AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Reference No.1 of 2021

Judgment reserved on: 12-5-2022

Judgment delivered on: 13-6-2022

In reference of State of Chhattisgarh, Through Police Chowki Chikhali, Aarakshi Kendra City Kotwali, Rajnandgaon, District Rajnandgaon (C.G.)

---- Applicant

Versus

Shekhar Korram, S/o Shri Gend Singh Korram, Aged about 28 years, R/o Gram Kanketara, Police Chowki Chikhali, Aarakshi Kendra City Kotwali, Rajnandgaon, District Rajnandgaon (C.G.)

---- Non-applicant

For Applicant/State: -
Ms. Prachi Mishra, Additional Advocate General and
Mr. Sudeep Verma, Deputy Govt. Advocate.

For Non-applicant: -
Mr. Saurabh Dangi and Ms. Aditi Singhvi, Advocates.

AND

Criminal Appeal No.1270 of 2021

Shekhar Korram, S/o Shri Gend Singh Korram, Aged around 28 years, R/o Village Kanketara, Police Chowki Chikhli, Police Station City Kotwali, Rajnandgaon, District Rajnandgaon (C.G.)

---- Appellant

Versus

State of Chhattisgarh, through Station House Officer, Police Chowki Chikhli, Police Station City Kotwali, Rajnandgaon, District Rajnandgaon (C.G.)

---- Respondent

For Appellant: Mr. Saurabh Dangi and Ms. Aditi Singhvi, Advocates.

For Respondent/State: -
Ms. Prachi Mishra, Additional Advocate General and
Mr. Sudeep Verma, Deputy Govt. Advocate.

Hon'ble Shri Sanjay K. Agrawal and
Hon'ble Smt. Rajani Dubey, JJ.

C.A.V. Judgment

Sanjay K. Agrawal, J: -

1. The appellant herein namely Shekhar Korram has been awarded with death sentence by the learned Additional Sessions Judge (Fast Track Special Court – POCSO), Rajnandgaon in Special Criminal (POCSO) Case No.50/2020 vide judgment dated 13-9-2021 after having found him guilty for offence punishable under Sections 363, 366, 302 of the IPC and Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act') and also under Section 201 of the IPC. He has been sentenced to death by hanging under sub-section (5) of Section 354 of the CrPC. Conviction and sentences imposed upon the appellant are as follows:-

Conviction	Sentence
Section 363 of the IPC	RI for seven years and fine of ₹ 5,000/-, in default, additional RI for one year
Section 366 of the IPC	RI for ten years and fine of ₹ 5,000/-, in default, additional RI for one year
Section 302 of the IPC and Section 6 of the POCSO Act	Death sentence (to be hanged till death)
Section 201 of the IPC	RI for seven years and fine of ₹ 5,000/-, in default, additional RI for one year

2. The learned Additional Sessions Judge in exercise of power conferred under Section 366 of the CrPC after passing the sentence of death submitted the proceedings to this Court for its confirmation and this is how this death reference is before us for consideration along with the appeal preferred by the accused / appellant herein being Cr.A.

No.1270/2021.

3. The prosecution case as unfolded during the course of trial is as under: -

Admitted facts / prosecution case, in brief: -

3.1) Case of the prosecution, in brief, is that on 22-8-2020 Omprakash @ Prakash Yadav (PW-1) lodged a complaint in Police Outpost Chikhli, Police Station City Kotwali, Rajnandgaon that his minor daughter aged about 3 years 6 months went missing and on that basis, Crime No.0/2020 was recorded for the offence punishable under Section 363 of the IPC vide Ex.P-38 by Police Outpost Chikhli, District Rajnandgaon and on the same day i.e. 22-8-2020, Police Outpost Chikhli has prepared a missing panchnama questionnaires under the prescribed format on the basis of the complaint made by Omprakash vide Ex.P-2. The first information report registered as Crime No.0/2020 (Ex.P-38) in Police Outpost Chikhli was later on transferred to Police Station City Kotwali, Rajnandgaon and registered as Crime No.382/2020 vide Ex.P-10. on the same day, i.e. 22-8-2020 at about 23:25 hours, information regarding murder of the missing minor girl has been received by the police and the police reached to the crime spot and prepared dehati morgue intimation vide Ex.P-11. The police also prepared morgue intimation regarding murder of minor girl vide Ex.P-39 and thereafter, took up the matter for investigation and prepared naksha panchnama of the crime spot vide Ex.P-4.

3.2) During investigation, the appellant was apprehended and he confessed to have abducted the deceased minor victim and thereafter committed sexual assault upon her and then killed her by smothering.

The police on suspicion and on information given by Narad Sinha (PW-2) and Bhuneshwari (PW-10), arrested the appellant / accused and recorded his memorandum statement under Section 27 of the Indian Evidence Act in shape of Ex.P-14. Pursuant to the memorandum disclosure statement of the appellant / accused, dead body of the deceased victim and pillow cover used in the crime were recovered vide Exs.P-15 & P-16. Further, underwear of the accused was also seized at his instance vide Ex.P-17. Pursuant to the memorandum statement of the appellant / accused, dead body of the deceased minor girl was recovered from the house of the appellant / accused on being disclosed by the accused / appellant and dead body was identified by her father Omprakash (PW-1) vide dead body identification panchnama Ex.P-5. Thereafter, dead body of the deceased was sent for postmortem examination and in turn, postmortem report Ex.P-34 was prepared and cause of death was found to be due to smothering. Thereafter, during the course of investigation, throughout proceedings of memorandum and seizure have been acknowledged by two witnesses namely, Sugriv Sahu (PW-5) and Devendra Kumar (PW-6), whereas the witnesses of last seen namely, Narad Sinha (PW-2) and Bhuneshwari (PW-10) recorded their statements before the Judicial Magistrate First Class, Rajnandgaon under Section 164 of the CrPC vide Ex.P-45. The accused / appellant was arrested on 23-8-2020 vide Ex.P-46. Vaginal swabs and slides were prepared and sent for forensic examination.

3.3) The jurisdictional police in order to substantiate the prosecution case of heinous crime, sent the blood samples of the deceased minor

girl as well as the accused for the purpose of chemical examination to the State Forensic Science Laboratory, Raipur vide Ex.P-28 from where FSL report has been received vide Ex.P-31. FSL examination Ex.P-31 and DNA test Ex.P-32 was conducted on the clothes of the deceased and on the vaginal swabs and slides prepared during postmortem. The DNA on the vaginal swabs of the deceased was found to be matching with the DNA sample extracted from the blood of the appellant / accused vide Ex.P-32. DNA was conducted and the DNA report was prepared by the Senior Scientific Officer of the FSL, Raipur namely Smt. Apolina Ekka, who has been examined as PW-17.

3.4) During the course of investigation, statements of the witnesses were recorded under Section 161 of the CrPC and after completion of investigation, charge-sheet was filed against the accused / appellant before the trial Court for offence punishable under Sections 363, 366, 376AB, 302, 201 of the IPC and Section 6 of the POCSO Act and on charge-sheet having been submitted by the jurisdictional police, the appellant abjured guilt and entered into defence.

4. The prosecution in order to bring home the offence, examined as many as 17 witnesses and exhibited documents 47 documents Exs.P-1 to P-47, whereas the defence examined no witness and exhibited only one document Ex.D-1. The accused was examined under Section 313 of the CrPC in which he pleaded innocence and false implication.

Defence of the accused: -

5. The appellant / accused entered into defence and abjured his guilt,

and pleaded innocence and false implication. His case was that he has not committed any offence and he has been falsely implicated. He has also examined none and only one document has been exhibited (Ex.D-1) in support of his defence as noticed herein-above.

Judgment / findings of trial Court: -

6. The trial Court after appreciating oral and documentary evidence on record, by its impugned judgment, convicted the appellant under Sections 363, 366, 302, 201 of the IPC and also under Section 6 of the POCSO Act and awarded death sentence as mentioned in the opening paragraph of this judgment and further, made reference to this Court for confirmation of death sentence awarded to the appellant / accused.

7. The learned trial Court in order to convict the appellant herein has found proved the following facts: -

- The appellant had kidnapped the minor victim aged about 3½ years from the lawful guardianship of her father Omprakash @ Prakash Yadav (PW-1) on 22-8-2020 for the purpose of sexually assaulting her which is punishable under Sections 363 and 366 of the IPC both as proved by the statements of Narad Sinha (PW-2) and Bhuneshwari (PW-10).
- Age of the victim was 3 years 6 months as proved by Ex.P-7 – birth certificate of the victim, as her date of birth was 13-12-2016 and date of offence is 22-8-2020.
- Death of the victim / deceased is homicidal in nature, as cause of death is smothering in view of the medical evidence of Dr.

Datta Sorte (PW-13) who has proved the document Ex.P-34 – postmortem report.

- The theory of last seen together is duly established from the testimony of Narad Sinha (PW-2) and Bhuneshwari (PW-10).
- Pursuant to the disclosure statement of the appellant under Section 27 of the Evidence Act, dead body of the minor victim was recovered vide Ex.P-15 followed with the recovery of pillow cover vide Ex.P-16, by which smothering was done and Ex.P-17 is undergarment of the accused. Saliva was found present on the pillow cover.
- Blood samples as well as fluid samples for the purpose of chemical examination from the body of the deceased and the appellant / accused were taken and sent to the FSL vide Ex.P-28 and in turn, the FSL report has been received vide Ex.P-31 in which semen as well as human sperm have been found on the frock (Art. H2) worn by the minor victim / deceased.
- DNA test was conducted on the clothes of the deceased and on the vaginal swabs and slides prepared during postmortem. The DNA on the vaginal swabs of the deceased was found to be matching with the DNA sample extracted from the blood of the appellant, which has been duly proved by Smt. Apolina Ekka (PW-17), Senior Scientific Officer of the State FSL, Raipur.
- Present is a case of rarest of rare case in which death sentence is the appropriate punishment.
- Considering the manner in which the offences have been

committed brutally and the victim being minor, appropriate penalty is the death sentence.

8. Feeling dissatisfied and aggrieved with the judgment of conviction recorded and sentences awarded, the appellant herein has preferred Cr.A.No.1270/2021 under Section 374(2) of the CrPC challenging his conviction for the aforesaid offences, particularly against the capital punishment awarded to him. However, the learned Additional Sessions Judge in accordance with the provisions contained in Section 366(1) of the CrPC, submitted the sentence of death to this Court for confirmation and this is how both the cases have been clubbed together, heard together and are being disposed of by this common judgment.

Submissions of parties: -

9. Mr. Saurabh Dangi and Ms. Aditi Singhvi, learned counsel appearing for the accused/appellant, would submit as under: -

    1. The prosecution has failed to bring home the offences charged to and found proved against the appellant herein beyond reasonable doubt and there is no sufficient evidence in shape of direct and indirect evidence to hold him guilty.

    2. Offences punishable under Sections 363 and 366 of the IPC are not proved as the ingredients of the above-stated offences are missing. Once the trial Court has convicted the appellant herein for offence under Section 363 of the IPC which also includes kidnapping, there is no need to convict him and sentence him for offence under Section 366 of the IPC, as such, if court

comes to the conclusion that offence under Section 366 of the IPC has been committed, conviction under Section 363 is liable to be set aside. Reliance has been placed in the matter of **Mohammed Yousuff alias Moula and another v. State of Karnataka**[1] in support of his contention.

3. Further elaborating his submission, Mr. Saurabh Dangi, learned counsel, would further submit that the theory of last seen together is found established by the learned trial Court relying upon the evidence of Narad Sinha (PW-2) and Bhuneshwari (PW-10), is also ill-founded. It has not been clearly established that the accused was last seen along with the victim / deceased and as such, the theory of last seen together is not established.

4. The disclosure statement and pursuant recovery are not proved in accordance with law, therefore, the circumstances proved on the basis of memorandum and seizure are liable to be set aside.

5. Likewise, the trial Court has found saliva on the pillow cover, but it has also not been proved that the saliva was that of the deceased minor victim, as such, no reliance can be placed on the same. Though the FSL report has been found proved and positive, but it was not sent to the serologist for ascertaining the origin of blood and in absence of matching of blood group, it cannot be said to be proved against the appellant herein.

6. The source of semen is also not found proved and it has also not been proved whether it belongs to the accused or not.

7. In alternative, Mr. Dangi, learned counsel, would also submit

1 2020 SCC OnLine SC 1118

that if the Court found proved that offence against the appellant under Section 302 of the IPC is established, the offence, if any, would be covered by Section 300 Fourthly of the IPC and therefore death sentence can be commuted to life sentence relying upon the decision of the Supreme Court in the matter of Shatrughna Baban Meshram v. State of Maharashtra[2] (paragraph 29).

8. Mr. Dangi, learned counsel for the appellant, would also rely upon the judgments of the Supreme Court in the matters of Pappu v. State of Uttar Pradesh[3], Bhagwani v. State of Madhya Pradesh[4], Mofil Khan and another v. State of Jharkhand[5], Lochan Shrivas v. State of Chhattisgarh[6] and Mohd. Firoz v. State of Madhya Pradesh[7] to buttress his submission and would submit that in the instant case, the learned Additional Sessions Judge has not given any effective opportunity to adduce evidence on the question of sentence, particularly in respect of rehabilitation and reformation of the accused and the State has also not proved the inability of the accused that he cannot be rehabilitated and reformed and without any enquiry, he has been sentenced to death which is liable to be commuted to life sentence in case, this Court comes to the conclusion and records finding that offence under Section 302 of the IPC is established beyond doubt by the prosecution. As such, the

2 (2021) 1 SCC 596
3 2022 SCC OnLine SC 176
4 2022 SCC OnLine SC 52
5 2021 SCC OnLine SC 1136
6 2021 SCC OnLine SC 1249
7 2022 SCC OnLine SC 480

reference be rejected and the appeal be allowed setting aside the judgment of the trial Court convicting the appellant for offence under Section 302 of the IPC and sentencing him with capital punishment as stated above.

9. The appellant is plumber by profession, he is a young person aged 28 years and is resident of a remote area of Tahsil Rajnandgaon i.e. Village Kanketara, there is every chance of his being reformed and rehabilitated and he has no criminal antecedents, therefore, his death sentence be commuted to life sentence.

10. Case of the appellant is covered by Section 300 Fourthly of the IPC and there was no intention to cause death, therefore, death penalty be converted into life sentence.

10. Ms. Prachi Mishra, learned Additional Advocate General, opening the argument on behalf of the State, would submit that the ingredients of offences under Sections 363 and 366 of the IPC, both, as well as the evidence for establishing those offences against the appellant herein were available in the present case and the statements of Narad Sinha (PW-2) and Bhuneshwari (PW-10) would clearly establish that the appellant had kidnapped the minor victim / girl aged about 3 years 6 months with intent to commit sexual assault covered by Sections 363 and 366 of the IPC and therefore he has rightly been convicted for offence under Sections 363 and 366 of the IPC as well. Elaborating her submission, she would further submit that under Section 363 of the IPC, distinction is based on the age of the minor, whereas under Section 366 of the IPC, it is purpose specific and gender specific.

Section 363 of the IPC is an offence of kidnapping as for offence of kidnapping under Section 363, maximum punishment prescribed is seven years and also liable to fine, whereas under Section 366 of the IPC, maximum punishment prescribed is ten years and shall also liable to fine. She would also submit that the offence of kidnapping from lawful guardianship is punishable under Section 361 of the IPC, as a minor is entitled to enjoy the safe care and custody of parents and parents are also entitled to provide care and custody to their ward who is minor. As such, considering the distinction of offence between Sections 363 and 366 of the IPC, it cannot be held that once a person is convicted for offence under Section 366 of the IPC, he cannot be convicted for offence under Section 363 of the IPC. She would rely upon the decisions of the Supreme Court in **Mohammed Yousuff alias Moula** (supra), **Kavita Chandrakant Lakhani v. State of Maharashtra and another**[8] and **Sannaia Subba Rao and others v. State of Andhra Pradesh**[9] to buttress her submission. She would lastly submit that the manner in which the offence has been committed shocks the conscience of the court and society as well, as such, the trial Court has rightly held that it is the rarest of rare case and rightly proceeded to award death penalty to the accused / appellant which deserves to be maintained by confirming the death sentence awarded to him.

11. Mr. Sudeep Verma, learned Deputy Government Advocate, would submit that the theory of last seen has duly been established by the testimony of Narad Sinha (PW-2) and Bhuneshwari (PW-10) and similarly on the basis of disclosure statement Ex.P-14, dead body of

8 (2018) 6 SCC 664
9 (2008) 17 SCC 225

the minor victim / deceased has been recovered vide Ex.P-15, and vide Ex.P-16, pillow cover and vide Ex.P-17, undergarment of the accused were recovered and sent to the FSL, Raipur from where report Ex.P-31 has been received which states that semen as well as human sperm have been found on the clothes worn by the victim / deceased and thus, incriminating circumstances have been duly established. Similarly, DNA report Ex.P-32 clearly establishes the guilt of the accused and in order to buttress his submission, Mr. Verma, learned Deputy Govt. Advocate, would rely upon the decision of the Supreme Court in the matter of **Mukesh and another v. State for NCT of Delhi and others**[10] (paragraph 221). He would further submit that the significance of the conduct of an accused post crime, is always material and relevant factor to generate the incriminating circumstances. Lastly, he would submit that it is one of the rarest of rare offence by which the appellant having abducted the minor victim subjected her to sexual intercourse and thereafter, caused her death by smothering and thereafter, concealed her dead body which was recovered pursuant to the disclosure statement Ex.P-14 by recovery panchnama Ex.P-15, as such, from the FSL report and the DNA profiling, the guilt of the accused is fully established and therefore it is a case where it would fall within the ambit of rarest of rare case fulfilling the crime test and criminal test as rendered by their Lordships of the Supreme Court in the matters of **Bachan Singh v. State of Punjab**[11] and **Mukesh** (supra) (paragraph 351). It is a case where the collective conscience of the society is shocked because of the crime

10 AIR 2017 SC 2161
11 AIR 1980 SC 898

committed.

12. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record of the trial Court thoroughly and extensively. We have also perused the conduct report received from the Jail Superintendent, Central Jail, Raipur, dated 9-5-2022 submitted by the learned State counsel in which conduct of the appellant herein has been found to be normal during the present incarceration in jail.

Challenge of the appellant's conviction under Sections 363 & 366 of the IPC

13. It has vehemently been contended by learned counsel for the appellant that offences under Sections 363 & 366 of the IPC are not prove beyond reasonable doubt, therefore, conviction for the aforesaid offences are liable to be set aside and in alternative, it has also been submitted that if conviction for offence under Section 366 of the IPC is upheld then conviction for offence under Section 363 of the IPC cannot sustain as the ingredients of the offence under Section 366 of the IPC also includes the offence of kidnapping / abduction.

14. Sections 359 and 361 of the IPC provide as under:-

> "**359. Kidnapping**.-Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.
>
> **361. Kidnapping from lawful guardianship**.-Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person

from lawful guardianship."

15. In order to address the said submission made on behalf of the appellant, it would be appropriate to notice the definition of kidnapping as defined in Section 359 of the IPC as well as Section 361 of the IPC which provides for kidnapping from lawful guardianship and Section 366 of the IPC which prescribes punishment for kidnapping. Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship. Kidnapping from lawful guardianship has been defined in Section 361 of the IPC. The offence under this section may be committed in respect of either a minor under 16 years of age, if a male, or under 18 years of age, if a female, or a person of unsound mind. The object of this section is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons. Thus, Section 361 of the IPC has four essential ingredients.

(1) Taking or enticing away a minor or a person of unsound mind.

(2) Such minor must be under sixteen years of age, if a male, or under eighteen years of age, if a female.

(3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.

(4) Such taking or enticing must be without the consent of such guardian.

16. The Supreme Court in the matter of **Parkash v. State of Haryana**[12] considering the provisions contained in Section 361 of the IPC has

12 (2004) 1 SCC 339

held that the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview and further held that it is not necessary that the taking or enticing must be shown to have been by means of force or fraud. It has also been held that persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the provisions contained in Section 361 of the IPC which is punishable under Section 363 of the IPC.

17. In the present case, age of the deceased victim has been proved by Omprakash @ Prakash Yadav (PW-1) and he has proved the birth certificate Ex.P-7 in which date of birth of the deceased is recorded as 13-12-2016 and date of offence is 22-8-2020. As such, the deceased was only 3 years 6 months of age on the date of offence and therefore for the purpose of Section 363 of the IPC, she (victim/girl) was minor below 18 years of age on the date of offence.

18. Reverting to the facts of the case, it is quite vivid that the appellant was seen taking away the minor deceased girl by Narad Sinha (PW-2), who has clearly stated in paragraph 2 of his statement before the court that on 22-8-2020, he noticed the accused with a minor girl and on being asked, the accused informed that she is the daughter of Omprakash Yadav and thereafter, the accused returned back along with minor girl. Similarly, Omprakash @ Prakash Yadav (PW-1), who is father of the deceased, has also stated that on 22-8-2020 his daughter went missing from his house when he came back to his house at about 4 p.m. on the date of incident and missing report

Exs.P-1 & P-2 was lodged by him. As such, it is clearly established that the appellant had taken away the deceased minor girl from the lawful custody of her father Omprakash @ Prakash Yadav (PW-1) without his permission or the permission of any of the family members, thereby the ingredients of Section 361 of the IPC are clearly made out. On the basis of appreciation of oral and documentary evidence on record, the trial Court has rightly come to the conclusion that the prosecution has proved the offence under Section 363 of the IPC against the appellant beyond reasonable doubt. We hereby affirm that finding recorded by the trial Court.

19. Now, the appellant has also been convicted for offence under Section 366 of the IPC which states as under: -

> "**366. Kidnapping, abducting or inducing woman to compel her marriage, etc.**—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."

20. In order to constitute offence under Section 366 of the IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took

place with the intent that the complainant may be seduced to illicit intercourse and / or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal provision. So far as charge under Section 366 of the IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

21. Their Lordships of the Supreme Court in the matter of **Mohammed Yousuff alias Moula and another v. State of Karnataka**[13] pointing out the essential ingredients required to be proved by the prosecution for bringing a case under Section 366 of the IPC, relying upon the decision rendered in the matter of **Kavita Chandrakant Lakhani v. State of Maharashtra**[14], has clearly held that in order to constitute an offence under Section 366 of the IPC, besides proving the factum of abduction, the prosecution has to prove that the said abduction was for one of the purposes mentioned in Section 366 of the IPC, and observed as under: -

> "8. Chapter XVI of IPC contains offences against the human body. Section 366, which is the pertinent provision, is contained within this Chapter. Kidnapping/abduction simpliciter is defined under Section 359 and maximum punishment for the same extends up to seven years and fine as provided under Section 363. However, if the

13 2020 SCC OnLine SC 1118
14 (2018) 6 SCC 664

> kidnapping is done with an intent of begging, to murder, for ransom, to induce women to marry, to have illicit intercourse stricter punishments are provided from Section 363A to Section 369.
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> 9. Section 366 clearly states that whoever kidnaps/ abducts any woman with the intent that she may be compelled or knowing that she will be compelled, to either get her married or forced/seduced to have illicit intercourse they shall be punished with imprisonment of up to ten years and fine. The aforesaid Section requires the prosecution not only to lead evidence to prove kidnapping simpliciter, but also requires them to lead evidence to portray the abovementioned specific intention of the kidnapper. Therefore, in order to constitute an offence under Section 366, besides proving the factum of the abduction, the prosecution has to prove that the said abduction was for one of the purposes mentioned in the section. In this case at hand the prosecution was also required to prove that there was compulsion on the part of the accused persons to get the victim married. [See Kavita Chandrakant Lakhani v. State of Maharashtra, (2018) 6 SCC 664].”

22. In the instant case, the appellant kidnapped the deceased victim with an intent to commit illicit intercourse with her as the offence of sexual assault has been found proved by the prosecution which satisfies the requirement of Section 366 of the IPC. As such, the prosecution has proved the offences under Sections 363 & 366 of the IPC beyond reasonable doubt and the argument that once the appellant has been convicted for offence under Section 363 of the IPC, he cannot be convicted for offence under Section 366 of the IPC is liable to be rejected, as conviction for offence under Section 366 of the IPC would be sustainable as the abduction was for the purpose of subjecting the deceased girl to illicit intercourse which has been found proved by the prosecution and therefore the argument made in this regard is hereby rejected.

23. The appellant has also been convicted for offence under Section 376AB of the IPC and Section 6 of the POCSO Act. Section 376AB of the IPC provides punishment for rape on woman under twelve years of age and provides as under: -

> "**376AB. Punishment for rape on woman under twelve years of age.**—Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:
>
> Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim:
>
> Provided further that any fine imposed under this section shall be paid to the victim."

24. Similarly, Section 3 of the POCSO Act defines penetrative sexual assault and Section 6 of the POCSO Act provides punishment for aggravated penetrative sexual assault which states as under: -

> "**6. Punishment for aggravated penetrative sexual assault.**—(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.
>
> (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

25. Aggravated penetrative sexual assault on a child has been defined in Section 5(m) of the POCSO Act which states as under: -

> "**5. Aggravated penetrative sexual assault.**—
>
> (m) whoever commits penetrative sexual assault on a

child below twelve years; or”

26. It is the case of the prosecution that the appellant has committed penetrative sexual assault upon the deceased victim as she has suffered 5 injuries on her genital area and total 21 injuries were found on her whole body which has been proved by the statement of Dr. Datta Sorte (PW-13) and that rape has been committed with the deceased and the same is further corroborated by the DNA report Ex.P-32, which has been proved by Smt. Apolina Ekka (PW-17), Senior Scientific Officer of the State FSL, Raipur, and that has been found proved by the learned trial Court, which has been assailed in this appeal.

27. Dr. Datta Sorte (PW-13), who has examined the minor victim has found 21 external injuries on the body of the deceased victim and 5 injuries on her private parts which states as under: -

बाह्य चोटे –

1. निचले होठ पर दाहिने तरफ कंट्यूजन मौजूद था जिसका आकार 1 सेमी गुणा 1 सेमी था।

2. होठ के चारों तरफ खरोच मौजूद थे जिसका आकार 0.5 सेमी गुणा 0.5 सेमी था।

3. चेहरा कंजेस्टेड था।

4. निचले होठ के अंदरूनी भाग पर मसल्स के भीतर तक कटा फटा घाव मौजूद था जिसका आकार 0.7 सेमी गुणा 0.5 सेमी था। घाव के किनारों पर खून मौजूद था।?

5. उपरी होठ के अंदरूनी भाग पर मसल्स के भीतर तक कटा फटा घाव मौजूद था जिसका आकार 1 सेमी गुणा 0.5 सेमी था। घाव के किनारों पर खून मौजूद था।

6. शव के दाहिने कंधे पर डेल्टाइड मसल्स एरिया पर खरोंचे मौजूद थी। जिसका आकार 0.1 सेमी गुणा 0.1 सेमी था।

7. शव के दाहिनी छाती पर खरोच तीसरे और चौथे पसली पर खरोचे मौजूद थी जिसका आकार 0.01 सेमी गुणा 0.2 सेमी था। शव के दाहिनी छाती के निप्पल के 3 सेमी उपर कांख की तरफ चोट मौजूद था।

8. शव के दांये भुजा के अंदरूनी भाग पर तीर खरोचे मौजूद थी जिनका आकार 1 सेमी गुणा 1 सेमी, 0.1 सेमी गुणा 0.1 सेमी जो दांये कंधे के 9

सेमी नीचे तथा बगल से 3 सेमी नीचे थी।

9. दाहिने भुजा के अंदरूनी निचले भाग पर खरोच था जिसका आकार 1 सेमी गुणा 1 सेमी था जो कंधे से 13 सेमी नीचे था।

10. दांये कोहनी तथा भुजा के बीच एक खरोच थी जिसका आकार 1 सेमी गुणा 0.5 सेमी था जो कोहनी से 2 सेमी उपर था।

11. दांये भुजा के अंदरूनी भाग पर खरोचे मौजूद थी जिसका आकार 1 सेमी गुणा 1 सेमी था जो बगल से 4 सेमी नीचे थे।

12. दाहिने भुजा के अंदरूनी भाग पर खरोच मौजूद थी जिसका आकार 0.2 सेमी गुणा 0.2 सेमी था जो दांये कोहनी से 4 सेमी उपर और कांख से 10 सेमी नीचे थी।

13. दांये भुजा के अंदरूनी भाग पर खरोच के निशान थे जिसका आकार 0. 1 सेमी गुणा 0.1 सेमी था जो कोहनी के 6 सेमी उपर कांख से 10 सेमी नीचे था।

14. दाहिने भुजा के अंदरूनी भाग पर एक खरोच थी जिसका आकार 0.1 सेमी गुणा 0.1 सेमी था जो कोहनी से 10 सेमी उपर और कांख से 6 सेमी नीचे था।

15. दाहिने घुटने के पीछे तीन खरोचे मौजूद थी जिनका आकार 1 गुणा 1 सेमी से लेकर 0.2 गुणा 0.2 सेमी था जो घुटने के बगल में 7 सेमी उपर तथा घुटने के 11 सेमी अंदरूनी भाग पर थी।

16. बायें जांघ एक खरोच मौजूद थी जिसका आकार 0.1 गुणा 0.1 सेमी था जो घुटने के 3 सेमी उपर थी।

17. दांयी जांघ उपरी भाग पर एक खरोच मौजूद था जिसका आकार 0.2 गुणा 0.2 सेमी था जो घुटने के 8 सेमी उपर तथा 7 सेमी अंदरूनी भाग पर था।

18. दांयी जांघ के पिछले हिस्से पर एक खरोच मौजूद थी जिसका आकार 0.1 गुणा 0.1 सेमी था जो घुटने के 12 सेमी उपर तथा कमर की हड्डी से 14 सेमी नीचे थी।

19. एक खरोच दांयी जांघ उपरी भाग पर मौजूद थी जिसका आकार 3 गुणा 0.5 सेमी था जो घुटने के 7 सेमी उपर एवं कमर के 11 सेमी नीचे था।

20. दो खरोच बांयी जांघ पर मौजूद थी जिसका आकार 0.3 सेमी गुणा 0.3 सेमी से लेकर 0.5 गुणा 0.3 सेमी था जो 3 सेमी कमर के नीचे एवं 11 सेमी घुटने के उपर था।

21. एक खरोच बांये कुल्हे पर था जिसका आकार 1 सेमी गुणा 0.2 सेमी था जो गुदाद्वार से 5 सेमी पर तथा सैकाम हड्डी से 8 सेमी दूरी पर था।

28. A careful perusal of the statement of Dr. Datta Sorte (PW-13) would show that the minor victim had also suffered five injuries on her genital area

(private part) and hymen was also found ruptured and on all injuries, there was redness which clearly indicates that she was subjected to forceful sexual intercourse. Dr. Datta Sorte (PW-13) in paragraph 9 of his statement has clearly stated that the deceased girl was subjected to rape and thereafter, she was murdered, which remains uncontroverted. Not only this, the frock which the deceased victim wore at the time of commission of offence was sent to the FSL and in the FSL report Ex.P-31, semen and spermatozoa were found on the said frock. The prosecution has also sent blood samples as well as fluid samples for chemical examination to the State FSL and report Ex.P-32 in this regard has been received in which the DNA sample developed from blood samples of the accused has matched with the DNA profiling developed from the vaginal swab of the victim. Opinion of the doctor (Ex.P-32) states as under: -

- प्रदर्श H_2(1834) मृतिका कु. वेदिका के फॉक से डी.एन.ए. प्रोफाईल प्राप्त नहीं हुआ।

- प्रदर्श C(1757) मृतिका कु. वेदिका के वेजाईनल स्वाब, प्रदर्श D(1758) मृतिका कु. वेदिका के वेजाईनल स्लाईड, एवं प्रदर्श G(1761) मृतिका कु. वेदिका के नेल स्क्रेपिंग में मिश्रित डी.एन.ए. प्रोफाईल प्राप्त हुआ।

- प्रदर्श D(1758) मृतिका कु. वेदिका की वेजाईनल स्लाईड, प्रदर्श G(1761) मृतिका कु. वेदिका के नेल स्क्रेपिंग एवं प्रदर्श H2(1834) मृतिका के फॉक से (Y) पुरूष डी.एन.ए. प्रोफाईल प्राप्त नहीं हुआ।

- प्रदर्श C(1757) मृतिका कु. वेदिका के वेजाईनल स्वाब से प्राप्त (Y) पुरूष डी.एन.ए. प्रोफाईल में प्रत्येक मार्कर पर पाये गये एलिल, प्रदर्श K(1762) आरोपी शेखर कोर्राम के रक्त नमूना से प्राप्त (Y) पुरूष डी.एन.ए. प्रोफाईल में पाये गये प्रत्येक मार्कर के एलिल समान हैं।

  <u>अभिमत–</u>:

  डी.एन.ए प्रोफाइलिंग हेतु प्राप्त प्रदर्शों पर किये गये परीक्षण एवं प्राप्त परिणामों के आधार पर निम्नलिखित निश्चयात्मक परिणाम प्राप्त हुए हैं: –

  1. प्रदर्श C(1757) में प्राप्त (Y) पुरूष डी.एन.ए. प्रोफाईल, प्रदर्श K(1762) से प्राप्त (Y) पुरूष डी.एन.ए. प्रोफाईल एक समान है।

29. It is well settled law that DNA report deserves to be accepted as bona fide evidence unless it is absolutely dented by defence and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance for the DNA analysis. The Supreme Court in **Mukesh** (supra) reviewing its earlier decision on the point and considering the provisions contained in Section 53A of the Code of Criminal Procedure, 1973, which is a provision for examination of person accused of rape by medical practitioner and which also includes the description of material taken from the person of the accused for DNA profiling and also considering Section 164A of the CrPC which also includes the description of material taken from the person of the woman for DNA profiling, held in paragraph 228 as under: -

> "228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non- acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted."

30. Turning to the facts of the case in the light of the aforesaid principles of law laid down by the Supreme Court qua DNA profiling in the matter of **Mukesh** (supra), it is quite vivid that in the present case, Smt. Apolina Ekka (PW-17), who is Senior Scientific Officer of the State FSL, Raipur, has categorically stated before the court that DNA samples as well as report of the DNA profile is prepared with all precautions and with scientific measures and standards and her report is Ex.P-32 in which DNA samples developed through blood samples of the accused have been found matching with the DNA profile developed through the vaginal swabs of the

deceased victim, as such, there is no dispute and it has been fully established. Not only this, the appellant was also found capable of committing sexual intercourse by Dr. Anil Mahakalkar (PW-16) who has examined the accused on 24-8-2020. The aforesaid medical evidence clearly leads to the conclusion that the appellant had committed sexual intercourse with the deceased victim and is guilty of committing penetrative sexual assault with the minor victim. In view of the provisions contained in Section 42 of the POCSO Act, the appellant has been sentenced to death under Section 6 of the said Act.

Conviction of the appellant under Section 302 of the IPC: -

31. The trial Court has convicted the appellant for offence under Section 302 of the IPC too which has been seriously challenged by learned counsel for the appellant. In order to deal with the submission made in this behalf, it would be appropriate to firstly consider whether death of the deceased was homicidal in nature, as the trial Court has held the death to be homicidal in nature and the appellant was last seen together with the deceased; recovery of dead body of the deceased has been made pursuant to the disclosure statement of the appellant; DNA sample of the accused generated from his blood had matched with the vaginal swabs of the deceased; and saliva of the deceased was found on the pillow cover used to smother the deceased. The facts so established are consistent only with the hypothesis of the accused and the chain of circumstances is complete as against the appellant which has seriously been challenged on behalf of the appellant.

32. In order to address the challenge so made, it would be appropriate to notice firstly as to whether the death of the deceased was homicidal in

nature which the trial Court has found proved and assailed by the appellant. Dead body of the deceased was recovered on 22-8-2020 from the house of the accused at his disclosure statement. Postmortem report Ex.P-34 discloses the cause of death of the deceased to be smothering which has been proved by Dr. Datta Sorte (PW-13) who conducted postmortem on the body of the deceased. A careful perusal of the statement of Dr. Datta Sorte (PW-13) extracted herein-above in paragraph 26 would show that as many as 21 injuries have been found on the body of the victim / deceased and five injuries on private part of the deceased was noticed. On internal examination, Dr. Datta Sorte (PW-13) has found dark blood in the heart of the deceased and left and right lungs were congested. In paragraph 9, he has opined that cause of death was smothering i.e. by pressing nose and mouth and death was homicidal in nature. No effective cross-examination has been made on behalf of the defence. Paragraph 6 of the statement of Dr. Datta Sorte (PW-13) states as under: -

06/ आंतरिक परीक्षण–

1. सिर की त्वचा तथा हड्डिया और अंदरुनी झिल्ली यथावत थी, भेजा यथावत तथा कंजेस्टेड था ।

2. पसली, परदा, कोमलस्व यथावत था । फुफ्फस यथावत तथा कंजेस्टेड था । कंठ और श्वासनली यथावत थी । दाहिने तथा बांया फेफड़ा कंजेस्टेड तथा यथावत था । फेफड़े को काटने के बाद ब्लड और द्रव निकल रहा था । रक्त स्त्राव की जगह पर पेटेचियर मौजूद था । पेरिआर परकसिया यथावत था । हृदय सामान्य का यथावत था । हृदय के अंदर डार्क खून था और पेटेचियर था ।

3. उदर का पर्दा, आंतो की झिल्ली, मुंह, ग्रासनली तथा ग्रसनी यथावत थी ।

4. पेट एवं उसके भीतर की वस्तुऍ यथावत थी तथा पेट खाली था । छोटी आंत एवं बड़ी आंत व उसके भीतर की वस्तुऍ यथावत थी तथा उनमें गैस तथा मल भरा हुआ था ।

5. यकृत, प्लीहा, गुर्दा यथावत व कंजेस्टेड था ।

6. भीतरी एवं बाहरी जननेंद्रिया सामान्य आकार की थी एवं

जननेंद्रिया अविकसित थी, गर्भाशय का आकार 2 गुणा 1.5 गुणा 0.5 सेमी था । ओवरी का आकार 2 गुणा 1 गुणा 0.5 सेमी था ।

33. Their Lordships of the Supreme Court relying upon Modi's Medical Jurisprudence and Toxicology, in the matter of **Subramaniam v. State of Tamil Nadu and another**[15], have elaborated the symptoms / signs of smothering / suffocation which is being highlighted by us herein and held as under: -

> "14. With regard to the post-mortem appearance, it is stated in *Modi*:
>
> "*Post-mortem appearance*
>
> Post-mortem appearances are external and internal
>
> (i) *External Appearance*
>
> The external appearance may be due to the cause producing suffocation, or to asphyxia.
>
> (a) *Appearance due to the Cause Producing Suffocation*.—In homicidal smothering, affected by the forcible application of the hand over the mouth and the nostrils, bruises and abrasions are often found on the lips and on the angles of the mouth, and alongside the nostrils. The inner mucosal surface of the lips may be found lacerated from pressure on the teeth. The nose may be flattened, and its septum may be fractured from pressure of the hand, but these signs are, in Modi's experience, very rare. There may be bruises and abrasions on the cheeks and the molar regions, or on the lower jaw, if there has been a struggle. Rarely, fracture or dislocation of the cervical vertebrae may occur if the neck has been forcibly wrenched in an attempt at smothering with the hand. No local signs of violence will be found, if a soft cloth or pillow has been used to block the mouth and nostrils.
>
> In compression of the chest, external signs of injury may not be present, but the ribs are usually fractured on both the sides. In homicidal compression of the chest brought about by the hands or knees of a murderer or by some other hard material, bruises and abrasions, symmetrical on both sides, are usually found on the skin together with extravasation of the blood in the

15 (2009) 14 SCC 415

subcutaneous tissues. Rarely, along with the ribs the sternum is also fractured. It should, however, be remembered that the traumatic asphyxia produces variable findings. In a fair person, purple suffusion of skin above the point of compression is apparent in severe fixation of the chest by mechanical compression. There may not be any external or internal signs where the pressure is slight or evenly distributed.

(b) *Appearance due to asphyxia*.—The face may be pale or suffused. The eyes are open, the eyeballs are prominent, and the conjunctivae are congested and sometimes there are petechial hemorrhages. The lips are livid, and the tongue sometimes protruded. Bloody froth comes out of the mouth and the nostrils. The skin shows punctiform ecchymoses with lividity of the limbs. Rupture of the tympanum may occur from a violent effort at respiration.

(ii) *Internal appearance*

Rags, mud or any other foreign matter may be found in the mouth, throat, larynx or trachea, when suffocation has been caused by the impaction of a foreign substance in the air-passages. It may also be found in the pharynx or the oesophagus. The mucous membrane of the trachea is usually bright red, covered with bloody froth and congested. The lungs are congested and emphysematous. They may be lacerated or contused even without any fracture of the rib, if death has been caused by pressure on the chest. Punctiform subpleural ecchymoses (Tardieu spots) are usually present at the root, base, and the lower margins of the lungs, but they are not characteristic of death by suffocation, as they may also be present in asphyxia death from other causes. They are also found on the thymus, pericardium, and along the roots of the coronary vessels. The lungs may be found quite normal, if death has occurred rapidly. The right side of the heart is often full of dark fluid blood, and the left empty. The blood does not readily coagulate; hence, wound caused after death may bleed. The brain is generally congested, and so are the abdominal organs, especially the liver, spleen and kidneys."

15. In the author's opinion, to come to a definite conclusion it is very essential to look for evidences of violence in the shape of external marks surrounding the mouth and nostrils or on inside the mucosal surface, or on the chest. According to the learned author, circumstantial evidence should always be taken into consideration to establish the proof of death from suffocation."

34. Going by paragraphs 14 & 15 of the decision rendered in Subramaniam

(supra) with regard to the postmortem appearance in case of smothering as elaborated by the Supreme Court, in the instant case, there were signs / symptoms of smothering on the body of the deceased like on internal appearance, lungs were congested and in heart, dark blood was found. As such, it has duly been proved that death of the deceased was homicidal in nature which has also been stated by Dr. Datta Sorte (PW-13) who has conducted postmortem. Therefore, it has duly been proved that nature of death was homicidal.

35. Now, the question is, whether the trial Court has rightly held that offence has been committed by the appellant herein?

Last seen together: -

36. The theory of last seen together has been found proved by the trial Court which has been vehemently assailed on behalf of appellant before this Court. In a very recent decision rendered on May 13, 2022 in the matter of **Veerendra v. State of Madhya Pradesh**[16], their Lordships of the Supreme Court relying upon the decision in the matter of **Nizam and another v. State of Rajasthan**[17] has held that it would not be prudent to base conviction solely on 'last seen theory'. It was further held that where time gap between 'last seen' and 'time of occurrence' is long it would be unsafe to base the conviction solely on the 'last seen theory' and held that in such circumstances, it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. It has been held in paragraphs 32.1 to 32.4 of the report as under: -

> "32.1 In the decision in Nizam and Anr. Vs. State of Rajasthan [(2016) 1 SCC 550] this Court held that it would not be prudent to base conviction solely on 'last seen theory'. This Court, obviously, sounded a caution that where time gap between 'last seen' and 'time of

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occurrence' is long it would be unsafe to base the conviction solely on the 'last seen theory' and held that in such circumstances, it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution.

32.2 In State of Rajasthan Vs. Kashi Ram reported in (2006) 12 SCC 254, at paragraph 23 this Court held :

> "23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., AIR 1960 Mad 218 : 1960 Crl LJ 620."

32.3 In Arabindra Mukherjee Vs. State of West Bengal [(2011) 14 SCC 352], while dismissing the appeal by the convict who stood sentenced for offences punishable under Section 302, 364, 120B and 201 of IPC, this Court held: "once the appellant was last seen with the deceased, the onus is upon him to show that either he was not involved in the occurrence at all or that he had left the deceased at her home or at any other reasonable place. To rebut the

evidence of last seen and its consequence in law, the onus was upon the accused to lead evidence in order to prove his innocence."

32.4 In Pattu Rajan Vs. State of Tamil Nadu [(2019) 4 SCC 771] this Court held in paragraph 63 thus :-

> "It is needless to observe that it has been established through a catena of judgment of this court that the doctrine of last seen, if proved, shifts the burden of proof on to the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last seen with him. Failure on the part of the accused to furnish any explanation in this regard, as in the case on hand, or furnishing false explanation would give rise to strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances."
>
> (Emphasis supplied)

37. Similarly, in the matter of **Satpal v. State of Haryana**[18], last seen theory has been held to be a weak piece of evidence by itself to found conviction upon the same singularly, unless it is coupled with other circumstances, and observed as under: -

> "6. We have considered the respective submissions and the evidence on record. There is no eye witness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is

18 (2018) 6 SCC 610

established, and there is corroborative evidence available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

38. Coming to the facts of the present case, the victim was found missing at around 4 p.m. on 22-8-2020 and dead body was recovered from the house of the appellant at 11.10 p.m. on the same day as per Ex.P-15, the dead body recovery panchnama, and the appellant was seen taking away the minor victim by Narad Sinha (PW-2), who is independent witness, as well as by Bhuneshwari (PW-10). Narad Sinha (PW-2) in his statement before the Court in paragraph 2 has clearly stated that on being asked as to who the girl was, the appellant has candidly replied that she is the daughter of Omprakash @ Prakash Yadav (PW-1) and thereafter, the deceased went missing and was later-on found dead in the house of the appellant. As such, the theory of last seen together is clearly established.

39. The law with regard to circumstantial evidence is well settled. In a case where the prosecution relies upon the circumstantial evidence, it must not only prove the circumstances but should link them in such a fashion so as to form an unending chain i.e. the guilt of the accused. But if there is any chance of the accused being innocent or the crime has been committed by some other person, then the accused has to be given the benefit of doubt and on the basis of circumstantial evidence, he cannot be convicted.

40. The law laid down by their Lordships of the Supreme Court in the matter of Sharad Birdhichand Sarda v. State of Maharashtra[19] is that the conditions which must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence are as under:-

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

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

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

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

(5) there must be a chain of evidence so 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.

41. In Sharad Birdhichand Sarda (supra), the Supreme Court has further held that suspicion, however strong, cannot take the place of legal proof. It has also been held that the well established rule of criminal justice is that "fouler the crime higher the proof" and in case of capital sentence, a very careful, cautious and meticulous approach was necessary to be made. It has been observed in paragraph 180 of the

19 (1984) 4 SCC 116

report as under: -

> "180. It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof". In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made."

Memorandum statement and seizure of the dead body of the deceased: -

42. Dead body of the deceased victim was found from the house of the appellant pursuant to his disclosure statement Ex.P-14 and same was recovered vide Ex.P-15 and the pillow cover used in the crime was also recovered vide Ex.P-16. Disclosure statement Ex.P-14 and recovery of dead body of the deceased have been proved by Sugriv Sahu (PW-5) and Devendra Kumar (PW-6). Sugriv Sahu (PW-5) has stated in his statement before the Court that on the basis of disclosure statement Ex.P-14 given by the accused, dead body of the deceased victim was recovered vide Ex.P-15 from the house of the appellant in between the wall and the divan cot. In para 7 he has clearly supported the case of the prosecution that in his presence pursuant to the disclosure statement of the appellant, the dead body of the deceased and pillow cover were recovered. Though he has been subjected to lengthy cross-examination, but he has maintained his version before the Court. Similarly, Devendra Kumar (PW-6) has also supported and proved the disclosure statement Ex.P-14, recovery of dead body of the deceased Ex.P-15 and recovery of pillow cover Ex.P-16. As such, Sugriv Sahu (PW-5) and Devendra Kumar (PW-6) have firmly proved the memorandum statement Ex.P-14, recovery of dead body Ex.P-15 and recovery of pillow cover Ex.P-16 from the house of the accused. Therefore, there is recovery of dead body at the instance of the appellant which has been established from the disclosure statement. As such, the circumstances have firmly been proved by the prosecution.

43. It has been next argued that it is the case of prosecution that the appellant

has smothered the mouth of the deceased by pillow cover by which she died and the said pillow cover was recovered vide Ex.P-16 pursuant to the memorandum of the accused Ex.P-14 and the same was sent for chemical examination to the State FSL from where report Ex.P-31 was received in which saliva was found on the pillow cover. It has been argued on behalf of the appellant that the said saliva was never sent to the DNA analysis which proves that the saliva was of the deceased, however, it has been held by the trial Court that the saliva was of the deceased.

44. True it is that there is no DNA report holding the saliva to be of the deceased. Therefore, mere recovery of pillow cover at the instance of the appellant and mere presence of saliva on the said pillow cover would not prove that the said saliva was of the deceased and the pillow cover was used to smother the deceased and to cause her death, but that would not absolve the appellant herein from the offence, as the other incriminating circumstances are available and found proved.

FSL report and DNA analysis: -

45. Vaginal swabs of the deceased victim were prepared during postmortem by Dr. Datta Sorte (PW-13) and his postmortem report is Ex.P-34. Blood samples of the appellant were collected vide Ex.P-25 and sent for DNA analysis. On examination of the DNA profile which was extracted from the vaginal swabs of the deceased and the blood samples of the appellant, it was found that the DNA profile generated from the vaginal swabs matched with the DNA profile generated from the blood samples of the appellant which has been proved by Smt. Apolina Ekka (PW-17), Senior Scientific Officer of the State FSL, Raipur, who has prepared and proved the DNA report Ex.P-32. DNA has been held to be reliable evidence by the Supreme Court in Mukesh (supra). Likewise, frock of the victim was also seized by the prosecution during postmortem by Dr. Datta Sorte (PW-13) vide

postmortem report Ex.P-34 and the said frock marked as Article H2 was sent for FSL examination vide Ex.P-38 and after forensic examination, stains of semen and spermatozoa were present on the frock of the deceased. Similarly, dead body of the deceased was found between bed and wall of the house of appellant which was recovered pursuant to the disclosure statement of the appellant.

46. Reverting to the facts of the case, it is quite evident that it is not the only evidence of last seen together of the appellant with the deceased, apart from that recovery of the dead body was made vide Ex.P-15 and same has been found proved by the trial Court and also by us in the foregoing paragraphs. Furthermore, FSL report Ex.P-31 also would show that spermatozoa and stains of semen were found on the frock of the deceased Article H2. Similarly, vaginal swabs of the victim were prepared during postmortem and on examination DNA profile extracted from the vaginal swabs of the deceased and DNA profile generated from the blood samples of the appellant were found matching. DNA report Ex.P-32 has been proved by Smt. Apolina Ekka (PW-17). As such, the trial Court has rightly on the basis of last seen together which has duly been established and proved and on the basis of recovery of dead body pursuant to the disclosure statement of the accused Ex.P-14 which has been duly proved by Sugriv Sahu (PW-5) & Devendra Kumar (PW-6) and further, on the basis of FSL report Ex.P-31 and DNA profiling Ex.P-32, has recorded the aforesaid finding against the appellant.

47. Thus, after appreciating the entire ocular and medical evidence on record, we do not find any illegality in appreciation of oral, medical and circumstantial evidence or arriving at a conclusion as to the guilt of the appellant by the trial Court warranting interference by this Court and we accordingly hereby confirm the conviction of the appellant

recorded under Section 302 of the IPC.

48. After hearing learned counsel for the parties and after going through the record, we do not find any perversity or illegality in the finding recorded by the trial Court convicting the appellant herein for offence under Section 201 of the IPC. We hereby affirm that finding as there is sufficient evidence available on record.

49. Now, the next question would be the question of death sentence awarded by the learned Additional Sessions Judge to the appellant herein directing that he should be hanged to death till his death and it has been sent to us for confirmation in accordance with Section 366 of the CrPC.

Death sentence

50. Now, the only question is, whether this case falls under the category of rarest of rare case justifying capital punishment. Their Lordships of the Supreme Court in umpteen number of judgments have laid down principles for awarding capital punishment for which the balance between aggravating circumstances and mitigating circumstances has to be struck. Seven other factors like, age of the accused, possibility of reformation and lack of intention of murder have also to be gone into the judicial mind.

51. Death penalty or imprisonment for life for the commission of murder under Section 302 of the IPC has been provided. In case of conviction under Section 302 of the IPC or any conviction for an offence punishable with death or in the alternative imprisonment for life, the Court is required to assign special reasons for awarding such

penalty and the special reason for awarding death sentence in accordance with sub-section (3) of Section 354 of the CrPC. Sub-section (3) of Section 354 of the CrPC reads as under:-

> **"S. 354 (3)**: When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

52. The language of Section 354(3) of the CrPC demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, 'in the case of sentence of death, the special reasons for such sentence' unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence i.e. the Court is required to hold that it is a case of rarest of rare warranting imposition of only death sentence.

53. Very recently, the Supreme Court in the matter of **Manoj and others v. State of Madhya Pradesh**[20] reviewing the entire case laws on the point beginning from **Bachan Singh** (supra) held in paragraph 204 as under: -

> "204. Mitigating factors in general, rather than excuse or validate the crime committed, seek to explain the surrounding circumstances of the criminal to enable the judge to decide between the death penalty or life imprisonment. An illustrative list of indicators first recognised in Bachan Singh[11] itself:
>
> > "Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:
> >
> > (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
> >
> > (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

20 Criminal Appeal Nos.248-250 of 2015, decided on 20-5-2022

> (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
>
> (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (6) That the accused acted under the duress or domination of another person.
>
> (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

> These are hardly exhaustive; subsequently, this court in several judgments has recognised, and considered commutation to life imprisonment, on grounds such as young age[21], socio-economic conditions[22], mental illness[23], criminal antecedents[24], as relevant indicators on the questions of sentence. Many of these factors reflect demonstrable ability or merely the possibility even, of the accused to reform (i.e. (3) and (4) of the Bachan Singh list), which make them important indicators when it comes to sentencing."

Their Lordships further emphasised the need for pre-sentence hearing – opportunity and obligation to provide material on the accused and in paragraphs 211 and 212 held as under: -

> "211. However, this too, is too little, too late and only offers a peek into the circumstances of the accused after conviction. The unfortunate reality is that in the absence of

21 Mahesh Dhanaji Shinde v. State of Maharashtra (2014) 4 SCC 292, Gurvail Singh v. State of Punjab (2013) 2 SCC 713, etc.
22 Mulla and another v. State of U.P. (2010) 3 SCC 508; Kamleshwar Paswan v. U.T. Chandigarh (2011) 11 SCC 564; Sunil Gaikwad v. State of Maharashtra (2014) 1 SCC 129
23 Shatrughan Chauhan v. Union of India (2014) 3 SCC 1
24 Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775

well-documented mitigating circumstances at the trial level, the aggravating circumstances seem far more compelling, or overwhelming, rendering the sentencing court prone to imposing the death penalty, on the basis of an incomplete, and hence, incorrect application of the Bachan Singh test.

212. The goal of reformation is ideal, and what society must strive towards – there are many references to it peppered in this court's jurisprudence across the decades – but what is lacking is a concrete framework that can measure and evaluate it. Unfortunately, this is mirrored by the failure to implement prison reforms of a meaningful kind, which has left the process of incarceration and prisons in general, to be a space of limited potential for systemic reformation. The goal of reformative punishment requires systems that actively enable reformation and rehabilitation, as a result of nuanced policy making. As a small step to correct these skewed results and facilitate better evaluation of whether there is a possibility for the accused to be reformed (beyond vague references to conduct, family background, etc.), this court deems it necessary to frame practical guidelines for the courts to adopt and implement, till the legislature and executive, formulate a coherent framework through legislation. These guidelines may also offer guidance or ideas, that such a legislative framework could benefit from, to systematically collect and evaluate information on mitigating circumstances."

Thereafter, their Lordships issued practical guidelines to collect mitigating circumstances and observed in paragraphs 213 to 217 as under: -

"213. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

214. To do this, the trial court must elicit information from the accused and the state, both. The state, must – for an offence carrying capital punishment – at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing

psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh*. Even for the other factors of (3) and (4) – an onus placed squarely on the state – conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

215. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

a) Age

b) Early family background (siblings, protection of parents, any history of violence or neglect)

c) Present family background (surviving family members, whether married, has children, etc.)

d) Type and level of education

e) Socio-economic background (including conditions of poverty or deprivation, if any)

f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

g) Income and the kind of employment (whether none, or temporary or permanent etc);

h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any) etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

216. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the

accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e., probation and welfare officer, superintendent of jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be – a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for an more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformative progress, and reveal post-conviction mental illness, if any.

217. It is pertinent to point out that this court, in *Anil v. State of Maharashtra*[25] has in fact directed criminal courts, to call for additional material:

> *"Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case."*
>
> (emphasis supplied)

We hereby fully endorse and direct that this should be implemented uniformly, as further elaborated above, for conviction of offences that carry the possibility of death sentence."

54. Reverting to the facts of the case in the light of the aforesaid practical guidelines issued by the Supreme Court in **Manoj** (supra), it is quite

25 (2014) 4 SCC 69

vivid that the trial Court has convicted the appellant and sentenced him to death on the same date. The trial Court has not taken into consideration the probability of the appellant to be reformed and rehabilitated and has only taken into consideration the crime and the manner in which it was committed and has not given effective opportunity of hearing on the question of sentence to the appellant. No evidence was brought on record on behalf of the prosecution to prove to the court that the appellant cannot be reformed or rehabilitated, by producing material about his conduct in jail and no opportunity of hearing was given to the appellant to produce evidence in that respect. Before this Court a report from jail has been produced in which the behaviour of the appellant has been found to be normal. No jail offence(s) has been said to have been committed by the appellant, though the appellant has committed the offence of kidnapping minor victim girl from the guardianship of her father and subjecting her to sexual intercourse by which she suffered 21 bodily injuries and five additional injuries on her private part which is barbaric, inhuman, heinous and extremely brutal. These are the incriminating circumstances, but there is no evidence on record that the appellant cannot be reformed or rehabilitated as at the time of offence he was aged about 24 years and he is a member of Scheduled Tribe, thereby he belongs to tribal community and his chances of being reformed or rehabilitated cannot be ruled out. Considering his report which is said to be absolutely normal in jail during his incarceration from 23-8-2020 and no criminal antecedents have been shown against him. Though it shocks the conscious of the

society at large, but, yet, in the facts and circumstances of the case, considering the young age of the appellant, upon thoughtful consideration, we are of the view that extreme sentence of death penalty is not warranted in the facts and circumstances of the case. We are of the opinion that this is not the rarest of rare case in which major penalty of sentence of death awarded has to be confirmed. In our view, imprisonment for life would be completely adequate and would meet the ends of justice. Accordingly, we direct commutation of death sentence into imprisonment for life. We further direct that the life sentence must extend to the imprisonment for remainder of natural life of the appellant herein – Shekhar Korram.

Conclusion

55. Consequently, Cr.Ref.No.1/2021 made by the Additional Sessions Judge (Fast Track Special Court – POCSO), Rajnandgaon to the extent of confirmation of imposition of death sentence to appellant Shekhar Korram is rejected accordingly.

56. However, Cr.A.No.1270/2021 filed on behalf of Shekhar Korram is partly allowed. Conviction of the appellant under Sections 363, 366, 302 of the IPC & Section 6 of the POCSO Act and Section 201 of the IPC are maintained, but, sentence of death is commuted to life imprisonment by maintaining the fine amount. We further direct that life sentence must extend to the imprisonment for remainder of natural life of the appellant herein – Shekhar Korram.

Compliance

57. The Registrar (Judicial) is directed to send a duly attested copy of this

judgment to the concerned Court of Session as mandated under Section 371 of the CrPC for needful.

Sd/-
(Sanjay K. Agrawal)
Judge

Sd/-
(Rajani Dubey)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Reference No.1 of 2021

In reference of State of Chhattisgarh

Versus

Shekhar Korram

AND

Criminal Appeal No.1270 of 2021

Shekhar Korram

Versus

State of Chhattisgarh

Head Note

Death sentence awarded to the appellant is commuted to imprisonment for life by directing that the life sentence must extend to the imprisonment for remainder of natural life of the appellant.

अपीलार्थी को दिये गये मृत्युदण्ड की सजा का लघुकरण आजीवन कारावास की सजा में इस निर्देश के साथ किया गया कि आजीवन कारावास की सजा अपीलार्थी के शेष प्राकृतिक जीवन तक विस्तारित होगी।