AS/AKD/TKM/SS & PA
Item No.230

IN THE HIGH COURT AT CALCUTTA

CRIMINAL APPELLATE JURISDICTION

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Suvra Ghosh

D.R.4 of 2017

In C/W
C.R.A.341 of 2017

State of West Bengal
-Vs-
Albert Toppo

For the Appellant/ Convict	**:**	Mr. Jayanta Narayan Chatterjee, Mr. Apalak Basu, Ms. Moumita Pandit, Mr. Indrajeet Dey, Mr. Jaysree Patra.
For the State	**:**	Mr. Neguive Ahmed, ld. A.P.P., Ms. Zareen N. Khan.
Heard on	**:**	9th & 10th December, 2019
Judgment on	**:**	10th December, 2019

Joymalya Bagchi, J. :-

Within a month from the promulgation of the Criminal Law (Amendment) Act, 2013 i.e. Act of XIII of 2013 redefining the penal contours of the offence of rape and proposing more severe punishment for such deplorable act, an innocent 13 year old girl was raped and strangulated amongst tea bushes of Mathura tea garden. In the morning of 27.2.2013 her lifeless body in a half naked condition

with a rope tied round her neck was found in the tea garden by P.W.2, a worker in the garden. It appears from the deposition of the mother of the victim, P.W.3 that in the evening of the previous day i.e. 26.2.2013 the victim had gone with the appellant, a neighbour, in his bicycle to a local market. She did not return. Futile searches were undertaken in the night and thereafter in the morning. Upon hearing that a dead body had been found in the tea garden, P.W.3 along with her husband and others rushed to the spot. On the written complaint lodged by her husband, Ismail Toppo (since deceased), first information report being Alipurduar P. S. Case No.79 of 2013 dated 27.2.2013 under Section 376(2)(f)/302 of the Indian Penal Code came to be registered against the appellant. The appellant was arrested and made a confessional statement before the investigating officer, P.W.23 on 27.2.2013. Pursuant to such leading statement of the appellant, panty of the victim girl was recovered from a place amongst the tea bushes 50 feet away from where her dead body was found. Post Mortem Doctor, P.W.20 opined that the victim had been raped and had died due to strangulation which was ante mortem and homicidal in nature. In conclusion of investigation charge sheet was filed against the appellant. The case was committed to the Court of Sessions and charges were framed under Section 376(2)(f)/302 of the Indian Penal Code. Appellant pleaded not guilty and claimed to be tried. Prosecution examined 23 witnesses in support of its case. The defence of the appellant was one of innocence and false implication. He, however, did not examine any witness to probabilise such defence. In conclusion of trial, the trial judge by judgment and order dated 5.5.2017 and 6.5.2017, while holding that the prosecution case does not attract offences under Section 376(2)(f) of the Indian Penal Code, convicted the appellant for commission of offence punishable under Section 376(2)/302 of the Indian Penal Code. Holding that the offence of rape and murder was an act of inhuman

monstrosity which shocked judicial conscience and as there was no mitigating circumstance in favour of the appellant, the trial court awarded the extreme penalty of death and a fine of Rs.20,000/- in default to suffer simple imprisonment for one year for the offence punishable under Section 302 of the Indian Penal Code and rigorous imprisonment for life and a fine of Rs.10,000/- in default to suffer simple imprisonment for 10 months more for the offence punishable under Section 376(2) of the Indian Penal Code upon the appellant.

Being aggrieved by the aforesaid judgment and order of conviction and sentence, the appellant has preferred the present appeal while the death reference No.4 of 2017 was registered for confirmation of death sentence imposed on the appellant.

Mr. Jayanta Narayan Chatterjee, learned Counsel appearing on behalf of the appellant argued that the prosecution evidence does not form a complete chain unerringly pointing to his guilt. Evidence of P.W.3 that she saw her daughter accompanying the appellant ought to be taken with a pinch of salt as she was inside the room and could not have seen the appellant accompany the victim, as alleged. Evidence of P.W.5, brother of the victim also suffers from various contradictions and inconsistencies. Other witnesses viz., P.W.4, P.W.11 and P.W.15 also contradict one another with regard to their presence as well as the manner in which they had seen the appellant accompanying the victim. In fact, P.W.11 stated that the lady who was accompanying the appellant was of the same size as the appellant and was wearing a salwar kamiz – clearly improbabilising the prosecution case. Conduct of the prosecution witnesses particularly P.W.3, mother of the victim in not enquiring from the appellant about the whereabouts of her daughter in the night of 26.2.2013 throws grave doubt whether the witness had at all seen the victim leave with the appellant. Extra

judicial confession relied upon by the prosecution is highly artificial and does not inspire confidence. P.W.3, mother of the victim has not corroborated the evidence of P.W.6 with regard to the extra judicial confession although the latter claimed that P.W.3 was present at the spot at the material point of time. Evidence of P.W.12 with regard to extra judicial confession is bereft of particulars with regard to time and manner in which such confession was made. Furthermore, he was belatedly examined before the Magistrate and there is no explanation why P.W.12 kept mum notwithstanding the knowledge of purported confession being made to him. Recovery of the panty of the victim pursuant to the leading statement of the appellant is shrouded in mystery. The said wearing apparel had been identified by the mother of the victim. There is an inexplicable delay of four days in recovering the said article of clothing although the appellant is said to have made the confessional statement on 27.2.2013. It is also relevant to note that the statements of witnesses P.W.7 and P.W.8, witnesses to the recovery, are at variance to one another and it appears that the said witnesses had enmity with the appellant. Investigation of the case suffers from grave deficiencies and/or defect. No forensic report with regard to vaginal swab and wearing apparel of the victim has been placed on record. D.N.A. profiling either of the victim or of the appellant as required under Section 164A and 53A of the Code of Criminal Procedure has not been undertaken. Although trial court held that the prosecution has failed to make out a case under Section 376(2)(f) of the Indian Penal Code, it proceeded in a laconic manner to hold the appellant guilty under Section 376(2) of the Indian Penal Code without specifying the relevant clause in the said provision under which the appellant was found guilty. Without prejudice to the aforesaid submissions, it was argued that the prosecution case which is riddled with so many inconsistencies and/or contradictions does not merit

awarding of death penalty. On the other hand, learned Counsel prayed for acquittal of the appellant.

Mr. Ahmed, learned Additional Public Prosecutor with Ms. Khan appearing for the State emphatically argued that the factual matrix of the case unfolds a heinous crime of rape and murder on a defenseless 13 year old girl by her neighbour whom she fondly referred to as 'Mamu'. Evidence of P.W.1 and P.W.5 unequivocally show that in the evening of 26.2.2013 the victim had left her residence with the appellant in a bicycle for going to the market. Soon thereafter, P.W.4 and P.W.11 while they were returning from the football field saw the appellant with a girl travelling in a bicycle towards the tea garden. P.W.15, a worker in the tea garden, also saw the appellant with the victim going in a bicycle towards the garden. On the next day, dead body of the victim in half naked condition with rope tied around her neck was found in the tea garden. Appellant made extra judicial confession to local people viz., P.W.6 and P.W.12. Subsequently, on the leading statement of the appellant, panty of the victim girl was recovered near a nala amongst tea bushes 50 feet away from the spot where the body of the victim was found. Post mortem doctor, P.W.20 deposed that the victim died due to strangulation and had been ravished prior to her death. These circumstances leave no doubt that the appellant had committed rape and murder of a minor girl. Mere failure to cite the relevant clause defining the offence of committing rape on a victim below 16 years i.e. Clause (i) of Section 376 sub Section (2) of the Indian Penal Code did prejudice the appellant as unequivocal facts constituting the offence had been read out to him under the first head of charge which was erroneously described as one under Section 376(2)(f) of the Indian Penal Code. The case being a heinous one of rape and murder of a defenseless minor girl and as the appellant appears to have acted with extreme

depravity in murdering the victim immediately after committing rape on her, trial court rightly awarded the death sentence upon the appellant which ought to be confirmed.

The prosecution case is based on circumstantial evidence. The circumstances relied upon by the prosecution to bring home the guilt of the appellant are as follows:-

(a) In the evening of 26.2.2013 the victim had left her residence along with the appellant in a bicycle to go to the market;

(b) Prosecution witnesses saw the appellant along with a girl in a bicycle proceeding towards the tea garden;

(c) On the next day at 9.30/10 a.m. the dead body of the victim in half naked condition with a rope tied round her neck was found in section II of Mathura tea garden;

(d) P.W 20, post mortem doctor opined that the victim had died due to strangulation which was ante mortem and homicidal in nature. He also opined that she had been subjected to forcible sexual intercourse prior to death;

(e) P.W. 22, the then Assistant Teacher of Kamakhyaguri High School produced school admission register and certificate which showed that the victim was 13 years of age at the time of incident;

(f) Appellant made a confessional statement to P.W 23 Investigating Officer and stated that he could take him to the place where he had thrown the panty of the deceased (Ext 16). Pursuant to such leading statement of the appellant, panty of the deceased was recovered from the tea bush at a distance of 50 ft. from the place where her body was recovered in presence of the independent witnesses, P.W.s 7 and 8.

Let me analyse the evidence on record to asses whether the aforesaid circumstances have been proved beyond doubt and if so, whether they form a complete chain pointing to the guilt of the appellant or not.

Last seen together:-

P.W 3 is the mother of the victim. She deposed on 26.2.2013 at 3 p.m. she had gone to Mathurapur Bazar with her husband. After marketing she returned home. Her husband returned around 6 pm. and told her three cabbages purchased by him had been given to the appellant for delivery to their house. As the appellant did not deliver the cabbages, victim was sent to his house to retrieve the cabbages. Victim returned with the cabbages and informed P.W 3 that she would go to the market with Albert on his bicycle. Thereafter both of them left the house in a bicycle. As the victim did not return home, they started searching for her. Search continued till 9 p.m. Thereafter next morning they again commenced search along with villagers. At 10/10.30 a.m. some local boys informed P.W. 3 that body of her daughter had been found in Section II of Mathura TG. Hearing the news she went to the spot and found the dead body of the victim in half naked condition with torn wearing apparels and with a rope tied on her neck. Her husband lodged written complaint with the police. In cross examination she clarified that she had seen Albert take the victim on his bicycle towards the market.

Brother of the victim was examined as P.W 5. As he was a young boy aged around 12 years at the time of deposition, trial court at the outset posed questions to determine his ability to depose. P.W 5 corroborated the evidence of his mother and stated that the victim had left the house with the appellant in a bicycle. He remained unshaken in cross examination. In fact, he clarified that he had a talk with Albert when the latter was accompanying his sister on a bicycle.

Learned counsel for the appellant strenuously argued that P.W 3 could not have seen the victim leaving with Albert. I am unable to subscribe to such contention. Evidence of P.W 3 and P.W 5 when read as a whole clearly show that the victim initially had gone to the house of Albert for taking cabbages. When she returned with cabbages she informed her mother that she was leaving for the market with Albert. Soon thereafter P.W 5 saw the victim leaving the residence with the appellant in a bicycle. While P.W 5 saw the incident standing on the road, P.W 3, who was inside the room had seen the incident from there. There is no evidence on record that the door of the room was locked or P.W. 3 could not have seen them leave while sitting inside the room. Evidence of both the witnesses do not militate against one another in a manner so as to create an irreparable wedge in the prosecution case. Thereafter, P.W 4 and 11 while returning home after playing football saw the appellant proceeding in a bicycle to the tea garden with a girl. P.W 4 deposed he had seen Albert on a bicycle with the girl sitting on the back seat of the bicycle. In cross examination, he stated the girl was wearing a frock. P.W. 11 deposed in similar lines and stated on query Albert told him that he would return shortly.

Referring to the cross examination of P.W. 11 where he stated that the girl who was sitting on the back seat of Albert's cycle was of the same size as Albert and was wearing '*salwar kameez*', it has been argued that it cannot be said that the appellant was carrying the victim who was a 13 year-old girl in the backseat of his cycle. I have given anxious consideration of such submission. It is true there is some inconsistency in the evidence of P.W 11 with regard to wearing apparels of the girl and her stature. However, reading the evidence of PW 4 and 11 as a whole particularly the cross examination of P.W 4 it appears that they had seen the appellant with the girl when dusk was setting in and the place was not well

lighted. None of them were acquainted with the victim girl but knew the appellant well. Hence, it is possible P.W. 11 while talking to the appellant had noticed that he was accompanied with a girl but had not noticed her dress or stature carefully. However, doubt with regard to identity of the girl who was accompanying the appellant on a bicycle is set at rest in light of the evidence of P.W 15, a worker of the tea garden who while proceeding from the garden had seen the victim on the backside of the cycle plied by Albert on a road in front of 'Sibmondir'. They were proceeding towards the garden. Although some suggestions with regard to political difference between the said prosecution witness and the appellant were advanced, the said witness denied such suggestion and remained steadfast to the aforesaid deposition in-chief. The evidence on record, therefore, clearly establishes the fact that in the evening of 26.2.2013 the victim had left with the appellant on the backside of his bicycle and had been seen by witnesses proceeding down the road towards the tea garden.

It has been argued that it is unnatural that P.W 3 did not enquire of the appellant with regard to the whereabouts of her daughter on the night she went missing. There is no evidence on record that the appellant was present in his house that night. Hence, I find little merit in the submission that PW 3 had acted unnaturally as she did not enquire of the appellant with regard to the whereabouts of her daughter on the fateful night.

On the other hand, evidence of relations i.e. P.W 3 and 5 find corroboration from the independent witnesses like P.W 4, 11 and 15 that the appellant left his residence with the victim on the backseat of his bicycle and proceeded towards the tea garden. P.W 15 identified the girl as the victim herself. Hence, prosecution has been able to prove that the appellant was last seen proceeding towards the tea

garden with the victim in the night preceding the morning when her dead body was found in the garden.

Recovery of dead body:-

While P.W 3, her husband and villagers proceeded to search for the victim in the village in the morning of 27.2.2013, P.W 2 Joseph Kujur deposed around 9.30/10 a.m he received information that the dead body of a minor girl in half naked condition with a rope tied to her neck and to a tea bush has been found. He went to the spot and found the girl. Police came there and took photograph of the dead body and thereafter removed the body. P.W 1 Chirantan Barua, Assistant Manager of the Mathura Tea Estate has corroborated such version of PW 2. P.W 3 deposed she heard from local boys that the dead body of her daughter was found in section II of Mathura tea garden. She proceeded to the spot and found her daughter in half naked condition with a rope tied round her neck. She identified the body of the girl. All the witnesses deposed in unison that upon seeing the condition of the victim they were of the opinion that she had been raped and murdered.

P.W 23, investigating officer of the case deposed that the then IC, Alipurduar P.S upon receipt of information of death, had gone to the Mathura tea garden. He received the written complaint from Ismail Toppo and forwarded the same to the police station. P.W 18 is the scribe of the FIR which was written as per the instruction of Ismail Toppo, father of the deceased (since deceased). He proved FIR (Ext. 14). Upon endorsement by the said officer in charge, investigation was entrusted to him. P.W 23 held inquest at the spot (Ext.17). P.W 19 took photographs of the victim girl and identified the photograph in court.

From the aforesaid evidence it appears that the dead body of the victim with a rope tied round her neck in a half naked condition was recovered from the tea garden in the morning of 27.2.2013.

Rape and homicidal death of the minor victim:-

Post mortem doctor, P.W. 20, held post-mortem examination on the dead body of the deceased on 01.03.2013. He found the decomposed body of the victim with a woolen jacket tied around the neck with a single knot over front of the neck. He found ligature mark encircling the whole of the neck running horizontally 10 inch x 3 inch in the area. On dissecting the neck, he found subcutaneous tissue of the neck congested, with haematoma over neck muscles, fracture of left junction between the body and greater cornu of thyroid bone.

On examination of the private parts he found laceration with haemotoma in the posterior commisure, fossa navicularis, hymen, hymenal opening, with vaginal cavity exposed. He preserved the vaginal swab and smear.

As per queries of the I.O. he had mentioned in the post-mortem report that

1) the cause of death was due to the effects of strangulation, ante mortem and homicidal in nature.
2) time elapsed since death from the putrefactive changes is more than 36 hours from the time of post-mortem examination.
3) there is evidence in the private parts to suggest that forcible sexual intercourse occurred prior to death.

He preserved wearing apparels, scalp hair, nail scrapping, vaginal swab and smear, post-mortem blood and post-mortem viscera and handed them over the escorting constable.

He opined that the cause of death was due to the effects of strangulation, ante mortem and homicidal in nature. He deposed that victim had been raped prior to her death.

He prepared post-mortem report and put his signature (Exhibit 11/A).

From the aforesaid opinion of the post-mortem doctor there is no doubt that the victim had been forcibly raped and thereafter suffered homicidal death due to strangulation. Birth certificate (Ext.12) and school admission register (Ext.13) produced by the then Assistant Teacher of Kamakhyaguri High School showed the victim was 13 years at the time of the incident.

P.W. 23 deposed he arrested the appellant on 27.02.2013 at 5.45 p.m. Appellant confessed his guilt and stated that he could identify the place of occurrence where he raped the victim and could help him recover the panty of the victim from the tea garden. He recorded statement of the accused (Exhibit 16). Pursuant to such statement on 03.03.2013 panty of the victim was recovered by the appellant in presence of independent witnesses P.W. 7 and P.W. 8. He proved the seizure list (Exhibit 3/2). He identified the panty in Court.

P.W. 7 and P.W. 8, independent witnesses to recovery of panty deposed that on 3rd March, 2013 police took the appellant to the garden. Appellant identified a place and took out a panty from the side of a *nalla.* It was a white panty with flower prints on it. Police labelled the wearing apparel and seized it under a seizure list. They put their signatures on the seizure list. P.W. 7 stated that the passage was not frequented by people.

P.W. 8 clarified in cross-examination that the place from where the panty was recovered was 50 meters from the place where dead body was found.

Recovery of the panty has been strongly challenged on the ground that there is inordinate delay in working out the purported confessional statement of the appellant. While appellant is alleged to have made the statement on 27.02.2013, the wearing apparel was recovered belatedly on 03.03.2013. It is also submitted that the wearing apparel was not identified by mother of the victim, P.W. 3.

I have considered the aforesaid submissions on behalf of the appellant. It is true there is some delay in recovering the panty of the deceased from the site of a *nalla (*waterway) amongst the tea bushes. However, recovery was witnessed by independent persons namely, P.W. 7 and P.W. 8. Although some suggestion was made with regard to political hostility between them and the appellant but nothing supporting such plea has come on record.

On the other hand, there is ample evidence that the place of recovery of the panty was an isolated place by the side of a nalla amongst tea bushes which was not frequented by people. Hence, recovery of the wearing apparel of the victim from a deserted place 50 ft. away from the body of the victim on the showing of the appellant cannot be doubted on the ground of delay as the possibility of any other person visiting the said isolated spot in the meantime was highly unlikely till it was pointed out by the appellant in presence of independent witnesses, P.W. 7 and P.W. 8.

Hence, I am of the opinion that the aforesaid circumstance has also been proved against the appellant beyond doubt.

Extra-Judicial Confession of the appellant:-

P.W. 6 and P.W. 12 spoke of an extra-judicial confession made to them by the appellant. P.W. 6 claimed that the appellant made an extra-judicial confession to him while they were searching for the victim in the morning. He admitted in cross-examination at that time, mother of the victim, P.W. 3, was with him. P.W. 3, however, has not corroborated such fact in her deposition. Father of the appellant, who was also searching for the victim along with his wife (P.W. 3) and others, did not disclose such vital incriminating fact in the First Information Report.

On the other hand, P.W. 6 admitted that there was dispute between him and the appellant improbabilising the circumstance that the appellant would confide such vital incriminating fact to him.

Similarly, evidence of P.W. 12 with regard to extra-judicial confession does not inspire confidence. The said witness did not state the time or under what circumstances appellant made extra-judicial confession to him. Conduct of the said witness is also most queer as he kept such vital fact to himself and did not divulge it to anyone including the parents of the victim. He was belatedly examined before the Magistrate and P.W. 23 has been silent as to how he came to know that the appellant had confessed to the said witness.

In the light of the aforesaid circumstances, I am unwilling to accept the prosecution case that the appellant had made an extra-judicial confession to P.W. 6 and P.W. 12.

However, ample evidence has come on record that in the evening of 26.02.2013 the appellant took the victim on his bicycle to the tea garden. On the next morning, the body of the victim was found in a half naked condition with rope tied her neck in the tea garden. Post-mortem doctor deposed that the victim died due to strangulation after being raped. The victim was last seen with the appellant proceeding towards the tea garden in the evening of 26.02.2013. In the morning of 27.02.2013 her dead body was found in the garden.

The aforesaid circumstances create a tantalizing juxtaposition and establish a live link between the last seen theory and the homicidal death of the minor. Under such circumstances, it was incumbent on the appellant to explain how the victim who was in his company had met such brutal end. Failure to do so, unerringly leads to the irresistible conclusion that it was the appellant who had committed the crime.

The aforesaid circumstances are further fortified by the recovery of the wearing apparel, that is, panty of the victim on the showing of the appellant in presence of the independent witnesses. Even if one disconnects the extra-judicial confession, the other circumstances, as narrated above, clearly establishes the prosecution case against the appellant beyond reasonable doubt.

It has been argued that no forensic report with regard to vaginal swab, nail cuttings of the victim has been placed on record. No DNA profiling of the appellant and the victim was done. Without DNA analysis report establishing the presence of bodily fluids of the appellant at the place of occurrence or in the private parts of the victim, the prosecution case cannot be said to be established beyond doubt.

Investigation in the present case could have been done with more care and circumspection in view of the gravity of the offence committed upon a minor girl. Failure to produce the forensic report and/or conduct DNA profiling/analysis of the appellant or the victim, though make an impact on the extreme penalty of death imposed upon the appellant, for reasons which we would discuss shortly would not erode the truthfulness of the prosecution case which appears to be fully established on the circumstances discussed herein before. Reference may be made to ***Sunil Vs. State Of Madhya Pradesh, 2017 (4) SCC 393***, where the Apex Court held that absence of DNA profiling by itself is not a ground to record an order of acquittal if the prosecution case is otherwise established on the strength of other circumstances.

As discussed above even if the extra-judicial confession of the appellant is not believed, other circumstances form a complete chain pointing to his guilt and, therefore, its authority also is of little assistance to the appellant.

I am also inclined to hold that the incorrect reference to the provision of law in the charge, that is, section 376(2)(f) instead of 376(2)(i) IPC would not in view of

the clear and unequivocal description of the accusation in the said head of charge amount to a mistrial in law.

Authorities relied on behalf of the appellant are not apposite. In ***Prakash Vs. State of Karnataka, (2014) 12 SCC 133***, the Apex Court acquitted the accused as there was no TI Parade identification was followed. In the present case appellant is known to all the witnesses who saw him take the victim to the tea garden where her mutilated body was found.

In ***State of Gujarat Vs. Kishan Bhai & Ors., (2014) 5 SCC 108***, the Apex Court affirmed the order of acquittal passed by the High Court in a case of rape and murder in view of the glaring deficiencies in investigation and as the evidence with regard to 'last seen' theory had not been adduced. In the present case not only has the prosecution established the 'last seen' theory beyond doubt but subsequent recovery of inner garment of the deceased on the showing of the appellant has also been proved by independent witnesses.

In ***Tarak Dey @ Dani Vs. The State of West Bengal, (2018) 3 C Cr LR (Cal) 541***, the Division Bench of this Court held that as the appellant and victim were not last seen together and extra-judicial confession was doubtful he was entitled to an order of acquittal. Facts of the present case however are different. Not only was the accused last seen with the victim but his evidence on record including wearing apparel of the victim on the leading statement of the appellant completes the chain of circumstances against him. Similarly, in ***Reksona Bibi @ Eksona Vs. State of West Bengal, (2017) 4 C Cr LR (Cal) 486***, the Division Bench of this Court acquitted the accused as a link in the chain of circumstances had snapped and there was no evidence.

In the light of the aforesaid discussion, I am of the opinion that the prosecution case has been proved beyond reasonable doubt. Conviction of the appellant is upheld under section 376(2)(i) of the Indian Penal Code.

It appears that the appellant has been sentenced to death for commission of the offence of murder. Trial Court has dwelt on the heinous nature of the crime committed on a defenseless minor girl to record the extreme penalty. The Court noted that the appellant was a next door neighbour and was referred to as 'Mamu' by the victim. Even then, he acted with extreme depravity in committing rape and thereafter murder of the defenseless child. In this background the Court was of the view that there was no possibility of reformation of the convict and the alternate sentence of life imprisonment was wholly foreclosed.

While upholding constitutionality of the death penalty in ***Bachan Singh Vs. State of Punjab, (1980) 2 SCC 684***, the Apex Court succinctly delineated the jurisprudence relating to imposition of death penalty. As an illustrative though no exhaustive exercise, the Court enumerated aggravating and mitigating circumstances as follows:-

> ***"202....Dr Chitale has suggested these "aggravating circumstances":***
>
> ***"Aggravating circumstances: A court may, however, in the following cases impose the penalty of death in its discretion:***
>
> ***(a) if the murder has been committed after previous planning and involves extreme brutality; or***
>
> ***(b) if the murder involves exceptional depravity; or***
>
> ***(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed—***
>
> ***(i) while such member or public servant was on duty; or***
>
> ***(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or***
>
> ***(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code***

> ***of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code."***
>
> ***203. Stated broadly, there can be no objection to the acceptance of these indicators but as we have indicated already, we would prefer not to fetter judicial discretion by attempting to make an exhaustive enumeration one way or the other.***
>
> *.....*
>
> ***206. Dr Chitale has suggested these mitigating factors:***
>
> ***"Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:***
>
> ***(1) That the offence was committed under the influence of extreme mental or emotional disturbance.***
>
> ***(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.***
>
> ***(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.***
>
> ***(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.***
>
> ***(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.***
>
> ***(6) That the accused acted under the duress or domination of another person.***
>
> ***(7) 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."***

In ***Machhi Singh and Ors. Vs. State of Punjab, (1983) 3 SCC 470***, the Apex Court enumerated the categories of heinous offences which may shock the collective conscience of the community and held:-

> ***"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 for 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 "ride 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."***

Having enumerated categories of heinous offences which shocks the collective conscience of the community, the Court proceeded to reiterate the ratio in ***Bachan Singh (supra)***:-

> ***"38. ...(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.***
> ***(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.***
> ***(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.***
> ***(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the***

> ***mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."***

Finally it held before imposing the extreme penalty of death, a Court is required to make a balance sheet of aggravating and mitigating circumstances to come to the following conclusion:-

> ***"39.....(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?***
> ***(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"***

The ratio in ***Machhi Singh (Supra)*** ought not to be understood to justify imposition of death penalty merely on the heinousness of the offence which shocks collective conscience of the community. Even then, such aggravating circumstance must be balanced with the mitigating circumstances emanating from the facts of the case and after giving full weightage to the mitigating circumstances a conclusion whether the case falls in the 'rarest of rare' categories.

This view has been emphasised by the Apex Court in ***Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra, (2009) 6 SCC 498***, wherein the Court held that it was erroneous to award death penalty merely on the heinousness of crime without considering the mitigating factors applicable to the criminal. It unequivocally stated both the 'crime test' and the 'criminal test' must be equally applied in order to come to a conclusion that there is no possibility of rehabilitation or reformation of the convict and the alternate form of punishment is wholly foreclosed.

The ratio in ***Bachan Singh (Supra)*** requires the Court to prepare a balance sheet between various aggravating circumstances on the one hand and mitigating

circumstances on the other hand. On a plane of computational objectivity, it may be difficult to comprehend how aggravating circumstances like heinousness of the offence or vulnerability of a defenseless victim would be balanced against socio-economic condition of a convict or the motive of crime. Each circumstance by its very nature is unique and peculiar to itself and their respective weightage would vary depending on the factual matrix of a case.

Bachan Singh (Supra) rightly avoided laying down mandatory guidelines in the exercise of judicial discretion in imposing death penalty since such activity lay within the realm of legislative competence. This has left the field wide open to subjective analysis of aggravating and mitigating factors by the courts on a case to case basis leading to an atmosphere of judge-centric sentencing. Such a situation may be criticised as lacking in certainty and being over-dependent on the personal predilection of a judge. In fact, in ***Swamy Shraddananda (2) Vs. State of Karnataka, (2008) 13 SCC 767***, the Apex Court ventilated such concern:-

> ***"51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench."***

Quoting the said observation with approval, in ***Santosh Kumar Satishbhushan Bariyar (supra)*** the Court observed:-

> ***"109....it is now clear that even the balance sheet of aggravating and mitigating circumstances approach invoked on a case-by-case basis has not worked sufficiently well so as to remove the vice of arbitrariness from our capital sentencing system."***

To remove the arbitrariness in individualized sentencing paradigm, the Court proceeded to hold as follows:-

> ***"131. When the court is faced with a capital sentencing case, a comparative analysis of the case before it with other purportedly similar cases would be in the fitness of the scheme of the Constitution. Comparison will***

presuppose an identification of a pool of equivalently circumstanced capital defendants. The gravity, nature and motive relating to crime will play a role in this analysis.

132. Next step would be to deal with the subjectivity involved in capital cases. The imprecision of the identification of aggravating and mitigating circumstances has to be minimised. It is to be noted that the mandate of equality clause applies to the sentencing process rather than the outcome. The comparative review must be undertaken not to channel the sentencing discretion available to the courts but to bring in consistency in identification of various relevant circumstances. The aggravating and mitigating circumstances have to be separately identified under a rigorous measure.

133. Bachan Singh when mandates principled precedent-based sentencing, compels careful scrutiny of mitigating circumstances and aggravating circumstances and then factoring in a process by which aggravating and mitigating circumstances appearing from the pool of comparable cases can be compared. The weight which is accorded by the court to particular aggravating and mitigating circumstances may vary from case to case in the name of individualised sentencing, but at the same time reasons for apportionment of weights shall be forthcoming. Such a comparison may point out excessiveness as also will help repel arbitrariness objections in future. A sentencing hearing, comparative review of cases and similarly aggravating and mitigating circumstances analysis can only be given a go-by if the sentencing court opts for life imprisonment."

One may summarise the aforesaid step by step exercise in the matter of sentencing as follows:-

(a) Comparative analysis of judicial precedents with the case in hand.

(b) Identification and enumeration of all mitigating and aggravating circumstances in a rigorous manner.

(c) Scrutiny of each of the aggravating and mitigating circumstance appearing in the case in the light of comparable judicial precedents and to give due weightage to them and prepare a balance-sheet of such circumstances.

(d) Reasons to be given with regard to the degree of weightage given to one circumstance vis-à-vis another to come to a conclusion whether the case falls in the category of 'rarest of rare'.

Comparative Judicial Precedents:-

In ***Kalu Khan Vs. State of Rajasthan, (2015) 16 SCC 492***, the Apex Court commuted the sentence of death to one of life imprisonment on the ground that the case was based on circumstantial evidence and the convict had no criminal antecedents.

In ***Bishnu Prasad Sinha and Anr. Vs. State of Assam, (2007) 11 SCC 467***, a 7/8 year child was raped and murdered. Death sentence was commuted as the case was based on circumstantial evidence and the convict had expressed remorse at the time of examination under section 313 Cr.P.C..

Keeping in mind the impecunious condition and the absence of criminal antecedents, sentence of death was altered to one of life imprisonment in ***Surendra Pal Shivbalakpal Vs. State of Gujarat, (2005) 3 SCC 127***, although the convict had committed the heinous offence of rape and murder of a girl.

In ***Bantu Alias Naresh Giri Vs. State of M.P., (2001) 9 SCC 615***, the death sentence was commuted to life imprisonment as the convict was a young offender aged about 22 years and had no criminal records although the case involved a heinous rape and murder of a six year old child.

In ***Amit Vs. State of Uttar Pradesh, (2012) 4 SCC 107***, the Apex Court commuted death sentence to life imprisonment as the offender was a young person aged about 28 years and had no criminal antecedents.

Similarly in ***Rameshbhai Chandubhai Rathod (2) Vs. State of Gujarat, (2011) 2 SCC 764***, death sentence of a young watchman aged about 27 years with no criminal antecedents who had committed rape and murder of a girl residing in the

apartment where he was employed was commuted to life imprisonment till the end of his full life subject to any remission/commutation at the instance of the government for good and sufficient behaviour.

As the convict was aged about 22 years and the jail authority submitted a report of good behaviour in jail (as in the present case), death sentence of the convict was commuted to life imprisonment in ***Javed Ahmed Abdul Hamid Pawala Vs. State of Maharashtra, (1985) 1 SCC 275***.

In ***Selvam Vs. State, (2014) 12 SCC 274***, death sentence of the accused was converted to life imprisonment without parole for 30 years in a case involving rape and murder of a child aged about 9 years.

In ***Raju Jagdish Paswan Vs. The State of Maharashtra, (2019) SCC OnLine SC 81***, the Court held that the prosecution has not been able to lead evidence that the appellant had propensity to commit further crime and there is no possibility of reformation or rehabilitation. Sentence of death in the case of rape and murder of a 9-year old girl was commuted by the Court.

In ***Viran Gyanlal Rajput Vs. The State of Maharashtra, (2019) 2 SCC 311***, although the trial court noted that there was a lack of remorse on the part of the convict during hearing, the Apex Court commuted the sentence of death to one of life imprisonment without remission for a period of 20 years on the ground prosecution failed to establish that he was beyond reform especially for his young age, lack of criminal antecedents, post incarceration conduct.

On the other hand, ***Mukesh & Anr. Vs. State (NCT of Delhi) & Ors., (2017) 6 SCC 1***, wherein the victim was gang raped, subjected to unnatural sex and assaulted in a bus leading to her death, on balancing the aggravating and mitigating circumstances, particularly the brutal manner of assault on the victim

in her private parts by inserting iron rod and completely damaging her rectum, the Court confirmed the sentence of death.

In ***Mannan Vs. State of Bihar, 2019 SC 2934***, the Court held that there was no material to show that the appellant had acted on premeditation and the case was based on circumstantial evidence and extra-judicial confession made by the accused to the police. Under such circumstances the court converted the sentence of death to one of life imprisonment without remission.

In the backdrop of the aforesaid judicial precedents one may examine the aggravating and mitigating circumstances appearing in the present case to assess whether the case would categorically warrant death sentence.

Balance sheet of aggravating and mitigating circumstances:-

The aggravating circumstances in the present case are as follows:-

(a) the victim was a 13-year old girl;

(b) the appellant was her neighbour and was referred by her as "Mamu";

(c) the victim was subjected to rape and thereafter strangulated to death by the appellant;

(d) it was not a case where the victim died as a consequence of rape but the act of strangulation was clearly with the intention to kill the victim.

In order to assess the mitigating circumstances, this court had called upon the Correctional Home to submit a report with regard to the post-conviction conduct of the appellant in the correctional home. Report submitted on behalf of the Correctional Home reads as follows:-

Government of West Bengal
Office of the Superintendent
Jalpaiguri Central Correctional Home, Jalpaiguri,
(Email: Supdt.jpgcch@gmail.com, Phone No. 03561-232007
Pin: 735101

TO WHOM IT MAY CONCERN

DETENTION-CERTIFICATE					
SL NO	**PARTICULARS**	**DETAILS**			
01	**REGISTER NO.**	**5007/A**			
02	**NAME**	**Albert Toppo**			
03	**FATHER'S NAME**	**Late August Toppo**			
04	**DATE OF ADMISSION AT CORRECTIONAL HOME**	**06.03.2013**			
05	**DATE OF SENTENCE**	**06.05.2017**			
06	**CASE REFERENCE**	**Arising out of Alipurduar PS Case No. 79/2013, dt. 27.02.2013 Session Case No. 161/2013, ST C/N 1(10)/2013 U/S 376 (2)/302 IPC**			
07	**SENTENCING COURT**	**By Ld. Additional Session Judge, Alipurduar.**			
08	**PERIOD SPENT AS UNDER TRIAL & ACTUAL PERIOD SPENT IN CORRECTIONAL HOME CUSTODY (WITHOUT REMISSION)**		**Y**	**M**	**D**
		Sentence Served as Convict (W.E.F. 06.05.2017 to 28/11/2019)	**02**	**06**	**22**
		UT Set off from 06.03.2013 to 05.05.2017	**04**	**01**	**29**
		Total Period Served behind bars.	**06**	**08**	**21**
09	**CONDUCT OF THE CONVICT**	**The conduct of the life convict is good, as per history ticket no adverse report found about the convict. Views of Co-inmates: The convict is supportive and no complain found from co-inmates against the life convict at inside the correctional home.**			
10	**REMARKS (IF ANY)**	**Nil**			

Superintendent
Jalpaiguri Central Correctional Home

Analysing the materials on record including the aforesaid report one may enumerate the mitigating circumstances in the present case as follows:-

(a) the appellant does not have criminal antecedents;

(b) *the appellant is the sole earning member of the family and has a family consisting of his wife and children;*

(c) *conduct of the appellant as per the report from correctional home shows that the appellant in spite of being awarded the extreme penalty of death maintains good and sociable behaviour inside jail. It cannot be said that such conduct is not indicative of a brutal state of mind which rules out every possibility of reformation;*

(d) *in the course of sentencing hearing before the trial court, the appellant expressed remorse for his act and begged for mercy;*

(e) *the case is based on circumstantial evidence and the evidence of prosecution witnesses is not corroborated by the production of forensic report including DNA profiling as required under Sections 53A/ 164A of the Code of Criminal Procedure;*

(f) *there is some delay in the recovery of the wearing apparel i.e. the panty pursuant to the leading statement of the appellant-convict.*

Inter-se weightage of circumstances and reasons therefor:-

Absence of forensic evidence, particularly DNA analysis reports of the appellant and the victim and delay in recovery of wearing apparels under section 27 of the Evidence Act though not sufficient to dislodge the prosecution case from the pedestal of 'beyond reasonable doubt', leaves a 'residual doubt' in the mind of the court in the matter of selection of appropriate punishment.

The doctrine of 'residual doubt' was enunciated by the US courts as a mitigating circumstance in death jurisprudence.

In ***Ashok Debbarma Vs. State of Tripura, (2014) 4 SCC 747***, the Apex Court for the first time introduced the aforesaid principle into Indian law and applied it as a mitigating circumstance to commute death sentence. The Apex Court held as follows:-

> ***32. "Residual doubt" is a mitigating circumstance, sometimes used and urged before the jury in the United States and, generally, not found favour by the various courts***

in the United States. In Franklin v. Lynaugh, while dealing with the death sentence, the Court held as follows:

"The petitioner also contends that the sentencing procedures followed in his case prevented the jury from considering, in mitigation of sentence, any 'residual doubts' it might have had about his guilt. The petitioner uses the phrase 'residual doubts' to refer to doubts that may have lingered in the minds of jurors who were convinced of his guilt beyond a reasonable doubt, but who were not absolutely certain of his guilt. Brief for Petitioner 14. The plurality and dissent reject the petitioner's 'residual doubt' claim because they conclude that the special verdict questions did not prevent the jury from giving mitigating effect to its 'residual doubt[s]' about the petitioner's guilt. See ante at Franklin, US p. 175; post at Franklin, US p. 189. This conclusion is open to question, however. Although the jury was permitted to consider evidence presented at the guilt phase in the course of answering the special verdict questions, the jury was specifically instructed to decide whether the evidence supported affirmative answers to the special questions 'beyond a reasonable doubt'. App. 15 (emphasis added). Because of this instruction, the jury might not have thought that, in sentencing the petitioner, it was free to demand proof of his guilt beyond all doubt."

33. In California v. Brown and other cases, the US courts took the view, "residual doubt" is not a fact about the defendant or the circumstances of the crime, but a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty". The petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

34. We also, in this country, as already indicated, expect the prosecution to prove its case beyond reasonable doubt, but not with "absolute certainty". But, in between "reasonable doubt" and "absolute certainty", a decision-maker's mind may wander, possibly in a given case he may go for "absolute certainty" so as to award death sentence, short of that he may go for "beyond reasonable doubt". Suffice it to say, so far as the present case is concerned, we entertained a lingering doubt as to whether the appellant alone could have executed the crime single-handedly, especially when the prosecution itself says that it was the handiwork of a large group of people. If that be so, in our view, the crime perpetrated by a group of people in an extremely brutal, grotesque and dastardly manner, could not have been thrown upon the appellant alone without charge-sheeting other group of persons numbering around 35. All the element test as well as the residual doubt test, in a given case, may favour the accused, as a mitigating factor.

This view has been subsequently reiterated by the Apex Court in ***Sudam @ Rahul Kaniram Jadhav Vs. The State of Maharashtra, (2011) 7 SCC 125***.

No doubt, death sentence may be awarded even in a case based on circumstantial evidence. However, in ***Santosh Kumar Satishbhushan Bariyar (Supra)***, quality of evidence adduced was considered to be a relevant factor in the matter of sentencing. The Court held that:-

> **"57. Circumstances which may not have been pertinent in conviction can also play an important role in the selection of sentence."**

Quality of evidence adduced in a case may be sufficient to prove the prosecution case beyond reasonable doubt. However, something more may be required by the court to come to a conclusion that the evidence on record is so pristine and convincing that the prosecution case transcends from one '*beyond reasonable doubt*' to one of '*absolute certainty'*. When the evidence adduced by the prosecution fails to satisfy such test, a lingering residual doubt remains in the mind of the court which may prompt the court to take recourse to the lesser sentence of life imprisonment (with or without remission) instead of irreversible penalty of death.

In the present case although prosecution has established the guilt of the appellant beyond reasonable doubt, defects in investigation like delay in recovery of undergarment of the victim, non-production of forensic report with regard to vaginal swab, nail cuttings as well as DNA analysis reports of the appellant and the victim create a residual doubt whether the case has been established against the appellant with absolute certainty. Had forensic evidence and DNA analysis reports of the appellant and victim been placed on record it would have removed all cobwebs of doubt regarding the guilt of the appellant and the prosecution case would be said to have traversed beyond the realm of reasonable doubt to absolute

certainty. In ***Mukesh (Supra)*** DNA analysis report, fingerprint and other forensic evidence were placed on record to corroborate the dying declaration of the victim and establish the presence of the convicts at the place of crime with absolute certainty. Failure to undertake such effort in the present case and the absence of clinching DNA evidence, as aforesaid, persuade me to resort to path of prudence and hold that in the light of the lingering residual doubt it may not be advisable to award death penalty to the appellant.

I am further fortified to come to such conclusion in view of the report from the Correctional Home with regard to good and sociable conduct of the appellant. Not only have the Correctional Home authorities recommended his good conduct, his co-inmates also described him as a supportive person. In the face of such report, I am unwilling to concur with the opinion of the trial court that the balance sheet of aggravating and mitigating circumstances gives rise to the irresistible conclusion that possibility of rehabilitation of the appellant-convict is completely ruled out and alternative sentence of life imprisonment remains wholly foreclosed. One must not lose sight of the fact that imposition of death penalty is a last resort which the court does most unwillingly and with a very heavy heart. It ought not to be awarded in cases where the glimmer of hope and rehabilitation is not completely lost.

On the other hand, if upon balancing the aggravating and mitigating circumstances, a possibility, even if slender, to salvage the soul of a condemned convict surfaces, every effort should be made towards that end and not to write off the convict to the gallows with utmost haste. If the penology of death jurisprudence is not actuated with humanism and concern for human dignity and life, it runs counter to the constitutional essence of just, reasonable and fair sentencing and would degenerate into retributive or bloodthirsty jurisprudence.

Even if the convict lacks in sensitivity and respect to human dignity and life, it does not give justification under our constitutional scheme to the State to degrade itself to the same standard lest 'eye for an eye' as the Father of the Nation sagely remarked would make 'the whole world blind'.

Conclusion:-

In the light of the aforesaid discussion, I am of the view that the appellant-convict does not deserve to be sentenced to death. However, in view of the grave and heinous nature of crime committed by the appellant-convict and to rule out every possibility of recidivism, I am of the opinion that the appellant may be directed to suffer rigorous imprisonment for life without remission for a period of 35 years and to pay a fine of Rs.20,000/-, in default, to suffer simple imprisonment for one year more for the offence punishable under Section 302 of the Indian Penal Code.

Sentence on the score of Section 376(2)(i) of the Indian Penal Code is also modified and he is directed to suffer rigorous imprisonment for 30 years and to pay a fine of Rs.10,000/-, in default, to suffer simple imprisonment for ten months more; both the sentences shall run concurrently.

Death Reference no. 4 of 2017 and criminal appeal no. 341 of 2017 are accordingly disposed of.

Lower court records along with a copy of this judgement be sent down at once to the learned trial court for necessary action.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Suvra Ghosh, J.) **(Joymalya Bagchi, J.)**