DATTATRAYA @ DATTA AMBO ROKADE

v.

THE STATE OF MAHARASHTRA

(Criminal Appeal Nos. 1110-1111 of 2015)

FEBRUARY 21, 2019

[N. V. RAMANA, DEEPAK GUPTA AND INDIRA BANERJEE, JJ.]

Penal Code, 1860: ss. 302, 376(2)(f), 377, 363, 364, 367 and 201 r/w ss. 3,4,5 (i) (l) and (m) of the Protection of Children from Sexual Offences Act, 2012 – Rape and murder of minor child – Conviction by trial court – Death sentence – High Court confirmed the conviction and sentence – Appeal to Supreme Court – Held: In view of the forensic reports along with extra-judicial confession made by the accused, conviction upheld – However, there is no material to show that the intention of the accused was to kill the victim – There is also no evidence to show any diabolic planning by the accused to commit the crime or that the murder was pre-meditated – Therefore, the case does not fall in the category of rarest of rare cases – The accused was also not defended effectively before the courts below – The accused neither sought nor was given the opportunity to place on record mitigating circumstances – Trial court imposed the extreme penalty of death sentence without considering as to whether there was no alternative to death sentence or that in absence of death sentence, the accused would be threat to society or whether the accused could be reformed – The accused has been denied an effective and meaningful hearing on the question of sentence u/s. 235(2) Cr.P.C.– Therefore death sentence is commuted to sentence of life imprisonment – Considering the heinous, revolting, abhorrent and despicable nature of the crime, accused is directed to undergo imprisonment for life, till his natural death without any remission of sentence – Sentence/Sentencing – Death sentence – Code of Criminal Procedure, 1973 – s. 235(2).

A *Code of Criminal Procedure, 1973:*

s. 235(2) – Scope of – Held: Provision u/s. 235(2) is not a mere formality and should be obeyed in letter and spirit – It is obligatory on the part of the trial Judge to hear the accused on the question of sentence and deal with it – For effective hearing u/s. B *235(2) the suggestion that the court intends to impose death penalty should specifically be made to the accused, so as to enable the accused to make effective representation against death sentence, by placing mitigating circumstances before the Court – Even if such issues are not raised on behalf of accused, the court is obliged on its own to elicit facts relevant to the question of existence of* C *miltigating circumstances – Sentence/Sentencing.*

Sentence/Sentencing:

Life imprisonment – Length of incarceration – Determination of – Held: It is open to the Court to prescribe the length of D *incarceration, especially in cases where death sentence has been replaced by life imprisonment.*

Life imprisonment – Length of incarceration – Held: Life imprisonment means imprisonment for entire life.

Allowing the appeals, the Court

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HELD : 1. Even though, there is nothing in the evidence of any of the witnesses, except the evidence of PW-12 and PW-18 and the weak evidence of the PW Nos. 4 and 5 purported to be corroborated by PW-10, to prove the accused-appellant guilty of the offences alleged, the forensic reports along with the extra-F **judicial confession made by the accused-appellant to his wife PW-18, clearly establishes the guilt of the accused-appellant. The examination of the reports of the Directorate of Forensic Laboratories, being Ex. No. 22 to 25 and in particular the examination report in Ex.25 indicates that DNA profile of the** G **blood detected on the plastic bag and the clothes and those obtained from the nails of the victim are identical and are from one and the same source of female origin. The DNA profile of semen detected on the underwear (Bermudas), the bedsheet, vaginal swab and anal swab of the victim are identical and from**

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one and the same source of male origin. The DNA analysis establishes beyond reasonable doubt that the victim was raped by the accused-appellant. Therefore, the conviction of the accused-appellant for the offences under Sections 302, 376(2)(f), 377 of the IPC read with Sections 3, 4 and 5 of the POCSO is confirmed. [Paras 85, 86 and 96] [322-B-E; 324-G]

2.1 In the present case, there is no evidence at all of any diabolic planning to commit the crime though the crime was undoubtedly cruel and heinous. The circumstances in which the victim entered the tenement of the accused-appellant are not known. There is no evidence to show that the accused-appellant took the victim to his tenement. Though unlikely, she might even have gone to his tenement on her own. [Para 122] [336-E]

2.2 As a mature man, over fifty years of age, the accused-appellant should have known that the rape of a five year old child by an adult was dangerous and could lead to such injuries, as was in all probability likely to cause death. The death of the deceased victim was not caused under any provocation, not to speak of sudden provocation. No such defence has been taken by the accused-appellant. Nor is it anybody's case that the death was caused in legitimate exercise in good faith of any right of the accused-appellant, whether of private defence or otherwise. The totality of the injuries support the finding of the Trial Court and the First Appellate Court that the accused-appellant murdered the deceased victim. Though the act of the accused squarely amounts to rape and murder, there is not a scrap of material to show that the intention of the accused-appellant was to kill the minor child. [Paras 125, 126 and 127] [337-B-D]

2.3 The doctor who had prepared the post mortem report opined that the cause of death was asphyxia due to smothering, associated with head injuries and sexual assault. He deposed that all the 5 injuries were possible by repeated sexual acts and forceful penetration. He opined that all the injuries were sufficient to cause instant death in the ordinary course. However, in view of the evidence of the post mortem report it would be appropriate to modify the sentence by reducing the same to imprisonment for life. [Paras 128 and 130] [337-E, H]

A **2.4 There can be no doubt that rape and murder of a 5 years old girl shocks the conscience. It is barbaric. There is, however, no evidence to support the finding that the murder was pre-meditated. The petitioner did not carry any weapon. The possibility that the accused-appellant might not have realized that his act could lead to death cannot altogether be ruled out. Moreover,** B **the Trial Court has apparently not considered the question of whether the crime is the rarest of rare crimes. [Para 131] [338-A-B]**

2.5 The present case does not fall in the category of the C **rarest of rare cases. Moreover, the accused-appellant was not defended effectively. The lawyer representing the accused-appellant only pleaded not guilty, emphasizing that there was no eye witness to the incident and sought leniency only on the ground of the age of the accused-appellant which was 53 years. The accused-appellant neither sought nor was given the opportunity** D **to file any affidavit placing on record relevant mitigating circumstances. The legal assistance availed by the accused-appellant was patently not satisfactory and he was not accompanied by a social worker. No attempt was made to place on record mitigating circumstances. No argument was advanced to the effect that there was no similar case against the accused-appellant.** E **[Paras 136 and 137] [338-G-H; 339-A-B]**

2.6 Considering the nature of the crime against a five year old child, the Trial Court imposed the extreme penalty of death without deciding the question of whether there was no alternative to imposing death sentence on the accused-appellant. There is F **no finding that in the absence of death sentence, the accused-appellant would continue to be a threat to the society. The question of whether the accused-appellant could be reformed, had not at all been considered. [Para 138] [339-C]**

G *Bachan Singh v. State of Punjab* **(1980) 2 SCC 684 – followed.**

Rajesh Kumar v. State (through Govt. of NCT of Delhi) **(2011) 13 SCC 706** *Machhi Singh & Others v. State of Punjab* **(1983) 3 SCC 470 : [1983] 3 SCR 413 ;** *Santosh Kumar Satishbhushan Bariyar v. State of*

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Maharashtra **(2009) 6 SCC 498 : [2009] 9 SCR 90 ;** *Ajay Pandit and Another v. State of Maharashtra* **(2012) 8 SCC 43 : [2012] 10 SCR 70 ;** *Mohinder Singh v. State of Punjab* **(2013) 3 SCC 294 : [2013] 3 SCR 90 ;** *Panchhi and Others v. State of U.P.* **(1998) 7 SCC 177 : [1998] 1 Suppl. SCR 40 ;** *Bantu v. State of M.P.* **(2001) 9 SCC 615 ;** *Amit v. State of Maharashtra* **(2003) 8 SCC 93 : [2003] 2 Suppl. SCR 285 ;** *Rahul v. State of Maharashtra* **(2005) 10 SCC 322 ;** *Surendra Pal Shivbalakpal v. State of Gujarat* **(2005) 3 SCC 127 : [2004] 4 Suppl. SCR 464 ;** *Mukesh and Another v. State (NCT of Delhi) and Others* **(2017) 3 SCC 717 ;** *Mohd. Manan @ Abdul Mannan v. State of Bihar* **2019 AIR 2934** *Haru Ghosh v. State of West Bengal* **(2009) 15 SCC 551 : [2009] 13 SCR 847 ;** *Lehna v. State of Haryana* **(2002) 3 SCC 76 : [2002] 1 SCR 377 ;** *Rajendra Prahladrao Wasnik v. State of Maharashtra* **Review Petition (Crl.) No. 306-307 of 2013 – relied on.**

3.1 Section 235(2) CrPC is not a mere formality. It is obligatory on the part of the trial Judge to hear the accused on the question of sentence and deal with it. The mandate of Section 235(2) CrPC had to be obeyed in letter and spirit. [Paras 103 and 105] [327-E; 329-D]

Santa Singh v. State of Punjab **(1976) 4 SCC 190 : [1977] 1 SCR 229 ;** *Dagdu and Others v. State of Maharashtra* **(1977) 3 SCC 68 : [1977] 3 SCR 636 – relied on.**

3.2 Irrespective of whether these issues were raised on behalf of the accused, the Court is obliged on its own to elicit facts relevant to the question of existence of mitigating circumstances. The Court made no attempt to elicit any facts relevant to the sentence. For effective hearing under Section 235(2) Cr.P.C., the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death

sentence, by placing mitigating circumstances before the Court. This has not been done in the present case. The Trial Court made no attempt to elicit relevant facts, nor did the Trial Court give any opportunity to the petitioner to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective and meaningful hearing on the question of sentence under Section 235(2) of the Cr.P.C. The death sentence imposed on the petitioner is liable to be commuted to life imprisonment on this ground. [Paras 139, 140 and 141] [339-D-G]

4. It is open to the Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by the life imprisonment. Even though life imprisonment means imprisonment for entire life, convicts are often granted reprieve and/or remission of sentence after imprisonment of not less than 14 years. Considering the heinous, revolting, abhorrent and despicable nature of the crime committed by the appellant, the appellant should undergo imprisonment for life, till his natural death and no remission of sentence be granted to him. [Paras 143 and 144] [340-A-C]

Mulla and Another v. State of U.P. **(2010) 3 SCC 508 : [2010] 2 SCR 633 – relied on.**

Case Law Reference

(1980) 2 SCC 684	**followed.**	**Para 99**
(2011) 13 SCC 706	**relied on.**	**Para 100**
[1977] 1 SCR 229	**relied on.**	**Para 103**
[1977] 3 SCR 636	**relied on.**	**Para 104**
[1983] 3 SCR 413	**relied on.**	**Para 106**
[2009] 9 SCR 90	**relied on.**	**Para 107**
[2012] 10 SCR 70	**relied on.**	**Para 108**
[2013] 3 SCR 90	**relied on.**	**Para 109**
[1998] 1 Suppl. SCR 40	**relied on.**	**Para 110**

(2001) 9 SCC 615	**relied on.**	**Para 111**
[2003] 2 Suppl. SCR 285	**relied on.**	**Para 112**
(2005) 10 SCC 322	**relied on.**	**Para 113**
[2004] 4 Suppl. SCR 464	**relied on.**	**Para 114**
(2017) 3 SCC 717	**relied on.**	**Para 115**
R.P. (Crl) No.306-307 of 2013	**relied on.**	**Para 118**
2019 AIR 2934	**relied on.**	**Para 118**
[2009] 13 SCR 847	**relied on.**	**Para 119**
[2002] 1 SCR 377	**relied on.**	**Para 121**
[2010] 2 SCR 633	**relied on.**	**Para 143**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1110-1111 of 2015.

From the Judgment and Order dated 21/24/25.03.2015 of the High Court of Judicature at Bombay in Criminal Appeal No. 1202 of 2013 and Criminal Confirmation Case No. 6 of 2013.

Gaurav Aggarwal, Anshu Raj Singh, Himanshu Agarwal, Ms. Pyoli, Advs. for the Appellant.

Nishant Ramakantrao Katneshwarkar, Anoop Kandari, Advs. for the Respondent.

The Judgment of the Court was delivered by

INDIRA BANERJEE, J.

1. These appeals are against the final judgment and order dated 21/24/25-3-2014 of the High Court of Judicature at Bombay in Criminal Appeal No. 1202 of 2013/Criminal Confirmation Case No.6 of 2013 whereby the High Court has confirmed the conviction of the appellant under Sections 302, 376(2)(f), 377, 363, 364, 367 and 201 of the Indian Penal Code, as also under Sections 3, 4, 5(i) (l) and (m) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'POCSO') and, *inter alia*, affirmed the sentence of death imposed on the appellant.

A 2. The facts giving rise to these appeals are abhorrent. The Complainant and his wife being the second Prosecution Witness (PW) resided at Room No.3 in the ground floor of Om Sai building, near the Shivsena Office in Koparigaon, with their son aged 10 years and two daughters aged 7 years and 5 years respectively.

B 3. It is the case of the complainant that he and his wife (PW 2), used to go to work, leaving the three children at home. On 22.1.2013, PW 2 had to go to her paternal home to visit her father. When PW 2 returned home around 2.00 p.m. she found that her youngest daughter, being the victim, was not at home. Assuming that the victim might be playing somewhere nearby, PW 2 left for work at around 2.15 p.m. At
C around 4.30 to 5.00 p.m. PW 2 received a call on her mobile phone from one Avaghade Mama, informing her that the victim was not at home. PW 2 thereafter returned home, and started searching for the victim. She contacted the complainant as also her own parents on mobile.

D 4. Thereafter the complainant, PW 2, her mother and brother all started looking for the victim in Koparigaon, Vashi and Sanpada areas. As the victim could not be found, a missing report was lodged with the APMC Police Station.

5. When the complainant and his wife (PW 2) reached home at around 2.30 a.m. after frantic efforts to trace the victim, they found the
E victim lying nude and still in front of the door of their tenement, with no movement.

6. The complainant contacted the police from his mobile and told the police that his daughter (the victim) had been found lying still, without any movement. The complainant and PW 2 took the victim to the Navi
F Mumbai Municipal Corporation Hospital, where the Medical Officer examined the victim and declared her 'brought dead'.

7. In the hospital the complainant noticed injuries on the body of victim. There was redness on both shoulders and both thighs of the victim, and laceration in the vagina and anus of the victim. Accompanied
G by the Inspector of APMC Police Station, who had come to the hospital for investigation, the complainant went to the APMC Police Station and lodged a First Information Report, on the basis of which Crime No.120/ 2013 was registered by the APMC Police Station.

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8. An inquest of the body of the victim was conducted and photographs of the body were taken. There were injuries. The vagina and the anus of the deceased victim was lacerated and blood was oozing out. On 23.1.2013, Dr. Bhushan Jain, assisted by Dr. Prerna Thakur, conducted post mortem examination of the deceased victim. Dr. Bhushan Jain also noticed injuries on the private part, anus, below the eye lid and above the upper lip. He collected the blood of the deceased victim for DNA mapping and grouping and also collected her vaginal and anal swab for detection of sperms. The samples were kept for chemical analysis.

9. Dr. Bhushan Jain who prepared the post mortem report (Exhibit 48) opined that the cause of death of the victim was asphyxia due to smothering, associated with head injuries and sexual assault. Dr. Bhusan Jain deposed that all the five injuries were possible by repeated sexual acts and forceful penetration. He opined that all these injuries were sufficient to cause instant death in the ordinary course.

10. In the meanwhile, on 23.1.2013 investigation commenced. PW 26 was the Investigating Officer. on 23.1.2013 at about 7.15 p.m., Panchnama (Ex.30) of the place where the deceased victim was found, was recorded in the presence of one Parashuram Mahadu Thakur, who deposed as the tenth prosecution witness (PW 10). A plastic bag of Surf Excel with plastic and two pieces of CDs were found on the spot. These were separately seized and packed and sealed under Panchnama (Ex.30).

11. The accused-appellant along with his wife Asha (PW 18) two sons Rupesh and Mahendra (PW 19), two daughters, Manisha and Nisha (PW 20) and a grandson Omkar used to reside in Room No. 8 of the same building, adjacent to the tenement of the complainant.

12. The accused-appellant had been unemployed for four years, and sat idle at home. Omkar the grandson of the accused-appellant used to be at school from 12.00 noon to 6.00 p.m. All other family members of the accused-appellant used to leave for work during the day. The accused-appellant used to stay at home alone.

13. It is the case of the prosecution that on 22.01.2013, in the afternoon, the accused-appellant took the victim to his house, raped her, had unnatural sexual intercourse with her causing her head injury and

A smothering her, as a result of which she died. On the same night at around 2.00 a.m., the accused-appellant had gone outside the house and on 23.01.2013, the accused-appellant went to the house of his brother at Kamothe without informing his wife, Asha (PW 18). On 24.01.2013 at about 07.30 p.m., PW 18 i.e., wife of the accused-appellant found the accused-appellant was in tension and asked him to go to their family doctor.

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14. On 24.01.2013 at about 7.30/8.00 p.m., PW 7 being the Family Doctor, examined the accused-appellant and found that the accused-appellant was tensed and his blood pressure was high. The Head Constable, Gejage, (PW 15) who had been making inquiries from the residents of Om Sai Building, had left his mobile number with the residents of the building including Mahendra (PW 19), the son of the accused-appellant so that they could contact him if they got any information with regard to the incident.

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15. It was the case of the prosecution that the accused-appellant used to force himself on his wife and have sexual intercourse with her without her consent two to four times a week. Furthermore, in 2004, when the accused-appellant and his family members were residing at Village Dudhanoli, the accused-appellant had outraged the modesty of a lady, Suvarna (PW 6) while she was attending to the call of nature. It is alleged that the accused-appellant was assaulted by villagers because of the aforesaid incident. The accused-appellant and his entire family, therefore, had to leave Village Dudhanoli forever.

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16. The prosecution has alleged that considering the antecedents of the accused-appellant and his conduct after the incident, PW 19 suspected that the accused-appellant might be the culprit who had committed the ghastly crime.

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17. On 24.01.2013, PW 19 contacted the Head Constable, Gejage (PW 15) and told him that he suspected the accused-appellant of being guilty. Thereafter, on the night of 24.01.2013, the said Head Constable, Gejage, (PW 15) and Senior Police Inspector, Kambale took the accused-appellant to the office of Crime Branch for inquiry. On 25.01.2013, the accused-appellant was arrested and the clothes on his person, i.e, blue coloured full pants, Bermuda pants and a yellow shirt were seized under panchnama, which is marked Ex. (Exhibit) 28. On 25.01.2013, the Investigating Officer, Police Inspector, Bhong, being the 26th Prosecution

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Witness (PW 26), went to the house of the accused-appellant along with a team from Forensic Science Laboratory and searched the house in the presence of panchas, the Forensic Laboratory team and daughter of the accused-appellant, Nisha (PW 20).

18. Three cushion covers from the Sofa, a cloth for cleaning the floor and a sari used as a bed-sheet, all stained with blood, were seized. On 25.01.2013 itself, the accused-appellant was examined by Dr. Tambe (PW 8), who found that the accused-appellant was in sound physical and mental condition. On 26.01.2013, the accused-appellant made a statement in the presence of Panchas on the basis of which which blood stained white coloured plastic gunny bag, blood stained orange coloured shirt and black pants of the deceased were recovered from the debris near Om Sai Building.

19. The complainant and his wife being the parents of the victim, identified her clothes. It is alleged that on 27.01.2013, Vinod and Sanjay being the 4th and 5th Prosecution Witnesses approached the Investigating Officer, Bhong (PW 26) and told him that on 22.01.2013, they had a meeting in the office of 10th Prosecution Witness (PW 10), Parshuram, which was situated in a building about 15 feet away from Om Sai Building. These witnesses told the police that after they came out of the office at about 4.30 p.m they were standing under a parking shed and talking. At that time, they saw a short old man carrying a white bag coming from the side of the staircase and going into a lane. The man kept the bag in the lane which was in front of the parking shed.

20. PW 4 and PW 5 identified the accused-appellant, as the same person, who had kept the bag in the lane, in a test identification parade conducted by the Executive Magistrate, Ratnanjali (PW 21). This very bag was recovered at the instance of the accused-appellant under Panchnama and packed in a packet (Ex.35 and Ex.36). Both PW 4 and PW 5 identified the bag as the same bag which had been carried by the accused-appellant and dumped in the lane.

21. It is stated that on 29.01.2013, the accused-appellant was produced before Dr. Thakur, the Casualty Medical Officer in Navi Mumbai Municipal Corporation Hospital (PW 16). Dr. Thakur collected blood of the accused-appellant in two plastic containers provided by the Forensic Science Laboratory, sealed the packet containing the plastic containers, filled in the identification form, attested the photograph of

A the accused-appellant and obtained thumb impression of the accused-appellant on identification form

22. The clothes of the accused-appellant, the white plastic bag, the clothes of the deceased, sealed bottle containing blood of the accused-appellant and his semen, hair and nail were sent to the Forensic Science B Laboratory. The blood, hair, nail, vaginal swab and anal swab of the victim were also sent to the Forensic Science Laboratory. The reports received by the Investigating Officer, Bhong (PW 26) from the Forensic Science Laboratory showed that D.N.A. profile of blood detected on the plastic bag, orange shirt of the deceased and sari cum bed-sheet seized from the house of the accused-appellant was identical with D.N.A. C profile of the deceased victim. The reports also showed that D.N.A. profile test of semen conducted on underwear (Bermuda pants) of the accused-appellant, and the vaginal swab and anal swab of the victim matched the D.N.A. profile of the accused-appellant.

23. Charges were framed against the accused-appellant under D Sections 363, 364, 367, 377, 302, 201 and 376 or alternatively 376(2)(f) of the Indian Penal Code. Charges were also framed under Sections 3, 4 and 5 of the Prevention of Children from Sexual Offences Act (hereinafter referred to as 'POCSO). The accused-appellant pleaded not guilty and claimed to be tried. His defence was of denial and false E implication.

24. The prosecution examined 27 witnesses. No witnesses were examined on behalf of the accused-appellant. Shorn of unnecessary details, the first prosecution witness, being the complainant (PW 1), deposed that when he returned home at around 3.20 a.m. on 23.1.2013, F after frantically searching for his daughter, he found his daughter lying naked in front of the door of his house. She was still and there was no movement. He informed the police. The victim was taken to Navi Mumbai Corporation Hospital where she was declared dead. PW 1 described the injuries on the victim i.e. redness on both shoulders and both thighs. He said there was blood in the private part of the victim and G there was a laceration in the vagina. The anus was swollen. He identified the complaint and stated that its contents were correct. PW-1 identified the following articles: -

a. A sealed packet which contained a black thread worn by the victim (Marked as Articles 1 and 1A).

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b. A sealed packet containing a plastic bag of surf excel powder of 1.5 kg (Marked as Article 2 and 2A).

c. A packet containing two pieces of CD (Marked as Articles 3 and 3A.

d. One sealed packet containing an orange coloured shirt, which he identified as shirt of the victim. (Marked as Articles 25 and 25A)

e. Another sealed packet containing black half pants which the witness identified as pants of the victim. (Marked as Articles 24 and 24A)

25. PW-1 deposed that his daughter, the victim, had been raped and murdered. In his cross-examination, he admitted that he had in course of his examination expressed suspicion against one Arun Pawar. Records reveal that the said Arun Pawar, a worker of the Shiv Sena Party had been arrested, but later released and charges against him dropped after investigation.

26. The **2nd Prosecution Witness (PW 2)**, being the wife of the complainant, and mother of the victim, in essence, reiterated what her husband had said. She also identified the black thread and the clothes worn by the victim. She also reiterated that initially she and her husband being the complainant had suspected that Arun Pawar was the culprit. She, however, denied that there had been any compromise between the complainant and his wife (PW 2) and the said Arun Pawar.

27. The **3rd Prosecution Witness (PW 3)** is a pancha, who signed on a panchnama at the hospital. She only put her signature on the packets containing the thread and the clothes of the victim. She also described the injuries on the victim. None of the first three witnesses have said anything to even suggest who could be the culprit.

28. The **4th Prosecution Witness (PW 4)** who claims to run a construction business, stated that he had business dealings with persons residing at Koprigaon. On 22.1.2013 he had gone to meet Parshuram Thakur at the Shiv Sena Office at Koprigaon. His friends Sanjay Govari and Devidas Dalavi, a resident of Airoli were also there at the office. This witness deposed that after coming out of the Shiv Sena Office, he, Sanjay Govari and Devidas Dalavi were standing below a shed in front of a building near the said Office. While they were standing below the

A shed, they saw an old man come from the side of the staircase, holding a white bag, which he kept in the lane which was in front of the parking shed. The old man was short and except for Bermuda pants that he had been wearing, he was bare bodied. According to this witness, he along with Devidas Dalavi and Sanjay Govari once again went to the office of Parshuram Thakur after a few days, when Parshuram Thakur told them about the rape and murder of a girl in a building in front of his office, which had taken place on 22.1.2013.

29. This witness stated that on hearing of the incident, he told Parshuram Thakur that on 22.1.2013 that he had seen an old man going into the lane in front of the shed under which they were standing, with a bag. Parshuram Thakur then told this witness to inform this to the police. On 27.1.2013, this witness along with Sanjay Govari who has also deposed as the fifth witness, went to the police station, met the police officer and disclosed what he had seen, which was recorded by the police.

30. Thereafter on 7.2.2013, this witness received a letter informing him that he should meet the Tehsildar. On 8.2.2013, this witness along with Sanjay Govari and Devidas Dalavi went to the Tehsildar, and thereafter, along with another lady, went to Taloja jail where he identified the accused-appellant as the person who had kept the bag in the lane.

31. This witness identified a white colour plastic bag taken out from a bag, marked Articles 23 A and 23. He also identified the Bermuda pants as the same pants worn by the accused-appellant. In cross-examination, he said that the old man with the bag did not arouse his suspicion. If his suspicion had been aroused, he would have gone to the police station the same day.

32. The **5th Prosecution Witness Sanjay Kamlakar Govari (PW 5)** reiterated what had been stated by PW 4. He also identified the plastic bag as the same one which had been dumped in the lane by the accused-appellant. He read out the description printed in the inner side of the plastic bag "crystal white sugar sulphiton Jawahar sugar hupari Kolhapur (Maharashtra State) India S-30 sucrose 50 kgs. 2009-2010 best before 3 years". In cross examination this witness stated that he had not seen any identification mark on the white bag on that day and he also stated that when he saw the white bag, he did not have any suspicion. He reiterated that he had seen the old man dropping the white plastic bag in the lane.

33. The **6th Prosecution Witness (PW 6)**, a teacher and a resident of Dudhanoli, Taluka Murbad, District Thane deposed that the accused-appellant had tried to outrage her modesty when she had gone to relieve herself in the open field in the year 1998 i.e. about 15 years before the present incident. She said that she and her husband had beaten up the accused-appellant and that night, the accused-appellant left the village permanently. The aforesaid incident has no connection with the rape and murder of the victim. In cross examination she admitted that she had not lodged any complaint against the accused-appellant.

34. The **7th Prosecution Witness (PW 7)**, a Homeopathic Doctor, deposed that on 24.1.2013 at about 7 p.m. the accused-appellant had visited her complaining of uneasiness. She said she noticed that the accused-appellant was suffering from tension and his blood pressure was slightly high. She thought that the accused-appellant might be suffering from acidity and accordingly prescribed medicines. The evidence of this witness does not by any stretch of imagination, establish the guilt of the accused-appellant for the offence alleged.

35. The **8th Prosecution Witness (PW 8)** an Associate Professor in Terana Medical College, Surgery Department deposed that on 25th January, 2013 he was on call duty at Navi Mumbai Municipal Corporation General Hospital. On that day he examined the accused-appellant who had been brought by the police. On examination, the accused-appellant appeared to be in sound physical and mental condition. On examination of private part that is genital, no external injury was found but "bilateral scrotal enlargement was seen". Apart from that there was no external injury. Genital size was normal. There was no external deformity in genital. Testicular reflex was normal. Penis was uncircumcised, Smegma was absent. There were no signs of sexually transmitted disease. There were no Injuries on glans penis.

36. This witness deposed that glance and sulcus was washed and washed material was collected in a glass bulb for examination. Blood was collected for blood grouping and examination. Samples of pubic hair and scalp hair were also collected. There was nothing to suggest that the patient was impotent. However, the witness volunteered that on physical examination it was not possible to draw 100% conclusion about potency. The evidence of this witness also does not contain anything material, that points to the guilt of the accused-appellant , for the offence alleged.

A 37. The **9th Prosecution Witness (PW 9),** a driver by occupation, is the Panch for the yellow shirt, blue pants and blue Bermudas under the pants of the accused-appellant which had been seized by the police. His evidence reveals that these clothes were found on the body of the accused-appellant on 25th January, 2013 at about 1.45 P.M., that is, almost 48 hours after the incident.

B 38. The **10th Prosecution Witness (PW 10)**, Parshuram Mahadu Thakur, a Builder in the business of construction, owned an apartment in a building in the ground floor of which there was a Shivsena office. He said that on 23rd January, 2013 at about 7.15 a.m., police officer Dighe called him near Om Sai Niwas. PW 10 stated that he had shown the C police officer the spot where the dead body of the victim had been found. By that time, the dead body had been removed. He also deposed that at the spot, a bag of Surf Excel and two pieces of CDs were found. On the bag of Surf Excel there were some blood stains. The bag of surf excel and pieces of CDs were separately packed by the police. The D police recorded spot panchnama. PW-10 identified his signature in the panchnama and deposed its contents were correct.

39. This witness deposed that PW Nos. 4, 5 and an agent Dalavi, used to come to his office during the period between 19th January, 2013 and 22nd January, 2013. On 22nd January, 2013, they had come to E his office at around 2/2.30 P.M. and they were there in his office till 4.30 p.m.

40. This witness said that on 26th January, 2013 the aforesaid persons again came to his office for discussion in relation to a plot. While talking to them, this witness told them that on 22nd January, 2013 F there had been rape and murder of a five year old girl. The police were inspecting a bag. On hearing this, PWs 4 and 5 and Dalavi mentioned that they had seen a man who seemed frightened, drop a bag. This witness deposed that he had advised the aforesaid persons to go and inform the police. Thereafter, the three persons left.

G 41. This witness stated that, on 27th January, 2013 he was called by A.P.M.C. police station and his statement was recorded. This witness also deposed that he knew the accused-appellant, who had been residing in Room No.8 of Om Sai Niwas building as a tenant. The family members of the victim were residing in Room No. 3 in the same building. The tenement of the accused-appellant and as well as the deceased victim H are in the ground floor of Om Sai Niwas building.

42. Significantly there are inconsistencies between the statement of this witness and the statements made by PW 4 and PW 5, who did not say that the man dropping the bag seemed frightened. On the other hand they said that the man did not arouse their suspicion.

43. The **11th Prosecution Witness (PW 11)**, Arvind Madhavji Gajara is the Panch in whose presence, the tenement of the accused-appellant was searched. He deposed that on 25th January, 2013 he had gone to Koparigaon in connection with his business. He saw that many persons had gathered near the Om Sai building. It was about 5.00 p.m. The police constable Rane called this witness. At that time the accused-appellant, a photographer and a panch by the name of Patil were was also present. At the request of the police he agreed to act and acted as Panch. The police took him to room No.8 of Om Sai apartment. A police officer rang the bell at the door. It was opened by a lady, who said that her name was Nisha. The police officer told Nisha that they wanted to search the house and asked whether she had any objection. Nisha replied that she had no objection.

44. This witness said there was one room which was partitioned and there was a kitchen. There was a sofa on which a bed sheet was lying. They noticed blood stains on the bedsheet. There were also blood stains below the sofa set.

45. This witness deposed that one of the persons in the search team scratched the blood stains to collect the dried blood. In the presence of this witness, the blood stained sheet on the sofa set, a cloth for cleaning the floor tiles lying on the window, a saree used on the bed as a bed sheet were also packed. In all six articles were seized and six labels were prepared. A bag in which the articles were packed was separately marked. The evidence of this witness only establishes that the tenement of the accused-appellant was searched with the consent of the accused-appellant's daughter and some articles seized. During the search blood stains were noticed, which were scraped for examination.

46. The **12th Prosecution Witness (PW 12)**, named Mustaqali Asgarali Ansari, a Carpenter by profession stated that on 26th January, 2013, he went to fill petrol in his motor-cycle at a petrol pump near APMC police station at about 3.00 p.m. At that time, a police constable, by name Mandole, called him and told him to come to APMC Police Station. He went to the APMC police station along with the constable.

A In the police station, one police officer by name Bhong and another panch More, one lady police and three police constables were present. The accused-appellant, whom this witness identified in Court, was also present in the police station.

47. According to PW 12, in the police station, the accused appellant B made a statement that he had kept the dead body of the girl in a bag and kept the said bag behind the staircase.

48. PW 12 deposed that the accused-appellant was taken to the building and from inside he took out clothes from the white bag, the capacity of which might be 50 to 60 kgs. He identified the clothes C namely the black half pants and an orange shirt. PW 12 deposed that the clothes were taken out from the bag.

49. Significantly even though this witness (PW12) was a panch to the seizure of the white bag, the printing inside the bag which the PW claims to have seen, were not noticed by him.

D 50. The **13th Prosecution Witness Dr. Bhushan Vilasrao Jain (PW 13)** conducted the post mortem examination on the body of the victim. He noticed the following injuries:

"(1) Lacerated wound seen over posterior vaginal wall with width 0.5 c.m. muscle deem hymen torn at 6 O' clock position reddish E blood oozes out.

(2) Lacerated wound over right lateral vaginal wall 1 x 0.2 c.m. muscle deep reddish, blood oozes out.

(3) Two lacerated wounds seen over anal region at 12 O'clock and 3 O'clock position of size 2 x 1 c.m. mucosa deep and 1 x 0.5 F c.m. mucosa deep respectively reddish.

(4) Two tiny abrasions seen over left maxillary region below eyelid laterally 0.5 x 0.3 c.m. each reddish.

(5) Aberated contusion over upper lip mucosal aspect in a middle G region 2.5 x 1.5."

51. He deposed that all the injuries were ante-mortem in nature and he further deposed of internal examination.

"2. On internal examination I noticed haemorrhage under scalp over occipital region 5 x 3 c.m. reddish and meninges were H

congested. Brain matter congested and -oedmatous. On cut section petechial haemorrhages seen over white matter. Both lungs were congested and oedematous with petechial haemorrhages.

3. Thoracic cavity contained dark fluid blood. Stomach contained 200 cc. semi digested rice, dal sabu like food material.

All visceral organs were congested."

52. This witness deposed that they kept blood for DNA mapping. Blood for grouping, nail clipping of both hands and plucked scalp hair for grouping and detection of foreign body. They also kept vaginal and anal swab for detection of sperms as also blood for chemical analysis. He opined that the cause of death is asphyxial death due to smothering associated with head injury and sexual assault.

53. This witness deposed that the injuries mentioned in column 17 of the postmortem report were possible by repeated sexual acts and forcible penetration of the penis in the vagina. The victim may have suffered some of the injuries while she was trying to rescue herself from the clutches of the culprit. The injuries referred to as injury Nos. 4 and 5 in the postmortem report may have been caused by the culprit by pressing the mouth of the victim with his hands. The injury described in the Report as injury No.4 may have been caused by finger nails.

54. This witness deposed that the injury shown in the postmortem report as injury No.19 over the head and under the scalp could have been suffered if the head had hit any hard object while the act of rape was committed.

55. PW-13 deposed that the injuries shown as injury Nos. 1 to 5 were sufficient to cause instant death. The injuries shown as injury Nos. 4 and 5 could also cause death. The Cyanosis in finger nails, petechial over brain and lungs and dark fluid blood were cardinal signs of asphyxia.

56. In cross-examination, PW 13 said that there was no injury to the brain substance. However, death was possible by reason of the injuries that were seen. He, however, said in his cross-examination that there was hemorrhage. This witness deposed that pressing of mouth and nostril causes smothering which leads to asphyxia and consequential death. In cross-examination, this witness said that he had not taken blood sample of accused-appellant for the purpose of DNA as blood sample was not produced before him. The evidence of this witness clearly establishes

A that the victim was raped and killed. There is nothing in his evidence that implicates the accused-appellant .

57. The **14th Prosecution Witness (PW 14)**, a neighbour of the complainant and the accused-appellant deposed that the accused-appellant had two daughters, two sons and one grand son, none of B whom stayed at home between 12 and 6 p.m. She deposed that the accused-appellant used to stare at her by opening the door slightly or by looking into the mirror and when she told this to another neighbour, that neighbour told her that the accused-appellant was in the habit of staring at women. She said that she did not say anything to the accused-appellant, considering his old age. In cross examination, this witness deposed that C the accused-appellant did not whistle at women nor did he tease the women of the building. He used to keep his door open and look into a mirror. Her evidence in cross-examination reveals that the accused-appellant was arrested on 25th January, 2013 and on 26th January, 2013, one Arun Pawar was arrested. This witness's evidence, at best raises D doubts about the character of the accused-appellant.

58. The **15th Prosecution Witness (PW 15)** a Head Constable of the Crime Branch deposed that the Senior Police Inspector called him and his colleagues for the purpose of investigation in relation to the murder of the victim. He deposed that he reached Koparigaon on 23rd E January, 2013. He visited each room in Om Sai Building and interrogated the residents. He had also given his mobile number to the residents so that he could be contacted in case any information was forthcoming.

59. This witness deposed that on 24th January, 2013, PW 19 Mahendra Rokade, son of the accused-appellant called him up and told F him that he was suspecting the involvement of his father, the accused-appellant, in the rape and murder of the victim.

60. The PW-19 allegedly told this constable that on the night of 22nd January, 2013 his father was stressed up. He also said that on an earlier occasion his father had tried to outrage the modesty of a woman G at his native place Dudhanoli. This witness further stated that on the night of 24th January, 2013 this witness and another police constable alongwith senior police inspector went to the Om Sai Building on receiving secret information that the accused-appellant had come home. According to this witness the wife, daughters and grandson of the accused-appellant and the accused-appellant were at home at that time. The accused-

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appellant was found in stress. The wife of the accused-appellant said that the accused-appellant had outraged the modesty of a woman at Dudhanoli. The accused-appellant was taken to the office of the crime branch. On 25th January, 2013, the accused-appellant confessed that he had committed the crime. From the evidence of the witness it can only be deduced that PW-19 had called him up and expressed suspicion of involvement of the his father in the rape and murder of the victim.

61. The **16th Prosecution Witness (PW 16)**, Dr. Prerana Anant Thakur deposed that she had personally collected the blood of accused-appellant and handed over the sealed container along with the prescribed identification form which she had filled in herself, to the police. She handed over the prescribed form and sealed packet containing blood sample to police Naik B. No.1761 who took that sample to Kalina Forensic Science Laboratory.

62. The **17th Prosecution Witness (PW 17)**, the owner of a photo studio named Balaji Photo Studio deposed that he went along with the police to take photographs of Room No.8 of Om Sai Niwas. On 25th January 2013, he took photographs of the sofa and pillow lying on the sofa on which there were blood stains. He took photographs of the bed and the floor under the sofa where there were blood stains. His camera was a digital camera. He got the photographs printed and he handed over the photographs along with memory card to the Investigating officer of the police station. He said that he was paid Rs.350/- for the photographs. The PW-16 and PW 17 have also not implicated the accused-appellant.

63. The **18th Prosecution Witness (PW 18)**, Asha Dattatraya Rokade, wife of the accused-appellant said that she was residing in Room No.8 of Om Sai Building along with the accused-appellant, their two sons, two daughters and a grand son (son of younger daughter, whose husband had expired). She deposed that the accused-appellant was unemployed and stayed at home alone, while the other members of the family went out to work and the grand child went to school. She said that on 22nd January, 2013 when she came back from work at around 7.30 p.m. she heard that the victim was missing. She had dinner at about 1.00 a.m. after all the family members returned, after which they went to sleep. She deposed that after 2.00 a.m., her husband went out of the house. On 23rd January, 2013 at about 7.00 a.m. police knocked at the

door of the house and inquired about the victim. On 23rd January, 2013 she left for work. When she left, her husband i.e., the accused-appellant and their daughter Nisha (PW 20) were at home but when she came back home at about 7.30 p.m. she did not find her husband. On inquiry, her daughter Nisha (PW 20) told her that the accused-appellant had gone to his brother's house. She further deposed that on 23rd January, 2013 she had dinner and went to sleep. On 24th January, 2013 when she went out to work her husband i.e. the accused-appellant came back. After returning at about 7.30 p.m., she made tea and served tea to the accused-appellant. While serving tea she asked the accused-appellant why he was tensed up. He replied that he was not feeling well. Thereafter she told him to go to hospital. The accused-appellant went to Dr. Nilima Pawar.

64. This witness deposed that after her husband, the accused-appellant came back from the doctor, he told her that he had raped and killed the victim. Thereafter at about 8.00 p.m. police took the accused-appellant for inquiry. On 25th January, 2013, she was informed by her son Mahendra that police had arrested her husband. He said that the accused-appellant had confessed to the crime before the police. The evidence of this witness is of importance since she has deposed that the accused-appellant confessed to her that he had raped and killed the victim.

65. Nothing much of substance has transpired from the evidence of the **19th Prosecution Witness (PW 19)**, Mahendra, son of the accused-appellant, except that he had called up the police and informed the police that he suspected the involvement of his father, the accused-appellant, in the rape and murder of the victim.

66. This witness reiterated the work schedule of the members of the family and school hours of his nephew. He said that he had heard that the victim had gone missing and had later heard that the victim had been raped and murdered. The police came to the building to make inquiries. This witness further deposed that when he had heard that his father had suddenly gone to Kamothe he became suspicious, in view of the past history of his father involving an incident at Dudhanoli village. He further said that on 25th January, 2013, the police contacted him and informed him that his father had confessed to the crime. He also identified the articles seized as Articles Nos.18-A, 19-A and 20-A. In cross

examination, this deponent deposed that on 23rd January, 2013 he was sleeping on the bed of the inner room having partition. At that time he did not find or see any stain on the bedsheet. The bedsheet used to be changed every 4 or 5 days and covers of sofa set and cushion after every two to three months. He also deposed that the flooring of the house is washed and cleaned daily.

67. The **20th Prosecution Witness (PW 20)**, Nisha, daughter of the accused-appellant deposed that on 25th January, 2013, in the evening, police came to their house with experts from the Forensic Laboratory and a photographer. After taking her permission, the police seized sofa cover, cushion cover, bedsheet and duster cloth. The expert found blood stains in the gap between the tiles on the floor and on the sofa cover. The sofa cover, cushion cover and bedsheet were stained with blood. All these articles were seized and the police obtained her signature and the signature of her father. She identified the sofaset cover, cushion cover, bed sheet and the duster cloth for cleaning the floor. She also identified the Bermudas of her father. She stated that when she was a young child she came to know that her father had caught the hand of a woman and therefore, the family had to leave the village Dudhanoli. In cross examination, this witness said that her father never spoke to her unnecessarily. She said that she cleans utensils and cleans floor on every alternate day. She said that she had not noticed anything abnormal on sofa, cushion or on the bed. Nothing significant has transpired from the evidence of this witness except that the tenement of the accused-appellant had been searched in the presence of forensic experts and a photographer. Photographs of the tenement were taken, some articles seized and samples of blood scrapings collected for examination.

68. The **21st Prosecution Witness (PW 21),** Ratnanjali Ravindra Sarnobat, deposed that he had conducted the Test Identification Parade (TIP) and the witnesses Bhagat, Govari and Dalavi (PW-4 & PW-5) had identified the accused-appellant.

69. The **22nd Prosecution Witness (PW 22)**, the Sub-Inspector of police at AMFC police station deposed that on 22nd January, 2013 he was on night duty from 9.00 p.m. onwards till 9.00 a.m. At about 9.15 a.m. the complainant and his wife gave a missing complaint in respect of the victim. At about 2.30 a.m. when he was patrolling out of the police station, he received a telephone call from the APMC police station that

A the missing girl had been found but with no movement. She was being taken to the Vashi Navi Mumbai Municipal Corporation Hospital (NMMC). The doctor declared the girl was dead after which the complainant filed an FIR. There is nothing in the deposition of this witness which establishes or points at the guilt of the accused-appellant. He only narrated the facts leading to the missing report and the first information report, the condition of the dead body of the victim, the seizure of articles taking of photographs etc.

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70. The **23rd Prosecution Witness (PW 23)** deposed that he had carried blood samples of accused-appellant to the Forensic Science Laboratory, Kalina for DNA profiling along with identification.

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71. The **24th Prosecution Witness (PW 24)** attached to APMC police station as Police Naik deposed that he brought back the DNA kit from the Forensic Science Laboratory, Kalina.

72. The **25th Prosecution Witness (PW 25)**, is the Assistant Investigating Officer in the case. She deposed that as Assistant Police Inspector she had investigated the case. On 23rd January, 2013 at about 5.00 a.m. she visited the spot and started making inquiries. She recorded the statement of the mother of the deceased victim (PW 2).

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73. On 26th January, 2013 she recorded the statements of some witnesses and recorded the supplementary statement of the mother of the deceased. She also recorded the statements of the wife of the accused-appellant, two daughters of the accused-appellant and other witnesses. Nothing significant, which points to the guilt of the accused-appellant has transpired from the evidence of PW-23, PW-24 and PW-25.

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74. The **26th Prosecution Witness (PW 26)**, the Senior Police Inspector and Investigating Officer deposed that he reached Navi Mumbai Municipal Corporation Hospital at about 3.00 a.m. after which he took the complainant to the police station and recorded the FIR. He deposed that on the basis of the FIR, Crime No.20 of 2013 was registered. PW-26 deposed that on 23rd January, 2013, he sent Police Inspector Lavand to the spot and he recorded the spot panchnama (Exh.30). He deposed that initially, the parents of the victim had expressed suspicion against one Pawar who was taken in custody. On investigation nothing was found against him and accordingly report under Section 169 of the Criminal Procedure Code was filed. On 24th January,

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2013 this witness recorded the statements of some witnesses. On 25th January, 2013, staff of the crime branch produced the accused-appellant before this witness. This witness interrogated the accused-appellant and arrested him under panchnama. The clothes he was wearing at the time of his arrest was seized under panchnama. The accused-appellant was wearing blue full pants, Bermuda pants and a yellow shirt. This witness further deposed that on 25th January, 2013 he called a team from the Forensic Science Laboratory who seized six articles from the house of the accused-appellant that is Article Nos.17-A, 18-A, 19-A, 20-A, and 21-A.

75. The seized articles were cushion covers, a cloth for cleaning the floor, a saree used as a bed sheet which were sealed in six packets. He deposed that experts from the Forensic Science Laboratory collected dried blood from the floor tiles beneath the sofa. The photographs of the sofa and other articles were taken at the time of recording the spot panchnama. PW-26 further stated that on 25th January, 2013 he got the accused-appellant medically examined and he also recorded the statements of witnesses. On 26th January, 2013 the accused-appellant offered in the presence of two panchas to show the place where he had put the clothes of the victim in a bag, which was the debris was by the side of staircase of the Om Sai Building. The statement of the accused-appellant was recorded by this witness. The statement so recorded was signed by Panchas and the accused-appellant affixed his thumb impression thereon. After that the accused-appellant took the Investigating Officer (PW 26) and others to the side of the staircase of the said building where debris were lying and he took out a plastic bag in which an orange shirt and black pants were found. The accused-appellant told the Investigating Officer that the shirt and the pants were the clothes of the victim. This witness deposed that the parents of the victim were called and they identified the clothes of the victim. There were blood stains on the shirt, pants and the plastic bag. The articles were seized and sealed in the presence of Panchas, whose signatures were obtained on the panchanama recorded on the spot.

76. This witness deposed that on 27th January, 2013 three witnesses Devidas, Vinod Bhagat and Govari came to the APMC police station and got their statements recorded. Thereafter a test identification parade was arranged. On 27th January, 2013 he seized the memory card produced by the photographer Rajesh Joshi (PW 17). From the evidence of this

witness, it transpires that blood samples collected for DNA profile were duly sent to the forensic laboratory. This witness deposed that during the investigation, it transpired that the accused-appellant had raped the victim and murdered her. After completion of investigation, this witness filed chargesheet.

77. The **27th Prosecution Witness (PW 27)**, an Assistant Chemical Analyzer in the Forensic Laboratory, Kalina deposed that he went to APMC Police Station along with his team consisting of four persons. The team went to Om Sai Building at Koparigaon. The accused-appellant was also present along with the Police. In the tenement of the accused-appellant there was one hall and kitchen and in the said hall there was a partition. When the door was opened they saw a sofa on the right. On careful inspection, they found there were three cushions on the sofa and on the cushion covers there were blood stains of the diameter 1 cm. to 2 cm. approximately. This witness deposed that he tested the blood stains with the help of phenolphthalein and confirmed that the stains were bloodstains. He deposed that three cushion covers which were bloodstained were removed from the cushion and handed over to the Investigating Officer. This witness deposed that he saw that there were blood stains on the floor near the middle leg of the sofa. He tested those stains with Phenolphthalein and confirmed that they were blood stains. Dry blood was scraped and collected with the help of cotton cloth and that cotton cloth was put into an envelope which was packed in a polythene bag and handed over to the Investigating Officer. This witness has deposed that the team saw bloodstained cloth on the window which was also tested and given to the Investigating Officer. There was one cot in the inner side of the partition. The bed was covered with a saree. He collected the scrapings of the blood stains on the saree for testing. It was confirmed that those were blood stains but as the test of the semen identification consumes much time, the saree cover was handed over to the IO with the instructions to properly seal each article and send the same to the Forensic Science Laboratory. This witness also identified the articles.

78. As observed above, the oral evidence of PW-1 and PW-2 being the parents of the deceased victim do not even suggest culpability of the accused-appellant. The 3rd Prosecution Witness only a Pancha who put her signatures on bag containing thread and clothes of the victim. The 4th and the 5th Prosecution Witnesses have claimed that they had

gone to visit Parshuram Thakur at the Shiv Sena Office at Koprigaon on the day of the incident. After they came out of the office, they were standing below a shed and talking, when they saw an old man come from the side of the staircase of the building, holding a white bag which he kept in the lane in front of the parking shed. These witnesses identified the accused-appellant as the man carrying the bag. They also identified the bag as the bag which the accused-appellant had been carrying.

79. There are, however, serious loopholes in the evidence of these two witnesses. First of all, these witnesses as per their own statement saw a man carrying a white bag. They did not go near the bag. No reliance can be placed on the purported identification by the witnesses of the bag produced by the police, as the very same bag which these witnesses had seen the accused-appellant carrying. Furthermore, one of the witnesses stated in cross-examination that they did not suspect anything when they saw the man carrying the bag. If the body of an eight year old child were being carried in a bag that would have aroused some suspicion.

80. In any case, these witnesses deposed that the bag was left in the lane opposite the parking shed, after they came out of the Shiv Sena Office building, which was around 4.30 p.m. The naked body of the deceased victim was first discovered in front of the door of the tenement of the complainant at around 2.00 a.m. at night. If the body had been dumped outside the door in the early evening, the body would surely have been noticed earlier.

81. The evidence of PW 6 that the accused-appellant had tried to outrage her modesty about 15 years ago, has no bearing to the incident of rape and murder of the deceased victim. Admittedly this witness had not lodged any police complaint against the accused-appellant.

82. The evidence of PW7 is also of no relevance. This witness, a Homeopathic Doctor, deposed that on examining the accused-appellant, she found him suffering from tension and his blood pressure was slightly high. As per her own evidence she thought that he might be suffering from acidity.

83. Similarly the evidence of PW 8, a doctor who had examined the accused-appellant, does not contain anything material to establish the guilt of the accused-appellant for the offence alleged.

84. The 9th Prosecution Witness is only a Panch in whose presence the clothing of the accused-appellant was seized. He stated that these were the clothes which the accused-appellant had been wearing about 2 days after the incident. The 10th Prosecution Witness only corroborated that the 4th and 5th witnesses had come to his office and they had later told him what they had seen on 22nd January, 2013.

85. Even though, as observed above, there is nothing in the evidence of any of the witnesses, except the evidence of PW-12 and PW-18 and the weak evidence of the PW Nos. 4 and 5 purported to be corroborated by the PW-10, to prove the accused-appellant guilty of the offences alleged, the forensic reports along with the extra-judicial confession made by the accused-appellant to his wife PW-18, clearly establishes the guilt of the accused-appellant.

86. The examination of the reports of the Directorate of Forensic Laboratories, State of Maharashtra, Home Department, Vidyanagari, Kalina, Santa Cruz (East) Mumbai being Ex. No. 22 to 25 and in particular the examination report in Ex.25 indicates that DNA profile of the blood detected on the plastic bag and the clothes and those obtained from the nails of the victim are identical and are from one and the same source of female origin. The DNA profile of semen detected on the underwear (Bermudas), the bedsheet, vaginal swab and anal swab of the victim are identical and from one and the same source of male origin. The DNA analysis establishes beyond reasonable doubt that the victim was raped by the accused-appellant.

87. By a judgment and order delivered on 6th and 7th June, 2013, the learned Special Judge (Protection of Children from Sexual Offences Act), Thane convicted the accused-appellant of offences under Sections 363, 364, 367, 302, 201, 376, 376(2)(f) and 377 of the Indian Penal Code read with Sections 4 and 6 of the Protection of Children from Sexual Offences Act, 2012.

88. On 7th June, 2013, the accused-appellant was produced in Court and heard on the question of sentence after which the Trial Court ordered as follows:

> "1. Accused Dattatray @ Datta Ambo Rokde is hereby convicted of the offences punishable under Sections 363, 364, 367, 302, 201 of the Indian Penal Code and under Sections 376, 376(2)(f), 377 of the Indian Penal Code r/w Section 3 punishable under Section

4 of the Protection of Children from Sexual Offences Act and under Sections 5(h)(i), 5(k), (I) (m) punishable under Section 6 of the Protection of Children from Sexual Offences Act.

2. Accused is sentenced to death for an offence punishable under Section 302 of the Indian Penal Code and he be hanged by the neck till he is dead, subject to confirmation by Hon'ble High Court of Judicature at Bombay.

3. Accused is sentenced to suffer imprisonment for life for offences under Sections 376, 376(2)(f), 377 of the Indian Penal Code and offence u/s 3 punishable u/s 4 and 5(h)(i), 5(k), (I) (m) punishable under Section 6 of the Protection of Children from Sexual Offences Act.

4. No separate sentence is awarded for offences under Sections 363, 364, 367 and 201 of the Indian Penal Code.

5. Accused is undertrial prisoner since 25.01.2013.

6. The Muddemal property be preserved till further orders in reference from Hon'ble High Court.

7. The copy of this judgment be furnished to accused free of cost forthwith.

8. The Registrar is directed to send the record and proceedings of this Special Case No.1/2013 to Hon'ble High Court for confirmation of death sentence."

89. The Registrar was directed to send the records and proceedings of the case to the High Court for confirmation of the death sentence. The accused-appellant also filed an appeal against the conviction and sentence being Criminal Appeal No.1202 of 2013.

90. The said Criminal Appeal No.1202 of 2013 was heard by a Division Bench of Bombay High Court alongwith the death sentence reference being Crl. Confirmation case No.6 of 2013 in Special Case No.1 of 2013.

91. By a judgment and order dated 21st, 24th, 25th March, 2014, the Division Bench of Bombay High Court confirmed the conviction and sentence of death imposed under Section 302 of the Indian Penal Code on the accused-appellant. The appeal of the accused-appellant was partly allowed only to the extent that the conviction of the accused-

A appellant under Section 376 simplicitor was set aside. The State has not filed any appeal against the judgment and order of the Division Bench.

92. We have considered the evidence on record in detail and we find absolutely no ground to interfere with the conviction of the accused-appellant, as confirmed by the First Appellate Court.

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93. As argued on behalf of the accused-appellant there may have been embellishment of the evidence against the accused-appellant. The evidence of the PWs 4 and 5 supported by PW-10 can never be the basis of any conviction and is fraught with inherent inconsistencies.

94. Even assuming that PWs 4 and 5 actually noticed the accused-
C appellant carrying a bag and dumping it in the lane opposite the car shed, this was in the evening of 22.1.2013 whereas the body of the victim was first seen by her parents outside the door of their tenement, well past midnight, at around 2.00 a.m.

95. Admittedly, these two witnesses had not noticed anything
D suspicious. A bag with the body of the child would, in all likelihood, have aroused suspicion. No other material was found to suggest that the body might have been concealed and/or wrapped and then put in the bag identified by PW-4 and PW-5. Admittedly, these two witnesses did not examine the bag carried by the accused-appellant (if at all) closely. No
E credence can be placed on identification by the PW 4 and 5, of the bag seized and produced by the Police, as the same bag carried by the accused-appellant. The identification is preposterous.

96. It is equally true that none of the witnesses except PW-18, Asha, wife of the accused-appellant to whom the accused-appellant
F confessed his guilt and the PW-12, a Pancha, in whose presence the accused-appellant made extra judicial confession to the Police, is relevant to the guilt of the accused-appellant. However, it is reiterated at the cost of repetition that the forensic evidence supported by the evidence of PW-18 establishes the guilt of the appellant beyond reasonable doubt. We, thus, confirm the conviction of the accused-appellant for the offences
G under Sections 302, 376(2)(f), 377 of the IPC read with Sections 3, 4 and 5 of the POCSO.

97. The question is, whether death sentence imposed on the accused-appellant for offences under Section 302 should be confirmed or be commuted to life sentence, as argued on behalf of the accused-
H appellant.

98. Counsel appearing on behalf of the accused-appellant submitted that (i) the case did not fall under the category of the rarest of rare cases; (ii) the accused-appellant was not effectively defended before the Trial Court and the First Appellate Court; (iii) the hearing given to the appellant under Section 235(2) of the Code of Criminal Procedure on the quantum of sentence was not an effective hearing; (iv) Counsel appearing on behalf of the accused-appellant before the Trial Court only submitted that there were no eye witnesses to the crime, and a lesser punishment should be imposed having regard to the age of the accused-appellant; (v) the attention of the Court was not drawn to mitigating circumstances for imposition of a lesser sentence and mitigating circumstances were never considered; (vi) the accused-appellant was not given the opportunity to file an affidavit placing on record mitigating circumstances; (vii) Trial court did not make any effort to elicit facts which could be mitigating circumstances against imposition of the extreme penalty of death sentence; (viii) there was no finding recorded either by Trial or the Appellate Court that there was no alternative to the imposition of death sentence and (ix) the Trial Court did not consider the possibility of reformation or rehabilitation of the accused-appellant. Counsel argued that there was no reason to suppose that the accused-appellant would be a continuing threat to society unless hanged.

99. In ***Bachan Singh v. State of Punjab***[1], this Court, while upholding the validity of death sentence held, that imprisonment for life was the rule and death sentence an exception, to be imposed in the "rarest of rare" cases, recording special reasons. In ***Bachan Singh*** (supra), this Court in effect held that before exercising discretion to impose the extreme penalty of death sentence, aggravating and mitigating circumstances are required to be considered. Some of the mitigating factors would be the extreme mental or emotional disturbance in which the offence might have been committed, the possibility that the accused-appellant would not be a continuing threat to society, the possibility of reformation and rehabilitation of the accused, mental defect or disorder of the accused etc.

100. In ***Rajesh Kumar vs. State (through Govt. of NCT of Delhi)***[2], this Court observed:-

"83. The ratio in Bachan Singh has received approval by the

[1] (1980) 2 SCC 684
[2] (2011) 13 SCC 706

international legal community and has been very favourably referred to by David Pannick in Judicial Review of the Death Penalty: Duckworth (see pp. 104-05). Roger Hood and Carolyn Hoyle in their treatise on The Death Penalty, 4th Edn. (Oxford) have also very much appreciated the Bachan Singh ratio (see p. 285). The concept of "rarest of rare" which has been evolved in Bachan Singh by this Court is also the internationally accepted standard in cases of death penalty.

84. Reference in this connection may also be made to the right based approach in exercising discretion in death penalty as suggested by Edward Fitzgerald, the British Barrister. [Edward Fitzgerald: The Mitigating Exercise in Capital Cases in Death Penalty Conference (3-5 June), Barbados: Conference Papers and Recommendations.] It has been suggested therein that right approach towards exercising discretion in capital cases is to start from a strong presumption against the death penalty. It is argued that "the presence of any significant mitigating factor justifies exemption from the death penalty even in the most gruesome cases" and Fitzgerald argues:

"Such a restrictive approach can be summarised as follows: The normal sentence should be life imprisonment. The death sentence should only be imposed instead of the life sentence in the 'rarest of rare' cases where the crime or crimes are of exceptional heinousness and the individual has no significant mitigation and is considered beyond reformation."

(Quoted in The Death Penalty, Roger Hood and Hoyle, 4th Edn., Oxford, p. 285.)

86. Taking an overall view of the facts in these appeals and for the reasons discussed above, we hold that death sentence cannot be inflicted on the appellant since the dictum of the Constitution Bench in Bachan Singh is that the legislative policy in Section 354(3) of the 1973 Code is that for a person convicted of murder, life imprisonment is the rule and death sentence, an exception, and the mitigating circumstances must be given due consideration. Bachan Singh further mandates that in considering the question of sentence the court must show a real and abiding concern for the dignity of human

life which must postulate resistance to taking life through law's instrumentality. Except in the "rarest of rare cases" and for "special reasons" death sentence cannot be imposed as an alternative option to the imposition of life sentence".

101. In ***Rajesh Kumar*** (supra), the accused was convicted of assault and murder of two helpless children in the most gruesome manner. This Court held that death sentence could not be inflicted, reiterating that life imprisonment was the rule and death sentence an exception only to be imposed in the "rarest of rare cases" and for "special reasons" when there were no mitigating circumstances.

102. Section 235 of the Criminal Procedure Code (Cr.P.C.), reads as follows:-

*"**235. Judgment of acquittal or conviction**.—(1) After hearing arguments and points of law (if any), the Judge shall give a judgment in the case.*

(2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of Section 360, hear the accused on the question of sentence, and then pass sentence on him according to law."

103. Section 235 (2) of the CrPC is not a mere formality. It is obligatory on the part of the learned trial Judge to hear the accused on the question of sentence and deal with it. To quote Bhagwati J. in ***Santa Singh vs. State of Punjab***[3]**.**

"2. .....This provision is clear and explicit and does not admit of any doubt. It requires that in every trial before a court of sessions, there must first be a decision as to the guilt of the accused. The court must, in the first instance, deliver a judgment convicting or acquitting the accused. If the accused is acquitted, no further question arises. But if he is convicted, then the court has to "hear the accused on the question of sentence, and then pass sentence on him according to law". When a judgment is rendered convicting the accused, he is, at that stage, to be given an opportunity to be heard in regard to the sentence and it is only after hearing him that the court can proceed to pass the sentence.

[3] (1976) 4 SCC 190

A *3. This new provision in Section 235(2) is in consonance with the modern trends in penology and sentencing procedures. There was no such provision in the old Code. Under the old Code, whatever the accused wished to submit in regard to the sentence had to be stated by him before the argumentss concluded and the judgment was delivered. There was no separate stage for being heard in regard to sentence. The accused had to produce material and make his submissions in regard to sentence on the assumption that he was ultimately going to be convicted. This was most unsatisfactory. The legislature, therefore, decided that it is only when the accused is convicted that the question of sentence should come up for consideration and at that stage, an opportunity should be given to the accused to be heard in regard to the sentence. Moreover, it was realised that sentencing is an important stage in the process of administration of criminal justice- as important as the adjudication of guilt-and it should not be consigned to a subsidiary position as if it were a matter of not much consequence. It should be a matter of some anxiety to the court to impose an appropriate punishment on the criminal and sentencing should, therefore, receive serious attention of the court.*

E *.....The reason is that a proper sentence is the amalgam of many factors such as the nature of the offence, the circumstances-extenuating or aggravating- of the offence, the prior criminal record, if any, of the offender, the age of the offender, the record of the offender as to employment, the background of the offender with reference to education, home life, sobreity and social adjustment, the emotional and mental condition of 'the offender, the prospects for the rehabilitation of the offender, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others and the current community need, if any, for such a deterrent in respect to the particular type of offence. These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after*

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conviction when the court can hear the accused in regard to these factors bearing on sentence and then pass proper sentence on the accused.

4. ....The hearing on the question of sentence, would be rendered devoid of all meaning and content and it would become an idle formality, if it were confined merely to hearing oral submissions without any opportunity being given to the parties and particularly to the accused, to produce material in regard to various factors bearing on the question of sentence, and if necessary, to lead evidence for the purpose of placing such material before the court.

104. In ***Santa Singh*** (supra), Bhagwati, J. set aside the sentence of death and remanded the case to the Sessions Court with a direction to pass appropriate sentence after giving an opportunity to the petitioner in the aforesaid case of being heard with regard to the question of sentence, in accordance with the provisions of Section 235(2) CrPC.

105. In ***Dagdu and Others v. State of Maharashtra***[4], a three-Judge Bench of this Court referred to ***Santa Singh*** (supra) and held that the mandate of Section 235(2) CrPC had to be obeyed in letter and spirit. Chandrachud, J. held:-

"79. ... The Court, on convicting an accused, must unquestionably hear him on the question of sentence. But if, for any reason, it omits to do so and the accused makes a grievance of it in the higher court, it would be open to that Court to remedy the breach by giving a hearing to the accused on the question of sentence. That opportunity has to be real and effective, which means that the accused must be permitted to adduce before the Court all the data which he desires to adduce on the question of sentence. The accused may exercise that right either by instructing his counsel to make oral submissions to the Court or he may, on affidavit or otherwise, place in writing before the Court whatever he desires to place before it on the question of sentence. The Court may, in appropriate cases, have to adjourn the matter in order to give to the accused sufficient time to produce the necessary data and to make his contentions on the question of sentence.

[4] (1977) 3 SCC 68

That, perhaps, must inevitably happen where the conviction is recorded for the first time by a higher court."

106. *In* ***Machhi Singh & Others v. State of Punjab***[5]*, this Court held:-*

"38. ... (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."

107. In ***Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra***[6], this Court observed and held:-

*"**157.** The doctrine of proportionality, which appears to be the premise whereupon the learned trial Judge as also the High Court laid its foundation for awarding death penalty on the appellant herein, provides for justifiable reasoning for awarding death penalty. However, while imposing any sentence on the accused the court must also keep in mind the doctrine of rehabilitation. This, considering Section 354(3) of the Code, is especially so in the cases where the court is to determine whether the case at hand falls within the rarest of the rare case.*

***158.** The reasons assigned by the courts below, in our opinion, do not satisfy Bachan Singh test. Section 354(3) of the Code provides for an exception. General rule of doctrine of proportionality, therefore, would not apply. We must read the said provision in the light of Article 21 of the Constitution of India. Law laid down by Bachan Singh and Machhi Singh interpreting Section 354(3) of the Code should be taken to be a part of our constitutional scheme.*

***159.** Although the Constitutional Bench judgment of the Supreme Court in Bachan Singh did not lay down any guidelines on determining which cases fall within the "rarest of rare" category, yet the mitigating circumstances listed in and endorsed by the judgment give reform and rehabilitation*

[5] (1983) 3 SCC 470

[6] (2009) 6 SCC 498

great importance, even requiring the State to prove that this would not be possible, as a precondition before the court awarded a death sentence. We cannot therefore determine punishment on grounds of proportionality alone. There is nothing before us that shows that the appellant cannot reform and be rehabilitated.

162. *Further indisputably, the manner and method of disposal of the dead body of the deceased was abhorrent and goes a long way in making the present case a most foul and despicable case of murder. However, we are of the opinion, that the mere mode of disposal of a dead body may not by itself be made the ground for inclusion of a case in the "rarest of rare" category for the purpose of imposition of the death sentence. It may have to be considered with several other factors.*

108. *In* ***Ajay Pandit and Another v. State of Maharashtra***[7]*, this Court held:-*

"47. Awarding death sentence is an exception, not the rule, and only in the rarest of rare cases, the court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) CrPC."

109. In ***Mohinder Singh v. State of Punjab***[8], this Court held:-

*"**22.** The doctrine of "rarest of rare" confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall*

[7] (2012) 8 SCC 43
[8] (2013) 3 SCC 294

A *within the ambit of "rarest of rare" and secondly, when the alternative option is unquestionably foreclosed. Bachan Singh suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose.*

B ***23.*** *In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end to anything to do with life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. The "rarest of rare" dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment would be pointless and completely devoid of any reason in the facts and circumstances of the case. As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second aspect to the "rarest of rare" doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme".*

110. In ***Panchhi and Others v. State of U.P.***[9], this Court observed:-

F "*20. … No doubt brutality looms large in the murders in this case particularly of the old and also the tender-aged child. It may be that the manner in which the killings were perpetrated may not by itself show any lighter side but that is not very peculiar or very special in these killings. Brutality of the manner in which a murder was perpetrated may be a ground but not the sole criterion for judging whether the case is one of the 'rarest of rare cases' as indicated in Bachan Singh case."*

H [9] (1998) 7 SCC 177

111. In ***Bantu v. State of M.P.***[10] this Court found that there was nothing on record to indicate that the appellant had any criminal antecedents nor could it be said that he would be a grave danger to the society at large despite the fact that the crime committed by him was heinous. This Court held:-

> "8. However, the learned counsel for the appellant submitted that in any set of circumstances, this is not the rarest of the rare case where the accused is to be sentenced to death. He submitted that age of the accused on the relevant day was less than 22 years. It is his submission that even though the act is heinous, considering the fact that no injuries were found on the deceased, it is probable that death might have occurred because of gagging her mouth and nosetrix [nostril] by the accused at the time of incident so that she may not raise a hue and cry. The death, according to him, was accidental and an unintentional one. In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is the rarest of the rare case where the accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence." (Emphasis supplied by us).

112. In ***Amit v. State of Maharashtra***[11] this Court took into consideration, the prior history of the appellant and noted that there was no record of any previous heinous crime and also there was no evidence that he would be a danger to society if the death penalty was not awarded to him. The relevant finding (Paragraph 10) is extracted hereinbelow:-

> "10. The next question is of the sentence. Considering that the appellant is a young man, at the time of the incident his age was about 20 years; he was a student; there is no record of any previous heinous crime and also there is no evidence that he will be a danger to the society, if the death penalty is not awarded. Though the offence committed by the appellant deserves severe condemnation and is a most heinous crime, but on cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases……."

[10] (2001) 9 SCC 615
[11] (2003) 8 SCC 93

113. In the case of **Rahul v. State of Maharashtra**[12] this Court noted that there was no adverse report about the conduct of the appellant therein either by the jail authorities or by the probationary officer and that he had no previous criminal record or at least nothing was brought to the notice of the Court. This Court observed as follows:-

> "4. We have considered all the relevant aspects of the case. It is true that the appellant committed a serious crime in a very ghastly manner but the fact that he was aged 24 years at the time of the crime, has to be taken note of. Even though, the appellant had been in custody since 27-11-1999 we are not furnished with any report regarding the appellant either by any probationary officer or by the jail authorities. The appellant had no previous criminal record, and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the appellant and other circumstances, we do not think that the penalty of death be imposed on him."

114. Similarly, in ***Surendra Pal Shivbalakpal v. State of Gujarat***[13] the absence of any involvement in any previous criminal case was considered to be a factor to be taken into consideration for the purposes of awarding the sentence to the appellant therein. This Court held :

> "13. The next question that arises for consideration is whether this is a "rarest of rare case"; we do not think that this is a "rarest of rare case" in which death penalty should be imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case. We confirm conviction of the appellant on all the counts, but the sentence of death penalty imposed on him for the offence under Section 302 IPC is commuted to life imprisonment."

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[12] (2005) 10 SCC 322

[13] (2005) 3 SCC 127

115. In ***Mukesh and Another v. State (NCT of Delhi) and Others***[14], a three-Judge Bench of this Court considered the earlier judgments of this Court referred to above and deemed it appropriate to give opportunity to the accused to file affidavits to bring on record mitigating circumstances for reduction of the sentence.

116. The accused-appellant was produced before the Trial court for hearing under Section 235(2) of the Code of Criminal Procedure the day after the judgment and order of his conviction was passed. The accused-appellant, it appears, did not make any submission on the point of sentence. This is recorded by the Trial Court. The accused-appellant only pleaded 'not guilty' submitting that there was no eye witness to the crime. The Trial Court has recorded that Advocate Waghachadu, the learned Advocate appearing for the accused-appellant submitted that "considering the fact that accused is 53 years old leniency be shown to accused" in awarding death sentence.

117. The Trial Court has accepted the submission of the learned Special Public Prosecutor that there were no mitigating circumstances to award life imprisonment instead of death sentence. The Special Public Prosecutor submitted that the offences had been committed with extreme depravity.

118. It may be pertinent to note that in awarding death sentence, the trial court referred to and relied upon two judgments of this Court of affirmation of death sentence, that is, ***Rajendra Prahladrao Wasnik v. State of Maharashtra***[15] *and* ***Mohd. Manan @ Abdul Mannan v. State of Bihar***[16]. On review of both the judgments, death sentence has been commuted to imprisonment for life.

119. In ***Haru Ghosh vs. State of West Bengal***[17], this Court commuted death sentence to life imprisonment in the case of a dastardly murder of two helpless persons for no fault of theirs. This Court, however, in commuting death sentence took into consideration the following factors:-

"i. There was no pre-meditation on the part of the accused;

ii. The act was on the spur of the moment;

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[14] (2017) 3 SCC 717
[15] R.P. (Crl) No. 306-307 of 2013
[16] Case NO. R.P (Crl) No. 308 of 2011 in Crl. A. No. 379 of 2009
[17] (2009) 15 SCC 551

A iii. The accused was not armed with any weapon;

iv. It was unknown under what circumstances the accused had entered the house of the deceased and what prompted him to assault the boy; and

B v. The cruel manner in which the murder was committed could not be the guiding factor and the accused himself had two minor children."

120. In ***Haru Ghosh (supra)***, this Court observed, "….*the cruel manner in which the murder was committed and the subsequent action on the part of the accused in severing the parts of the body* C *of the deceased, do not by themselves become the guiding factor in favour of death sentence.*"

121. In ***Lehna vs. State of Haryana***[18], even though three lives had been lost by reason of the crime, this Court modified the punishment by commuting death sentence to life imprisonment, observing that there D was no evidence of any diabolic planning to commit the crime, though the act was cruel.

122. In this case too there is no evidence at all of any diabolic planning to commit the crime though the crime was undoubtedly cruel and heinous. The circumstances in which the victim entered the tenement E of the accused-appellant are not known. There is no evidence to show that the accused-appellant took the victim to his tenement. Though unlikely, she might even have gone to his tenement on her own.

123. Under the Indian Penal Code and, in particular, Section 299 thereof, whoever causes death by doing an act either with the intention F of causing death or with the intention of causing such bodily injury as is likely to cause death or with the knowledge that he is likely, by such act, to cause death, commits the offence of culpable homicide.

124. As per the definition of Section 300 of the IPC, except in cases excepted thereafter, culpable homicide is murder if the act by G which the death is caused (i) is done with the intention of causing death or (ii) if it is done with the intention of causing such bodily harm as the offender knows to be likely to cause the death of the person to whom the harm is caused or (iii) if the act is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is

H [18] (2002) 3 SCC 76

sufficient in the ordinary course of nature to cause death or (iv) if the person committing the act knows that it is so imminently dangerous that it must, in all probabily, cause death or such bodily injury as is likely to cause death and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid. A

125. As a mature man, over fifty years of age, the accused-appellant should have known that the rape of a five year old child by an adult was dangerous and could lead to such injuries, as was in all probability likely to cause death. B

126. The death of the deceased victim was not caused under any provocation, not to speak of sudden provocation. No such defence has been taken by the accused-appellant. Nor is it anybody's case that the death was caused in legitimate exercise in good faith of any right of the accused-appellant, whether of private defence or otherwise. The death has been caused without any provocation. C

127. The totality of the injuries support the finding of the Trial Court and the First Appellate Court that the accused-appellant murdered the deceased victim. Though the act of the accused squarely amounts to rape and murder, there is not a scrap of material to show that the intention of the accused-appellant was to kill the minor child. D

128. The PW-1, Dr. Bhusan Jain who had prepared the post mortem report opined that the cause of death was asphyxia due to smothering, associated with head injuries and sexual assault. Dr. Bhusan Jain deposed that all the 5 injuries were possible by repeated sexual acts and forceful penetration. He opined that all the injuries were sufficient to cause instant death in the ordinary course. E

129. Being a man of about 50 years of age, the accused-appellant should have known that repeated sexual assault could have led to the death of the victim and in fact did lead to the death of the victim, only five years of age. The accused-appellant has rightly been convicted of murder apart from child rape. However, there is no evidence at all direct or circumstantial which establishes that the intention of the accused-appellant was to kill the deceased victim. F G

130. Considering the totality of the evidence before us, we uphold the conviction of the accused-appellant. However, in view of the evidence of the post mortem report of Dr. Bhusan Jain, we deem it appropriate to modify the sentence by reducing the same to imprisonment for life. H

A 131. There can be no doubt that rape and murder of a 5 years old girl shocks the conscience. It is barbaric. There is, however, no evidence to support the finding that the murder was pre-meditated. The petitioner did not carry any weapon. The possibility that the accused-appellant might not have realized that his act could lead to death cannot altogether be ruled out. Moreover, the Trial Court has apparently not considered the question of whether the crime is the rarest of rare crimes as mandated by the Supreme Court in ***Bachan Singh*** *(supra)*.

132. In Review Petition (Crl.) No.306-307 of 2013 (***Rajendra Prahladrao Wasnik v. State of Maharashtra)*** the Court commuted the death sentence, in a case of rape and murder of a three year old child to life imprisonment, *inter alia,* observing that the case did not fall in the category of the rarest of the rare.

133. As argued by learned counsel appearing on behalf of the petitioner, the High Court found the offence to be in the category of the rarest of rare cases, having regard to the nature of the offence and the age of the victim.

134. Counsel for the accused-appellant submitted that the brutality of the crime and age of the victim was not ground enough to inflict death sentence. Learned counsel submitted that the petitioner had been convicted on circumstantial evidence, based on faulty investigation.

135. However, as observed above, the forensic evidence construed in the light of the evidence of PW-18, Asha, wife of the accused-appellant, that the accused-appellant had confessed to the crime to her, establishes the guilt of the accused-appellant and death sentence can be imposed even where conviction is based on circumstantial evidence, provided the case falls in the category of the rarest of rare and there are no mitigating circumstances and no possibility of reform or rehabilitation of the convict.

136. On analogy of the reasoning in Review Petition (Crl) No. 306-307 of 2013 in the case of **Rajendra Prahladrao Wasnik v. State of Maharashtra**, this Court is constrained to hold that this case does not fall in the category of the rarest of rare cases. Moreover, the accused-appellant was not defended effectively. The lawyer representing the accused-appellant only pleaded not guilty, emphasizing that there was no eye witness to the incident and sought leniency only on the ground of the age of the accused-appellant which was 53 years.

137. The accused-appellant neither sought nor was given the opportunity to file any affidavit placing on record relevant mitigating circumstances. The legal assistance availed by the accused-appellant was patently not satisfactory and he was not accompanied by a social worker. No attempt was made to place on record mitigating circumstances. No argument was advanced to the effect that there was no similar case against the accused-appellant. In the absence of any arguments, the Trial Court did not consider the question of whether the accused-appellant could be reformed.

138. Considering the nature of the crime against a five year old child, the Trial Court imposed the extreme penalty of death without deciding the question of whether there was no alternative to imposing death sentence on the accused-appellant. There is no finding that in the absence of death sentence, the accused-appellant would continue to be a threat to the society. The question of whether the accused-appellant could be reformed, had not at all been considered.

139. As held in ***Dagdu (supra)*** irrespective of whether these issues were raised on behalf of the accused, the Court is obliged on its own to elicit facts relevant to the question of existence of mitigating circumstances. The Court made no attempt to elicit any facts relevant to the sentence.

140. For effective hearing under Section 235(2) of the Code of Criminal Procedure, the suggestion that the court intends to impose death penalty should specifically be made to the accused, to enable the accused to make an effective representation against death sentence, by placing mitigating circumstances before the Court. This has not been done. The Trial Court made no attempt to elicit relevant facts, nor did the Trial Court give any opportunity to the petitioner to file an affidavit placing on record mitigating factors. As such the petitioner has been denied an effective hearing.

141. Contrary to the dictum of this Court, *inter alia*, in ***Dagdu (supra)*** and ***Santa Singh (supra)*** the petitioner was not given a real, effective and meaningful hearing on the question of sentence under Section 235(2) of the Cr.P.C. The death sentence imposed on the petitioner is liable to be commuted to life imprisonment on this ground.

142. There can be no doubt that the rape and murder of a five years old child is absolutely heinous and barbaric, but as observed above, it cannot be said to be in the category of rarest of rare cases.

143. In ***Mulla and Another v. State of U.P.***[19], this Court has affirmed that it is open to the Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by the life imprisonment. This Court observed, "*the court should be free to determine the length of imprisonment which will suffice the offence committed*."

144. Even though life imprisonment means imprisonment for entire life, convicts are often granted reprieve and/or remission of sentence after imprisonment of not less than 14 years. In this case, considering the heinous, revolting, abhorrent and despicable nature of the crime committed by the appellant, we feel that the appellant should undergo imprisonment for life, till his natural death and no remission of sentence be granted to him.

145. For the above reasons, we are of the view that the present appeals are one of such cases where we would be justified in holding that confinement till natural life of the accused-appellant shall fulfil the requisite criteria of punishment considering the peculiar facts and circumstances of the present case. Accordingly, the death sentence awarded by the trial court is hereby modified to "life imprisonment" i.e., imprisonment for the natural life of the appellant herein. The appeals are allowed accordingly to the extent indicated above.

Kalpana K. Tripathy Appeals allowed.

[19] (2010) 3 SCC 508