

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR.

CRIMINAL CONFIRMATION CASE NO. 2 OF 2018

The State of Maharashtra,
Through Police Station Officer,
Police Station Sonegaon,
District Nagpur .. **APPELLANT**

...**VERSUS**...

Santosh S/o. Ramdas Kalwe,
Aged about 25 yrs, Occ. Labour,
R/o. Dapori, Post Tandli,
Tah. Malegaon, Distt. Washim

At Present R/o. C/o. Raobhanji
Dahane, Khapri Railway, Nagpur .. **RESPONDENT**

WITH
CRIMINAL APPEAL NO. 368 OF 2018

Santosh S/o. Ramdas Kalwe,
Aged about 23 yrs, Occ. Student,
R/o. Dapori, Post Tandli-Hiwra,
Tah. Malegaon, Distt. Washim .. **APPELLANT**

...**VERSUS**...

State of Maharashtra,
Through Police Station Officer,
Police Station Sonegaon, Nagpur
District Nagpur .. **RESPONDENT**

Shri S. D.Chande, Advocate for the appellant in Cri. Appeal No. 368 of
2018 and for respondent in Cri. Confirmation Case No. 2 of 2018
Shri S. S. Doifode, APP for the State

CORAM : SUNIL B. SHUKRE AND G. A. SANAP, JJ.
RESERVED ON : 06/07/2022
PRONOUNCED ON :27/07/2022

JUDGMENT : (PER : G. A. SANAP, J)

1. In this appeal, challenge is to the judgment and order dated 05.05.2018, passed by the learned Additional Sessions Judge-3, Nagpur whereby, the learned Judge convicted the appellant for commission of the offences under Sections 302, 364-A and 201 of the Indian Penal Code (For short 'IPC') and sentenced him to death for the offence punishable under Section 302 of the IPC. The learned Judge also awarded the term sentence for the offences punishable under Sections 364-A and 201 of the IPC. The learned Additional Sessions Judge-3, Nagpur has also made reference to this Court for confirmation of death sentence awarded to the appellant. The appeal and reference are being disposed of by this common judgment.

2. The facts giving rising to this appeal are as follows:

The informant - Nitin Natthuji Borkar is the father of the deceased Yash. On the date of the incident, the deceased was 11 years old. It is the case of the prosecution that the appellant at the time of the incident was residing in a rented premises belonging to one Mr Dahane. The house of the informant is adjoining to the house of Mr. Dahane. On 10.06.2013, in the morning at about 6:00 a.m., the informant went to his Saloon shop. He came back to his house for lunch at 11:30 a.m. His wife Vaishali and his parents were at home. His son Yash (deceased) was playing, in front of his house, with other children. He called his son for lunch, however, he did not take lunch with him. After lunch, he went to his Saloon shop. It is stated that at about 7:00 p.m. wife of the informant made a phone call and informed him that Yash was not traceable. He went to his house. His wife informed him that Yash (deceased) was

missing since 4:30 p.m.

3. The informant with his neighbor Raju Sontakke took search of Yash in Khapri Village and MIHAN locality. Yash was not found. The informant and Raju Sontakke went to village Kalkuhi, where the relatives of the informant reside. There they contacted Vitthal Jumde, an acquaintance of the informant and told him that Yash was missing. Vasanta, the nephew of the informant, was taking bath. The informant received a call on his mobile No. 9763631482 from the Mobile No. 8087879857. The caller made inquiry with the informant as “Tum ladke ke pita ho kya, Tumhara ladka Yash mere pas hai. Maine tumhare ladke ko kidnap kiya hai.” (Are you the father of the boy, I have your son Yash. I have kidnapped your son). The informant got frightened. He was unable to talk to the caller. He handed over the phone to Vasanta Jumde. Vasanta Jumde talked with the caller. After completion of the call, Vasanta told the informant that the caller gave his name as Javed Khan and he made call from village Khapri. Vasanta told the informant that the caller made a demand of Rs.2,00,000/- as a ransom to free his son. Vasanta told the caller that informant would not be able to satisfy his demand because the informant is poor. The caller extended the threat that if the amount is not paid then they would have to repent over their mistakes. In the midst of the call, Vasanta tried to hand over phone back to the informant to talk to the caller. The informant was terribly frightened and therefore, he could not talk to the caller. The caller then disconnected the call.

4. The informant with Raju Sontakke came back to his house and

conveyed this information to his wife and family members. The informant along with his relative went to Police Station Sonegaon at about 11:30 p.m. and lodged the report. The informant at the time of lodging the report provided the description of his son and the clothes worn by him. On the basis of this information, the crime bearing No. 119 of 2013 came to be registered against the caller of mobile No. 8087879857. Police Inspector Shri. T. K. Wahile (PW-27) deputed the police to trace out the deceased Yash Borkar. On his request, the Cyber Cell of Crime Branch, Nagpur traced out the location of mobile No. 8087879857 near MIHAN bridge.

5. In the morning of 11.06.2013, Poonam Vijay Mahakalkar (PW-4) informed the Police that on 10.06.2013 at about 4:00 p.m. she had seen deceased Yash Borkar on motorbike alongwith one person. The Police conducted the thorough inquiry and came to know that name of said person was Santosh (Appellant). This clue provided impetus to investigation. PW-26 took the search of the appellant at village Khapri, but he could not be found at his house. The people from the vicinity had gathered there. The people saw the appellant and chased him. He was apprehended. The mob started beating him. The investigating officer (PW-27) took him in the custody. PW-27 took him to the Police Station and arrested him. Mobile phone found at the time of his personal search was seized.

6. The appellant during the course of investigation expressed his desire to point out the place where he had hidden the dead body of the deceased Yash Borkar after committing his murder. The confessional

statement was recorded in presence of the panchas. The appellant led them to the place, where the dead body was concealed and pointed out the said place and the dead body. The dead body was found lying under the hip of stones. The informant was summoned to the spot. He identified the dead body of his son. The dead body was sent to hospital for postmortem. Further investigation revealed that the deceased was lastly seen in the company of appellant. The samples were seized during the investigation. The investigating officer received the CA report of the samples. On completion of investigation, the investigating officer filed the charge sheet in the Court of Judicial Magistrate First Class, Nagpur. On committal of the case to the Sessions Court, the learned Additional Sessions Judge framed the charge against the appellant. The appellant pleaded not guilty. His defense is of total denial and false implication.

7. The prosecution examined 27 witnesses to bring home the guilt of the appellant. The prosecution relied upon number of documents. The learned Additional Sessions Judge, Nagpur on appreciation and analysis of the evidence, found the same sufficient to prove the guilt of the appellant beyond reasonable doubt. The learned Judge, therefore, convicted the appellant and awarded him sentence as above. Being aggrieved by the judgment and order, the appellant is before this Court in the appeal. The learned Additional Sessions Judge, Nagpur has also made a reference for confirmation of death sentence.

8. We have heard the learned Advocate Mr S. D. Chande for the appellant and learned APP Mr S. S. Doifode for the State. We have gone through the record and proceedings.

9. The learned Advocate Mr S. D. Chande appearing for the appellant submitted that the case of the prosecution is based on circumstantial evidence and the chain of the circumstances sought to be relied upon has not been established to prove the complicity of the appellant in the commission of the crime. The learned Advocate submitted that even the circumstances sought to be relied upon are of shaky nature and character. The learned Advocate took us through the evidence of PW-4 and 5, who claimed to have lastly seen the deceased Yash in the company of the appellant. The learned Advocate submitted that the evidence of PW-4 and 5 is full of omissions and inconsistencies and therefore, the same cannot be made the basis of the conviction of the appellant and also the capital punishment. The learned Advocate submitted that the evidence relied upon to prove the motive for commission of crime, is not at all reliable. The learned Advocate took us through the evidence of investigating officer and panch witness to memorandum and discovery panchanama under Section 27 of the Evidence Act and submitted that the investigating officer had planted the entire material in this connection in the name of the appellant. In the submission of the learned Advocate, the evidence adduced by the prosecution is not sufficient to prove the guilt of the appellant beyond reasonable doubt. The learned Advocate further submitted that the case in question is not the rarest of the rare cases to award the death penalty. The learned Advocate took us through the judgment of the trial Court and submitted that the learned Judge has not recorded the convincing reasons to exercise the discretion against the appellant, while awarding the death sentence. The learned Advocate submitted that the evidence in this case is not sufficient to establish the guilt of the appellant as well as to

award the death sentence.

10. The learned APP submitted that the circumstances relied upon by the prosecution, to prove the guilt against the appellant, have been proved beyond reasonable doubt. The learned APP submitted that the deceased having last seen in the company of the appellant, before the commission of his murder, is the strong circumstance against the appellant. The appellant has not offered any explanation either in the cross examination of witnesses or in his statement recorded under Section 313 of the Code of Criminal Procedure (For short 'Cr.P.C.'). The learned APP submitted that the place where the dead body was hidden by the appellant was within his exclusive knowledge and therefore, the act of the appellant pointing out the said place and the dead body is the strong circumstance against the appellant. The learned APP submitted that this main circumstance has been fully corroborated by the other circumstances. In the submission of the learned APP the circumstances relied upon to prove the guilt of the appellant have been fully established. The chain of the circumstances has been completed to draw a conclusion consistent with the guilt of the appellant. The learned APP submitted that the serious nature of the crime and the circumstances in which the crime was committed would be the important factor to be taken into consideration while awarding the death sentence. It has been taken into consideration. In short, the learned APP submitted that the case in question falls in the rarest of the rare category warranting the death penalty.

11. The case of prosecution is based on circumstantial evidence. In this backdrop, nature of death and cause of death would be an important

circumstance. PW-13 Dr. Rishikesh Pathak had conducted the postmortem of the dead body of the deceased Sahil @ Yash Nitin Borkar. Police Constable Bhimrao, Bakal No. 3204, attached to police station Sonegaon, carried the dead body to Government Medical College, Nagpur on 11.06.2013. PW-13 has deposed that the copy of the inquest panchanama had been forwarded with the dead body. He has stated that he found external and internal injuries on the dead body. The external injuries found by him on the dead body are as follows:

- i] Lacerated wound present over left forehead, just above medial end of left eyebrow of size 1 cm X 0.3 cm X muscle deep vertical.
- ii] Lacerated wound present just below middle 1/3rd part of the left eyebrow of size 1 cm X 0.3 cm X muscle deep, vertical.
- iii] Abrasion present just below lateral end of left eyebrow of size 1.5 cm X 0.3 cm, vertical red
- iv] Contusion present over left upper eyelid at its lateral end of size 1 cm X 1 cm, red.
- v] Contused abrasion present over left zygomatic region of size 1.5 cm X 1 cm, red.
- vi] Contusion present over forehead in midline, 5 cm above glabella of size 0.5 cm X 0.5 cm, red.
- vii] Contused abrasion present over left forehead, 4 cm lateral to injury No.6 of size 3 cm X 2.5 cm, red.
- viii] Abrasion present over right forehead, 1.5 cm lateral to injury No. 6 of size 1 cm X 0.2 cm, vertical, red.
- ix] Lacerated wound present over right forehead 2 cm lateral to injury No. 8 of size 1 cm X 0.7 cm X muscle deep with

surrounding area of size 1.5 cm contused, red.

x] Contusion present over right forehead, 1 cm above lateral 1/3rd part of right eyebrow of size 1 cm X 1 cm, red.

xi] Abrasion present over right forehead, 3.5 cm above injury No. 10 of size 1 cm X 0.2 cm, horizontal, red.

xii] contused abrasion present 1.5 cm lateral to lateral angle of right eye of size 1 cm X 0.7 cm, red.

xiii] Contused abrasion present over right zygomatic region of size 1 cm X 0.5 cm, horizontal, red.

xiv] Abrasion present over right side of nose of size 0.5 cm X 0.3 cm, red.

xv] Abrasion present over anterior aspect of chest on right side in 6th intercostal space, 3 cm from midline of size 3 cm X 0.2 cm, horizontal, red.

xvi] Abrasion present over anterior aspect of left forearm, middle 1/3rd of size 2.5 cm X 0.2 cm, horizontal, red.

xvii] Abrasion present over posterior aspect of left shoulder of size 0.5 cm X 0.5 cm, red.

xviii] Abrasion present over right supra scapular region of size 2.5 cm X 2 cm, red.

xix] Abrasion present over lateral aspect of right knee of size 0.5 cm X 0.5 cm, red.

xx] Abrasion present 5 cm, below injury No. 19 of size 1 cm X 0.2 cm, horizontal, red.

xxi] Abrasion present over lateral aspect of right leg, middle 1/3rd part of size 0.5 cm X 0.5 cm, red

xxii] Abrasion present over posterior aspect of left leg, lower

1/3rd of size 1 cm X 0.2 cm, vertical, red.

12. PW-13 has deposed that he found following internal injuries at the time of the postmortem of the dead body. The internal injuries are as follows:

Head - (i) Under scalp hematoma present over right frontal region over an area of size 3 cm x 2.5 cm, red with overlying scalp contused. Under scalp hematoma present over left frontal region over an area of size 2 cm x 2 cm, red with overlying scalp contused.

(ii) Skull – Intact, no fracture.

(iii) Brain – Meninges – congested. Brain – congested, 880 grams subarachnoid hemaorrhage present all over brain surface in the form of thin film. Contusion present over right frontal lobe over cortical and subcortical region of size 0.5 cm x 0.4 cm.

13. PW-13 has stated that he collected viscera, one piece of gauge soaked in blood, swab and smear from anal and peri anal area for the purpose of chemical analysis. PW-13 has categorically stated that he packed, labeled and sealed the samples and handed over the same to the Constable, alongwith Form B, for the purpose of chemical analysis. He has deposed that injuries were ante-mortem. The external injuries were corresponding with the internal injuries and the injuries were sufficient in the ordinary course of nature to cause death. On the basis of his examination, he has opined that the cause of the death was due to the head injury. He has stated that the injuries were fresh and might have

been caused between 12 to 24 hours prior to the postmortem. The injuries could be caused due to hard and blunt object. On the basis of his examination, he has categorically stated that deceased died homicidal death.

14. The investigating officer, during the course of the investigation, had forwarded the weapons to PW-13 for his opinion on the queries raised by him. PW-13 examined the stones and compared the same with the postmortem report. He opined that the injuries mentioned in column No. 17 of the postmortem report could be possible by those stones. In his cross examination, he has admitted that the injuries might be possible due to fall from the height on rough surface. On the basis of this admission, it was sought to be contended that the death in this case could be accidental, as well. It is to be noted that this suggestion would not be sufficient to discard the credible evidence of medical officer. The deceased had sustained multiple injuries. There is no material or the circumstance to probablize the defense that these injuries had been caused due to fall on the ground. The facts recorded in inquest panchanama Exh. 37, if appreciated in the backdrop of the evidence of the medical officer, would show that there is no substance in the defense of the appellant. The evidence is sufficient to prove that the deceased died a homicidal death. Besides, the other evidence adduced by the prosecution is sufficient to fortify the conclusion that the death was homicidal.

15. Before we proceed to anyalise and appreciate the circumstances and the evidence adduced by the prosecution to prove its case, it would be

apposite, at this stage, to take into consideration the settled legal position vis-a-vis the circumstantial evidence. In the case of *Sharad Birdhichand Sarda – Vs – State of Maharashtra*¹, the Hon'ble Apex Court has stated the five broad legal principles to be considered while dealing with the criminal case based on circumstantial evidence. It is held as follows:

“(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra where the following observations were made : [SCC para 19, p.807: SCC (Cri) p. 1047].

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance ‘between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.

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

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

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

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

1. (1984) 4 SCC 116

16. It would be necessary to consider whether the prosecution case and the evidence adduced by the prosecution satisfy the broad legal tests stated in the case of *Sharad Sarda (cited supra)*. In this case, the prosecution is relying upon the following circumstances:

- i] The deceased was last seen together in the company of the appellant.
- ii] Kidnapping of the deceased and demand of ransom by the appellant.
- iii] Motive
- iv] The recovery of the dead body at the instance of the appellant.
- v] The recovery of incriminating articles from the room of the appellant and other incriminating circumstances.

17. The deceased and the appellant were residing in the same locality of village Khapri. The appellant had come to Khapri from his native place Dapori in Malegaon Taluka, District Washim, for doing labour work. At village Khapri initially he resided in the premises of one Shraavan Mahakalkar (PW-6), as a tenant. Shraavan Mahakalkar (PW-6) has stated that the appellant resided in his premises for a period of three months in the year 2013. It is the case of the prosecution that after three months the appellant went to stay in the tenanted premises owned by Mr. Dahane in the month of April 2013. It has come on record that one Ravikumar Pagote (PW-8) and the appellant were residing together as a tenants in one room. One Ashwin and Bunty were residing together as a tenants in another room of Mr. Dahane. The evidence on record would show that appellant was not permanent resident of village Khapri. It has come on record in the evidence of PW-8 Ravikumar that the appellant was working as a loader in Future Supply Chain. He has stated that he was working as a Computer Operator in Future Supply Chain at Khapri. In this

backdrop, it would be necessary to consider the circumstances relied upon by the prosecution against the appellant.

THE DECEASED LAST SEEN TOGETHER IN THE COMPANY OF APPELLANT

18. The prosecution has relied upon the evidence of PW-4 Poonam Vijay Mahakalkar and PW-5 Vishal @ Monu Rajesh Choudhari. It is the case of the prosecution that these two witnesses had seen the deceased in the company of the appellant. It is the prosecution case that after this the deceased went missing.

19. Vishal Choudhari (PW-5) at the relevant time was studying in sixth standard. He was residing with his parents and brother in the rented premises belonging to Mr. Dahane. He has stated that Ravi Bhaiya and the appellant were the tenants of Mr. Dahane. Similarly, one Ashwin and Bunty were also the tenants of Mr. Dahane. He has stated that Ravi Bhaiya and the appellant were residing in the room adjoining to their room. He has categorically stated that he and the deceased would frequently visit the room of appellant. They used to play with the appellant. The appellant used to serve cold drinks and chips to the deceased. While unfolding the events occurred on the fateful day, he has stated that his mother and brother had gone to Kolkata and his father had gone to his work. On that day, Ravi Bhaiya came from another station and prepared his food. At that time appellant was not present in the room. He and Ravi took the lunch. After taking rest Ravi went to his duty in the afternoon. He has stated that Ravi had left message with him for appellant to cook food in the evening. After arrival of the appellant, he

conveyed this message of Ravi to him. The appellant left his room on motorcycle and after sometime came back with deceased. They had brought thumbs up bottle and packets of chips. They went inside the room and locked it from inside. He was playing outside the house. He has stated that after some time the door was opened and therefore, he went in the room. In the room, there was smell of alcohol. The smell of alcohol was coming from the mouth of the appellant as well as the deceased, who was lying on the ground. He has stated that he inquired with Yash about the consumption of liquor. Yash abused him. He told him that he would inform this to his parents. He has stated that after 5 to 10 minutes, he came out of his room and found that the appellant was locking his room. On inquiry with appellant, the appellant told him that deceased had left his room. He has stated that he, Ashwin and one more tenant were sitting in front of his house. The appellant came there and closed his room from inside. The door of the appellant's room was slightly opened. PW-5 saw that the appellant was smoking and the deceased was lying in the room. He has categorically stated that the deceased was requesting the appellant to drop him at his house. The appellant was not ready because deceased was in a drunken condition. He has stated that the deceased passed urine inside the room. After this, the appellant and the deceased Yash went outside together. He has categorically stated that the appellant took the deceased towards MIHAN puliya (Bridge). He has stated that at that time, he was standing near the Pan Kiosk at Railway Station. After some time, the appellant came back and told him that he wanted to perform pooja. He has stated that, therefore, they approached one priest. The priest did not come to perform pooja and therefore, he and appellant went to market and

brought articles for performing pooja. The appellant, according to this witness, arranged and performed the pooja. He distributed Laddu and Pedha (Sweets). After this, the appellant prepared the meals. They together took the dinner. PW-5 slept in front of his house. He has stated in the night, Ravi Bhaiya came from his work. They together went to terrace and slept there. PW-5, as can be seen from his evidence, has narrated the events occurred in his presence in great detail. He has stated that on the next day police made inquiry with him and recorded his statement. He narrated the incident to the police. It has come on record that his statement was also recorded by the learned Judicial Magistrate First Class under Section 164 of the Cr.P.C. PW-5 has identified the clothes on the person of the deceased as well as on the person of the appellant on the date of the incident. He has also identified the articles which had been brought for performing the pooja by the appellant. It is to be noted that the PW-5 is the natural witness. His presence on the spot was natural inasmuch as he was residing in the room adjoining to the room of appellant. His statement that he had close association with the appellant and the deceased cannot be disbelieved. He has stated that they used to play together.

20. This witness was subjected to searching cross examination by the learned Advocate for the appellant and attempt was made in the cross examination to bring on record the omissions and inconsistencies in his evidence. The perusal of his cross examination in entirety would show that answers given by him in the cross examination are consistent with the facts stated by him in his examination-in-chief. The core of his evidence that he saw the deceased in the company of the appellant before the

deceased went missing has not at all been shaken. His statement recorded by the learned Judicial Magistrate First Class, Nagpur at Exh. 25 would show that the substance of the evidence before the Court was narrated by him before the learned Magistrate. The statement recorded by the learned Magistrate, being an independent Judicial Officer, would assume great importance. The said statement can be made use for the purpose of corroboration. The sum and substance of his evidence before the Court and the broad facts stated by him while recording statement by Judicial Magistrate First Class, Nagpur would show that he has not deviated from the core of his evidence on the aspect of last seen together theory. Similarly no dent has been caused to the core of his evidence despite searching cross examination. It is to be noted that no material omission or inconsistency qua the last seen together theory deposed by him has been brought on record. In fact, there are no omissions and inconsistencies on this aspect. PW-5 was having friendly relations with the appellant. No material has been brought on record in his cross examination to suggest that this witness had grudge against the appellant for one reason or the other. The perusal of his evidence in entirety would show that he has narrated the truth before the Court. He has not made a slightest attempt to exaggerate the facts. The perusal of his evidence would show that planting of this witness to support the case of the prosecution has been completely ruled out. This aspect would weigh in favour of the credibility of this witness and the fairness of the investigation. At the time of the incident, this witness was studying in sixth standard. He was hardly 12 to 13 years old. Being a neighbor and at that time his school had not opened, his presence at the house was but natural. On the basis of the evidence of this witness, the prosecution has proved that the appellant

carried the deceased with him towards MIHAN bridge. They went there by walking. It has come on record that PW-5 last saw the deceased in the company of the appellant between 4:30 p.m. and 5:30 p.m. It is the case of the prosecution that there after the deceased went missing. The PW-5 apart from deposing about the deceased having seen in the company of the appellant has deposed in great detail about the subsequent conduct of the appellant. PW-5, therefore, apart from being a natural witness is also a reliable witness.

21. The second important witness relied on the last seen theory is PW-4 Poonam Vijay Mahakalkar. It is the case of the prosecution that she had also seen the appellant in the company of unknown person proceeding on motorcycle in the direction of MIHAN bridge. She has stated that on 10.06.2013, at about 4:00 p.m. to 4:30 p.m., she was washing clothes on public tap, which is in front of her house. She has stated that Yash (deceased) passed urine on open plot. One motorcycle was standing on the road towards the side of the School. One person was on the motorcycle. She has stated that after passing urine deceased Yash sat on the motorcycle and they went towards the School. She has stated that, thereafter, she did not see Yash. She has stated that there was heavy rain at about 7:00 p.m. to 7:30 p.m. The mother of Yash came to her house and made inquiry. She has stated that she told her that Yash had gone on motorcycle with one unknown person towards the side of the School. She has stated that on the next day police came to her house and made inquiry with her. She narrated this incident to the police. She has stated about the clothes worn by Yash when she saw him. She identified the clothes and also the appellant in the Court.

22. As per PW-4, the appellant was not known to her. A case is sought to be made out that, since the appellant was residing in the same locality, the statement of PW-4 that she did not know him is unbelievable. In our opinion, this statement of the witness that she did not know the appellant, on the date of the incident, would by itself be a credible circumstance. If PW-4 had been a got up witness then she would have stated that the appellant being resident of locality was known to her. However, the prosecution did not make any attempt in that direction. In our opinion, this circumstance would be very vital and important and as such would weigh in favour of the prosecution. Perusal of her evidence would show that she has not exaggerated the facts. It is to be noted that the investigating officer, on being confronted with the fact that the person involved in the crime was not known to the PW-4, made a request to Mr Prakash Somkunwar, Special Executive Magistrate, Nagpur to conduct the test identification parade of the appellant. PW-4 has stated that she went to jail for the purpose of identification parade. In the jail, she was made to sit in one room. After some time she was taken in another room. In the said room seven persons were made to stand in a row. One officer was present in the room. She has stated that the officer told her to identify the person whom she had seen in the company of the Yash and carried him on his motorcycle. She has stated that the persons standing in a row were of the same age group and their appearance was matching. She has stated that she identified one person, who had carried Yash on his motorcycle. Said person was standing at Sr. No. 3 in the row. She has stated that, thereafter, some writing was prepared and she made signature. She has identified her signature on the Test Identification Parade memorandum at Exh.22. Ultimately she identified the appellant in the Court.

23. The attempt was made in the cross examination to falsify the statement of this witness. The thrust of the cross examination was that this witness was knowing the appellant, but just to make her evidence probable this kind of story has been put forth. It is to be noted that her presence in the locality was but natural. She was knowing the deceased and the family of the deceased. In her cross examination, she has stated that she did not know whether the appellant was residing as a tenant in the house of Shravan Mahakalkar. In her evidence, she has narrated the description of the motorcycle. Perusal of her cross examination would show that no material omissions and inconsistencies or contradictions have been brought on record. The perusal of her evidence in entirety would show that she is not an interested witness. Her evidence would also indicate that she was not tutored. There was no reason for her to depose against the appellant. It is nobody's case that she was the only girl from vicinity who could be a soft target to plant as a witness against the appellant. No material has been elicited, in the cross examination, to make her evidence unbelievable. In our view, therefore, the evidence of PW-4 corroborates the evidence of PW-5, who is the star witness of the prosecution, on this material aspect.

24. On minute scrutiny and appreciation of the evidence of both these witnesses we do not see iota of material to doubt the credibility of these witnesses. On the basis of the evidence of these witnesses the prosecution has proved beyond doubt that before commission of the murder, the deceased was last seen in the company of the appellant.

**KIDNAPPING OF THE DECEASED AND DEMAND OF RANSOM
BY THE APPELLANT.**

25. In order to prove the kidnapping and demand of ransom, the prosecution has relied upon the evidence of PW-1 Nitin Natthuji Borkar, the father of the deceased, PW-2 Vasanta S/o. Keshaoraoji Jumade and PW-3 Vaishali W/o. Nitin Borkar, the mother of the deceased. PW-1 has deposed that he is having Saloon shop. At that time, he, his wife, his parents, his daughter and deceased were residing together. He has stated that on the date of the incident at about 11:30 p.m. he took lunch at his house and went to his saloon shop. He has stated that at about 7:00 p.m. he received phone call from his wife that his son is missing. When he came back from the shop his wife told him that the deceased was missing from 4:30 p.m. She has further stated that she took search of the deceased in village Khapri, but he was not found. His wife requested him to take the search of the deceased. PW-1 along with his neighbor Raju Sontakke took search of the deceased in village Khapri, but he could not be traced out. They, therefore, went to village Kalkuhi and met Vitthal Jumde. They told Vitthal Jumde about the missing of deceased. They requested Mr. Jumde to accompany them for taking search of the deceased. When they were about to leave the house of Mr. Jumde, PW-1 received a call on his mobile No. 9763631482 from Mobile No. 8087879857. He attended the call. The caller told him as "Tum Ladke Ke Pita Ho Kya, Tumhara Ladka Yash Mere Pas Hai, Maine Tumhare Ladke ko Kidnap Kiya Hai" (Are you the father of the boy, I have your son Yash. I have kidnapped your son). PW-1 got frightened. He gave phone to Vasanta, the nephew of Vitthal. Vasanta had a talk with the caller. After talking with the caller, Vasanta informed him that the caller told his name as

Javed Khan. He further informed that caller told him that the deceased was in his custody and they should not take his search. The caller further told Vasanta that his family was under crises and he is in need of Rs.2 lacs and the father of the Yash should arrange the money. Vasanta told the caller that the father of the Yash is not financially well of and therefore, it would not be possible for him to make the arrangement. The caller threatened that if the money is not paid then they should not blame if something goes wrong with the boy. Vasanta handed over phone to PW-1 to continue further talk. However, the PW-1 was terribly frightened and therefore, he could not talk to the caller. He has stated the call was received in between 9:30 p.m. and 9:45 p.m. PW-1 has stated that, thereafter, he and Raju Sontakke came back to his house and informed this fact to his wife. They, therefore, called their relatives and informed this fact to them. PW-1 alongwith his relatives went to Police Station Sonegaon at about 11:30 p.m. and reported the incident to the Police. The report is at Exh. 16. In this report, it was categorically stated that the call was received from Mobile No. 8087879857.

26. Perusal of his cross examination would show that his evidence on the point of receipt of a call from mobile No. 8087879857 and the demand of ransom of Rs.2,00,000/- has gone unchallenged and uncontroverted. There is no cross on this aspect. There is not even a suggestion to this witness on this important aspect.

27. PW-2 is Vasanta Jumde. He has stated that PW-1 had come to his house and made inquiry about his missing son. He has stated about the receipt of the phone call by PW-1, the demand of ransom and threat

of killing of son of PW-1 by the caller. He has further stated that he personally spoke to the caller, when the mobile was handed over to him by PW-1. The caller gave his name as Javed Khan. His evidence corroborates the version of PW-1. His evidence on the point of his conversation with the caller, the demand of ransom and the threat to the child have gone unchallenged. The facts stated by this witness in his evidence clearly indicate that the PW-1 had gone to his house. The incident and events as stated by him and PW-1, indeed occurred in his presence. We do not see any reason to disbelieve his evidence. The possibility of planting this witness has also been ruled out. He has not exaggerated the facts. There is no omission or inconsistencies in his evidence. We have no reason to disbelieve and discard his evidence.

28. PW-3 Vaishali Borkar is the mother of the deceased. She has stated that after taking lunch the deceased went to play with Sumit Borkar and Harshal Sahastrabudhe. She has stated that after taking lunch, her husband went to Saloon shop. At about 2:00 p.m. she went to take rest. After one hour, she noticed that the deceased Yash and Harshal were playing, on the hip of sand. She has stated that the deceased Yash brought cow dung cake to the house and left for playing. He went towards temple. She has stated that deceased Yash did not come back. There was heavy rain. She was worried for her son. She took search of deceased Yash, but he could not be traced out. She, therefore, made a phone call to her relatives. She took search of the deceased in the area. She, therefore, made a phone call to her husband at about 7:00 p.m. and informed him that the deceased is missing. She has stated that after receipt of message her husband came. She has corroborated the evidence

of her husband on the point of demand of ransom by the caller. She has stated that after coming back to the house, her husband told her that their son was kidnapped for ransom. PW-3 has stated about the clothes worn by the deceased on the date of the incident. The clothes had been seized during the course of investigation. PW-3 identified the clothes of the deceased in the Court. In her cross examination, she has admitted that she had stated before Police while recording her statement that she made an inquiry from Poonam (PW-4) as to whether motorcycle rider was known person. She has stated that Poonam informed her that said person was unknown. In our view this admission, in the cross examination, apart from supporting the evidence of PW-4 Poonam, proved beyond doubt that she made inquiry with PW-4. It is not clear on perusal of cross examination whether this inquiry was made on 11th or 10th. It is the case of the prosecution that PW-4 disclosed this fact when she came to know about the incident on the next date. The evidence of this witness, therefore, corroborates the evidence of PW-1 and PW-2. The evidence of these three witnesses if read together would show that after 4:30 p.m. on that day the deceased went missing. They took search. On the basis of their evidence, it has been proved that in the process of search PW-1 and 2 received the call from the kidnapper demanding the ransom. The conduct of PW-1 reporting the matter to the police is consistent with the conduct of the man of ordinary prudence. PW-1 apart from providing the details of the demand of ransom stated the mobile number from which the call was received. Their evidence proves that the deceased was kidnapped and after kidnapping the kidnapper, who later on transpired to be appellant, made a demand of ransom. The evidence of these witnesses further fortifies the evidence of PW-4 and 5 on the point of kidnapping.

MOTIVE

29. As per the case of the prosecution, the motive for kidnapping of the deceased Yash by the appellant was ransom from the father of the deceased. PW-1 is the father of the deceased. The evidence of PW-1, 2, 5, 8 and 11 would crystallize the motive for commission of crime. The evidence of PW-1 and 2 is sufficient to prove that the kidnapping of the deceased was for ransom. PW-1 and 2 on receipt of call of ransom reported the matter to the police within shortest possible time. The further motive for commission of crime has been established on the basis of evidence of PW-5, 8 and 11. These three witnesses in unison deposed that in the evening of the fateful day the appellant performed pooja at his house. He distributed the sweets. The enthusiasm and the zest displayed by the accused indicated that the pooja was performed to celebrate the success of his mission. The learned Additional Sessions Judge has opined that the motive behind this crime was also to offer a human sacrifice. In the teeth of the evidence available on record, we agree with the findings of the learned Additional Sessions Judge on this count. There is an ample evidence on record to prove that the appellant in the past indulged in extorting money by posing himself as a Police Officer. We conclude that the prosecution on the basis of evidence has proved the motive for commission of the crime by the appellant. It is said that the motive is always locked in the mind of the accused. The evidence is the medium to unlock the motive. In this case, the hidden motive of the appellant has been fully unlocked and established by the prosecution.

RECOVERY OF THE DEAD BODY

30. The appellant was arrested on 11.06.2013 at about 12:45 p.m. by

PW-27. Exh. 125 is the arrest panchanama. He was arrested from village Khapri. PW-27 has stated that when the people from the locality suspected the role of the appellant in the crime, they caught hold him and started beating him mercilessly. PW-27, therefore, intervened and took him in custody. It has come on record in his evidence that by this time, he had made inquiry with PW-4 Poonam. On the basis of the information provided by PW-1 about the mobile number, PW-27 with the help of Cyber Cell, Nagpur had traced out the location of the mobile number. The Cyber Cell, Nagpur informed him that at the relevant time, namely the time of incident, the location of the said mobile phone was near MIHAN bridge. PW-27 conducted the personal search of the appellant. He recovered one Nokia Mobile phone with two SIM card slots. In one slot the SIM card of mobile No. 8087473843 was found. It was seized. PW-27 has deposed that they took the appellant to police station and interrogated him. During the course of his interrogation, the appellant expressed his desire to make a confession. PW-24, therefore, summoned two panch witnesses. He has stated that the appellant in presence of panchas made the statement that he had kidnapped Yash @ Sahil Borkar for ransom and committed his murder. He has stated that he had concealed the dead body of Yash @ Sahil Borkar in the pit near MIHAN bridge and he would point out the said place and the dead body. PW-27 in presence of the panch witnesses prepared memorandum panchanama. Memorandum panchanama is at Exh. 43. The appellant led the police and the panchas towards MIHAN bridge. The vehicle was taken in the direction as pointed out by the appellant. On the say of the appellant they stopped the vehicle and got down from the vehicle. The appellant, thereafter, took them near one pit. There was cement concrete

rubble hip. The appellant removed the stones from the hip and pointed out the dead body. They found the dead body of a child in the pit lying in a supine position. The father of the child was called. He identified the dead body of his son. On the spot there was water and mud. The clothes on the dead body were smeared with earth. The sandal in the right leg was also stained with mud. On the spot PW-27 drew discovery panchanama. It is at Exh. 44. PW-27 instructed PSI Rahul Suryatal (PW-24) to conduct the inquest panchanama. He did it accordingly.

31. At this stage it would be necessary to appreciate the evidence of panch witness. PW-11 Shankar Jumde acted as a panch witness to the memorandum and discovery panchanama. He has stated that on 11.06.2013, he was called by the police at Sonegaon Police Station. One more panch witness was also called. He has stated that the police told that the appellant wanted to make statement and therefore, they should act as a panch witness. He has stated that in their presence the appellant made a confessional statement and stated that he had concealed the dead body in a pit near MIHAN bridge and he would point out the said place and the dead body. The memorandum statement is at Exh. 43. He has identified his signature on it. He has further stated that thereafter, the police, panchas and the appellant left the police station. The appellant led them to the place where the dead body was hidden by him. He pointed out the said place and the dead body. They found the dead body of a child. The dead body was taken out from the pit with the help of police. He has stated about clothes on the dead body. He has stated that the seizure (discovery) panchanama was drawn. It is at Exh. 44. He has stated that he, another panch and appellant signed the panchanama. He identified

the clothes in the Court. This witness was subjected to searching cross examination. It was suggested to him in the cross examination that the place where the dead body was found was an open land accessible to one and all. He has denied the suggestions that at the said place there was no pit. He has stated that after taking discovery of the dead body, the people from the locality had gathered there. He has denied the suggestion that he has a cordial relations with the police and therefore, made signatures on the documents already kept ready by the police in the police station. Minute perusal of his cross examination would show that he successfully weathered the storm of searching cross examination. Perusal of his cross examination would show that no dent has been caused to the core of his evidence. On minute scrutiny of his evidence, we are satisfied that this witness is credible and trustworthy. The possibility of this witness being tutored and planted has been completely ruled out. It is to be noted that if this witness had not acted as a panch and witnessed the actual happenings he would have been caught unaware in his cross examination on certain vital aspects. Perusal of his cross examination would show that no material has been elicited in his cross examination to doubt his credibility. The evidence of this independent witness coupled with the evidence of PW-27 proves beyond doubt that the appellant made confessional statement about place where the dead body was concealed and pointed out the said place and the dead body to the police.

32. The evidence of PW-27 and PW-11 has further been corroborated by the evidence of PW-1, the father of the deceased. PW-1 has deposed that after discovery of the dead body he was called on the spot by the police. He went there and saw the dead body. He identified

the dead body of his son. Perusal of the discovery panchanama Exh. 44 would show that the dead body was concealed in a pit. It was found lying in a supine position. The independent panch witness has narrated the relevant facts in great detail. We do not see any reason to discard and disbelieve his evidence. On the basis of evidence of PW-11 and PW-27, prosecution has successfully proved that the dead body was discovered at the instance of the appellant. The dead body was concealed in a pit. Despite search by the parents and relatives they could not locate it. The dead body was recovered from a pit near the MIHAN bridge. The prosecution has, therefore, established this vital and important circumstance. The place where the dead body was concealed was within the exclusive knowledge of the appellant. The discovery was made on 11.06.2013 between 13:30 p.m. & 14:55 p.m. In our opinion, this proved circumstance is one of the strongest circumstances relied upon by the prosecution.

RECOVERY OF THE INCRIMINATING ARTICLES FROM THE ROOM OF THE APPELLANT AND OTHER INCRIMINATING CIRCUMSTANCES.

33. PW-26 Sandeep Borse, API has deposed about seizure of the clothes and other articles of the appellant from his house in presence of two panchas and the seizure of the stones and sample of earth from the spot. In his evidence, he has described the articles seized by him from the house of the appellant. The seizure was effected on 11.06.2013 itself. The important articles seized were full pant and one green colour T-shirt stained with mud. In the search, he found TATA DOCOMO company SIM card cover. On one TATA DOCOMO company SIM card cover,

the mobile No. 8087879857 was written. This mobile SIM card was used by the appellant for making the ransom call. The room partner of the appellant Ravikumar Pagote (PW-8) was also present at the time of the search. He has deposed in his evidence about this search. He signed on the search and seizure panchanama. PW-26 identified all the articles in the Court.

34. PW-20 Arun Shyamrao Junurkar is the panch witness to this search and seizure. In his evidence, he has deposed about the search of the premises of the appellant. He has deposed about the seizure of the empty packet of TATA DOCOMO SIM cards, currency notes and clothes. He has categorically stated that the clothes were stained with mud. In his evidence before the Court, he identified all the articles seized in his presence. He has confirmed his signatures on the panchanama at Exh. 35. In his cross examination, nothing has been elicited except reiteration of the facts stated by him in his examination-in-chief. He is an independent witness. It is not even suggested to this witness that he is either relative of the PW-1 or interested one way or the other in the success of the prosecution.

35. PW-17 Rakesh Tulshiram Masram is the panch witness to the seizure of the mobile phone from the appellant at the time of his personal search. The appellant was arrested in his presence on 11.06.2013. Sanotsh Nawale was another panch witness. The seizure memo Exh.70 has been proved. In the Court he identified the articles and appellant. The investigating officer has stated that in the mobile handset the SIM card of No. 8087879857 was found. The prosecution has proved the recovery

of the SIM card with number 8087879857 from the mobile which was used by the appellant for making the ransom call. The perusal of the cross examination of the investigating officer and this witness would show that no explanation has been put forth on this aspect. Since the recovery of this SIM card was made from the appellant it was his duty to explain the same. In the absence of explanation, reasonable judicial inference would be required to be drawn against the appellant. It would reflect upon his conduct.

36. It would be necessary to deal with the evidence of seizure of the clothes on the dead body and other articles found near the dead body. The dead body was sent for postmortem. Medical officer PW-13 has deposed that alongwith the samples, the clothes found on the dead body were handed over to police constable, who had brought the dead body. PW-24 Rahul S/o. Kamaji Suryatal had seized those clothes. He has stated that on 11.06.2013 at about 8:30 p.m. police constable Bhimrao had brought the clothes handed over to him by medical officer and other samples. He has stated that he seized the same in presence of the panchas. The panchanama is Exh. 29. In the Court, he has identified the clothes and the articles.

37. PW-7 Rahul Sudhakar Belkhode is the panch witness to this seizure. He has stated that on 11.06.2013, he was called to the police station by police. In the police station, police told him that he would be required to act as a panch for the seizure of the clothes. He has stated that in his presence the clothes smeared with mud were seized. He identified his signature on the seizure panchanama Exh. 29. In his cross

examination, an attempt was made to suggest that he was residing far away from the police station and therefore, his presence in the vicinity of the police station was doubtful. In his cross examination, he has stated that on panchanama apart from his signature the signature of one more person was obtained. The clothes found on the dead body were smeared with mud. This fact has been established on the basis of the evidence of PW-24 and the medical officer.

38. The articles and samples collected and seized during the course of investigation were sent to CA by PW-27. PW-27 has deposed about it. PW-27 collected the call detail record of the phone numbers namely the mobile phone used by the appellant and phone used by the PW-1. PW-14 Bhimrao s/o. Janba Sontakke, the Police Constable, had carried all the articles to CA, Nagpur. He has stated that he collected the sealed parcels from malkhana incharge of Sonegaon Police Station. The extract of the malkhana register is produced on record at Exh. 59. The description of the articles and condition of the articles can be seen from this extract. Exh. 60 is the station diary entry of the departure of PW-14 to the CA office. It is dated 26.06.2013. Exh. 61 is the invoice challan/ acknowledgement from the office of CA in token of receipt of 13 parcels. PW-14 has stated that all the articles were packed and properly sealed.

39. In order to establish the involvement of the appellant in the crime, the prosecution has heavily relied upon the CA report. Exh. 141 is the CA report of the blood group of the appellant. His blood group is 'A'. Exh. 142 is the CA report of the analysis of the blood gauze piece, cotton swab and smeared slides of the deceased. The semen was not detected on

the articles Nos. 2 and 3. The blood group could not be determined as the result was inconclusive. Exh. 143 is the CA report of three stones recovered from the place where the dead body was found. The stones were found stained with human blood. Exh. 145 is the report of analysis of 14 samples. The description of the articles has been mentioned in the report at Exh. 145. Exh. 146 is the report of the analysis of the earth/mud found on the clothes of the deceased, clothes of the appellant and the earth collected as a sample from the spot. The CA has opined that the earth in Exh. 1 to Exh. 3 (Pair of plastic chappal, one sealed sandal and packed earth seized from the spot) and earth collected from Exh. 5 to Exh. 10 (clothes of the deceased and the clothes of the appellant) tallied with earth in Exh. 4 (the dry earth seized from the spot) in respect of hue, physics-chemical characteristics and spectro chemical composition. It is to be noted that the CA reports were admitted in the evidence by invoking the provisions of Section 293 of the Cr.P.C. The appellant had an option and opportunity to call the CA for cross examination and test his veracity. The record reveals that no steps in that direction were taken. The perusal of the CA report would, therefore, prove that the earth/soil found smeared on the clothes of the deceased and the clothes of the appellant and collected from the spot is one and the same. It has also been proved that on the three stones, found on the spot, the human blood was detected. In our opinion, therefore, the chain from the stage of recovery of the clothes from the spot and from the house of the appellant clearly proves that the appellant was involved in the commission of crime. We do not see any reason to discard and disbelieve this evidence. The recovery and seizure of the samples and articles has been proved on credible evidence. The possibility of tampering with the

samples has been completely ruled out. Similarly, no material has been brought on record in the cross examination of the witnesses to probabalize the hypothesis of tampering with the samples. In our opinion, this is another important circumstance to connect the appellant with the commission of the crime.

40. In order to establish the presence of the appellant in the vicinity of the spot, in the night of 10.06.2013, the prosecution has heavily relied upon the call detail record of mobile phone of the appellant. Similarly, the call detail record of mobile phone of PW-1 and the appellant are relied upon to establish the conversation between appellant and the PW-1. It is the case of the prosecution that the appellant from mobile No. 8087879857 had made a phone call to the PW-1 on his mobile number 9763631482. PW-22 Sachin Mahadeo Shinde is the Nodal Officer of IDEA Cellular Ltd., Pune. He has proved the call detail record of the mobile number of the PW-1. It is at Exh. 86. Perusal of this call detail record would show that on 10.06.2013 between 21:30:22 & 21:40:33 hours three calls were received on the mobile number of the PW-1 from mobile No. 8087879857. Exh. 87 is the tower details of the mobile number of the PW-1. PW-22 has deposed that the tower location of this number was Chinchbhawan, Wardha Road, Nagpur. The tower details of the mobile number of PW-1 would show that it was within the vicinity of house of PW-2 Vasanta Jumde.

41. PW-23 Dhananjay S/o. Dattatraya Yadav is the Nodal Officer of TATA Teleservices (Maharashtra) Ltd., Pune. He provided the call detail record of mobile No.8087879857. Exh. 93 would show that from this

number three calls were made to the mobile number of PW-1 on 10.06.2013 between 21:30:23 & 21:40:33 hours. PW-23 has stated that when the calls were made from mobile No. 8087879857, on 10.06.2013, the tower location of the mobile was Hotel Sun and Sand, near MIHAN Fly Over, Wardha Road, Nagpur. PW-23 has categorically stated that this mobile number was activated on 25.03.2013 and it was used only on 25.03.2013, 27.03.2013 and 10.06.2013. It is to be noted that the SIM card was not in the name of the appellant. The SIM card was in the name of one Leena Pundalik Masale. The son of Leena Masale has deposed before the Court. He has stated that the signature of his mother Leena Masale was forged for obtaining this SIM card. The facts placed on record clearly indicate that there is substance in this contention of the prosecution. The SIM card of mobile No. 8087879857 was found in the mobile phone of the appellant. It was recovered from his possession.

42. In this context the proximity of time between deceased last seen in the company of the appellant and the time of death would be another important circumstance. Medical officer PW-13 has deposed that the death had taken place between 12-24 hours prior to the postmortem. The postmortem was conducted at 5:40 p.m. on 11.06.2013. On the basis of this evidence it is seen that the death might have taken place between 5:00 p.m. of 10.06.2013 and 5:00 a.m. of 11.06.2013. On the basis of the evidence of PW-4 and 5, the case of the prosecution with regard to the deceased being last seen in the company of the appellant has been established. The deceased was in the company of the appellant from 4:30 p.m. In our view, this proximity of a time would be another circumstance

in favour of the prosecution and against the appellant. On re-appreciation of the entire evidence we are satisfied that the prosecution has established all the circumstances. The circumstances relied upon by the prosecution have been fully established. The facts established on the basis of the circumstances are consistent only with the hypothesis of the guilt of the appellant. The circumstances established in this case are conclusive in nature and tendency. The chain of evidence has been completed which does not leave any reasonable ground for the conclusion consistent with the innocence of the appellant. The circumstances by applying all human probability show that the appellant and the appellant alone was involved in the commission of the murder.

43. The prosecution has successfully proved the guilt of the appellant. It would, therefore, be necessary to decide whether the case in question falls in the rarest of the rare case category to award the death sentence. The learned Advocate for the appellant submitted that the appellant was 19 years old at the time of commission of crime. He had no criminal antecedent. The appellant was bright student. He had secured 80 % marks in Secondary School Examination. The learned Advocate submitted that the case of the prosecution is based on circumstantial evidence. The learned Advocate submitted that the material on record does not indicate that there is no possibility of reformation of the appellant in future, if he is given an opportunity. The learned Advocate further submitted that the appellant has been taking education from the prison. He has completed his graduation. The learned Advocate submitted that the learned Additional Sessions Judge has awarded the death penalty without recording the cogent and convincing reasons. In

the submission of the learned Advocate for the appellant this is not the rarest of the rare cases so as to warrant the extreme punishment of death sentence.

44. The learned APP submitted that the prosecution has proved the motive for commission of crime. The motive for commission of crime was to force the parents of the deceased to satisfy the demand of ransom. The learned APP submitted that the appellant kidnapped the innocent minor child/victim and committed his murder in brutal and deplorable manner. The learned APP submitted that the beastly and diabolic act committed by the appellant in the given set of facts and circumstances would fall in the rarest of the rare category. The learned APP submitted that any sympathy or leniency to the appellant in this case would be totally misplaced. The aggravating circumstances established in this case are sufficient to warrant the death penalty.

45. In order to appreciate the submissions we have minutely perused the record and proceedings. We have also perused the landmark decisions of the Supreme Court of India in the cases of *Jagmohan Singh vs. State of Uttar Pradesh*², *Bachan Singh vs. State of Punjab*³ and *Machhi Singh and Others Vs. State of Punjab*⁴. These decisions have settled the legal position on the issue of handing down the death penalty. The principles laid down by these decisions can be summed up as follows:

2. 1973 (1) SCC 20

3. 1980 (2) SCC 684

4. 1983 (3) SCC 470

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

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

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

(4) The option to impose sentence of imprisonment for life should be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

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

46. In the backdrop of the above principles in the matter of awarding death sentence, it would be necessary to peruse the reasons recorded by the learned Additional Sessions Judge for awarding death sentence and the material taken into consideration to form the opinion that the case in question is of the rarest of the rare category.

47. Perusal of the Judgment would show that the learned Additional Sessions Judge has drawn the list of aggravating and mitigating circumstances. It is seen that the learned Additional Sessions Judge weighed the aggravating and mitigating circumstances and found that the aggravating circumstances would outweigh the mitigating circumstances. On going through the aggravating and mitigating circumstances listed in the Judgment by the learned Additional Sessions Judge, we find that the

learned Additional Sessions Judge has not properly evaluated the aggravating and mitigating circumstances. It is seen that the learned Additional Sessions Judge opined that all the aggravating circumstances have not been satisfied in this case. It is to be noted that the learned Additional Sessions Judge has failed to consider that the case of the prosecution was totally based on circumstantial evidence. The learned Additional Sessions Judge has failed to take note that when the case is based on circumstantial evidence there is always a scope and possibility of residual doubt in the mind of Court about the guilt of the accused. The circumstantial evidence may be sufficient to hold the accused guilty. However, the same may not be of a category to dispel the residuary doubt about the case of the prosecution from the mind of the Court. It is to be noted that before awarding the death sentence the Court must be satisfied that the crime, criminal and the rarest of the rare category tests are fully satisfied. In this case, the learned Additional Sessions Judge has not properly appreciated the aspect of the age of the appellant and the possibility of his reformation. In the above cases, it is held that the life imprisonment is the rule and the death sentence is an exception. The case would fall in the exceptional category if the same would satisfy the crime, criminal and the rarest of the category tests. We have minutely perused the material on record and particularly the reasons recorded by the learned Additional Sessions Judge to award the death sentence to the appellant. In our opinion, if the facts, circumstances and material on record is *juxtaposed* with the principles of law referred above, would show that the case on hand does not fall in the rarest of the rare category. We are, therefore, inclined to accept the submissions made by the learned Advocate for the appellant on this point. The death sentence is, therefore,

required to be quashed and set aside. In the fact and circumstances, we conclude that the sentence of rigorous imprisonment for life would meet the ends of justice. Hence, the following order:

ORDER

1. The criminal appeal is partly allowed.
2. The order passed by the learned Additional Sessions Judge, awarding the death sentence is set aside.
3. The appellant is sentenced to suffer rigorous imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code.
4. The substantive sentences awarded to the appellant under Sections 302, 364-A and 201 of the Indian Penal Code to run concurrently.
5. The criminal appeal stands disposed of, accordingly.

In view of modification of the death sentence, the Criminal Confirmation Case No. 2 of 2018 also stands disposed of.

(G. A. SANAP, J.)

(SUNIL B. SHUKRE, J.)