Reserved/Court No.46

Case :- CAPITAL CASES No. - 5599 of 2011
Appellant :- Vijay Bahadur Gaur
Respondent :- State Of U.P.
Counsel for Appellant :- From Jail,Sunil Vashisth Amicus Curiae
Counsel for Respondent :- Govt. Advocate

Hon'ble Amar Saran,J.
Hon'ble Mrs. Sunita Agarwal,J.

(Delivered by Hon'ble Amar Saran, J.)

This Capital appeal arises from the judgement of the additional Sessions Judge, Mirzapur, dated 23.7.2011 convicting and sentencing the appellant to death under section 302 I.P.C. and to imprisonment for life together with a fine of Rs.25,000/- under section 376 (2) (f) I.P.C. In default of payment of fine, the appellant is to undergo 20 months additional rigorous imprisonment. He is also sentenced to imprisonment for 5 years and a fine of Rs.5,000/- under section 201 I.P.C. In default of payment of fine under this provision, the appellant is to undergo 5 months additional rigorous imprisonment.

We have heard Sri Sunil Vashisth, learned Amicus Curiae for the appellant and Sri Akhilesh Singh, learned Government Advocate assisted by Sri Anand Tiwari and Sri R.K. Singh, learned Additional Government Advocates.

Briefly, the prosecution case was that on 29.12.2009 at about 10.30 a.m., the 5 years old deceased Priyanka had gone along with her brother Sheru aged 7 years to the house of her neighbour, the appellant Vijai Bahadur, who had plucked some guavas from a tree at his door step and given them to the two children. He had asked Sheru, P.W. 2 to go home and had told

him that he would be taking Priyanka to her *bua's* place. Sheru had returned home. After these facts were revealed by Sheru in the evening when he was questioned regarding the whereabouts of his sister, Sheru, and Priyanka's father Ram Moorat, P.W. 3 had made a mobile call to his sister at Lorika making inquiries about the whereabouts of Priyanka. He was informed that neither Priyanka nor Vijai Bahadur had come to her place. Then Ram Moorat and his other family members kept searching for Priyanka and Vijai Bahadur. On 3.1.2010 they learnt that Vijai Bahadur has come to his house, but Priyanka was not with him. Then at about 7 a.m. the informant Chhavinath Gond, P.W.1, grand uncle of Priyanka and Sheru accompanied by his son Ram Moorat, and Shyama Charan and Rambachan Gond went to the house of Vijai Bahadur. Vijai Bahadur was at his *baithak* (sitting room). They inquired about Priyanka, but he denied having any knowledge about her whereabouts till 11 a.m. However when these persons acted a little strictly with Vijai Bahadur and told him that they intended to take him to the police station Chunar, then he fell on their legs and apologised for his mistake. He said that he should be hanged because he had tried to commit rape on Priyanka in the *Arhar*, (pigeon pea) field of Om Prakash Vakil. Priyanka had started running. Then fearing that she would disclose this matter at home he had strangulated her neck with a belt resulting in her death. Then, he left for his aunt (*Mausi's)* place. He had come home on that day for collecting his clothes for going to Mumbai, when he was apprehended. He agreed to take the witnesses to show them the place, where he had strangulated the girl and

her dead body was lying. The witnesses had accompanied the appellant to Om Prakash's *Arhar* field. There Vijai Bahadur showed the naked corpse of Priyanka to the witnesses. Her clothes were lying on her body and her neck was strangulated with a belt. On reaching the dead body Vijai Bahadur started weeping remorsefully saying that he had committed a great sin by murdering the innocent girl child. The witnesses should forgive him. Vijai Bahadur was then taken to the police station, where a report of this incident was lodged on 3.1.2010 at 12.50 p.m. by P.W. 1 Chhavinath (Ext. Ka-1).

P.W. 6 Head Moharrir Lalta Prasad Yadav, P.S. Kotwali, Chunar prepared the check F.I.R. (Ext. Ka-15) on the basis of the report, which was submitted by Chhavinath and also made necessary G.D. entries on the directions of the S.H.O., P.S. Chunar, D.P. Shukla. P.W. 5 D.P. Shukla immediately started investigation of the case and recorded the statement of the informant at the police station itself. As the accused Vijai Bahadur had been brought to the Police Station by the informant, he was immediately taken into custody. Then the Investigating Officer along with the informant and other police personnel reached the place of incident, which was shown to him by the informant and other witnesses and recovered the corpse of Km. Priyanka from a field in village Dhuniya Mazara, Rampur, Sakteshgarh. The dead body was naked except that a half pant, full sleeve shirt and one sweater, were lying over the corpse. The neck of the corpse had been strangled with a nylon *patti* (belt), which had a double knot at the back. The I.O. opened the same and took the "*patti*" and other clothes of the deceased in possession. He prepared the recovery

memo in the presence of Ram Moorat and Ram Bahadur etc. After dictating the recovery memo (Ext. Ka 3) to S.S.I. R.P. Dubey, inquest (Ext. Ka-2) was conducted by S.S.I. R.P. Dubey on his direction. The I.O. also made a site plan on the pointing out of the informant (Ext. Ka-13). He recorded the statement of the accused and other witnesses in the case diary.

Post mortem was conducted on the dead body of Km. Priyanka by P.W. 4 Dr. N.K. Srivastava on 03.01.2010 at 4.30 p.m. The age of the deceased was 5 years and the time of death about 4 to 7 days earlier. The rigor mortis had disappeared and the body had decomposed. There was greenish discolouration on the abdomen. The dead body revealed the following external injuries:-

(1) Abrasion 3 cm x 2 cm on the left side forehead just lateral to mid line.

(2) Abrasion 3 cm x 2 cm on the right cheek bone.

(3) Abrasion 3 cm x 2 cm on the middle of left cheek.

(4) Abrasion 2 cm x on the middle of chin.

(5) Abrasion 3 cm x 2 cm on the back of the left wrist joint.

(6) Multiple abrasion on fingers of left hand.

(7) Multiple abrasion on the right hand and wrist.

(8) Abrasion 6 cm x 4 cm on the middle of chest.

(9) Abrasion mark of 1.5 cm all around neck.

(10) Contused swelling 6 cm x 6 cm on the inner part of left thigh.

(11) Contused swelling 5 cm x 6 cm on the medial part of right thigh.

(12) Vagina is dilated by two fingers, which admits two fingers easily.

(13) The vaginal walls were lacerated. Blood was flowing from the vagina and nose.

(14) There was a tear on the vaginal wall. Brain was congested. Echymosis was present beneath the ligature mark. Hyoid bone was fractured. Blood was present in the neck. Carotid artery was ruptured. Both the lungs were congested. Right chamber of heart was full of blood. The left chamber was empty. The walls were greenish in colour and there was a foul smell. Gases were present in the cavity. The tongue was protruded. Food parts were present in the stomach and the large intestine contained faecal matter and gases. The cause of death was due to asphyxia as a result of strangulation.

After completing the investigation, the charge-sheet was submitted against the appellant by P.W. 5 D.P. Shukla (Ext. Ka-14).

Apart from the aforesaid formal witnesses, three witnesses of fact have been examined in this case. They are P.W. 1 Chhavinath, P.W. 2 Sheru and P.W. 3 Ram Moorat Gond.

P.W. 1 Chhavinath Gaur deposed that on the date of incident the children of his nephew Ram Moorat, Sheru aged 7 years and Priyanka aged 5 years had gone to the door of Vijai Bahadur Gaur, who had plucked guavas and given it to them. Vijai Bahadur asked Sheru to go home and he said that he would be taking Priyanka to her aunt *(bua)* Sitapati's residence at Chopan. Sheru had returned home alone. When

Priyanka did not return till evening, then Sheru was questioned, and he disclosed the above mentioned facts. The witnesses then went to Vijai Bahadur's house, but he was not present there, nor was Priyanka present. Then when a mobile call was made to Sitapati she disclosed that neither Vijai Bahadur, nor Priyanka had come to her place. After that a search was made for several days for Vijai Bahadur and Priyanka, but they were not found.

On 3.1.2010 it was learnt that Vijai Bahadur had come home. On that information P.W. 1 Chhavinath Gaur, Shyama Charan, Ram Moorat, Ram Bachan and other villagers went to Vijai Bahadur 's house and made inquiries about Priyanka. First he denied having any information, but when he was questioned a little firmly and informed that he would be taken to the police station and the witnesses took him out of the *baithaka* i.e. sitting room, where he was sitting, then he fell on the feet of the witnesses and admitted to have committed a big mistake. He disclosed that he had taken Priyanka to Om Prakash Advocate's *Arahar* field, where he tried to commit rape on Priyanka. He had made Priyanka naked. When she started crying he realized that she would disclose all these facts at her home. Then with a nylon belt, he strangled her. Vijai Bahadur then took Chhavinath and others to the middle of the *Arhar* field of Om Prakash, where he had raped and murdered Priyanka. The corpse was lying in a nude condition and it had got distended. Priyanka's clothes were lying on her body and there was a nylon belt on her neck. He took Vijai Bahadur along with him to lodge the report at P.S. Chunar, where he handed over Vijai Bahadur to police custody.

After satisfying himself of the capacity of the 8 or 9 year old Sheru, P.W. 2 Sheru, the brother of the deceased to depose his evidence was recorded by the trial Judge. At the time of incident Sheru was 7 years old, whilst Priyanka was 5 years old. This witness deposed that he along with Priyanka had gone to Vijai Bahadur's place on the date of incident, which was one year earlier at about 10.30 a.m. On seeing them, Vijai Bahadur had plucked guavas from his guava tree, and handed them over to the children. Viay Bahadur had sent him home telling him that he would be taking Priyanka to her *bua's* place. When Priyanka did not return till evening, on being asked, he told his parents about the happenings in the morning at Vijai Bahadur's place. After that his sister Priyanka never returned. After 5-6 days of the disclosure by Vijai Bahadur, Priyanka's dead body was recovered from an *Arahar* field. She had been murdered by Vijai.

P.W. 3 Ram Moorat Gond deposed that Sheru was his son and Priyanka was his daughter. On 29.12.2009 at about 10.30 a.m., Priyanka had gone along with Sheru to Vijai Bahadur's place. When Priyanka did not return till evening, then he asked Sheru about her whereabouts. Thereupon Sheru disclosed how Vijai Bahadur had plucked guavas from his tree and had given them to Priyanka and Sheru. He had asked Sheru to go home and had said that he would be taking Priyanka to her *bua's* place. Then he made a search for Vijai Bahadur and Priyanka, but they were not found. He phoned his sister Sita in Chopan and learnt that neither Priyanka, nor Vijai Bahadur had arrived at her place. After that he searched for his daughter amongst relations and acquaintances, but got

no information about Priyanka or Vijai Bahadur. On 03.01.2010 at about 7 a.m. on receiving information that Vijai Bahadur had come home, this witness along with his uncle Chhavinath, Shyamacharan, Rambachaan Gaur, Sheru and other villagers had gone to the house of Vijai Bahadur Gaur. He was present in his sitting room. When, they asked Vijai Bahadur about Priyanka, initially he disclosed nothing. But when Ram Moorat and others persisted in making inquiries, till about 11 a.m. and threatened to take him to the police station Chunar and pulled him out of the *baithaka* (sitting room) with that objective, then Vijai Bahadur started apologizing and admitted to having committed a great mistake. He admitted that on the date of incident, when he started committing rape on Priyanka in the *arhar* field of Om Prakash Advocate, she started running. Out of fear that Priyanka would disclose all these facts at her home, he had strangulated her with a belt causing her death. He then took the witnesses to show them the dead body at the place where it was lying. Then Vijai Bahadur led the way to Om Prakash's field and then in the middle of the field, he pointed out the corpse of Priyanka. The corpse was naked and clothes were lying on her stomach and chest. Near the corpse of Priyanka, again Vijai Bahadur apologised before the witnesses and stated that he had committed a great sin. After that Vijai Bahadur was taken to the police station, where a report was lodged. At about 2.30 p.m. they arrived at the spot with the police. The police took the body into custody and conducted inquest, which he himself also signed, after it was read over to him. The I.O. took the clothes (half pant, woollen sweater

and shirt and a nylon belt (which was tied around Priyanka's neck) in possession and prepared the recovery memos.

It was argued by the learned Amicus Curiae that the conduct of the witnesses was unnatural that even though, the deceased Priyanka had disappeared on 29.12.2009, no report was lodged till the arrest of the appellant on 3.1.2010. Even a *gumsudagi* or missing report was not lodged before the date of arrest of the appellant. The alleged confessional statement of the accused was given under pressure of the witnesses after they had questioned him from 7 a.m. to 11 a.m. and were threatening to to take him to the police station. Hence the extra-judicial confessional statement, was inadmissible in view of section 24 of the Evidence Act. As the F.I.R. and evidence revealed that the appellant had already disclosed the location of the dead body of Priyanka to be the field of Om Prakash Vakil, hence the factum was known from before and the said recovery fell foul of section 27 of the Evidence Act.

It was further argued that as some faecal matter seemed to be present on the deceased, it was possible that the deceased had gone to that place to ease herself, where she might have been murdered by anyone. If the deceased had indeed been kidnapped, the conduct of the witnesses in not asking Sheru till evening time as to why she had not returned was unnatural.

It is also argued that as the accused did not appear to have any criminal antecedents and his age was only 24 years and this being a case of circumstantial evidence, it did not fall in the category of rarest of rare cases for awarding the death penalty.

Learned Government Advocate, on the other hand, contended that the delay in lodging the F.I.R. and not taking action was explained, as a search was being made for finding out the whereabouts of Priyanka. There was no reason for the false implication of the appellant, who had not even been initially implicated, but he was involved in this crime only after he had effected the recovery of the dead body from a concealed place and had made the extra-judicial confession before the witnesses. There was evidence of last-seen given by the child witness, P.W. 2 Sheru, who was not shaken in his cross examination. That the appellant absconded for 4 or 5 days after the incident was another circumstance against him. The accused had confessed to having committed the crime and there is no reason to doubt the reliability, veracity and truthfulness of the extra judicial confession given by the accused, which was corroborated by the discovery of the cadaver on the pointing out of the appellant from Om Prakash's *arhar* field.There was no evidence or signs showing that the appellant had been subjected to any beating for the purpose of extracting an extra-judicial confession, and he had not even set up such a case in his statement under section 313 Cr. P. C. No suggestion was given on behalf of the appellant that the deceased and Sheru had not visited his place in the morning of the incident. Looking to the brutality of the crime where a 5 year old girl child had been brutally raped and murdered and her nude body had been cast away in the field, only the death sentence was appropriate punishment for the appellant.

The prosecution has sought to rely on the following

circumstances for establishing the complicity of the appellant in this offence:-

(1) Evidence of last-seen

Priyanka aged 5 years had gone along with P.W. 2 her brother Sheru aged 7 years to the place of the appellant and that the appellant had plucked guavas from his tree and handed them over to the two children. Then he had asked Sheru to go home and had told him that he would be taking Priyanka along with him to Priyanka's *bua* Sitapati's place in Chopan. This child returned home alone. On being questioned in the evening, he had disclosed these facts. The Court had satisfied itself before examining Sheru that he could fully understand the questions and was competent to depose. On a careful perusal of the evidence of this witness, we find that he has given clear and proper answers and there is no reason either to doubt his understanding or the reliability or veracity of his testimony. No suggestion was even given to this witness that he had not come along with the deceased to the appellant's place on the date of incident at about 10.30 a.m. or that he and the deceased had not been given guavas by the appellant.

(2) Absence of explanation about the fate of the girl after being left in appellant's company.

Except an adamant denial of this fact as to what happened to Priyanka after she was left in his company by Sheru, the appellant has offered no explanation whatsoever regarding her whereabouts. In *Joseph S/o Kooveli Poulo vs. State of Kerala, (2000) 5 SCC 197* it was held that a blanket denial of the allegations against an accused regarding facts,

which were exclusively within his knowledge, which only he and none else could have explained, and also the falsity of the defence plea are missing links for completing the chain of incriminating circumstances necessary for connecting an accused with the crime.

In *Sahadevan @ Sagadevan vs. State, 2003 (1) SCC 534,* it has been held that if the prosecution is able to lead evidence for showing that the missing person was last seen in the company of the accused, thereafter, it becomes obligatory on the accused to explain the circumstances, in which the missing person and the accused had parted from his company. This onus is also cast on the accused in view of section 106 of the Evidence Act, as it is a fact specially within the knowledge of the accused. The appellant has not at all been able to explain as to how and in what circumstances the deceased left home save by making a blanket denial, which in view of the clear, reliable and disinterested testimony of PW 2 Sheru, the 7 year old brother of the deceased, is not believable.

(3) <u>Absconding of the appellant.</u>

After the incident dated 29.12.2009 the appellant absconded and he only returned to his house in village Rampur Sakteshgarh after 4 or 5 days on 3.1.2010 for collecting his clothes as he wanted to go away to Mumbai, but he was apprehended by the witnesses, P.W. 1 Chhavinath Gaur, informant and the grand uncle of the deceased and P.W. 3 Ram Moorat Gaur, the father of the deceased and others at about 7 a.m. on 3.1.2010. Section 8, illustrations (h) and (i) of the Evidence Act mention that absconding of an accused

after commission of an alleged crime are relevant circumstances showing the subsequent conduct of an accused and are admissible under the said provision.

(4) <u>Extra judicial confession of the accused.</u>

After the appellant was apprehended by the witnesses on 03.01.2010, he was questioned for several hours by P.W. 1 Chhavinath Gaur and P.W. 3 Ram Moorat Gaur and other persons Shyamacharan and Rambachan, but although initially he was silent, later when some pressure was put to this accused, he admitted his mistake and fell at the feet of the witnesses and stated that after he had sent back Sheru home on 29.12.2009, he had taken Priyanka to the pigeon pea (*arhar)* field of Om Prakash, where he tried to commit rape on her. When she began crying and started running away, then fearing that she would speak about the crime, he had strangled her neck with a nylon belt and had thrown her nude dead body in the middle of Om Prakash's field. He had then placed her clothes on her stomach and chest.

In this connection, it was argued by the learned Amicus Curiae that the extra judicial confession could not be read against the appellant because some pressure was exerted on the appellant and he was threatened that he would be taken to the police station and therefore, it was hit by section 24 of the Evidence Act. It would be useful to examine this contention. Section 24 of the Evidence Act reads as under:-

"24. Confession caused by inducement, threat or promise, when irrelevant in criminal proceeding. ---A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have

been caused by an inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him."

Thus under the aforesaid provision, the confession by an accused person is irrelevant in a criminal proceeding only if it appears to have been caused by any inducement, threat or promise having regard to the charge of the accused person, proceeding from a person in authority and which in the opinion of the Court was sufficient for making the accused person think that he would gain some advantage and avoid any evil in reference to the proceedings against him. In the first place at the stage when the appellant was taken by the villagers to get the cadaver of the missing girl discovered, no proceeding had been initiated against the appellant. More importantly the said extra judicial confession before the villagers could not have been said to have been made on account of pressure from any person or authority, who had the power of protecting the accused. In *Darshan Lal vs. State of Jammu and Kashmir, (1975) 4 SCC, 34*, it has been held that the uncle and cousin of the accused husband of the deceased, were not persons in authority and hence the extra judicial confession made before them, was not covered by the interdict of section 24 of the Evidence Act and did not suffer from any legal infirmity. Even a Village Administrative Officer has been held not to be a person in authority in *Siva Kumar*

Vs. State, (2006) 1 SCC, 714.

In the case of *Ratan Gaur Vs. State of Bihar, 1959 SCR, 1336,* whereas a *Mukhia, Sarpanch* and *Panch* have been held to be persons in authority, but the extra judicial confession made before them was held not to be inadmissible under section 24 of the Evidence Act as it could not be said on the facts of the case that the confession was the result of any inducement or threat or promise held out by those persons. In the present case also we find that except for a threat extended to the appellant by the villagers that they would take him to the police station no force or pressure was applied to the appellant, nor was he subjected to any assault or violence, and no injury was seen on his body, but it seems rather that he had become repentant for the crime after committing it and hence had confessed to his crime before the villagers in a spirit of remorse, seeking their pardon for his crime. The confession does not appear to be the result of any inducement, and certainly it was no inducement which was made on account of pressure of any authority. Significantly in his 313 Cr.P.C statement, the appellant had stated that after the offence, the village people had tied up his family members, in order to call him. He had reached Chunar by the Jammu Tavi Express, when he was picked up by the police. Therefore, except for the blanket denial, and his false submission as to the mode of his apprehension, he has not suggested anywhere that he had made the confession because of pressure of the villagers.

Learned *amicus curiae* further contended that the said recovery was not admissible under section 27 of the Evidence

Act as the appellant had already informed the witnesses that the dead body was lying in the *arhar* field of Om Prakash and also because the cadaver was recovered from an open field, therefore, the recovery could not be used for linking the appellant with this offence. We think this submission is clearly erroneous. In the first place, the recovery in the instant case was not made under section 27 of the Evidence Act at all.

Section 27 of the Evidence Act reads as follows:-

"27. How much of information received from accused may be proved.---Provided that, when any fact is deposed to as discovered to consequence of information received from a person accused of any offence, in the custody of a police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

Thus, section 27 of the Evidence Act, which is an exception to sections 25 and 26 of the Evidence Act, (the latter two sections speak of the prohibition of utilisation of confessions made to a Police Officer, unless the said confession is made in the presence of a Magistrate). Section 27 of the Evidence Act permits a limited use of the confession to a police officer inasmuch as some discovery is made consequent to a fact deposed to by the accused, who is in the custody of a police officer and only so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. The reason for this exception is that even though confessions made before the police officer have been made inadmissible to prevent an allegation of misuse of his authority by the police officer, but

so far as something is discovered as a result of the confession, that part of the statement relating to the discovery is made admissible because the statement or deposition is confirmed by the discovery of the concealed item, of which only the accused had any knowledge. But as in the present case the confession was not made before any police officer, there was no question of application of section 27 of the Evidence Act, nor was the extra-judicial confession subject to the limitations mentioned in the section that only the knowledge relating to the information as was distinctly related to the discovery of the concealed item was attributable to the accused, and the other part of the confession which was not necessarily related to the discovery was inadmissible.

In any case no such fetter applies to an extra judicial confession made to common persons, which is not a confession to a police officer, and if the extra judicial confession is such that implicit reliance can be placed on it, then the entire confession, which includes knowledge or information as to the circumstances of the crime, and also the part which is a direct confession of his guilt, becomes legally admissible.

In *State of A.P. Vs. Kanda Gopaladu, (2005) 13 SCC 116* cited by the learned Government Advocate in his written arguments, after reviewing the case law, (i.e. the decisions in *Gura Singh v. State of Rajasthan, (2001) 2 SCC 205, Rao Shiv Bahadur Singh v. State of V.P., 1954 SCR 1098 , Maghar Singh v. State of M.P., (1975) 4 SCC 234, Narayan Singh v. State of M.P., (1985) 4 SCC 26, Kishore Chand v.*

State of H.P., (1991) 1 SCC 286, Baldev Raj v. State of Haryana, 1991 Supp (1) SCC 14, Piara Singh v. State of Punjab, (1977) 4 SCC 452, Madan Gopal Kakkad v. Naval Dubey, (1992) 3 SCC 204 it has been held that there is no reason to pre-suppose that evidence of extra judicial confession is invariably evidence of a tainted or weak nature, and it cannot be relied upon without corroboration even if there are reasons to think that it is true and voluntary, and was made before witnesses who have no reason to state falsely regarding its contents and where no suggestions were even given to the witnesses that the confession was tainted or non-voluntary. Corroboration is required only by way of abundant caution. If the Court believes the witness before whom the extra-judicial confession was made and is satisfied that it was true and voluntary, then the conviction can be founded on such evidence alone.

In the present case from a close scrutiny of the extra-judicial confession we are of the opinion that it is intrinsically reliable and free from taint or weakness and the witnesses have no reason to speak falsely regarding the extra-judicial confession made before them. We find that the circumstance as to how the accused had taken the 5 year old deceased girl along with him mentioned in the extra-judicial confession, was a fact which was also corroborated by PW 2 Sheru, and about which on initial inquiry by the villagers the appellant gave no explanation, but only after stern questioning by the villagers he disclosed all the facts regarding the abduction and murder. We think that this extra-judicial confession had a ring of truth in it, on which implicit reliance could be placed, even if the

appellant had not got the cadaver discovered.

But in the circumstances of this case, the strongest corroboration of the extra-judicial confession comes from the fact, that thereafter the appellant actually got Priyanka's dead body discovered, which was concealed in the middle of Om Prakash Vakil's *arhar* field.

That this discovery of the dead body was from a concealed place, was only based on the appellant's disclosure and pointing out of the corpse, and was not based on previous discovery by the villagers or from the appellant's statement in this extra-judicial confession that he had hidden the body in Om Prakash Vakil's place, is apparent from the fact that only after the appellant was apprehended by the villagers on 3.1.10 after 5 days of the disappearance of the deceased on 29.12.09, that the cadaver was found. Significantly when the autopsy was conducted on the cadaver of Priyanka on 3.1.2010 at 4.30 p.m. by P.W. 4 Dr. N.K. Srivastava, he noted that the deceased had died 4 to 7 days earlier. Her stomach was distended and the body was in a decomposed state. It would be wholly illogical to think that the rapidly putrefying dead body had been found by the villagers, but they waited for 5 days for the appellant's return, who had gone missing, to lodge an FIR and to plant the recovery of the dead body on him. One other reason for concluding that the body was in an absolutely concealed state under the thick Arhar undergrowth was the fact that the cadaver was even unharmed by animals as was admitted by Dr. N.K. Srivastava, PW 4.

The faint suggestion regarding some dispute between the appellant and the family of the deceased regarding some

sahan land was wholly unsubstantiated and was categorically denied by PW1 Chavinath Gond, the informant and grand uncle of the deceased and PW 3, Ram Moorat, her father. This suggestion also therefore does not create any dent on the reliability of the extra-judicial confession

(5) The delayed F.I.R. and inquiry from the witness Sheru after disappearance of Priyanka.

Learned Amicus Curiae had tried to assail the credibility of the prosecution case by pointing out to the delay in lodging the F.I.R. We are of the opinion that this circumstance rather than raising a doubt regarding the credibility of the prosecution case is actually a circumstance for showing that the FIR was lodged against the appellant only after the informant and witnesses were fully satisfied about the complicity of the appellant. We think that from the delayed lodging of the report, it is apparent that the informant Chhavinath Guar, grand uncle of the deceased and P.W. 3 Ram Moorat Gaur, father of the deceased did not even in their farthest dreams imagine that the appellant could have committed such a dreadful crime. Therefore, beyond searching for the appellant and the deceased for the next 4 or 5 days, they chose not to lodge any report. Only after the appellant was apprehended on 3.1.2010, and he confessed and got discovered the cadaver of the deceased from the field of Om Prakash, that the witnesses took the appellant to the police station and handed him over to the police and lodged the report. It was for the same reason they felt that no one would harm the 5 year old child, that the poor father of the deceased and

informant may not have even bothered to question Sheru till the evening as to what had happened to Priyanka. It is not at all unnatural that poor children play around and parents, who are busy in carrying on with the problems of their own daily lives trying to make two ends meet, sometimes become a little careless even when the child is away from the home for several hours in rural areas or in urban slums. But one inference may be validly drawn that from the belated F.I.R. and inquiry from Sheru, PW 2 and others regarding the disappearance of Priyanka, it is apparent that the witnesses were not at all interested in implicating the appellant until they were completely sure that he had committed the crime, and they had not implicated him on account of any enmity.

(5) Conclusions in the light of principles laid down in cases law related to circumstantial evidence:

In the light of the aforesaid evidence and the settled principles for appreciation of circumstantial evidence as laid down in *Sharad Birdhi Chand Sarda Vs. State of Maharashtra, (1984) 4 SCC 116, Shivaji Sahabrao Bobade Vs. State of Maharashtra, 1973 (2) SCC, 793, Padala Veera Raddy Vs. State of A.P., 1990 SC 79, Ramreddy Rajesh Khanna Reddy Vs. State of A.P., 2006 (10) SCC 172* and *Jagroop Singh Vs. State of Punjab, (2012) 11 SCC 768 et al,* the primary requirement for convicting an accused in a case of circumstantial evidence is that the mental distance between 'may be' and 'must be' ought to be bridged and that conviction cannot be recorded on vague conjectures. The facts established should be consistent only with the hypothesis of the guilt of the accused. The circumstances should be of a

conclusive nature and tendency; they should exclude any other possible hypothesis except the one to be proved and that the chain of other evidence must be so complete, so as to leave no other reasonable ground for a conclusion consistent with the innocence of the accused and must show that in all human probability the crime must have been committed by the accused. In this case, from the incriminating circumstances enumerated above, the mental distance between 'may be' and 'must be' has clearly been bridged. The circumstances such as absconding by the accused for 5 days, after he had taken away the deceased, the extra judicial confession after being apprehended before the villagers and more significantly, the recovery of the dead body of the deceased from a hidden place, deep inside an “Arhar” field by the appellant, information regarding which fact only he had knowledge, are all circumstances, which are consistent only with the hypothesis of the guilt of the accused and are inconsistent with his innocence and clearly show that in all human probability, it was the accused and none other who had committed this crime. We, therefore, uphold the findings and conclusion of the Trial Judge convicting the appellant.

(6) The question of sentence

The final question, which arises in this case is what would be appropriate sentence and whether this was the rarest of rare case, where the sentence of death awarded by the Trial Judge be upheld. It can not be doubted that the crime of the appellant in sending away the 7 year old brother of the

deceased after giving a guava to him, and then his luring away the 5 year old deceased Priyanka (who must have been close to the appellant), on the false pretext that he would take Priyanka to her *bua's* place in Chopan and thereafter committing rape and murder of the little girl was an extremely brutal crime. But it has now been reiterated in a number of cases that the nature of the crime cannot be the only consideration, without taking into account the antecedents of the offender, for deciding whether a particular case was the rarest of rare case, where the death sentence was the only option, and where the other option of awarding a sentence of life imprisonment was unquestionably foreclosed.

In the Constitutional bench decision, *Bachan Singh vs. State of Punjab, (1980) 2 SCC 684* which was even cited by the trial judge, the Apex Court has enjoined giving importance to the antecedents of the prisoner, apart from the gravity of the crime, for reaching the conclusion whether only a death sentence was appropriate. Although it was noticed by the trial Judge, the circumstances that this offender was a young man of about 21 or 22 years or that this was his first crime have however not been taken into account, but only the depravity of the crime was considered. There was also no material to suggest that the reform of the appellant was wholly improbable and that he was likely to commit such crimes in the future, about which a positive finding has to be given as per *Bachan Singh*. The appellant may also not have planned to commit the crime, but suddenly when the victim appeared along with her brother at his door step, he may have lost his head, and then he may have taken her to Om Prakash Vakil's

field where he ravished her, and on seeing her protests and cries, and fearing exposure he may have murdered the deceased, and then hidden her body in Om Prakash's field and then had run away from the spot. In somewhat similar circumstances, in *Amit v State of U.P.*, *(2012) 4 SCC 107,* where a 3 year old girl had been murdered by a 28 year old man, the Apex Court converted a sentence of death to a sentence of life imprisonment, to run for the whole life of the prisoner, as he had no criminal antecedents, and it was not likely that the accused would repeat the offence. Thus it was mentioned in *Amit* in para 22:

> *"In the present case also, we find that when the appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in Rameshbhai Chandubhai Rathod (2) v. State of Gujarat, (2011) 2 SCC 764 we convert the death sentence awarded to the appellant to imprisonment for life and direct that the life sentence of the appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons."*

In *Raju v State of Haryana, (2001) 9 SCC 50,* the appellant had committed the rape and murder of the 11 year old deceased after enticing her with toffees. On his arrest, his

shirt and and pant had bloodstains and his underwear had blood and seminal stains. The accused gave no explanation of the blood stains. The Supreme Court held that as the appellant who had no criminal antecedents, appeared to have acted without premeditation in giving two brick blows to the deceased after she threatened to expose him, it could not be concluded that he would be a danger to society, and the sentence of death awarded by the Courts below was commuted to a sentence of imprisonment for life.

In *Amrit Singh* v. *State of Punjab*, (2006) 12 SCC 79, where a 7 year old child was raped and murdered by the 31 year old accused, the Apex Court had converted the sentence of death to life imprisonment holding that this was not the rarest of rare case and the crime may have been committed because of a momentary lapse, on part of the the accused on seeing the girl at a secluded place, and the deceased may have been gagged inadvertently, without any intention to kill her. Paragraphs 21 and 22 of the law report read:

> *"21. The opinion of the learned trial Judge as also the High Court that the appellant being aged about 31 years and not suffering from any disease, was in a dominating position and might have got her mouth gagged cannot be held to be irrelevant. Some marks of violence not only on the neck but also on her mouth were found. Submission of Mr. Agarwal, however, that the appellant might not have an intention to kill the deceased, thus, may have some force. The death occurred not as a result of strangulation but because of excessive bleeding. The deceased had bleed half a litre of blood. Dr Reshamchand Singh, PW 1 did not*

state that injury on the neck could have contributed to her death. The death occurred, therefore, as a consequence of and not because of any specific overt act on the part of the appellant.

22. Imposition of death penalty in a case of this nature, in our opinion, was, thus, improper. Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of the appellant, seeing a lonely girl at a secluded place. He had no premeditation for commission of the offence. The offence may look heinous, but under no circumstances, can it be said to be a rarest of rare case."

In *Rameshbhai Chandubhai Rathod (2)* v. *State of Gujarat, (2011) 2 SCC 764* there was a difference of opinion of the two Judges who had heard the case on whether a death sentence of a sentence of life imprisonment be awarded. Accordingly the matter was referred to a larger Bench which observed that as the accused was about 27 years of age who had raped and killed a child studying in a school in Class IV, but as there was no finding regarding the possible reformation and rehabilitation of the appellant and the possibility of his becoming a useful member of society on being given the opportunity, hence the proper course in the case would be to substitute the sentence of death with a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons. Paragraphs 9 and 10 of the law report at SCC page

767, read as follows:

> *"9. Both the Hon'ble Judges have relied extensively on Dhananjoy Chatterjee case,(1994) 2 SCC 220 . In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so.*
>
> *10. We are, therefore, of the opinion that in the light of the findings recorded by Ganguly, J. it would not be proper to maintain the death sentence on the appellant."*
> *Both the Hon'ble Judges have relied extensively on Dhananjoy Chatterjee case,(1994) 2 SCC 220 . In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible*

rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so."

In *Akhtar* v. *State of U.P., (1999) 6 SCC 60,* for the rape and murder by gagging of a young girl, who the appellant came across at a lonely place, the sentence of death awarded to the accused was converted to one of life imprisonment and it was observed in paragraph 3 at SCC pp. 62-63:

"3. … But in the case in hand on examining the evidence of the three witnesses it appears to us that the appellant-accused has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the appellant-accused found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the case in hand cannot be held to be one of the rarest of rare cases justifying the punishment of death."

In *Mohd. Chaman* v. *State (NCT of Delhi) (2001) 2 SCC 28*, where the 30 year old accused had raped and killed a one-and-a-half year old child, even after describing the crime as heinous, and that the appellant had no control over his carnal desires, the Apex Court had converted the death penalty to one of imprisonment for life holding that a humanist approach needed to be followed and it could not be held that the appellant was such a desperate person who

would endanger the community. It was held at page 40 of SCC para 25:

> *"25. Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: whether the case can be classified as of a 'rarest of rare' category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in Bachan Singh, (1980) 2 SCC 684, Machhi Singh, (1983) 3 SCC 470 and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the 'rarest of rare cases' deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment."*

In *Surendra Pal Shivbalakpal* v. *State of Gujarat*, *(2005) 3 SCC127* which was a case where an impecunious 36 year old U.P. migrant labourer had raped a young girl after being rebuffed by her mother for demanding sexual favours, in

which the death penalty awarded to the accused was converted to life imprisonment as there was no material for showing that the appellant was involved in any other case or that he would be a menace to society. In para 13 it was held (SCC p. 131):

> *"13. The next question that arises for consideration is whether this is a 'rarest of rare case'; we do not think that this is a 'rarest of rare case' in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case."*

Learned G.A. on the other hand in his written arguments seeking death penalty for the appellant placed reliance on *Bantu v. State of U.P., (2008) 11 SCC 113, Mohd. Mannan v State of Bihar, (2011) 5 SCC 317,* and *Rajendra Prahladrao Vasnik v. State of Maharashtra, (2012) 4* SCC 37, *(2009) 3 SCC (Cri) 146,* where the Apex Court has held that on balancing the aggravating with the mitigating circumstances, the only punishment that would suffice in those cases looking to the brutality of the crimes, was a sentence of death.

In *Bantu v. State of U.P., (2008) 11 SCC 113* the Capital sentence awarded in a case where a minor girl of 5 years was raped and murdered was upheld, as the Apex Court, following

the principles laid down in *Bachan Singh*, pointed out that the death sentence was appropriate in cases when the victim of the murder was an innocent child or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer was in a dominating position, or a public figure generally loved and respected by the community.

In *Mohd. Mannan,* a 7 year old girl had been done to death by a 43 year old mason who was working in the house. He had sent the victim child to buy betel to a shop after winning her trust. He thereafter followed her to the shop, and took her away on a bicycle to a lonely spot, where he murdered her after causing various injuries to her for satisfying his lust. None suspected his evil designs, as the victim was a thin unattractive girl barely four feet in height. The Apex Court noticed the brutality of the crime and considered the appellant a menace incapable of reform.

In *Rajendra Prahladrao Vasnik* a 3 year old girl had been lured away on the pretext of buying her biscuits away by a 31 year old man with a false identity who had and won the trust of a poor family. Thereafter the girl had been brutally raped, and there were bleeding injures on her nose and mouth, and on her private parts. There were even bite marks on her chest. The deceased was then left in a naked condition in an open field.

In the recent decision of the Apex Court, *Shankar Kisanrao Khade v State of Maharashtra, (2013) 5 SCC 546,* its earlier decision in *Sangeet* v. *State of Haryana, (2013) 2 SCC 452*, was reiterated and it was observed that the appropriateness of the "balancing test" of balancing the aggravating and

mitigating circumstances, the aggravating circumstances being the circumstances of the crime, and the mitigating circumstances being the circumstances of the criminal needed to be reconsidered, as these distinct and unrelated factors could not be put on the same scale. Hon'ble K.S.P. Radhakrishnan J in his opinion in *Shankar Kisanrao Khade* noted that even where the aggravating circumstances were extremely grave, only if the mitigating circumstances relating to the accused were zero percent, i.e. there was complete absence of any circumstance favourable to the accused personally with regard to his antecedents, could the case be considered one where the death penalty might be justified. Even then it needed to be considered whether it was the rarest of rare case where only a death penalty was appropriate. In *Shankar Kisanrao,* the 52 year old appellant had enticed a 12 year old moderately intellectually challenged girl living with her grandmother, and then repeatedly sodomized and raped her before strangulating her. However as the appellant had only been earlier implicated for the murder of his wife and also in a case under section 380/ 457 IPC, but was not convicted in those cases, hence the Apex Court considered the High Court allegation against the appellant of having criminal antecedents not to have been established, and the case in hand was therefore not considered the rarest of rare cases for award of the death penalty. Justice Radhakrishnan in paragraphs 37,38 and 39 of the law report specifically faulted the judgements in *Mohd. Mannan,* and *Rajendra Prahladrao Vasnik* for applying the “balancing test.”

In his separate opinion Justice Madan B. Lokur has observed in paragraph 123 of the law report, that the possibility of reform or rehabilitation of the appellant was not ruled out by any expert evidence in *Mohd. Mannan,* and *Bantu* unlike some other cases the conviction being based only on circumstantial evidence was not held to be a mitigating factor. The youthfulness of the offender and absence of criminal antecedents was also not considered in these cases

In the aforesaid background we are of the opinion that this is not the rarest of rare cases, where the special reasons exist for only awarding the death penalty and where the other option of awarding a sentence of imprisonment for life was unquestionably foreclosed.

In another case of rape and murder of an eighteen year old girl, by a young painter working in the house, who was suddenly overwhelmed by a sense of lust, and who after committing the murder tried to conceal the corpse in a trunk in the house, this Court in *Sanjay Kumar v State of U.P., (2012) 77 ACC 65* after relying on the decisions in *Ramraj v State of Chattisgarh, (2010) 1 SCC 573, Mulla v State of U.P, (2010) 3 SCC 508,* and *Rameshbhai Chandubhai Rathod (2) v State of Gujarat (2011) 2 SCC 764,* had commuted the sentence of death, to a sentence of imprisonment for life for the remainder of the appellant's life subject to the clemency powers of the President or Governor under Articles 72 or 161 or the State's powers of remission under the relevant statute. In an appeal preferred against the said judgment in *State of U.P. v Sanjay Kumar,* reported in *(2012) 8 ACC 537,* the Apex Court after reviewing the case law on the point, had regarded

this approach of the High Court as finding an appropriate *via media,* for situations where the Court may be loath to impose a sentence of death for any extenuating circumstances, and yet may feel that the routine sentence for life which in practice works out to a sentence of 14 years or 20 years in view of guidelines framed by the State was grossly inadequate or disproportionately small. For such offences, the sentencing or the Appellate Court for proportionate sentencing whilst doing away with the death sentence in a particular case, could impose a sentence even extending for the prisoner's entire remaining natural life, or for a fixed term over and above the mandatory 14 years actual jail term under section 433 A Cr.P.C, subject to the State retaining its powers of exercise of clemency or for granting remission, in a *bona fide* and non-arbitrary and objective manner.

On these considerations we are of the view that the judgement of the trial judge convicting the appellant as above be upheld. However the death sentence awarded to the appellant under section 302 IPC is commuted to a sentence of imprisonment for life, which is to run for the remainder of the appellant's natural life, subject to a *bona fide* exercise of the clemency powers of the President or Governor or the powers of remission of the State under the appropriate statutory provisions. The remaining sentences awarded by the trial Court are upheld. The Reference for confirming the death sentence is rejected.

Appeal is partly allowed.

Dated: 10.02.2014

HSM