IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE :10.07.2018

CORAM

THE HONOURABLE DR.JUSTICE S.VIMALA
AND
THE HONOURABLE MRS.JUSTICE S.RAMATHILAGAM

CRL. A. NO.234 OF 2018
AND
R.T. NO.1 OF 2018

CRL. A. NO.234 OF 2018

Dashwanth .. Appellant

- Vs -

State rep. by
The Inspector of Police
T-14, Mangadu Police Station
Chennai. .. Respondent

R.T. NO.1 OF 2018

Sessions Judge
Mahila Court
Chengalpet. .. Referring Officer

- Vs -

Dashwanth .. Respondent

Appeal filed under Section 372 (2) of the Code of Criminal Procedure praying to call for the records pertaining to the above S.C. No.133 of 2017 and set aside the conviction and sentence passed by the learned Sessions Judge, Mahila Court, Chengalpet, dated 19.02.2018 and to allow the above Criminal Appeal.

Reference made under Section 366 of Cr.P.C. to go into the question of confirmation of the death sentence awarded by the learned Sessions Judge, Mahila Court, Chengalpet, in S.C. No.133 of 2017 dated 19.02.2018.

For Appellant : Mr. P.V.Selvarajan in CA 234/2018
Mr.C.Emalias, Public Prosecutor
Assisted by Mr.Md.Riyas, APP &
MS.Prabhavathi, APP in RT 1/2018

For Respondent :Mr. C.Emalias, Public Prosecutor
Assisted by Mr.Md.Riyas, APP &
Ms.Prabhavathi, APP in CA 234/2018
Mr. P.V.Selvarajan in RT 1/2018

For intervenor : Mr.V.Kannadasan

Reserved on	***Pronounced on***
28.04.2018	***10.07.2018***

COMMON JUDGMENT

DR. S.VIMALA, J.

"Not all scars show
Not all wounds heal
Not all illness can be seen
Not all pain is obvious
Remember this before passing Judgment on another",

so said David Avocado Wolfe. This quote applies not only while judging the accused, but also while judging the plight of the victim, if we take into account,

the innocence ignorance and inexpressiveness of child. That is why it is said **though "*silent" and "listen" are words spelled with the same letters, but for listening the silent cry of the child, justice would be an impossibility. This is all the more true in the case of child sexual abuse, which itself is a silent crime.***

2. Gruesome, brutal and inhumane murder of the child, whose ambitions have been aborted and life aflamed, for which the accused has been made responsible by the trial court by imposing death penalty. The justifiability or otherwise of the death penalty has to be tested by this Court as per the mandate of Section 366 of the Code of Criminal Procedure.

3. Criminal Appeal No.234 of 2018 is filed by the accused/appellant in S.C. No.133 of 2018 challenging the conviction and sentence imposed upon him, while R.T. No.1 of 2018 is made by the learned Sessions Judge Mahila Court, Chengalpet, seeking confirmation of the death sentence.

4. The appeal as well as the reference are disposed of by this common judgment.

5. The accused was tried before the learned Sessions Judge on the allegation that on 05.02.2017, at about 06.00 p.m., when the deceased, who was aged about 7 years, was playing in the ground floor along with other children, the accused kidnapped the deceased and took her to his flat with the intention to commit sexual assault on the deceased and in furtherance of the said intention, the accused took the deceased to the bedroom, molested and killed her. Later,

the accused burnt the body of the deceased using petrol, in order to erase the evidence and to escape from the clutches of law.

6. The accused faced trial in respect of charges under Sections 363, 366, 354-B, 302 and 201 IPC and Sections 8 r/w 7 and 6 r/w 5 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). On being found guilty, the accused was convicted and sentenced as under :-

Section of Offence	Sentence- Imprisonment
U/s 363 IPC	7 years
U/s 366 IPC	10 Years
U/s 354-B IPC	7 Years
U/s 201 IPC	7 Years
U/s 6 r/w 5 of POCSO Act	10 Years
U/s 8 r/w 7 of POCSO Act	5 Years
U/s 302 IPC	Death

The prosecution case in nutshell:

7. The parents of the deceased, Babu and Sridevi, ***believing in human beings***, left their girl child just outside their flat and went for shopping on 5.2.2017 at about 6.00 pm. After returning back, their voices for their daughter did not get any response. Without realizing that they are going to see only the skeletal remains of their dear and beloved child, they searched frantically for their daughter. The initial search for their daughter along with their neighbours, including the accused, thereafter, with the aid of the police machinery, yielded no results. The passion driven father, frantic in his efforts to find a clue as to the

whereabouts of his daughter, searched through the video footage available with the nearby Temple, which ultimately bore fruit in the form of a lead as to the mode by which the girl might have been whisked out of the place. The clueless police, till then, took the clue furnished by the frantic father, but nearly after 40 hours, browsed through the **video footage** and the repeated viewing enabled them to have a clue regarding the involvement of the accused in the crime which ultimately led to finding out the burnt body of the deceased on the dawn of the gloomy day of 8.2.2017.

8. P.W.s 1 and 2 are the father and mother of the deceased. On the fateful day, i.e., 05.02.2017, the case of the prosecution unfolds that, after giving milk to the deceased around 6.00 p.m., P.W.2 (the mother) left the deceased to play along with her friends in the downstairs area of the flat in which they were residing while P.W.s 1 and 2 left in their two wheeler along with the younger brother of the deceased to the market to purchase vegetables. On their return from the market around 7.15 p.m., after purchasing vegetables, when they looked for the deceased, they were unable to find her. Therefore, P.W.s 1 and 2 embarked upon a search of the deceased. However, inspite of a very diligent search throughout the entire flat as also the adjoining areas around the premises occupied by them, they could not find their daughter. After a strenuous effort to locate their daughter, which went in vain, the criminal machinery was set in motion by P.W.1 by lodging a complaint, Ex.P-1, at about 9.30 p.m., on 5.2.2017,

with P.W.27, the Sub Inspector of Police of Mangadu Police Station, who registered a case in Crime No.285/2017 on the file of T-14, Mangadu Police Station under the head 'Girl Missing' at 22.00 hrs.

9. On the registration of the said complaint, P.W.29, the Inspector of Police took up the investigation and he visited the premises occupied by the deceased from where the deceased was found to be missing. In the presence of witnesses, he prepared Ex.P-2, observation mahazar and Ex.P-33, rough sketch. Information was given to control room, crime records bureau, media, etc., regarding the missing of the child. P.W.29 examined the parents of the deceased and other witnesses, viz., Prabha and Duraivelu. Continuing with the investigation, on receipt of a confidential tip from **informers**, the investigation got focused over the accused and the accused was arrested on 8.2.2017 at 9.00 a.m., near AGS Park, Mugalivakkam. The accused voluntarily came forward to give a confession statement, which was recorded in the presence of P.W.7, the Village Administrative Officer of Mugalivakkam, and her Assistant, P.W.8. **The admissible portion of the confession statement is Ex.P-8.**

10. Based on the said confession, the offence was altered from one of “Girl missing” to one under Sections 4 and 8 of Protection of Children from Sexual Offences (for short 'POCSO') Act and Sections 302 and 201 IPC under Ex.P-34. Pursuant to the confession of the accused, M.O.4, Apache Motorcycle and M.O.5, Oppo Cellphone were recovered under the cover of mahazar, Ex.P-3. The accused

took the police officers to the place where the dead body was burnt, where the investigating officer, P.W.29, in the presence of P.Ws. 7 and 8 prepared observation mahazar, Ex.P-4 and drew rough sketch, Ex.P-35. The body was identified by P.W.14, Munisekar, the Administrative Officer of the School in which the deceased was studying. Thereafter, the body was sent to Kilpauk Medical College Hospital, Chennai.

11. In the course of investigation, the accused identified, **M.O.6, a blue colour travel bag in which the undergarment, M.O.1, worn by the deceased** and two cool drink bottles M.O.11 (each measuring about 2 ltrs.), were recovered under the cover of **recovery mahzar, Ex.P-5**. From the place where the body was burnt, M.O.8, the burnt hair of the deceased, M.O.7, burnt ashes, M.O.9, burnt earth and M.O.10, sample earth were also recovered.

12. Thereafter, the accused took the police and other witnesses to his house and identified the place where the deceased was subjected to sexual abuse and subsequently murdered. **The Investigating Officer prepared Ex.P-6, observation mahazar and drew the rough sketch Ex.P-36 of the said place**. From the said place, the accused produced M.O.12, the blue colour jeans pant and M.O.13, the T-shirt worn by him at the time of causing the death of the deceased. The accused also produced **M.O.2, the ear rings, M.O.3, the anklets of the deceased** as also M.O.16, Axis Bank ATM Card, M.O.17, PAN Card and M.O.18, identity card issued by SRM University, from his purse, which were also recovered.

The portion of the bed cover, M.O.15, on which the deceased had urinated was also recovered.

13. On the same day, at about 16.30 hrs., P.W.29, conducted inquest over the mortal remains of the deceased in the presence of panchayatdars and prepared Ex.P-37, inquest report.

14. P.W.16, the Doctor, attached to the Kilpauk Medical College Hospital, Chennai, on receipt of the requisition for conducting post mortem on the body of the deceased, commenced post-mortem. The essential features noticed during post-mortem reads as under:-

> *"External Features : …. Face : Eye lashes and eye brows singed. Upper lip and lower lip burnt in the exposed areas and charred in few areas**. Inner surface of the lower lip showed bruising at the centre over an area of 2 cms x 1 cm x 0.5 cm**. **Lower central incisors found loosened with surrounding bruising.** Blackening of teeth was found. Anterior 2/3rds of the tongue burnt.*

15. The remains of heart, brain, etc., were sent for chemical examination, the thigh bones were sent for DNA analysis and the skull of the deceased was sent for superimposition. After receipt of the report of the respective forensic and scientific experts, the doctor opined that since the body of the deceased was completely charred and burnt, **opinion as to the exact cause of death could not be given.** However, later on, on certain queries raised by P.W.30, the investigation officer, **the Doctor has opined that death of the deceased due to smothering**

cannot be ruled out. After post-mortem examination, the body was handed over to the parents.

16. Continuing with further investigation, P.W.29, on 13.2.17, gave requisition letter under Ex.P-38 seeking medical examination of the accused. The Doctor certified that there was nothing to suggest that the accused is impotent. Requisition was given seeking police custody of the accused and after obtaining permission for two days the accused was taken into custody on 18.2.17. The accused produced M.O.19, the helmet, which was recovered under recovery mahazar, Ex.P-11. **Ex.P-10 is the admissible portion in the confession leading to the recovery of helmet.** Thereafter, the accused was sent to judicial custody on 19.2.17.

17. On the requisition, Ex.P-39 given by the investigation officer, on 21.2.17, the parents of the deceased were subjected to DNA examination. On 22.2.17, the recovered materials were sent to the court with a requisition, Ex.P-40, to send those materials for forensic examination. **P.W.29, examined P.W.18, the person, who sold petrol to the accused.** At that time, P.W.18 informed the investigation officer about the accused making payment through credit card. Based on the said statement, the documents, viz., the credit card slip, pertaining to purchase of petrol by the accused, was seized on production of the same by P.W.18. P.W.18 was brought to the police station where he identified the accused

as the person to whom he sold petrol on the fateful night.

18. P.W.29, under request, Ex.P-41, obtained the photographs of the deceased and along with the said photographs, sent the skull recovered along with a requisition letter, Ex.P-42, for conducting superimposition test for complete identification of the body of the deceased. On 5.4.2017, P.W.29 on being transferred handed over the investigation to P.W.30.

19. P.W.30, taking up further investigation, examined the witnesses, who had already been examined by P.W.29 and recorded their statements. On 6.6.17, the accused was sent for medical examination. On 27.4.17, P.W.30 gave requisition letter, Ex.P-43 along with a set of questions to the doctor, P.W.16, who conducted autopsy, seeking clarification. **Reply was given by P.W.16, the doctor, who conducted autopsy in writing on 1.7.17 under Ex.P-21**. On 1.7.17, the photographer, P.W.12, who took photographs of the place where the dead body was found was examined. P.W.30 gave letter under Ex.P-44 and received the photographs in the form of a CD from P.W.12. P.W.30, thereafter, recorded the statement of the various forensic experts and also examined the Manager of the Bank, which had issued credit card to the accused. P.W.30, thereafter, examined P.W.s 14 and 15, who were already examined by P.W.29 and recorded their further statements. On 16.8.17, P.W.30 filed the charge sheet against the accused after altering the section of the offence under Ex.P-45 and charging the accused under

Sections 302, 201, 363, 366, 354 (B) IPC and under Sections 8 r/w 7 and 6 r/w 5 of the POCSO Act.

20. The prosecution, in order to sustain their case, examined P.W.s 1 to 30, marked Exs.P-1 to P-45 and also marked M.O.s 1 to 19. The accused was, thereafter, questioned under Section 313 (1) (b) Cr.P.C. with regard to the incriminating circumstances made out against him in the evidence tendered by the prosecution witnesses and he denied the same as false and the **accused filed a written statement**. On behalf of the accused, no witness was examined nor any documents were marked.

21. The sum and substance of the written statement is that the accused came from the office on 07.02.2017 around 05.00 am and at about 07.30 am, he was enquired by Mangadu Police and thereafter, at about 11.00 am, he was enquired by different Police Personnel; he was asked to state whether he was involved in any case, for which he replied that he had a problem with the girlfriend in respect of which he was given warning; later on, his father was asked to bring the cell phone of the accused and accordingly it was handed over by the father; the father was informed that it is the formal enquiry; but the accused was made to sign in several blank papers; later on, remanded on 09.02.2017; he would make further statement, after getting the details of the statement of witnesses.

22. The trial court, on a consideration of oral and documentary evidence and other materials, found the accused guilty under Sections 302, 201, 363, 366 and 354 (B) IPC and also under Sections 8 r/w 7 and 6 r/w 5 of the POCSO Act and sentenced the accused as above. Challenging the legality of the conviction and sentence, passed by the trial court, while the accused has preferred C.A. No. 234 of 2018, the reference has been made by the learned Sessions Judge, Mahila Court, Chengalpet, to this Court under Section 366 Cr.P.C. for confirmation of the death sentence.

23. The learned counsel appearing for the appellant Mr.P.V.Selvarajan drew the attention of this Court to the discrepancies and pitfalls in the evidence of the prosecution, which have been analysed by us under the various heads, to drive home the point that the evidence placed by the prosecution before the trial court falls short of a convincing chain, which is the mandatory requirement insofar as circumstantial evidence is concerned and, therefore, appealed to this Court that the conviction and sentence recorded by the trial court is not only erroneous, but based on no evidence or erroneous appreciation of evidence and not in accordance with the legal requirements enunciated in the following pronouncements, as tabulated hereunder and, therefore, prayed for an outright acquittal :-

i) *2015 (7) SCC 178 (Tomaso Bruno & Anr. - Vs – State of U.P.) - Non Production of CCTV Footage*

ii) C.A. 530 & 341 of 2004 dt. 23.01.2015 (Sohan @ Sovan – Vs – State of Rajasthan) – Non-conduct of Test Identification Parade

iii) MANU/SC/0656/2014 (Anjan Kumar Sarma & Ors. - Vs – State of Assam) – Last seen theory

iv) 2012 (2) SCC 399 (Madhu – Vs – State of Kerala) – Confession State – Sec. 25 & 26 of Evidence Act

v) 1984 (4) SCC 116 (Sharad Birdhichand Sarda – Vs – State of Maharashtra) – Circumstantial Evidence

vi) JT 2018 (4) SCC 275 (Navaneethakrishnan – Vs - The State) – Confession Statement - Section 27 of Evidence Act

24. The learned Public Prosecutor Mr.C.Emalias, leading the arguments for the State, not only for confirmation of death penalty, but also against the very many grounds raised by the appellant for interference with the trial court, submitted that the trial court, after threadbare analysis, has recorded the conviction and sentence, not only based on oral and documentary evidence, but also following the various legal precedents of the Supreme Court as also this Court and, therefore, submitted that no interference is called for with the judgment recorded by the Trial Court. Countering the various pronouncements placed on record by the learned counsel for the appellant, learned Public Prosecutor, placed heavy reliance on the following decisions :-

i) AIR 1973 SC 2622 (Shivaji Sahabrao Bobade & Anr. – Vs – State of Maharashtra) - Motive

ii) 2015 (6) SCC 652 (Purushottam Dashrath Borate & Anr. - Vs – State of Maharashtra) – Death Penalty – Rarest of Rare Case

iii) 2017 (4) SCC 124 (B.A. Umesh – Vs – Registrar General, High Court of Karnataka) – Death Sentence

iv) 2008 (11) SCC 113 (Bantu – Vs – State of UP) – Circumstantial Evidence

v) 2005 (7) SCC 714 (A.N.Venkatesh & Anr. - Vs – State of Karnataka) – Section 27 of Evidence Act

vi) 2012 (5) SCC 753 (Chunda Murmu – Vs – State of WB) – Statement of Accused leading to recovery

vii) 2015 (2) SCC 647 (Motilal Yadav – Vs – State of Bihar) – Test Identification

viii) 2012 (12) SCC 158 (Shanti Devi – Vs – State of Rajasthan) – Recovery / Circumstantial Evidence

25. The learned counsel appearing for the intervener Mr.V.Kannadasan has submitted written arguments contending that there being evidence of P.W.3 having seen the accused in the company of the deceased at about 6.15 p.m. on the fateful day, u/s 106 of the Evidence Act, the burden lies upon the accused to explain as to what has happened to the deceased, how it happened and why it happened. The failure of the accused to explain the same, an adverse inference should necessarily be drawn against accused. To substantiate the said contention, learned counsel for the intervener relied upon the following decisions :-

i) Babu @ Balasubramaniam & Ors. – Vs – State of T.N. - 2013

(8) SCC 60 ;

ii) State of W.B. - Vs – Mir Mohammed & Ors. (AIR 2000 SC 2988; and

iii) Paramasivam & Ors. - Vs – State by Inspector of Police - AIR 2014 SC 2936.

26. The case of the prosecution rests on circumstantial evidence. The prosecution relies upon two very significant facts, viz., (i) the theory of last seen; and (ii) confession of the accused leading to discovery of fact. In addition to the above two vital links, the prosecution has projected attendant circumstances to show the connecting link in the chain. It is for this Court to find out whether the entire evidence forms a complete chain.

DRIVING FORCE, i.e., THE MOVING FORCE FOR THE OCCURRENCE :

27. The motive is the cause or reason that moves the will and induces the action of any human being. What could have been the moving force for the accused to have committed this offence?

28. In order to enlarge the probability of the occurrence, i.e., moving force for the occurrence, the prosecution relies upon the habit of the accused in viewing the obscene sexual videos in the cell phone and submits that the said act should have been a compelling and impulsive emotion for him to have committed this kind of offence.

29. The learned counsel for the accused would submit that the prosecution has pathetically failed to prove the motive, which is the vital link in the chain, which having not been established, the conviction is unsustainable.

30. Whether there is a necessity to prove the motive? If proved, what is the value of proof of motive is the incidental issue.

31. In ***State of U.P. - Vs – Hari Prasad (1974 (3) SCC 673)*** the Supreme Court had an occasion to consider the relevancy and necessity of motive in a case of murder and whether absence of motive would be detrimental to the case. In the said decision, the Supreme Court observed as under :-

> *"2. ..... it is never incumbent on the prosecution to prove the motive for the crime. And often times, a motive is indicated to heighten the probability that the offence was committed by the person who was impelled by that motive.* ***But, if the crime is alleged to have been committed for a particular motive, it is relevant to inquire whether the pattern of the crime fits in with the alleged motive****."*
>
> *(Emphasis supplied)*

32. The habit of the accused in seeing obscene movies in his mobile and his urge for carnal pleasure has been projected as motive for the occurrence. It is trite to point out that the evidence regarding the existence of motive which operates in the mind of the accused is very often very limited, and may not be within the reach of others. The motive driving the accused to commit an offence

may be known only to him and to no other. Therefore, if the evidence on record suggests adequately, the existence of the necessary motive required to commit a crime, it may be conceived that the accused has in fact, committed the same.

(Vide Rohtash Kumar – Vs – State of Haryana - 2013 (14) SCC 434).

33. The above ratio laid down by the Supreme Court clearly defines that motive, though may be an attributing factor, nevertheless, it is not a relevant or a determining factor, which the prosecution needs to establish to take the chain of circumstance forward. ***The motive only heightens the probability that the offence*** was committed by the person who was impelled by that motive and if the crime is alleged to have been committed for a particular motive, it is relevant to inquire **whether the pattern of the crime fits in with the alleged motive.**

34. The prosecution relies upon M.O.5, the Oppo Mobile Phone, recovered from the accused and evidence of P.W.22, the forensic expert, who has given his opinion that offline obscene videos were found recorded in the said mobile phone. P.W.22, in chief examination, has further opined that evidence was available to show that the mobile phone had been used to browse obscene websites.

35. P.W.22, during cross examination as to the dates on which obscene websites were browsed, has mentioned, that there is evidence that the accused had browsed the obscene websites on 14th and 20th of January 2017. Further,

P.W.22 has categorically rejected the suggestion that sending of obscene pictures from one mobile phone to another mobile phone would entail receipt of those pictures under the received folder. P.W.22 has further went on to speak that telltale evidence with regard to browsing would find a place only in the offline website folder.

36. The above evidence of P.W.22 coupled with his report, Ex.P-25, relating to analysis of M.O.5, clearly reveals that the said mobile phone was used for browsing obscene websites and that telltale evidence was available in the mobile phone to substantiate usage of the phone for browsing obscene websites.

37. To the question put to the accused under Section 313 relating to the incriminating evidence of P.W.22, the accused had not denied the ownership of the mobile phone and has further stated in answer to the said question that he was in the habit of seeing obscene movies, though not regularly. Therefore, it is clear from the evidence of P.W.22 and from the answer of the accused under Section 313 questioning, the habit of the accused viewing obscene videos stands established. Therefore, the above evidence clearly goes to show the interest of the accused in viewing obscene materials, which had been suggested as the driving force for the accused to commit the offence stands established. In such a scenario, the motive put forth by the prosecution cannot be said to be unacceptable.

38. Under Section 30 of the POCSO Act, the special Court shall presume the existence of mental state, in respect of certain offences, which of course, is a rebuttal presumption.

OPPORTUNITY FOR THE ACCUSED:

39. According to the case of the learned Public Prosecutor, the accused being a neighbour might have had the opportunity of seeing the lonliness of the child, i.e., in the absence of the parents and the familiarity of the accused with the child would have made the child to go along with the accused unhesitatingly and, therefore, it had become possible for the accused to have ravished the victim girl. However, this cannot be a compelling factor, but could be one of the factors to be considered along with other circumstances.

ACCUSED AND DECEASED -LAST SEEN TOGETHER:

40. The prosecution has projected P.W.3 as the person, who has last seen the deceased in the company of the accused. In such a scenario, what is the extent of proof required to prove the said circumstance and, whether the evidence of P.W.3 that he saw the deceased in the company of the accused at about 6.30 p.m. on the fateful day has been proved by the prosecution.

41. The theory of last seen together is one where two persons are seen together alive and after an interval of time, one of them is found alive and the other dead. If the period between the two is short, presumption can be drawn

that the person who is alive would be the perpetrator of death of the other. Time gap should be such as to rule out possibility of somebody else committing the crime. Last seen together principle is one of the pivotal principles to be taken into consideration in establishing the guilt of the accused. In the absence of eye-witnesses and tangible evidence, circumstantial evidence is the last resort for the prosecution in a murder case, of which the last seen theory plays a crucial role in fixing the culpability on the person, with whom the deceased was last seen alive. Once the prosecution proves the last seen theory, the onus shifts on the accused to counter blast the said proof, by adducing necessary evidence. It is an important link in the circumstantial evidence.

42. In this case, apart from the evidence regarding last seen together, which is under serious challenge there is evidence of a) the accused joining with the police for some time in tracing out the victim and there after absconding b) the accused making confession as well as pointing out the place where the burnt dead body was there c) confession of the accused and based on that the accused showing the place where the occurrence of sexual assault took place and also the recovery of anklet and ear-rings of the deceased from the accused and d) the purchase of petrol using credit card in the bottles and not in the vehicle.

43. The prosecution has let in the evidence of P.W.3 who deposed that on the day of occurrence, while he was going upstairs to take back the dried clothes,

he saw the accused, his dog and the deceased playing together in the second floor at about 6.15 p.m. According to the prosecution, P.W.3 was the person who saw the deceased in the company of the accused lastly.

44. It is the contention of the learned counsel for the accused that the ***initial statement*** of P.W.3 recorded u/s 161 of Cr.P.C. did not disclose P.W.3 seeing the accused in the company of the deceased, but only in the later statement, which was ***recorded after a period of two month***s from the date of occurrence P.W.3 has spoken about seeing the deceased in the company of the accused at about 6.15 p.m. on the fateful day and, therefore, its truth and veracity is doubtful and, therefore, no reliance could be placed on the said statement.

45. However, it is to be pointed out that in chief examination, P.W.3 has spoken not only about seeing the deceased in the company of the accused on the fateful day, i.e., 5.2.2017, but also informing the said fact to the police officers on that day itself. It is the further deposition of P.W.3 that the accused also joined in the search of the deceased.

46. The question before the Court is *"Which statement of P.W.3 is to be believed - Whether his initial statement to the police officials or his subsequent evidence in Court.* What is the weightage required to be attached to the evidence given to the police and to the Court and which evidence has more weightage.

47. According to the Indian Evidence Act, evidence means and includes:-

> *(i) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry and such statements are called oral evidence;*
>
> *(ii) all documents produced for the inspection of the Court.*

48. In other words, evidence includes that which is given by witness or offered by documents. Clause (a) defines testimonial evidence. Testimony means the statement of the witness made under the oath or affirmation. Therefore, the statement of the witness before the Court is evidence and the earlier statements made before any other authority are merely corroborative / contradictory of the statement given before the Court, thus adding strength or weakness to the statement made before the Court.

49. The statement given to the court is on oath which is subjected to cross examination and the earlier statement before the police is admissible only for the purpose of establishing the contradiction. ***The evidence given before the court alone is the substantive evidence***. It is appropriate to rely upon the decision of the Hon'ble Supreme Court, reported in ***Mohd. Farooq Abdul Gafur – Vs - State Of Maharashtra (2010 (14) SCC 641),*** in which it had been held that the statement of the witnesses before the court alone is substantive evidence. The court held so relying upon the decision in ***Amitsingh Bhikamsingh Thakur v. State of Maharashtra (2007 (2) SCC 310)***, at page 315, wherein it has been observed

thus:

> *14. "7. It is trite to say that the **substantive evidence** is the **evidence** of identification in court. Apart from the clear provisions of Section 9 of the **Evidence Act**, the position in law is well settled by a catena of decisions of this Court. The facts, which establish the identity of the **accused** persons, are relevant under Section 9 of the **Evidence** Act. **As a general rule, the substantive evidence of a witness is the statement made in court.** The evidence of mere identification of the accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of a prior test identification, therefore, is to test and strengthen the trustworthiness of that evidence. It is accordingly considered a safe rule of prudence to generally look for corroboration of the sworn testimony of witnesses in court as to the identity of the accused who are strangers to them, in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration.*
>
> *(Emphasis supplied)*

50. Now, in the backdrop of the above ratio, the question is whether the evidence of P.W.3 can be relied upon, either especially without corroboration, or more especially in the light of earlier contradiction in the statement of P.W.3 made on two different dates.

51. So far as corroboration is concerned, even though there is no corroboration from other witnesses, the corroboration comes from subsequent circumstances as pointed out in the earlier paragraph. So far as the statement

before the police is concerned, the version of P.W.3 before the Court is that **he had stated to the police, at the earliest point of time, the exact version of the evidence, which he had deposed before the Court,** but the statement recorded by the police did not contain the relevant details.

52. **If the appellant wants to take advantage of the contradiction in the evidence of P.W.3, the** contradiction should have been brought to the notice of P.W.3 during cross-examination and his comment should have been invited. It has not been done so. The fact that there were two statements recorded by the police and there was contradiction in between the two statements has not been put to P.W. 3 at all. Under such circumstances, it is not open to the learned counsel of the appellant to argue on the omission found in the initial statement recorded by the police u/s 161 Cr.P.C. The evidence of P.W. 3, coupled with the subsequent events would go to show that the evidence of P.W. 3 before the court must be true and the alleged statement recorded by the police u/s 161 Cr.P.C., does not reflect the true statement made by P.W.3. In the above backdrop, this court holds that the theory of last seen together stands proved by the evidence of P.W.3 apart from the subsequent attendant circumstances.

53. No action was taken by the Police at the initial point of time, inspite of P.W.3 informing the Police that he had seen the deceased with the company of the accused, might have been due to the fact that the accused also participated in

searching for the deceased initially.

CONFESSION LEADING TO RECOVERY:

54. There are two exceptions laid down in the Evidence Act so far the admissibility of confession made by an accused is concerned. The first exception, under Section 26, relates to the confession made by the accused in immediate presence of a Magistrate and the other finds a place under Section 27 i.e. when the confession leads to discovery of facts. Section 27 permits the proof of all kinds of information whether contained in a confession or not and therefore goes beyond the provisions of Sections 25 and 26.

55. The broad ground for not admitting confession made to Police Officer is to avoid the danger of admitting false / induced / compelled confessions, but the necessity of the exclusion disappears when the truth of the confession is guaranteed by the discovery of facts in consequence of the information given.

56. It is the case of the prosecution that the accused gave a confession and based on that the burnt body was discovered which confirmed that the confession is true and therefore, the confession leading to discovery of fact as mandated under Section 27 must be relied upon. The very fact that it is the accused who was able to show the place where the burnt body was found, in tune with his confession statement, has been spoken to by the investigating officer, P.W.29, as also by P.W.21, the forensic expert and by P.W.s 7 and 8 who are

also the witnesses for the confession statement made by the accused, in their respective depositions before the Court.

57. The learned counsel for the appellant would contend that, nowhere the accused has stated that he would show the place where the burnt body is and, therefore, the confession did not lead to discovery of the dead body and therefore, the confession cannot be relied upon.

58. Perusal of the confession statement of the accused reveals that there is no express statement in the confession of the accused that he would show the place where the dead body was burnt. But what he has stated is that it is he who burnt the dead body with petrol. Whether, the statement that "*I would show the place where the dead body is*" is so very important to come to the conclusion that the accused is guilty or that the statement that he has burnt the body with petrol and ultimately the accused actually showed the place where the dead body was burnt would be essential to hold that the accused was aware of the crime or in fact had committed the crime.

59. For better appreciation, it is relevant to consider Section 27 of the Indian Evidence Act, which deals with the evidence that could be relied upon for proving a discovery of fact, which is extracted hereunder:-

> "***27. How much of information received from accused may be proved.*** *— Provided that, when any fact is deposed to as discovered inconsequence 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."

(Emphasis supplied)

60. The decision of the Privy Council in ***Pulukuri Kottaya – Vs - Emperor (AIR 1947 PC 67)*** is the oft quoted authority for supporting the interpretation that the "*fact discovered*" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. The crux of the ratio in *Pulukuri Kottaya case (supra)* was explained by this Court in ***State of Maharashtra - Vs - Damu (2000 (6) SCC 269)***, where Thomas J., observed thus :-

*"35) The decision of the Privy Council in **Pulukuri Kottaya v. Emperor** (supra) is the most quoted authority for supporting the interpretation that the 'fact discovered' envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect." **In Mohd. Inayatullah v. State of Maharashtra [1976 1 SCC 828]**, Sarkaria, J. while clarifying that the expression "fact discovered" in Section 27 is not restricted to a physical or material fact which can be perceived by the senses, and that it does include a mental fact, explained the meaning by giving the gist of what was laid down in **Pulukuri Kottaya** case (supra). The learned Judge, speaking for the Bench observed thus:*

"*Now it is fairly settled that the expression 'fact discovered' includes not only the physical object produced, but also the*

> *place from which it is produced and the knowledge of the accused as to this (see* ***Pulukuri Kottaya v. Emperor (supra); Udai Bhan v. State of U.P.)***"
>
> *(Emphasis supplied)*

61. The fact discovered in consequence of information given by the accused must be a relevant fact. ***The information and the fact should be connected with each other as cause and effect***. If any portion of the information does not satisfy this test, it should be excluded. Therefore, it is the connection of the thing discovered with the offence which renders it as a relevant fact. The mere pointing out of places by the accused where the occurrence took place without any material fact having been discovered there would not come within the term "*fact discovered*" enumerated under Section 27. The fact discovered may be the stolen property, the instrument of crime, the corpse of the person murdered or any other material thing; or may be a material thing in relation to the place or the locality where it is found.

62. Explaining the relationship between Sections 26 and 27 and the ban imposed by Section 26, their Lordships said:

> "*That ban was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. But if all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, the ban will lose its effect. On normal principles of construction their*

Lordships think that the proviso to Section 26 added by Section 27 should not be held to nullify the substance of the section. In their Lordships' view it is fallacious to treat the "fact discovered" as equivalent to the object produced; ***the fact discovered embraces the place from which the object is produced and the knowledge of accused as to this, and the information given must relate distinctly to this fact****.*

(Emphasis supplied)

63. The above proposition of law laid down by the Privy Council was reiterated by the Supreme Court in ***State of U.P. v. Jogeshwar, (1983) 2 SCC 305 : AIR 1983 SC 349 Cr. L.J. 686 : 1983 All L.J. 231***, wherein it was held "*that fact discovered means the authorship of concealment, and not the guns and daggers used in the crime. Conduct and concealment are incriminating circumstances.* ***This conduct substantiated by discoveries constitutes evidence****"*.

64. Explaining the scope of the section in general terms, their Lordships observed:

"***Section 27, which is not artistically worded, provides an exception to the prohibition imposed by the preceding section, and enables certain statements made by a person in police custody to be proved. The condition necessary to bring the section into operation is that discovery of a fact in consequence of information received from a person accused of any offence in the custody of police officer must be deposed to, and thereupon so much of the information as relates distinctly to the fact thereby discovered may be proved…….***

(Emphasis supplied)

65. In ***A.N. Venkatesh – Vs - State of Karnataka, (2005) 7 SCC 714*** the Supreme Court had occasion to deal with a similar issue and in that context, the Supreme Court held thus :-

> *9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in Prakash Chand v. State (Delhi Admn.)[(1979) 3 SCC 90 : 1979 SCC (Cri) 656 : AIR 1979 SC 400] .* ***Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused****. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act."*

(Emphasis Supplied)

66. Therefore, it is clear from the above ratio consistently laid down *that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact*. ***Further, the conduct and concealment are incriminating circumstances. This conduct, substantiated by discoveries, constitutes evidence***. *The Supreme Court has further reiterated in a catena of decisions that pointing out a material object by the accused furnishing the information is not a necessary concomitant of Section 27.* ***Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential there should be such pointing out in order to make the information admissible under Section 27***. It could well be that on the basis of the information furnished by the accused the investigating officer may go to the spot in the company of witnesses and recover the material object.

67. In the light of the above proposition, the confession of the accused could be treated as an information, leading to a discovery of fact, as mandated under Section 27 of the Evidence Act.

68. In the above evidential backdrop, it is clear that the above confession of the accused has led to the discovery of the corpse of the deceased in the place

pointed out by the accused. Further, the evidence of P.W.s 7 and 8, who have no axe to grind against the accused, support the prosecution version and have spoken in unison that it was the accused, who took them and showed the place where the body of the deceased was burnt. In effect, it could only mean that it was within the knowledge of the accused who knew the place where the dead body of the deceased was burnt and he took the witnesses and the investigation officer to the place. Therefore, it is clear that the discovery of fact about the body of the deceased being at the place, where it was identified by the accused and that too in a burnt stage, has come out from the lips of the accused, through his confession statement, which is admissible under Section 27 of the Indian Evidence Act. ***The fact that there had been a dead body in a bush, which had been burnt, had been within the knowledge of the accused, which after confession had been proved to be true and correct by the recovery of the burnt dead body***. The presence of petrol in the tissues of the mortal remains of the deceased would further strengthen the mode of killing as put forth by the prosecution, which has been spoken to by the accused.

69. It is to be pointed out that though the above incriminating circumstances in the evidence of P.W.s 7, 8, 29 and the scientific officers have been put to the accused, but the accused has not come out with any explanation whatsoever as to how he had knowledge about the burnt dead body being there.

Further, it is to be pointed out that the spot in which the dead body has been burnt is a secluded spot, outside the view of the public and, therefore, in all earnestness, the accused was supposed to give an explanation about his knowledge of the dead body at the said place.

PURCHASE OF PETROL:

70. The prosecution theory is that petrol was procured by the accused for the purpose of setting on flame the corpse of the deceased, though it is the stand of the accused that it was purchased for his motorcycle. However, the answer of the accused in response to that portion of the evidence under Section 313 questioning shows the falsity of the answer of the accused. The quantity of petrol that could be procured for the sum of Rs.322/=, at the rate of Rs.67/= per litre, which is the admission of the accused himself works out to about 4.80 litres, which is almost the capacity of two bottles recovered by the investigating officer from the place where the body was burnt. The scientific expert has spoken about the capacity of the bottles as also the presence of petrol in the said bottles. Further, the proximity of time when the petrol was procured is also important, as the credit card slip reflects the time of purchase as 9.19 p.m., which is in close proximity to the time when the body could have been burnt.

71. Further, one other crucial thing to be noticed here is the way in which an individual normally fills fuel. Either it would be litre specific or amount

specific. It is usually not the customary practice to fill up petrol for unspecific amounts. However, here petrol has been filled for an amount, which is neither litre specific nor amount specific. Though, in isolation, human mind acts in any way which it likes, but keeping all the attendant circumstances in mind, the filling up of petrol for an amount of Rs.322.23 is not in consonance with the stand taken by the accused. It would only mean that the accused wanted to have the bottles filled up with petrol and it was neither amount specific nor litre specific.

RECOVERY OF BELONGINGS OF THE DECEASED :

72. Similar is the case with regard to the recovery of ear rings and anklets of the deceased, which were recovered from the purse of the accused, which also lends support to the connection between the death of the deceased and the accused. If not for the accused killing the deceased and disposing off the dead body, as stated above, the accused could not have come into possession of the material objects, which were the belongings of the deceased.

73. Therefore, all the factors, cumulatively taken together, inevitably leads to the conclusion that the accused had knowledge about the place where the burnt dead body of the deceased was and had led the witnesses and the investigating team to the said place and the fact that the burnt dead body having been discovered pursuant to the confession statement of the accused is a fact discovered in pursuance of the confession statement of the accused.

CAUSE OF DEATH - HOMICIDAL VIOLENCE - MEDICAL EVIDENCE:

74. It is the contention of the learned counsel for the accused that P.W.16, the doctor, who conducted post-mortem on the body of the deceased, has not opined in any uncertain terms about the cause of death. The only evidence is that death due to smothering cannot be ruled out. That being the case, it is vehemently contended that the prosecution having not brought home the actual cause of death of the deceased, the charge that the deceased died on account of homicidal violence cannot be sustained.

75. The array of questions that flow through the mind of all, who have had access to this case, including this Court is, "How did the child sustain the burns?" Can it be by self-immolation? If not, who else is responsible? If it is by somebody else, is it the accused or anybody else. What is the nature of the place in which the dead body was found? What are the necessary inference that could be drawn with relation to the dead body being found in a bush. Does the place where the body was burnt indicate the intention relating to screening of the offence/body from public view?

76. As regards the theory of self-immolation, this Court could very safely and out rightly discard the said theory for the simple reason that it would be a physical impossibility for a 7 year old child to procure petrol and, thereafter, to burn herself, that too, in a very secluded and remote spot. It has been specifically

established by medical evidence that the burns are not ante-mortem but post-mortem in nature, i.e., having been caused by burning the body with petrol after death. Further, the body has been burnt in a secluded place, in a thorny bush, which not only dispels the theory of self immolation, but also advances the theory that it has been done so for screening the dead body from being found and identified.

77. That leaves this Court with the only other possibility relating to somebody immolating the child. If the child had been set on flames by some other person, was it before the death of the child or after the death of the child.

78. Once a finding has been adduced that the burning has been carried out after the death of the child, what could be the reason for burning the body after the death of the child. The theory propounded by the prosecution is that the accused sexually abused the child and in the said process, the child may have raised alarm, the accused tried to close her mouth and applied pressure on the mouth and neck, which could have resulted in suffocation leading to the death of the deceased and in order to screen the offence, the accused moved the child out of the house in a bag and took it to the scene of burning, where he tried to screen the evidence by burning the corpse using petrol.

79. The nature of burn injuries has been clearly spoken to by the doctor. According to the doctor, those injuries are post-mortem burn injuries. The

burning has been to such an extent that the whole body tissues of the deceased have been burnt to ashes and have started crumbling, except for a small area on the body, where skin was found, which was ultimately retrieved by the doctor and sent for analysis. The areas of the skin, which stood protected luckily, has lent a hand not only to this Court to decipher the cause of death, but also to the Doctor, who, though not initially but after queries being raised by the investigation officer, has opined about the probable cause of death.

80. The main contention raised by the learned counsel for the accused is that when there is no medical evidence to conclusively establish the cause of death or indicate the probable cause of death, the accused cannot be held guilty of murder.

81. Though such a contention is advanced, the main thrust of the contention is on the opinion given by the doctor, who conducted post mortem, wherein the doctor has stated that it is not possible to give any opinion as to the cause of death because the body is totally in a burnt condition. However, it is not the only opinion given by the doctor, but there are two other opinions, one is that death due to smothering cannot be ruled out and the other one is that death was not due to ante-mortem burn injuries. A harmonious interpretation has to be given to the three opinions, to ascertain the cause of death.

82. What are the incriminating materials available from the post mortem

report, which would give indications regarding the cause of death? So far as the post mortem report is concerned, it does not end with the opinion expressed by the doctor in the post mortem report alone, but it covers the opinion expressed by the doctor to the investigating officer by saying that death by smothering cannot be ruled out. This opinion is closely in tune with the prosecution theory. Further the details etched out by the Doctor as to the condition of the body and the various observations in the post mortem report have to be considered in the light of medical jurisprudence to understand the way in which death would have occurred and also the probable cause of death.

83. To support the finding that death by smothering cannot be ruled out, reliance can be had to the observations made in the post mortem report with regard to the face of the deceased, where it is observed as under :-

> *"eye lashes and eye brows singed. Upper lip and lower lip burnt in the exposed areas and charred in few areas.* ***Inner surface of the lower lip showed bruising at the centre over an area of 2 cm x 1 m x 0.5 cm. Lower central incisors found loosened with the surrounding bruising****. Blackening of teeth was found. Anterior 2/3 of the tongue burnt."*

(Emphasis supplied)

84. Even though the body has been burnt and charred in many areas with body tissues crumbling on touch, fortunately for the cause of justice, a small portion of the skin/tissue had remained unburnt. This aspect we have cross-

checked it by watching the CD that has been marked in this case. One such area is the inner part of the lower lip. The observations made with regard to the injuries to the lower lip, the investigating officer has raised certain queries to the doctor and the doctor has answered the questions raised and it will be most appropriate to reproduce the same:-

Q-1) What was the condition of the body when starting the post mortem examination.

A-1) The whole body was in a burnt condition and charred in many areas of the body. Body tissues crumbled on touch.

Q-2) Can blackening of teeth as mentioned in your post mortem certificate occur in burns?

A-2) Yes.

Q-3) Can the cause of death be attributed to burns? State reasons.

A-3) As the burnt areas did not show any ante-mortem signs, cause of death cannot be attributed to burns.

Q-4) Right leg below the knee to the ankle is found missing as mentioned in your post-mortem certificate. Is the separation ante-mortem or post-mortem?

A-4) Right leg below the knee is missing due to crumbling after burns. It is post-mortem in nature.

Q-5) What are the conditions where the inner surface of the lip can show bruising?

A-5) any condition where there is application of blunt force over the mouth which presses/crushes the lip against the hard teeth produces bruising of lips. It may be direct impact/smothering/fall over hard surface or object.

Q-6) Can the loosening of lower central incisor and surrounding bruising occur in smothering?

A-6) Yes. Possible.

Q-7) Bruise mentioned in your post-mortem certificate pertained to the inner aspect of the lower lip can occur in smothering. Yes or No?

A-7) Yes.

Q-8) If yes, can the cause of death be attributed to smothering and why the cause of death was not given as smothering in your post mortem certificate?

A-8) Death due to smothering cannot be ruled out. In a typical case of smothering, there will be bluish discoloration of finger/toe nails, petechial haemorrhages, sub-conjuctival hemorrhage, injuries around the mouth and nose, congestion of all organs and fluidity of blood. As the body was burnt all over, none of these could be made out externally or internally, except for the contusion over lips. Hence, the opinion was not given in the post-mortem certificate as smothering.

85. The question is whether those burn injuries are ante-mortem or post-mortem, which alone decides the mode of death. The opinion of the doctor, as is evident from the questions and answers is that they are post-mortem burn

injuries.

86. The doctor, who conducted post mortem has stated that as the body of the deceased had been in a charred condition, the cause of death could not be ascertained. ***However, the doctor has stated that as the burnt areas did not show any ante-mortem signs, cause of death cannot be attributed to burns***. Therefore, the report has to be holistically considered and interpreted.

87. How could the doctor come to the conclusion that the burns are post-mortem, is one of the vital questions that the Court posed to itself and embarked upon on finding an answer to it. An in-depth study of not only the medico-legal cases, but the conclusions arrived at by the forensic pathologists provide the necessary clues for differentiating between ante-mortem and post-mortem burns. Every time a body comes to autopsy with a history of death due to burns, it poses a challenge to the Forensic Pathologist whether it is an ante-mortem or post-mortem burn. Its distinction is always paramount to the investigator.

88. *Post-mortem burn injuries are characterized by absence of vital reaction, absence of line of redness, no soot particles in the trachea and bronchus, no cherry red colour of the blood and absence of reparative process. The internal organs are usually roasted with emission of peculiar odour. Vesicles may be present both in the ante-mortem and post-mortem burns but in the post-mortem burns they contain mostly air and the little fluid comprises of very little*

albumen with no cholorides and have dull, yellow, dry hard base. While increased enzyme reaction is present in the periphery of ante-mortem burns, no enzyme activity is present in cases of post-mortem burns.

89. The Forensic Pathologist plays a paramount role in the investigation of a crime. His part significantly increases in the bodies which are found dead on the spot, with no witnesses and no proper history. The post-mortem findings in these cases give vital clues to the police investigators.

90. On a careful perusal of the post-mortem certificate as well as the questionnaire, to which the doctor has given her views, it is evident that the doctor has specifically stated that the burnt areas did not show any ante-mortem signs and, therefore, cause of death cannot be attributed to burns. Therefore, it is clear from the opinion of the doctor that the burn injuries are not ante-mortem in nature, which leads only to the irrefutable conclusion that the burn injuries should necessarily be post-mortem in nature. Therefore, it is amply clear from the above evidence that the deceased had died of homicidal violence, the deceased having been done to death and, thereafter, burnt in order to screen material evidence. On the basis of the above reasoning and irrefutable medical evidence, this Court holds that the deceased died on account of homicidal violence.

91. Normally, when there is a murder, it may be on account of several

reasons if the deceased is a grown up person, but it is limited in cases involving children. The murder may be a murder for gain or for any other reason, which only the perpetrator of the crime would be aware of. The theory of the prosecution is that the deceased was sexually abused and during that attempt, in order to prevent others from hearing the voice of the deceased, the accused had closed the mouth of the deceased and, thereby, applied pressure on the neck and mouth, which resulted in smothering. Whether the evidence collected during investigation would indicate that death had happened due to smothering.

92. The medical evidence on record shows the injury in the form of bruising at the centre of the lower lip over an area of 2 cm x 1 cm x 0.5 cm and the loosening of the lower central incisors with surrounding bruising lends support to the doctor to arrive at a conclusion that death due to smothering cannot be ruled out.

93. What are the circumstances under which loosening of teeth and bruising of the tissues would have occurred? Admittedly, by exerting pressure over the mouth of the deceased, (in order to prevent the voice from being audible to persons outside) loosening of the teeth and bruising would have happened and an analysis of the various medico-legal cases, leads this Court to the definitive interpretation that death would have been on account of smothering.

94. The circumstances narrated above shows that the links are all in place and that the probability of the accused committing the crime assumes moral certainty on a construction of the crime scene. The construction of the crime scene at the time of occurrence would only have been to the effect that in order to mute the cry of the child from reaching the ears of the neighbours, the accused had closed her mouth by applying pressure over the mouth of the deceased, which alone could have caused the injury on the inner lip of the deceased. Fortunately for the prosecution, the portion of the lip, which remains intact, has supported the theory that the deceased would have died of smothering, which stands proved by the medical evidence. Apart from that, the loosening of the lower central incisors and surrounding bruising would only go to show that death should have been only on account of smothering and that the smothering is at the time of causing sexual assault. When the child is aged about 7 years, the murder could be either for gain or for causing sexual abuse. From the materials recovered, viz., one ear ring and one anklet from the accused, it could easily be inferred that murder could not have been for gain. Then naturally the other reason is that it should be for causing sexual abuse.

95. For grown up persons, normal pressure, even extra pressure exerted on the lips will not easily cause shaky teeth, but when the child is aged about 7 years, because of milky teeth, it is quite possible to become shaky easily. Once the

medical evidence discloses facts leading to the conclusion that death by smothering could not be ruled out and that the prosecution has let in evidence to substantiate that the accused is the perpetrator of the crime, the circumstances of which has been properly linked, then it is for the accused to explain. In the absence of any explanation on the part of the accused, the crime scene construction would only go to show that the accused, would have chosen to burn the dead body with a view to erase the evidence, which if not done, would directly implicate the accused with the commission of the offence. Once the accused is found guilty of causing the murder and erasing the evidence, then the appeal filed by the accused has to be necessarily thrown out for want of merits.

CHARGES UNDER POCSO ACT:

96. It is an admitted fact that the deceased is a child aged 7 years at the time of the occurrence, which stands established by the bona fide certificate, Ex.P-15, issued by the school. The charges framed against the accused are under Sections 6 r/w 5 and 8 r/w 7 of the Act. The charges are under Sections 5 and 7 of the Act and in respect of which punishment are provided under Sections 6 and 8 of the Act.

97. So far as Section 5 of the Act is concerned, it speaks about aggravated penetrative sexual assault and Section 6 is about punishment for the same. The aggravated penetrative sexual assault is with reference to the same act being

committed by Police Officer, Member of Armed Forces, Public Servant, Management or Staff of a hostel, etc. Therefore, the provisions of Section 5 of the Act is not attracted so far as this accused is concerned. However, the provision applicable will be Section 3 of the Act which speaks about penetrative sexual assault. The offence under Section 3 is punishable under Section 4 of the Act for which the punishment is imprisonment for a period which shall not be less than seven years, but which may extend to imprisonment for life. Section 3 of the Act dealing with penetrative sexual assault reads as under:-

> *"**Section 3 - Penetrative sexual assault**. - A person is said to commit "penetrative sexual assault" if--*
>
> *(a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*
>
> *(b) he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
>
> *(c) he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*
>
> *(d) he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.*

98. Therefore, the charge should have been under Section 3 of the Act and the punishment should have been under Section 4 of the Act. Therefore, Section 6 r/w 5 of the Act imposed by the trial court shall stand amended as Section 4 r/w 3 of the Act. The mistake in the charge does not affect the rights of the accused as the offence alleged under Section 3 of the Act stands proved which is a lesser offence than the offence under Section 5 of the Act.

99. Section 7 of the Act dealing with sexual assault, for which the punishment is imprisonment of either description which shall not be less than three years but which may extend to five years with fine.

100. Section 7 of the Act reads as under:-

> *"7. **Sexual Assault.** – Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intend which involves physical contact without penetration is said to commit sexual assault."*

101. The Legislature had foreseen the hardship and inability that child witnesses would face while deposing with perfection and precision, due to shame, guilt feeling, etc., on the same lines the act was committed, which is not so in the case of adult witnesses and, therefore, the Legislature, with a view to safeguard the children from such horrid experience, had provided for the

presumption under Section 29 of the Act. For better clarity, Section 29 of the Act is extracted hereunder :-

> "***29. Presumption as to Certain Offences***.-
>
> *When a person is prosecuted for committing or abetting or attenuating to commit any offence under Sections, 3, 5, 7 and Section 9 of this Act, the special court shall presume, that such person has committed or abetted or attempted to commit the offence as the case may be unless the contrary is proved."*

102. POCSO Act, 2012, has two provisions, i.e. Sections 29 and 30, which jointly make a pair of presumptions. Section 29 raises a presumption, if the allegation was relating to the offences under Sections 3, 5, 7 and 9 of POCSO Act, that such person had committed the offence unless the contrary is proved. These offences are punishable under Sections 4, 6, 8 and 10 respectively. Therefore, the onus shifts on the person, who is accused of the crime to prove that he has, in fact, not committed the offence.

103. The second is the presumption under Section 30 and it talks about the existence of *mens rea* or culpable mind on the part of the accused, whenever it is so required under the provisions of POCSO Act. This culpable mental state includes intention, motive, knowledge of a fact and the belief in or reason to believe a fact. But, the Legislature has specifically provided in Section 30 (1) itself that this is a rebuttable presumption and it is open for the accused to prove that he was not having such intention, motive, knowledge or belief as was required to

prove the offence.

104. In the case on hand, the offences under Sections 3 and 7 of the POCSO Act stand proved by the recovery of the innerwear of the deceased (M.O.1) and the presence of semen on the innerwear, apart from other circumstances leading to the inference that the accused should have committed the offence of sexual assault (Section 7) and penetrative sexual assault (Section 3).

105. Though much argument has been advanced in relation to the recovery of M.O.1, the innerwear of the deceased, which, it is argued is a planted one, it is to be pointed out that M.O.1 has been recovered from the place where the body has been burnt along with the bag in which the body of the deceased was allegedly taken to the place where it was burned. It is to be pointed out that the innerwear of the deceased was stained with semen. It is the case of the prosecution that the innerwear was removed while sexual assault was committed on the deceased. Due to the untimely death of the deceased, the deceased had to be moved along with all the belongings. In such circumstances, the innerwear might also have been moved along with the deceased. Therefore, the recovery of M.O.1, innerwear, is just and reasonable and cannot be said to be a concocted or a planted one. However, the accused, has not taken any steps to rebut the evidence nor prove that he had neither intention to commit the offence nor had

committed the offence by adducing just and proper evidence. In such a scenario, the presumption has to be drawn that it was the accused, who committed the offence.

LACK OF CLARITY IN THE QUESTIONS PUT TO THE ACCUSED U/S 313 OF CR.P.C. :

106. Learned counsel for the accused vehemently contended that the questioning u/s 313 (1) (b) Cr.P.C. being not simple and that the questioning being complex and confusing, the said act has deprived the accused of a fair opportunity to answer them. It is further submitted that the Supreme Court, in ***Sharad Birdhichand Sarda – Vs – State of Maharashtra (1984 (4) SCC 116)*** has held that the questioning u/s 313 Cr.P.C. should be straight and simple so as to enable the accused to give his answers and any deviation from the same would vitiate the entire trial.

107. The task before this Court is, whether the questions posed to the accused u/s 313 Cr.P.C. were so complex that it has caused prejudice to the accused to the extent of being beyond comprehension of the accused.

108. The Supreme Court in the case of ***Ajay Singh v. State of Maharashtra (2007 (12) SCC 341)*** considered the object of examination u/s 313 (1) (b) Cr.P.C. and also the safeguards provided to the accused and the procedure to be adopted by the Court in framing questions to be posed to the accused and in the said context, observed as under:-

"3. The object of examination under this section is to give the accused an opportunity to explain the case made against him. This statement can be taken into consideration in judging his innocence or guilt. Where there is an onus on the accused to discharge, it depends on the facts and circumstances of the case if such statement discharges the onus.

14. ***The word "generally" in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand.*** *A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."*

(Emphasis supplied)

109. From the above decision, it is clear that the purpose of putting questions to the accused u/s 313 (1) (b) Cr.P.C. is to provide an opportunity to the accused to explain the incriminating circumstances put forth against him. It is further evident from the said decision that the questions must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed.

110. In this context, this Court, with a view to find out whether the questions posed were confusing and complex, went through the questions put forth by the trial court to the accused u/s 313 (1) (b) Cr.P.C. and also perused the answers given by the accused to the questions. Though the questions are lengthy, it has not caused any prejudice to the accused as his capacity to understand them is not less, as reflected by the answers given by him.

111. To show that the accused has really understood the questions before giving the answers, it would be trite to point out the answer given by the accused with regard to the evidence tendered by P.W.14, who identified the body of the deceased. To the question posed by the Court, the answer given by the accused is as hereunder :-

nfs;tp m/rh/14 jpU/Kdpnrfh; jdJ rhl;rpaj;jpy; jhd; ehuhazh <blf;ndh !;Typy; eph;thf mjpfhhpahf gzpg[hptjhft[k;. 05/02/2017k; njjp ,ut[9/30 kzpastpy; j';fs gs;spapy; ntiy bra;a[k; m/rh/2 _njtp vd;gth; jd;Dila bkhigy; nghdpy; miHj;J mth; kfs; cwhrpdpia fhztpy;iy vd;W brhd;djhft[k; cwhrpdpa[k; j';fs gs;spapy;

jhd; goj;jhh; vd;Wk jd; tPL ghoapy; ,Ue;jhy; mJ ,ut[neuk; vd;gjhy; jhd; nghftpy;iy vd;Wk;. kWehs; fhiy gs;spf;Tlj;jpw;F fhiy 9/30 kzpastpy; kh';fhL nghyprhh; te;J cwhrpdpiaa[k; mtuJ jhahh; _njtp gw;wpa[k; tprhhpj;jhh;fs; vd;Wk.8/2/2017k; njjp md;W fhiy 6/00 kzpastpy; jd; tPl;L bjhiyf;hl;rpapy; cwhrpdpia rhfoj;Jtpl;ljhf gpshc&; epa[!; ghh;jJtpl;L. clnd cwhrpdpapd; tPl;ow;F nghd nghJ m/rh/1. m/rh/2 ,Ue;jhft[k; mth;fs; jd;id ghh;j;jt[ld; mGjjhft[k; mth;fs; ngrf;Toa kdepiyapy; ,y;yhjjhy; m';fpUe;j xU bghpathplk; nfl;l nghJ mth;fs; FoapUf;Fk; gpshl;oy; 2tJ khoapy; FoapUf;Fk; vjphpahfpa ePh; cwhrpdpia ck; tPl;ow;F miHj;J;r brd;W nug; bra;J bfhd;Wtpl;ljhf brhy;Yfpwhh;fs; vd;W brhd;dhh; vd;Wk; clnd jhd; nghyprhh; bek;gh; nfl;nld; Ma;thsh; utpf;Fkhh; vd;gtUila bek;giu bfhLj;jhh;fs; mthplk; jhd; nghdpy; ngrpa nghJ mth; nghdpy; jftiy brhy;y KoahJ mth;fs; kJuthay; nlhy;nfl; ? jhk;guk; bkapd; nuhl;oy; gpzj;ij vhpj;j ,lj;jpw;F nghtjhft[k; jd;ida[k; ntz;Lbkd;why; m';F thU';fs; vd;W brhd;djhft[k; jhd; me;j ,lj;ij njo fz;Lgpoj;J ngha;tpl;ljhft[k; me;j ,lj;jpy; nghyprhh; mjpfk; ,Ue;jhh;fs; vd;Wk; m';F vjphpahfpa ePUk; ,Ue;jhft[k;. ePh; gpzj;ij vhpj;j ,lj;ij fhz;gpj;Jf; bfhz;oUe;jhft[k;. me;j vhpe;j epiyapUe;j rpWkpapd; gpzj;ij ghh;jJ mjDila thapypUe;j nky;gw;fs ,uz;ila[k; ghh;j;J ,J cwhrpdpapDilaJ jhd; vd jhd; brhd;djhft[k; me;j FHe;ij j';fs; gs;spapy; mth;fs; mk;khit ghhf; tUk; nghJ j';fnshL tpisahLk; me;j Fhe;ijapd; gw;fs vLg;ghf ,Uf;Fk; me;j ,uz;L gw;fis ghh;j;J jhd; nfyp bra;ntd; vd;Wk; mjdhy; vdf;F me;j gw;fs gw;wp bjhpa[k; vd;Wk; jhd; nghyprhhplk; fhl;oaJ me;j g[ifg;glj;jpy; cs;s ,uz;L gw;fis itj;Jjhd; vd;Wk; m/rh/M13y; 12tJ g[ifg;glj;jpy; vhpe;j epiyapy; cs;s rpWkpapd; Kfj;jpy; ,Uf;Fk; gw;fs vd;W rhl;rpak; milahsk; fhl;oa[s;hnu mJ gw;wp ePh; vd;d TWfpwPh;?

gjpy; md;W ,th; me;j rpWkpapd; vhpf;fg;gl;l gpzk; fple;j ,lj;jpy; ,Ue;jhuh vd;W vdf;Fj; bjhpahJ/ rpWkpapd; cwtpdh;fs ahUk; m';F fpilahJ/ gy;iy itj;J egiu milahsk; fhzKoahJ/

112. While P.W.14 has deposed that he had identified the body of the deceased on the basis of the teeth of the deceased, of which he used to make fun of the deceased, having clearly understood the question, has answered that he is not aware whether P.W.14 was present at the spot and identified the dead body and further went on to state that no relatives of the deceased was at the spot to identify the dead body. The accused has further went on to state that it is an impossibility to identify a dead body on the basis of the teeth. From the above answer of the deceased, it is clearly evident that the accused has understood the question and has given the answer, which clearly shows that he is shrewd, intelligent and has understood the question before answering.

113. Therefore, it cannot be said that the questions were complex or confusing or that the accused was confused with questions that he was not in a position to give proper and clear answers.

EVIDENTIARY VALUE OF STATEMENTS OF THE ACCUSED U/S 313 OF CR.P.C. :

114. Before proceeding to analyze the other links in the evidence, it would be pertinent to look into the evidentiary value of the statements of the accused under Section 313 (1) (b) of Cr.P.C.

115. The Supreme Court had occasion to consider the evidentiary value of the statement of the accused under Section 313 Cr.P.C. in the case of ***Edmund S.***

Lyngdoh v. State of Meghalaya, (2016 (15) SCC 572) and in the said judgment, held thus :-

> *"21. Where the accused gives evasive answers in his cross-examination under Section 313 CrPC, an adverse inference can be drawn against him. But such inference cannot be a substitute for the evidence which the prosecution must adduce to bring home the offence of the accused. The statement under Section 313 CrPC is not evidence. In* ***Bishnu Prasad Sinha v. State of Assam [Bishnu Prasad Sinha v. State of Assam, (2007) 11 SCC 467 : (2008) 1 SCC (Cri) 766]*** *, this Court held that conviction of the accused cannot be based merely on his statement recorded under Section 313 CrPC which cannot be regarded as evidence. It is only the stand or version of the accused by way of explanation explaining the incriminating evidence/circumstances appearing against him.* ***The statement made in defence by the accused under Section 313 CrPC can certainly be taken aid of to lend credence to other evidence led by the prosecution. The statements made under Section 313 CrPC must be considered not in isolation but in conjunction with the other prosecution evidence****."*
>
> *(Emphasis supplied)*

116. From the above ratio laid down by the Supreme Court, it is amply clear that though the statement of the accused with regard to the questioning u/s 313 of Cr.P.C. is not substantive evidence that could be used against him in isolation to arrive at the culpability of the accused, however, the same can be taken aid of to lend credence to the other evidence let in by the prosecution.

117. It is therefore clear that there is no embargo on the Court to look into the answers given by the accused to the questions posed by the Court u/s 313 of Cr.P.C. for the purpose of seeing whether it lends support to the evidence of prosecution witnesses in order to find out the culpability of the accused.

CHANCE WITNESS :

118. It is the contention of the learned counsel for the accused that P.W.11, though has spoken about seeing the accused on the fateful day at about 6.30 p.m., leaving his house with a ***bag on his back*** and in a tensed mood, however, her testimony is not in consonance with the CCTV footage in which the person in the motor cycle was said to have carried ***the bag on the front of the vehicle***. In such circumstances, it is submitted that placing reliance on the evidence of P.W.11 would not be justified.

119. The evidence of P.W.11, who is a chance witness, reveals that on the date of occurrence, when she was taking a walk along with her dog, she saw the accused leaving his house in an unnumbered motorcycle with a bag on his back

and helmet on the front of the vehicle and at that time, he was in a very tensed mood. P.W.11 is a chance witness and it is the bounden duty of this Court to surf through her evidence to find out whether the said evidence is believable and the implication of her testimony with the attendant circumstances noted above.

120. The Supreme Court in ***Chanakya Dhibar – Vs - State of W.B., (2004) 12 SCC 398***, had occasion to consider the plea relating to chance witness at the scene of occurrence and in that context, held as under :-

> "*17. **Coming to the plea of the accused that PW5 was a "chance witness" who has not explained how he happened to be at the alleged place of occurrence it has to be noted that the said witness was an independent witness. There was not even a suggestion to the witness that he had any animosity towards any of the accused. In a murder trial by describing the independent witnesses as "chance witnesses" it cannot be implied thereby that their evidence is suspicious and their presence at the scene doubtful. Murders are not committed with previous notice to witnesses soliciting their presence.** If murder is committed in a dwelling house, the inmates of the house are natural witnesses. If murder is committed in a street, only passers-by will be witnesses. Their evidence cannot be brushed aside or viewed with suspicion on the ground that they are mere "chance witnesses". The expression "chance witness" is borrowed from countries where every man's home is considered his castle and everyone must have an explanation for his presence elsewhere or in another man's castle. It is quite an unsuitable expression in a country where people are less formal*

and more casual."

(Emphasis supplied)

121. Keeping the above ratio laid down by the Supreme Court in mind, this Court proceeds to analyze the evidence of P.W.11. The prosecution has projected two crime scenes and according to evidence, the body has been shifted from first crime scene to the second crime scene. In this context the evidence of P.W.11 acquires significance. The theory of the prosecution relating to moving of the dead body in a bag by the murderer gets support not only from the evidence of P.W.11, but also by the statement of the accused to the question under Section 313 of Cr.P.C, which bolster up the evidence of P.W.11. It would be relevant to extract the actual statement of the accused to the question under Section 313 of Cr.P.C., posed by the trial court relating to the incriminating evidence of P.W.11 against the accused :-

nfs;tp m/rh/11 jpUkjp/g[c&;gh jdJ rhl;rpaj;jpy; M$h; vjphpahfpa ck;ik bjhpa[k; vd;Wk; ePh; mtuJ tPl;ow;F vjphpy; cs;s epfpjh gpshl;rpy; FoapUg;gjhft[k;. 5/2/2017k; njjp khiy 6/30 kzpastpy; jhd; tshf;Fk; ehia thf;fp'; Tl;o nghFk; nghJ ntyk;khs; nghjp fhk;g!; mUnf epd;W bfhz;oUe;jhft[k; m';fpUe;J 5 Kjy; 10 mo J}uk; jhd; epfpjh gpshl;;!; ,Uf;Fk; vd;Wk; mg;nghJ epfpjh gpshl;rpd; bkapd; nfl;il ntfkhf jpwe;j rj;jk; nfl;L jpUk;gp ghh;j;j nghJ vjphpahfpa ePh; gpshl;rpypUe;J xU gjpt[bra;ag;glhj ,Urf;u thfdj;jpd; nky; cl;fhh;e;J bfhz;L ckJ KJfpy; xU igia khl;of;bfhz;L mij rhp bra;Jbfh;zL

tz;oapd;Kd;gf;fj;jpy;bcwy;bkl;il itj;Jf;bfhz;L bld;c&dhf nfl;il js;spf;bfhz;L rh;bud;W nghdjhft[k;. mjd;gpwF jhd; eha[ld; tPl;ow;F brd;Wtpl;ljhft[k;. md;W

khiy 7/00 kzpapypU;eJ 7/15 kzpf;Fs;shf tPl;ow;F fPnH kf;fs; ngrpf;bfhz;oUe;j ryryg;ghf ngrpf;bfhz;oUe;j rj;jk; nfl;L ghh;j;jnghJ cwhrpdpapd; mk;kh cwhrpdpia fhztpy;iy vd njof;bhz;oUe;jhh; vd;Wk;. gpwF ,uz;L ehl;fs; fHpj;J vjphpahfpa ePh; cwhrpdpia gyhj;fhuk; bra;J bra;J bfhd;W

vhpj;Jtpl;ljhf brhd;djhft[k;. jd;dplk; fhl;lg;gLk; rh/bgh/6 Md ngf;ifj;jhd vjphpahfpa ePh; md;W Kjfpy; khl;of;bfhz;L

brd;wjhft[k; r/bgh/19 bcwy;bkl;iljhd; ,Urf;uthfdj;jpd; Kd; itj;Jf;bfhz;L brd;wjhft[k;. rh/bgh/4 Md mg;ghr;rp igf; jhd; md;W xl;or; brd;wjhft[k; rhl;rpak; Twf; nfl;Onu mJ gw;wp ePh; vd;d TWfpwPh;?

gjpy; ,e;j ngf;ifj;jhd; ehd; khl;of;bfhz;L nghndd;/ Mdhy; ,e;j rhl;rp vd;id md;W ghh;j;jhuh vd;W vdf;Fj; bjhpahJ/

122. A careful perusal of the answer given by the accused to the question reveals that the accused had categorically stated that on the said day at about the time spoken to by P.W.11, he had went outside taking the bag, marked before the Court by the prosecution as M.O.6. However, he has further stated that he is not aware whether P.W.11 had seen him on that day. Therefore, the categorical admission of the accused is to the effect that he went out taking the bag. In such a scenario, a burden is imposed on the accused to explain the circumstances leading to his moving out of his house with the bag on the said date at the hour spoken to by P.W.11. In the absence of any explanation forthcoming from the accused, the statement of the accused relating to his movement with the bag only strengthens the theory projected by the prosecution and also adds credibility to the testimony of P.W.11.

123. Further, it is to be pointed out that as admitted by the accused himself, he had went out of the house on two different occasions, one during the time as spoken to by P.W.11 and the other time at about 9.00 p.m., when he had gone out for purchasing petrol. Further, the distance from the house of the accused to the petrol bunk and the subsequent place where the dead body of the deceased was burnt assumes significance and, therefore, a burden is cast on the accused to explain his conduct, which the accused has miserably failed.

NON PRODUCTION OF CCTV FOOTAGE :

124. Learned counsel appearing for the accused submitted that it is the case of the prosecution that P.W.1, on viewing the CCTV footage, had informed the investigation officer and then the investigation took a turn by the police viewing the CCTV footage and fixing the culpability on the accused. It is the further contention of the learned counsel that the CCTV footage which showed a person driving a motorcycle and carrying something on the front of the motorcycle, happened to be the eye opener for the investigation team. Such being the case, it is incumbent on the prosecution to have marked the CCTV footage, which is a very vital piece of evidence in the armour of the prosecution and a connecting link in the chain of circumstance and the failure to mark the same is detrimental to the case of the prosecution. To substantiate the said plea, reliance was placed on the decision of the Supreme Court in ***Tomaso Bruno &***

Anr. - Vs – State of U.P. (***2015 (7) SCC 178).***

125. It is trite to point out that the prosecution is supposed to place before the Court all the relevant documents based on which the case is developed and the culpability of the accused in the commission of the crime. In the case on hand, it is evident from the material documents that subsequent to P.W.1 informing about the CCTV footage, the investigating team had viewed the CCTV footage. Though it is the case of the prosecution that it did not give any clue as to the identity of the accused and, therefore, the same has not been placed before the Court, the said plea cannot be taken as the gospel truth. It would be relevant to point out that the clue as to the way in which the child could have been moved out from the place of her dwelling really emanated from the CCTV footage, which had pushed the investigating team to pursue the said clue. In such a backdrop, the CCTV footage assumes significance. It is stated in the evidence of Investigating officer that they had been repeatedly looking into the CCTV footage and got the clue. This evidence only indicates that from the CCTV footage, the police was able to get only the clue for the investigation and not the proof for the establishment of offence. Therefore, non production of CCTV footage is not fatal.

126. The reliance placed on the decision in *Tomaso Bruno's case (supra)* by the learned counsel for the accused will not come in aid of the accused for the simple reason that in the said case, the murder was committed in the place where

the accused and the deceased had stayed together. The accused had taken a plea that they were not in the hotel at the relevant point of time when the murder was said to have been committed. In such circumstances, the Supreme Court held that non-production of the CCTV footage was fatal to the case of the prosecution.

127. So far as this case is concerned, the non production is not fatal as the prosecution did not exclusively rely upon the CCTV footage. The evidence itself indicate that there had been repeated playing of CCTV footage due to poor visibility and clarity. The CCTV footage has given the clue or a broad idea for the prosecution to commence the investigation in a proper direction and as such it is not a material relied upon by the prosecution to fix the culpability on the accused. Further, there are other circumstances also to show that the deceased is the perpetrator of the crime. Even otherwise the prosecution is relying upon the evidence of an eye witness, who has seen the accused moving with a bag in the back in a motorcycle at the relevant point of time, which has been admitted by the accused as well, the non production of CCTV footage cannot be said to be a material omission affecting the prosecution case.

IDENTIFICATION OF DEAD BODY OF DECEASED BY SCHOOL AUTHORITY P.W.14 :

128. An ancillary contention has been advanced by the learned counsel for the accused that the body of the deceased had not been identified by the parents, viz., P.W.s 1 and 2, but by P.W.14, an employee of the school, where the deceased was studying. It is further submitted that the best persons to identify

the body is the parents and not P.W.14 and, therefore, the said non-identification of the body by the parents leaves a doubt on the theory projected by the prosecution.

129. Though such a contention is advanced by the learned counsel for the accused, the same needs to be rejected for the simple reason that there is no dispute with regard to the body being that of the deceased. It has been proven beyond reasonable doubt through forensic evidence and superimposition technique that the body was that of the child of P.W.s 1 and 2 and that the parentage also stands established by DNA tests.

130. P.W.14, an employee of the school, who knows the deceased well, had identified the body of the deceased. Further, P.W.14 had made the identification based on the teeth of the deceased, which is very evident from the photographs, which have been marked as Ex.P-13. Further, the superimposition of the skull of the deceased with the photographs gives a clear indication of the teeth of the deceased and, therefore, for a person, who knows the deceased well, the deceased being a student of the school in which he is employed, it would not be difficult for him to make the identification.

131. ***It is to be pointed out that parting with a daughter even at the joyful time of her marriage is very difficult for the parents. Even a joyful occasion gives pain to the heart of the parents, who have to part with their daughter, who was nourished and cherished by them. That being the case, parting with their child by way of death, that too in a very gruesome and barbaric manner, as in the case on hand, the pain that the hearts of the parents would suffer is beyond the comprehension of this Court to express in words. Words are not adequate in any language to express the agony and pain that the parents would suffer in seeing their child being done to death in such an inhumane manner. No amount of sympathy can relieve the pain that the two souls would have gone through since the day they came to know about the eternal loss of their beloved daughter. In such a backdrop, the non-identification of the dead body by the parents cannot in any way jeopardize the case of the prosecution.***

132. On the basis of the above evidence, this Court is of the view that the prosecution has proved the case against the accused beyond all reasonable doubts and left with the question of deciding whether the death penalty is to be confirmed.

DEATH PENALTY :

133. Sentencing an accused has several purposes. There are various theories of punishment. What are the parameters to be taken into account to find

out whether the case falls under the *rarest of rare* category as laid down by the Supreme Court and whether the sentence of death given to the accused by the Trial Court is just and proper?

134. Article 45 of the Constitution of India recognises the importance of dignity and personality of the child.

135. ***The Constitution has envisaged a happy and healthy childhood for children, which is free from abuse and exploitation. But we live in a society where the safety and security of children remains an unfulfilled promise.***

136. While the learned counsel for the appellant submitted that the case does not fall under the category of rarest of rare cases as propounded by the Supreme Court, The learned Public Prosecutor submits that the crime is a heinous crime committed by the accused on a young, blossoming girl child, who had believed in love and affection and went along with the accused only to be spoiled and burnt by the poisonous tentacles of the accused and murders of such nature have been deprecated by the Supreme Court, warrants capital punishment, and but for capital punishment to the accused, the chances of the accused indulging in crimes of similar nature is a recurring possibility, which has unquestionably led the trial court to the inference that the accused is beyond reformation and his continuation in the social system would only lead to more similar crimes. Considering all the above factors, sentence of death was imposed on the accused

and, therefore, no interference is called for with the sentence of death recorded by the Trial Court.

137. It is also further brought to the notice of this Court by the learned Public Prosecutor that the accused escaped from the custody of the police and he had to be secured through the Mumbai Police, but during the period of bail, had even indulging in murdering his mother for which a case has been registered by the Kundrathur Police and the case has been committed to the Sessions and is awaiting trial; the above act of the accused clearly shows that reformation of the accused is a distant dream and, therefore, prudence should prevail in sentencing the accused to death. The fact that there is a case pending in respect of the murder of his mother is not under dispute. Whether actually this accused was responsible or not is a different issue to be decided by the trial court.

138. Therefore, the essential question is whether the nature of case requires confirmation of death penalty or requires reconsideration for a lesser punishment of imprisonment for life.

139. In ***Bachan Singh – Vs – State of Punjab (AIR 1980 SC 898)***, the Supreme Court held that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal, and what is the relative weight to be given to the aggravating and mitigating factors depends on the facts and

circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator and that is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water-tight compartments**. In a sense, to kill is cruel and therefore, all murders are acts of cruelty.** ***But, such cruelty may vary in its degree of culpability and it is only when the culpability assumes the proportion of extreme depravity that 'special reasons' can legitimately be said to exist.*** The Supreme Court, in the said judgment, held that in the exercise of its discretion, the court shall take into account the following circumstances, before awarding sentence :-

> "*(a) That the offence was committed under the influence of extreme mental or emotional disturbance.*
>
> *(b)* ***The age of the accused. If the accused is young or old, he shall not be sentenced to death.***
>
> *(c) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.*
>
> *(d) The probability that the accused can be reformed and rehabilitated.*
>
> *The State shall by evidence prove that the accused does not satisfy the conditions (c) and (d) above.*

(e) That in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(f) That the accused acted under the duress or domination of another person.

(g) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

None of the conditions apply to the accused excepting the age. So far as age is concerned, it is only one of the consideration, but not a determinative factor by itself. So far as sexual offences are concerned, when the accused is young, the probability of repeating the offence is more.

140. In ***Machhi Singh & Ors. – Vs – State of Punjab (1983 SCC (Cri) 681)***, the Supreme Court held that before awarding death sentence, the following questions may be asked and answered as a test to determine the *'rarest of rare'* case in which death sentence can be inflicted :-

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

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

141. The Supreme Court went on to hold that the guidelines which emerge from *Bachan Singh's case (supra)*, will have to be applied to the facts of each individual case, where the question of imposition of death sentence arises. It was further held that in rarest of rare cases, when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power-centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:-

> *(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.*
>
> *(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the motherland.*
>
> *(3) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons, but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.*
>
> *(4) When the crime is enormous in proportion. For instance,*

when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

(Emphasis Supplied)

142. The Supreme Court was of the view that if upon taking an overall view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for determining the rarest of rare case, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

143. The above tests enunciated by the Supreme Court, while awarding death sentence, has been dealt with in a catena of decisions and the circumstances, which are mitigating and aggravating based on which sentence needs to be awarded, has been culled out from various decisions and highlighted by the Supreme Court in ***Ramnaresh – Vs – State of Chhattisgarh (2012 (4) SCC 257)***, and the same is extracted hereunder :-

"*76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh and thereafter, in Machhi Singh. The aforesaid judgments, primarily dissect these principles into two*

different compartments — one being the 'aggravating circumstances' while the other being the 'mitigating circumstances'. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. ***To balance the two is the primary duty of the court.*** *It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) Cr.P.C.*

Aggravating circumstances

(1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Cr.P.C.

(9) When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

(10) When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(11) When murder is committed for a motive which evidences total depravity and meanness.

(12) When there is a cold-blooded murder without provocation.

(13) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the

offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.

77. While determining the questions relatable to sentencing policy, the court has to follow certain principles and those

principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.

Principles

(1) The court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

60. This Court has consistently held that only in those exceptional cases where the crime is so brutal, diabolical and revolting so as to shock the collective conscience of the community, would it be appropriate to award death sentence. Since such circumstances cannot be laid down as a straitjacket formula but must be ascertained from case to case, the legislature has left it open for the courts to examine the facts of the case and appropriately decide upon the sentence proportional to the gravity of the offence."

144. On the question of striking a delicate balance between the proportionality of crime to the sentencing policy and arriving at the imposition of penalty in rarest of rare cases, the words of Lord Denning has been quoted with approval by the Supreme Court in ***Deepak Rai – Vs – State of Bihar (2013 (10) SCC 421)***, which is quoted hereunder :-

> *"…. The punishment is the way in which society expresses its denunciation of wrongdoing; and, in order to maintain respect for the law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishments as being a deterrent or reformative or preventive and nothing else. …… The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not."*
>
> *(Emphasis Supplied)*

145. Following the principles laid down by the Supreme Court above, this Court has to consider the aggravating and mitigating circumstances before confirming the death sentence.

146. Judgments of the Supreme Court dissect the principles for awarding death sentence into two different compartments – one being the *'aggravating circumstances'* while the other being the *'mitigating circumstances'*. It will be appropriate for the court to come to a final conclusion upon balancing the

exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the Court as contemplated under Section 354 (3) Cr.P.C. ***(Vide – Amar Singh Yadav – Vs – State of U.P. (2014 (13) SCC 443).***

147. The learned Public Prosecutor has highlighted that not only the accused has committed this gruesome and barbaric murder with skill and tact to throw the investigating agency into doldrums initially, but for certain telltale evidence that later pointed to the murderer, but even thereafter, the accused has murdered his mother for which committal is over and trial is to start and, therefore, this shows the non-reformative mind of the accused. Though such a contention is advanced, however, this Court cannot advert to the subsequent murder, in which the accused is alleged to have murdered his mother at this stage, but the cumulative effect of all the evidence in the present case alone needs to be looked into to sentence the accused. If this Court finds that the accused is such a dangerous person, that to spare his life would endanger the community, then this Court would be left with no alternative but to sentence the accused to his last abode.

148. In the present case, the case of the prosecution reveals neither any provocation nor pressure on the accused, but only the sense of physical pleasure from women folk, which led to the pressure on the vocal cord of the deceased

cutting off not only her voice to the outside world, but also severing her continuance in the material world. The further act of the accused in trying to screen the offence is more gruesome than the act of commission of death itself. The diabolical ingenuity with which the body has been disposed off by the accused to ward of any attraction to him has led to the ***budding flower being reduced to ashes even before blossoming. The mindset of the accused to commit such a heinous act is more cruel than the act itself.*** The brutality and the beastly act of the accused cannot be described in words. The evidence on record clearly show not only the mindset of the accused, while trying to satisfy his sexual urge, but also the diabolic planning to dispose of the body and screen the offence in order to close the eyes of justice. In this context, we agree with Immanuel Kant when he declares "***If the punishment of an innocent person is a mistake of justice administration, failure to punish a criminal indicates that the absence of justice, which is a worse mistake."***

149. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence to the crime. Crimes like the one before us cannot be looked with magnanimity.

150. Opponents of capital punishment may brand it as surrender of our emotions to grief, fear, etc. But for the supporters, this is totally false. Many of us would find it hard even to kill an ant, much less a man. Accepting capital punishment means not that we surrender our emotion, but that we overcome it.

151. Those who argue for abolition of death penalty contend that the imposition of death penalty on the accused takes away the right to life as guaranteed to him under Article 21 of the Constitution of India.

152. Would not the act of violating physical space of women and children amount to violation of Article 21 of the Constitution of India for the women and children? The victims of sexual abuse go through an unfathomable, emotional, physical and psychological pain, not only at the ignominious point, but throughout their life.

153. Is not the safety and security and in fact the right to life of the larger mass more important than the right to life of a single individual?

154. The convict themselves sometime understand the gravity of the offence committed by them. It would be apt to refer here the words of one of the convicted sex offender, viz., Larry Don McQuay, in Washington Monthly (1994) who said that "*what is barbaric is what I have done to so many children; refusing to castrate me is barbaric to the children I will molest. Chemical castration is considered as cruel and unusual punishment, but, no punishment is crueller or*

more unusual than the pain I have caused my victims". (sic)

155. ***The punishment aspect always revolves around the interest of the accused alone. We need to think of the fact that the children who suffer sexual abuse during childhood continue to suffer throughout their life, facing problems even in marital relationship. Why should they suffer in silence? These sufferings should be understood as "cry for help".***

156. The society requires a justice system which not only takes care of retributive, preventive, reformative aspect of punishment, which is oriented towards the accused, but it needs a system which takes care of the socio milieu in which girls and women are safer. That is why ***Nelson Mandela said***

> "***Safety and security don't just happen, they are the result of collective consensus and public investment. We owe our children, the most vulnerable citizens in our society, a life free of violence and fear."***

157. In the present case, there is not even a hint of hesitation in the mind of this Court with respect to ***the aggravating circumstances outweighing the mitigating circumstances.*** This Court does not find any justification to convert the death sentence imposed by the court below to "life imprisonment for the rest of the life". The gruesome offence was committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be a hardened criminal; but the faith imposed by the young child on the accused, has

been shattered to pieces when the child had been lured as a puppet to satisfy the sexual lust of the criminal mind and her existence in the world had, not only, been put to rest by the iron hands of the accused but even the parents have been deprived of having a last look at their daughter having been lost due to the barbaric act of the accused in incinerating the body of the deceased to ashes with diabolic ingenuity which collectively shocked the conscience of the society. If not for the present case, there would be not too many cases, which would fall within the category of "*the rarest of rare cases*" calling upon the Court for maximum punishment. ***If at all there is a case warranting award of death sentence, it is the present case.*** The dreadfulness displayed by the accused in committing sexual abuse and, thereafter, hiding the body of the deceased for it to be set on flames in the later part of the day, but with cold blooded mind, joining the search party in trying to locate the deceased, ***knowing fully well, that his eyes which is also searching for the deceased knows that it is his hands, which had killed the deceased and had snatched it beyond the grasp of the affectionate parents, is something which this Court finds difficult not only to fathom, but also to comprehend***. The viciousness and ruthlessness with which the accused had committed the brutal act definitely brings the case within the category of "*rarest of rare cases"*. It is manifest that the wanton lust and the carnal desire ruled the mindset of the appellant to commit this beastly crime.

158. Though an ancillary contention is raised that the age of the accused is a factor, which should also be taken into consideration, while imposing punishment, it is to be pointed out that though age is a factor, but it is not a determinative factor, for the purpose of deciding the punishment. This Court is of the considered opinion that the mind of the accused is reflected in the manner in which the body of the deceased had been tried to be disposed off shows the ruthless character of the accused, which shows that the mind is beyond reformation.

159. For the reasoning and findings recorded above, this Court is conceivably satisfied that any sentence other than death would not be commensurate with the gravity of the offence committed and, therefore, the case of the accused squarely falls under the category of "*rarest of rare cases",* and definitely demands the sentence of death and, accordingly, on the reasoning recorded above, this Court finds no reason to deviate from the sentence awarded by the Trial Court and, accordingly, this Court confirms the sentence of death imposed on the accused.

160. The conviction and sentence imposed on the accused under Sections 201, 363, 366 and 354-B IPC and u/s 8 r/w 7 and 4 r/w 3 of the POCSO Act are also confirmed.

161. This Court though swayed by the demands for abolition of capital punishment from the pages of penology, is still conscious of the larger social interest and attendant implications of letting out the criminals involved in child sexual abuse and left with the hopson's choice of sticking to the capital punishment as the appropriate punishment for the accused in this reference and thereby, concur with the reasoning offered by Brutus after assassination of Caesar in Shakesperian history Julius Caesar as follows:

I loved Caesar less, by that I loved Rome more.

162. ***Brutus's statement essentially means that his love for the Roman citizens and the Roman public, outweighs his individual love and affinity for Julius Caesar. So, as our love for the society outweighing the love for the individual.***

163. ***This Court while confirming the death sentence imposed on the accused wish that the last second of this accused at the long end of the rope be the last second of end of the lust of potential offenders of the whole world towards womenfolk.***

164. In the result, the Criminal Appeal filed by the appellant / accused is dismissed. The reference made under Section 366 of Cr.P.C., with regard to the

question of confirmation of the death sentence awarded by the learned Sessions Judge, Mahila Court, Chengalpet, in S.C. No.133 of 2017 dated 19.02.2018, against the accused is confirmed and it is answered accordingly.

Justice S.RAMATHILAGAM

165. While concurring with the Judgment of My Sister Justice, I would like to add additional consideration for confirming the death sentence.

166. While confirming the sentence of death, the learned Sessions Judge has referred few cases, where, death sentence had been confirmed in cases of rape and murder. While referring the case in Crl.A.No.609 – 610 of 2017 (Vinay Sharma and another vs. State of NCT of Delhi and others), the following observation would be relevant:

> "36. ..... It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the home and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under- garment and thereafter took her to die septic tank alongwith the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned counsel for the accused

(appellants) could not point any mitigating circumstances from the record of me case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

166.1. In the case of Ankush Maruti Shinde and ors. vs. State of Maharashtra (2009) 6 SCC 667, the concerned accused persons were found guilty of offences under Sections 307 IPC, 376(2)(g) IPC and 397 read with 395 and 396 of IPC. The Supreme Court declined to interfere with the concurrent findings of the court below and upheld the death penalty awarded to the accused, taking into account the brutality of the incident, ***tender age of the deceased***, and the fact of a minor girl being mercilessly gang raped and then put to death. The Court also noted that there was ***no provocation from the deceased's side*** and the two surviving eye witnesses had fully corroborated the case of the eye witnesses.

166.2. Considering the increasing crime rate and violence against women, the Hon'ble Supreme Court in the case of **Dhananjay Chatterjee Alias Dhana vs State Of W.B.,** observed as under:

"14. In recent years, ***the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern***. Today there are admitted disparities.

Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, 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. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. ***Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration***.

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 fitting to the crime so that the courts reflect 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. ”

166.3. Explaining the paramount duty of the court while considering the sentence, the Hon'ble Supreme Court, in the case of Purushottam Dashrath

Borate & Anr vs State Of Maharashtra (2015) 6 SCC 652, held as follows:

> "The Court while considering the issue of sentencing are bound to acknowledge the rights of the victim and their family, apart from the rights of the society and the accused. The agony suffered by the family of victims cannot be ignored in any case. In Mohfil Khan's case, this Court specially observed that " it would be paramount duty of the Court to provide justice to ***the incidental victims of the crime – the family members of the deceased persons***."

167. Therefore, I have no hesitation to conclude that this case comes within the category of rarest of rare case, warranting imposition of death penalty. Accordingly, I do not find any reasons to interfere with the findings of the trial Court and I concur with the findings of the death penalty.

(S.V.J.) (S.R.T.J.)

10.07.2018

Index : Yes / No

Internet : Yes / No

GLN/SRK/OGY

To

1) The Sessions Judge Mahila
Court, Chengalpet.

2) The Public Prosecutor
High Court, Madras.

DR. S.VIMALA, J.
AND
S.RAMATHILAGAM, J.

GLN/SRK/OGY

PRE-DELIVERY JUDGMENT IN
CRL. A. NO.234 OF 2018
AND
R.T. NO.1 OF 2018

Pronounced on
10.07.2018

CRL. A. NO.234 OF 2018
AND
R.T. NO.1 OF 2018

DR. S.VIMALA, J.
AND
S.RAMATHILAGAM, J.

After pronouncement of the Judgment, the learned counsel appearing for the accused/appellant prayed that this Court may grant leave to the accused/appellant to file appeal before the Supreme Court.

2. Considering the entire factual matrix, this Court is inclined to grant leave. Accordingly, leave is granted.

(S.V.J.) (S.R.T.J.)
10.07.2018

GLN/OGY

DR. S.VIMALA, J.
AND
S.RAMATHILAGAM, J.

GLN/OGY

CRL. A. NO.234 OF 2018
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