fetch Sunita. He came to learn from Tulsi Devi, wife of the appellant that Sunita left the coaching centre at 9 A.M. Nitai Chandra Das did not suspect any foul play in connection with missing of Sunita till 26.04.2008, though he made extensive search of Sunita along with her wife and other friends and relatives from all possible sources. When Nitai Chandra Das came to learn about the missing of Papri from

the same coaching centre on 25.04.2008, he also suspected that someone might have compelled Sunita to elope with him. As a result, Nitai Chandra Das lodged FIR (Exhibit-1 in S.C. 27 of 2008) on 26.04.2008. Accordingly, the delay of about one month in registration of FIR is explained to the satisfaction of the Court. Since missing diary was lodged in both the cases immediately after missing of Papri and Sunita without suspecting any foul play and since FIR was lodged in both the cases as soon as uncle of Papri and step father of Sunita suspected kidnapping of the minor girls, we are of the view that the delay in registration of the FIR has been properly explained in the facts and circumstances of the present case. The delay in registration of FIR in both the cases is not fatal as contended on behalf of the appellant.

4.2. It is the duty of the Investigating Agency to send a report to the Learned Magistrate immediately after registration of the FIR in compliance with the provisions of Section 157 of the Code of Criminal Procedure, which is done by forwarding a copy of FIR to Learned Magistrate. According to Mr. Rao, the copy of FIR in both the cases were sent to the Court of Learned Magistrate on 30.04.2008 i.e. long after four days of registration of the FIR. Mr. Rao has also pointed out that the gravity of the offence was toned up by adding Section 364/302/376/201/404/34 of the Indian Penal Code without permission from Learned Magistrate. Admittedly, the copy of FIR was placed before Learned Magistrate on 30.04.2008 disclosing the offence under Section

364/302/376/201/404/34 as reflected from the order passed by Learned Magistrate on 30.04.2008. However, on perusal of the order passed by Learned Judicial Magistrate, Mayabunder on 30.04.2008 it appears that there was disruption of traffic for prolonged period due to inclement weather and heavy rain on 29.04.2008 and the Investigating Officer could bring the arrested accused persons from Diglipur police station to Mayabunder Court in the night on 29.04.2008. It also appears from the order passed by Learned Magistrate on 30.04.2008 that the Investigating Officer could not produce all the documents along with the arrested accused persons including the appellant before Learned Magistrate in the night on 29.04.2008, and as such the accused persons were produced before the Court of Learned Magistrate on 30.04.2008. The question for our determination is whether delay of about four days in transmission of FIR to the Court of Learned Magistrate will cast any doubt on the manner of carrying out the investigation.

4.3. The proposition of law laid down by the Supreme Court in "Pala Singh V. State of Punjab" reported in AIR 1972 SC 2679 is that mere delay in dispatch of FIR to the Court of Learned Magistrate in the absence of any prejudice to the accused cannot by itself justify the conclusion that the investigation was tainted. We would also like to rely on the case of "Sahdeo V. State of UP" reported in 2004 SCC (Cri) 1873 wherein the prosecution did not explain delay of six days in sending the FIR to the Court of Learned Magistrate. The FIR was

registered at Sikhera police station in UP on 12.01.2000 at 7.15 p.m. and the copy of FIR was received by Learned Magistrate on 18.01.2000. The case ended in conviction and went up to the Supreme Court on appeal. The contention made on behalf of the defence before the Supreme Court is that the FIR must have been concocted after holding inquest and Post Mortem Examination of the deceased and that is why the prosecution could not explain delay of six days in transmission of the FIR to the Court. By turning down the defence contention, it is held by the Supreme Court that the absence of details in the FIR shows its genuineness and the delay in transmission of the FIR from the police station to the Court of Learned Magistrate probably would have happened due to some reasons, which could not be explained, as the Investigating Officer was not given any opportunity to explain the same. Accordingly, the Supreme Court held in "Sahdeo V. State of U.P." (Supra) that the delay of six days in transmission of FIR to Learned Magistrate was not fatal to the prosecution.

4.4. In the instant case, P. M. Krishnakumar (PW 35 of S.C. 26 of 2008), ASI investigated the case of Papri only on 26.04.2008 and N. C. Dakua (PW 29 of S.C. 27 of 2008), ASI investigated the case of Sunita on 26.04.2008. Inspector J. S. Yadav (PW 36 of S.C. 26 of 2008 and PW 31 of S.C. 27 of 2008) investigated both the cases till 30.04.2008 and thereafter investigation was taken over by Inspector Tarsem Singh. On close scrutiny of the evidence of Inspector J. S. Yadav and ASI

P. M. Krishnakumar and ASI N. C. Dakua we do not find that any question was put to those witnesses as to why delay of four days took place in forwarding the copies of FIR of both the cases from the police station to the Court of Learned Magistrate. In the absence of giving any opportunity to the Investigating Officer of both the cases to explain the delay in transmission of FIRs from the Diglipur police station to the Court of Learned Magistrate at Mayabunder, we are of the view that the delay in transmission of the FIR would not be fatal, particularly when the delay of one day took place due to inclement weather and disruption of traffic for prolonged period in the remote corner of the northern part of Andaman. Our view gets support from the proposition of law laid down by the Supreme Court in "Sahdeo V. State of U.P." (Supra). Accordingly, we are unable to accept the contention made on behalf of the appellant in this regard.

4.5. With regard to the submission of Mr. Rao that some sections of the Indian Penal Code were added in the FIR without the permission of Learned Magistrate, we would like to observe that the investigation is the exclusive domain of the police. The penal sections of the law are incorporated in the FIR on the basis of information disclosed by the informant before the Officer-in-charge of the police station. With the progress of investigation the gravity of the offence may be toned up or toned down depending on the evidence collected by the Investigating Officer. It is the duty of the Investigating Officer to keep the Learned Magistrate informed of the graver penal

sections, so that Learned Magistrate can take into consideration the further progress of investigation to decide the question of liberty of an individual accused person. It is not the requirement of law that the Investigating Officer will have to obtain prior permission from the Court of Learned Magistrate for charging the accused with graver penal sections during investigation. In both the cases FIR was registered under Section 363 of the Indian Penal Code as the informant of both the cases suspected kidnapping of the minor victim girls. With the progress of investigation and recovery of dead bodies of the victims and other articles used as weapon of offence, the appellant and the three juveniles were charged under graver penal sections of rape, murder and disappearance of evidence. The subsequent events after registration of the FIR are reflected briefly in the order passed by Learned Magistrate on 30.04.2008. In view of our above findings, we do not find any substance in the submission made on behalf of the appellant.

4.6. The contention of Mr. Rao is that the appellant was arrested on 27.04.2008 and produced before the Court of Learned Magistrate at Mayabunder on 30.04.2008 i.e. after 3 days of arrest and thereby the fundamental right of the appellant was infringed. It appears from the arrest memo kept in the record of the lower court that the appellant was arrested on 28.04.2008 and produced before the Court of Learned Magistrate at Mayabunder on 30.04.2008 due to inclement weather and disruption of traffic for heavy rain in the remote

corner of northern Andaman. This fact is reflected in the order passed by Learned Magistrate on 30.04.2008. Since the appellant was arrested in connection with both the cases on 28.04.2008 and produced before the Court of Learned Magistrate on 30.04.2008 due to prolonged disruption of traffic for heavy rain during journey on 29.04.2008, we are unable to accept the contention made on behalf of the appellant with regard to illegal detention of the appellant at the initial stage of the investigation. Accordingly, we are of the view that the FIRs of both the cases are not defective and there is no delay in transmission of the FIR and production of the appellant before the Court of Learned Magistrate in the facts and circumstances of the present case.

5. **Detection of crime:** The communication system of the entire country has undergone sea change after easy availability of SIM and cell phone. The ubiquitous use of cell phone in the remote corner of Andaman helped in commission of crime as well as in detection of crime. The step father of the deceased Sunita and the uncle of the deceased Papri lodged missing diary in the police station without suspecting any foul play on 26.03.2008 and 24.04.2008 respectively. Two cell phones – one bearing Airtel SIM 9933261982 belonging to Subhas Biswas (father of Papri) and another cell phone bearing BSNL SIM 9434297966 belonging to Dipali Biswas (mother of Papri) were used mainly by Papri and her elder sister Papiya. On 24.04.2008 Papri left home at about 3.00 p.m. for the coaching centre. Papri took away the cell phone having Airtel

SIM 9933261982 (hereinafter referred to as Airtel phone in custody of Papri). On 26.04.2008 at 6.39 a.m. one SMS was received from the Airtel phone in the custody of Papri to cell phone having BSNL SIM 9434297966 (hereinafter referred to as BSNL phone used by Papiya) to the effect that she was in danger and Manas was responsible for the same. This SMS was detected by Papiya, elder sister of Papri and shown to all members of the family immediately. The uncle of Papri immediately rushed to police station at Diglipur and lodged the FIR by filing a written complaint. The Investigating Agency swung into action. The call details of Airtel SIM in the custody of Papri were collected and it was found that there was exchange of calls from the said Airtel phone of Papri to BSNL SIM 9474265111 and Airtel SIM 9933247383. The Inspector J. S. Yadav (PW 36 of S.C. 26 of 2008 and PW 31 of S.C. 27 of 2008), who investigated both the cases for the major period of investigation, came to know that BSNL SIM 9474265111 belonged to one Arjun Tigga (hereinafter referred to as BSNL phone of Arjun Tigga). However, Inspector J. S. Yadav came to know that Airtel SIM 9933247383 belonged to one K. Mohammad. The whereabout of K. Mohammed could not be traced out at that stage. On 26.04.2008 Inspector J. S. Yadav interrogated Arjun Tigga and could ascertain that the appellant hired Omni Car from its owner Niranjan Malo for use of guests of NGO on 26.03.2008 and on 24.04.2008. Ultimately, the appellant and three juveniles – Naushad, Ashraf and Shiva were interrogated and the dead bodies of

Sunita and Papri were recovered along with other articles used by the deceased and articles used as weapon of offence as per statement of the appellant. It is pertinent to evaluate the evidence adduced before the trial court with regard to detection of the crime by Inspector J. S. Yadav.

5.1. One Shabana Jamal (PW 24 of S.C. 26 of 2008), the Executive Human Resource Administration, Airtel at Port Blair produced the call details of various Airtel SIMs wanted by Investigating Agency including call details of Airtel SIM 9933247383 belonging to K. Mohammed and Airtel phone kept in the custody of Papri at the time of missing. K. Moorthy (PW 12 of S.C. 26 of 2008) has stated in evidence before the Court that the appellant R. P. Raj whose nick name is Biju collected one Airtel SIM from the salesman of a shop at Buniadabad under P.S. Chatham in the night at about 7.30 p.m. to 8.00 p.m. It is elicited from the evidence of K. Moorthy that the appellant collected the Airtel SIM 9933247383 standing in the name of K. Mohammed as the appellant wanted one Airtel SIM which must be activated immediately. The evidence of K. Moorthy is corroborated by Sumit Toppo (PW 17 of S.C. 26 of 2008) who sold out the SIM bearing no.9933247383 in the name of K. Mohammed to the appellant. The consistent evidence of both K. Moorthy and Sumit Toppo is that the appellant wanted urgently Airtel SIM for his urgent work at Diglipur in the next morning and the salesman Sumit Toppo handed over the SIM no.9933247383 in the name of K. Mohammed as the said SIM was activated long back and the owner of the SIM did not

collect the SIM and as such the SIM was lying in the shop of Vellingam Agency. The application form of K. Mohammed and his voter identity card were subsequently seized by the Investigating Officer from the office of Bharti Airtel Limited and those were marked Exhibit-32 of S.C. 26 of 2008. Nothing transpires from cross-examination of K. Moorthy and Sumit Toppo to disbelieve their evidence. It has, thus, been established that the appellant collected Airtel SIM no.9933247383 (hereinafter referred to as Airtel phone used by the appellant) from a place situated under different police station namely police station Chatham in order to keep his identity secret at the time of commission of the crime in his rented accommodation at Keralapuram within P.S. Diglipur.

5.2. The cross-examination of Shabana Jamal (PW 24 of S.C. 26 of 2008) reveals that the Airtel phone used by the appellant was activated on 27.06.2007. This witness has stated during cross-examination that activated SIM will remain operative for a period of three months and thereafter the SIM will expire. It goes without saying that the activated SIM will remain operative if the SIM is recharged at regular interval. There is nothing on record to indicate that the Airtel phone used by the appellant was not recharged or was not operative from 27.06.2007 till the date of detection of the crime. The call details of the said Airtel phone used by the appellant go to establish that the said Airtel phone was operative immediately before commission of the crime and after commission of the crime. Accordingly, we do not find any substance in the

submission of Mr. Rao that the Airtel phone used by the appellant immediately before and immediately after commission of the crime cannot remain operational after its activation on 27.06.2007, particularly when the witness Sumit Toppo has categorically stated in evidence that the said SIM was lying operational in the shop since long back.

5.3. Narahari Das (PW 23 of S.C. 26 of 2008), the Assistant General Manager, BSNL, Andaman & Nicobar Circle has produced the call details of SIM including SIM no.9474265111 belonging to Arjun Tigga and SIM No.9434297966 used by Papiya, elder sister of the deceased Papri. The call details of both the above BSNL phones and Airtel phones were admitted into evidence and marked Exhibits. On analysis of the call details of the above BSNL and Airtel phones, Inspector J. S. Yadav came to know that there was communication of Arjun Tigga with the appellant on the one hand and the communication of Papri with the appellant on the other hand before the incident of missing of Papri on 24.04.2008. The communication between Arjun Tigga and the appellant before and after the commission of the offence was also established from the call details admitted into evidence.

5.4. Arjun Tigga (PW 2 of S.C. 26 of 2008 and PW 3 of S.C. 27 of 2008) has stated in evidence that he was driving the Omni Car belonging to one Niranjan Malo from December, 2007 to April, 2008 on payment of monthly remuneration of Rs.3,000/-. He has stated that the owner of NGO hired the said Omni Car from his employer, Niranjan Malo and he had to report to the

house of the appellant near fish market on 26.03.2008 at 7 O'clock in the morning. He has categorically stated how on 26.03.2008 the appellant and two juveniles Shiva and Md. Ashraf and Sunita boarded the car at 9 O'clock and went to the rented house of the appellant at Keralapuram. The appellant alone came back from the rented house at Keralapuram to his residential house where he runs the coaching centre along with his wife, Tulsi Devi after about 45 minutes to 1 hour and again went to that house at Keralapuram along with a file accompanied by another juvenile Naushad. He has further stated that the appellant accompanied by three juveniles Naushad, Shiva and Ashraf came back to the coaching centre of the appellant on 26.03.2008 at 4 p.m. When the driver Arjun Tigga asked the appellant why Sunita did not accompany them from the house at Keralapuram, the appellant readily replied that Sunita had already left the place by bus. This witness again took the appellant and the said three juveniles from the coaching centre to the rented house at Keralapuram at 4 p.m. on 26.03.2008 and he was asked to come again at 8 p.m. However, this witness came back to his employer Niranjan Malo and handed over the key of the car and asked him to report to the owner of NGO again at 8 p.m. on 26.03.2008.

5.5. Arjun Tigga (PW 2 of S.C. 26 of 2008 and PW 3 of S.C. 27 of 2008) has further stated that on 24.04.2008 at about 9 O'clock in the morning he had to report to the house of the appellant as per instruction of his employer as the Omni car

was hired again by the owner of NGO. On 24.04.2008 at about 3 P.M. the appellant accompanied by three juveniles – Shiva, Ashraf and Naushad boarded the Omni car near the coaching centre of the appellant and took Papri on the way near secondary school at Subhas Gram and went to the rented house of the appellant at Keralapuram. The description of the rented house of the appellant at Keralapuram given by Arjun Tigga tallies with the description of the said house photographed by the photographer engaged by the Investigation Agency and the same also tallies with the location of the said house shown in the sketch map marked Exhibit-44 of S.C. 26 of 2008. The appellant asked this witness to wait for sometime near the said rented house of the appellant at Keralapuram, but the appellant was feeling pain in abdomen and as such he left the place. On instruction of the appellant he took the juveniles Naushad and Shiva from that place and dropped them in their respective houses. Again on instruction of the appellant he took the juveniles Naushad and Shiva at about 6 p.m. and dropped them in the rented house of the appellant at Keralapuram. Thereafter, the driver, Arjun Tigga took the appellant and the juvenile Shiva from the rented house of the appellant at Keralapuram to his coaching centre and again went to the rented house at Keralapuram, when the appellant was carrying a file and a plastic gunny bag of large size. On that day at about 8 O'clock in the night this witness took the appellant and the above three juveniles from the rented house of the appellant at Keralapuram to the

coaching centre. When the driver Arjun Tigga asked the appellant why Papri did not accompany them, the appellant readily replied that Papri had already gone to the house of her relative by bus. On 26.04.2008 this witness disclosed the above sequence of events initially before the Investigating Officer and thereafter before Learned Magistrate and his statement was recorded by Learned Magistrate on 08.05.2008 under Section 164 of the Code of Criminal Procedure. The above statement of Arjun Tigga is corroborated by his earlier statement recorded under Section 164 of the Code of Criminal Procedure.

5.6. It is the consistent evidence of Arjun Tigga (PW 2 of S.C. 26 of 2008 and PW 3 of S.C. 27 of 2008) and Niranjan Malo (PW 3 of S.C. 26 of 2008 and PW 4 of S.C. 27 of 2008) that the owner of one NGO who disclosed his identity as RX and cell number as 9933247383 hired the said Omni car on 26.03.2008 and 24.04.2008. Niranjan Malo stated that on 26.03.2008 the driver Arjun Tigga came back to his residence and handed over the key of the car at 6 p.m. with request to report back to the appellant at 8 p.m. in his rented house at Keralapuram. He has also stated that on 26.03.2008 at about 8 p.m. he reported to the rented house of the appellant at Keralapuram and the appellant accompanied by three juveniles boarded the car and got down at Diglipur Bazar. Similarly, this witness has stated that on 24.04.2008 the driver Arjun Tigga took the said Omni car and reported to the house of the appellant near fish market in the morning at 9 O'clock and after completion

of the work of the appellant returned the car and the key of the car on the same day at 10 O'clock in the night. The fact of hiring the Omni car by the appellant by disclosing his identity as RX NGO having Airtel SIM 9933247383 is also reflected from the notebook maintained by the driver of the Omni car as per instruction of the owner, which is admitted into evidence and marked Mat. Exhibit-VI of S.C. 26 of 2008. The evidence of Arjun Tigga is corroborated by Niranjan Malo, and the oral evidence of both the witnesses is further corroborated by the entries made in the notebook by the driver of the Omni car. It has already been established from the evidence on record that the said Airtel SIM bearing no.9933247383 was used by the appellant.

5.7. Mr. Krishna Rao, Learned Counsel, contended that the evidence of Arjun Tigga and Niranjan Malo cannot be relied upon for the following reasons: first, driving licence of Arjun Tigga was not seized by police, secondly, no document is forthcoming to show that Arjun Tigga used to receive monthly salary as driver from the owner Niranjan Malo, thirdly, Omni car of Niranjan Malo was a private car which was not meant for hiring by public and fourthly, Arjun Tigga did not disclose the fact of missing of Sunita from 27.03.2008 till 26.04.2008 when the police called him for interrogation and fifthly, the notebook (Mat. Exhibit-VI of S.C. 26 of 2008) was fabricated by Investigating Officer for the purpose of the case, as the entries in the notebook are made only for the purpose of hiring the said Omni car on 26.03.2008 and 24.04.2008.

5.8. We have given anxious consideration to the above submission made on behalf of the appellant. The existence or non-existence of driving licence of Arjun Tigga will not cast any doubt on the credibility of his evidence, as no case is made out by the defence that Arjun Tigga does not know driving. The absence of documentary evidence with regard to payment of monthly salary to the driver Arjun Tigga by the owner Niranjan Malo cannot have any bearing on the credibility of their evidence, because the payment of salary to the driver may not be documented in rural area, particularly when the driver is driving the vehicle on temporary basis for a few months. The private Omni car may not be legally used for hiring by the owner Niranjan Malo, but the fact of use of Omni car by the appellant cannot be disbelieved only because the hiring of the private car was not permissible under the law. It is true that the driver Arjun Tigga did not disclose the fact of missing of Sunita from 27.03.2008 till 26.04.2008. Since the appellant specifically stated to the driver, Arjun Tigga that Sunita had left the place by availing of bus on 26.03.2008 at about 4 p.m., it is quite natural for any person of ordinary prudence not to suspect any foul play. However, after getting the reply from the appellant that Papri also had gone to the house of her relative by availing of bus on 24.04.2008 Arjun Tigga came to learn on 25.04.2008 that Papri was also missing and thereafter he disclosed before police the manner of use of the Omni car in detail by the appellant. This conduct of the driver Arjun Tigga falls within the orbit of reasonable probability for

not disclosing the fact of missing of Sunita from 27.03.2008 till 26.04.2008. The notebook (Mat. Exhibit-VI of S.C. 26 of 2008) was maintained by the driver Arjun Tigga for recording the running kilometer as per instruction of the owner, Niranjan Malo. The notebook disclosed the identity of the appellant as RX NGO having Airtel phone 9933247383. Had it been fabricated for the purpose of this case as contended on behalf of the appellant, the name and address of the appellant also would have been disclosed there. In view of our above findings, we are inclined to give credence to the testimony of both the driver Arjun Tigga and the owner Niranjan Malo particularly when their evidence is consistent and corroborated each other in material particulars and the same is again corroborated by entries made in the notebook by the driver Arjun Tigga (Mat. Exhibit-VI of S.C. 26 of 2008). We are unable to accept the submission made on behalf of the appellant with regard to the credibility of the above two witnesses.

6. **Discovery of fact as per statement of the appellant**: The statement made by the appellant in presence of the witnesses Prabhat Kumar Biswas and Binod Hawaladar led to recovery of dead bodies of Sunita and Papri and also recovery of gold ornaments and Airtel phone in the custody of Papri and recovery of weapon used in commission of the offence. The entire statement of the appellant including the inculpatory part is admitted into evidence by the trial court and marked Exhibit-13 of S.C. 26 of 2008 and Exhibit-15 of S.C. 27 of 2008. It will be

wise on our part to review the law embodied in Section 27 of the Evidence Act for acceptance of relevant portion of the statement of the appellant without relying on the entire statement marked Exhibit-13 and Exhibit-15 respectively in both cases. The Supreme Court has explained the meaning of "discovery of fact" in consequence of information received from the accused laid down in Section 27 of the Evidence Act in paragraph 35 of "State of Maharashtra V. Damu" reported in (2000) 6 SCC 269, as follows:

> "The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered in a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature, but if it results in discovery of a fact it becomes a reliable information. Hence the legislature permitted such information to be used as evidence by restricting the admissible portion to the minimum. It is now well settled that recovery of an object is not discovery of a fact as envisaged in the section. The decision of the Privy Council in "Pulukuri Kottaya V. Emperor" is the most quoted authority for supporting the interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect."

It is also pertinent to point out from paragraph 42 of "Vikram Singh and Others V. State of Punjab" reported in (2010) 3 SCC 56 to the effect that the statement made by the person accused of any offence and in the custody of police is relevant under Section 27 of the Evidence Act, if the statement leads to discovery of facts and as such there is no need of formal arrest of the person for

making his statement relevant under Section 27 of the Evidence Act. Mr. S. K. Mondal, Learned Senior Counsel appearing on behalf of the State has also relied on "State of Maharashtra V. Suresh" reported in (2000) 1 SCC 471 wherein it is laid down in paragraph 26 that there are three possibilities when an accused person points out the place where a dead body or an incriminating material was concealed without stating that it was concealed by himself. The first possibility is that he himself would have concealed it. The second possibility is that he would have seen somebody else concealing it. The third possibility is that he would have been told by another person that it was concealed there. If the accused person declines to tell the court that his knowledge about the concealment was on account of first two possibilities, the criminal court can presume that it was concealed by the accused himself. This is because the accused is the only person who can offer the explanation as to how else he came to know of such concealment and if he chooses to refrain from telling the court as to how else he came to know of it, the presumption is a well-justified course to be adopted by the court that the concealment was made by himself. It is also laid down by the Supreme Court in paragraph 27 of State of Maharashtra V. Suresh (Supra) as follows:

> "a false answer offered by the accused when his attention was drawn to the aforesaid circumstance renders that circumstance capable of inculpating him. In a situation like this such a false answer can also be counted as providing "a missing link" for completion of the chain of circumstances."

7. **Recovery of dead body and other incriminating articles**: The appellant has given statement in presence of two independent witnesses namely Prabhat Kumar Biswas and Binod Hawaladar that the appellant and three juveniles - Ashraf, Naushad and Shiva kept the dead body of Sunita in a big plastic bag and the same was buried in a hole inside the bushes near the creek which is about 30 to 35 metres away from the main road at Keralapuram. The appellant has also stated that the school bag of Sunita was hidden inside the bush near the same place. The appellant also stated that he along with the three juveniles - Naushad, Ashraf and Shiva kept the dead body of Papri inside the one plastic sack and buried the same near the creek at Keralapuram. The appellant has also stated that the knife by which the head of Sunita was slit and the rope by which Papri was strangulated are kept concealed in his rented house at Keralapuram and the Airtel phone in the custody of Papri and the gold chain worn by Papri and the ornaments worn by Sunita are kept concealed in his house at Diglipur where he runs the coaching centre. He has also stated that he would be in a position to show the place where the dead bodies of both the girls are buried under the bush at Keralapuram. This aspect of the statement given by the appellant is corroborated by the witnesses Prabhat Kumar Biswas (PW 15 of S.C. 26 of 2008 and PW 12 of S.C. 27 of 2008) and Binod Hawaladar (PW 16 of S.C. 26 of 2008 and PW 13 of S.C. 27 of 2008). The other inculpatory part of the statement given by the appellant (Exhibit-13 of S.C. 26 of 2008 and Exhibit-15 of S.C. 27 of 2008) with regard to the manner of

committing murder of Sunita and Papri cannot lead to discovery of facts and as such the said portion of the statement is not considered by us on the ground that the same is not relevant and admissible under Section 27 of the Evidence Act.

7.1. Inspector J. S. Yadav (PW 36 of S.C. 26 of 2008 and PW 31 of S.C. 27 of 2008) accompanied by the witness Prabhat Kumar Biswas, Binod Hawaladar, the uncle of Papri and step father of Sunita went to the place at Keralapuram near the creek. The appellant and the three juveniles – Ashraf, Naushad and Shiva had pointed out the place where the dead bodies of Sunita and Papri were buried at a distance of about three metres from each other and recovered the same after digging the earth. Two plastic gunny bags were recovered. After opening the mouth of one gunny bag the skeleton and decomposed dead body was recovered which was identified as that of Sunita by her step father from her wearing apparels. The dead body which was taken out from another plastic gunny bag was identified as that of Papri by her uncle from her face and the wearing apparels, umbrella and the shoes which were also kept inside the gunny bag. The school bag of Sunita containing English Book Honeycomb, Geometry Box etc. was also recovered from inside the bush from the same place as pointed out by the appellant. The inquest of both the dead bodies was done in presence of the witnesses and both the dead bodies were sent to Community Health Centre at Diglipur for Post Mortem Examination.

7.2. Mr. Krishna Rao has pointed out the inconsistency in the sequence of recovery of the dead bodies of Sunita and Papri, as

narrated by the witnesses - Prabhat Kumar Biswas, Binod Hawaladar, Nirmal Biswas (uncle of Papri) and Nitai Chandra Das (step father of Sunita) and the sequence of recovery of those dead bodies narrated by Inspector J. S. Yadav and reflected in the sketch map prepared by him. While Inspector J. S. Yadav has stated in evidence and mentioned in the sketch map that first the dead body of Papri Biswas was recovered as shown by the appellant and the juveniles and thereafter the school bag of Sunita was recovered from the bush and thereafter the dead body of Sunita was recovered as pointed out by the appellant and three juveniles, the other witnesses including the step father of Sunita and uncle of Papri have stated in evidence that first the dead body of Sunita was recovered as pointed out by the appellant and three juveniles and thereafter the dead body of Papri was recovered as pointed out by the appellant and three juveniles and thereafter the school bag of Sunita was recovered from the bush as pointed out by the appellant and three juveniles. This inconsistency with regard to sequence of recovery of the dead bodies of Sunita and Papri cannot shake the credibility of the witnesses, when the dead bodies of Sunita and Papri and the school bag of Sunita were recovered on the basis of the statement of the appellant and as pointed out by the appellant and three juveniles - Naushad, Ashraf and Shiva. The wearing apparels of the deceased Papri, the umbrella of Papri kept inside the plastic gunny bag and the shoes of Papri kept inside the plastic gunny bag were identified by her uncle, mother, elder sister and the witnesses to the recovery of dead body in

court during trial. Similarly, the wearing apparels of Sunita and the school bag of Sunita containing English Book Honeycomb and Geometry Box of Sunita recovered along with the dead bodies were identified by her step father, mother and witnesses to the recovery of the dead body in the court during trial. The two gunny bags within which the dead bodies were kept and buried were also identified by the witnesses to the recovery of dead bodies in the court during trial.

7.3. The Airtel phone kept in the custody of Papri and the gold chain worn by Papri were recovered from the house of the appellant near fish market as per statement of the appellant. Inspector J. S. Yadav seized those articles in presence of the witnesses Prabhat Kumar Biswas and Binod Hawaladar who signed on the seizure list and identified those articles during the trial. The Inspector J. S. Yadav seized the gold earring and silver payel worn by Sunita from the suitcase of the appellant kept in his house near fish market as pointed out by the appellant. This seizure was done in presence of Rakesh Haldar and Mithun Baroi (PW 6 and PW 7 of S.C. 27 of 2008 respectively) who signed on the seizure list and identified these articles during trial. Similarly, the knife used in committing the murder of Sunita and the rope used in strangulating Papri were also recovered from the rented house of the appellant at Keralapuram as per statement of the appellant. These articles were seized by Inspector J. S. Yadav in presence of witnesses Prabhat Kumar Biswas and Binod Hawaladar, who identified these articles during the trial in the court. It appears from the report of CFSL

that the human blood was detected on the wearing apparels of the deceased Sunita and on the knife recovered from the rented house of the appellant at Keralapuram and also on the reksin cover of the bed seized from the rented house of the appellant at Keralapuram. The recovery of the gold chain of Papri and the Airtel phone in the custody of Papri from the house of the appellant not only connects the appellant with the crime, but also indicates the knowledge of the appellant about those articles of Papri kept concealed in his room. Similarly, the fact of recovery of the knife with human blood on the basis of statement of the appellant from the rented house of the appellant at Keralapuram and existence of human blood on the wearing apparel of Sunita not only indicates involvement of the appellant with the crime of Sunita, but also indicates his knowledge about concealment of the weapon of offence in his rented house at Keralapuram. The recovery of the dead bodies of Sunita and Papri as per statement of the appellant unerringly points out the knowledge of the appellant about concealment of those dead bodies and the school bag of Sunita inside the bush near the creek at Keralapuram. No explanation is offered by the appellant as to how he came to learn that the dead bodies of Sunita and Papri were buried near the creek at Keralapuram and the school bag of Sunita was kept inside the bush near the dead body at Keralapuram. In the absence of any explanation with regard to concealment of the dead bodies of Sunita and Papri, the concealment of school bag of Sunita inside the bush at Keralapuram, the concealment of Airtel phone kept in the

custody of Papri and gold chain worn by Papri, the concealment of gold earring and silver payel of Sunita and the concealment of knife containing human blood and the rope in the rented house of the appellant at Keralapuram, the logical inference is that the appellant himself concealed the dead bodies and these articles of Sunita and Papri and the weapons of offence.

7.4. Mr. Rao has strenuously argued that the gold chain of Papri and the ornaments of Sunita were not disclosed either in the missing diary or in the FIR. According to Mr. Rao, recovery of ornaments alleged to be worn by Sunita and Papri from the house of the appellant is not reliable evidence, as the existence of the ornaments on the body of the victims were not disclosed in the missing diary or FIR. We would like to observe that in the missing diary only the age, height, complexion and wearing apparels of the victims and other particulars are disclosed for proper identity of the missing girls. The omission to describe the gold chain of Papri or the gold earring and silver payel of Sunita in the missing diary and FIR cannot be the ground to disbelieve the fact of recovery of those articles from the house of the appellant as pointed out by him, particularly when the independent seizure witnesses have corroborated the seizure and identified those articles in the court during trial. So, we are unable to accept the contention made on behalf of the appellant in this regard.

8. **Cause of death of Sunita and Papri:** A panel of three doctors – Dr. Shiny Varghese, Dr. R. Shivanisan, Dr. Antony (PW 26, PW 27 and PW 28 of S.C. 26 of 2008) held Post Mortem

Examination on the dead body of Papri Biswas, aged about 14 years. The doctors have opined that the cause of death was mechanical asphyxia by strangulation. The doctors have also opined that the deceased was subjected to violent sexual intercourse before death. The doctors have come to the said conclusion on the basis of following external injuries: (i) contusion in right breast, (ii) bruising over right thigh, (iii) bruising over right hypochondrum (iv) ligature mark around neck completely encircled at the level of thyroid cartilage almost horizontal in direction with bruising prominent on the left lateral aspect of the neck, (v) Labia majora swollen, congested, hymen ruptured, (vi) bruising over posterior wall of vagina and (vii) a haematomah over right vaginal wall of 2 cm X 2 cm. The internal dissection reveals as follows: (i) one neck - deep echymosis over neck muscles below ligature mark C3-C4 vertebra dislocated, (ii) stomach - empty indicating the probable time of 6 hours before death. The time of death was ascertained as more than three days from the time of Post Mortem Examination but less than 5 days from the time of Post Mortem Examination. The Post Mortem Examination was done on 28.04.2008, which means death of Papri was caused in between 23.04.2008 and 25.04.2008. Since Papri was missing from 3 p.m. on 24.04.2008, she must have been subjected to sexual intercourse and thereafter she must have been strangulated in between 24.04.2008 and 25.04.2008.

8.1. The Post Mortem Examination of the dead body of Sunita was also done by a panel of two doctors – Dr. Shiny Varghese and Dr. Shivanisan (PW 21 and PW 22 of S.C. 27 of 2008). The doctors found remnants of skeleton and remnants of muscle and hair in plastic sack. The doctors could opine that the skeleton appeared to be of a female aged in between 14 and 17 years, but they could not ascertain the cause of death. So the cause of death of Sunita could not be ascertained by way of Post Mortem Examination. However, the skeleton was found to be of female and the dead body was identified by the step father of Sunita from wearing apparels of Sunita. The doctors have opined that it takes about a month in the island for disappearance of muscles and tissues in a dead body which is buried and as such it can be ascertained that Sunita died about a month ago from the date of Post Mortem Examination of 28.04.2008. It appears from CFSL report that there is existence of human blood on the wearing apparel of Sunita and human blood on the knife recovered as per statement of the appellant and also existence of human blood on the reksin of the bed in the rented house of the appellant at Keralapuram. This aspect of expert evidence coupled with recovery of the dead body of Sunita with her head separated from body as per statement of the appellant point out that Sunita was murdered.

9. **Previous conduct of the appellant:** The appellant used to reside along with his wife Tulsi Devi in the house of his father-in-law, Somasetthi at Subhas Gram in Diglipur. Both the appellant and his wife Tulsi Devi were running a coaching centre

for the students studying in the school. The appellant and Tulsi Devi used to run the said coaching centre in one room of the said house of his father-in-law. One Sushila Nair (PW 21 of S.C. 26 of 2008), the Auxiliary Nurse-cum-Midwife under Directorate of Health Services had one house at Keralapuram which is situated at a distance of about 8 kilometres from the coaching centre of the appellant. Sushila Nair used to stay at Port Blair as she was posted in G. B. Pant Hospital at Port Blair. She engaged her neighbour Jacob Cherian for inducting suitable tenant in the house at Keralapuram. It transpires from the evidence of Jacob Cherian (PW 18 of S.C. 26 2008) that on 18th March, 2008 he inducted the appellant as tenant in the said house at monthly rental of Rs.1500/- for running the NGO of the appellant. No activities of any NGO run by the appellant are forthcoming in the evidence before the court. This aspect of evidence adduced by the prosecution indicates that the appellant thought out a plan to get a house on rent, which is far away from his coaching centre for commission of crime. The contention of Mr. Rao that in the absence of any rent receipt or agreement of tenancy the evidence of Jacob Cherian about inducting the appellant as tenant in the house of Sushila Nair at Keralapuram, cannot be relied upon, has no substance.

9.1. We have already discussed how the appellant collected Airtel SIM in the name of K. Mohammed from a place under P.S. Chatham with the help of Sumit Toppo and K. Moorthy (PW 17 and PW 12 of S.C. 26 of 2008) immediately before the commission of the first offence. We have also discussed how the

appellant hired the Omni car of Niranjan Malo by keeping his identity secret and by disclosing his identity as RX NGO having Airtel SIM no.9933247383 by making false statement that he needed the vehicle for some guests of NGO coming from Port Blair. The appellant hired the vehicle from the owner Niranjan Malo on both 26.03.2008 and 24.04.2008 by making contact with the owner of the car on the previous dates i.e. on 25.03.2008 and 23.04.2008 respectively. The detailed use of Omni car by the appellant on both 26.03.2008 and 24.04.2008 is disclosed in the evidence of the driver Arjun Tigga during trial. The notebook (Mat. Exhibit-VI of S.C. 26 of 2008) containing the identity of the appellant as RX NGO having cell no.9933247383 is recorded. The fact of hiring Omni car by keeping the identity of the appellant secret and by using Airtel SIM of another person at the time of commission of the crime indicate well conceived plan of the appellant for committing crime and escaping the clutches of law.

10. **Subsequent conduct of the appellant:** It is the consistent evidence of the step father and mother of Sunita (PW 1 and PW 2 of S.C. 27 of 2008) that on 26.03.2008 at 12 O'clock when the step father of Sunita came back to coaching centre of the appellant to take Sunita back to home, Tulsi Devi, the wife of the appellant stated that Sunita had left the coaching centre at about 9 O'clock in the morning while she was busy in preparing food in the kitchen. Both the step father of Sunita and the mother of Sunita found on 26.03.2008 at 12 O'clock that the appellant was absent from the house i.e. the coaching centre.

10.1. It appears from the evidence of Rina Biswas (PW 8 of S.C. 26 of 2008), aunt of deceased Papri that when she went to the coaching centre of the appellant on 25.04.2008 in the morning in order to enquire the whereabout of Papri, the appellant came out of his house and met the driver, Arjun Tigga ignoring her presence and went out with the driver Arjun Tigga quickly from that place. One Koushik Mondal (PW 13 of S.C. 26 of 2008) Auto driver has stated in evidence that he took the appellant and three juveniles to the rented house of the appellant at Keralapuram on 25.04.2008 at about 2.30 p.m. Similarly, Krishna Babu Lal (PW 14 of S.C. 26 of 2008), jeep driver has stated in evidence that he took the appellant and three juveniles from Arial Bay of Diglipur to Diglipur market on 25.04.2008 in the afternoon. One Evangeline Juliet (PW 19 of S.C. 26 of 2008), who runs stationary-cum-bakery-cum-pan shop at Keralapuram, has stated in evidence that on 25.04.2008 at about 3 p.m. he saw the appellant and three juveniles loitering near his shop room at Keralapuram.

11. **Appellant Last seen together with the deceased:** Arjun Tigga (PW 2 of S.C. 26 of 2008 and PW 3 of S.C. 27 of 2008) has categorically stated in evidence that on 26.03.2008 at about 9 O'clock in the morning the appellant along with two juveniles - Shiva and Ashraf and victim Sunita boarded the Omni car near the coaching centre of the appellant and got down from the car at Keralapuram and entered the rented house of the appellant at Keralapuram. After about one hour the appellant alone came back to his coaching centre, took out a file and again boarded

the Omni car along with the juvenile Naushad and went to his rented accommodation at Keralapuram. On the same day at about 12.30 p.m. the appellant accompanied by three juveniles – Naushad, Shiva and Ashraf came back from the rented house of the appellant at Keralapuram by the Omni car, but Sunita was absent at that time. So, Sunita was found in the company of the appellant and three juveniles for the last time by the driver Arjun Tigga and thereafter her dead body was recovered on the basis of statement of the appellant on 28.04.2008.

11.1. The driver Arjun Tigga has also stated in evidence that on 24.04.2008 at about 3 p.m. the appellant and three juveniles - Shiva, Ashraf and Naushad boarded the Omni car near the coaching centre of the appellant and took victim Papri on the way near secondary school of Subhas Gram and went to the rented house of the appellant at Keralapuram. Subsequently, the juvenile - Naushad and Shiva were dropped in their respective houses and in the evening at about 6 p.m. the driver Arjun Tigga again took the juvenile - Naushad and Shiva from their respective houses to the rented house of the appellant at Keralapuram. Thereafter, the appellant and the juvenile - Shiva came back from Keralapuram to the coaching centre of the appellant and the appellant took one big plastic gunny bag and one file from his house to the rented house at Keralapuram. Thereafter at about 8.30 p.m. the appellant and three juvenile - Naushad, Ashraf and Shiva came back from the rented house of the appellant at Keralapuram to the coaching centre of the appellant, but Papri was absent at that time on 28.04.2008. So, Papri was found in

the company of the appellant and three juveniles for the last time and thereafter her dead body was recovered on the basis of the statement of the appellant.

11.2. Mr. Krishna Rao, Learned Counsel contends that no force was applied for taking Sunita or Papri by the appellant and the victim girls did not raise any hue and cry. They boarded the car voluntarily without any demur. According to Mr. Rao, this conduct of the victims – Sunita and Papri was unnatural. With regard to the above submission of Mr. Rao, we would like to observe that both the victims – Sunita and Papri boarded the car along with three other students of the coaching centre namely three juveniles - Ashraf, Naushad and Shiva and the appellant who happens to be the trusted private tutor of both the victims. It is quite natural under the above circumstances not to raise any hue and cry by the victims. Both the victims are minor aged about 14 years and they accompanied their teacher of the coaching centre. The victims were also accompanied by the students of the coaching centre. They must have reposed full faith in the appellant when the appellant took them along with other students of the coaching centre to his rented house at Keralpuram. In view of our above findings, we do not find any merit in the submission made on behalf of the appellant.

12. **False and misleading statement of appellant:** It is elicited from the evidence of the driver Arjun Tigga (PW 2 of S.C. 26 of 2008 and PW 3 of S.C. 27 of 2008) that on 26.03.2008 at about 12.30 p.m. when the appellant and three juveniles came back from Keralapuram by the Omni car of Arjun Tigga, he specifically asked

the appellant why Sunita was absent. The appellant gave false statement that Sunita had already left the place by availing of bus. Similarly, on 24.04.2008 when the appellant and three juveniles came back from Keralpuram at about 8.30 p.m. by the Omni car, the driver Arjun Tigga specifically asked about the cause of absence of Papri. The appellant gave false statement that Papri had already left for the house of her relative by bus.

12.1. It appears from the consistent evidence of parents, uncle, aunt and elder sister of Papri (PW 5, 6, 1, 8 and 9 of S.C. 26 of 2008) that on 24.04.2008 at 3.52 P.M. SMS was received from Airtel phone kept in the custody of Papri to BSNL phone used by Papiya, elder sister of Papri that she was proceeding towards Mayabunder and no effort should be made to enquire about her. Again, on 24.04.2008 at 5.09 P.M. another SMS was received from Airtel phone kept in the custody of Papri to BSNL phone used by Papiya that she had reached Mayabunder and there is no need to be worried about. Thereafter, on 26.04.2008 at 6.39 A.M. another SMS was received from the Airtel phone kept in the custody of Papri to BSNL phone used by Papiya that she was in danger and Manas was responsible for the same. The fact of receiving the above SMS from the Airtel phone kept in the custody of Papri to the BSNL phone used by Papiya is established from the evidence on record. The SMS was received in English script but in Hindi language, while the mother tongue of Papri is Bengali. It is quite natural that Papri would communicate with her elder sister and other members of her family in Bengali and the SMS would be sent by her from her Airtel phone to the BSNL phone in Bengali language and not in Hindi language.

We have already ascertained the time of death of Papri in between 24.04.2008 and 25.04.2008. It is relevant to point out that this Airtel phone kept in the custody of Papri was recovered from the house of the appellant by the police. Naturally, the SMS sent on 26.04.2008 at 6.39 A.M. was sent by the appellant in order to mislead the members of the family of Papri. It is established from the evidence on record that the distance between Diglipur and Mayabunder can be covered by any vehicle within a span of not less than two hours. The first SMS was received from the Airtel phone kept in the custody of Papri on 24.04.2008 at 3.52 P.M. while she claimed to have been proceeding towards Mayabunder from Diglipur and the next SMS is received on 24.04.2008 at 5.09 P.M. conveying her arrival at Mayabunder. The difference in time of the two SMS is 1 hour 17 minutes. It is impossible for any person to arrive from Diglipur to Mayabunder by any vehicle within 1 hour and 17 minutes. This also indicates that the SMS on 24.04.2008 at 3.52 P.M. and on the same day at 5.09 P.M. were sent by none else than the appellant in order to mislead the members of the family of Papri.

13. **Motive behind the crime:** Motive moves a man to commit the crime. Motive is to be inferred from the circumstances appearing in the evidence of a particular case. In the instant case, the call details of BSNL phone used by Papiya and the call details of Airtel phone used by the appellant from 23.04.2008 to 25.04.2008 indicate that there was exchange of communication and SMS between the appellant and either Papri or her elder sister Papiya through out 24 hours and even in between 1 O'clock and 2 O'clock

in the night and sometimes the communication between them continued from 5 minutes to 7 minutes. The call details of Airtel phone used by the appellant and the call details of Airtel phone kept in the custody of Papri from 23.04.2008 to 25.04.2008 also indicate that there were exchange of communication and SMS between the appellant and Papri on several occasions. It is quite unnatural for the teacher of a coaching centre to talk and exchange SMS with her girl students through out day and night continuously on 23.04.2008 and 24.04.2008 till 4.37 P.M. Since Papri and her elder sister Papiya were the students of the coaching centre of the appellant and since no close intimacy between the members of the family of the appellant and the members of the family of the deceased Papri is forthcoming in evidence, we would like to safely hold that the appellant used to communicate and exchange SMS through out day and night with her girl students namely Papri or her elder sister Papiya. This conduct of the appellant indicates his obsessive sexual desire for his girl students. Inspector J. S. Yadav (PW 36 of S.C. 26 of 2008 and PW 31 of S.C. 27 of 2008) has stated in evidence that on 27.04.2008 he seized 5 CDs of blue films from the house of the appellant by preparing seizure list (Exhibit-35 of S.C. 26 of 2008) in presence of the witness Binod Hawladar and Prabhat Biswas. These CDs of blue films were identified both by Inspector J. S. Yadav and the seizure witnesses during trial in the court and the same were collectively marked Exhibit-XXV of S.C. 26 of 2008. The possession of CD of blue films by the appellant and the conduct of the appellant in making unnatural communication with the girl students through out day and night go to establish

obsessive sexual desire of the appellant. This obsessive sexual desire of the appellant is the motive of the appellant in making secret plan of taking a house on rent at Keralapuram and hiring Omni car by keeping his identity secret for the commission of the crime. Accordingly, we are of the view that obsessive sexual desire of the appellant was the motive behind the crime.

14. **Test of circumstantial evidence:** The present case is based on circumstantial evidence. The test of circumstantial evidence is laid down by the Supreme Court in paragraph 10 of "Padala Veera Reddy V. State of Andhra Pradesh" reported in AIR 1990 SC 79, which is as follows:

> "This court in a series of decisions has consistently 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 towards 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."

14.1. In the instant case, the prosecution has established by cogent evidence the circumstances discussed above. We would like to summarise the following circumstances which are established from evidence on record beyond reasonable doubt: (i) the appellant was last seen with Sunita on 26.03.2008 at 9 A.M. at Keralapuram by the driver Arjun Tigga. Similarly, the appellant was last seen with

Papri on 24.04.2008 after 3 P.M. at Keralapuram by the driver Arjun Tigga, (ii) the dead bodies of Sunita and Papri were recovered as per statement of the appellant near the creek at Keralapuram, (iii) the school bag of Sunita concealed inside the bush at Keralapuram was also recovered as per statement of the appellant, (iv) the Airtel phone having SIM 9933261982 kept in the custody of Papri and the gold chain worn by Papri were recovered from the house of the appellant near fish market on the basis of his statement, (v) the gold earring and silver payel worn by Sunita were recovered from the suitcase of the appellant kept in his house near fish market on the basis of his statement, (vi) the knife containing human blood and one rope which may be used for strangulation were recovered from the rented house of the appellant at Keralapuram as per his statement, (vii) the wearing apparel of Sunita contained human blood as per CFSL report, (viii) the cause of death of Sunita could not be ascertained by Post Mortem Examination but the cause of death of Papri was asphyxia by strangulation after violent sexual intercourse, (ix) pre-conceived plan of the appellant to take the house of Sushila Nair on rent at Keralapuram on 18.03.2008, (x) pre-conceived plan of the appellant to hire the Omni car of Niranjan Malo on 26.03.2008 and 24.04.2008 by keeping his identity secret and by disclosing his identity as RX NGO, (xi) pre-conceived plan of the appellant to collect Airtel SIM No.9933247383 in the name of one K. Mohammed from the far off shop situated under another police station with the help of K. Moorthy and Sumit Toppo, (xii) the false and misleading statement given by the appellant to the driver Arjun Tigga about the

absence of Sunita on 26.03.2008 at about 12.30 P.M. and about absence of Papri on 24.04.2008 at about 8.30 P.M. during departure of the appellant and three juveniles from Keralapuram by the Omni car, (xiii) the false and misleading SMS sent to BSNL phone used by Papiya by the appellant from Airtel phone kept in the custody of Papri at the time of leaving her house on 24.04.2008, (xiv) the unnatural movement of the appellant at Keralapuram on 25.04.2008 at about 2.30 P.M., (xv) the unnatural behaviour of the appellant on 25.04.2008 when he came out from his house to meet the driver Arjun Tigga by ignoring the presence of aunt of Papri, (xvi) the obsessive sexual desire of the appellant is the motive for commission of the crime.

14.2. On close scrutiny of the entire evidence and on consideration of the circumstances proved beyond doubt, we can safely draw the inference that the circumstances pointed out hereinabove unerringly point out the guilt of the appellant and three juveniles – Md. Naushad, Md. Ashraf and C. Shiva Kumar. The circumstances, taken cumulatively, have formed a complete chain which is incapable of explanation of any other hypothesis than that of the guilt of the appellant and the three juveniles and the circumstantial evidence is consistent only with the guilt of the appellant and the three juveniles – Md. Naushad, Md. Ashraf and Shiva Kumar who are facing enquiry before the Juvenile Justice Board under the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (in short “the Juvenile Justice Act”). The circumstances also lead us to hold that the appellant is the kingpin behind commission of the crime, who made meticulous planning for

commission of the said crime. In view of our above findings, we agree with Learned Sessions Judge in holding the appellant guilty of the charge under Section 364/302/376/201/404/34 of the Indian Penal Code in the case of Papri (S.C. 26 of 2008) and under Section 364/302/201/404/34 of the Indian Penal Code in the case of Sunita (S.C. 27 of 2008). We would like to make it very clear that the Juvenile Justice Board holding inquiry in connection with three juveniles – Md. Naushad, Md. Ashraf and Shiva Kumar must not be influenced by the observations and findings made by us. The Juvenile Justice Board will hold the inquiry in accordance with law and form opinion independent of the observations made by us in this appeal and pass order, if not already passed, under Section 15 of the Juvenile Justice Act.

15. **Submission from Bar on Sentence:** No argument is advanced on behalf of the appellant with regard to various terms of imprisonment and fine imposed on the appellant by Learned Sessions Judge for the offences under Section 364/376/201/404 of the Indian Penal Code in the case of Papri (S.C. 26 of 2008) and under Section 364/302/201/404/34 of the Indian Penal Code in the case of Sunita (S.C. 27 of 2008). Mr. Krishna Rao, Learned Counsel has strenuously argued against the imposition of death sentence on the appellant in the case of murder of Papri (S.C. 26 of 2008). On the other hand, Mr. S. K. Mandal, Learned Senior Counsel for the State has vehemently urged this court to consider this case as rarest of the rare and to confirm death sentence of the appellant imposed by Learned Sessions Judge.

15.1. Mr. Krishna Rao has pointed out the following mitigating factors against the imposition of death sentence on the appellant: (i) the appellant committed crime along with three juveniles who are facing enquiry before the Juvenile Justice Board and as such the appellant is not the only person responsible for diabolic and gruesome murder of two minor girls, (ii) the appellant was only 24 years old at the time of commission of the crime and he is still pursuing his studies through correspondence course in the correctional home, (iii) there is no adverse report against the appellant and there is none to look after the wife and children of the appellant, and (iv) there is nothing on record to indicate that the appellant will not be reformed and his existence is a menace to the society. Mr. Rao has relied on the following decisions of the Supreme Court in support of his above contention: (i) "Mohinder Singh V. State of Punjab" reported in AIR 2013 SC 3622, (ii) "State of Rajasthan V. Balveer alias Balli & another" reported in (2013) 16 SCC 321, (iii) "State of West Bengal V. Binoy Bagdi" reported in 2013 Cr.L.J. 63 (Calcutta), (iv) "Santosh Kumar Satish Bhushan Bariyar V. State of Maharashtra" reported in (2009) 6 SCC 498, (v) "Bachittar Singh and another V. State of Punjab" reported in (2002) 8 SCC 125, (vi) "Ram Anup Singh & others V. State of Bihar" reported in (2002) 6 SCC 686, (vii) "Kumudi Lall V. State of U.P." reported in (1999) 4 SCC 108, (viii) "Sheik Abdul Hamid & another V. State of MP" reported in (1998) 3 SCC 188, (ix) "Shaikh Ayub V. State of Maharashtra" reported in (1998) 9 SCC 521, and (x) "Sheikh Ishaque & others V. State of Bihar" reported in (1995) 3 SCC 392.

15.2. Mr. S. K. Mandal, Learned Senior Counsel for the State has pointed out the following aggravating factors for imposition of death sentence on the appellant: (i) the appellant committed crime in a pre-planned manner and the murder of two minor girl is gruesome and diabolic in nature, (ii) the appellant being the teacher of the coaching centre committed rape and murder of his two minor girl students who had relationship of trust with him, (iii) the appellant committed the murder of one minor girl of his coaching centre and after a gap of about a month he committed rape and murder of another minor girl of his coaching centre when the first murder had gone undetected till commission of the second offence. Mr. Mondal has cited the following decisions of the Supreme Court in support of his above contention: (i) "Sushil Murmu V. State of Jharkhand" reported in (2004) 2 SCC 338, (ii) "Surendra Koli V. State of U.P." reported in AIR 2011 SC 970, (iii) "Dhananjoy Chatterjee V. State of West Bengal" reported in (1994) 2 SCC 220, (iv) "B.A. Umesh V. Registrar General, High Court of Karnataka" reported in (2011) 3 SCC 85, (v) "Shivaji alias Dadya Shankar Alhat V. State of Maharashtra" reported in (2008) 15 SCC 269, (vi) "Ponnusamy V. State of Tamil Nadu" reported in (2008) 5 SCC 587, (vii) "Rajendra Pralhadrao Wasnik V. State of Maharashtra" reported in (2012) 4 SCC 37, (viii) "Shivu and another V. Registrar General, High Court of Karnataka" reported in (2007) 4 SCC 713, and (ix) "State of U.P. V. Satish" reported in (2005) 3 SCC 114.

16. **Proposition of law on death sentence:** Before referring to the authority cited from the Bar, we would like to refer to the case of

"Bachan Singh V. State of Punjab" reported in 1980(2) SCC 684 where the procedure for awarding death sentence for special reasons was held to be constitutional and not violative of Articles 14, 19 and 21 of the Constitution. The proposition emerging from "Bachan Singh" (Supra) for imposition of extreme penalty of death is reiterated in paragraph 38 of "Machhi Singh & others V. State of Punjab" reported in (1983) 3 SCC 470, which is as follows:

> "(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability, (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime', (iii) Life imprisonment is the rule and death sentence is an exception. In other words, death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances, (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

16.1. With the above proposition of law laid down by the Supreme Court we would like to discuss some authorities on the proposition of law for awarding death sentence. In "Shivaji V. State of Maharashtra" reported in (2008) 15 SCC 269 the Supreme Court held that death sentence can be awarded on the basis of circumstantial evidence by laying down in last portion of paragraph 26 that the death penalty can be imposed when the collective conscience of the community is

shocked. The community may entertain such sentiment in the following circumstances:

> "(i) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community, (ii) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis when the murderer is in a dominating position or in a position of trust or murder is committed in the course for betrayal of the motherland, (iii) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation, (iv) When the crime is enormous in proportion. For instance, when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed, (v) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community."

16.2. The Supreme Court has summarised the aggravating and mitigating circumstances for consideration before imposition of death penalty in last part of paragraph 33 of "Rajendra Pralhadrao Wasnik V. State of Maharashtra" reported in (2012) 4 SCC 37, which are as follows:

> "**Aggravating circumstances:** (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions, (2) The offence was committed while the offender was engaged in the commission of another serious offence, (3) The offence was committed with the intention to create a fear

psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person, (4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits, (5) Hired killings, (6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim, (7) The offence was committed by a person while in lawful custody, (8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C., (9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community, (10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person, (11) When murder is committed for a motive which evidences total depravity and meanness, (12) When there is a cold-blooded murder without provocation, (13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances: (1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course, (2) The age of the accused is a relevant consideration but not a determinative factor by itself, (3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated, (4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct, (5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence, (6) Where the court upon

> proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime, (7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though prosecution has brought home the guilt of the accused."

17. Now we would like to consider the authorities cited by Mr. Rao on behalf of the appellant.

17.1. In "Mohinder Singh V. State of Punjab" reported in AIR 2013 (SC) 3622 "the accused was earlier convicted for rape of his minor daughter and sentenced to imprisonment for 12 years. While on parole he attempted to kill his wife who gave evidence in the case of rape of his minor daughter. The wife and daughter compelled the accused to live separately in rented accommodation where he could not maintain his livelihood. He committed the murder of his wife and one minor daughter out of frustration due to attitude of wife and children." This case did not fall within the category of rarest of the rare cases, and sentencing aim of reformation of the convict can still be achieved in the facts and circumstances of the case and as such death sentence was commuted to life imprisonment.

17.2. In "State of Rajasthan V. Balveer alias Balli" reported in (2013) 16 SCC 321 the judgment of conviction and death sentence passed by the Trial Court was reversed by the High Court. The Supreme Court restored the order of conviction passed by the Trial Court, but held that special reasons were not assigned by the Trial Court with regard to both crime and criminal for awarding death sentence. The Supreme Court imposed the sentence of life imprisonment, as there were no materials to establish that the

character of the accused persons was of extreme depravity so as to make them liable for the punishment of death.

17.3. In “State of West Bengal V. Binoy Bagdi” reported in 2013 Cri.L.J. 63 (Calcutta) the Division Bench of our High Court commuted death sentence of the accused to life imprisonment after finding the accused guilty of rape and murder of innocent girl of 14 years old, as there was no evidence to establish that the accused could not be reformed or rehabilitated or that the accused would commit criminal acts of violence and thereby would be a threat to the society.

17.4. In “Santosh Kumar Satish Bhushan Bariyar V. State of Maharashtra” reported in (2009) 6 SCC 498 the Supreme Court commuted sentence of death to imprisonment for life in a case of kidnapping of a common friend for ransom and killing him and disposing of his dead body in most cruel and diabolical manner for the following reasons:

> “(i) the prosecution case hinges on evidence of approval, (ii) the circumstantial evidence pointing to the guilt of the accused is not of exceptional nature, (iii) the accused persons were not professional killers, but unemployed youth searching for job, (iv) the special reasons were not assigned by the courts below in imposition of death sentence, (v) the mitigating factors of young age applicable for awarding life imprisonment to co-accused persons is also applicable to the appellant as the appellant is older than the co-accused persons only by two years, (vi) the idea of kidnapping and murder emanated from the appellant, but the plan was executed by all the accused persons including the co-accused persons who was awarded life imprisonment.”

17.5. In “Bachittar Singh and another V. State of Punjab” reported in (2002) 8 SCC 125 the appellants committed gruesome murder of

their two brothers and six members of their families due to greed to grab the land of the deceased brother. There was no evidence of previous misconduct of the appellants. There was nothing on record to indicate that the appellants would be a menace to the society threatening the peaceful and harmonious co-existence of the society. The Supreme Court commuted death sentence of the appellants to imprisonment for life as the case did not fall within the category of rarest of the rare cases and as the appellants could be reformed or rehabilitated as law abiding citizens.

17.6. In "Ram Anup Singh & others V. State of Bihar" reported in (2002) 6 SCC 686 the appellants committed murder of four members of the family. One of the appellants is the full brother of the head of the family which was eliminated due to property dispute. The act committed by the appellants was inhumane and cruel. There is nothing in the evidence to suggest that the appellants are menace to the society and there is nothing on record to conclude that the appellants cannot be reformed or rehabilitated and that they constitute a continuing threat to the society. Accordingly, the Supreme Court commuted death sentence of the appellants to imprisonment for life.

17.7. In "Kumudi Lall V. State of U.P." reported in (1999) 4 SCC 108 the Supreme Court did not impose extreme penalty of death on the appellant who committed rape of a victim aged 14 years in spite of her resistance and thereafter killed the victim by way of strangulation by tying the salwar around her neck in order to prevent her for raising shouts. The Supreme Court did not consider

this case as rarest of the rare cases for imposition of death sentence.

17.8. In “Sheik Abdul Hamid & another V. State of M.P.” reported in (1998) 3 SCC 188 the appellants committed murder of three persons of the family including innocent child in order to grab the property. There was no evidence to show how the murder had taken place and as such it cannot be concluded that it was cold-blooded murder. The special reasons given by the trial court and affirmed by the High Court for imposition of death sentence is that it was cruel act where the appellants did not spare the innocent child and the motive was to grab the property. The Supreme Court commuted sentence of death to imprisonment for life by holding that the present case does not fall within the category of the rarest of the rare cases.

17.9. In “Shaikh Ayub V. the State of Maharashtra” reported in (1998) 9 SCC 521 the appellant committed murder of his wife and five children. The Supreme Court held that the appellant had killed his wife and his three children because of unhappiness and frustration and not because of any criminal tendency and as such death sentence was commuted to imprisonment of life.

17.10. In “Sheikh Ishaque & others V. State of Bihar” reported in (1995) 3 SCC 392 the appellants committed murder of three persons by setting the house on fire in which those persons were sleeping in order to take retaliation as the deceased gave evidence against the appellants in the criminal case of dacoity and thereby the appellant had to suffer sentence of imprisonment. This case was not considered as rarest of the rare by the Supreme Court as no special

reasons were assigned for awarding death sentence. Accordingly, the Supreme Court commuted sentence of death to imprisonment for life.

18. Now, we would like to consider the authorities cited by Mr. Mandal on behalf of the State.

18.1. In "Sushil Murmu V. State of Jharkhand" reported in (2004) 2 SCC 338 the appellants committed the murder of 9 year old child to pacify the Goddess Kali. The appellant was also facing trial in another case involving similar accusations. Death sentence awarded by the trial court was affirmed by the High Court and upheld by the Supreme Court as rarest of the rare cases.

18.2. In "Surendra Koli V. State of U.P. & others" reported in AIR 2011 SC 970 the appellant was found to be guilty of committing murder of the girls by strangulation after alluring them to come inside the house for having sex and thereafter eating up their body parts after cooking them. The appellant was awarded death sentence by the trial court and confirmed by the High Court for horrifying and barbaric crime of killing several small girls after having sex with them. This death sentence was confirmed by the Supreme Court as rarest of the rare cases.

18.3. In "Dhananjoy Chatterjee V. State of West Bengal" reported in (1994) 2 SCC 220 the appellant was found to be guilty of committing rape and murder as security guard of the housing complex in order to take retaliation for his transfer on the complaint of the deceased, as the appellant used to tease the deceased on her way to the school. The death sentence imposed by the trial court on the appellant was affirmed by the High Court.

The Supreme Court confirmed the death sentence of the appellant as the rarest of the rare cases.

18.4. In “B. A. Umesh V. Registrar General, High Court of Karnataka” reported in (2011) 3 SCC 85 the appellant was found to be guilty of committing rape and murder and robbery. The appellant repeated the same crime within a few days of the first crime and was caught red handed. The trial court awarded death sentence which was affirmed by the High Court. The Supreme Court brought this case within the category of the rarest of the rare case for imposition of death penalty on consideration of the extreme depravity with which the offences were committed by the appellant who was found to be a menace to the society and is incapable of rehabilitation.

18.5. In “ Shivaji V. State of Maharashtra” reported in (2008) 15 SCC 269 the appellant was found to be guilty of committing rape and murder of a small child aged 9 years. The death sentence imposed by the trial court and affirmed by the High Court was further upheld by the Supreme Court by considering the case as one of the rarest of the rare.

18.6. In “Ponnusamy V. State of Tamil Nadu” reported in (2008) 5 SCC 587 the appellant was found to be guilty of committing murder of his wife and disappearance of evidence. The appellant was found to be guilty on the basis of extra judicial confession, though there was no medical opinion about cause of death. The Supreme Court upheld the death sentence of the appellant imposed by the trial court and affirmed by the High Court as the Supreme Court found this case as rarest of the rare.

18.7. In “Rajendra Pralhadrao Wasnik V. State of Maharashtra” reported in (2012) 4 SCC 37 the appellant was found to be guilty of committing rape and murder of 3 years old child. The death sentence of the appellant imposed by the trial court and affirmed by the High Court was upheld by the Supreme Court on consideration of the crime committed by the appellant as not only heinous, but also brutal and inhuman and on further consideration of the fact that there was relationship of trust and confidence between the appellant and the deceased.

18.8. In “Shivu and another V. Registrar General, High Court of Karnataka” reported in (2007) 4 SCC 713 the appellant was found to be guilty of committing rape and murder of a young girl of hardly 18 years old. The appellant was sentenced to death by the trial court and affirmed by the High Court. The Supreme Court found the case as rarest of the rare and affirmed death sentence of the appellant.

18.9. In “State of U.P. V. Satish” reported in (2005) 3 SCC 114 the appellant was found to be guilty of committing rape and murder of a child aged about 6 years. The Death Sentence imposed on the appellant by the Sessions Court was reversed on appeal by the High Court, but the Supreme Court restored the death sentence imposed by the trial court by considering the case in the category of rarest of the rare.

19. **Sentence of the appellant:** With the above views on death sentence expounded by the Supreme Court, we would like to consider the aggravating and mitigating circumstances for arriving

at the conclusion whether the present case falls within the category of rarest of the rare warranting death sentence of the appellant.

19.1. We would like to point out the following aggravating circumstances emerging from the evidence on record: (i) the appellant committed rape and murder of minor girl aged 14 years by making meticulous planning in advance, (ii) diabolic and gruesome murder of two minor girls aged 14 years and disposal of their dead bodies in most brutal and inhuman manner, (iii) the appellant had relationship of trust with the two minor girls who were the students of his coaching centre, (iv) the appellant committed murder of two defenceless girl students of his coaching centre at an interval of almost one month, (v) the murder was committed by making inhumane treatment and torture at least on one of the two defenceless innocent minor girls, (vi) the murder is committed for a motive which evinces total depravity and meanness, (vii) the brutality of the crime committed by the appellant not only shocks the judicial conscience but also pricks the conscience of the entire society.

19.2. The following mitigating circumstances have emerged from the materials on record in favour of the appellant: (i) the gruesome and diabolic murder of two defenceless minor girls was committed not only by the appellant, but also by three juveniles - Md. Naushad, Md. Ashraf and C. Shiva Kumar, (ii) the appellant was 24 years old at the time of commission of the crime and he is continuing his studies through correspondence course in the correctional home, (iii) there is no previous criminal record against the appellant before

the commission of crime of murder of two minor girls at an interval of almost one month.

19.3. There is nothing on record to indicate that the appellant cannot be reformed or rehabilitated considering his age and the fact that he is still continuing his studies through correspondence course in the correctional home. Even though the act of commission of murder of two defenceless minor girls at an interval of almost one month may indicate that the existence of the appellant is a menace to the society, we have to keep in mind that the appellant alone is not responsible for commission of diabolic and gruesome murders. The three juveniles – Md. Naushad, Md. Ashraf and C. Shiva Kumar who participated in the crime with the appellant are facing enquiry before the Juvenile Justice Board under the Juvenile Justice Act. We must not be oblivious of the application of the doctrine of proportionality to the sentencing policy under the Indian Criminal Jurisprudence. Now if we make a balance of the aggravating circumstances and the mitigating circumstances pointed out hereinabove, we find that the scale is tilted in favour of the mitigating circumstances against imposition of death penalty on the appellant. In view of our above findings, we cannot persuade ourselves to hold that the present case falls within the category of the rarest of the rare warranting death penalty of the appellant. The logical inference is that the appellant should be sentenced to imprisonment for life.

20. Apart from balancing aggravating circumstances and mitigating circumstances for arriving at the conclusion whether the case falls within the category of rarest of the rare warranting death penalty,

the Supreme Court has formulated "crime test", "criminal test" and "R-R test" for awarding death sentence in "Shankar Kisanrao Khade V. State of Maharashtra" reported in (2013) 5 SCC 546. The Apex Court has expounded the above tests in paragraph 52 of "Shankar Kisanrao Khade" (supra) as follows:

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

21. By applying "crime test" we find that the offence of rape and murder of one minor girl aged about 14 years was in a pre-planned manner; that the cold-blooded, diabolic and gruesome murder of another minor girl aged about 14 years was committed and the dead bodies were disposed of in brutal and inhuman manner; that the appellant

had relationship of trust with both the minor girls who were his students of the coaching centre; that the murder of two defenceless minor girls was committed at an interval of almost one month; that the murder was committed by making inhuman torture on the victim girls; that the murder was committed for a motive which evinces total depravity and meanness.

22. By applying "criminal test" we find that the appellant was aged about 24 years at the time of commission of the crime; that he is continuing his studies through correspondence course in the correctional home, that there is no previous criminal antecedent of the appellant before commission of murder of two minor girls at an interval of almost one month and that the appellant was not alone responsible for gruesome and diabolic murder of two defenceless minor girls.

23. By applying the "R-R test", apart from "crime test" and "criminal test" we cannot persuade ourselves to hold that the existence of the appellant is a menace to the society for committing diabolical and gruesome murders of two defenceless minor girls at an interval of one month, as there is nothing on record to indicate that the appellant cannot be reformed or rehabilitated considering his age and his effort to continue his studies through correspondence course in the correctional home. Thus, by applying the proposition of law laid down in "Shankar Kisanrao Khade" (supra) we have no hesitation to hold that the death penalty awarded to the appellant needs to be converted to imprisonment for life.

24. Now, two issues need to be resolved to avoid any complication about serving of sentence by the appellant in future. The first issue

is whether imprisonment for life will mean 14 years or 20 years or natural life of the convict. The second issue is whether all the sentences imposed on the appellant in two separate trials will run concurrently or consecutively. It is pertinent to point out that Section 31 of the Code of Criminal Procedure casts an obligation on the court to specify whether the sentences imposed on the convict for each of the offences will run concurrently or consecutively one after the other, when a person is convicted for several offences in one trial. The provisions of Section 31 of the Code of Criminal Procedure are attracted when sentence is imposed for several offences in one trial. In the instant case, the appellant is convicted and sentenced to term imprisonment for various offences and imprisonment for life for murder in one trial and again term imprisonment for some offences and imprisonment for life for murder in another trial, even when the death sentence is converted to imprisonment for life in connection with one trial.

25. Relying on “Sangeet V. State of Haryana” reported in (2013) 2 SCC 452 it is held by the Supreme Court in “Shankar Kisanrao Khade” (supra) that a sentence of imprisonment for life means imprisonment for the rest of the normal life of the convict. The sentence imposed by the court is subject to exercise of power by the appropriate government under Section 432 of the Code of Criminal Procedure or by the Governor under Article 161 of the Constitution of India or by the President under Article 72 of the Constitution of India, though it is commonly believed that the convict is not entitled to any remission in a case of sentence of life imprisonment. Since the appellant will now serve term imprisonment as well as life

imprisonment in connection with rape and murder and other offences in one trial and term imprisonment and life imprisonment for murder and other offences in another trial, it will be wise and prudent on our part to clarify that the sentence of term imprisonment in both the trials will run concurrently, but the sentence of life imprisonment in each of the trials will run consecutively, that is, after expiry of sentence of life imprisonment in one case, the commencement of sentence of life imprisonment in another case will start. Our above view of imposition of sentence on the appellant is fortified by the proposition of law laid down by the Supreme Court in "Ravindra Trimbak Chouthmal V. State of Maharashtra" reported in [(1996) SCC (Cri) 608], "Ronny V. State of Maharashtra" reported in [(1998) SCC (Cri) 859], "Sandesh V. State of Maharashtra" reported in [(2013) 2 SCC 479], "Sanaullah Khan V. State of Bihar" reported in [(2013) 3 SCC 52] and "Shankar Kisanrao Khade" (supra).

25. Accordingly, Criminal Appeal No.15 of 2013 preferred by the appellant is dismissed and the judgment and order passed by Learned Sessions Judge, Andaman & Nicobar Islands in Sessions Case No.27 of 2008 is affirmed. The Criminal Appeal No.13 of 2013 is allowed in part and the judgment of conviction passed by Learned Sessions Judge, Andaman & Nicobar Islands in Sessions Case No.26 of 2008 is affirmed, but sentence of death is commuted to imprisonment for life. The submission of proceedings for confirmation of death of the appellant by Learned Sessions Judge in D. R. No.001 of 2013 is returned by commuting death sentence of the appellant to imprisonment for life, which must be construed as

the entire natural life of the appellant. While the sentence of term imprisonment in both the cases will run concurrently, the sentence of life imprisonment in two cases will run consecutively.

The department is directed to send down a copy of this judgment and order to Learned Sessions Judge, Andaman & Nicobar Islands along with lower court record.

The urgent photostat certified copy of the judgment and order, if applied for, be given to the parties on priority basis after compliance with all necessary formalities.

This judgment is delivered from the main Bench of the High Court at Calcutta through Video Conferencing and as such the judgment and order will be uploaded in the server of the main Bench of the High Court at Calcutta.

(R. K. Bag, J.)

Dipankar Datta, J.

1. I have read the well-considered and well-reasoned judgment authored by my learned brother Hon'ble Bag, J. I am in complete agreement with My Lord that the convictions recorded by the learned Sessions Judge against the appellant for commission of various offences including the double murder of the two teenaged girls, Sunita and Papri, deserve to be upheld. Further, there is no reason not to concur with My Lord that the appellant deserves the sentence of life imprisonment for murdering Sunita. I also share My Lord's view that the reference under section 366 of the Code of

Criminal Procedure, 1973 (hereafter the Cr.P.C.) for confirmation of the death sentence imposed on the appellant for murdering Papri ought to be answered by commuting it to a sentence of life in prison, as well as the manner in which such sentences shall be served. However, I wish to express my views for such commutation and hence this separate opinion.

2. The authorities cited by the learned advocates for the appellant and the State on the aspect of sentence have been discussed by My Lord. Certain other authorities have also been considered by My Lord. Since it is a difficult task for a judge to decide whether a murder convict should be ordered to die or not, it would be of some worth to trace how the law on sentencing for murder has developed in this country over the years.

3. Bachan Singh v. State of Punjab, reported in (1980) 2 SCC 684 and Machhi Singh v. State of Punjab, reported in (1983) 3 SCC 470 are decisions of the Supreme Court of high authority, which appear to have guided Courts for years together in determination of sentence to be imposed in a particular case till some decisions of recent origin of the Supreme Court itself (which I propose to refer later) striking discordant notes. Bachan Singh (supra) and Machhi Singh (supra) were preceded by Jagmohan Singh v. State of Uttar Pradesh, reported in (1973) 1 SCC 20, when the Criminal Procedure Code, 1898 was in force.

4. While upholding the constitutionality of death penalty and repelling a challenge that unguided and uncontrolled discretion in the matter of awarding capital punishment or life imprisonment has been conferred on the judges by section 302, Indian Penal Code

(hereafter the IPC) which is violative of Article 14 of the Constitution, the Supreme Court in Jagmohan Singh (supra), *inter alia*, held that judges in India although have a very wide discretion in the matter of fixing the degree of punishment, such discretion had to be exercised judicially after balancing all the aggravating and mitigating circumstances of the *crime* (emphasis supplied) and that in exercising its discretion to choose either of the two alternative sentences provided in section 302, the court is *principally* (emphasis supplied) concerned with the facts and circumstances whether aggravating or mitigating, which are connected with *the particular crime under inquiry* (emphasis supplied).

5. It seems that because of the change in law brought about by section 354(3), Cr.P.C. requiring courts to record special reasons for sentencing a murder convict to death, Bachan Singh (supra) did not entirely agree with the aforesaid proposition and introduced the concept of consideration of relevant circumstances relating to *the criminal* (emphasis supplied) as well. This would be evident from the following observations:

> "164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions *(iv)(a)* and *(v)(b)* in *Jagmohan* shall have to be recast and may be stated as below:
>
> (*a*) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence.
>
> "(*b*) While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous

> character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

Based on the departure noticed above, it was finally concluded that:

> "209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. 'We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society.' Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency — a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."
>
> (emphasis supplied)

6. Machhi Singh (supra), while explaining Bachan Singh (supra), introduced the concept of a balance sheet, to be prepared on accounting of the aggravating and the mitigating factors, while deciding on which of the two alternatives ought to be selected in the facts of a given case. Paragraph 38 of the decision is reproduced in the judgment of My Lord, but a proper understanding of the law

laid down therein together with the reasons why society should feel persuaded to lift the immunity from death penalty in a given case would be facilitated if certain other paragraphs preceding and following paragraph 38 are read together. It was ruled that:

> "32. The reasons why the community as a whole does not endorse the humanistic approach reflected in 'death sentence-in-no-case' doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of 'reverence for life' principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so 'in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:
>
> *I. Manner of commission of murder*
>
> 33. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
>
> (*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.
>
> (*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. Motive for commission of murder

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course of betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (*a*) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder

37. When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (*b*) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case*:*

> '(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.
>
> 39. 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?
>
> 40. 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 hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."

7. There has been a long line of decisions thereafter where the Supreme Court confirmed death penalty awarded by the High Courts or commuted death to life in prison but instead of considering them separately, it would be proper to refer first to two decisions of Benches comprising three learned judges of the

Supreme Court [which are set apart by the decision in Machhi Singh (supra) by almost twenty and twenty five years] and then to some other decisions of Benches comprising two learned judges.

8. In Lehna v. State of Haryana, reported in (2002) 3 SCC 76, the accused took away the lives of his mother, brother and sister-in-law, and injured his father and nephew. He was awarded death penalty. The Supreme Court after careful consideration of the guidelines found in Bachan Singh (supra) and Machhi Singh (supra), observed that:

> "18. *** A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised. 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 the life inadequate and calls for a death sentence?; and (*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?"

While noticing that there was a definite swing towards life imprisonment in the Cr.P.C., it was observed that:

> "14. The other question of vital importance is whether death sentence is the appropriate one. Section 302 IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for 'special reasons', as provided in Section 354(3). There is another provision in the Code which also uses the significant expression 'special reason'. It is Section 361. Section 360 of the 1973 Code re-enacts, in substance, Section 562 of the Criminal

> Procedure Code, 1898 (in short 'the old Code'). Section 361 which is a new provision in the Code makes it mandatory for the court to record 'special reasons' for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state 'special reasons' if it does not do so. In the context of Section 360, the 'special reasons' contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute-book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors. Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed."

Ultimately, considering the mental condition of the convict (he was deprived of property by his father and he considered his brother and sister-in-law to be responsible for the same) and while commuting the death penalty, it was held that:

> "25. A convict hovers between life and death when the question of gravity of the offence and award of adequate sentence comes up for consideration. Mankind has shifted from the state of nature towards a civilized society and it is no longer the physical opinion of the majority that takes away the liberty of a citizen by convicting him and making him suffer a sentence of imprisonment. Award of punishment following conviction at a trial in a system wedded to the rule of law is the outcome of cool deliberation in the court room after adequate hearing is afforded to the parties, accusations are brought against

> the accused, the prosecuted is given an opportunity of meeting the accusations by establishing his innocence. It is the outcome of cool deliberations and the screening of the material by the informed man i.e. the Judge that leads to determination of the lis.
>
> 26. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt."

9. In Swamy Shraddananda (2) v. State of Karnataka, reported in (2008) 13 SCC 767, the Supreme Court while deciding the fate of the accused on the aspect of sentence (for brutally murdering an innocent wealthy lady out of greed) arising out of a difference of opinion between two Hon'ble Judges [Swamy Shraddananda v. State of Karnataka, reported in (2007) 12 SCC 288] had the occasion to consider in depth Jagmohan Singh (supra), Bachan Singh (supra) and Machhi Singh (supra) and other decisions of the Supreme Court. Some important observations on sentencing from the said decision are extracted hereunder:

> "42. In *Machhi Singh* the Court held that for practical application the rarest of rare cases principle must be read and understood in the background of the five categories of murder cases enumerated in it. Thus the standardisation and classification of cases that the two earlier Constitution Benches had resolutely refrained from doing finally came to be done in *Machhi Singh*.
>
> 43. In *Machhi Singh* the Court crafted the categories of murder in which 'the community' should demand death sentence for the offender with great care and thoughtfulness. But the judgment in *Machhi Singh* was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the *Machhi Singh* categories will make it clear that the classification was made looking at murder mainly as an

> act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of *Machhi Singh*, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and 'whistle-blowers'. There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in *Bachan Singh*, therefore, we respectfully wish to say that even though the categories framed in *Machhi Singh* provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in *Bachan Singh* itself."

That Machhi Singh (supra) enlarged the scope for imposition of death penalty compared to what Bachan Singh (supra) laid down is the dictum one would find in paragraph 48 of Swamy Shraddananda (2) (supra). However, being a decision coming from a Bench comprising 3 (three) learned judges and Machhi Singh (supra) also being a decision of a coordinate Bench, the latter was not overruled but it was clarified that although the guidelines provided were useful, they are not inflexible, absolute or immutable.

10. Close on the heels of Swamy Shraddananda (2) (supra) came the decision in Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra, reported in (2009) 6 SCC 498. The Supreme Court while reviewing the case law on the subject observed that equality

clause ingrained under Article 14 applies to the judicial process at the sentencing stage. It was reiterated that although the judicial principles for imposing death penalty were not uniform, the basic principle that life imprisonment is the rule and death penalty an exception would emerge for examination in each case for determining the appropriateness of punishment bearing in mind that death sentence should be sparingly awarded, only in the rarest of rare cases where reform is not possible. It was further observed that the discretion given to the Court in such cases assumes importance and its exercise rendered extremely difficult because of the irrevocable character of that penalty. The Court also held that where two views are possible imposition of death sentence would not be appropriate, but where there is no other option and where reform was not possible death sentence may be imposed. Applying the principles evolved in Bachan Singh (supra) and Machhi Singh (supra), the Court commuted the death sentence awarded to one of the appellants to life imprisonment holding that the case did not satisfy the "rarest of the rare" test to warrant the award of death sentence, even though decapitation of the victim's body and its disposal were considered brutal.

11. The two-judge Bench in Sangeet v. State of Haryana, reported in (2013) 2 SCC 452, took a fresh look at sentencing of murder convicts and came up with observations doubting the balance sheet theory in Machhi Singh (supra). The relevant observations read as follows:

> "29. **** this Court in *Machhi Singh* revived the 'balancing' of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the

> mitigating circumstances pertaining to a criminal. It hardly need be stated, with respect, that these are completely distinct and different elements and cannot be compared with one another. A balance sheet cannot be drawn up of two distinct and different constituents of an incident. Nevertheless, the balance sheet theory held the field post *Machhi Singh*."
>
> * * *
>
> "33. Therefore, in our respectful opinion, not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in light of the conclusions in *Bachan Singh*. ***"
>
> * * *
>
> "51. It appears to us that the standardisation and categorisation of crimes in *Machhi Singh* has not received further importance from this Court, although it is referred to from time to time. ***"

12. Any discussion with regard to sentencing would be incomplete if the decision in Shankar Kisanrao Khade v. State of Maharashtra, reported in (2013) 5 SCC 546, referred to by My Lord is not noticed. The Bench, comprising of the same learned judges who decided Sangeet (supra), observed that "crime test" i.e. 100% aggravating circumstances, "criminal test" i.e. 0% mitigating circumstances, and "R-R test" i.e. "rarest of rare cases", and not "balancing test" have to be satisfied for imposing death penalty. Although the three tests were satisfied in the case at hand, the Supreme Court proceeded to commute the death sentence on the ground that the High Court erroneously considered pendency of criminal proceedings against the convict as an aggravating circumstance.

13. With respect, this decision leaves a small window for a critical reader to pose a question: if indeed in a given case all the three tests are satisfied and various aggravating circumstances have been considered for imposing death penalty out of which one

circumstance is found extraneous, and if such extraneous aggravating circumstance is effaced from consideration by applying the doctrine of severability and the rest are considered sufficient to inflict death penalty, what result the case in question would produce?

14. Be that as it may, did the Supreme Court in Shankar Kisanrao Khade (supra) suggest that the aggravating circumstances and the mitigating circumstances need not be balanced? If so, this decision could be viewed as laying down a law seemingly inconsistent with the declaration of law in larger Bench decisions in Bachan Singh (supra), Machhi Singh (supra) and Lehna (supra).

15. Sangeet (supra) and Shankar Kisanrao Khade (supra), in my reading, echo the majority view in Rajendra Prasad v. State of Uttar Pradesh, reported in (1979) 3 SCC 646 (without referring to it), where stress was given on the criminal rather than on his crimes. Bachan Singh (supra) has overruled the dictum in Rajendra Prasad (supra) that the focus has now completely shifted from the crime to the criminal and that special reasons in section 354(3), Cr.P.C. "must relate not to the crime as such but to the criminal". Paragraph 201, which is relevant, reads as under:

> "201. With great respect, we find ourselves unable to agree to this enunciation. As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard *both* to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because 'style is the man'. In many cases, the

> extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate watertight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist."

16. The minority opinion expressed by Hon'ble A.P. Sen, J. (as His Lordship then was) in Rajendra Prasad (supra) makes interesting reading. Hon'ble V.R. Krishna Iyer, J. (as His Lordship then was), the author of the majority opinion, had to revise His Lordship's original draft judgment after reading the strong views expressed by Hon'ble Sen, J. in favour of death penalty imposed on the appellants. While respectfully differing with the majority opinion, His Lordship lucidly outlined the need for retention of death penalty and stressed that it was the duty of the courts to impose proper punishment, depending upon the degree of criminality and desirability to impose such punishment as a measure of social necessity, as a means of deterring other potential offenders.

17. A minority opinion is not to be relied on for deciding an issue before the Court. However, I have taken the liberty of referring to it since the majority opinion in Rajendra Prasad (supra) to certain extent has subsequently been overruled and Bachan Singh (supra) did not hold in favour of abolition of death penalty, which was also the view of Hon'ble Sen, J.

18. The decision in Sunil Damodar Gaikwad v. State of Maharashtra, reported in (2014) 1 SCC 129, contains an illuminating observation on judicial comity and is quoted below:

> "20. When there are binding decisions, judicial comity expects and requires the same to be followed. Judicial comity is an integral part of judicial discipline and judicial discipline the cornerstone of judicial integrity. No doubt, in case there are newer dimensions not in conflict with the ratio of the larger Bench decisions or where there is anything to be added to and explained, it is always permissible to introduce the same. Poverty, socio-economic, psychic compulsions, undeserved adversities in life are thus some of the mitigating factors to be considered, in addition to those indicated in *Bachan Singh* and *Machhi Singh* cases. Thus, we are bound to analyse the facts in the light of the aggravating and mitigating factors indicated in the binding decisions which have influenced the commission of the crime, the criminal, and his circumstances, while considering the sentence."

19. In view of the above dictum, any subsequent Bench of lesser strength is certainly within its authority to introduce newer tests in addition to but not in derogation of those which stand established by decisions of Benches of greater strength like Bachan Singh (supra), Machhi Singh (supra), Lehna (supra) and Swamy Shraddhananda (2) (supra). However, since all the decisions except Lehna (supra) were considered in the decision in Shankar Kisanrao Khade (supra), the efficacy of its precedential value cannot be said by a High Court judge to have eroded and thus the tests have to be applied in determining whether a murder convict deserves death penalty or not.

20. Despite the requirement of all the three tests i.e. "crime test", "criminal test" and "R-R test" being satisfied as a prologue for infliction of death penalty being laid down in Shankar Kisanrao Khade (supra), there have been later decisions of the Supreme Court where death penalty has been imposed based on Bachan Singh (supra) and Machhi Singh (supra) guidelines without

considering Shankar Kisanrao Khade (supra). Reference may be made to two recent unreported decisions dated 8th May, 2015 and 15th May, 2015 in Criminal Appeal No. 1439 of 2013 (Purushottam Dashrath Borate v. State of Maharashtra) in Criminal Appeal Nos. 802 – 803 of 2015 (Shabnam v. State of Uttar Pradesh) respectively, delivered by the same three-Judge Bench of the Supreme Court. In the latter decision, one of the accused who was pregnant on the date of commission of crime was not spared death penalty.

21. The Supreme Court may be perfectly justified in following any one of its previous decisions but the pronounced difference in judicial approaches while dealing with death penalty cases tends to make life difficult for a High Court judge or a Sessions Judge in view of Article 141 of the Constitution. Technically, he is bound by all the decisions and it is no longer the law that a judge has the liberty to follow that decision which, according to him, is good in point of law. Even if a subsequent Bench decision of the Supreme Court expresses an opinion contrary to the opinion of an earlier Bench upon consideration of such opinion, it is the later decision that binds a High Court judge as well as the Sessions Judge.

22. Inconsistency in approach of different Benches has not gone unnoticed by the Supreme Court. It would now be useful to notice some such decisions of the Supreme Court where concern about lack of uniformity and consistency touching the process of sentence has been adverted to.

23. In Swamy Shraddananda (2) (supra) itself, the Supreme Court's lament as to the lack of uniformity and consistency in sentencing is discernible. It was held:

> "48. Coupled with the deficiency of the criminal justice system is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* laid down the principle of the rarest of rare cases. *Machhi Singh*, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* categories were followed uniformly and consistently."
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> * * *
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> "51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench."

24. In Santosh Kumar Satishbhushan Bariyar (supra) too, it was commented that:

> "109. … the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system. It can be safely said that the *Bachan Singh* threshold of 'the *rarest of rare* cases' has been most variedly and inconsistently applied by the various High Courts as also this Court."

25. The Supreme Court has again acknowledged the sentencing principle as judge-centric in Sangeet (supra) where, considering the above extract, it was observed as follows:

> "32. It does appear that in view of the inherent multitude of possibilities, the aggravating and mitigating circumstances approach has not been effectively implemented."

26. Inapt it would not be, at this stage, to travel down memory lane and to refer to another minority opinion : the dissent of Hon'ble P.N. Bhagwati, J. (as His Lordship then was) in Bachan Singh (supra), reported in (1982) 3 SCC 24. While holding that death penalty for murder under section 302, I.P.C. read with section 354 (3), Cr.P.C. is unconstitutional and void being violative of Articles 14 and 21 of the Constitution, His Lordship had the occasion to observe:

> '69. ********** It is obvious on a plain reading of Section 302 of the Indian Penal Code which provides death penalty as alternative punishment for murder that it leaves it entirely to the discretion of the court whether to impose death sentence or to award only life imprisonment to an accused convicted of the offence of murder. This section does not lay down any standards or principles to guide the discretion of the court in the matter of imposition of death penalty. The critical choice between physical liquidation and lifelong incarceration is left to the discretion of the court and .no legislative light is shed as to how this deadly discretion is to be exercised. The court is left free to navigate in an uncharted sea without any compass or directional guidance. The respondents sought to find some guidance in Section 354, sub-section (3) of the Code of Criminal Procedure, 1973 but I fail to see how that section can be of any help at all in providing guidance in the exercise of discretion. On the contrary it makes the exercise of discretion more difficult and uncertain. Section 354, sub-section (3) provides that in case of offence of murder, life sentence shall be the rule and it is only in exceptional cases for special reasons that death penalty may be awarded. But what are the special reasons for which the court may award death penalty is a matter on which Section 354, sub-section (3) is silent nor is any guidance in that behalf provided by any other provision of law. It is left to the judge to grope in the dark for himself and in the exercise of his unguided and unfettered discretion decide what reasons may be considered as 'special reasons' justifying award of death penalty and whether in a given case any such special reasons exist which should persuade the court to depart from the normal rule and inflict death penalty on the accused. There being no legislative policy or principle to guide the court in exercising its discretion in this delicate and sensitive area of life and death, the exercise of discretion of the court is bound to vary from judge to judge. What may appear as

special reasons to one judge may not so appear to another and the decision in a given case whether to impose the death sentence or to let off the offender only with life imprisonment would, to a large extent, depend upon who is the judge called upon to make the decision. The reason for this uncertainty in the sentencing process is two-fold. Firstly, the nature of the sentencing process is such that it involves a highly delicate task calling for skills and talents very much different from those ordinarily expected of lawyers. ..... But without any such guidelines given by the legislature, the task of the judges becomes much more arbitrary and the sentencing decision is bound to vary with each judge. Secondly, when unguided discretion is conferred upon the court to choose between life and death, by providing a totally vague and indefinite criterion of 'special reasons' without laying down any principles or guidelines for determining what should be considered to be 'special reasons', the choice is bound to be influenced by the subjective philosophy of the judge called upon to pass the sentence and on his value system and social philosophy will depend whether the accused shall live or die. No doubt the judge will have to give 'special reasons' if he opts in favour of inflicting the death penalty, but that does not eliminate arbitrariness and caprice, firstly because there being no guidelines provided by the legislature, the reasons which may appeal to one judge as 'special reasons' may not appeal to another, and secondly, because reasons can always be found for a conclusion that the judge instinctively wishes to reach and the judge can bona fide and conscientiously find such reasons to be 'special reasons'. *****"

* * *

"73. All these factors singly and cumulatively indicate not merely that there is an enormous potential of arbitrary award of death penalty by the High Courts and the Supreme Court but that, in fact, death sentences have been awarded arbitrarily and freakishly (*vide* Dr Upendra Baxi's note on 'Arbitrariness of Judicial Imposition of Capital Punishment')."

27. The aforesaid extracts make it more than clear that if there is one area of grave concern where the courts have been consistently inconsistent, it is the area of sentencing for offence punishable under section 302, IPC.

28. At this stage, to appreciate how right the Supreme Court is in its opinion that there has been lack of consistency in sentencing a murderer, it may not be irrelevant if facts and circumstances of two sets of like cases [{Saibanna v. State of Karnataka, reported in (2005) 4 SCC 165 and Mohinder Singh v. State of Punjab, reported in AIR 2013 SC 3622} and {Dhananjoy Chatterjee v. State of West Bengal, reported in (1994) 2 SCC 220 and Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, reported in (2011) 2 SCC 764}] are considered in the light of the punishment imposed therein. The material facts and circumstances are tabulated as under:

SAIBANNA	MOHINDER SINGH
1. The accused was serving a sentence of life imprisonment for murdering his first wife.	1. Based on the testimony of his wife that he had raped his minor daughter, the accused was serving a prison term of 12 years.
2. While released on parole, the accused committed murder of his second wife and their child of 1-1/2 years of age.	2. While released on parole, the accused murdered his wife and minor daughter.
3. The gruesome crime was committed with a weapon called zambia, which is a hunting knife used for attack and not ordinarily available in a house.	3. The accused hacked his wife and daughter several times with a kulhara (axe) and both died on the spot. While the wife received three blows on her head, neck and hand, the daughter received three repeated blows on her head.
4. The accused was provoked to	4. Provocation for committing the

commit the crime as he suspected the fidelity of his wife.	crime was that the wife had testified against the accused.
5. The Supreme Court did not find any mitigating circumstance favouring the accused.	5. Two circumstance were considered by the Supreme Court to be mitigating. First, the wife did not allow the accused to live under the same roof with their daughters and drove him out; and secondly, he did not commit murder of his second daughter who was present on the spot and spared her life.
6. Death sentence imposed was confirmed by the Supreme Court.	6. Death sentence was commuted to life imprisonment by the Supreme Court.

DHANANJOY CHATTERJEE	RAMESHBHAI CHANDUBHAI RATHOD
1. The 18 years old victim, together with her parents and brother, was residing in Flat No. 3A of Anand Apartment, Kolkata.	1. The victim, aged 10 years, was residing with her parents in Flat No. A/2 of Sanodip Apartment, Surat.
2. The accused raped and murdered the victim.	2. The victim was raped and murdered by the accused.
3. The accused was a security guard of the apartment and holding a position of trust.	3. The accused was a watchman at the apartment and was holding a position of trust.
4. The accused was 27 years of age when he committed the crime.	4. The accused was 28 years of age on the date of commission of

	crime.
5. A couple of days before the crime, the accused had been transferred to another apartment for duty on the complaint of harassment lodged by the victim.	5. After committing rape of the victim, the accused killed her fearing disclosure by her of rape having been committed on her by him.
6. Death sentence was confirmed by the Supreme Court.	6. Death sentence was commuted to life because no evidence of possibility of the accused being reformed and rehabilitated was adduced and it could not be ruled out that the accused would not commit any offence later on.

29. The Supreme Court must have considered it appropriate to sentence Saibanna and Dhananjoy to death, and Rameshbhai and Mohinder to life in prison; however, comparison of the facts in Saibanna (supra) and Dhananjoy Chatterjee (supra) with the facts in the other similar cases, with respect, betray embarrassing results. While Dhananjoy committed rape and murder of an eighteen year old girl as a retaliatory measure, which could have been considered a mitigating circumstance, Rameshbhai had no justification to rape the ten year old girl except for satiating his lust, and then to murder her for hiding his misdeed. Mohinder not only raped his minor daughter but committed double murder of his wife and the said daughter while on parole to wreak vengeance, whereas Saibanna suffered death penalty in more or less like circumstances.

While Dhananjoy was a security guard and the Supreme Court felt that it was his sacred duty as a security guard to ensure the protection and welfare of the inhabitants of the flats instead of gratifying his lust and murdering the victim girl in retaliation of his transfer on her complaint, Mohinder was a father who raped his own minor daughter. Who else can be more trusted by a minor girl than her own father? While reading the decision in Mohinder Singh (supra), it seemed to me that a prudent mother would never allow her raped daughter to live with a rapist father under the same roof and by her side and this is what the lady did to ensure that the accused stays at a distance from his daughter; further that, the accused had proceeded towards the other daughter and showed her the axe and she narrowly escaped, having ran into a room and bolting it from inside. The degree of retaliation in Mohinder Singh (supra) is found so high that he could easily be called a desperado, yet, he was awarded imprisonment for life. Mr. Krishna Rao seems to be justified in contending that if indeed a rapist and double murderer does not deserve the death penalty for reasons given in paragraph 23 of the decision in Mohinder Singh (supra), the appellant too does not deserve death penalty. Also, having regard to commutation of death penalty imposed on Mohinder, whether Dhananjoy and Saibanna at all deserved death penalty would remain a vexed question forever.

30. I am not oblivious that in Aloke Nath Dutta v. State of West Bengal, reported in (2007) 12 SCC 230, a two-judge Bench has expressed that the view taken in Saibanna (supra), also a decision of a

coordinate Bench, is doubtful. Any reason for expressing such opinion is conspicuous by its absence. In any event, this again amplifies the perception that sentencing is individualistic.

31. Crimes against women (be it adult or minor) have assumed alarming proportions in recent years. While quite a few are reported, one cannot keep count of the number of unreported crimes against women. Brutal, barbaric, grotesque and diabolical crimes against women shocking the collective conscience of the community may have attracted the death penalty in a few cases, but there have been more cases where despite the crime being heinous and diabolic, the Court thought it appropriate to award the lighter of the two punishments that could be imposed under section 302 IPC on the accused. Although constitutionality, consistency and certainty are said to be the hallmarks of a sound judicial process, consistency in the sentencing process is yet to be achieved. To my mind, the criminal justice system has not been able to evolve a clear cut principle or workable formula of universal acceptance even today for imposing death penalty. Many a time, the thought process has been influenced by ideas from the West. Guidelines have not developed for what would constitute “rarest of rare cases”. It is left for determination depending on the facts obtaining in a particular case and without doubt, is a relative concept. Opinion taking the place of principle is not uncommon. It is not necessary that two judges would always agree as to whether a case before them falls in the category of the “rarest of rare cases”. The situation is best exemplified in the difference of opinion between judges,

noticed in Swamy Shraddhananda (2) (supra) and Rameshbhai Chandubhai Rathod (2) (supra).

32. The ratio of Bachan Singh (supra) is clear that the sentence of death ought to be given only in the "rarest of rare cases" and only when the option of awarding the sentence of life imprisonment is "unquestionably foreclosed". The decision did not standardise or categorise cases where death penalty ought to be awarded and concurred with the view in Jagmohan Singh (supra) that "such 'standardisation' is well-nigh impossible". In my reading of the decision, what "unquestionably foreclosed" postulates is that if there be a lingering doubt in the mind of the concerned judge as to whether the murder convict should be ordered to die or escape with life imprisonment, the latter should be preferred. In other words, the judge must be absolutely certain that no punishment other than death penalty would serve the interest of justice. There could be and is no quarrel in respect of such principle.

33. I do not also see Machhi Singh (supra) having been overruled even indirectly by the Supreme Court. Even today, one finds scores of decisions of the Supreme Court relying on the guidelines therein. I would read paragraph 32 of Machhi Singh (supra) as an accurate authoritative statement of law which, with great force and conviction, emphasizes the need for retention of death penalty in a country like ours and is a pointed counter to arguments of those who masquerade as crusaders for abolition of death penalty. India is a unique country, having people with a lot of commonality as well as dissimilarity. They speak regional languages, have varied

mindsets, come from multi-cultural backgrounds and their social upbringing is also different, leading to distinct identifiable behavioural patterns. Conditions of life prevalent in India are vastly different from other countries and there cannot possibly be any comparison. It ought to be realized that to commit a crime is not an activity guaranteed by our Constitution and the laws; and India being a secular nation, secularism in the context of our Constitution and Directive Principles means an attitude of 'live and let live' and that 'right to life' guaranteed under Article 21 of the Constitution on a broader canvass also can be said to envision 'live and let live' in view of the statement of law in paragraph 32 of Machhi Singh (supra). An offender who brings the life of one of his fellow-men to an abrupt end in derogation of his right to life without there being any extenuating factor ought not to be shown the leniency of commutation of death penalty by stretching the laws beyond abnormal limits to his advantage at par with laws prevalent in foreign countries, particularly when the collective conscience of the society demands his extermination. The problem, in all fairness to the victim, the criminal as well as the society, ought to be addressed from the perspective of the society at large and not within the narrow confines of any individual culprit. A judge's voice must be the society's voice based on sound legal principles capable of being applied uniformly and not the voice of an individual judge who abhors death penalty, as has quite often been the case. It is trite that a particular judge as a citizen of the country may be in favour of either abolition or retention of death penalty but while discharging judicial duty, morals or ethics of a

punishment should have no place and a judge has to tread the path of law and the guidelines laid down by judicial pronouncements and award sentence in exercise of sound judicial discretion, irrespective of consequences.

34. With all the humility at my command, I cannot help observing that a conspectus of the decisions on the point of sentencing revealing an element of subjectivity being involved in formation of opinion for and against imposition of death penalty needs to be obliterated if just justice is to be done in a given case; also that, in the absence of a universally accepted criteria or yardstick for determining whether in a particular case death penalty or life sentence should be ordered, having regard to the nature, motive and gravity of the crime and the circumstances surrounding the murder, judicial approaches of the Apex Court judges have varied leading to judges of the High Court and courts subordinate thereto being faced with decisions in cases having broadly similar features but different results.

35. Decisions having precedential value provide invaluable guidance to a judge on whom the same is binding. However, when such a decision views an extremely grave and heinous nature of crime committed by an accused, who expresses no sense of remorse, as not warranting death penalty based on specious mitigating circumstances, the likelihood of the concerned judge being misguided under the weight of inconsistent precedents cannot be ruled out altogether. It is, therefore, necessary to cull out the

principles that have stood the test of time and then to decide on the sentence the accused deserves.

36. One other important aspect needs discussion. Decisions of the Supreme Court are legion where omission of the State to adduce evidence to persuade the Court to hold that an accused is incapable of being rehabilitated and reformed or that he would continue to remain as a threat to society, has been considered a mitigating circumstance for the convict and the Court has leaned towards commutation of death penalty.

37. No evidence placed on record by the State to suggest that the appellants cannot be reformed or rehabilitated and that they constitute a continuing threat to the society, was one of the reasons for not confirming the death penalty in Ram Anup Singh v. State of Bihar, reported in (2002) 2 SCC 686.

38. In Ramesh v. State of Rajasthan, reported in (2011) 3 SCC 685, the Supreme Court ruled that the State should “by evidence prove that the accused does not satisfy these conditions, meaning thereby that the accused is not likely to be reformed if it wants to sustain the plea for award of death sentence”.

39. Referring to Bachan Singh (supra), the Supreme Court once again in Rajesh Kumar v. State, reported in (2011) 13 SCC 706, held that the State having failed to show that the appellant was a continuing threat to the society or that he was beyond reform or rehabilitation by adducing evidence to the contrary, is certainly a mitigating circumstance which the High Court had failed to consider.

40. Similar view has been taken in Rameshbhai Chandubhai Rathod (2) (supra), while upholding the view of Hon'ble A.K. Ganguly, J. (as His Lordship then was) in Rameshbhai Chandubhai Rathod v. State of Gujarat, reported in (2009) 5 SCC 740.

41. In course of the research that I could conduct on the subject I tried to lay my hands on an authority which with some degree of clarity provides guidance on the nature of evidence that the State is required to adduce to demonstrate that a convict is incapable of rehabilitation and reformation or that he would be a continuing threat to society thereby inviting death penalty from the court, but in vain. It is axiomatic that neither the State can create evidence in respect of a future occurrence nor can it be predicated that in future, a convict would or would not be reformed. In the state of uncertainty where I find myself presently, I am left to wonder as to whether the evidence that the Supreme Court has been referring to in the aforesaid decisions are those relating to the conduct of the convict prior to the commission of the offence for which he is awaiting sentence upon conviction and/or his conduct in the correctional home upon arrest, either prior to the judgment of conviction and order of sentence of the trial court or during pendency of an appeal thereagainst. If indeed my understanding is correct and whether a murder convict would be amenable to reformation or not has to be inferred from the facts already on record, to my mind, it would be a very narrow corridor within which one may have to confine his consideration. In terms of Shankar Kisanrao Khade (supra), criminal conviction and criminal history

are not to be equated, and pendency of criminal proceedings cannot be considered to be an aggravating circumstance. Therefore, first time offenders or offenders who for valuable consideration accomplish their plan by committing murders of persons targeted may well escape death penalty for want of sufficient evidence regarding their (mis)conduct at the relevant time.

42. Death penalty is not unconstitutional in our country, has to be accepted. The will of the people expressed through the legislature and as interpreted by the Supreme Court is that only in exceptional cases, death penalty could be ordered. That of course is permissible, after weighing the aggravating and mitigating circumstances and if the case before the court is of the “rarest of rare cases”. Rate of crimes including murder in the yester years was comparatively much less than now and that seems to be the reason for the Supreme Court in Bachan Singh (supra) viewing murder as “rare”, and it was the “rarest of rare cases” of murder that could only qualify to fall in such category. When the Supreme Court propounded the “rarest of rare cases” theory, murder was not a regular feature as now, when one scarcely requires an excuse for committing it. In the present day scenario when murder cannot emphatically be considered as a “rare” offence, rarely could a case qualify to be the “rarest” (death arising out of terrorist attacks or otherwise where the interest of the State and public order is at stake excepted). Viewed from that angle, I wish the “rarest of rare cases” theory is reconsidered. Also, such strict tests have been laid down in recent decisions on the fulfilment whereof death penalty

can be inflicted that for all practical purposes, death penalty would soon exist only on paper without being put into practice. In such a situation, in my view, a judge may order death with extreme caution and care, most sparingly, and that too for the 'gravest of most serious crimes'.

43. As the law stands today, it cannot be gainsaid that there can be no exhaustive enumeration of situations calling for a death penalty. Each case has to be considered on the basis of its own peculiar facts and it is a balanced approach that would be the call of the day. Take a situation where an accused (either holding a position of trust and confidence in relation to the victim or not) commits a well-planned murder of the victim without any plausible justification at all arousing a sense of revulsion, or even an unplanned murder but consciously while in his senses and in the absence of any provocation from any quarter, brutally torturing the victim minute by minute to painful death in the process, and such a murder could be perceived as barbaric, gruesome, diabolical, abominable and whatever other adjective one may choose to employ, - such an accused must be presumed to be well aware of the implications and the consequences of the heinous act he commits : that death is one of the penalties he might stand to suffer if the judge considers that his case falls within the "rarest of rare cases". Therefore, he indulges in the offence of murder risking his future. Should, in such a situation, the society go out of its way to secure or protect the future of the accused who practically forfeits his right to life? The answer ought not to be in the affirmative. At

the stage the guilt is proved beyond doubt and the sentence is to follow, the judge who has to select the penalty to be imposed is required to take into consideration all circumstances in relation to the crime as well as the criminal. In terms of the authorities in the field, an accused may be let off death penalty if the State fails to prove that the accused is such that there is no chance of his reformation. Whether or not an accused is likely to be reformed, if he is let off with a sentence of life imprisonment, is a matter of pure chance. There is no guarantee that after walking out of the correctional home either on parole or after remission of sentence, the accused would not wreak vengeance against those who testified against him. The accused in Saibanna (supra) and Mohinder Singh (supra) are convicts who illustrate the point.

44. Instances are not rare where the courts choosing life imprisonment instead of death as a penalty have given undue importance to the criminal and his future, so much so, that the circumstances relating to the crime take a back seat behind the criminal. While holding that a case does not fall within the description of “rarest of rare cases”, no real attempt is made to categorise which case would constitute “rarest of rare cases”. May be, perfect categorisation may not be possible and each case ought to be decided on its own merits but even then, the parameters that would distinguish one group of murder cases from those cases forming another group warranting death penalty are too hazy to be applied with consistency and certainty. Needless to observe, a decision in a case where death penalty is eminently desirable but is not imposed without

considering the facet of society's abhorrence of such a crime and for no better reason than that the accused must have a chance of being reformed would, in my opinion, put the society at risk. It is time for the legislature to lay down the parameters instead of leaving it to the judiciary to deal with similar cases and award different sentences.

45. The following observation in Bachan Singh (supra) is worthy of being noticed:

> "175. We must leave unto the Legislature, the things that are Legislature's. 'The highest judicial duty is to recognise the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits.' As Judges, we have to resist the temptation to substitute our own value-choices for the will of the people. Since substituted judicial 'made-to-order' standards, howsoever painstakingly made, do not bear the people's imprimatur, they may not have the same authenticity and efficacy as the silent zones, and green belts designedly marked out and left open by Parliament in its legislative planning for fair play of judicial discretion to take care of the variable, unpredictable circumstances of the individual cases, relevant to individualised sentencing. When Judges, acting individually or collectively, in their benign anxiety to do what they think is morally good for the people, take upon themselves the responsibility of setting down social norms of conduct, there is every danger, despite their effort to make a rational guess of the notions of right and wrong prevailing in the community at large and despite their intention to abide by the dictates of mere reason, that they might write their own peculiar view or personal predilection into the law, sincerely mistaking that changeling for what they perceive to be the community ethic. The perception of 'community' standards or ethics may vary from Judge to Judge. In this sensitive highly controversial area of death penalty, with all its complexity, vast implications and manifold ramifications, even all the Judges sitting cloistered in this Court and acting unanimously, cannot assume the role which properly belongs to the chosen representatives of the people in Parliament, particularly when Judges have no divining rod to divine accurately the will of the people. ***"

46. Despite nearly thirty-five summers having passed since Bachan Singh (supra), the Parliament has preferred to be totally laid back in this regard. Till such time appropriate legislation sees the light of the day, I am inclined to be of the view that in a case where circumstances established leave no scope for the judge to discern slightest provocation for the accused to commit the murder being the subject matter of trial, or the accused is found to commit murder without the community contributing even in a small way leading to the accused's depravity, greed, rage, lust, etc. and there has been no failing on the part of the society to enable the accused to lead a healthy, dignified and well-meaning life, or the accused derives pleasure in killing innocent people, there is no reason as to why such an accused may not be considered as one deserving death penalty without the judge being overly concerned about the age of the accused, or how his family would survive, or how his children would grow up, or whether there is scope for his reformation, or how well he could have served the society in future, if released, on being reformed while in the correctional home.

47. Coming to the facts of the present case, it appears that the learned Sessions Judge upon balancing of the aggravating and mitigating circumstances assigned the following special reasons for imposing death penalty on the appellant for murdering Papri:

a) relationship of trust between the victim and the appellant;

b) premeditated murder of Sunita going unnoticed, encouraging the appellant to repeat the crime;

c) an unprecedented incident, which is shocking for the sparse population of the Andaman and Niccobar Islands;

d) young boys lured into the crime by the appellant; and

e) perception that the appellant cannot be reformed or rehabilitated;

48. The rape and murder of Papri by the appellant was preceded by the murder of Sunita. The appellant was in his family way with his wife and child. He was running the coaching centre with his wife. There could be no ostensible cause for any want on his part, since quite a few young children were being taught at the said coaching centre. The victims were also the students of the appellant. In India, a teacher is regarded as 'guru' and such a guru is expected to treat his students as his own sons and daughters. Unfortunately, the appellant treated Sunita and Papri differently. That he was mentally pervert is established from recovery of cassettes containing pornographic material. Instead of extending his arms towards Sunita and Papri as protective shield, the appellant used the same arms for ending their lives and, thereafter, for causing disappearance of their dead bodies. Overpowered by his notorious desire to have sex with Papri, the appellant was successful in luring her and she having ultimately fallen prey, was ravished. One cannot be too sure on the available evidence as to whether Sunita met the same fate as Papri or not. There can indeed be no doubt that the nefarious plan that the appellant hatched was meticulously executed. Twin murders of minor girl students in the span of a month is clear evidence of the appellant's depraved mind and

meanness which, in turn, is a source of revulsion. He is indeed a menace whom the society can hardly take the risk to bear.

49. That the appellant is perilously close to deserving death penalty is, to my mind, not in question.

50. However, the aforesaid discussion on the development of law relating to sentencing a murder convict reveals that the law is still in a fluid state; principles applicable with certainty in all cases are yet to see the light of the day. When a 'life and death' question in the real sense of the term is involved, as in this case, it is well nigh impossible to order extermination of a murder convict. This is the sole reason why I feel persuaded to spare the appellant the noose of the hangman being tied around his neck.

51. I agree with My Lord that the death sentence ought to be commuted and the appellant ought to appropriately serve the sentences as proposed by My Lord.

(Dipankar Datta, J.)