GAHC010236332018

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Death Sentence Ref./3/2018

THE STATE OF ASSAM
REPRESENTED BY PP, ASSAM.

VERSUS

JASHIM UDDIN BARBHUIYA
HAILAKANDI

Advocate for the Petitioner : Mr. T. J. Mahanta, Amicus Curiae
Mr. T. Gogoi, Advocate
Ms. S. Jahan, Additional Public Prosecutor

Advocate for the Respondent : Mr. A. I. Uddin, Advocate

Linked Case : Crl.A./389/2018

JASHIM UDDIN BARBHUIYA

VERSUS

THE STATE OF ASSAM AND ANR
REPRESENTED BY PP
ASSAM.

2:MADHU CHANDRA RIANG

Advocate for Appellant : Mr. A. I. Uddin, Advocate

Advocate for Respondent(s) : Ms. S. Jahan, Additional PP
Mr. K. A. Mazumder, Advocate
Mr. Mrinmoy Dutta, Amicus Curiae

Date of Judgement : 19.04.2024

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

JUDGMENT & ORDER

(Mridul Kumar Kalita, J)

1. Heard Mr. A.I. Uddin, learned counsel for the appellant. Also heard Ms. S. Jahan, learned Additional Public Prosecutor for the state of Assam, as well as Mr. K. A. Majumdar, learned counsel for the informant. Also heard Mr. T. J. Mahanta, learned senior counsel, who has been appointed as *Amicus Curiae* to assist this Court in Death Sentence Reference No. 3/2018, he is assisted by Mr. T. Gogoi, Advocate.

2. By this common judgment, we propose to dispose of the Criminal Appeal No. 389/2018 as well as to answer the Death Reference made by the trial court under Section 366 of the Code of Criminal Procedure, 1973.

3. The Criminal Appeal No. 389/2018 has been registered on filing of an appeal under Section 374 of the Code of Criminal Procedure, 1973 by the appellant, Jashim Uddin Barbhuiya, impugning the judgment dated 1.10.2018 passed by the learned Sessions Judge, Hailakandi in Sessions (T-1)Case No. 60/2018, whereby the present appellant has been convicted under Sections 376/302 of the Indian Penal Code as well as under Section 4 of the POCSO Act, 2012, and by order dated 04.10.2018, the appellant has been sentenced to imprisonment for life for the offence of committing rape/penetrative sexual assault and to pay a fine of Rs. 10,000/- under Section 376 of the Indian Penal Code, read with Section 4 of the POCSO Act, 2012, in default of payment of fine to undergo rigorous imprisonment for 3 months. The appellant has also been sentenced to death for committing the offence of murder under Section 302 of the Indian Penal Code, and was also sentenced to pay a fine of Rs. 10,000/- under Section 302 of the Indian Penal Code, in default of payment of fine to undergo rigorous imprisonment for 3 months.

4. By the order dated 04.10.2018, the trial court has, under Section 366 of the Code of Criminal Procedure, 1973, submitted the proceedings of Sessions (T-1) Case No. 60/2018, to this Court, for confirmation of the sentence of death imposed on the present appellant.

5. On receipt of the proceedings of Sessions (T-1) Case No. 60/2018, the Death Reference Case No. 03/2018 has been registered.

6. The facts relevant for consideration of the Criminal Appeal Case No. 389/2018 as well as for answering the Death Reference Case No. 03/2018, in brief, are as follows:

i. On 14.03.2018, one Madhuchandra Riyang lodged an FIR before the

Officer in Charge of Ramnathpur Police Station, *inter-alia,* alleging that on this said day, i.e., 14.03.2018, his neighbour, Brojendra Riyang and the first informant were doing house repairing work and his two nieces, namely, Vishnupriya Riyang and Debarung Riyang, returned to their house and noticed another niece "X"*(real name not disclosed, to protect the identity of the victim, the victim shall hereinafter be referred to as "X" in this judgment)* was found lying dead with a cut on her neck and on seeing this they raised hue and cry. The first informant along with his companion Brajendra Riyang rushed to the place of occurrence and found his niece "X" lying dead with a cut on her neck. It is stated in the FIR that the elder brother of the first informant had gone to harvest Jhum (shifting cultivation), and after calling him home, the police was informed about the matter over the telephone. It is also stated in the FIR that the first informant noticed the accused Jashim Uddin Barbhuiya, running away with a blood-stained *dao* in his hand and therefore he believes that the accused Jashim Uddin Barbhuiya, finding the niece of the informant namely, "X" alone in the house, committed rape on her and in order to conceal evidence, he killed her by cutting her neck.

ii. On receipt of the said FIR, Hailakandi P. S. Case No. 47/2018 was registered under Section 302/376 of the Indian Penal Code read with Section 4 of the POCSO Act, 2012 and Sabir Ali, SI of Police, was entrusted to investigate the case.

iii. During the investigation, the Investigating Officer visited the place of occurrence, and recorded the statement of witnesses. The Investigating Officer also drew the representative samples of blood of the deceased and, after inquest of the dead body, sent the dead body for post-mortem

examination to S. K. Roy Civil Hospital, Hailakandi. The wearing apparels of the deceased was also seized by the Investigating Officer.

iv. The Investigating Officer also recorded the statements of some of the witnesses under Section 161 of the Code of Criminal Procedure, 1973 and the statements of some of the witnesses were also recorded under Section 164 of the Code of Criminal Procedure, 1973.

v. On 15.03.2018, the appellant was arrested by the police. The weapon of offence i.e., a *dao* was recovered after being led by the accused and same was sent for forensic examination. After collection of the post-mortem report, F.S.L. examination report and after finding sufficient materials against the present appellant, the charge-sheet was laid against the present appellant under Section 302/376/201 of the Indian Penal Code read with Section 4 of the POCSO Act, 2012.

vi. Finding the case to be exclusively triable by the Court of Sessions, the Committal Court, i.e. the Court of learned Judicial Magistrate 1st Class Hailakandi, on 14.06.2018, committed the case to the Court of learned Sessions Judge, Hailakandi for trial.

vii. The present appellant faced the trial while remaining in custody and on 20.06.2018, charges under Sections 376/302 of the Indian Penal Code read with Section 4 of the POCSO Act, 2012 were framed against the appellant. When the said charges were read over and explained to the present appellant, he pleaded not guilty to the said charges and claimed to be tried.

viii. In order to bring home the charges against the present appellant, the prosecution side examined altogether 21 prosecution witnesses and

exhibited 24 documents as Exhibit-1 to Exhibit-24. The prosecution side also exhibited six Material Exhibits and exhibited them as Material Exhibit Nos. 1 to 6.

ix. The appellant was examined under Section 313 of the Code of Criminal Procedure, 1973, during which, he denied the truthfulness of the incriminating evidence adduced against him by the prosecution side and pleaded his innocence. He has also stated that he has been falsely implicated in this case out of grudge due to a land dispute between the informant side and the present appellant, however, the appellant declined to adduce any evidence in his defence.

x. Ultimately, on completion of the trial, by the judgment and order which has been impugned in the Criminal Appeal No. 389/2018, the appellant has been convicted and sentenced in the manner as already described in paragraph No. 2 herein before.

7. Firstly, we propose to take up and consider the Criminal Appeal No. 389/2018 and thereafter, we shall answer the Death Reference in this judgment.

8. The trial court had framed the following points for determination in the Sessions (T-1) Case No. 60/2018

i. Whether the accused person, on 14.03.2018 at about 1:00 PM, at village-Betcherra under Ramnathpur Police Station committed rape on the victim 'X', niece of the informant Madhu Chandra Riang and thereby committed an offence punishable under Section 376 of the I.P.C.?

ii. Whether the accused person on the aforesaid date, time and place, after committing rape on the victim 'X', committed murder intentionally causing her death and thereby committed an offence punishable under Section

302 of the I.P.C.?

iii. Whether the accused person, on the aforesaid date, time and place, committed penetrative sexual assault upon the victim 'X', a minor girl and thereby committed an offence punishable under Section 4 of the POCSO Act, 2012?

9. Before considering the rival submissions made by learned counsel for both the sides, let us go through the evidence which is available on record.

10. PW-1 Madhuchandra Riang, the informant, has deposed that on 14.3.2018, the father of the deceased went for Jhum cultivation and her mother Mayabi and sister Jolly Rung Riang went to a nearby house for husking paddy. The younger sisters of the deceased namely Bishnupriya Riang and Deba Rung Riang went to School. At that time, he (PW-1) and his cousin Brojendra were on the roof of his house for repairing works, from where the house of the deceased is visible, as his house and the house of the deceased are situated on the same hillock at a distance of around "*20 nals" (approximately about 220 feet).* He further stated that at that time, at about 1.00 PM, he (PW-1) saw the appellant was going towards the east of the house of the deceased through a small path, and there was a dao in his hand having blood stains. He thought that the appellant might have cut any cow or something else, and he never thought that the appellant had committed such an incident. PW-1 further deposed that after about 2 to 3 minutes, the younger sisters of the deceased came from school and they started raising hue and cry calling him and immediately, he rushed to the house of the deceased and found her lying dead on the ground in a pool of blood with cut throat injury. He further stated that he found the upper dress of the deceased almost open, there was a teeth bite on her breast, her panty was found in the lower part of her leg and on seeing the same, he became puzzled

and then he raised hue and cry. It is further stated by the witness that at that time, he told his niece Anjali Riang to inform the parents of the deceased through her mobile phone and accordingly the parents of the deceased along with other people came, and the police were informed. On getting the information, the police came, collected the sample of blood and took the dead body to Civil Hospital, Hailakandi. He has further stated that since the father of the deceased was busy with the dead body, he (PW-1) lodged the FIR which is exhibited as Ext-1, wherein Ext. 1(1) is his signature. PW-1 also deposed that before the occurrence, the appellant attempted to commit rape on Ms. Jolly Rung Riyang and to that effect, a case was lodged and the appellant was in jail for 3 months in connection with the case and after release from jail, the appellant also attempted to do bad acts with the elder sister of the deceased namely Jolly Rung Riang while she was returning home from jhum cultivation but when she raised *dao*, the appellant left her. He has also stated that Material Ext. (i) is the *dao*, Material Ext. (ii) is the panty of the deceased having blood stains and Material Ext. (iii) is the container containing cotton by which blood was collected from the place of occurrence.

11. During cross examination, PW-1 stated that the house of the deceased is situated in the south-east corner of his house. After hearing hue and cry, he first went to the place of occurrence and thereafter, Anjali and her brother went there. He has also stated that the parents of the deceased arrived there after half an hour along with other neighbouring people. He also stated that the house of the appellant is about 750 meters from his house. He denied the suggestion that he did not state before the police that the panty of the deceased was found on the lower part of her leg. He also answered in negative to a few other suggestive questions put to him by the learned defence counsel.

12. The PW-2, Fariz Uddin Choudhury, has deposed that on 14.3.2018 he was a Panchayat Member of Group No. 1 of Killarbak-Jalnacherra GP, and on that day, while he was returning from Garmurah market, he was reported by one lady of Betcherra that one Riang girl, daughter of Muktajay Riang was killed. PW-2 has further stated that he visited the place of occurrence and found the dead body of the deceased lying on the floor of the house and there was a cut injury on her neck and he identified the photographs of the deceased which are exhibited as Exhibits Nos. 3, 4, 5 and 6. This witness was declared as a hostile witness.

13. During cross examination by the prosecution, he denied the suggestion that the sample of blood of the deceased was drawn in his presence by the police and he put his signature on the seizure list. He has further stated that he had heard that the appellant Jashim Uddin killed the girl.

14. During cross examination by the defence, PW-2 has stated that he could not recall whether the police took his signature on blank paper or not. He deposed that before reaching the spot he came to know that Jashim Uddin has killed the girl. He has also stated thathe made attempt to hand over the accused to the police. He has also stated that the photographs of the deceased were taken from the spot.

15. The PW-3, Kananta Riang has deposed that the accused person is a resident of his village. On 14.3.2018 at about 1.30 PM, his nephew Dilip Kumar Riang came to him and reported that someone had killed the deceased by cutting her throat. At that time, the mother and sister of the deceased were in his (PW-3's) house for husking paddy. He had stated that on the relevant day, at about 10:30 to 11:00 AM while he was returning from the house of his maternal uncle Joberai Riang, he saw the appellant going towards the east with a *dao* in

his hand and the house of the deceased is also towards the east. He has further stated that on getting the information about the incident, he (PW-3),along with other people including the mother and sister of the deceased rushed to the place of occurrence and found the deceased lying dead in a pool of blood on the floor of her house and her clothes were found scattered. He also saw teeth bite on her breasts and thereafter, police was informed, police came and collected blood with cotton from the place of occurrence in his presence. Police seized the sample of blood and prepared the seizure list which is exhibited as Exhibit-2. He has also identified the Material Ext-(iii), container containing cotton by which blood was collected. He has further stated that the PW-1 told him that he (PW-1) saw the appellant going with a *dao* with blood stains. He has further stated that since the PW-1 told him that he saw the appellant going with a *dao* with blood stains towards the east of the house of the deceased, it is his strong belief that the appellant and none else killed the deceased. He has further stated that about 6 to 7 months before the incident, the appellant attempted to commit rape on his cousin Ms. Jolly Rung Riyang and in that connection, the appellant was in jail for 3 months and after his release from the jail, the accused person tried to do bad acts with the elder sister of the deceased. He has also exhibited the photographs of the deceased as Exhibit Nos. 3, 4, 5 and 6.

16. During cross examination, he has stated that the mother of the deceased arranged the wearing clothes of the deceased in order. He has also stated that he made his statement to the police in the place of occurrence, on the relevant night itself. He has also stated that there is no land dispute between the father of the deceased and the appellant. He has also stated that he narrated the entire incident to the police. He has also stated that he and PW-1 had a land dispute with the appellant and his family members.

17. The PW-4, Muktajay Riang, father of the deceased, has deposed that the house of the appellant is situated in the plain area near to their hillock. On 14.3.2018 in the morning hour, he along with others went for *jhum* cultivation at a walking distance of 15 to 20 minutes from his house and thereafter, his wife Maiyabe Rung and daughter Jolly Rung Riang went to the house of Kananta Riang for husking paddy and his other 2 daughters viz. Bishnupriya and Deba Rung went to their school and his daughter viz. the deceased was alone in the home. On the that day, at about 1.30 PM, he got Information from Anjali over mobile phone that his daughter 'X' aged 13 years, was killed by inflicting cut throat injury and immediately he, along with Sarjay and others, rushed to his house and found his daughter lying dead on the floor of his house with cut throat injury in a pool of blood. He has further stated that the upper dress of his daughter was found lifted upwards and her lower dress was also found downwards at leg and there was teeth bite on her breast. After 2 to 3 minutes, his wife and daughter Jolly came and then his wife arranged the dress of the deceased which was in scattered position. He has also stated that his brother Madhu Chandra told him that he saw the accused going by the side of his (PW-4) house with a dao in his hand having blood stains. He has also stated that around 5 months before the incident, the accused person attempted to commit rape on Ms. Jolly Rung Riyang and for that a criminal case was lodged in connection with that case, the accused person was in jail for 3 months and after getting released from jail, the appellant attempted to do bad acts with his another daughter Ms. Kanti Rung Riyang while she was returning from jhum cultivation but when she resisted the appellant with a *dao*, he (appellant) left her. He has also identified the photographs of his deceased daughter which are exhibited as Exhibit Nos.-3, 4, 5 and 6.

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18. During cross examination, he has stated that on his arrival at the place of occurrence, he found his brother Madhuchandra, Anjali and wife of Sarjay present there. Thereafter, Kananta arrived and following Kananta, his wife and another daughter arrived at the place of occurrence. The police recorded his statement at the place of occurrence itself. He did not have any land dispute with the appellant or his family members. He denied the suggestion that his daughter committed suicide and the *dao* by which she committed suicide was concealed by Madhuchandra.

19. The PW-5, Sarjay Riang, has deposed that the appellant is an inhabitant of his village. On 14.3.2018 he, Muktajay and other Riang people went for jhum cultivation in the morning and at about 1:30. P.M., Anjali, daughter of Fulendra, informed Muktajay over the mobile phone that his (Muktajey) daughter was murdered by slitting at her neck. After getting the said information, they all rushed to the house of Muktajay and found her lying dead on the floor of the house with cut throat injury, the clothes of her chest were found upward, there were teeth bites on both the breasts and her panty was found removed downwards at knee level. Thereafter, Kananta came and following him, Mayabi Rlang and Jollyrung Riang, the mother and sister respectively of the deceased came there and then the mother of the deceased brought the clothes of the deceased to cover her due to bashfulness. He has further stated that in the evening, the police came and collected blood from the floor with cotton in his presence and seized the same by seizure list (Exhibit-2) and Material Exhibit (iii) is the container containing cotton by which blood was collected and thereafter, the police took the dead body for post mortem examination. He has also stated that Madhuchandra (PW-1) told them that he saw the appellant going with a

blood-stained *dao*.

20. During cross examination, he has stated that the house of the deceased is around 50 meters far from his house. He has also stated that no weapon was found near the dead body. He answered negatively to certain suggestive questions put to him by the learned defence counsel.

21. The PW-6, Dilip Kumar Riang, has deposed that the appellant person is a resident of their village. On 14.3.2018 at about 11.30 AM he was in his house and at that time, the appellant came to their house with a *dao* in his hand and asked for a glass of water and at that time, he and his sister Anjali were in the house. He has further stated that he gave water to the appellant and then the accused person asked him about the parents of the deceased and then he told the appellant that her parents went for jhum cultivation and thereafter, the appellant proceeded towards the house of the deceased. He also stated that on the same day at about 1:00 to 1:30 PM he saw the appellant returning through a path near their house and after 2 to 3 minutes, Bishnupriya and Debarung, little sisters of the deceased, came running to Madhuchandra and reported to him that their sister i.e., the deceased was vomiting blood and accordingly, they and Madhuchandra went to the house of the deceased and found her lying dead on the floor with slit throat injury and her upper clothes were found kept upward above the chest level. the panty and lower clothes were found at the knee level and there were teeth bites on her chest. He also stated that thereafter he went to the house of Kananta (PW-3) and informed about the incident to the mother of the deceased. He has also stated that since the appellant went towards the house of the deceased and the deceased was alone in her house, it is none but the appellant had killed the deceased after committing rape on her. He has also stated that he made a statement in respect

of the incident before the Magistrate, which is exhibited as Exhibit-7, wherein Exhibit-7(1) and Exhibit-7(2) are his signatures

22. During cross examination, he denied the suggestion that he made a statement before the Magistrate on being tutored by Madhuchandra and the police. He has also answered in negative to the suggestive question to him by the learned defence counsel that he did not state before the Magistrate that the upper clothes of the deceased were found kept above the chest level and the panty and lower clothes were found at the knee level.

23. The PW-7, Anjali Riang, has deposed that she knows the appellant as he is a resident of her village. On 14.3.2018, at about 11:30 AM she, along with her brother Dilip was present in their house and at that time, the appellant came to their house and asked her brother whether the parents of the deceased were in the house or not, then her brother replied that they went for jhum cultivation and thereafter the appellant went towards east i.e., towards the house of the deceased and at that time, the accused had a *dao* in his hand. She has further stated that thereafter, at about 1:30 P.M. Bishnupriya and Debarung, the younger sisters of the deceased came running to the house of Madhuchandra, which is also situated near their house and told that the deceased was vomiting blood and accordingly, they rushed to the house of the deceased and found her dead lying on the floor of her house with slit throat injury. She found her ganjee upward above breast, in both the breasts there were teeth bites and her long pants as well as panty were also found at knee level. She has also stated that there was profuse bleeding from her cut throat injury. Then she informed the father of the deceased over mobile phone about the incident and accordingly, the father of the deceased and other people arrived and thereafter, the mother of the deceased arrived. In the evening,

police came and collected blood from the floor with cotton. Her statement was recorded by a Magistrate under Section 164 of the Code of Criminal Procedure, 1973 which is exhibited as Exhibit-8 and Exhibits-8(1) and Exhibit-8(2) are her signatures. She has further stated that since on the relevant day only the accused person went towards the house of the deceased when she (deceased) was alone in her house and after sometime, she was found being killed, it is her strong belief that none but the appellant committed the incident.

24. During cross examination, she has stated that at first, Madhuchandra went to the place of occurrence and following him, she and her brother also went there. She has answered in negative to a suggestive question put to her by the learned defence counsel to the effect that the deceased was having love affair with Rashmoni. She has also answered in negative to a suggestive question that she did not tell the police that she found *ganjee* of the deceased upward above breast, and there were teeth bites on her breast and her long pant as well as panty were also found at knee level.

25. The PW-8, Jollyrung Riang, sister of the deceased, has deposed that on 14.3.2018, she along with her mother Mayabi Riang went to the house of Kananta (PW-3) for husking paddy keeping her sister 'X' (deceased) alone in the house. At that time, her father was in jhum cultivation and her other sisters Bishnupriya and Debarung went to school and on that day at about 1:30 P.M., one Dilip came to the house of Kananta and reported them that her sister 'X' was lying dead with cut throat injury and accordingly, they rushed to the house and found 'X' lying dead on the floor of the house with cut injury. She has further stated that there was profuse bleeding and her ganjee was found above the breast level, there were teeth bites at her breasts, her long pants and panties were found at knee level and she (deceased) was naked. She has

further deposed that while they were going towards the house of Kananta, they saw the accused proceeding towards hillock where they reside and thereafter, he (appellant) came to the house of Kananta where they were husking paddy and after seeing them, he (appellant) returned back towards their hillock and at the time, there was a *dao* in his hand. In the evening, police came and took the dead body and her statement was recorded by Magistrate under Section 164 of the Code of Criminal Procedure, 1973 which is exhibited as Exhibit-9 and Exhibit-9(1) is her signature. She has further stated that her maternal uncle Madhuchandra told them that he saw the accused person going towards the east of their house with a *dao* having blood stain. She stated that about one year back while she was returning from jhum cultivation alone, the accused person blocked her path to do bad act with her but she raised hue and cry and then, the people from their hillock started running towards the place and then, he left her. She further stated that before the said incident with her, the appellant also attempted to do bad act with Kantirung Riang while she was returning from shop.

26. During cross examination, she has stated that her mother arranged the dress of her sister namely the deceased, to cover her private parts. She denied the suggestion that her sister committed suicide. She has also stated that the house of Madhuchandra (PW-1) is visible from her house. She has also stated that it takes two minutes time to reach the house of Madhuchandra (PW-1) from their house. PW-1 and Pandiral are brothers and they reside in the same homestead. She has also answered in negative to a suggestive question that she did not tell the police that she found *ganjee* of the deceased upward above the breast and in both the breasts there were teeth bites and her long pants as well as panties were also found at knee level. She has also answered in negative

to few other suggestive questions put to her by learned defence counsel.

27. The PW- 9, Smt. Kantirung Riang, has deposed that she knows the appellant as he is an inhabitant of their village. On 14.3.2018 she was at Katlicherra market and at about 1:30 P.M. her brother Kirtanjay Riang informed her over mobile phone that "X" was murdered and accordingly, she went to the house of "X" and found her lying dead on the ground with cut throat injury. She has also stated that about 2 years back, one day, at about 11:00 A.M. while she was returning from the shop, suddenly, the appellant came from behind and by gagging her mouth dragged her to a nearby jungle and attempted to commit rape on her but she gave teeth bite at his (appellant) hand and raised hue and cry and then, the appellant left the place leaving her and thereafter, her father lodged a police case and in connection with the case, the appellant had to stay in jail for 3 months and after getting release from jail, he attacked the elder sister of the deceased and attempted to do bad act on her. She has further deposed that the appellant always roams around their houses with a *dao* in his hands with the intent to commit rape on Riang girls if found alone in the house. Her statement was recorded by Magistrate which is exhibited as Exhibit-10 and Exhibit-10(1) her signature.

28. During cross examination, she denied the suggestion that she has deposed falsely against the appellant as per the instructions of PW-1. She has also answered in negative to few other suggestive questions put to her by the learned defence counsel.

29. The PW-10, Mr. James Aind, Circle Officer - cum- SDM, Katlicherra, Hailakandi has deposed that on 17.03.2018, in the afternoon he along with the accused, DSP Sri N. Barman, S.I. Sabir Ali, one Cameraman and other police personnel went to village-Betcherra and at first, the appellant Jashim Uddin took

them to his house which was found under lock and key and one of his relatives unlocked the door, thereafter, the appellant showed a *dao* kept beneath a table. He also stated that the accused person told him as well as the police personnel that he (appellant) committed the murder with the said *dao*. Police seized the *dao* in his presence. The seizure list is exhibited as Exhibit-11, and Exhibit-11(1) is his signature. He has further stated that the police sealed the *dao* in the house of appellant at that relevant point of time. He also identified the *dao* in the Court vide Material Exhibit-(i). He has further stated that the shirt and *lungi* which were worn by the appellant at the time of occurrence were also seized by the police on being shown by appellant from his (appellant) house by seizure list exhibited as Exhibit-11, and Exhibit-11(1) is his signature. He exhibited the shirt and lungi in the Court as Material Exhibit-(iv). He has further stated that thereafter, the appellant took them to the house of the deceased, i.e., the place of occurrence and demonstrated how he committed the incident, and the appellant even showed them the path through which he left the place of occurrence after committing the incident. He has further stated that the appellant left the place of occurrence through a back side path of the house of victim. The appellant led them to the path by which he left the place of occurrence and after going a little distance there is a *nala* (drain having water) and near the said *nala,* there was a big stone and they found blood stain on the said stone, the appellant told them that he (appellant) washed the *dao* in the said *nala* after the incident. Police collected blood from the said stone with cotton. The seizure list is exhibited as Exhibit-12, and Exhibit-12 (1) is his signature.

30. During cross examination, he has stated that he entered into the room of appellant along with the police and the appellant and in the said room the

dao was found being kept beneath a table. He has also stated that at that time there was no bloodstain on the *dao,* nor there was any bloodstain on the lungi and the shirt as same were already washed. He has further stated that there was no clear-cut path in the back side of the house of the deceased and they went through the said path with struggle on being led by the appellant. He has also answered in negative to few other suggestive questions put to him by learned defence counsel.

31. The PW-11, Abdul Khalique Laskar has deposed that after about 2 days after the incident when he was at village-Betcherra, he saw the In-charge, Jamira Outpost, along with the appellant and other police personnel, many public and one Magistrate were proceeding towards the place of occurrence and after sometime, he also went there. He has further stated that on his arrival, he found them in the house of victim and thereafter, the appellant led police personnel as well as others including him to a *nala (stream)* to the eastern side of the house of the deceased. On the bank of the *nala*, the appellant told them that after committing the incident, at first, he (appellant) kept the *dao* on a big stone and tried to wipe the blood. The appellant showed the stone to them as well as to police. They saw some blood stain on the said stone. Police collected blood with cotton from the said stone. The seizure list is exhibited as Exhibit-12, and Exhibit-12(2) is his signature. He identified the said cotton in the Court whereby the blood was collected from the stone. He has further stated that one cameraman was present who captured the entire event in his camera.

32. During cross examination, he has stated that SI Sabir Ali and other police personnel along with CRPF personnel were present at the relevant time. He has also stated that he cannot say if the police compelled the appellant to say the entire event. He cannot say whether the blood which was found on the

stone was of human or not.

33. The PW-12, Sri Arup Sen who is a cameraman, has deposed that on being asked by police, one day, in the month of March, 2018 he went to village-Betcherra carrying his camera along with Executive Magistrate James Aind, police personnel, some public and the appellant. At first, the appellant took them to his house. The appellant entered into his house and took out a *dao* from beneath the table in his room. The appellant told police in his presence that he (appellant) killed the deceased 'X' with the said dao. The appellant also took out the shirt and lungi and told them that when he killed the deceased, he was wearing the said shirt and lungi. The police seized the *dao* and wearing apparels. He has also stated that thereafter, the appellant took police to the house of deceased, and in his presence, the appellant narrated the entire incident as well as the way as to how he killed the deceased "X". He has further stated that thereafter, the accused person took police towards the backside of the house of victim and told them that after committing the said incident, he had left the place of occurrence through the said path. Thereafter, the appellant took the police to some distance to the plain area and showed a big stone and told that after the occurrence, he (accused) tried to wipe blood from the *dao* on the said stone. He saw blood stain on the said stone. The appellant also told them that thereafter, he washed the *dao* in a drain and showed the said drain to them. He captured the entire event in his camera. He handed over the memory card to the Investigating Officer, Sabir Ali who seized the same which is exhibited as Exhibit-13 and Exhibit-13(1) is his signature. He exhibited the memory card as Material Exhibit-(vi) in the Court.

34. During cross examination, he had stated that the police took him from Hailakandi Police Station and at that time, the appellant was in the lockup of

Hailakandi Police Station. From the house of appellant which was locked, the *dao* was recovered by police on being shown by the appellant and the *dao* was found beneath the table at the lower rack. He has also stated that he did not see any bloodstains on the *dao*, lungi or the shirt that were seized from the house of the accused.

35. The PW-13, Sri Pannalal Das, Constable UBC No. 45 of Jamira Police Patrol Post has deposed that on 14.03.2018, at about 4:00 PM, the In-charge, Sabir Ali, Jamira Out Post received a phone call that a murder took place at village Betcherra. Thereafter, In-charge along with him and battalion staff went to a hillock in village Betcherra and found 'X' lying dead on the ground with a cut throat injury in a pool of blood. In his presence, the S.I., Sabir Ali collected blood with cotton. The seizure list is exhibited as Exhibit-2 and Exhibit-2(4) is his signature. He identified the said cotton in the Court which is exhibited as Material Exhibit-(iii).

36. During cross examination, he has stated that he cannot say whether the In-charge made any GD entry or not before starting for the place of occurrence. He put his signature on the seizure list on the relevant night at about 8:30 P.M. at the place of occurrence.

37. The PW-14, Sri Ripon Kumar Das, Constable No. 407 of Jamira Police Patrol Post has deposed that in connection with the murder of 'X', the accused person was interrogated and he (appellant) narrated the entire incident and accordingly, on 17.03.2018, the In-charge Sabir Ali, DSP HQ, Executive Magistrate, he himself, CRPF Personnel and others went to village- Betcherra along with the appellant. At first, the appellant took them to his (appellant) house where one of the rooms was found locked, which was unlocked by his (appellant) family members. The appellant led them inside the room and

showed a *dao* kept beneath a table in his room. The appellant told them that he killed the deceased with the said *dao*. The appellant also showed a lungi and a shirt that he was wearing during the incident. He has further stated that the In-charge, Sabir Ali, seized the *dao* and wearing apparels in his presence. The seizure list is exhibited as Exhibit-11 and Exhibit-11(2) is his signature. He further identified the same in the Court which is exhibited as Material Exhibits-(i) & (iv) respectively. He also stated that there was a cameraman with them who captured the entire event of leading to the discovery and seizure of *dao* etc. on his camera. He has further stated that the appellant took them to the house of the victim and narrated the entire incident as to how he killed the victim. Thereafter, the appellant took them to the backside path of the house of victim through which he left the place of occurrence after committing the incident. Through the said path, after reaching the plain area, the appellant showed them a stone and they found blood stain on the said stone. The In-charge collected blood from the said stone with cotton in his presence and seized it after preparing the seizure list which is exhibited as Exhibit-12, and Exhibit-12(3) is his signature. He identified the cotton in the court which is exhibited as Material Exhibit (v). He further stated that thereafter, the accused person showed a *nala* and told them that after committing the crime, he washed the *dao* in the said *nala*.

38. During cross examination, he stated that the *dao* was found in the room of the appellant under a table. The *dao* was packed and sealed in the house of appellant. He did not see any blood stain on the *dao*.

39. The PW-15, Sri Jagdish Das, Additional S.P., Hailakandi has deposed that on 14.03.2018 in the late evening, he was informed by the O/C, Ramnathpur P.S. and I/C, Jamira Police Patrol Post to the effect that the

appellant committed rape and murder of 'X' and then he immediately instructed the DSP, Hailakandi, O/C, Ramnathpur P.S. and I/C, Jamira Police Patrol Post to move to the place of occurrence and accordingly, they went there and took the dead body to the Civil Hospital, Hailakandi. On the next day, he visited the place of occurrence and found many people gathered in and around there. They told him that the appellant had done such type of heinous activities earlier also. He asked the local people to find out the appellant. He also visited the house of accused but did not find him there. Thereafter, he left the place. After sometime, one Abul informed him over telephone that they had nabbed the appellant, then he returned back to the place and the local public handed over the appellant to him. Then he took the appellant to the police station at Hailakandi and the interrogated him. He also stated that during the interrogation, the appellant confessed before him that he attempted to commit rape on the victim 'X' and thereafter, he killed her. During the interrogation, the appellant also stated that the *dao* by which he killed her, was kept by him in his house beneath a table. He has further stated that on 17.03.2018, the DSP Sri Nayanmoni Barman, Executive Magistrate James Aind, Investigating Officer Sabir Ali, one Cameraman namely Arup Sen and other police personnel, on being led by the appellant, went to the house of the appellant and recovered the dao from his house on being shown by the appellant. The entire event was captured in the camera. The *dao* was then sealed immediately in the house of appellant. He has further stated that they sent the *dao* and a sample of blood to the FSL and the FSL report came back positive. He has further stated that the panty of the deceased was also sent to the FSL and the report came positive of the same having semen.

40. During cross examination, he stated that before his visit to the place of

occurrence the dead body was shifted to Hailakandi. He also stated that he did not find anything to hold that the deceased was suffering from any mental or physical illness. He has also answered in negative to few other suggestive questions put to him by the learned defence counsel. He has also stated that he being Senior Officer supervised the entire Investigation.

41. The PW-16, Sri Nayanmoni Barman, DSP (HQ), Hailakandi has deposed that on the relevant day i.e. on 14.03.2018 in the evening, the S.P., Hailakandi informed him that a murder took place at village-Betcherra under Jamira Police Patrol Post and instructed him to proceed there. Accordingly, he along with his PSOs went to a hillock of village-Betcherra and found 'X' lying dead on the floor of her house in a pool of blood with cut throat injury. He found the dress of the deceased in disorderly condition. It was dark. He instructed the Investigating Officer Sabir Ali to collect blood sample of the deceased, accordingly, the blood sample was collected with cotton. Thereafter, in consultation with his Superior Officers, he shifted the dead body to the Civil Hospital, Hailakandi. On the next day, an inquest and post mortem were conducted. On 15.03.2018 he received information that the villagers nabbed the appellant and had handed over him to the Additional S.P., Hailakandi. Thereafter, the appellant was brought into the custody of Hailakandi Police Station under his supervision as well as his seniors. He has further stated that during interrogation, the appellant confessed that he committed the murder and after commission of the crime, he washed the *dao* and kept it in his house beneath a table. He has further stated that the, Executive Magistrate Sri James Aind and cameraman Arup Sen, along with other police personnel and public on being led by the accused person went to the house of appellant which was found locked, his family members brought the key and unlocked the door. Thereafter, the appellant showed the *dao* kept under a

table. He has further stated that the Investigating Officer had seized the *dao* in the presence of witnesses and sealed it there. On being shown by the appellant, they also found a shirt and lungi which the appellant wore at the time of commission of the murder, which were also seized by the I.O. He identified the *dao* and the wearing apparels in the court which are exhibited as Material Exhibit (i) & (iv). He has further deposed that the appellant showed them the pose as to how he committed the incident. The appellant took them to the place of occurrence and told them that he wanted to rape the victim and then he killed her with the *dao*. Thereafter, the appellant took them towards a path to the right side of the house of deceased and after reaching plain area, the appellant showed them a big stone where he wanted to wipe blood from his *dao* and they found blood stain on the said stone. They collected blood sample from the said stone with cotton and seized it and prepared the seizure list which is exhibited as Exhibit-12, and identified the seized cotton in the Court which is exhibited as Material Exhibit (v). The appellant also told them that thereafter, he (accused) washed the *dao* in a *nala* (stream) and showed them the drain. He has further stated that the entire event of recovery of the *dao* has been captured in the camera.

42. During cross examination, he has stated that initial supervision of investigation was done by him. He denied the suggestion that by putting the accused under pressure or threat, they made the appellant to make such confessional statement leading to discovery. He has also stated that the appellant was interrogated in the lockup of Hailakandi Police Station. He has also answered in negative to few other suggestive questions put to him by the learned defence counsel.

43. The PW-17, Dr. R.B. Malakar and PW-18, Dr. Abdul Hussain Barbhuiya

have deposed that on 15.03.2018 in reference to the Ramnathpur P.S. Case No. 47/2018 they along with another Doctor namely, Dr. G.B. Deori as a team conducted post mortem on the dead body of 'X' aged about 15 years and found her wearing a red coloured *jangia (panty)*, black leggings, deep violet inner and blackish top outer side. The whole body was paled and upper limbs, upper part of the chest, back, and neck were blood stained and dry. During examination, they found injuries: (i) one oblique cut throat Injury of size 13cm x 3cm x 3.5cm, (ii) ecchymosis over both hands, moreover, on the right hand and palmer aspects and (iii) labia and majora both are swollen up and vagina was found wide open, internal congested. In their opinion, the cause of death was due to irreversible hemorrhagic shock and also due to the stoppage of respiration and was caused by sharp hard object. Exhibit-15 is the post mortem report. They have further stated that after post mortem, a red colour panty was seized by the police in their presence which was worn by the deceased immediately before post mortem. The seizure list is exhibited as Exhibit-14, and they put their signatures thereon as seizure witnesses.

44. During cross examination, they have stated that they did not find any injury in the breast. The cut injury as found by them at the neck of the deceased can be caused by the Material Exhibit-(i), *dao*. The report of vaginal swab examination discloses no spermatozoa. In the post mortem report, according to PW-17, the nature of death is not mentioned.

45. The PW-19, S.I. Sabir Ali, who is the Investigating Officer of the case has deposed that on 14.03.2018 while he was posted as In-charge, Jamira Police Patrol Post, at about 3:30 PM, he received a phone call from one Abul Hussain Mazumder of village- Betcherra to the effect that one Riang girl namely 'X' was murdered at her residence, accordingly, he conveyed the information to

his superior officers and he was instructed to proceed to the place of occurrence. Then, he made G.D. Entry No. 347 dated 14.03.2018 and went to the place of occurrence. In the meantime, he communicated with the Executive Magistrate Sri James Aind for conducting inquest on the dead body but due to darkness, he advised to send the dead body to the Civil Hospital, Hailakandi. In the place of occurrence, inside the house, the dead body of 'X' was found lying on the floor in pool of blood with cut throat injury. The photographs of the dead body were taken by his mobile and Exhibit Nos. 3 to 6 are the said photographs. The DSP, Hailakandi, Sri. N. Barman also reached the place of occurrence in the meantime, his source disclosed the name of the appellant as the culprit, then he sent his source to the house of the appellant but did not find him there. He also deposed that in the presence of witnesses he collected a blood sample of the deceased with cotton and seized the same and prepared a seizure list which is exhibited as Exhibit-2. He identified the cotton in the Court vide Material Exhibit (iii). He further stated that the place of occurrence is on the top of the hillock and there are houses of 4 Riang families. He remained in constant touch with the source but the appellant was not found in his house. He asked the local people to inform him about his whereabouts as soon as possible. He has further stated that thereafter, he reached to the Civil Hospital, Hailakandi and found inquest was started in the Morgue of Civil Hospital by the Executive Magistrate, Sri D. Chakraborty. Exhibit-19 is the inquest report and Exhibit-19(1) is his signature as a witness to the inquest. He has further deposed that after post mortem examination, he examined the team of doctors and seized a red colour panty in presence of doctors which was worn by the deceased at the time of occurrence which is exhibited as Exhibit-14 and Exhibit-14(4) is his signature. He identified the panty in the Court which was exhibited as Material Exhibit (ii).

He has further stated that in the meantime, he received information that local people nabbed the appellant and handed him over to the Additional S.P., Hailakandi, Sri Jagdish Das, who brought the appellant to Hailakandi Police Station. He has further stated that at Hailakandi Police Station, the appellant was thoroughly interrogated and the appellant confessed that he has committed the incident. The appellant also told him that after committing the incident, he left the place of occurrence through the backside path of the house of the deceased and washed his *dao* in a stream by which he killed the deceased and thereafter, he went to his house and kept the *dao* beneath a table of his house. He recorded the statement of the appellant under Section 161 of Code of Criminal Procedure, 1973 which is exhibited as Exhibit-20 and Exhibit-20(1) is his signature. He has further stated that during interrogation, the accused person told him that he (appellant) would lead them to the place where he had kept the *dao* and accordingly, on 17.03.2018 he along with DSP Sri N. Barman, Executive Magistrate Sri James Aind, one videographer Sri Arup Sen and other police personnel went to the house of appellant at village-Betcherra on being led by him (accused) and found his room was locked. His family members took out the key and unlocked the room. After entering into the room, the appellant showed them the *dao* kept beneath a table by which he committed the murder. The appellant also showed them one shirt and lungi which he (appellant) wore at the time of occurrence. He seized the *dao,* lungi and shirt and prepared the seizure list which is exhibited as Exhibit-11, and Exhibit-11(3) is his signature. He sealed the *dao* in the house of accused itself in presence of witnesses. He exhibited the *dao* in the Court as Material Exhibit-(i) and the box containing lungi and shirt as Material Exhibit-(iv). He has further stated that thereafter, the appellant took them to the place of occurrence and demonstrated the way how

he committed the incident in the house of the victim. Thereafter, the appellant led them towards the backside of the house of victim through which he left the place of occurrence after the incident. After going to the downwards, the appellant showed them a big stone where he tried to wipe the blood from his *dao* and they found blood stain on the said stone. Accordingly, he collected the sample of blood from the stone with a blade and then took it in cotton and he seized the cotton vide Ext.-12 and Ext.-12(4) is his signature. He exhibited the said cotton in the court as Material Exhibit-(v). The appellant also told them that thereafter, he washed the dao in a nearby stream and he led them to the stream. He has further stated that the entire event of recovery has been captured in the camera by the cameraman. He seized the memory card from the cameraman and prepared the seizure list which is exhibited as Exhibit-13, and Exhibit-13(2) is his signature. He identified the memory card in the court which is exhibited as Material Exhibit-(vi). He has further deposed that thereafter, the sealed samples and *dao* were sent to the FSL, Guwahati and thereafter, he received the FSL report. He has further stated that the witness Kanti Rung Riang was also sexually victimized by the appellant and the case is pending trial in the Court of learned Judicial Magistrate 1stClass, Hailakandi, i.e., G. R. Case No. 2350/2016. He has further stated that after completion of investigation, he submitted charge sheet against the appellant under Section 376/302/201 of the Indian Penal Code.

46. During cross examination, PW-19 has stated that apart from the dead body and blood, he did not find any other mark of violence inside the house of the deceased. He informed the Executive Magistrate, Mr. James Aind over phone. In the night itself, the dead body was shifted to S.K. Roy Civil Hospital, Hailakandi and he did not come to the Civil Hospital, Hailakandi on that night.

He seized the panty of the deceased at 12:15 P.M. in the morgue of the Civil Hospital, after the post mortem examination. He examined the appellant and also had him medically examined but no injury was found on his person. The path runs from the west to east. He has also stated that there is a very small passage inside the fence between the house of Madhuchandra Riang and the house of the deceased that proceeds towards jungle. The last residence of the path is the residence of deceased. He found blood stain outside the house of the deceased. He denied the suggestion that they compelled the appellant to confess guilt by applying force upon him. He has also stated that the appellant is a married person and his wife was not present at the time of recovery. He has also stated that though there was blood stain in the *dao* but it was not visible with naked eye and as such, he sent the *dao* to the FSL for analysis and the FSL report came positive of having the presence of human blood in the *dao*. He cannot say under what section/sections of law, the G.R. Case No. 2350/2016 was charge sheeted. He has also stated that Kanti Rung Riang who is the relative of Madhuchandra Riang (PW-1) did not state before him that there were teeth bites on the breasts of the deceased. The PW-1 also did not state before him that the panty of the deceased was found in the lower part of the leg. He has also stated that the PW-3, Kananta Riang did not state before him that the mother of the deceased arranged her clothes in order which was found scattered. The PW-3 also did not state before him that it is his strong belief that it is the appellant, who committed the incident. The PW-3 also did not state before him that he saw the appellant in the early hour going towards the east with a *dao* in his hand. He has also stated that the PW-5, Sarjay Riang did not state before him that the clothes of the deceased was found upward and there were teeth bites in both the breasts and her panty was found removed

downwards at knee level. He has also stated that the PW-6, Dilip Kumar Riang did not state before Magistrate that the upper clothes of the deceased were found upward above chest level and panty as well as lower clothes were found at knee level. The PW-7, Anjali Riang did not state before him as well as before Magistrate that they found her *ganjee* upward above breast and in both the breasts, there were teeth bites and her long pant as well as panties of red colour were found at knee level. The PW-7 also did not state before him and the Magistrate that the appellant asked her brother about the parents of the deceased. The PW-8 Jolly Rung Riang did not state before Magistrate that her mother got the dress of her sister viz. the deceased in order, for covering her private parts. The PW-8 also did not state before him as well as before Magistrate that they found her *ganjee* was above the breast level and there were teeth bites on her breasts and her long pants and panty were found at knee level and she was naked. The PW-9, Kanti Rung Riang did not state before Magistrate that the appellant attempted to do bad acts with Jolly Rung Riang also. The PW-9 also did not state before the Magistrate that the appellant always roams around their houses to see whether any Riang girl alone in the house for the purpose of committing rape. The PW-15, Jagadish Das did not state before him that he visited the house of the appellant.

47. The PW. 20, Sri Dhrubajyoti Chakraborty, Executive Magistrate, Hailakandi has deposed that on 15.03.2018 at 10:45 AM, he conducted an inquest on the dead body of the deceased, who was aged about 13 years in the Civil Hospital, Hailakandi and found an injury mark on her right hand, her lower part of the vagina was found swollen and open, there was scratch mark/bruises on her back and her neck was half cut in the front side and he opined that the cause of dead appears to be by bleeding consequent to deep cut throat. The

probability of rape may not also be ruled out. However, he has further stated that the real cause of death has to be ascertained after conducting post mortem examination. He has further stated that he conducted the inquest in the presence of Muktajoy Riang, Binanjoy Riang, Kananta Riang and S.I. Sabir Ali. Ext.-19(2) is his signature on the Ext.-19, inquest report.

48. The PW. 21, Smt. Renu Borah Handique, Scientific Officer of FSL, Guwahati has deposed that on 23.03.2018 she received a seal parcel from the Director of FSL. In connection with Ramnathpur P.S. Case No. 47/2018 for examination and on the same day, she opened the parcel and found suspected blood like substance obtained in a piece of cotton marked as Sero-3951/A, one bamboo handle *dao* contains a stain of suspected blood marked as Sero-3951/B, one multi-colour full sleeve shirt contains stain of suspected blood marked as Sero-3951/C, one multi-colour lungi contains stain of suspected blood marked as Sero-3951/D, suspected blood stain absorbed in cotton marked as Sero-3951/E and one maroon colour panty contains stain of suspected semen marked as Sero-3951/F. She examined the above mentioned articles and found Ext. No. Sero-3951/A i.e. the suspected blood like substance obtained in a piece of cotton and Ext. No. Sero-3951/B i.e. the stain contains in the *dao* gave a positive test for human blood. She has further stated that on examination, the Ext. No. Sero-3951/F i.e., the stain contains in the maroon colour panty gave positive test for human semen (spermatozoa). Ext.-23 is the report given by her and Ext.-23(1) is her signature. She has further stated that the Junior Scientific Officer, Sri Arup Manta received the above mentioned 6 numbers of items for the DNA test, but DNA yield from the exhibits was not of a good quality and therefore, he could not compare the same.

49. During cross examination, she has stated that she is working as

Scientific Officer at FSL, since 24 years. The report submitted by her which is exhibited as Exhibit-23 is confirmative. She proposed DNA test for further confirmation. She has also stated that she could not detect the perpetrator of the crime from Exhibit-23 and Exhibit-24.

50. During his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has denied the truthfulness of the evidence adduced by the prosecution witnesses. In answer to question No. 41 posed to him, he has stated that the police assaulted him in the lock up and that his house was locked and it was his mother who had unlocked the door of the house, and police seized a *dao* from his house. However, he had stated that he did not commit any offence. He also stated in answer to question No. 71, that police assaulted him and compelled him to confess. He has pleaded his innocence. He has also stated that he had land dispute with the father of the deceased, one Kananta, Madhuchandra and other young people regarding 40 bighas of land over which he had palm cultivation and many fruit bearing trees. He has stated that in order to grab the said land, the Riang people have entangled him in the false case and that he is in fact innocent. However, the appellant declined to adduce any evidence in his defense.

51. Mr. A. I. Uddin, learned counsel for the appellant has submitted that the prosecution side has failed to prove its case beyond all reasonable doubt. He has submitted that the prosecution case is full of doubt and conviction cannot be sustained on the basis of insufficient evidence which is available on record. The learned counsel for the appellant has also submitted that the prosecution case is based entirely on circumstantial evidence and there are several missing links in the chain of circumstances which do not lead to the only inference that the appellant is guilty of the offence with which he is charged. He has submitted

that the circumstances do not point towards the guilt of the appellant only and there are gaps in between the circumstances and the appellant is to be given benefits of such gaps or doubt which the prosecution side has not been able to fill up by adducing credible evidence.

52. In support of his submission, learned counsel for the appellant has cited a ruling of this court in the Apex Court of India in "***Sharad Birdhi Chand Sarda v. State of Maharashtra"*** reported in ***(1984) 4 SCC 116,*** wherein it was observed as follows:

> "***153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:***
>
> ***(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 [(1973) 2 SCC 793: 1973 SCC (Cri) 1033: 1973 Crl LJ 1783] where the 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.

53. The learned counsel for the appellant has submitted that only PW-1 has deposed that he saw the appellant was proceeding towards the east of the house of the deceased with a blood-stained *dao* in his hand. It is submitted by learned counsel for the appellant that the PW-1 stated that he saw the appellant with blood-stained dao from a distance of 20 *nals,* i.e., 240 feet and it is quite unnatural for a person to see blood stains on a *dao* from such a distance with naked eyes and the trial court had erred in relying on said piece of evidence as it ought to have been rejected as unnatural and unbelievable.

54. Learned counsel for the appellant has also submitted that from the testimony of PW-1, it appears that when he was working on the roof of his house for repairing works, his cousin Brojendra was also there with him. However, the prosecution side has not examined said Brojendra who could have corroborated the testimony of PW-1,if he had spoken the truth. It is submitted that by withholding the evidence of said Brojendra, the prosecution side has

only fortified the doubts that PW-1 was not stating the truth when he stated that he saw blood-stained *dao* from a distance of 240 feet from the rooftop of his house.

55. Learned counsel for the appellant has also submitted that the prosecution side has failed to examine vital witnesses and no reason has been cited for non-examination of such witnesses. It is submitted by learned counsel for the appellant that apart from Brojendra, one Abul Hasan who had informed regarding the incident to the police and also regarding nabbing of the appellant by the local people to the police has not been examined by the prosecution side as a witness. It is also submitted that the scribe of the written FIR filed by the PW-1 was also not examined as a witness for the prosecution. It is also submitted that the mother of the deceased who is said to have arranged the dress of the deceased in order, and the two sisters of the deceased who were the first to arrive at the place of occurrence after the alleged incident were also not been examined by the prosecution side.

56. It is submitted by learned counsel for the appellant that the non-examination of the above-mentioned witnesses would only lead to the inference that if they would have produced the said witnesses, it would have been unfavorable to the prosecution case and therefore, the prosecution had withheld the examination of aforesaid witnesses. It is submitted that from such non-examination an adverse inference should be drawn against the prosecution case and benefit should be given to the appellant. To fortify his submission, learned counsel for the appellant has also cited a ruling of the Apex Court in the case of "***Gargi Vs. State of Haryana"*** reported in ***(2019) 9 SCC 738*** and in the case of "***Pratap Singh and Another Vs. State of Madhya Pradesh"*** reported in ***(2005) 13 SCC 624***.

57. As regards the discovery of fact under Section 27 of the Indian Evidence Act, learned counsel for the appellant has submitted that the portion of the statement where the appellant has confessed to his guilt is inadmissible in evidence as said confession was made by the appellant in custody of the police and the appellant is protected under Section 24 and 25 of the Indian Evidence Act. It is also submitted by the learned counsel for the appellant that as the confession was not made in the immediate presence of any Judicial Magistrate, said confession may not be proved against the present appellant. To fortify his submission, learned counsel for the appellant has also cited a ruling of this court in the case of "***Karthik Chakraborty Vs. State of Assam"*** reported in ***2017 5 GLT1 (FB 144)*** wherein it was observed that the expression "Magistrate" appearing in Section 26 of the Evidence Act would mean only a Judicial Magistrate and not an Executive Magistrate.

58. It is submitted by learned counsel for the appellant that while answering to the questions posed by trial court to the appellant during his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has categorically stated that he was subjected to torture by the police in the lock-up and was compelled to make confessional statements and therefore, the said confession is inadmissible and the trial court could not have regarded the said confession as one of the incriminating circumstances while coming to the conclusion of guilt of the present appellant. To fortify his submission, learned counsel for the appellant has also cited a ruling of the Apex Court in the case of "***The State of Bombay vs Kathi Kalu Oghad and Others"*** reported in ***AIR 1961 SC 1808*** wherein it was observed that if compulsion had been used in obtaining the information under section 27 of the Indian Evidence Act, same may not be used against the giver of such information.

59. Learned counsel for the appellant has submitted that mere finding of human blood on the *dao* which was recovered during the course of investigation would not lead to the inference that the said *dao* has been used for commission of the alleged offence by the appellant in this case. It has also been submitted that the prosecution side has miserably failed to establish that the *dao* which was recovered by the investigating officer during the course of investigation was used for commission of the offence in this case as the blood stain found on the *dao* which was recovered was not cross-matched with the blood of the deceased to establish the fact that the said *dao* was used for commission of the offence. To fortify his submission learned counsel for the appellant has also cited a ruling of the Apex Court of India in the case of "***Kansa Behera Vs. State of Orissa"*** reported in (***1987) 3 SCC 480.***

60. Learned counsel for the appellant has also submitted that the oral evidence of the witnesses is contradictory to the medical evidence which is brought on record on the point of injury found on the deceased. It is submitted by the learned counsel for the appellant that though most of the prosecution witnesses have deposed that they have seen the marks of teeth bite injury on the breast of the deceased. However, neither in the inquest report nor in the post-mortem report any such mark of teeth bite was found on the breast of the deceased. It is submitted by learned counsel for the appellant that the testimony of the prosecution witnesses to the effect that they have seen the teeth bite injury on the breast of the deceased may not be relied upon as it is contradictory to the medical evidence on record and there is no reason why the doctor who conducted the post-mortem examination would not find any such teeth bite marks on the breast of the deceased, if it were actually there. It is further submitted that the inquest of the deceased was not conducted at the

place of occurrence where the dead body was found and therefore, the inquest report which is exhibited as Exhibit-19 is not reliable in this case and ought not to have been relied upon by the trial court.

61. Learned counsel for the appellant has also submitted that even before lodging of the formal FIR which was exhibited as Exhibit-1, the police was informed about the incident by telephonic information given by Abul Hussain and the FIR which has been exhibited as Exhibit-1 was registered after a delay of 7 hours which was not explained by any of the witnesses. It is submitted by learned counsel for the appellant that non-registration of FIR on the basis of telephonic information and registration of the same on the basis of delayed FIR itself leads to an inference that in the delayed FIR embellishments were made and it was an afterthought, and therefore, it ought not to have been relied upon by the trial court. It is also submitted by learned counsel for the appellant that though the FIR does not mention any date or time of forwarding of the same to the Magistrate, however, in the order dated 16.03.2018 passed by learned Magistrate, it appears that the FIR was placed before the learned Magistrate on 14.03.2018 at 8.00PM and therefore, it is submitted that the said FIR ought not to have been relied upon by the trial court in coming to the finding of the guilt of the present appellant.

62. Emphasizing the importance of the prompt lodging of FIR, learned counsel for the appellant has also cited a ruling of the Apex Court in the case of "***Meharaj Singh versus State of Uttar Pradesh"*** reported in ***(1994) 5 SCC 188*** wherein it was observed as follows:

> "***12. FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial.***

The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 CrPC, is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still

in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by PW 8."

63. Learned counsel for the appellant has also cited a ruling of the Apex Court in the case of "***Sudarshan and Another Vs. State of Maharashtra"*** reported in ***(2014) 12 SCC 312*** wherein it was observed as follows:

"***15. ..... The necessity of sending the copy of the FIR to the Magistrate concerned hardly needs to be emphasised. The primary purpose is to ensure that truthful version is recorded in the FIR and there is no manipulation or interpolation therein afterwards. For this reason, this statutory requirement is provided under Section 157 of the Code of Criminal Procedure, 1973".***

64. It is also submitted by learned counsel for the appellant that though Section 114B of the Evidence Act provides for the presumption which may be drawn by the Court as regards the consent in a case of rape, however, in the instant case, the trial court took recourse to presumption as regards the commission of rape itself when there was no credible evidence on record to suggest that the appellant had committed rape on the deceased. It is further submitted by learned counsel for the appellant that though the forensic examination of the stain found on the panty of the deceased shows that the

said stains were of human semen, however, there is no evidence on record to suggest that said semen was of the present appellant as no cross matching of the stains of semen which were found on the panty of the deceased was done with the semen of the present appellant which could have been easily done by the Investigating Officer.

65. Learned counsel for the appellant has also submitted that the trial court had erred in taking into consideration the previous bad character of the appellant as one of the incriminating circumstances in coming to the conclusion of guilt of the present appellant in the case. It is submitted that though there is evidence on record by the prosecution witnesses that the present appellant had attempted to outrage the modesty of the PW-8 and PW-9 on earlier occasions, however, said bad character, according to learned counsel for the appellant, is inadmissible in the present case, pending against the appellant, in view of the embargo provided in Section 54 of the Indian Evidence Act.

66. It is also submitted by learned counsel for the appellant that in a criminal case the prosecution side has to prove its case beyond all reasonable doubt and without doing so it cannot rest its case wholly on the provisions contained in Section 102 and 106 of the Indian Evidence Act as before applying Section 106 of the Indian Evidence Act the prosecution side must prove certain foundational fact and only then the onus shifts to the accused under Section 106 of the Indian Evidence Act. Learned counsel for the appellant has also cited a ruling of the Apex Court of India in the case of "***Paramjeet Singh @ Pamma versus State of Uttarakhand"*** reported in ***(2010) 10 SCC 439*** wherein it was observed as follows:

> "***10. A criminal trial is not a fairy tale wherein one is free to give flight to one's imagination and fantasy. Crime is***

an event in real life and is the product of an interplay between different human emotions. In arriving at a conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case, in the final analysis, would have to depend upon its own facts. The court must bear in mind that "human nature is too willing, when faced with brutal crimes, to spin stories out of strong suspicions". Though an offence may be gruesome and revolt the human conscience, an accused can be convicted only on legal evidence and not on surmises and conjecture. The law does not permit the court to punish the accused on the basis of a moral conviction or suspicion alone. "The burden of proof in a criminal trial never shifts and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence." In fact, it is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. The fact that the offence was committed in a very cruel and revolting manner may in itself be a reason for scrutinising the evidence more closely, lest the shocking nature of the crime induces an instinctive reaction against dispassionate judicial scrutiny of the facts and law. "

67. Learned counsel for the appellant has also submitted that under the facts and circumstances of this case the provision of section 106 of the Indian Evidence Act is not applicable to this case. To fortify his submission, he has cited a ruling of the

Apex Court in the case of "***P. Mani Vs. State of Tamil Nadu"*** reported in ***(2006) 3 SCC 161***.

68. Learned counsel for the appellant has submitted that though the appellant has also been convicted under Section 4 of the POCSO Act, 2012, which deals with penetrative sexual assault, however there is no evidence of any penetration by the present appellant and other ingredients of Section 4 of the POCSO Act, 2012, as well as Section 376 of the Indian Penal Code. It is submitted by the learned counsel for the appellant that merely finding stains of semen on the panty of the deceased in the forensic examination would not implicate the present appellant unless the semen found on the panty of the deceased is cross-matched with the semen of the present appellant so as to ascertain that as to whether the semen found on the panties of the deceased were of the present appellant or not. Further, it is submitted by the learned counsel for the appellant that no evidence of recent sexual assault was found on the dead body of the deceased and no spermatozoa were found inside the vagina of the deceased on medical examination which only leads to the inference that she was not subject to penetrative sexual assault before her death.

69. Learned counsel for the appellant has also submitted that the prosecution side has not examined the Magistrate who recorded the statements of the witnesses under Section 164 of the Code of Criminal Procedure, 1973 hence such statements are not admissible in evidence and to fortify his submission he has cited a ruling of the Apex Court of India in the case of "***Malay Kumar Ganguly versus Dr. Sukumar Mukherjee and Others"*** reported in ***(2009) 9 SCC 221*** wherein it was observed as follows:

"***37. It is true that ordinarily if a party to an action does***

not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is, however, trite that a document becomes inadmissible in evidence unless the author thereof is examined; the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a court of law. The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken.

70. Learned counsel for the appellant has submitted that during medical examination of the appellant, no injury was found on his male organ. It is also submitted that, no conclusive evidence regarding commission of offence under section 376 of the Indian Penal Code or under section 4 of the POCSO Act, 2012 has been adduced in this case. Learned counsel for the appellant has also cited a ruling of the Supreme Court of India in the case of "***State of Gujarat Vs. Ratan Singh @Chinubhai Anup Singh Chauhan"*** to fortify his submission.

71. Learned counsel for the appellant has also submitted that the prosecution witnesses have made improvement and exaggerations on material particulars from the version which they gave before the investigating officer when their statements were recorded under section 161 of the Code of Criminal Procedure, 1973, therefore, their testimonies are not reliable. Learned counsel for the appellant has also cited a ruling of this court in the in the case of "***Sabir Hussain Borbhuia and others versus State of Assam"*** reported in ***2018 1 GLT 726*** to fortify his submission.

72. On the other hand, Ms. S. Jahan, learned Additional Public Prosecutor

has submitted that in this case, the circumstances from which the conclusion of guilt of the present appellant has been drawn are fully established and from the proved circumstances, no other hypothesis except the guilt of the accused is established in this case.

73. She has submitted that from the evidence of PW-4, who is the father of the victim, as well as PW-8, who is the sister of the victim, it becomes clear that when the alleged offence occurred, the victim was alone in her house and the appellant took advantage of that and committed the gruesome act against the helpless victim. She also submitted that the conduct of the appellant prior to the occurrence of the incident is also relevant, as from the testimony of PW-6, i.e., Shri Dilip Kumar Riyang, it appears that the appellant had come in his house before the incident with a *dao* in his hand and had asked about the parents of the victim.

74. Learned Additional Public Prosecutor has also submitted that the PW-3 stated that on the date of incident at about 10.30 a.m. to 11.00 AM, while returning from her maternal uncle's house, she saw the appellant going towards the east, i.e., towards the house of the victim with a *dao* in his hand. PW-6 has also submitted that the appellant at about 11.30 a.m. came to his house and asked for a glass of water and when he gave him the water, the appellant asked him about the parents of the victim and when PW-6 replied him that they have gone out for jhum cultivation, the appellant proceeded towards the house of the victim. Learned Additional Public Prosecutor has also submitted that PW-7, Anjali Riyang, who is the sister of PW-6, had also stated that she also saw that the appellant heading towards the east to the house of the victim with a machete *(dao)* in his hand.

75. Learned Additional Public Prosecutor has also submitted that PW-8, who

is the sister of the victim has also stated that when she and her mother were going to the house of PW-3 for husking paddy, she saw the appellant proceeding towards the hillock where their house is situated. Learned Additional Public Prosecutor has submitted that the testimony of these witnesses, which remain uncontroverted, only shows that just prior to the commission of alleged incident, the appellant was seen going towards the house of the victim with a dao in his hand.

76. Learned Additional Public Prosecutor has submitted that testimony of PW-1 who was working on the roof of his house, from where the house of the victim is visible, has stated in his deposition that he saw the appellant going towards the east of the house of the victim through a small path *(juri)* with a blood-stained *dao* in his hand.

77. Learned Additional Public Prosecutor has also submitted that PW-6 has also stated that he also saw the appellant at around 1:00 PM to 1:30 PM returning through a path near his house. It is also submitted by learned Additional Public Prosecutor that after about 2 to 3 minutes the PW-1 saw the sisters of the victim returning from the school and thereafter they immediately raised hue and cry, calling him and when he rushed to the house of the victim, he saw the victim girl lying in a pool of blood. It is submitted by learned Additional Public Prosecutor that the proximity of time at which the appellant was seen leaving the place of occurrence with a blood-stained dao and the commission of alleged incident where the victim was found lying in a pool of blood with her neck cut leaves no room for any doubt that the offence has been committed by the appellant.

78. Learned Additional Public Prosecutor has also submitted the testimony of PW-1 and PW-3 to the effect that they saw the victim lying on the ground in

a pool of blood with cut throat injury and the upper dress of the victim was almost open and they also found teeth bites on her breast leaving no room for doubt that the victim was subjected to sexual intercourse before she was killed with the *dao* by the appellant.

79. It is also submitted by the learned Additional Public Prosecutor that the Executive Magistrate who conducted the inquest on the dead body of the victim also found the lower part of vagina of the victim swollen and open with scratch marks and bruises on her back and also found the neck of the victim half cut. She has also submitted that the opinion of the Executive Magistrate, who conducted the inquest, to the effect that the probability of rape may not be ruled out, is relevant, if it is read with the other evidence i.e., the evidence of PW-1, PW-3 and other PWs who had deposed that they saw the upper dress of the victim lifted upwards and also saw teeth bite marks on her breast.

80. Learned Additional Public Prosecutor also submitted that the evidence of PW-17, i.e., the doctor who conducted the post mortem examination of the dead body of the victim girl clearly shows that the death of the victim was homicidal as he also opined that the injury on the neck could have been inflicted by the *dao* that was recovered.

81. Learned Additional Public Prosecutor has also submitted that the weapon of assault in this case i.e., the *dao* was recovered as per the information given by the appellant and he led to the recovery of weapon of assault in this case. Learned Additional Public Prosecutor has submitted that the testimony of PW-10 as well as testimony of PW-16, PW-19 and PW-12 shows that the appellant led the police team to his house which was under lock and key and was opened by one of the relative of the appellant and the appellant showed the *dao* which was kept beneath a table. It is also submitted by learned

Additional Public Prosecutor that on the basis of the statement of the appellant which was recorded by the Investigating Officer and which is exhibited as Exhibit-20, it also transpires that after committing the offence, the appellant went to a stream which is behind the house of the victim and where he washed the *dao* on a big stone where the prosecution witnesses also found stains of blood.

82. Learned Additional Public Prosecutor has also submitted that the testimony of PW-21, who is the Scientific Officer, clearly shows that on examination of the *dao,* it was found that the same contain the stains of human blood and this fact could not be controverted by the defense side and this led to only conclusion that the said *dao* has been used for killing the victim girl and after committing the offence, the appellant had tried to wash away the blood so as to conceal the evidence and thereafter kept the *dao* beneath a table in his house and therefore, there is clear incriminating evidence against the present appellant to show that he had killed the victim after committing her rape.

83. Learned Additional Public Prosecutor has also submitted that the undergarment of the victim contained the stains of human spermatozoa, which has been confirmed by the testimony of PW-21 and this only leads to the conclusion that the victim was raped before she was killed by the appellant.

84. Learned Additional Public Prosecutor has also submitted that the conduct of the appellant prior to the commission of the alleged offence is also relevant as from the testimony of PW-1, PW-9 and PW-8. It has come to light that the appellant also attempted to commit rape of the sister of the victim i.e. PW-9 and regarding the said incident, a case was also lodged against the appellant for which he also remained in jail for three months. Learned Additional Public Prosecutor has also submitted that the appellant also attempted to

outrage the modesty of PW-8 but as she resisted, she could not be sexually assaulted by the appellant. Learned Additional Public Prosecutor has also submitted that such criminal antecedents of the appellant are relevant as they show the nature of the appellant as well as the fact that he was accused of similar offences on earlier occasions also.

85. Learned Additional Public Prosecutor has also submitted that the appellant used to carry the machete *(dao)* in his hand and used to roam around the homestead. It is also submitted by learned Additional Public Prosecutor that the testimony of PW-21 clearly shows that there was presence of human blood in the *dao* which was recovered as per the information received under Section 27 of the Indian Evidence Act from the appellant. Learned Additional Public Prosecutor has also submitted that the appellant did not offer any explanation regarding presence of human blood in his *dao.* Learned Additional Public Prosecutor has also submitted that while answering to question No. 79 put to him during his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant only stated that the same to be false. However, it is submitted by learned Additional Public Prosecutor that the testimony of PW-21, which remained unimpeached, leaves no room for doubt that human blood was found on the *dao* which was recovered after being led by the present appellant and the appellant has miserably failed to give any explanation for the presence of human blood which only leads to the conclusion that the said *dao* has been used by the appellant for committing the murder of the victim girl "X".

86. Learned Additional Public Prosecutor has also submitted that the testimony of PW-6, PW-7, PW-8 and PW-9 has been corroborated by their statements, which were recorded under Section 164 of the Code of Criminal Procedure, 1973 during the course of the investigation, in all the material

particulars. Learned Additional Public Prosecutor has also submitted that the trial court was correct in arriving at the finding of guilt of the present appellant on the basis of corroborated testimony of the prosecution witnesses.

87. Learned Additional Public Prosecutor has cited following rulings in support of submissions made by her -(1)***Sharad BirdhiChand Sarda Vs. State of Maharashtra (supra)*** (2) ***Md. Naushad Vs. State reported*** *in* ***MANU/SC/0744/2023*** (3) ***State of Himachal Pradesh Vs. Jeet Singh*** reported in (***1999) 4 SCC 370*** (4) ***Md. Nazir Hussein Laskar Vs. State of Assam*** reported in ***2020 (2)GLT 479*** (5) ***Md. Arif Vs. State of NCT of Delhi*** reported in (***2011) 13 SCC 6241*** (6) ***Md. Inayatullah Vs. State of Maharashtra*** reported in (***1976) 1 SCC 828*** (7)***Rajiv Phukan Vs. State of Assam*** reported in ***2009 (2)GLT 414***(8)***Sunil Vs. State of Madhya Pradesh*** reported in (***2017) 4 SCC 393*** (9) ***Selvi and Others Vs. State of Karnataka*** reported in (***2010) 7 SCC 263*** (10) ***Satyapal Vs. State of Haryana*** reported in (***2009) 6 SCC 635*** (11)***Chotkau Vs. State of Uttar Pradesh*** reported in (***2023) 6 SCC 742*** (12) ***Appa Bhai and Others Vs. State of Gujarat*** reported in ***AIR1988 SC 696*** (13) ***Yanab Sheikh Vs. State of West Bengal*** reported in (***2013) 6 SCC 428*** (14)***V. K. Mishra Vs. State of Uttarakhand*** reported in (***2015) 9SCC 588*** (15) ***Rajendra Pralhadrao Wasnik Vs. State of Maharashtra*** reported in (***2019) 12SCC 460*** and (16) ***Manoj Pratap Singh Vs. State of Rajasthan*** reported in (***2022) 9 SCC 81***.

88. We have considered the submissions made by learned counsel for both the sides and have meticulously gone through the materials available on record as well as the judgments cited by learned counsel for both the sides in support of their submissions.

89. In paragraph No. 64 of the impugned judgment, the trial court has enumerated 16 circumstances which, according to the trial court, have formed a complete chain of evidence unerringly pointing towards guilt of the appellant. For the sake of convenience, those circumstances are quoted herein below:

> "***On 14.03.2018 at about 11:30 A.M. the victim 'X' was alone in the house as her father went for jhum cultivation, mother and another sister (PW-8) went for husking paddy to the house of PW-3 and other two little sisters went to school.***
>
> ***(i) At that time, when the mother and another sister were proceeding towards the house of PW-3, they saw the accused coming towards their hillock.***
>
> ***(ii) At about 11.30 A.M. the accused went to the house of PWs.- 6 & 7. He enquired about the parents of the victim 'X', the PW-6 replied that her parents went for Jhum cultivation and after taking seat for around 5 minutes, he went towards the house of victim 'X'.***
>
> ***(iii) Thereafter, the accused went to the house of PW-3 and took idea about the time to be taken by the PW-8 and her mother in husking paddy.***
>
> ***(iv) Thereafter, the accused got it confirmed that the victim 'X' would be alone in the house for quite a long time and accordingly, he entered into the house of deceased X'.***
>
> ***(v) The PW-3 also saw the accused going towards the house of victim 'X' with a dao in his hand.***
>
> ***(vi) The accused appealed to 'X' to have sex but she raised protest and on that, the accused forced her to have sex and tried to put off her wearing cloths, which she***

resisted by applying all her force and during that course, she sustained injury at her hands and back as revealed from the post mortem report and inquest report.

(vii) The accused able to disrobe her to some extent and penetrated his penis forcefully into her vagina and as a result, her labia majora has been found swollen up and the vagina was found wide open as appeared from the post mortem and inquest report.

(viii) Due to persistent resistance of the victim, the accused could not meet his lust satisfactorily but semen was emitted and thereafter, he thought that if he leaves the victim alive, she would leave no stone unturned to punish him and as such, in order to do away with her, inflicted the fatal blow at her neck by means of dao.

(ix) At about 1:00 P.M. the PW-1 saw the accused going towards east of the house of deceased with a blood stained dao.

(x) The Exhibits Nos. 3, 4, 5 & 6, the photographs of the deceased depict that her wearing apparels were found scattered, which receive corroboration from the evidence of the witnesses such as PWs-1, 3, 4, 5, 6, 7 & 8 who have stated that they found the lower dress of the deceased at knee level and the upper dress above the breast level and in order to protect her private parts from being seen by the public, due to bashfulness, it was brought in order by her mother.

(xi) The panty which was worn by 'X' at the relevant time was seized and sent to FSL and the report of FSL came

positive of having human semen.

(xii) The nature and size of the cut throat injury from post mortem report is suggestive to the fact that the said probable means was caused by the dao.

(xiii) The accused confessed before police that he killed the deceased X' by means of the dao, which he had kept in his house beneath a table. Accordingly, he led the police to his house which was under lock and key, his family member unlocked the house and on being shown by the accused, the dao was found kept beneath a table in his house. The dao was sealed immediately and was sent for FSL analysis. The FSL report came positive of having human blood in the said dao.

(xiv) The accused did not offer any explanation as regards having of human blood in the dao which was found in his house in a room under lock and key.

(xv) The accused has a tendency to do forceful sexual assault on the Riang girls and on the relevant day, with the said tendency, he wanted to have sexual intercourse with 'X' and after gratifying his lust, in order to cause disappearance of evidence, in cool mind, he had killed her."

90. The trial court came to the conclusion that the above-mentioned circumstances form a complete chain of evidence conclusively leading only to the guilt of the appellant. It came to the finding that on the basis of aforementioned circumstances, the only conclusion which may be arrived at is that it is the present appellant who had committed rape and thereafter killed the victim girl 'X'.

91. Now, let us consider as to whether the trial court was right in convicting the appellant under Section 376 of the Indian Penal Code as well as Section 4 of the POCSO Act, 2012 and whether sufficient materials are there on record to arrive at such a conclusion. We shall also examine as to whether the circumstances, from which the conclusion of guilt of the appellant under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012 have been arrived at by the trial court, are fully established or not.

92. For convicting the appellant under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012, there must be evidence on record to show that the appellant had done any of the following act-

> (a) penetrated his penis, to any extent, into the vagina, mouth, urethra or anus of the victim "X" or made her to do so with him or any other person; or
>
> (b) inserted, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the victim "X" or made her to do so with him or any other person; or
>
> (c) manipulated any part of the body of the victim "X" so as to cause penetration into the vagina, urethra, anus or any part of body of the victim "X" or made her to do so with him or any other person; or
>
> (d) applied his mouth to the vagina, anus, urethra of the victim "X" or made her to do so with him or any other person.

93. As in this case, there is no eyewitness to the alleged offence who could have adduced direct evidence, hence, the prosecution's case is based on circumstantial evidence only. However, in the instant case, there appears to be no circumstantial evidence on record to conclusively prove the existence of any of the four ingredients mentioned in the foregoing paragraph.

94. If we look at the circumstances enumerated by the trial court in paragraph No. 64 of the impugned judgment, it appears that the circumstances Nos.(vii), (viii), (ix), (xi) and (xii) have been relied upon by the trial court to come to the finding of guilt of the appellant under Section 376 of the Indian penal Code as well as Section 4 of the POCSO Act, 2012. However, if we peruse the circumstances described in clauses (vii), (viii) & (ix) of the paragraph No. 64 of the impugned judgment, it appears that there is no admissible evidence on record to establish the circumstances described in the said clauses. It is not clear from where and on what evidence the trial court has come to the finding that the circumstances described in the aforesaid clauses were fully established. In "***Sharad Birdhichand Sarda v. State of Maharashtra" (supra),*** the Apex Court has held that the circumstances from which the conclusion of guilt is to be drawn should be fully established. However, the circumstances described by the trial court in clauses (vii), (viii) & (ix) of the paragraph No. 64 of the impugned judgment appears to be only assumption of facts which might have happened at the time of alleged incident, however, in absence of any admissible evidence to prove the same, the said circumstances cannot be regarded as fully established.

95. PW-15, who is the Additional Superintendent of Police, and PW-16, who is the Deputy Superintendent of Police, have deposed that during interrogation, the appellant had confessed that he committed murder and he also attempted to commit rape on the victim 'X'. Similarly, PW-11, PW-12, PW-13 and PW-14 have also deposed that the appellant had confessed his guilt. The PW-10, who

is the Circle Officer as well as Sub-Divisional Magistrate has also deposed that the appellant had confessed that he committed the murder of the victim 'X'. However, from the testimony of all the above witnesses, it also appears that when the appellant had allegedly made his confessional statement, he was in police custody and no Judicial Magistrate was present at that time.

96. We have seen in paragraph No. 57 of this judgment hereinbefore, that in the case of "***Karthik Chakraborty Vs. State of Assam" (Supra),*** a full Bench of this court has held that the expression "Magistrate" appearing in Section 26 of the Evidence Act would mean only Judicial Magistrate and not the Executive Magistrate.

97. In this instant case, there is no evidence that when the appellant was making his confessional statement in the police custody, any Judicial Magistrate was present. Therefore, due to the embargo of Section 25 and Section 26 of the Indian Evidence Act, the confession made by the appellant while in police custody as well as the confession made to the police officer is not admissible in this case.

98. If we exclude the so-called confessional statement of the appellant as inadmissible evidence, only the oral testimony of prosecution witnesses, inquest report, post-mortem examination report, forensic laboratory report, exhibited documents as well as material exhibits remains as the evidence for prosecution side. However, we are of the considered opinion that none of the said evidence the prosecution side, proves conclusively that the appellant had done any of the acts described in clauses (a), (b), (c) or (d) of paragraph No. 92 of this judgement.

99. Though, PW-1, PW-3, PW-5, PW-6, PW-7, PW-8 as well as PW-9 have

stated in their deposition before the trial court that they saw teeth bites on the breast of the deceased and they also found that the clothes of the deceased were scattered and the panty of the deceased were found on the lower part of the leg and the mother of the deceased arranged the clothes of the deceased due to bashfulness. However, PW-19, who is the Investigating Officer of the case, has stated during his cross-examination, that none of the aforesaid witnesses have stated before him during investigation that they saw the teeth bites on the breast of the deceased ~~and~~ or that they ~~also~~ had found the panty of the deceased at the knee level and upper dress above the breast level.

100. It appears that while deposing before the trial court, the aforementioned witnesses have improved upon their version and have stated something which they had not stated before the Investigating Officer during the investigation. As the omission to state the above facts, under the facts and circumstances of the case, is also a material omission, therefore, it would be regarded as a contradiction under Section 162 of the Code of Criminal Procedure, 1973 and due to the said contradiction, the testimony of the aforesaid witnesses to the extent that they saw teeth bite on the breast of the victim 'X' and also saw her panties below the knee level is not reliable. Moreover, while conducting the inquest over the dead body of the victim "X", the PW-20 found no injury on the breast of the deceased. During the post-mortem examination of the deceased also, no injury on her breast was found, therefore, the circumstance No. (xi) described by the trial court in paragraph No. 64 of the impugned judgment cannot be regarded as fully established.

101. PW-18 who is the doctor who conducted the post-mortem examination of the dead body of deceased 'X' has deposed that during post-mortem examination the external labia majora were found to be swollen and the vagina

was found to be wide open. However, he has opined that there is no evidence of recent sexual intercourse as there was absence of any spermatozoa or any injury in and around the vagina. The trial court while discussing this evidence has concluded that from the swollen labia majora it is presumed that something came into forceful contact with the private parts of the deceased and contrary to the opinion of the doctors, who conducted the post-mortem examination of the dead body of the victim "X", the trial court had presumed that the victim was raped before she was killed, only due to the swelling of the labia majora of the deceased "X". Trial court also took into consideration the fact that Exhibit-23, which is the FSL report regarding the examination of the undergarments of the deceased, which states that human semen was found on the said undergarment. However, there is no evidence on record to show that the stains of semen found on the undergarments of the deceased were cross-matched with the semen of the present appellant.

102. Otherwise also, merely finding semen stains on the undergarments of the deceased without finding any semen or spermatozoa in and around the vagina or private parts of the deceased "X" does not conclusively prove that the victim was subjected to penetrative sexual intercourse before her death. It is pertinent to mention here that the swollen labia majora in a girl may be caused due to rough penetrative sexual intercourse, however, it may also be caused due to other reasons like infection etc. In the instant case, when apart from swollen labia majora, no other injury was found in and around the private parts of the victim and no traces of semen were found in and around the private parts of the victim 'X', and when the doctors who conducted the post-mortem examination have opined that she was not subjected to recent sexual intercourse, as such, we are of the considered opinion that it would not be

correct to conclude that the victim was subjected to forcible sexual intercourse before her death..

103. When the doctors (PW-17 & PW-18) who conducted the post-mortem examination have opined that the victim "X" was not subjected to recent sexual intercourse, there has to be cogent evidence on record to discard the said opinion and come to a contrary finding. However, it appears that the conclusion of the trial court in paragraph No. 60 of the impugned judgment to the effect that" *despite strong resistance of the victim, forceful penetration was done and as a result she sustained injury at her labia majora and it was swollen which constitutes offence of rape under section 375 of the Indian Penal Code as well as penetrative sexual assault under section 3 of the POCSO Act, 2012*," is not based on the facts that can be regarded as proved or established facts and it appears that the conclusion at paragraph No. 60 of the impugned judgment has been drawn by the trial court merely on assumption. As there is no eyewitness to the alleged incident any conclusion has to be drawn only on the basis of established facts and evidence available on record. However, in the instant case, we are constrained to hold that the evidence available on record falls short of the requirement to conclude that the victim girl 'X' was subjected to penetrative sexual intercourse before her death.

104. We are therefore of the considered opinion that the finding of the trial court in convicting the appellant under Section 376 of the Indian Penal Code and Section 4 of the POCSO Act, 2012 is not sustainable and the same is liable to be set aside, which we hereby do.

105. Now, let us consider as to whether the trial court was right in convicting the appellant under Section 302 of the Indian Penal Code for committing the murder of victim 'X'.

106. For arriving at the finding of guilt of the appellant under section 302 of the Indian Penal Code for committing murder of the victim 'X', the trial court has relied upon circumstances enumerated in clause (i), (ii), (iii), (iv), (v), (vi), (x), (xiii), (xiv), and (xv) of the paragraph No. 64 of the impugned judgment.

107. The said circumstances have been reproduced in paragraph No. 89 of this judgment. The trial court was of the considered opinion that the aforementioned circumstances form a complete chain of evidence, conclusively leading to the only finding that it is the present appellant who had committed the murder of victim girl 'X'.

108. During post-mortem examination of the dead body of the victim 'X', PW-17 and PW-18, who are the doctors who conducted the post-mortem examination, found that the whole body of the victim was paled and upper limbs and upper part of chest, back, neck was bloodstained and was dry. On examination following main injury was found on the dead body: -

> "*One cut throat injury at the level of C4 and C5 with upper and towards left, measuring 13 cm X 3 cm width, and 3.5 cm depth, cutting and separating skin, subcutaneous tissues, muscles, trachea, nerves and great vessels (Jugular & carotids), and there are blood clots in and around the injured site.*"

109. It was opined by the PW-17 and PW-18 that the aforementioned injuries were ante-mortem in nature and the death was due to irreversible hemorrhagic shock and also due to stoppage of respiration and is caused by sharp hard object.

110. During cross-examination PW-17 had stated that the cut injury found on the dead body of the victim at the neck can be caused by material exhibit (i),

i.e., the *dao* which was seized in this case.

111. The fact that when the dead body was found lying in a pool of blood, no sharp weapon was found near the dead body, itself shows that the injury caused on the victim 'X' was not self-inflicted and it was caused by someone else who had, after the commission of offence, taken away the weapon of offence from the crime scene. Therefore, we do not have any hesitation to concur with the finding of the trial court that the death of the victim 'X' was not suicidal but homicidal in nature.

112. Now, if we look at the circumstances No.(i) enumerated by the trial court in paragraph No. 64 of the impugned judgment, it appears that the said circumstance that the victim 'X' was alone in her house on 14.03.2018 at about 11.30 a.m. when the alleged incident was committed, has been fully established by the testimony of PW-4 and PW-8.

113. It is also relevant to note that the many of the prosecution witnesses had seen the appellant moving towards the house of the deceased at around the time when the alleged offence could have been committed. PW-3, PW-6 and PW-7 had seen the appellant going towards the house of the deceased in and around the time just before when the alleged offence had happened. It is also relevant that PW-1 had seen the appellant going towards east of the house of the deceased through a small path with blood-stained *dao* in his hand. PW-6 also saw the appellant returning through the path near his house.

114. Thus, it appears that PW-1, PW-3, PW-6 and PW-7 had seen the appellant near the house of the deceased with a *dao* in his hand. One of the most important circumstances which has been proved by the testimony of PW-6 and PW-7 is that the appellant at around 11.30 a.m. went to their house and

inquired about the parents of the victim 'X' to which PW-6 replied to the appellant that the parents of the victim had gone for jhum cultivation and thereafter after waiting for about five minutes in the house of the PW-7 the appellant went towards the house of the victim and at that time the victim was alone in her house.

115. Another important circumstance which has been proved by the testimony of PW-1 is that he saw the appellant going towards east of the house of the victim through a small path with *dao* in his hand at around 1.00 PM to 1.30 PM, just before he heard the hue and cry made by the younger sisters of the deceased after seeing the dead body of the victim 'X' in their house. PW-1 has also stated that the *dao* was stained in blood. Even if we discard the evidence of PW-1 to the extent that he could not have seen blood stain on the *dao* from a distance of 220 feet, however, the fact that the appellant was seen carrying a *dao* and going away from the residence of the deceased just moments before the dead body was found in a pool of blood by the sisters of the victim is an incriminating circumstance against the appellant.

116. As regards the submission of learned counsel for the Appellant, that the prosecution side has not examined some of the vital witnesses who ought to have been examined, like Brojendra, who was accompanying PW-1 when he was working; Abul Hasan, who had apprehended the appellant; The mother of the victim, who has stated that she arranged the disorderly kept clothes of the victim and the minor sisters of the deceased, who were the first persons to have witnessed the dead body of the victim after the commission of alleged offence, it is important to note that in the case of ***Appa Bhai and Others Vs. State of Gujarat*** (Supra), cited by learned Additional Public Prosecutor, the Apex Court of India has observed that non-examination of independent witnesses is in itself

not fatal to the prosecution case.

117. In the instant case also, though the Investigating Officer could have examined Brojendra and could have cited him as prosecution witness, as he was also present along with PW-1 when they were working in the house of PW-1, from where the PW-1 saw the appellant going away from the house of the deceased, carrying a blood-stained *dao* in his hand. However, mere non-examination of Brojendra would not cast doubt on the testimony of PW-1, if it is otherwise found reliable. Even if we agree with the submissions made by learned counsel for the appellant, that it may not be possible for a normal person to notice blood stains on a machete *(dao),* from a distance of 220 feet, However, the fact that the appellant was seen carrying a *dao* and was going away from the house of the deceased, in which, after some time, the dead body of the deceased was found, could not be demolished by the defence side during the cross-examination of PW-1, therefore, mere non-examination of Brojendra as prosecution witness would not make the testimony of PW-1 unreliable. There seems to be no reason as to why PW-1 would falsely implicate the present appellant.

118. It is also pertinent to take note of the fact that apart from PW-1, other witnesses namely PW-3, PW-6 and PW-7 had also seen the appellant carrying *dao* and was seen going away from the residence of the victim girl. Even if we discard the testimony of PW-3 to the effect that he saw the appellant going towards the house of the victim 'X' with a *dao,* due to the contradiction in his testimony proved by the Investigating Officer i.e., PW-19, who has deposed that PW-3 did not make any such statement to him while he recorded the statement of PW-3 during investigation. However, the statement of PW-6 and PW-7 to the effect that the appellant went to their house just before the incident, and

inquired about the parents of the deceased, and thereafter left towards the house of the deceased in with a *dao* in his hand remains uncontroverted. This circumstance is certainly an incriminating circumstance and which is a link towards arriving at a conclusion of guilt of the present appellant, when seen along with other incriminating circumstances.

119. As regards the submission of the learned counsel for the appellant, that Abul Hasan who apprehended the victim was not examined, we are of the considered opinion that the examination of Abul Hasan would have only revealed as to under what circumstances the appellant was apprehended. However, it would not dilute or in any manner lead to an adverse inference regarding the circumstances of seeing the appellant carrying a *dao* near the house of the victim girl.

120. As regards non-examination of mother and the sisters of the deceased victim, though it would have been proper for the Investigating Officer to have examined the mother of the deceased as well as sisters of the deceased who were first to see the dead body of the victim. However, non-examination of the same would not, in our considered opinion, make much difference as the fact of the death of the victim due to the injuries sustained by her on her neck has been established by other available evidence and same is not disputed. Moreover, we have also explained as to why the evidence on record do not suggest the death of the victim to be suicidal and why same appears to be homicidal in nature.

121. The most important circumstance in the chain of circumstances which have been established by the prosecution witnesses is the recovery of *dao* from the house of the appellant which was kept beneath a table and the said recovery was made on the basis of the information given by the appellant in his

statement which was exhibited as Exhibit-20 and which is admissible under Section 27 of the Indian Evidence Act. In the said statement of the appellant, he has confessed his guilt of having killed the victim 'X' and thereafter he also stated how he went to wash the bloodstain from the *dao* by which he had killed the victim in the stream nearby the house of the victim and thereafter he came back to his house and kept his *dao* below the wooden table.

122. Though, that part of the statement of the appellant which is exhibited as Exhibit-20, wherein he has confessed his guilt and explained in what manner he committed the offence is not admissible as evidence, as same is hit by Section 25 and 26 of the Indian Evidence Act. However, that portion of his statement wherein he has stated *that "on reaching home I kept my dao below a wooden table"* is admissible under Section 27 of the Indian Evidence Act. It is also pertinent to note herein that on the basis of the information received by the disclosure made by the appellant under Section 27 of the Indian Evidence Act, the *dao* was ultimately recovered from the house of the appellant kept below a wooden table that is exactly the place which has been indicated in the statement made by the appellant under Section 27 of the Indian Evidence Act.

123. Though, the learned counsel for the appellant has submitted that the mother of the victim had opened the lock of the house where ultimately *dao* was found itself shows that the place where the *dao* was recovered was accessible to all persons and it could have also been kept there by anybody including any other family members of the appellant. However, we are not convinced with the submissions made by learned counsel for the appellant that the *dao* could have been kept beneath the table by any of the family member of the appellant as there is no evidence in that respect on record. On the other hand, the testimony of prosecution witnesses shows that the fact that the *dao*

was found kept below the table in a house of the appellant was discovered in consequence to the disclosure statement made by the appellant (Exhibit No. 20) under section 27 of the Indian Evidence Act. The evidence to the effect that the room of the appellant was locked and was opened by his mother establishes that the said room from where the *dao* was recovered was not a public place and not accessible to persons from outside the household of the appellant. Thus, no one else could have kept the said *dao* below the table inside the said room.

124. Though learned counsel for the appellant has cited a ruling of the Apex Court in the case of "***The State of Bombay vs Kathi Kalu Oghad and Others" (supra),*** wherein the Apex Court has observed that if compulsion had been used in obtaining the information under Section 27 of the Indian Evidence Act, same may not be used against the giver of such information. However, apart from his statement made under Section 313 of the Code of Criminal Procedure, 1973, the appellant had nowhere mentioned that he was subject to torture or he was compelled to give statement under Section 27 of the Indian Evidence Act.

125. No defence evidence has been adduced to show that the appellant was compelled to give statement before the police, or he was compelled to give information under Section 27 regarding the place where he had kept the *dao* in his house. To give the benefit of observations made by the Apex Court in the case of "***The State of Bombay vs Kathi Kalu Oghad and Others" (supra)*** to the appellant, that the information under Section 27 of the Indian Evidence Act may not be used against the giver of such information if he was compelled to divulge such information, there has to be some trustworthy material on record from which the court may come to the conclusion that the appellant was

compelled to divulge the information, and that it was not a voluntary disclosure. However, in the instant case, no such material is there on record, apart from the statement of the appellant recorded under Section 313 of the Code of Criminal Procedure, 1973, which in itself is not sufficient to hold that the appellant was compelled to divulge information under section 127 of the Code of Criminal Procedure, 1973. Therefore, we are not inclined to give the benefit of the observations made in the aforementioned case to the appellant.

126. The statement of PW-21, i.e., the Senior Scientific Officer, Forensic Laboratory, Guwahati, as well as Exhibit-23, which is the Forensic Laboratory report wherein it has been stated that the examination of the seized *dao* gave a positive test for human blood is relevant in this regard.

127. While answering to question No. 43 during his examination under Section 313 of the Code of Criminal Procedure, 1973, the appellant has admitted that the police had seized the *dao* which was exhibited as material exhibit (i). It is not the case of the appellant that the *dao* seized from his house, as per the disclosure statement given by him, and on which the stains of blood were found, as per the forensic laboratory report, was not his *dao.* He has never stated that the said *dao* does not belong to him. The circumstance No. (xv) stated in paragraph No. 64 of the impugned judgment by the trial court, to the effect that the appellant did not offer any explanation as regards having human blood in the *dao* which was found is very relevant and is an incriminating circumstance pointing towards the guilt of the appellant.

128. Therefore, from the evidence available on record following facts and circumstances are established in case, namely (i)The fact that an oblique cut throat injury of the sides 13 cm X 3 cm X 3.5 cm was found on the dead body of the victim and that the dead body of the victim was found with above cut throat

injury in a pool of blood in her house also remains uncontroverted; (ii) The fact that as per the postmortem examination report, the death of the victim 'X' was caused due to irreversible hemorrhagic shock and due to the stoppage of respiration and was caused by sharp, hard object also remains uncontroverted; (iii) The opinion of the doctor, who conducted the postmortem examination on the dead body of the victim, regarding the fact that the injury found on the victim's neck may be caused by the dao, which has been exhibited as Material Exhibit No. (i) remains uncontroverted; (iv) when the alleged offence occurred, the victim X was alone in her house; (v) the appellant was seen carrying a *dao* going towards east of the house of the deceased through a small path, just before the dead body of the deceased 'X' lying in a pool of blood was found by the younger sisters of the deceased; (vi) the appellant had come to the House of PW-6 with a *dao* in his hand, and asked about the parents of the victim and after waiting for some time, he left towards the house of the deceased victim "X"; (vii) the testimony of PW- 8 to the extent that the appellant also went to the house of PW-3, where they were husking paddy and on seeing them he immediately left from that place towards the hillock where PW-8 resides and that he was carrying a *dao* at that time also remain uncontroverted; (viii) The fact that the *dao* of the appellant was recovered from his house where it was kept under a table and the fact that the said recovery was made on the basis of the disclosure statement made by the appellant which is exhibited as Exhibit-20, also remains uncontroverted and fully established; (ix) The fact that as per Exhibit-23, as well as testimony of PW-21, the *dao* which was seized by the Investigating Officer on the basis of disclosure statement made by the appellant was found with the stains of human blood remains uncontroverted; (x) the fact that the appellant had failed to give any explanation regarding the presence of

human blood in his *dao* and relieve his burden under section 106 of the Indian Evidence Act also remains uncontroverted.

129. Even if we ignore the evidence on record which relates to making of confession by the appellant, as well as the evidence relating to reconstruction of crime scene by the appellant, the circumstances enumerated in the foregoing paragraph *(i.e., paragraph No. 128)* are fully established. Thus, under the facts and circumstances of this case, the facts established in this case are consistent only with the hypothesis of the guilt of the appellant, and the chain of evidence appears to be so complete that it does not to leave any reasonable ground for the conclusion consistent with the innocence of the appellant and it also appears that in all human probability the murder of victim "X" has been committed by the appellant only.

130. In view of above discussion and reasons, we hereby upheld the conviction of the appellant by the trial court under Section 302 of the Indian Penal Code for committing murder of the victim 'X' with the help of the *dao* which has been exhibited as material exhibit (i) in this case.

131. Thus, in view of the discussions made and reasons stated in foregoing paragraphs, the conviction of the appellant under Section 376 of the Indian Penal Code, as well as under Section 4 of the POCSO Act, 2012 is hereby set aside. However, the conviction of the present appellant under Section 302 of the Indian Penal Code for committing murder of the deceased 'X' is hereby upheld.

132. Now, let us answer the death reference made by learned Sessions Judge, Hailakandi under Section 366 of the Code of Criminal Procedure, 1973, wherein he has submitted the proceeding of Sessions (T-1) Case No. 60/2018 to this court for confirmation of sentence of death imposed on the present appellant by

order dated 4.10.2018 passed in Sessions (T-1) Case No. 60/2018. Learned Sessions Judge has imposed death penalty on the present appellant on the premises that he was found convicted under Section 302 as well as under Section 376 of the Indian Penal Code, and also under Section 4 of the POCSO Act, 2012. By referring to the observations made by the Supreme Court of India in the case of "***Bachchan Singh -vs- State of Punjab",*** reported in ***1980 (2) SCC 684,*** as well as in the case of "***Machhi Singh and others -vs- State of Punjab",*** reported in ***1983 (3) SCC 470***, the learned Sessions Judge, Hailakandi was of the considered opinion that the case of the appellant falls within the category of rarest of rare cases where victim 'X', who is a minor girl of 13 to 15 years of age, was raped and murdered by the appellant, who is aged about 25 years when the offence was committed.

133. The learned Sessions Judge, while sentencing the present appellant with death penalty considered the fact that the appellant having been a married person and having a wife followed his lust, and in order to get it, victimized a minor girl and after gratifying his lust killed her so as to destroy the evidence of his misdeeds. Learned Session Judge also considered that the evidence on record showed that the appellant had committed the murder and rape of the minor girl 'X' in a pre-planned manner. The learned Session Judge also considered the fact that the appellant had criminal antecedents where he had tried to sexually assault PW-9 as well as PW-8 on earlier occasions.

134. On the other hand, the only mitigating circumstances enumerated by the learned Session Judge in favor of the appellant was that he was a young man of 25 years when he committed the offense and he has got a wife and children to look after and he is the sole bread earner of his family. The learned Sessions Judge also came to the conclusion that there is no chance of reformation of the

present appellant, and as the balance in this case tilt towards the aggravating circumstances, he considered the case to be rarest of rare case, and accordingly sentenced the appellant to death penalty.

135. Learned Additional Public Prosecutor has also supported the observations made by the learned Session Judge while coming to the conclusion that the present case falls within the category of rarest of rare cases, and the fact that in the present case, the aggravating circumstances outweighs the mitigating circumstances justifying the imposition of death penalty on the appellant.

136. Learned Additional Public Prosecutor has also submitted that considering the criminal antecedents of the present appellant, there is no hope of reformation of the present appellant and therefore, the trial court was correct in imposing the death penalty on the present appellant.

137. In support of her submissions learned Additional Public Prosecutor has cited rulings of the Apex Court in the case of "***Rajendra Prahladrao Wasnik-vs- State of Maharashtra"*** reported in ***2019 (12) SCC 460***, as well as in the case of "***Manoj Pratap Singh versus State of Rajasthan"*** reported in ***2022 (9) SCC 81***. In the second case cited by learned Additional Public Prosecutor, the Apex Court has observed that when innocent and helpless girl is raped and murdered and the accused is in a position to dominate her, it will be proper to award the death sentence to such an accused.

138. On the other hand, Mr. T.J. Mahanta, learned senior advocate who was appointed as Amicus Curiae to assist this Court in answering the Death Reference and who was assisted by Mr. Tarun Kumar Gogoi, Advocate, as well Mr. Mrinmoy Dutta, who was also appointed as Amicus Curiae, have submitted that in the instant case, the conviction has been given to the present appellant

only on the basis of circumstantial evidence, and not even a single eyewitness is there. They have also submitted that on balancing of mitigating and aggravating circumstances, this case would tilt the balance in favor of the appellant and this case does not fall within the category of rarest of rare case, and therefore, learned Amicus Curiae opposed the confirmation of death penalty imposed by learned Session Judge on the appellant. The learned Amicus Curiae has also submitted that the learned Sessions Judge, Hailakandi had erred in taking into consideration the allegations against the present appellant made by PW-8 and PW-9 regarding attempt to sexually assault them, as the said allegations are at the stage of accusation only and the appellant is yet to be held guilty of the said allegations by a competent court of law.

139. Learned Amicus Curiae has submitted that the Trial court also failed to take into consideration the fact that the appellant is a young man of 25 years of age and has got his wife and children, and is the only bread earner of his family. It is also submitted by learned Amicus Curiae that the conclusion arrived at by the learned trial court that the present appellant is not amenable to reformation is also not based on established facts and is only a presumption.

140. Similar to the submissions made by learned Amicus Curiae. learned counsel for the appellant also submitted that there is every probability of the appellant getting an order of acquittal in the pending appeal against the impugned judgment and he has also submitted that the fact that considering the age of the appellant the mitigating circumstances outweighs the aggravating circumstances and hence imposition of death penalty on the appellant is not justified.

141. We have considered the submissions made by learned counsel for both the sides as well as learned Amicus Curiae.

142. The death penalty was imposed on the present appellant on the premises that he was found to be guilty, both under Section 302 of the Indian Penal Code as well as Section 376 of the Indian Penal Code as well as Section 4 of the POCSO Act of 2012.

143. However, in view of the setting aside of the conviction of the present appellant under Section 376 of the Indian Penal Code as well as under Section 4 of the POCSO Act of 2012, we are of the view that the instant case does not fall in the category of rarest of rare cases as only one cut injury was found on the dead body. Moreover, although the appellant has been convicted under Section 302 of the Indian Penal Code, the said conviction has been made solely on the basis of circumstantial evidence.

144. Further, though the trial court has taken into consideration the past criminal antecedent of the appellant regarding his attempts to outrage the modesty of PW-8 and PW-9 on earlier occasions as aggravating circumstances, however, materials on record shows that the said allegations are at the stage of accusation only and the appellant is yet to be held guilty of the said allegations by a competent court of law, hence, we are of the considered opinion that the said accusations could not be regarded as an aggravating circumstance for imposition of death penalty on the appellant.

145. In the case of "***Machhi Singh and others -vs- State of Punjab***" *(supra)*, the Supreme Court of India has observed that the extreme penalty of death need not to be inflicted except in gravest cases of extreme culpability. Life imprisonment is the rule and death sentence is an exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose the sentence of

life imprisonment cannot be conscientiously exercise having regard to the nature and circumstances of the crime all the relevant circumstances.

146. Moreover, the trial court while imposing the ultimate penalty of death on the appellant, failed to take in to consideration the possibility of his reformation, rehabilitation and social reintegration. It is only when the possibility of reformation, rehabilitation and social reintegration of the convict is ruled out, the extreme penalty of death may be imposed, which is not the case in the instant case.

147. In view of the above discussion, we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to impose the death penalty and the mitigating factors in the present case, in our opinion, are sufficient to place it out of the "*rarest of rare*" category.

148. For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. The death reference No. 3 of 2018 is accordingly answered.

149. The learned Amicus Curiae will be entitled to his usual honorarium.

150. Let the Trial Court Record be sent back.

151. Let a free copy of this order be served on the appellant.

JUDGE **JUDGE.**

Comparing Assistant