REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 575 OF 2007

Rameshbhai Chandubhai Rathod ..Appellant

Versus

State of Gujarat ..Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

1. A large number of cases in recent times coming before this Court involving rape and/or murder of girls of tender age is a matter of concern. In the instant case the victim who had not seen even ten summers in her life is the victim of sexual assault and animal lust of the accused appellant. She was not only raped but was murdered by the accused appellant. The accused was found guilty for offences punishable under Sections 363, 366, 376, 397 and 302 of the Indian Penal Code, 1860 (in short the 'IPC'). He was sentenced to 7 years, 10 years, imprisonment for life, 7 years and death sentence for the aforesaid offences. Conviction was recorded and sentences were imposed by learned Additional Sessions Judge, Fast Track Court No.9, Surat. In view of the award of the death sentence reference was made under Section 366 of the Code of Criminal Procedure, 1973 (in short the 'Code'). The accused appellant had also preferred an appeal which was dismissed by the impugned judgment. Both the confirmation case and the criminal appeal were disposed of. Death sentence was confirmed while the criminal appeal was dismissed.

2. Prosecution version as unfolded during trial is as follows:

The complainant i.e. Nareshbhai Thakorebhai Patel is residing in flat No. A/2 of Sanudip Apartment, located on Rander Road of Surat City, with his family. On the Ground Floor of the apartment, he is running a grocery shop as well as a STD PCO Booth. The name of his wife is Ms. Kailashben. They were blessed with two children. The eldest is boy named Brijesh who was aged about 16 years at the time of incident. The deceased was student of IVth Standard, in Ankur School, situated near Sardar Circle, Surat, whereas son of the complainant was prosecuting studies in Swaminarayan Gurukul and was staying in hostel of Swaminarayan Temple. The appellant was employed as Watchman of Sanudip Apartment and was residing with his wife Savita and two children in a room of the apartment which is opposite Sanudip Apartment. The incident took place on December 17, 1999. The complainant with his wife, Ms. Kailashben, went to Udhana at about 8 PM to attend a religious ceremony. After return from Udhana, the complainant did not find the victim. Therefore, he made inquiries about the victim from his relatives. Those staying in the apartment informed the complainant that sometime before his return from Udhana, the deceased was playing badminton, but they were not knowing as to where she had gone. The complainant made extensive search about his daughter of tender age but in vain. At about 2.30 AM on December 18, 1999, he lodged complaint with Rander Police Station, stating that the victim was missing. The information given by the complainant was recorded by Head Constable Ramdas Barko Borde, who was PSO of the Police Station. Head Constable Borde handed over investigation of complaint lodged by the complainant to ASI Mr. Ashokbhai H. Patil. After lodging the complaint, the complainant continued search of the victim. On December 18, 1999, one Mr. Bipinbhai Bhandari, who is a friend of the complainant, came to the house of the complainant and informed the complainant that his old servant, Vishnubhai, had informed him that he had spotted the appellant taking the deceased with him on his cycle. Mr. Bipinbhai also informed the complainant that he was told by Vishnubhai that he had shouted at the appellant but the appellant had not stopped. On learning these facts, the complainant started search of the appellant, who was employed as Watchman of the apartment. The complainant also informed the

police as to what was conveyed to him by his friend Mr. Bipinbhai Bhandari. Extensive search about the victim and the appellant did not yield any result on December 18, 1999. Mr. Chandravadan Naginbhai Patel, who is brother-in-law of the complainant, stayed at the house of complainant in the night of December 18, 1999. In the morning of December 19, 1999, while going home to take a bath, Mr. Chandravadan Patel spotted the appellant sitting in an open space near vegetable market. Mr. Chandravadan asked the appellant as to where the victim was. Thereupon, the appellant informed M Chandravadan that he had raped the victim and killed her. Therefore, Mr. Chandravadan brought the appellant to the house of the complainant. On being asked, the appellant informed the complainant and others, who had collected near the house of the complainant, that he had taken the deceased on December 17, 1999 with him on his bicycle and raped her and as he had feared that she would disclose the incident to others, he had killed her. Thereupon, the complainant informed the police, who arrived at the house of the complainant within no time. The appellant took the complainant and police to the place of incident where dead body of the deceased was found lying. The complainant, thereupon, lodged First Information Report about rape of his daughter and her murder, against the appellant on December 19, 1999. On the basis of complaint of the complainant, offences were registered against the appellant. The complaint of the complainant was investigated by PI SA Desai, who held inquest on the dead body of the deceased and made arrangements for sending the same to hospital for postmortem examination. From the place of incident, a broken bottle containing Castor oil and a knife, were recovered. The appellant was arrested and pursuant to disclosure statement made by him, the cycle used by him, for carrying the deceased to the place of incident, and school-bag of the deceased, containing gold and silver ornaments, were recovered. Silver and gold ornaments recovered from the school-bag were identified by mother of the deceased as belonging to the deceased. PI Desai recorded statements of those persons who were supposed to be conversant with the facts of the case. Incriminating articles seized during the course of investigation were sent to Forensic Science Laboratory (in short the 'FSL') for analysis. The post-mortem examination of the body of the deceased indicated that the deceased was subjected to rape and was, thereafter, murdered. The

appellant, who was arrested, was forwarded to Dr. Meghrekhaben Mehta for Medical Examination. Before Dr. Megrekhaben Mehta, the appellant stated that he had sustained injuries while committing rape and murder. On completion of investigation, the appellant was charge-sheeted in the Court of learned Chief Judicial Magistrate, Surat, for commission of offences punishable under Sections 363, 366, 376, 302 and 397 IPC. As the offences punishable under Sections 366, 376, 397, 302 are exclusively triable by a Court of Sessions, the case was committed to Sessions Court, Surat for trial, where it was numbered as Sessions Case No. 79 of 2000.

Since the accused persons pleaded innocence trial was held. Thirty four witnesses were examined. In addition, certain documents were placed on record. The case primarily was based on circumstantial evidence as there was no eye witness. The circumstances highlighted by the trial Court and the High Court are as follows:

1. The first circumstance is that the deceased was raped and she died a homicidal death.
2. The second circumstance is that the deceased victim who was aged about 10 years was residing with her parents in flat No.A/2 of Sanudip Apartment located on Rander Road of Surat City.
3. The third circumstance is that the appellant was serving as a Watchman since long and he was residing with his family in a room located on ground floor of Happy Home Apartments situated opposite Sanudip Apartment, Surat.
4. The fourth circumstance is that the accused appellant had won the confidence of the victim as a result of which the victim had reposed confidence in the appellant.
5. The fifth circumstance which is sought to be proved is that between 8.45 p.m. and 9.00p.m. on December 17, 1999 the appellant was last seen playing badminton with the deceased in Sanudip Apartment.
6. The sixth circumstance which is sought to be proved is that the on December 19, 1999 at about 10.30 p.m. the parents of the victim returned home and found that the deceased was missing.

7. The seventh circumstance which is sought to be relied upon by the prosecution is that between 9.00 p.m. and 9.30 p.m on December 17, 1999 Vishnubhai Bahadur (PW-24) had seen the appellant taking the deceased on his cycle near Adajan Patia, Surat.

8. The eighth circumstance is that after PW-24 had disclosed before Shankarbhai (PW-6) and others that he had seen the appellant going on a cycle towards Jakat-Naka with the deceased, a search was made and appellant was found missing.

9. The next circumstance which is sought to be relied upon by the prosecution is that in the morning of December 1999 witness Chandravadan who was going home had seen the accused sitting at an open place near Bhulka Bhavan School and had approached the appellant and on enquiry being made the appellant had made extra judicial confession before him at that time.

10. The other circumstance which is sought to be proved by the prosecution is that on arrival of police at Sanudip Apartment after being informed by complainant Nareshbhai the appellant had shown the place of incident where the dead body of the deceased was found lying.

11. The next circumstance is that at the instance of the accused appellant his cycle and school bag of the deceased were recovered and school bag was found containing anklets and earrings belonging to the deceased.

12. Human Blood was found from T-shirt of the accused and no explanation was offered by the appellant as to how human blood was found on his T-shirt.

The High Court found the circumstances to be credible, cogent and reliable. The High Court while referring the circumstances as noted by the High Court upheld the conviction. It did not find any substance in the plea of the accused appellant that the evidence of the child witness (PW-17) cannot be relied upon and the extra judicial confession cannot also be relied upon as police was present. The concept of last seen together cannot be pressed into service in the instant case as PW-24 was not sure of the date or the time. Additionally, it was submitted that in a case

where circumstantial evidence is the foundation for conclusion of guilt the death sentence cannot be awarded. The High Court noted that the evidence of the child witness PW-17 after careful analysis has been found to be acceptable and, therefore there is no infirmity in the conclusion of the High Court. Similarly, the plea relating to the extra judicial confession was also not accepted. The High Court held that several witnesses have seen the accused and the deceased together in close proximity time at the time of occurrence and, therefore, the accused was required to explain the circumstances as to how immediately thereafter the deceased was found to be dead. Therefore, the appeal filed by the accused appellant was dismissed and the death sentence awarded was confirmed and other sentences and the conviction as recorded were confirmed.

3. The stand taken before the High Court was re-iterated in this Court.

4. It is to be noted that the circumstances highlighted by the trial Court and analysed in detail by the High Court unerringly point at the accused to be author of the crime in the present case.

5. So far as the last seen aspect is concerned PWs 4, 5, 6, 17 and 24 had categorically stated that the deceased was seen in the company of the accused just before the time of death. Additionally, the extra judicial confession was not recorded in the presence of the police. It is clear from the evidence of the witnesses that when the first confession was recorded police personnel were not present. So far as the evidence of PW-24 regarding the last seen aspect is concerned his evidence has to be read alongwith the evidence of PWs 5 and 6. Though PW-17 was a child witness nevertheless the Court has taken care of analyzing his evidence after being satisfied that child was speaking the truth.

6. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this court. In State of U.P. v. Satish [2005 (3) SCC 114] it was noted as follows:

"22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

7. In Ramreddy Rajeshkhanna Reddy v. State of A.P. [2006 (10) SCC 172] it was noted as follows:

"27. The last-seen theory, furthermore, comes into play where the time gap between the point of time when the accused and the deceased were last seen alive and the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. Even in such a case the courts should look for some corroboration".

(See also *Bodh Raj* v. *State of J&K (2002(8) SCC 45)*.)"

8. A similar view was also taken in Jaswant Gir v. State of Punjab [2005(12) SCC 438], Kusuma Ankama Rao v State of A.P. (2008(9) SCALE 652) and in Manivel & Ors. v. State of Tamil Nadu (2008(5) Supreme 577).

9. In Joseph and Poulo v. State of Kerala [2000(5) SCC 197] it was, inter alia, held as follows:

"The formidable incriminating circumstances against the appellant, as far as we could see, are that the deceased was taken away from the convent by the appellant under a false pretext and she was last seen alive only in his company and that it is on the information furnished by the appellant in the course of investigation that jewels of the deceased which were sold to PW 11 by the appellant, were seized."

"The incriminating circumstances enumerated above unmistakably and inevitably lead to the guilt of the appellant and nothing has been highlighted or brought on record to make the facts proved or the circumstances established to be in any manner in consonance with the innocence at any rate of the appellant. During the time of questioning under Section 313 Cr.P.C. the appellant instead of making at least an attempt to explain or clarity the incriminating circumstances inculpating him, and connecting him with the crime by his adamant attitude of total denial of everything when those

circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed.(See: State of Maharashtra v. Suresh). That missing link to connect the accused appellant, we find in this case provided by the blunt and outright denial of every one and all that incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause of the death of Gracy and for robbing her of her jewellery worn by her — MOs 1 to 3, under Section 392. The deceased meekly went with the accused from the Convent on account of the misrepresentation made that her mother was seriously ill and hospitalised apparently reposing faith and confidence in him in view of his close relationship — being the husband of her own sister, but the appellant seems to have not only betrayed the confidence reposed in him but also took advantage of the loneliness of the hapless woman. The quantum of punishment imposed is commensurate with the gravity of the charges held proved and calls for no interference in our hands, despite the fact that we are not agreeing with the High Court in respect of the findings relating to the charge under Section 376.

10. In Damodar v. State of Karnataka [2000 SCC (Crl) 90] it was, inter alia, observed as follows:

11. "From the evidence of PWs. 1,6,7 & 8 the prosecution has satisfactorily established that the appellant was last seen with the deceased on 30.4.91. The appellant either in his Section 313 Cr.P.C. statement or by any other evidence has not established when and where he and the deceased parted company after being last seen."

12. Before analyzing factual aspects it may be stated that for a crime to be proved it is not necessary that the crime must be seen to have been committed and must, in all circumstances be proved by direct ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or factum probandum may be proved indirectly by means of certain inferences drawn from factum probans, that is, the evidentiary facts. To put it differently circumstantial evidence is not direct to the point in issue but consists of evidence of various other facts which are so closely associated with the fact in issue that taken together they form a chain of circumstances from which the

existence of the principal fact can be legally inferred or presumed.

13. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan AIR (1977 SC 1063); Eradu and Ors. v. State of Hyderabad (AIR 1956 SC 316); Earabhadrappa v. State of Karnataka (AIR 1983 SC 446); State of U.P. v. Sukhbasi and Ors. (AIR 1985 SC 1224); Balwinder Singh v. State of Punjab (AIR 1987 SC 350); Ashok Kumar Chatterjee v. State of M.P. (AIR 1989 SC 1890). The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab (AIR 1954 SC 621), it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring the offences home beyond any reasonable doubt.

14. We may also make a reference to a decision of this Court in C. Chenga Reddy and Ors. v. State of A.P. (1996) 10 SCC 193, wherein it has been observed thus:

"In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence....".

15. In Padala Veera Reddy v. State of A.P. and Ors. (AIR 1990 SC 79), it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests:

"(1) the circumstances from which an inference of guilt is sought to be drawn, must be

cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

16. In State of U.P. v. Ashok Kumar Srivastava, (1992 Crl.LJ 1104), it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.

17. Sir Alfred Wills in his admirable book "Wills' Circumstantial Evidence" (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt, (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted".

18. There is no doubt that conviction can be based solely on circumstantial evidence but it

should be tested by the touch-stone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.

19. In Hanumant Govind Nargundkar and Anr. V. State of Madhya Pradesh, (AIR 1952 SC 343), wherein it was observed thus:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

20. A reference may be made to a later decision in Sharad Birdhichand Sarda v. State of Maharashtra, (AIR 1984 SC 1622). Therein, while dealing with circumstantial evidence, it has been held that onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully established. They are:

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) the circumstances should be of a conclusive nature and tendency;

(4) they should exclude every possible hypothesis except the one to be proved; and

(5) there must be a chain of evidence so compete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

21. One of the other important circumstances is that the accused appellant had shown the place of incident where the dead body of the deceased was found lying. At the instance of the appellant his cycle and school bag of the deceased were recovered and the school bag was found containing anklets and earrings belonging to the deceased. Human blood was found on the T-shirt of the accused. The falsity of defence plea has been regarded as an additional link in the chain of circumstances. The conviction has therefore been rightly recorded by the trial Court and affirmed by the High Court.

22. Coming to the question of award of death sentence, this has to be considered in the background of factual scenario.

23. The law regulates social interests, arbitrates conflicting claims and demands. Security of persons and property of the people is an essential function of the State. It could be achieved through instrumentality of criminal law. Undoubtedly, there is a cross cultural conflict where living law must find answer to the new challenges and the courts are required to mould the sentencing system to meet the challenges. The contagion of lawlessness would undermine social order and lay it in ruins. Protection of society and stamping out criminal proclivity must be the object of law which must be achieved by imposing appropriate sentence. Therefore, law as a corner-stone of the edifice of "order" should meet the challenges confronting the society. Friedman in his "Law in Changing Society" stated that, "State of criminal law continues to be – as it should be – a decisive reflection of social consciousness of society". Therefore, in operating the sentencing system, law should adopt the corrective machinery or the deterrence based on factual matrix. By deft modulation sentencing process be stern where it should be, and tempered with mercy where it warrants to be. The facts and given circumstances in each case, the nature of the crime, the manner in which it was planned and committed, the motive for commission of the crime, the conduct of the accused, the nature of weapons used and all other attending circumstances are relevant facts which would enter into the area of consideration. For instance a murder committed

due to deep-seated mutual and personal rivalry may not call for penalty of death. But an organised crime or mass murders of innocent people would call for imposition of death sentence as deterrence. In Mahesh v. State of M.P. (1987) 2 SCR 710), this Court while refusing to reduce the death sentence observed thus:

"It will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and such cruel acts. To give the lesser punishment for the accused would be to render the justicing system of the country suspect. The common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon."

24. Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed etc. This position was illuminatingly stated by this Court in Sevaka Perumal etc. v. State of Tamil Naidu (AIR 1991 SC 1463).

25. The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.

26. Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of sentences. The practice of

punishing all serious crimes with equal severity is now unknown in civilized societies, but such a radical departure from the principle of proportionality has disappeared from the law only in recent times. Even now for a single grave infraction drastic sentences are imposed. Anything less than a penalty of greatest severity for any serious crime is thought then to be a measure of toleration that is unwarranted and unwise. But in fact, quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences.

27. After giving due consideration to the facts and circumstances of each case, for deciding just and appropriate sentence to be awarded for an offence, the aggravating and mitigating factors and circumstances in which a crime has been committed are to be delicately balanced on the basis of really relevant circumstances in a dispassionate manner by the Court. Such act of balancing is indeed a difficult task. It has been very aptly indicated in Dennis Councle MCG Dautha v. State of California: 402 US 183: 28 L.D. 2d 711 that no formula of a foolproof nature is possible that would provide a reasonable criterion in determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime. In the absence of any foolproof formula which may provide any basis for reasonable criteria to correctly assess various circumstances germane to the consideration of gravity of crime, the discretionary judgment in the facts of each case, is the only way in which such judgment may be equitably distinguished.

28. In Jashubha Bharatsinh Gohil v. State of Gujarat (1994 (4) SCC 353), it has been held by this Court that in the matter of death sentence, the Courts are required to answer new challenges and mould the sentencing system to meet these challenges. The object should be to protect the society and to deter the criminal in achieving the avowed object to law by imposing appropriate sentence. It is expected that the Courts would operate the sentencing system so as to impose such sentence which reflects the conscience of the society and the sentencing process has to be stern where it should be. Even though the principles were indicated in the background of

death sentence and life sentence, the logic applies to all cases where appropriate sentence is the issue.

29. Imposition of sentence without considering its effect on the social order in many cases may be in reality a futile exercise. The social impact of the crime, e.g. where it relates to offences against women, dacoity, kidnapping, misappropriation of public money, treason and other offences involving moral turpitude or moral delinquency which have great impact on social order, and public interest, cannot be lost sight of and per se require exemplary treatment. Any liberal attitude by imposing meager sentences or taking too sympathetic view merely on account of lapse of time in respect of such offences will be result-wise counter productive in the long run and against societal interest which needs to be cared for and strengthened by string of deterrence inbuilt in the sentencing system.

30. In Dhananjoy Chatterjee v. State of W.B. (1994 (2) SCC 220), this Court has observed that shockingly large number of criminals go unpunished thereby increasingly, encouraging the criminals and in the ultimate making justice suffer by weakening the system's creditability. The imposition of appropriate punishment is the manner in which the Court responds to the society's cry for justice against the criminal. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Court must not only keep in view the rights of the criminal but also the rights of the victim of the crime and the society at large while considering the imposition of appropriate punishment.

31. Similar view has also been expressed in Ravji v. State of Rajasthan, (1996 (2) SCC 175). It has been held in the said case that it is the nature and gravity of the crime but not the criminal, which are germane for consideration of appropriate punishment in a criminal trial. The Court will be failing in its duty if appropriate punishment is not awarded for a crime which has been committed not only against the individual victim but also against the society to which the

criminal and victim belong. The punishment to be awarded for a crime must not be irrelevant but it should conform to and be consistent with the atrocity and brutality with which the crime has been perpetrated, the enormity of the crime warranting public abhorrence and it should "respond to the society's cry for justice against the criminal". If for extremely heinous crime of murder perpetrated in a very brutal manner without any provocation, most deterrent punishment is not given, the case of deterrent punishment will lose its relevance.

32. These aspects have been elaborated in State of M.P. v. Munna Choubey [2005 (2) SCC 712].

33. In Bachan Singh v. State of Punjab [1980 (2) SCC 684] a Constitution Bench of this Court at para 132 summed up the position as follows: (SCC p.729)

"*132*. To sum up, the question whether or not death penalty serves any penological purpose is a difficult, complex and intractable issue. It has evoked strong, divergent views. For the purpose of testing the constitutionality of the impugned provision as to death penalty in Section 302, Penal Code on the ground of reasonableness in the light of Articles 19 and 21 of the Constitution, it is not necessary for us to express any categorical opinion, one way or the other, as to which of these two antithetical views, held by the Abolitionists and Retentionists, is correct. It is sufficient to say that the very fact that persons of reason, learning and light are rationally and deeply divided in their opinion on this issue, is a ground among others, for rejecting the petitioners' argument that retention of death penalty in the impugned provision, is totally devoid of reason and purpose. If, notwithstanding the view of the Abolitionists to the contrary, a very large segment of people, the world over, including sociologists, legislators, jurists, judges and administrators still firmly believe in the worth and necessity of capital punishment for the protection of society, if in the perspective of prevailing crime conditions in India, contemporary public opinion channelised through the people's representatives in Parliament, has repeatedly in the last three decades, rejected all attempts, including the one made recently, to abolish or specifically restrict the area of death penalty, if death penalty is still a recognised legal sanction for murder or some types of murder in most of the civilised countries in the world, if the framers of the Indian Constitution were fully aware — as we shall presently show they were — of the existence of death penalty as punishment for murder, under the Indian Penal Code, if the 35th Report and subsequent reports of the Law Commission suggesting retention of death penalty, and recommending revision of the Criminal Procedure Code and the insertion of the new Sections 235(2) and 354(3) in that Code providing for pre-sentence hearing and sentencing procedure on conviction for murder and other capital offences were before Parliament and presumably considered by it when in 1972-73 it took up revision of the Code of 1898 and replaced it by the Code of Criminal Procedure, 1973, it is not possible to hold that the provision of death penalty as an alternative punishment for murder, in Section 302, Penal Code is unreasonable and not in the public interest. We would, therefore, conclude that the impugned provision in Section 302, violates neither the letter nor the ethos of Article 19."

34. Similarly, in Machhi Singh v. State of Punjab [1983 (3) SCC 470] in para 38 the position was summed up as follows: (SCC p. 489)

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

(*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."

35. The position was again reiterated in Devender Pal Singh v. State of NCT of Delhi [2002 (5)SCC 234] : (SCC p. 271, para 58)

"*58*. From *Bachan Singh* 's case (supra) and *Machhi Singh's case (supra)* the principle culled out is that 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, the same can be awarded. It was observed:

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 '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."

36. If upon taking an overall global 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 the rarest of rare cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

37. What is culled out from the decisions noted above is that while deciding the question as to whether the extreme penalty of death sentence is to be awarded, a balance sheet of aggravating and mitigating circumstances has to be drawn up.

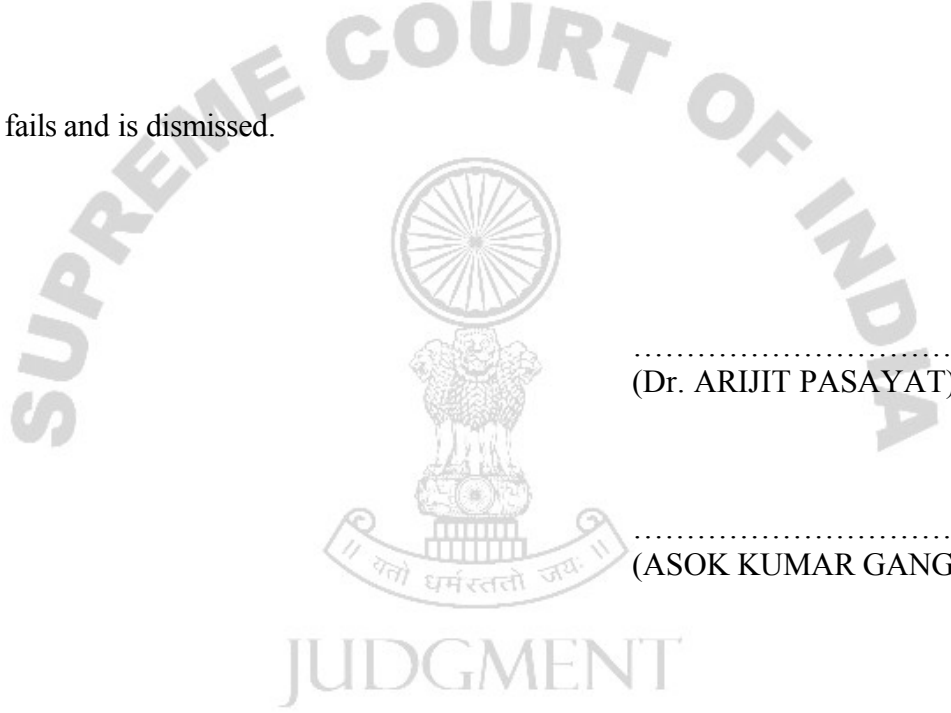
38. The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play. In fact in most of the cases where death sentence are awarded for rape and murder and the like, there is practically no scope for having an eye witness. They are not committed in the public view. But very nature of things in such cases, the available evidence is circumstantial evidence. If the said evidence has been found to be credible, cogent and trustworthy for the purpose of recording conviction, to treat that evidence as a mitigating circumstance, would amount to consideration of an irrelevant aspect. The plea of learned counsel for the appellant that the conviction is based on circumstantial evidence and, therefore, the death

sentence should not be awarded is clearly unsustainable.

39. The case at hand falls in the rarest of rare category. The circumstances highlighted establish the depraved acts of the accused and they call for only one sentence i.e. death sentence.

40. Looked at from any angle the judgment of the High Court confirming the death sentence does not want any interference.

41. The appeal fails and is dismissed.



.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(ASOK KUMAR GANGULY)

New Delhi,
April 27, 2009

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 575 OF 2007

Rameshbhai Chandubhai Rathod ..Appellant

Versus

State of Gujarat ..Respondent

J U D G M E N T

Dr. ARIJIT PASAYAT, J.

Though both of us have agreed that conviction is to be maintained, one of us Pasayat, J has confirmed the death sentence while Ganguly, J has held that life sentence is to be given. The matter is referred to a larger bench only on the question of sentence. The matter be placed before Hon'ble the Chief Justice of India for necessary orders.

…….J.
(Dr. ARIJIT PASAYAT)

…….J.
(ASOK KUIMAR GANGULY)

New Delhi,
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REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.575 OF 2007

Rameshbhai Chandubhai Rathod .Appellant(s)

- Versus -

State of Gujarat Respondent(s)

J U D G M E N T

Ganguly, J

1. I have gone through the judgment prepared by My Lord Hon'ble Dr. Justice Pasayat, but I have not found myself in entire agreement with the conclusions reached by His Lordship. I need hardly say that it is only with great respect to His Lordship that I venture to express a divergent opinion on the sentence and I consider it my sacred duty as a judge to do so. In my view in this case death penalty cannot be inflicted on the appellant.

2. From the judgment of His Lordship, it appears that the case against the appellant rests on circumstantial evidence. Those circumstances have been noted by the Hon'ble High Court and adverted to by His Lordship in the judgment. Twelve circumstances have been noted and they are as follows:-

I. The 1st circumstance is that the deceased was raped and she died a homicidal death.

II. The 2nd circumstance is that the deceased victim who was aged about 10 years was residing with her parents in flat No.A/2 of Sanudip Apartment located on Rander Road of Surat City.

III. The 3rd circumstance is that the appellant was serving as a Watchman since long and he was residing with his family in a room located on ground floor of Happy Home Apartments situated opposite Sanudip Apartment, Surat.

IV. The 4th circumstance is that the accused appellant had won the confidence of the victim as a result of which the victim had reposed confidence in the appellant.

V. The 5th circumstance which is sought to be proved is that between 8.45 p.m. and 9.00 p.m. on December 17, 1999 the appellant was last seen playing badminton with the deceased in Sanudip Apartment.

VI. The 6th circumstance which is sought to be proved is that on December 17, 1999 at about 10.30 p.m. the parents of the victim returned home and found that the deceased was missing.

VII. The 7th circumstance which is sought to be relied upon by the prosecution is that between 9.00 p.m. and 9.30 p.m on December 17, 1999 Vishnubhai Bahadur (PW-24) had seen the appellant taking the deceased on his cycle near Adajan Patia, Surat.

VIII. The 8th circumstance is that after PW-24 had disclosed before Shankarbhai (PW-6) and others that he had seen the appellant going on a cycle towards Jakat-Naka with the deceased, a search was made and appellant was found missing.

IX. The next circumstance which is sought to be relied upon by the prosecution is that in the morning of December 19, 1999 witness Chandravadan who was going home had seen the accused sitting at an open place near Bhulka Bhavan School and had approached the appellant and on enquiry being made the appellant had made extra judicial confession before him at that time.

X. The other circumstance which is sought to be proved by the prosecution is that on arrival of police at Sanudip Apartment after being informed by complainant Nareshbhai the appellant had shown the place of incident where the dead body of the deceased was found lying.

XI. The next circumstance is that at the instance of the accused appellant his cycle and school bag of the deceased were recovered and school bag was found containing anklets and earrings belonging to the deceased.

XII. Human Blood was found from T-shirt of the accused and no explanation was offered by the appellant as to how human blood was found on his T-shirt.

3. On going through those circumstances, to my mind, the first three circumstances, by themselves, do not fasten any guilt on the appellant. In conjunction with other circumstances they may be relevant. However the 4th, 5th, 7th, 8th, 9th, 10th, 11th and 12th circumstances might have been considered relevant by His Lordship for bringing home the guilt of the appellant and then bringing the case

within the rarest of rare cases, a principle formulated by the majority judgment in **Bachan Singh** Vs. **State of Punjab** - AIR 1980 SC 898, by this Court for imposing death penalty.

4. Since I differ with His Lordship on the question of inflicting the death penalty on the appellant, I propose to consider the evidence leading onto some of those circumstances.

5. To prove the fourth circumstance, the prosecution examined witness Kailashben, who is the mother of the deceased. Kailashben deposed that the appellant used to take the victim to school on his cycle and leave her at school when the *rickshawallah* failed to turn up to take her to school. The same version has been given by another witness, Chandravadan Nagin Bhai Patel (PW.4). The High Court has also noted that the appellant, in his written statement had stated that the deceased would occasionally play with his daughter and come to his room and that he never misbehaved with the deceased. These pieces of evidence cannot be said to fasten any guilt on the appellant. However, the High Court on appreciation of these pieces of evidence came to the conclusion that the prosecution proved that the appellant had enticed the victim to come with him and the fact that the appellant took the victim on the bicycle on December 17, 1999 becomes "plausible and acceptable".

6. Therefore, the High Court's conclusions on the 4th circumstance are not very definite. The High Court itself considered its conclusion in respect of the 4th circumstance a 'plausible one'. Imposition of death sentence by considering one of the circumstances which High Court finds 'plausible' is, to my mind, in defiance of any reasoning which brings a case within the category of the 'rarest of rare cases'.

7. In proving the 5th circumstance, the prosecution relied heavily on evidence of the child witness, namely Darshanaben. When she deposed, before the Court in 2004, she was 17 years old. The incident happened in 1999 and at that time, she must have been 12 years old.

8. In the examination-in-chief, she stated that she went to *Sanudip* Apartments between 8 and 8:30 p.m., she and the deceased were playing badminton. At that time, one Jayanti Dada was sitting near the STD shop. However, the evidence of Jayanti Dada is not forthcoming even though the witness said when she went for dinner in the house of the deceased, Jayanti Dada was playing badminton with the deceased. After dinner, the witness came back and again started playing with the deceased. Then, her father came and took her home. At this point, her evidence in chief is "thereafter, Khusbu (the deceased), was playing badminton with the appellant". According to her evidence, they were playing badminton at about 9 p.m.

9. For the appreciation of the evidence of a child witness, this Court has evolved certain principles and in some of its judgments this Court has relied on the proposition formulated by Justice Brewer in ***Wheeler*** *Vs.* ***United States*** *- 159 US 523 (1895).*

10. Justice Brewer opined that the evidence of a child witness is not to be rejected *per se* but rule of prudence demands that it should be subjected to a close scrutiny. If on a close scrutiny, the Court finds it reliable, even conviction can be based on it.

11. This principle laid down in ***Wheeler*** (supra) has been accepted by this Court in ***Ratansinh Dalsukhbhai Nayak*** Vs. ***State of Gujarat*** *- (2004) 1 SCC 64,* at pg. 67 and also in ***Nivrutti Pandurang Kokate and Others*** *Vs.* ***State of Maharashtra*** *- (2008) 12 SCC 565,* at pg. 567.

12. Even earlier than that, this Court in ***Dattu Ramrao Sakhare and Others*** *Vs.* ***State of Maharashtra*** *- (1997) 5 SCC 341,* had held that there is no rule of practice that the evidence of a child witness needs corroboration in order to base conviction on it. However, as a rule of prudence, the Court insists it is desirable to have corroboration from other dependable evidence (See page 343).

13. In ***Suryanarayana*** *Vs.* ***State of Karnataka*** *- (2001) 9 SCC 129,* this Court held that corroboration

of the testimony of a child witness is not a rule but is a measure of caution and prudence (See page 133).

14. In this case, of course, there is some corroboration of the evidence of the child witness from the deposition given by Shankarbhai, who mentioned that, the accused was playing badminton with the deceased. So far as the 5th circumstance is concerned, guilt of the appellant did not surface till then.

15. So far as the 6th circumstance is concerned, the same is that the deceased was found missing by her parents when they returned home on 17.12.1999 at about 10.30 p.m. This also does not indicate any guilt of the appellant.

16. The 7th and 8th circumstances are very crucial and in this connection, the evidence of PW.24 is very vital for fastening the guilt on the appellant. PW.24 in his evidence in chief said that he had seen the appellant taking the deceased on a bicycle between 9.00 to 9.30 p.m. The said witness was having the business of selling Chinese food in a lorry near Adajan Patiya Char Rasta. But in his cross-examination he has said "on the date of incident at about 8.00 p.m. I had seen Ramesh with Khushbu, who was going on cycle sitting behind Khushbu, on the road Adajan Patiya Char Rasta opposite to my lorry".

17. This is a vital discrepancy. The evidence of the child witness corroborated by Shankarbhai is that, deceased was playing badminton till about 9.00 p.m. The deceased was first playing with the child witness, then with Jayanti Dada and then again with the child witness and ultimately with the appellant when the child witness left the apartment with her father for their house. Therefore, the evidence of PW.24, which is adduced by the prosecution to prove the theory of 'last seen' is that on 8.00 p.m. PW.24 had seen the appellant and the victim going on a cycle in front of his lorry from which he was selling Chinese food.

18. In that case, the deceased and the appellant must have left the apartment before 8 p.m. Thus there is a very vital discrepancy about time between the evidence of child witness as corroborated by Shankarbhai and the evidence of PW.24 on the question of 'last seen'. The prosecution sought to prove this 'last seen' theory on the basis of the 5th and 7th circumstances. This discrepancy has not been noticed either by the High Court or in the judgment of His Lordship.

19. The next, the 8th circumstance, as noted in the judgment of His Lordship is that after PW.24 had disclosed before Shankarbhai (PW.6) that he had seen the appellant going on a cycle towards Jakat Naka with the deceased, a search was made and the appellant was found missing. From the evidence of Vishnu Bahadur (PW.24), it appears that on the date of the incident i.e. 17.12.1999, after he saw the appellant going with the deceased on a cycle and he called the appellant to stop, the appellant did not stop the cycle and was going towards Jakat Naka. Thereafter his evidence in chief is that he closed the lorry at about 11.00 p.m. and went to his house and slept. On 17.12.1999 Vishnu Bahadur (PW.24) did not meet Shankarbhai (PW.6). On the next day i.e. 18.12.1999 at about 1.00 to 1.30 p.m., Vishnu Bahadur (PW.24) after cooking Chinese food in his house went to Sanudip Apartment and met Shankarbhai (PW.6). When he went to that Apartment, he saw a crowd there. Then his evidence is, "I asked Shankarbhai, what is happened. In reply, Shankarbhai told me that Khushbu is missing since last night. At that time I informed Shankarbhai that yesterday evening I have seen Ramesh, who was going on cycle with Khushbu. The police had inquired him."

20. It is clear from the aforesaid evidence that Vishnu Bahadur (PW.24) met Shankarbhai (PW.6) on the next day i.e. on 18.12.1999 quite late and which is after mid day and then he informed Shankarbhai about the incident of the appellant going on a cycle with the deceased. So the information by PW.24 to PW.6 that he saw on 17.12.1999 the appellant and the deceased going together on a cycle towards Jakat Naka was not given before 1.00 to 1.30 p.m. on 18.12.1999.

21. The 9th circumstance which introduces the extra judicial confession by the appellant to Chandravadan (PW.4) shows a different sequence of events. Evidence of Chandravadan (PW.4) is that on the night of 17.12.1999, Nareshbhai and Kailashben, the parents of the deceased, came to his house for the purpose of searching the deceased. Then Chandervadan went with them to search the deceased and stayed at the place of Nareshbhai and then he went to the house of his mother-in-law, where he stayed the whole night then left for his house to have a bath which is obviously the next day i.e. 18.12.1999. When he was leaving for his house on a motorcycle, he saw the appellant sitting behind Bhulka Bhavan School in an open plot. He went to the appellant and asked him about Khusbhu and then the appellant made his confessional statement of allegedly raping and murdering Khushbu. Chandravadan (PW.4) then took the appellant "to the house of Nareshbhai" where Nareshbhai and others interrogated the appellant and before them appellant is alleged to have made the same confessional statement. Then Nareshbhai 'called up the Police Station' and 'informed the police'. PW.4 also deposed, 'Before police came, I left the house of Nareshbhai and went to my house to have a bath' – this is the evidence of PW.4 in chief. It is clear from the aforesaid evidence of PW.4 that he took the appellant to the father of the deceased on the next day and police was immediately informed before he could go to his house to take his bath.

22. To my mind this discloses major discrepancies in the sequence of events, which formed the core of 7th, 8th and 9th circumstances and are very vital to establish the guilt of the appellant. According to my reading of the evidence there is no chance of the appellant being found missing after the reporting of the incident by PW.24 on 18.12.1999 at about 1.00 to 1.30 p.m. in as much as PW.4 brought the appellant to the apartment in the morning hours of 18.12.1999 and the police was immediately called. In between the confession was allegedly made by the appellant.

23. It appears that in his statement under Section 313 Cr.P.C., the appellant submitted that he wants to give a written statement and he actually had given a written statement to the Trial Court. The same was marked as Exhibit 133. In the said written statement dated 1.4.2005 he has *inter alia* stated:-

"I have not made any confession before the residents of the society or the police, because I have not committed any offence. Moreover, I have not shown dead body of Khushbu to the Police. I had not led police to the place where dead body was lying. I have not made any confession before the police or panch persons. I have not drawn the police to the place of my residence. I have not given anything from the school bag. The police had created these evidences with a view to involve me in the case falsely."

24. This has to be treated as part of the accused's statement under Section 313. The provision under Section 313 of the Code is for the benefit of the accused [see **Basavaraj R. Patil & others** Vs. **State of Karnataka and others** – (2000) 8 SCC 740]. Therefore, this written statement which the accused has given and the Court made it as an Exhibit must be treated as part of his statement under Section 313.

25. It appears therefore, the appellant has retracted his confession.

26. When an extra-judicial confession is retracted by an accused, there is no inflexible rule that the Court must invariably accept the retraction. But at the same time it is unsafe for the court to rely on the retracted confession, unless the Court on a consideration of the entire evidence comes to a definite conclusion that the retracted confession is true. If the Court wants to reject the retraction, Court must give cogent reasons before the Court rejects it. (See the Division Bench Judgment of Calcutta High Court in **King Emperor** Vs. **Biseswar Dey and others** – 26 C.W.N. 1010). This is still good law. The same principle has been accepted after elaborate discussion by this Court in **Mohd. Azad @ Samin** Vs. **State of West Bengal** reported in JT 2008(11) SC 658 at 665 of the report. (See para 21).

27. It does not appear that the High Court has given any reason for not accepting the retraction of the confession by the accused. The High Court dealt with so-called extra judicial confessions by the appellant and held that the second extra judicial confession by the appellant before the police is hit by Section 25 of the Evidence Act. But about the retraction of his first extra judicial confession in the written statement of the appellant, which is part of his 313 statement, there is no discussion in

the judgment of the High Court.

28. In paragraph 13 of the High Court judgment, the High Court merely referred to the general denials by the appellant in the course of his examination under Section 313 Cr.P.C. and held that the non-explanation of the suspicious circumstances under which the deceased had died will be treated as an additional link against the appellant. In a case where death penalty has been imposed, this Court expects the High Court to consider the evidence with greater care and circumspection.

29. This Court finds that the written statement of the appellant was accepted by the High Court while formulating various circumstances against the appellant. A part of the written statement was considered for formulating the 4th circumstance against him. So High Court cannot accept one part of the statement to the total non-consideration of the other part in which the appellant has retracted his confession and especially when it was affirming death sentence against the appellant.

30. The 12th circumstance against the appellant is that blood was found on his T-shirt. But the High Court observed that the blood group of the deceased was 'A' and the blood group found on T-shirt of the appellant couldn't be determined. So, in my view, the mere fact that blood stain was found on the T-Shirt of the appellant cannot be taken as a circumstance against him.

31. But the High Court glossed over this gap in the prosecution evidence by citing **Khujji alias Surendra Tiwari** Vs. **State of Madhya Pradesh** - AIR 1991 SC 1853. In that judgment, a three judge Bench of this Court held that even when group of blood stains found on the clothes of the accused is not determined, the same is of no consequence when there is direct evidence against the accused that he inflicted a knife blow on the deceased.

32. This ratio cannot be applied here as there is no direct evidence. This is a case of circumstantial evidence. Therefore, in the absence of any proof that the group of the blood stain found on the T-

shirt of the accused is that of the deceased, the 12th circumstance cannot be said to be one pointing towards the guilt of the accused and especially in a case where death penalty is affirmed by the High Court.

33. In the complaint, which was filed by the father of the deceased girl, there is no allegation of robbery. In the evidence led in this case and on which adverse circumstances have been formulated against the appellant, it appears that the deceased girl went with the appellant on her own. In the circumstances noted against the appellant, there is no allegation of robbery against the appellant.

34. In his statement under Section 313, the accused was not told that he has committed robbery. Only in some of the questions it was put to him that the deceased girl was wearing golden earrings and silver anklets. It was never put to him that he has committed any robbery. Even then the Hon'ble High Court after assessment of the evidence in this case and while confirming the death sentence reached its finding that the appellant has committed robbery. The question which was put to the appellant in connection with those ornaments is as follows:-

> "This witness has further stated in her deposition that, her daughter was going to school by rickshaw. Some times Mr. Ramesh was going to put her on school on his cycle when rickshaw was not available. Moreover, this witness has identified cloths, golden earrings and silver anklets of deceased Ms. Khushbu. What you want to say about it?"

35. From the aforesaid question, it cannot be said that it was put to the appellant that he committed robbery but the High Court reached a finding that the appellant committed robbery and held:

> "It is obvious that a most heinous type of barbaric rape, murder and robbery was committed on a helpless and defenseless girl aged 10 years."

36. I am constrained to hold that appreciation of evidence by the High Court in this case, in affirming death penalty, has not been on a proper perspective and keeping in mind the parameters of 'rarest of rare cases' formulated in **Bachan Singh** (supra).

37. The High Court while confirming death sentence in this case, compared this case with the decision

of this Court in the case of **Dhananjoy Chatterjee alias Dhana** Vs. **State of W.B.** – (1994) 2 SCC 220, and justified the death penalty in this case as similar penalty was imposed in the case of **Dhananjoy** (supra).

38. There are vital differences in the facts of the two cases. In the present case, there is no allegation that the appellant ever misbehaved with the deceased.

39. In **Dhananjoy** (supra), prior to the date of crime, there were many occasions when the victim had been teased by Dhananjoy on her way to and back from her school. The latest being on 2nd March, 1990, three days prior to her death, when Dhananjoy had asked the deceased to accompany him to watch a movie. To that the deceased protested and had told her mother about it. Then her father had consulted some neighbours and thereafter, filed a written complaint to the security agency which had hired Dhananjoy and deployed in their apartment. The agency had arranged for Dhananjoy to be transferred to another apartment. Thus there was a motive and a sense of revenge in the mind of Dhananjoy in committing the crime against the deceased.

40. Here the facts are totally different.

41. In **Dhananjoy** (supra), *about the time or after the commission of the crime,* two PWs saw him come out in the balcony of the same flat in which the victim girl stayed when they called out his name. Dhananjoy should not have gone to that flat as the father of the victim girl filed a complaint against him upon the same his transfer from the apartment was under consideration. Dhananjoy was immediately asked to come down by those who called him and in response to their call, he came out on the balcony of that flat. Thus Dhananjoy's presence in the scene of crime at or about the time of commission of the crime is not merely based on the circumstantial evidence.

42. Third point of difference is with respect to the behaviour of Dhananjoy after the crime.

43. In **Dhananjoy** (supra) there are two very suspicious conduct of his. One is after he came down from the flat, Dhananjoy absconded.

44. After he came down, he spoke with the supervisor in a hurry and left the place. And thereafter, he did not report back to the office for many days nor did he come to collect his salary. He was later on found from his native village and his plea of alibi was found to be "belated and vague" by this Court.

45. In this case the appellant did not abscond. He came to the same apartment on the next day.

46. In **Dhananjoy** (supra), a cream coloured shirt button was found in the place of occurrence and which matched with the buttons of his shirt handed over by the accused to the police after he was apprehended. Also, a broken chain was found which was proved to have been worn by Dhananjoy as it was recognized as being given to him by one of the PWs.

47. Also, another item, i.e. a watch which was found from the Dhananjoy's house had been taken by him from the flat and belonged to the mother of the deceased.

48. Thus, these items connected unerringly Dhananjoy with the crime and are crucial in nature.

49. There is no such evidence in this case.

50. Therefore imposition of death penalty in **Dhananjoy** (supra) does not justify the imposition of the same sentence here.

51. In **Megh Singh** Vs. **State of Punjab** – (2003) 8 SCC 666, this Court held that in criminal law one

additional or different fact may make a world of difference between the conclusions in two cases or between two accused in the same case.

52. Criminal cases depend on facts and a single significant factual detail may alter the entire conclusion (para 18 page 671).

53. Death Penalty is a vexed subject in our legal system. In the 35th Report of the Law Commission on Capital Punishment, arguments for both its retention and abolition were considered. The matter came to be considered by the Law Commission as, Raghunath Mishra, Member of the Lok Sabha, moved a resolution in the House for its abolition. And in the course of the debate, it was agreed that the question be referred to the Law Commission.

54. The Commission gave a detailed Report running into several volumes. Ultimately the Commission recommended its retention but also recommended certain amendments of the Code of Criminal Procedure and the Indian Penal Code. Those recommendations given in Appendix XLIV of the report run as under:

"1). The Code of Criminal Procedure, 1898 - A provision requiring reasons for imposing either sentence (of death or imprisonment for life) for an offence which is punishable with death or imprisonment for life in an alternative, should be inserted in the Code. [Paragraphs 820-822 of the body of the Report]

2) Indian Penal Code - Persons below 18 years of age at the time of Commission of the offence should not be sentenced to death. [Paragraphs 878 and 887 of the body of the Report]"

55. The Commission's recommendations for its retention were given in a guarded language and they may be quoted:-

"Having regard, however, to the conditions in India, to the variety of the social up-bringing of its inhabitants, to the disparity in the level of morality and education in the country, to the vastness of its area, to the diversity of its population and to the paramount need for maintaining law and order in the country <u>at the present juncture</u>, India cannot risk the experiment of abolition of capital punishment."

(Emphasis added)

56. Despite these recommendations, the validity of death sentence came up for consideration before this Court on several occasions. In one of the earliest cases, in the case of **Jagmohan Singh** Vs. **State of U.P** – AIR 1973 SC 947, this Court upheld its validity, even though, it acknowledged that this is a difficult and controversial subject. Soon thereafter the matter came up for consideration before this Court again in **Ediga Anamma** Vs. **State of Andhra Pradesh** – AIR 1974 SC 799, in which this Court laid down that the life sentence should be the rule and death sentence is an exception. In that case Justice Krishna Iyer, speaking for this Court, gave certain guidelines in paragraph 26 and described them as positive indicators against death sentence under Indian law. Those guidelines are as follows:-

> "26**.** Where the murderer is too young or too old the clemency of penal justice helps him. Where the offender suffers from socio-economic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the Court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302, read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the Court may humanly opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless state of the victim, and the like, steel the heart of the law for a sterner sentence. We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life."
>
> (Emphasis supplied)

57. Those formulations by Justice Krishna Iyer have been accepted in Amnesty International Report of Death Penalty (See Amnesty International Publication, page 80 to 81).

58. The aforesaid formulations must be kept in mind by Courts while exercising their discretion in imposing death penalty. His Lordship was of the view that individualization of sentencing is normally achieved by a judicial 'hunch' which according to His Lordship was a procedural defect. In my judgment His Lordship's formulation of the principles in **Ediga Anamma** (supra) is a systematic statement, which, in the language of Justice Homes, may be called "inarticulate

premises" which Court should consider before imposing the death sentence. In **Ediga Anamma** (supra) Justice Krishna Iyer while tracing the history of capital punishment observed that its history "hopefully reflects the march of civilization from terrorism to humanism and the geography of death penalty depicts retreat from country after country." (See para 22 page 805).

59. The Constitution Bench in **Bachan Singh** (supra) considered the decision in **Ediga Anamma** (supra) and did not express a contrary view on those guidelines. On the other hand, it shared the same view, by quoting from **Ediga** in paragraph 207, page 945 of the report.

60. But the categories of mitigating circumstances are never close and in paragraph 204 (page 944 of the said report) of **Bachan Singh** (supra), this Court recorded the submissions of Dr. Chitaley, the learned counsel who suggested some further mitigating factors. They are:-

"*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."

61. After recording the submissions of the learned counsel, the Court in Paragraph 205 at page 944 of the report accorded its approval to the same by saying that those are "undoubtedly relevant circumstances and must be given great weight in the determination of sentence". Therefore apart from the mitigating circumstances formulated in **Ediga Anamma**, those suggested by Dr. Chitaley and approved by this Court, unless they overlap, form part of the ratio in **Bachan Singh** as

mitigating circumstances accepted by this Court.

62. In paragraph 207, the learned Judges held that there are numerous other circumstances justifying the passing of the lighter sentence, as there may be circumstances of aggravation.

63. In paragraph 207, in **Bachan Singh**, the learned Judges explained the principles in sentencing policy under Section 354(3) of the Code of Criminal Procedure. In my view the provisions of Section 354(3) must be read conjointly with Section 235(2) of the said Code.

64. In a case where the Court imposes the death sentence both the aforesaid provisions, namely, Section 235(2) and Section 354(3) of the Code assume signal significance.

65. The Constitutional validity of Section 354(3) was upheld in **Bachan Singh** (supra) as the learned Judges have said that the legislative policy in sentencing is discernable from those two Sections.

66. In my judgment both those two Sections supplement each other and in a case where death penalty is imposed, both the Sections must be harmoniously and conjointly appreciated and read.

67. In **Bachan Singh** (supra), this Court interpreted those Sections almost in the similar view as would appear from paragraphs 164 and 165 (page 936 of the report). The Constitution Bench held :-

> "164. .....Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3), a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the court should not confine its consideration "principally" or *merely* to the circumstances connected with the particular *crime*, *but also* give due consideration to the circumstances of the *criminal*.

68. In a criminal trial where the prosecution seeks to make out a case for imposition of death sentence, it has to discharge a very heavy and an onerous burden. In such cases, the prosecution must, and I

repeat, must discharge this burden by demonstrating the existence of aggravating circumstances and the consequential absence of mitigating circumstances. In discharging such a burden the prosecution must not only prove beyond reasonable doubt that the accused has committed the crime but in order to make out a case for death sentence, it also has to prove beyond any reasonable doubt how the crime has been committed and specially the aggravating circumstances which warrant a death penalty. In such exercise by the prosecution, the accused must be given a real and effective chance of rebuttal and to disprove the existence of aggravating circumstance. Therefore apart from his examination under Section 313, the accused must be separately heard on the sentence to be imposed on him where he can demonstrate all the mitigating circumstances. Those must be weighed in the balance and they must receive a liberal and expansive interpretation by Court. In this context the following observations in **Bachan Singh** (supra) are very pertinent:-

"…Nonetheless, it cannot be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in Section 354(3). Judges should never be blood thirsty. Hanging of murderers has never been too good for them. Facts and figures albeit incomplete, furnished by the Union of India, show that in the past Courts have inflicted the extreme penalty with extreme infrequency……. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality.

(Emphasis supplied)

69. From the records, it does not appear that adequate and effective hearing was given to the accused by the trial court on the aforesaid basis before imposing the death sentence on him. It appears that the Additional Sessions Judge, 9th Fast Track Court, Gujarat returned a finding of guilt of the present appellant on 18.5.2005 and on that day itself allegedly heard the appellant on the sentence and imposed death sentence on that day. Unfortunately that is not the purpose of Section 235(2) of

the Code.

70. Section 235(2) as interpreted by this Court in **Bachan Singh** (supra), and quoted above, provides for a 'bifurcated trial'. It gives the accused (i) a right of pre-sentence hearing, on which he can (ii) bring on record material or evidence which may not be (iii) strictly relevant to or connected with the particular crime but (iv) may have a bearing on the choice of sentence. Therefore it has to be a regular hearing like a trial and not a mere empty formality or an exercise in an idle ritual. In view of the mitigating circumstances endorsed in **Bachan Singh** (supra) the State must prove, by adducing evidence, that accused does not satisfy clause (3) and (4) of the circumstances mentioned in paragraph 204 (page 944 of the report) as those mitigating circumstances were accepted in para 205 (page 944 of the report) in **Bachan Singh** (supra).

71. Here prosecution has not discharged any burden at all for less the burden referred to above. This is a statutory obligation which is cast on the Court in a case where both Sections 235(2) read with Section 354(3) apply in view of the law laid down in **Bachan Singh** (supra). The mandate of Article 141 of the Constitution cannot be ignored either by the trial Court or the High Court.

72. Therefore, regardless of whether the accused asks for such a hearing, the same must be offered to the accused and an adequate opportunity for bringing materials on record must be given to him especially in case where Section 354(3) comes into play. It is only after undertaking that exercise that 'special reasons' for imposing death penalty can be recorded by the Court.

73. In the order imposing death sentence, the learned trial Judge has not even once referred to Section 354(3) of the Code. Therefore, the imposing of death sentence by the learned trial Court is wholly illegal and contrary to the provisions of the Code of Criminal Procedure and contrary to the law laid down by this Court in **Bachan Singh** (supra).

74. Even without referring to **Bachan Singh**, *in* ***Muniappan*** *Vs.* ***State of Tamil Nadu*** *- (1981) 3 SCC*

11, a two judge bench of this Court emphasized on the importance of hearing the accused on the question of sentence under Section 235(2) CrPC and came to the conclusion that the question of hearing the accused on sentence was not to be discharged without putting formal questions to the accused. The obligation of hearing the accused under Section 235(2) CrPC has been explained as follows:-

"The Judge must make a genuine effort to elicit from the accused all information which will eventually bear on the question of sentence... question which the Judge can put to the accused under Section 235(2) and the answers which the accused makes to those questions are beyond the narrow constraints of the Evidence Act. The court, while on the question of sentence is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction".

75. Relying on the principles laid down in **Bachan Singh** in ***Allauddin Mian*** *Vs.* ***State of Bihar*** – (1989) 3 SCC 5, the Supreme Court deprecated the practice of the trial Court which, after recording the finding of guilt and before the accused could "absorb and overcome the shock of conviction" asked the accused to say on the question of sentence. In the instant case, the same procedure was adopted as pointed out in Para 67 herein above. The learned Judges held that by doing so the purpose of Section 235(2) is not served.

76. The learned judges held that the provision of Section 235(2) of the CrPC serves a dual purpose and those purposes are as follows:

"...The said provision therefore satisfies a dual purpose; it satisfies the rule of natural justice by according to the accused an opportunity of being heard on the question of sentence and at the same time helps the court to choose the sentence to be awarded. Since the provision is intended to give the accused an opportunity to place before the court all the relevant material having a bearing on the question of sentence there can be no doubt that the provision is salutary and must be strictly followed. It is clearly mandatory and should not be treated as a mere formality".

77. After observing as such, this Court mandated a general rule which should be followed in sentencing, specially in cases of sentencing of Death Sentences and those general principles are as follows:-

"...We think as a general rule the trial courts should after recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the

relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender."

78. In a subsequent three judge bench judgment of ***Malkiyat Singh and others*** *Vs.* ***State of Punjab*** - *(1991)* 4 SCC 341, this Court again reiterated in Para 18 at pg 356 of the report that the sentence awarded on the same day when finding of the guilt was arrived at is not in accordance with the law. Explaining the provisions under Section 235(2) CrPC, this Court held:-

"Hearing contemplated is not confined merely to oral hearing but also intended to afford an opportunity to the prosecution as well as the accused to place before the court facts and material relating to various factors on the question of sentence, and if interested by either side, to have evidence adduced to show mitigating circumstances to impose a lesser sentence or aggravating grounds to impose death penalty. Therefore, sufficient time must be given to the accused or the prosecution on the question of sentence, to show the grounds on which the prosecution may plead or the accused may show that the maximum sentence of death may be the appropriate sentence or the minimum sentence of life imprisonment may be awarded, as the case may be. No doubt the accused declined to adduce oral evidence. But it does not prevent to show the grounds to impose lesser sentence on A-1. This Court in the aforestated *Allauddin* and *Anguswamy* cases held that the sentence awarded on the same day of finding guilt is not in accordance with the law".

79. *In* ***Arshad*** *v.* ***State of Karnataka*** - (1994) 4 SCC 383, this Court through Justice Anand (as his Lordship was then) again deplored the practice of proving guilt and sentencing on the same day. In that case, both was done on 8-5-92 itself and by a cryptic order. This Court held that the objective for which Section 235(2) was brought into the Code was completely ignored by the Session Judge and the Learned Judge disapproved the sentencing procedure in a cryptic manner. It was held that it exposes the lack of sensitiveness on the part of the Court in dealing with such cases. (Para 17, pg. 389 of report).

80. The High Court, unfortunately as the first appellate Court, both on facts and in law, has confirmed the death sentence without pointing out these glaring illegalities in sentencing procedure of the trial Court and especially in a case where a death penalty has been imposed.

81. The duties cast on the High Court, while dealing with reference for confirmation of death penalty under Sections 366, 367, 368, 369 and 370 of Code were also pointed out in **Bachan Singh** in

paragraphs 157, 158, 159 at page 934 of the report. In paragraph 159, the position has been summed up as under:-

"159. The High Court has been given very wide powers under these provisions to prevent any possible miscarriage of justice. In *State of Maharashtra* v. *Sindhi*, AIR 1975 SC 1665 this Court reiterated, with emphasis, that while dealing with a reference for confirmation of a sentence of death, the High Court must consider the proceedings in all their aspects, reappraise, reassess and reconsider the entire facts and law and, if necessary, after taking additional evidence, come to its own conclusions on the material on record in regard to the conviction of the accused (and the sentence) independently of the view expressed by the Sessions Judge".

82. Unfortunately in this case High Court failed to correct the flawed sentencing procedure followed by the trial Court and erred in law by confirming the death sentence which led to an obvious miscarriage of justice.

83. The challenge to the constitutionality of death sentence was repelled in **Bachan Singh** (supra) only in view of the legislative safeguards given in the sentencing policy in the aforesaid provisions of Sections 235(2) and 354(3) of the Code. The Court has held that such procedure "cannot, by any reckoning, be said to be unfair, unreasonable and unjust" (para 167, page 937).

84. Thus, it appears that this Court upheld the constitutionality of death penalty on the aforesaid doctrine of 'due process' which has been introduced in our constitutional jurisprudence in the case of **Smt. Maneka Gandhi** Vs. **Union of India and another** – AIR 1978 SC 597.

85. By repeatedly referring to the dicta in **Maneka Gandhi** (supra), the majority judgment in **Bachan Singh** (supra) upheld the vires of the provisions of Indian Penal Code on death penalty in view of the reasonable, fair and just procedures which are provided in the sentencing policy by those Sections in the Criminal Procedure Code (paras 135 and 136, page 930 of the report).

86. Similarly in **Furman** V. **Georgia** - 408 U.S. 238 (1972),U.S. Supreme Court impliedly overruled its earlier decision in **McGautha** V. **California** – 402 U.S. 183, 196 (1971). In this context it may be mentioned that in nine separate opinions the learned Judges struck down in **Furman Vs. Georgia** by a majority of 5-4, the death penalty statutes at issue as cruel and unusual in view of the denial of the 'due process' guaranteed by the Fourteenth Amendment.

87. Learned Judges in **Furman** observed that the sentencing policy was not properly structured and, therefore, it causes denial of Fundamental Rights.

88. The Supreme Court in **Bachan Singh** (supra) also insisted on the importance of structured sentencing policy in death sentence cases to uphold its validity and held that structured sentencing policy has been achieved in view of the aforesaid two provisions, namely, Section 354(3) and Section 235(2) of the Code.

89. Therefore fairness, justice and reasonableness which constitute the essence of guarantee of life and liberty epitomized in Article 21 of the Constitution also pervades the sentencing policy in Sections 235(2) and 354(3) of the Code. Those two provisions virtually assimilate the concept of "procedure established by law" within the meaning of Article 21 of the Constitution.

90. Thus, a strict compliance with those provisions in the way it was interpreted in **Bachan Singh** (supra) having regard to the development of constitutional law by this Court, is a must before death sentence can be imposed.

91. While I fully share my learned Brother's anxiety about the expectation of society to the adequacy of

the sentence to the nature of the crime, at the same time, we cannot be oblivious of the person who is alleged to have committed the crime and his rights under a fair and structured sentencing policy. This Court laid down in **Bachan Singh** (supra) that before imposing death sentence, an abiding concern for the dignity of human life must be shown by Court.

92. We must recognize that 'cry for justice' is not answered by frequent awarding of death sentence on a purported faith on 'deterrence creed'. Before choosing the option for death sentence, the Court must consciously eschew its tendency of 'retributive ruthlessness'.

93. In **Bachan Singh** (supra), the majority opinion warned in paragraph 125, page 927:-

> "that Judges should not take upon themselves the responsibility of becoming oracles or spokemen of public opinion: Not being representatives of the people, it is often better, as a matter of judicial restraint, to leave the function of assessing public opinion to the chosen representatives of the people in the legislature concerned.

94. Therefore, this Court cannot afford to prioritise the sentiments of outrage about the nature of the crimes committed over the requirement to carefully consider whether the person committing the crime is a threat to the society. The Court must consider whether there is a possibility of reform or rehabilitation of the man committing the crime and which must be at the heart of the sentencing process. It is only this approach that can keep imposition of death sentence within the 'rarest of the rare cases'.

95. The expression 'rarest of rare cases' is not to be read as a mere play on words or a tautologous expression.

96. In upholding the constitutional validity of capital punishment, the Constitution Bench of this Court used that expression in **Bachan Singh** in order to read down and confine the imposition of capital punishment to extremely limited cases. This is a very loaded expression and is not to trifled with.

It is pregnant with respect for the inviolability of human life. That is why the word 'rare' has been used twice and once in a superlative sense. Therefore, the significance of this expression cannot be watered down on a perceived notion of a 'cry for justice'.

97. I now propose rely on a few decisions to show how this expression 'rarest of rare case' has been interpreted by this Court even where the accused was found guilty of both murder and rape and death sentence was awarded by the trial Court and the High Court confirmed it.

98. In the case of **Chaman** Vs. **Stae of NCT- (2001) 2 SCC 28**, the Court after finding the commission of crime held that a girl of 1 and ½ years was raped and killed but did not approve of the death sentence imposed on him by the Courts below and imposed on him a life sentence as this Court found that the appellant is not a dangerous person to endanger the society and the case is not coming within the parameters of the 'rarest of rare case'.

99. In the case of **Bantu @ Naresh Giri** Vs. **State of Uttar Pradesh- AIR 2002 S.C. 70**, the accused was sentenced to death for the rape and murder of a 6 year old child. In Para 8 of the said judgment, the Learned judges after considering the age of the accused and also the fact that he did not have any past criminal record held that the accused will not be a grave danger to society and further held that the case does not fall under the rarest of rare cases and death sentence was commuted to life sentence.

100. In **Surendra Pal Singh** Vs. **State of Gujarat- (2005) 3 SCC 127**, a minor girl was raped and killed and the Sessions Court imposed death penalty and the High Court of Gujarat also affirmed the same. But this Court found that the case does not fall under the rarest of rare cases and considering that the appellant was 36 years old and has no previous criminal record, held that he was not a menace to society. This Court held that it was not a rarest of rare cases and confirmed the conviction but commuted the sentence from death sentence to life imprisonment.

101. In **Amrit Singh** Vs. **State of Punjab- AIR 2002 SC 132**, the accused was found guilty of rape of a minor girl and also of her death. Death occurred not as a result of strangulation but due to excessive bleeding from her private parts. In that case, the Trial Court sentenced the accused to death sentence which was confirmed by the High Court of Punjab and Haryana in a reference proceeding before it.

102. In para 21 of page 136 of the judgment, this Court held that the imposition of death sentence in such cases was improper and it cannot be put in the category of rarest of rare cases and the Court imposed a sentence of rigorous imprisonment for life on that ground.

103. In the case of **Kulwinder Singh** Vs. **State of Punjab- AIR 2007 SC** 2868, Hardip Kaur was found to have been raped by the accused and on her protest, she was found to have been strangulated as a result of which she died. Another person, Joginder Kaur also died in the same incident as a result of injuries received from gandashi blows inflicted on the neck by the accused. In that case, the death sentence was commuted to imprisonment for life as the Court found that it cannot be brought in the category of rarest of rare cases.

104. Keeping these principles in mind, I find that in the instant case the appellant is a young man and his age was 28 years old as per the version in the charge-sheet. He is married and has two daughters. He has no criminal antecedents, at least none has been brought on record. His behaviour in general was not objectionable and certainly not with the deceased girl prior to the incident. The unfortunate incident is possibly the first crime committed by the appellant. He is not otherwise a criminal. Such a person is not a threat to the society. His entire life is ahead of him.

105. Before I conclude, if I may quote a few lines from Sir Winston Churchill about Crime and

Punishment and which have been quoted by C.H. Rolph in "Commonsense about Crime and Punishment, page 175". Those matchless words of Sir Winston Churchill are as under:-

"The mood and temper of the public with regard to the treatment of crime and criminals is one of the unfailing tests of the civilization of any country. A calm, dispassionate, recognition of the rights of the accused – and even of the convicted – criminal against the State; a constant heart-searching by all charged with the duty of punishment; a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment; tireless efforts towards the discovery of curative and regenerative processes; unfailing faith that there is a treasure, if you can only find it, in the heart of every man; these are the symbols which in the treatment of crime and criminal, mark and measure the stored-up strength of a nation, and are sign and proof of the living virtue in it".

106. For the reasons discussed above and in view of mitigating circumstances and the law laid down in **Bachan Singh** (supra) and the various gaps in the prosecution evidence, pointed hereinabove, death sentence cannot be awarded to the appellant as in my view it does not come under the 'rarest of rare cases'. Apart from that in the case of the appellant proper sentencing procedure was not followed by the trial Court and the Hon'ble High Court erred by approving the same. But I do not agree with his conviction on charges of robbery which, in my opinion, was not proved and on the alleged conviction on robbery no sentence was awarded to the appellant.

107. I agree with His Lordship that the appellant has to be convicted on other charges. However, his conviction does not automatically lead to his death sentence.

108. In my humble opinion instead of death sentence a sentence of rigorous imprisonment for life will serve the ends of justice.

109. With the aforesaid modification on the sentence the appeal is dismissed to the extent indicated above.

.....J.

New Delhi (ASOK KUMAR GANGULY)
April 27, 2009