IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/CRIMINAL CONFIRMATION CASE NO. 1 of 2023
With
R/CRIMINAL APPEAL NO. 777 of 2023

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE ILESH J. VORA

and
HONOURABLE MR. JUSTICE R. T. VACHHANI

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Approved for Reporting	Yes	No

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STATE OF GUJARAT
Versus
PRADIP S/O RAJESH @ RAJENDRA @ RAMESHVAR RAJKUMAR GUPTA

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Appearance:
MR RONAK RAVAL, APP for the Appellant(s) No. 1
NOTICE SERVED for the Respondent(s) No. 1

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CORAM:**HONOURABLE MR. JUSTICE ILESH J. VORA**
and
HONOURABLE MR. JUSTICE R. T. VACHHANI

Date : 30/01/2026

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)

1. The death reference has come up before this Court for confirmation of a Death Sentence awarded to the appellant – sole accused Pradip Rajesh Rajkumar Gupta, by judgment dated 30.01.2023, passed in Special POCSO Case No.73 of 2022, whereby, the Additional Sessions Court at Valsad, has convicted the appellant accused for the following offences and sentenced as tabulated hereinunder:

Conviction under Section	Punishment	Fine	In default of fine
302 of IPC	Death Sentence	-	-
6 of POCSO	Death Sentence	-	-
201 of IPC	RI for 7 years	Rs.10,000	RI for 2 years
S.376(A)(B) of IPC	No separate sentence being awarded.		

2. The appellant herein has also questioned the legality and correctness of the judgment of conviction and order of death sentence by preferring conviction appeal.

3. The prosecution case, in nutshell, is that,

The appellant accused Pradik Shah was tried and prosecuted for the offence of murder and rape of 9 years old child, allegedly committed on 9 years of old victim. The victim along with the parents and brother were living in the rented room no.7, a common chawl, situated at Vapi, Gitanagar Area. In the common chawl, there were other people living in the different rooms of the said common chawl.

The witness Ashadevi – PW:6 who happened to be aunt of the accused was living in room no.6 and next-door neighbour of the complainant. The accused was used to come at the house of his aunt Ashadevi for lunch and dinner, as she was providing dinning service to the vicinity of people.

According to prosecution case, the parents and the brother of the

deceased were working in the factory situated in industrial area of Vapi and their schedule was morning 08:00 to evening 07:00. The deceased child was studying in 4th standard with Mother Teresa School, Vapi and her school time was 7-00 am to 2-00 pm noon. The deceased was having extra key of the house, so that after returning from the school, she could live in the room. On 07.02.2020, at about 2-15 pm, the deceased was alone in the room and was watching TV. The accused Pradip, in the first attempt, had tried to enter in the room but the deceased victim was vigilant and did not permit him to enter into the room. Despite of this, the accused after sometime, after taking in his hand the scarf from the corridor of the colony, he entered inside the room forcefully. There was resistance by the child and to avoid further interference of the third party, the accused increased the volume of the T.V. and thereafter, tried to abuse the sexually the victim but there was resistance, as a result, the accused strangulated her and put the scarf on her neck after killing her, she was raped by the accused. In order to screen the offence, the dead body of the deceased hanged on the ceiling fan with the support of the scarf to prove that the deceased committed the suicide.

The occupants of room No. 6 – Ashaben (PW-6), at about 04:00 o’clock knocked the door of room no.7, to handover the plat but there was no response, as a result, she pushed the door and entered into the room and show the deceased in a hanging position. She had informed the owner of the room – Sunilbhai

(PW-7). The witness Sunilbhai contacted the father of the child, Gaurishankar Shah (PW-3). The father, mother and brother immediately rushed to the place of occurrence. The body of the deceased was taken down from the ceiling fan. The dead body was taken to the Government Hospital, Vapi in the ambulance, where she was declared 'dead' on arrival. The father of the child PW-3 lodged an FIR with the Vapi Town Police Station, alleging that, unknown person killed his daughter and then, raped her.

Upon registration of the offence, the investigation was handed over to S.J. Baraiya (PW-15). During the course of investigation, the IO prepared the inquest and the dead body was sent for postmortem and recorded the statement of the witnesses, drew the panchnama of place of occurrence and collected necessary samples for forensic analysis and also seized and recovered the locket (pendent) found at the place of incident. During the investigation, it was reveled that the appellant – accused Pradip was found in the colony i.e. near the house of the deceased and the witness PW-14 – Pushpadevi Pathak, saw him when he was following the deceased child in noon hours. The accused then arrested and was referred to the medical hospital for medical examination. The statements of the material witnesses being recorded by the Executive Magistrate under Section 164 of the Cr.P.C. On the basis of disclosure statement of the accused, he pointed out the place of occurrence. The accused was again referred to the medical hospital for DNA

profiling and the samples as well as seized articles were deposited before the Surat FSL and after receiving the necessary reports, the chargesheet for the offences as referred above came to be filed against the accused before the Jurisdictional Magistrate.

4. As the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions at Valsad Sessions Court.

5. The Sessions Court, Valsad framed the charges against the appellant. The accused – appellant, in his statement, did not have admitted the charge and claimed to be tried.

6. The prosecution, in order to prove the charge, adduced the following oral and documentary evidence in support of its case.

Oral evidence :

PW 1 – Exh.13	Dr. Pinkesh Modi
PW 2 – Exh.22	Dr. Devagini Gamanbhai
PW 3 – Exh.27	Gaurishankar Rajkumar
PW 4 – Exh.29	Aartiben
PW 5 – Exh.30	Sumandevi Sunil Jayshaval
PW 6 – Exh.32	Ashadevi Shravanbhai Shah
PW 7 – Exh.33	Sunilbhai Babubhai
PW 8 – Exh.35	Roshankumar Vinodbhai Shah
PW 9 – Exh.37	Satishbhai Babubhai
PW 10 – Exh.49	Deepak Dinanath Singh
PW 11 – Exh.55	Manohar Krishna Mohan Choudhari
PW 12 – Exh.57	Ravi Hiralal
PW 13 – Exh.61	Durgesh Sivanand
PW 14 – Exh.62	Pushpadevi Girja
PW 15 – Exh.64	Sardarsingh Jivabhai
PW 16 – Exh.81	Bharatbhai Kanjibhai
PW 17 – Exh.85	Umashankar Acchelal Vishvakarma

Documentary evidence :

Exh.65	Report of crime
Exh.28	Complaint
Exh.20	Bonafide
Exh.34	Inquest Panchnama
Exh.38	Panchnama of place of offence
Exh.39	Panchnama of clothes of deceased
Exh.50	Panchnama of clothes of accused
Exh.56	Panchnama of statement under Section 27
Exh.58	Panchnama of statement under Section 27
Exh.23	Accused medical certificate
Exh.14	PM Note
Exh.15	Certificate
Exh.66	Map of place of offence
Exh.67	Report of place
Exh.68	Report of place
Exh.69	Forwarding notes
Exh.70	Forwarding notes
Exh.71	Forwarding notes
Exh.72	FSL valsad letter
Exh.73	Weapon report
Exh.74	FSL surat letter
Exh.75	Biological report
Exh.76	Serological report
Exh.77	FSL surat letter
Exh.78	DNA report
Exh.79	FSL surat letter
Exh.80	DNA report

7. After closure of the prosecution evidence, the statement of the appellant – accused under Section 313 of the Cr.P.C., was recorded, to which, he stated that, he was caught by the police at his home in the night hours and was pressurized to confess his guilt and was taken on the railway track and was threatened to confess the guilt. He has further stated that, he did not visited the place of incident, nor he had went into the room, where the incident occurred.

Trial Court Finding:

8. After hearing the parties and upon appreciation of the material evidence, the appellant accused held guilty for the offence of murder and rape and awarded death sentence and while recording the sentence, the trial Court observed that, the crime committed by the accused is heinous crime and the manner in which, the deceased child was sexually abused and killed, the case would fall in the category of rarest of rare case. The trial Court mainly relied upon the circumstances viz. (I) the extrajudicial confession made by the accused before the witnesses, (II) the testimony of witness Pushpadevi Pathak (PW-14), who had seen the accused when he was entering into the room of the child, (III) the evidence of Forensic Science including DNA analysis report; (IV) the locket which was found at the place of incident and it belongs to the appellant accused (V) and the conduct of the accused.

Evidence adduced by the prosecution :

9. We would like to have a cursorary look at the evidence adduced by the prosecution through its witnesses :

(1) **Dr. Pikesh Maheshbhai Modi (PW-1)**: This witness being Assistant Professor, Forensic Medicine, New Civil Hospital, Surat, conducted the Postmortem on the body of the deceased child on 08.02.2020. The witness noticed the following external injuries and internal injuries on the body of the deceased :

External injuries :

(15) Following injuries present in vulva part

1. 0.5cm contusion present on right side of vestibule just below clitoris

2. 0.8x0.3cm contusion present on left side of vestibule just below clitoris

3. around the urethral opening 0.5cm contusion present, margins of the urethral opening has redness

4. Just beneath the lobia-minosa at 1'o clock and 2'o clock position contusion of size 1x0.3cm present

5. Contusion of size 1x0.5cm present in Fossa navicularis and Fourchette at 6'o clock and 7'o clock position

6. Hymen is contused, redden and margins of hymen show redness

7. Contusion of size 1x0.3cm present at labia minora from 10'o clock position to 8'o clock position

Following injuries are present at anal region:

1. Tear of size 1cm in length subcutaneous deep, 4 in number extended upto internal splinter of anus present at 6'o clock, 7'o clock, 9'o clock and 12'o clock position, red labeled blood present at margins of the tears

2. Mucocutaneous junction shows abrasion circumferently and redness

3. Mucosa of the anus and rectum are redden stained with red coloured blood, dry blood stains present around the perianal part.

Note: Contusions mentioned in the Vulva part are red in colour. Abrasin mentioned in Anal part are bright red in colour.

(16) Not applicable

(17) External Injuries

1. Abraded contusion of size 3x1.5cm, horizontally rail-road type, present on front part of right shoulder with a gap of 0.5cm. Its inner end is 8cm right to midline and in the line of stern notch, bright red in colour

2. Contusion of size 6x5.5cm horizontally present on front and mid

part of lower neck below thyroid cartilage, 1cm above sternal notch and 10cm below chin

3. Abraded contusion of size 5.5x0.5cm, 'U' shaped, present on right side of neck, overlapping injury no.2 its lower border is 1.5cm above sternal notch and its inner border is 1.3cm right to midline

4. Abraded contusion of size 2x1.2cm, horizontally present on front of mid neck, overlapping injury no.2 it is 3c above sternal notch

5. Abraded contusion of size 3.5x1cm, horizontally present right side of front neck, overlapping injury no.2, its inner end is 1cm right to midline and 5.5cm above sternal notch

6. Ligature mark in the form of pressure abrasion pale yellowish brown in colour of size 8x1cm, present on right side of neck, starting from midline at the level of thyroid cartilage, going obiliquelly upward and backward towards right side of back of neck, its upper margins is 7.5cm below chin in front of neck, 3cm and 4cm below right angle of mandible and right mastoid process respectively.

7. Abrasion of size 2x1.5cm, pale yellowish brown colour, present on right side of neck between injury no.5 and 6.

8. Linear abrasion of size 1x0.4cm, scratched type, coma shaped, horizontally present on front of left side of neck, 0.8cm left to midline and 9.8cm below chin surrounding to its contusion present.

9. Linear abrasion of size 0.4x0.3 cm and 0.4x0.2cm, coma shaped present in area of 1x1cm at right front of neck, 3cm right to midline and 9cm below chin.

10. Linear abrasion of size 0.5x0.2cm and 0.5x0.1cm, coma shaped present in area of 2x1 cm at right side of neck, 1cm right to midline and 5cm blow chin.

11. Abrasion of size 4x1cm obliquely present on front and upper part of right side of neck, its lower inner end is 4cm below chin and just right

to midline, and show pale yellowish brown in colour.

12. Abrasion of size of 0.5x0.4cm, 0.3x0.3cm and 0.8x0.5cm round in shape present in area of 3x0.5cm at right upper part of neck at right ramus of mandible bone, it is 2cm right to midline and show pale yellowish brown colour.

13. Abrasion of size 0.8x0.5cm obliquely present on front upper part of left side neck, its lower inner end is 2.5cm below chin and 1.5cm left to midline, show pale yellowish in nature

14. Abrasion of size 2x0.5cm, obliquely present on front upper part of left side of neck, its lower inner end is 3cm below chin and 2cm left to midline show pale yellowish in nature.

15. Abrasion contusion of size 2x0.8cm, oval in shape obliquely present on front and left side of neck, its lower inner end is 7cm below chin and 2cm left to midline

16. Abraded contusion of size 4x0.9cm obliquely present on front and left side of neck, its lower inner end is 9.5cm below to chin and 1.3cm left to midline

17. Linear abrasion of size 0.3x0.1cm and 0.6x0.1cm coma shaped, present in area of 1x1cm size, just left to midline and 6.5cm below chin

18. Ligatuse mark in the form of pressure abrasion of size 7.5x1cm, pale yellowish brown in colour, present on front and outer part of left side of neck, starting from 4cm left to midline, above the thyroid cartilage, going obliquely upward and backward toward back side of neck. Its upper margins is 2.5cm below left angle of mandible and 3.5cm below to left mastoid process between two ligature marks, injury no.6 and injury no.18 is 7.5cm on front side and 8cm on back side of neck.

19. Abrasion of size 4x1.5cm horizontally present on back and left side of neck, 1.5cm left to midline and 8.5cm below occipital protuberance

20. Contusion of size 2x1cm, horizontally present on lower gum, below incisor teeth, strained frenulum.

21. Abrasion of size 0.5cm in diameter round in shape present on mid forehead at glabella

Note:

A. Abrasion mentioned in serial no.17 injury no. - 8,9,10,17,19,21 are bright red in colour.

B. Abraded contusion mentioned in serial no.17 injury no.- 1,3,4,5,15,16 are red in colour.

C. Contusion mentioned in serial no.17 injury no.-2,20 are red in colour

D. Injuries mentioned in serial no.17 injury no.-6,7,11,12,13,14,18 are post-mortem in nature

E. Subcutaneous tissues of underlying skin layers beneath the injury no.-6,7,11,12,13,14,18 did not show any vital reaction on small hemorrhage.

(18)(A)

Yes injuries mentioned in serial no.15, serial no.17, serial no. 19(1), 19(A) are antemortem in nature, fresh prior to death, except post mortem injuries. Injuries which are postmortem in nature are mentioned above.

Internal Injuries :

(19)

1. Contusion of size 2x1cm, present at parieto occipital parts of scalp tissues in midline, 5cm above occipital protuberance

2. No fractures found

3. All covering of brains are intact. Brain is congested, CSF is clear.

(19)(A) Neck

On internal examination of neck, subcutaneous tissue beneath the injury no.- 2,3,4,5,15,16 mentioned in serial no.17 show contusion of soft tissues, neck muscle. On examination thyroid gland, stenocleidomastoid muscle, thyroid, sternothyroid muscle around wind pipe, soft tissues around bone, epiglottis at base of tongue shows extravasation of blood, red in colour. Soft tissues, neck tissues beneath the injury no.- 6,7,11,12,13,14,18 did not show any ecchymoses or extravasation blood. Mucosa of epiglottis and trachea congested and shows petechial hemorrhage.

(20)

1. Mucosa congested, rest nothing particular. Injuries are mentioned in serial no.19(A).

2. Both lungs are oedematous and congested, interlobular surfaces of both lungs show petechial hemorrhage. On cut section blood mixed froth comes out

3. All four chambers of heart contains fluid blood dark-red in colour.

The witness PW-1, after postmortem, obtained the necessary samples like blood, vaginal swabs, nails, smears, viscera, etc.

According to opinion of the doctor PW-1, the cause of death was asphyxia on account of manual strangulation (throttling) and there were evidences of suggestive of sexual assault. The witness has produced the PM report at Exh. 14.

In the cross-examination, the witness PW-1 has agreed with the suggestion that, the manner in which the deceased received injuries on her private part, the possibility of the sustaining of the

injuries on the body of the accused cannot be rules out.

(2) **Dr. Devangini Patel (PW-2)**: This witness had examined accused Pradip Shah on 09.02.2020 and 19.02.2020. On 09.02.2020, the accused was referred for medical examination. The witness being a Medical Officer, posted at Government Hospital, Vapi, after examination of the accused, opined the competency of the accused for intercourse and obtained a necessary samples like semen, heir, blood group and saliava for forensic science analysis. The accused was second time referred to the witness on 19.02.2020 for DNA profile. The witness in his chief-examination stated that for DNA analysis, she had filled up necessary forms and took the necessary blood samples from the body of the accused and sent the samples to the FSL Surat.

(3) **Gaurishankar Rajkumar Shah (PW**-3) **&Aartiben Gaurishankar Shah (PW-4)**: Both this witnesses are mother and father of the deceased child. So far main incident of murder and rape is concerned, they are not the witness of the incident and later on, they came to know that the accused was the author of the crime.

(4) **Sumandevi Jaiswal (PW:5):** This witness being a neighbour and occupant of Room No.5 has deposed about the incident and she has also admitted the contents of her statement recorded under Section 164 of the Cr.P.C. (Exh.31). However, facts remain that she was not the witness of the incident. She deposed

against the accused to the extent that on the day of incident in noon hours, she saw the accused was roaming in the corridor of the colony.

(5) **Ashadevi Shravnbhai Shah (PW:6)**: This witness is the next door of the deceased child and was occupant of Room No.6. She is the relative of the accused and the accused was used to come to her house for lunch and dinner for which she was charging monthly Rs.2000/-. She has stated in her chief examination that on 06.02.2020, the accused Pradeep came to her house and was asking to refund of Rs.800/-. She has further stated that after deducting Rs.300/-, she had paid Rs.500/- to the accused. On the aspect of incident, she has stated that on 07.02.2020, she had called the deceased by shouting as she intends to give utensil but there was no response from her. She has further stated that thereafter, she had pushed the door and when she entered into room, she found that the deceased was hanging in the ceiling fan and T.V. was on and volume in high speed. She has further stated that she had informed the occupier of Room No.8 and thereafter, Sunilbhai, who is the owner of the rooms, came at the place. She has further stated that the accused Pradeep confessed before her that the deceased was strangulated by him and he had done everything. However, on the material aspect, the witness failed to clarify the incident part, as a result, she had been declared hostile. In the cross examination, after declaring her hostile, she admitted that at the time of incident, she had seen the accused in the corridor of the colony. She has further admitted

in the cross examination that when she was called at the police station, the accused confessed his guilt before her. She has also identified the locket from the seized articles and clarified that the accused was used to wear it.

(6) **Sunil Babubhai Patel (PW:7):** This witness is the owner of the colony which he has constructed in one plus two floor and the same is situated in the Tanki Faliya at Vapi. The witness has admitted that Room No.7 was being given on rent to father of the child. The witness has further stated that on 07.02.2020, he received an information for the occupants of the colony that the deceased child was found hanging on the ceiling fan of Room No.7. He is also inquest witness of panchnama of incident at Exh.34.

(7) **Roshankumar Shah (PW:8)**: This witness is the brother of the deceased child and was not having any personal knowledge about the incident and involvement of the accused.

(8) **Satish Patel (PW:9)**: This witness was cited as a panch witness of the recovery of seized articles like locket, one thread, allegedly recovered from the place of the incident.

(9) **Manohar Chaudhary (PW:11):** This witness was cited as panch witness of panchnama at Exh.56, whereby the accused on his disclosure statement, voluntarily show the place of incident.

(10) **Pushpadevi Pathak (PW:14)**: This witness being a occupant of Room No.1 was neighbour of the deceased child. The witness in

her chief examination stated that on the day of incident, she was sitting in the corridor of the colony and doing embroidery work and at that time, the deceased child came from her school and after formal conversation with her, she proceeded towards Room No.7 and the accused Pradeep was in colony and had followed the deceased child and thereafter, she did not have noticed the presence of the accused in the corridor of the colony. The witness has further stated that the next door neighbour of the child Ms.Aartidevi and informed everyone about the incident. She has further stated that her statement was recorded twice i.e. one by police and second one by Magistrate (Exh.63). In the cross examination, she has stated that in her police statement, she did not have disclosed the facts that the accused Pradeep had followed the deceased.

(11) **Sardarsingh Jivabhai Bariya (PW:15)**: This witness had investigated the case and filed the chargesheet against the accused. The witness at the relevant time, was posted as Police Inspector with Tapi Town Police Station. In the chief examination, he stated that on 07.02.2020, he recorded the FIR of the father of the child and after registration of the offence, he was handed over the investigation of the case. The witness has stated that during the course of investigation, on the basis of inquest, the dead body of the deceased was sent for post-morterm and after the opinion of the P.M. doctor, he made an addition of the offences of rape, etc. The I.O. has further stated that as a part of investigation, he recorded the statement of the

witnesses and referred the witnesses to the Magistrate concerned for recording their statement under Section 164 of the Cr.P.C. The I.O. has further stated that in the presence of FSL officer, he drew the panchnama of scene of occurrence and seized and recovered the necessary things for forensic analysis like locket and related things. So far as arrest of the accused is concerned, the I.O. has stated that during the course of investigation, it revealed that the accused was the author of the crime and after preliminary investigation of him, he was arrested and sent for medical examination and also seized his cloths. The I.O. has further stated that on the basis of voluntary disclosure statement of the accused, the panchnama of scene of occurrence as pointed out by the accused being drawn and another panchnama of pointing out the whereabouts of threads and etc. being drawn in the presence of panchas. The I.O. in his chief examination has further stated that the accused was referred to the Government Medical Hospital for DNA profiling and after collecting the necessary samples, the same were deposited with the FSL Surat and after receiving the necessary report from the FSL, the chargesheet against the accused came to be filed before the Jurisdictional Magistrate.

In the cross examination, the I.O. has admitted that there was suspicion in his mind about the involvement of the accused because of his presence in the corridor of the colony. The I.O. has also admitted that the doctor in the form of heart can easily available in the market.

Submissions:

10. We have heard learned counsel Mr.Kalpesh Pandit appearing for and on behalf of the accused appellant and Mr.Ronak Raval, learned Additional Public Prosecutor for the respondent – State.

11. Mr.Kalpesh Pandit, learned counsel, while assailing the impugned judgment of conviction and order of death sentence, has urged the following submissions:

(A) In the present case, the prosecution has failed to prove the charge beyond reasonable doubt, as it is fundamental principles of criminal jurisprudence that the accused is presumed to be innocent till he is proved to be guilty.

(B) In the facts of the present case, the accused came to be arrested on the basis of suspicion as there is nothing on record to prove that the witnesses have seen the accused entering into the room no.7 where the child was alone seeing the T.V. after completing her lunch. The accused was used to come to the house of witness Aartidevi for taking lunch and dinner and he was known to everyone and therefore, his presence as stated by witnesses believed as it is, would not be a ground to infer that, he was the author of the crime. Thus, the appellant had been implicated in the offence on the basis of suspicion and it is settled position of law that doubt cannot be replaced of proof and suspicion howsoever grave, it may be, is not substitute of proof and therefore, the burden lies on the prosecution to prove the allegations beyond

reasonable doubt and in the facts of the present case, the prosecution failed to prove the charge beyond reasonable doubt.

(C) It is the case of the prosecution that the accused made extrajudicial confession of his guilt before the witness Ashadevi (PW:6). On this aspect, it was submitted that the evidence of extrajudicial confession is inherently weak evidence and before acting upon it, strong corroboration is required and the confession should be voluntarily, true and credible to infer the involvement of the accused. In the present case, the witness Ashadevi has not stated in clear terms that the accused has confessed his guilt in an unequal terms and the words spoken by the witness is not clear conveying that the accused is the perpetrator of the crime. Thus, the evidence of Ashadevi does not inspire confidence on the aspect of extrajudicial confession of the accused.

(D) That the deceased was alone at the Room No.7 which situated in the residential area of City Vapi and there were 10 to 15 rooms in the chawl and the area of the chawl was thickly populated and if it is so, then it could be highly impossible for the accused remained with the child for about two hours and that too, in the knowledge of the witnesses who had witnessed that the accused was roaming in the corridor of the colony and was following the child. Thus, the presence of the accused in the room is not established in clear terms.

(E) The accused was referred to Government Hospital for medical examination and after 10 days of the incident i.e. 19.02.2020, he was again referred to Government Hospital for DNA Profiling. The report

of the DNA profiling being produced in the evidence of I.O. and has not been proved by examining the scientific officer and therefore, the DNA profiling report cannot be admitted in evidence *ipso facto* by virtue of Section 293 Cr.P.C. and it is necessary for the prosecution to prove that the techniques of DNA profiling were reliably applied by the experts **(Rahul Vs. State of Delhi, Ministry of Home Affairs, 2023 (1) SCC 83)**.

(F) The prosecution case rests on the circumstantial evidence and inference of guilt can only be justified when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person and therefore, the incriminating circumstances have not been cogently and firmly established and the chain of incriminating circumstances is not complete to arrive at a conclusion that within all human probabilities, the crime was committed by the accused and non-else.

(G) The defence of the accused that he was picked up from his residence by the police and took him to the railway track and threatened him to confess the guilt, which seems to be probable and acceptable.

12. In such circumstances, as referred to above, Mr.Kalpesh Pandit, learned counsel prayed that there being merits in this appeal and the same may be allowed and further requested that the order of conviction and death penalty be set aside and the appellant may be acquitted of the charges of murder and rape.

13. Alternatively, it was submitted that in any event, if this Court after appreciation of the evidence would convince that the appellant accused is the author of the crime, then the death sentence as awarded by taking into account the grave nature of the crime without considering the possibility of the reformation is not sustainable in eye of law as no special reasons being assigned by the Trial Court and admittedly, the accused is not a harden criminal and menace to the society. The accused is aged of 20 years and possibility of his information cannot be ruled out, and therefore, case is not one of the rarest of rare case.

14. Mr.Ronak Raval, learned Additional Public Prosecutor for the respondent – State, vehemently opposed the appeal and contended that the Trial Court has not committed any error in holding the accused appellant guilty of the offence. That the identity of the accused is not in dispute and on the day of incident, he had not gone to the factory where he was working and the witnesses are consistent on the aspect that on the day of incident, he was roaming of corridor of the colony and more particularly, witness Pushpadevi Pathak (PW:14) has stated that the accused was following the deceased child and thereafter, he was disappeared for some time. The evidence of Pushpadevi being corroborated by her own 164 statement Exh.63. The witness Ashadevi (PW:6) in clear terms has stated that the accused Pradeep confessed his guilt before her and there was no coercion or other factors for confessing the guilt by the accused and therefore, the extrajudicial confession being made voluntarily and there was no reason for Ashadevi to depose falsely against the accused. Thus, in the noon

hours, when the deceased child was alone, the accused by following her entered into the room and when she resisted, the accused strangulated her by throttling and then, committed a rape upon her and the said facts being corroborated by the medical evidence as so many injures were found on the private parts of the deceased and considering the age of the deceased, the theory of suicide cannot be accepted and the only inference would arise that in order to screen the offence, the accused hanged the deceased with the help of scarf so that the theory of suicide could be believed. In such circumstances, the presence of the accused at the place of the incident, and subsequently, confessing his guilty before the witness would establish and prove that he was the author of the crime as the FSL report would further corroborate the story of the prosecution on the aspect of involvement of the accused in the crime.

15. In the above learned Additional Public Prosecutor prayed that there being no merits in the appeal, and the same may be dismissed.

16. On the alternative submission, the learned Additional Public Prosecutor argued that this is a fit case imposing of capital punishment and the child was defenceless and the manner in which the crime was committed, the imposition of any other punishment would be completely inadequate and would not meet end of justice and therefore, no interference warranted by this Court in the capital punishment.

17. We have heard learned counsel for both the parties and perused the case records. In our opinion, the following facts are not in dispute :

(i) The identity of the appellant accused is not in dispute, as the complainant and the accused belonged to same community;

(ii) The incident of murder and rape was occurred at the room no. 7, Gitanagar, Tanki Falia, Vapi and the colony was known as 'Sunilbhai's chawl'.

(iii) On 07.02.2020, the parents of deceased child aged about 9 years and her brother went to their work place and their routine time was 8=00 morning to 7=00 evening. The deceased child was studying in Mother Teresa School at Vapi and the school time was 7=00 morning to 2=00 noon and as per their routine practice, the deceased child used to take her lunch after returning from the school and till evening, she stayed in the room alone and admittedly on the date of incident, in the noon hours i.e. 2=00 to 4=00 pm she was alone at home and watching TV.

(iv) On 07.02.2020, the neighbour, occupier of room no. 6 – Aashadevi PW-6, had noticed the deceased child in a hanging position with the ceiling fan of the room. She informed the owner of the chawl and in turn, the parents and brother being informed by the PW-7 Sunil Patel. The dead body was taken down and upon arrival of the police, the father PW-3 Gaurishankar Shah lodged an FIR for the act of rape and murder against the unknown person.

(v) The appellant accused Pradip was used to come in the chawl for lunch and dinner at this aunt's house (Aashadevi PW:6).

(vi) The deceased had sustained injuries on her private parts and the

cause of death was asphyxia on account of manual strangulation (throttling) and she was sexually abused.

18. In the aforesaid admitted facts and considering the medical evidence, it is proved and established that, the death of deceased was homicidal and she was sexually abused.

19. In order to prove the charge, the prosecution has mainly relied on the following incriminating circumstances;

(i) extrajudicial confession of the accused before the witness Aashadevi PW-6,

(ii) theory of last scene together, as the accused had followed the deceased when she was about to enter into the room,

(iii) locket of the accused found at the place of occurrence,

(iv) forensic evidence like blood stain of the accused on the half pant of the deceased and presence of the semen on the cloths.

20. Having regard to the evidence on record, the only question that arises for our consideration is as to whether the circumstances as referred forms a chain of events pointing only to the guilt of the accused and none else?

21. Before we proceed with the analysis of the evidence and contentions of the parties, it is necessary to briefly examined the law relating to circumstantial evidence. It is settled position of law that, the circumstantial evidence is not direct to the point in issue but consists of

evidence of other facts which are closely associated with the facts in issue that taken together, they formed a chain of circumstances from which, the existence of the principal fact can be legally inferred or presumed, the chain must be complete and each fact forming the part of chain must be proved. The circumstances from which, the conclusion of guilt is to be drawn should be in the first instance fully established and thereafter, circumstances taken cumulatively should form a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must further show that in all probabilities the offence must have been committed by the accused (**Sharad Birdhichand Sarda Vs. State of Maharashtra , AIR 1984 SC 1622**).

22. In the present case, on 07.02.2020, the alleged incident of murder and rape was being occurred in the room no. 7 of the common chawl situated in the area of Gitanagar, Vapi and the age of the victim was 9 years and she was studying in 4th standard and at relevant time, no one present at the home and taking the disadvantage of the situation, she was strangulated to death and then she was sexually abused and to believe the incident as suicide, she was hang with the scarf on the ceiling fan. In such circumstances, there is no dispute that the death of the deceased was homicidal in nature and having regard to the injuries referred by the PM doctor, it is proved and established that deceased child was subjected to rape. In that context, the issue is whether the prosecution able to prove the charge of murder and rape against the appellant accused ?

Analysis & findings:

23. We have carefully read the evidence of witnesses. On perusal of the testimony of the witnesses, it is proved and established that on 07.02.2020, the appellant accused did not attend his labour work and remained present in the area of place of incident. Thus, he was very much present during the noon hours i.e. from 02:00 to 04:00 hours, during which, the alleged offence had occurred, as the witnesses have categorically stated the presence of the accused at the place. The witness PW-14 Pushpadevi Pathak, being a neighbour, had made conversation with the victim on the day of incident, when she came returned from the school and at that time, when the victim on the way to her home i.e. room no. 7, the accused had followed her and then he disappeared. The evidence of the witness PW-14 does inspire confidence and her version seems to be natural and nothing being brought on record to substantiate that she was telling lie or tried to falsely implicate the accused because of shocking incident. The statement of the witness Pushpaben was being recorded by the Judicial Magistrate of Vapi Court and same is produced at Exh. 63. There is no contradiction in the police statement as well as 164 statement with respect to the conduct of the accused – appellant and his entering into the room of the deceased. In both the statements, she had stated about the true facts of the incident and conduct of the accused and in the deposition, the version is same, as disclosed before the police as well as the Magistrate and therefore, on 07.02.2020, the accused being a known person of the chawl, had followed the victim and considering his conduct of disappearance for two hours would be reason to infer

that, he was in the room of the victim. It is relevant to note that, when the incident was reported to the parents and dead body of the victim taken down, the accused was present in the chawl and had accompanied the mother of the deceased PW-4 Artidevi to the hospital. Thus, therefore the incriminating circumstances as referred, is conclusively proved and further established that, the accused appellant at the time of incident, was remained present in the place of occurrence and after following the deceased, he entered into the room.

24. The another circumstances relied is the extrajudicial confession of the accused before PW-6 Aashadevi. The witness is related to the accused as well as complainant PW-3 and as per her evidence, on 06.02.2020 i.e. day before the incident, the accused came to her and demanded the due amount of Rs.300/- and after deducting Rs.300/- she paid Rs.500/- to the accused. On the day of incident, the accused was found present at the place and according to say of the witness, in the noon hours, he was roaming near the house of the deceased and considering her relationship with the accused, the accused confessed before her that, **"he killed the deceased by throttling and everything is being done by him."** It is in the context of the evidence of the witness, we are required to examine the question as to whether the accused had voluntarily made confession and whether his confession is true or being relied upon as evidence to implicate the accused. Before we examine the legality and admissibility of the confession, we take the notice of the fact that the witness Aashadevi on the aspect of material fact, did not have supported the case of the prosecution and she was declared hostile. However, in the chief-examination, the

witness has deposed against the accused about his confession of his guilt as referred above and after declaring her hostile, she stick to her version about the extrajudicial confession of the accused, and therefore, though the witness declared hostile, her entire evidence cannot be treated as effaced from the record and her testimony to the extent found reliable can be acted upon (**Bhagwansinh Vs. State of Haryana 1976 (1) SCC 389**). In such circumstances, the evidence of PW-6 on the aspect of extrajudicial confession of the accused before her cannot be rejected, subject to the taste of its admissibility and voluntariness of the confession.

25. We may profitably refer the law relating to extrajudicial confession as in the present case, the extrajudicial confession made by the accused before PW-6. It is settled position of law that, an extrajudicial confession, if voluntarily and true, in a fit state of mind, can be relied upon by the Court and the value of the evidence depends upon the reliability of the evidence to whom it is made and conviction can be based thereon, if the evidence about the confession comes from a witness, who appears to be unbias, not even remotely inimical to the accused. It is also required to be proved that the words spoken by the witness should be clear, unambiguous and unmistakenly convey that, the accused is the perpetrator of the crime and ordinarily, the confession should be corroborated by some other material and this requirement of corroboration is a matter of prudence and not an invariable rule of law and at the same time, it is bear in mind that, the extrajudicial confession is a weak piece of evidence and wherever the court upon due appreciation of the entire evidence of the prosecution

intends to base a conviction on the extrajudicial confession, it must be ensured that same inspires confidence and is corroborated by other evidence.

26. In light of the aforesaid principles of law and applying the same to the facts of present case, we have carefully examined the evidence of PW-6 Aashadevi and found that, her evidence on the aspect of extrajudicial confession clearly convey the words spoken by the accused – appellant. The witness is related to the accused and despite of this, she does not deviate from her stand about the facts of extrajudicial confession made by the accused. Thus, the evidence of PW-6 does inspire confidence and truthful and there is no reason or motive for her to depose against the accused with intention to falsely involved him in the crime. The presence of the accused as referred by the witness PW-6 is being corroborated by the other witnesses and during the time of offence, he was very much in the area of the offence and therefore, the confession of guilt before the witness seems to be natural and in a free atmosphere, the accused confessed before the witness about the killing of deceased and committing rape upon her. Thus, the evidence of extrajudicial confession is being made voluntarily and made in a free state of mind by the accused and there was no ill-will or bias on the part of the witness against the accused and thus, the piece of evidence in the form of extrajudicial confession does inspire confidence and is corroborated by the other prosecution evidence and we do not find any material discrepancies or inherent probabilities in the extrajudicial confession. In such circumstances, it is proved and established that the extrajudicial confession made before

PW-6 is true, voluntary, truthful and has support by other prosecution evidence.

27. The next circumstances relied upon by the prosecution is the locket (pendent) of the accused allegedly found in the room where the offence was committed. The witnesses being a close relatives are consistent on this aspect that, the accused was used to wear a locket (in the form of double heart) and admittedly same was found at the place of occurrence. In such circumstances, the another incriminating piece of evidence is also pointing towards the involvement of the accused in the crime.

28. The next circumstances is the forensic science analysis report which positively signaling the involvement of the accused and the evidence of forensic analysis being a corroborative piece of evidence can be admitted and read against the accused. In the facts of the present case, the samples for forensic chemical analysis being collected and deposited before the FSL, Surat Laboratory. The half pent of the deceased child was having blood group – A which is of accused appellant and semen of the same group being found in the vaginal swab. So far as DNA report is concerned, it has been directly referred in the evidence of I.O. and accordingly, it was admitted in the evidence. In our opinion, DNA profiling report cannot be considered and admitted in the evidence because the prosecution has not examined the scientific officer to prove the techniques of DNA profiling. In the case of **Rahul Vs. State of Delhi (2023 (1) SCC 83)**, the Supreme Court, while dealing with the identical issue, has held that the DNA

profiling report cannot be admitted in evidence *ipso facto* by virtue of Section 293 of Cr.P.C. and it is necessary for the prosecution to prove that the techniques of DNA profiling were reliably applied by the expert. In the present case, scientific officer who had prepared and conducted the case has not been examined and therefore, the DNA report cannot be admitted and read against the accused. However, we must clarify that the general reports of the forensic chemical analysis is being taken into consideration and as such, even if we exclude the DNA profiling report, the general report of the Surat Forensic Laboratory can be read in evidence.

29. For the reasons recorded hereinabove, and having regard to the evidence, and conduct of the accused, the incriminating circumstances, as referred in the preceding para of this judgment stands firmly established and chain of events conclusively as referred above, which give rise to inference that the accused was the author of the crime and none-else. Thus, in our opinion, the prosecution succeeds in proving the charge against the appellant accused that on 07.02.2020, at the Room No.7 of common chawl, situated at Gitanagar, Vapi, the deceased child was killed by manual strangulation (throttling) and then, she was sexually abused and her dead body with the help of scarf was being hanged in the ceiling fan, so as to demonstrate the act of suicide.

30. We do not agree with the submissions that the accused has been implicated on the basis of suspicion and findings of conviction are based on surmises and conjectures, as the circumstances relied by the

prosecution are conclusively proved and established and taking it cumulatively formed a chain so complete that there is no escape from the conclusion that within all human probabilities, the crime has been committed by the accused and none-else and therefore, the motive clearly shows that the accused committed a murder and rape to satisfy his lust and in order to screen his offence, at the relevant time, he increased the voice the T.V. so that no one could notice the scream of the deceased and thereafter, he hanged the deceased with the support of scarf. So, we do not have any slightest doubt in our mind that the accused being implicated in the crime on the basis of suspicion. At this point, it may be also relevant to mention an observation made by **Lord Denning, J. in Miller Vs. Miller of Pension (1947) 2 ALL ER 372, 373H**;

> *"That degree is well settled. It need not certainty but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the Court of justice…."*

Thus, the requirement of criminal trial is not to prove the case beyond all doubt but beyond reasonable doubt and such doubt cannot be imaginary, fanciful, trivial or merely a possible doubt, but a fair doubt based on reasons and common sense **(Ramakant Rai Vs. Madan Rai (2003) 12 SCC 395.** In such circumstances, in the present case, the prosecution succeeds in proving the charge beyond reasonable doubt and there is no doubt about it.

31. We may now deal with the alternative prayer with regard to capital punishment awarded by the Trial Court.

32. The Trial Court vide its judgment dated 30.01.2023 convicted the appellant accused for the murder and rape of the deceased child aged about 9 years under Sections 302, 201 and 376(A), (B) of the Indian Penal Code and Sections 4 and 6 of the POCSO Act. On the issue of sentence, the Trial Court on the same day i.e. 30.01.2023, imposed the sentence of capital punishment. Consequently, the reference in terms of Section 366 for confirmation of death sentence being forwarded to this High Court.

33. Mr.Kalpesh Pandit, learned counsel appearing for the appellant accused has submitted that the Trial Court has not recorded the special reasons for awarding capital punishment for satisfying the criteria that life sentence is rule and death is exception and as such there is no discussion on the aspect whether the accused would be menace or there is no chances of his reformation and imposing life sentence would be completely inadequate and would not met end of justice and therefore, the capital punishment is not sustainable in eye of law. In support of the contentions, heavy reliance being placed on the case of Supreme Court delivered in the case of **Sundar @ Sundarrajan Vs. State of Inspector of Police (2023 LiveLaw Supreme Court 217)** to contend that the rarest of rare doctrine requires that the death sentence not be imposed only by taking into account the grave nature of the crime but only if there is no possibility of reformation of the accused.

34. On the other hand, learned Additional Public Prosecutor for the State has submitted that the offence had been of extreme depravity,

which shocks the conscience, more particularly looking to the age of the victim and at the relevant time, she was helpless and the manner in which she was killed and abused sexually demonstrates that these mitigating factors would prevail over the factors pertaining to the accused and therefore, the plea of non-sustainability of the capital punishment has no merits.

35. In the facts of the present case, the Trial Court after pronouncing the judgment of conviction, after affording an opportunity of hearing, on the same day, awarded imposed a capital punishment. The law is settled on this aspect. The Trial Court after pronouncing the judgment of conviction should have adjourned the case for further hearing on the sentence of capital punishment because under Sections 235(2) of Cr.P.C., it is mandatory for the Court to hear the accused and provide sufficient opportunity to him for furnishing the necessary information on mitigating circumstances. It is, thus, clear that the learned Trial Court has not given adequate opportunity to the accused to furnish the mitigating circumstances in his favour neither it tried to collect the same, nor discussed what the mitigating circumstances are available. In this connection, we may profitably refer the case of **Manoj Vs. State of Madhya Pradesh (2023 (2) SCC 353)**, wherein the Supreme Court gave emphasis on practical guidelines to collect mitigating circumstances, which are as follows:

> *"248. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation*

in a majority of cases reaching the appellate stage.

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

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

> *(a) Age;*
>
> *(b) Early family background (siblings, protection of parents, any history of violence or neglect);*
>
> *(c) Present family background (surviving family members, whether married, has children, etc.);*
>
> *(d) Type and level of education;*
>
> *(e) Socio-economic background (including conditions of poverty or deprivation, if any);*
>
> *(f) Criminal antecedents (details of offence and whether*

convicted, sentence served, if any);

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

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

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

251. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e. Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial Court's conviction, or High Court's confirmation, as the case may be, a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for a more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformative progress, and reveal post-conviction mental illness, if any.

252. It is pertinent to point out that this Court in Anil -Vs.- State of Maharashtra : (2014) 4 Supreme Court Cases 69 has in fact directed criminal courts to call for additional material:

(SCC p. 86, para 33)

> *"33….Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the Court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like section 302 I.P.C., after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case."*
>
> *We hereby fully endorse and direct that this should be implemented uniformly, as further elaborated above, for conviction of offences that carry the possibility of death sentence."*

36. Thus, the law requires the court to record special reasons for awarding such sentence. In the case of **Ramnaresh & ors. Vs. State of Chhatisgarh (2012 AIR SC 1917)**, after referring the earlier judgments on the death sentence including **Bachchansingh vs. State of Punjab (1980 2 SC 684) and Machhisingh vs. State of Punjab (1983 3 SCC 470),** held that, before imposing death sentence, the trial court has to consider matters like nature of offence, how and under what circumstances it was committed, the extent of brutality with which the offence was committed, the motive for the offence, the possibility of the convict being reformed or rehabilitated, adequacy of

the sentence of life imprisonment and other attendant circumstances. The Supreme Court further clarified that, the factors referred hereinabove cannot be similar or identical in any two given cases and therefore, it has been laid down that, it is imperative for the court to examine each case on its own facts, in light of the enunciated principles and then, arrive at final conclusion whether the case in hand is one of the rarest of rare cases and imposition of death penalty alone shall serve the ends of justice. In order to examine the aforesaid aspect in some greater depth and with objectivity, the Supreme Court reiterated the various guiding factors by referring the various judgments. Paras 60 to 71 which reads thus:

“60. In State of Maharashtra V/s. Goraksha Ambaji Adsul [(2011) 7 SCC 437], wherein this Court discussed the law in some detail and enunciated the principles as follows :

"30. The principles governing the sentencing policy in our criminal jurisprudence have more or less been consistent, right from the pronouncement of the Constitution Bench judgment of this Court in <u>Bachan Singh V/s. State of Punjab</u>. Awarding punishment is certainly an onerous function in the dispensation of criminal justice. The court is expected to keep in mind the facts and circumstances of a case, the principles of law governing award of sentence, the legislative intent of special or general statute raised in the case and the impact of awarding punishment. These are the nuances which need to be examined by the court with discernment and in depth.

61. In Machhi Singh & Ors. V/s. State of Rajasthan [(1983) 3 SCC 470], this Court stated certain relevant considerations like the

manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and the personality of the victim of murder. These considerations further demonstrate that the matter has to be examined with reference to a particular case, for instance, murder of an innocent child who could not have or has not provided even an excuse, much less a provocation for murder. Similarly, murder of a helpless woman who might be relying on a person because of her age or inrmity, if murdered by that person, would be an indicator of breach of relationship or trust as the case may be. It would neither be proper nor probably permissible that the judicial approach of the court in such matters treat one of the stated considerations or factors as determinative. The court should examine all or majority of the relevant considerations to spell comprehensively the special reasons to be recorded in the order, as contemplated under Section 354(3) of the Cr.P.C.

62. In the case of Dhananjoy Chatterjee @ Dhana V/s. State of West Bengal [(1994) 2 SCC 220] while arming the award of death sentence by the High Court, this Court noticed that `in recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern'. The Court reiterated the principle that it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime, as also the society, has the satisfaction that justice has been done to it.

63. The Court held as follows:-

"15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment betting the crime so that the courts reect public abhorrence of the crime.

The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

64. In this case, the Court was concerned with the case of a security guard who had been transferred at the complaint of a lady living in the ats with regard to teasing of her young girl child. The security guard went up to the at of the lady, committed rape on her daughter and then murdered her brutally. The Court found it to be a t case for imposition of capital punishment.

65. Again, in the case of Surja Ram V/s. State of Rajasthan [(1996) 6 SCC 271], this Court armed the death sentence awarded by the High Court primarily taking into consideration that there was no provocation and the manner in which the crime was committed was brutal. Noticing that the Court has to award a punishment which is just and fair by administering justice tempered with such mercy not only as the criminal may justly deserve but also to the rights of the victims of the crime to have the assailant appropriately punished and the society's reasonable expectation from the court for the appropriate deterrent punishment conforming to the gravity of the

offence and consistent with the public abhorrence for the heinous crime committed by the accused.

66. The Court further held as under: (Suraj Ram case (1996) 6 SCC 271)

"18. After giving our anxious consideration to the facts and circumstances of the case, it appears to us that for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced in a dispassionate manner. Such act of balancing is indeed a dicult task. It has been very aptly indicated in Dennis Councle McGautha V/s. State of California that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the innite variety of circumstances that may affect the gravity of the crime of murder. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime of murder, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished."

67. This Court in Prajeet Kumar Singh V/s. State of Bihar [(2008) 4 SCC 434], B.A. Umesh V/s. Registrar General, High Court of Karnataka [(2011) 3 SCC 85], State of Rajasthan V/s. Kashi Ram [(2006) 12 SCC 254] and Atbir V/s. Government of NCT of Delhi [(2010) 9 SCC 1] had conrmed the death sentence awarded by the High Courts for different reasons after applying the principles enunciated in one or more afore-referred judgments.

68. Now, we may notice the cases which were relied upon by the learned counsel appearing for the appellants and wherein this Court had declined to conrm the imposition of capital punishment treating them not to be the rarest of rare cases.

69. In Ronny @ Ronald James Alwaris Etc. V/s. State of Maharashtra [(1998) 3 SCC 625], the Court while relying upon the judgment of this Court in the case of Allauddin Mian & Ors. V/s. State of Bihar [(1989) 3 SCC 5], held that ...the choice of the death sentence has to be made only in the `rarest of rare' cases and that where culpability of the accused has assumed depravity or where the accused is found to be an ardent criminal and menace to the society...."

70. The Court also noticed the above-stated principle that the Court should ordinarily impose a lesser punishment and not the extreme punishment of death which should be reserved for exceptional cases only. The Court, while considering the cumulative effect of all the factors such as the offences not committed under the inuence of extreme mental or emotional disturbance and the fact that the accused were young and the possibility of their reformation and rehabilitation could not be ruled out, converted death sentence into life imprisonment.

71. Similarly, in the case of Bantu @ Naresh Giri V/s. State of M.P. [(2001) 9 SCC 615] while dealing with the case of rape and murder of a six year old girl, this Court found that the case was not one of the `rarest of rare' cases. The Court noticed that, accused was less than 22 years at the time of commission of the offence, there were no injuries on the body of the deceased and the death probably occurred

as a result of gagging of the nostril by the accused. Thus, the Court while noticing that the crime was heinous, commuted the sentence of death to one of life imprisonment."

37. Guided by the above principles and applying the same to the facts of the present case, the trial court failed to conduct an inquiry to ascertain the mitigating circumstances as well as to foreclose the possibility of reformation and rehabilitation of the appellants accused and also did not prepare a balance sheet of aggravating and mitigating circumstances and there is no definite finding that the option of imposing of any penalty other than death penalty is unquestionably foreclosed and would be insufficient in the facts and circumstances of the case and also did not observe that, the convict is beyond reformation and would be a menace to the society if allowed to return after specific period of time. Admittedly, so far criminal antecedent is concerned, the appellant accused having no any such kind of past antecedent nor he is habitual offender. The prosecution failed to place on record the necessary data of the accused to show that he would commit criminal acts of violence in the future. In such circumstances, in our opinion, considering the age of the accused appellant, the possibility of reformation and rehabilitation of him, cannot be ruled out.

38. In view of the foregoing discussions and having regard to the facts and circumstances of the present case, and striking balance between the aggravating and mitigating circumstances of the case, more particularly, the background of the accused, his social conditions

as he was working as a labourer in the factory, it cannot be said that he would be menace to the society in future. We may take the notice of the fact that the crime was heinous and inhuman, but considering the reasons as discussed above, it cannot be held with certainty that this case falls in the “rarest of rare case”.

39. We are, therefore, inclined to convert the sentence imposed on the appellant from death to life for the offences punishable under Section 302 of the Indian Penal Code and Section 6 of the POCSO Act, as a result, we are not confirming the death sentence as proposed by the Trial Court.

40. Accordingly, the appeal is **party allowed**. The conviction of the appellant for the offences punishable under Sections 302, 376(A)(B) and 201 of the Indian Penal Code and Section 6 of the POCSO Act is confirmed and upheld as recorded by the Trial Court. We commute the death sentence into the one of life imprisonment. The confirmation case stands **dismissed**. R & P be sent back to the concerned Trial Court henceforth.

(ILESH J. VORA,J)

(R. T. VACHHANI, J)

Rakesh