

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL CONFIRMATION CASE NO. 2 OF 2019**

The State of Maharashtra. ... Appellant.

v/s.

Mohammad Aabed Mohammad Ajmir  
Shaikh.

Aged 20 years.

Residing at Gautam Chawl,  
Near Mohammadiya Masjid,  
Roshan Baug, Bhiwandi,  
Dist. Thane.

... Respondent.

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Mr. Arfan Sait, APP for State.

Ms. Payoshi Roy a/w. Dr. Yug Mohit Chaudhry, advocate for  
Respondent No. 1.

Ms. Priyanka Chavan, appointed Advocate for victim.

Mr. Rajendra Prakash Mayane, Sr. Police Inspector, Bhiwandi City  
Traffic Unit, Bhiwandi, Dist. Thane.

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**CORAM : SMT. SADHANA S. JADHAV &  
PRITHVIRAJ K. CHAVAN, JJ.**

**RESERVED ON : DECEMBER 10, 2021.**

**PRONOUNCED ON : FEBRUARY 8, 2022.**

**JUDGMENT (PER SMT. SADHANA S. JADHAV, J)**

*The stone of a grave had crushed the candle before it could*

*spread light or its aura could be seen.*

1           The tragic death of the child Miss. “X” came to light on 4<sup>th</sup> April, 2018, when her almost decomposed body was found in an abandoned state in the thorny bushes of an open land, which was used by the locals for defecating.

2           The State has filed this Case for confirming the death sentence awarded against the Respondent-Accused vide Judgment and Order dated 8<sup>th</sup> March, 2019 passed by the Additional Sessions Judge & Special Judge under POCSO Act, Thane in Special Case (Child Protection) No. 159 of 2018. The operative order reads as under :

“1. Accused Mohammad Aabed Mohammad Ajmir Shaikh, aged 20 years is hereby convicted as per section 235(2) of the Code of Criminal Procedure for the offence punishable under sections 363, 364, 366-A, 302, 201 of Indian Penal Code and offence punishable under sections 4, 8 and 10 of the Protection of Children from Sexual Offences Act, 2012.

2. Accused is hereby convicted as per section 235(2) of the Code of Criminal Procedure Code for the offence punishable under section 302 of Indian Penal Code and be

hanged by the neck till he is dead.

3. Accused is hereby sentenced to suffer rigorous imprisonment for life which shall mean imprisonment for the remainder of his natural life and to pay fine of Rs. 5,000 (Rupees Five Thousand only) for the offence punishable under section 376(2)(i) of Indian Penal Code. In default of payment of fine, shall suffer rigorous imprisonment for one year.

4. Accused is sentenced to suffer rigorous imprisonment for 5 years and shall pay fine of Rs. 5,000/- (Rupees Five Thousand only) for the offence punishable under section 363 of IPC. In default of payment of fine, shall suffer rigorous imprisonment for 6 months.

5. Accused is sentenced to suffer rigorous imprisonment for 5 years and shall pay fine of Rs. 5000/- (Rupees Five Thousand only) for the offence punishable under section 364 of IPC. In default of payment of fine, shall suffer rigorous imprisonment for 6 months.

6. Accused is sentenced to suffer rigorous imprisonment for 5 years and shall pay fine of Rs. 5,000/- (Rupees Five Thousand only) for the offence punishable under section 366-A of IPC. In default of payment of fine, shall suffer rigorous imprisonment for 6 months.

7. Accused is sentenced to suffer rigorous imprisonment for 3 years and shall pay fine of Rs. 5,000/- (Rupees Five

Thousand only) for the offence punishable under section 201 of IPC. In default of payment of fine, shall suffer rigorous imprisonment for 6 months.

8 All the substantive sentences for imprisonment of the accused shall run concurrently.

9 After realization of the amount, it shall be given to the parents of deceased girl after appeal period is over.

10 Accused is in jail. Hence, he is entitled for set off under section 428 of the Code of Criminal Procedure for the period already undergone in jail for the punishments of the offences except for the punishment under section 376(2)(i) as it implies that life imprisonment shall mean the imprisonment for remainder of life.

11 In view of section 28(2) of Cr. P.C. the sentence of death shall be subject to the confirmation by the Hon'ble High Court. Hence, entire proceeding be sent to the Hon'ble High Court at the earliest.

12 Muddemal property being worthless be destroyed after appeal period is over.

13 The District Legal Service, Thane is hereby requested to award compensation to the parents of deceased girl, as per rule.

14. Judgment declared in open court.

15. Copy of this Judgment be given to the accused free of costs.”

3 The facts of the case in nutshell are as under :

On 2<sup>nd</sup> April, 2018 early morning PW. 1 lodged a missing report at Bhoiwada Police station alleging therein that on 1<sup>st</sup> April, 2018 he left his house at about 4.00 p.m after his afternoon break and went to his pan stall. At about 6.00 p.m, his elder son Ajay visited the pan stall only to inform him that his younger sister who had gone to play at about 4.30 p.m had not yet returned home and was not traceable. The complainant immediately shut down his shop and went in search of his daughter, but in vain. Finally, in the early hours of 2/4/2018 he was constrained to lodge a report alleging therein that some unknown person, for reasons unknown to him, had kidnapped his daughter. On the basis of the said report, Crime No. 47/2018 was registered at Bhoiwada Police Station against unknown person for an offence punishable under Section 363 of Indian Penal Code. Investigation was set in motion.

4 On 4<sup>th</sup> April, 2018 when P.W 1 was at home, he was

informed by some children from the neighbourhood that the missing child was found. The people in the vicinity informed the complainant that an abandoned dead body of a child was seen in the bushes on the open land behind the chawl. He had also learnt from the people in the neighbourhood that a person working in the power loom had seen the dead body when he had gone to the spot for defecating. PW. 1 reached the spot, saw the dead body and identified it to be that of his daughter from the clothes and the footwear. He had also seen that her two hands and right leg were almost amputated and the dead body was almost decomposed. The complainant had noticed that maggots were crawling all over her body. The complainant was shattered.

5           For parents, the loss of a child is not just loss of a person they loved, but it is a psychological loss for the parents as their dreams for the child and with the child come to an end. It creates a vacuum from within. In cases like present one, after seeing the decomposed body, the first thought that would come to the parents is that they never dared to hurt the feelings and aspirations of the child, they used to be careful to touch the child, lest even their feather touch may hurt the tender hands and legs. Then, how could someone cause such a

gruesome murder of that innocent child?

6           With a heavy heart, the complainant immediately informed the police about having traced the dead body of the missing child. He gave the location to the police. The police reached on the spot. Inquest was performed on the dead body, on the spot. The inquest panchnama is at Exh. 29. The body was sent for post-mortem and it was determined that the cause of death was “Head injury with fracture of underlying skull with amputation of both upper extremities(Unnatural)”. On 4<sup>th</sup> April, 2018 a formal report was lodged by the complainant in Bhoiwada Police Station, Bhiwandi about finding the dead body of his daughter at a secluded location. Section 302 of India Penal Code was added.

7           On 6<sup>th</sup> April, 2018 the police learnt that one worker in a weaving mill (present appellant) had confessed before his co-worker about having committed the offence. The statement of P.W.14 was recorded. Pursuant to the said statement, the police searched for the accused, but it was learnt from reliable sources that the accused had fled to his hometown in Bihar. The investigating officer along with the

brother of the accused reached Bihar. The accused was arrested and was brought to Maharashtra. The accused was produced before the Magistrate. After completion of investigation, charge-sheet was filed and the case was registered as Special Case (Child Protection) No. 159/2018.

8           At the trial the prosecution has examined as many as 22 witnesses to bring home the guilt of the accused. PW 1 is the father of the deceased. PW 2 is the photographer, who took the pictures of the deceased at the scene of offence. PW 3 Kumar Mandal maintained the attendance register of the workers at the Power Loom, in which the accused and PW 14 were working as co-workers. PW 4 Dr. Vedpathak has performed autopsy on the dead body of the deceased along with PW.18 Dr. Bhise, PW 5 Rajiv Bansal has claimed to have seen the deceased lastly in the company of the accused. PW 6 Nitin is the brother of the deceased and the son of PW 1. PW 7 Abdul Khan and PW 8 Mahindra Nikam are the panchas for the scene of offence. PW 9 Jatin Mokashi is a government employee and he is a panch to the fact that the accused had led the investigating agency to the spot, from where the accused had picked up the victim. PW 10 Vijay Shinde is the

Nodal Officer, who has proved the call details record of the accused, which is not disputed. PW 11 Jafar is panch for seizure of clothes of the deceased, whereas PW 12 Bhimrao Patekar is the panch for the recovery of clothes of the accused at his instance under Section 27 of the Indian Evidence Act. PW 13 Siddharth has produced the CCTV footage installed at the Power Loom where the accused and PW 14 were working.

9 PW 14 Mohammad Irfan Shaikh is the star witness to whom the accused had allegedly made an extra judicial confession. PW 15 PSI Nilesh Jadhav had received the muddemal and prepared a receipt to that effect. PW16 Ujwala Ramoshi is the carrier of the sample to CA office. PW 17 is the PSO who registered the complaint of PW 1 on 2<sup>nd</sup> April, 2018. PW 19 is the medical officer who examined the accused. PW 20 Jayshree Mhaske, medical officer collected samples of accused and parents of victim for DNA testing. PW 21 Mohmmad Azmatullah Shaikh is the brother of the accused. PW 22 Rajendra Maine is the investigating officer.

10 The prosecution has placed implicit reliance on the

evidence of PW 1 the complainant i.e the unfortunate father of the deceased, PW 4 Dr. Pritija Vedpathak and PW 18 Dr. Bhise who conducted autopsy on the dead body of the deceased, PW 5 Raju Bansal, the witness who claims to have seen the deceased lastly in the company of the accused, PW 6 the brother of the deceased who claims to be playing with the deceased before she went missing. PW 14 Mohmmad Irfan Shaikh, who happens to be the room-mate as well as the co-worker of the accused to whom the accused had made an extra-judicial confession in respect of having caused death of Miss "X" on 1<sup>st</sup> April 2918, PW 21 the brother of the accused and PW 22 the investigating officer.

11 PW. 1 the complainant has deposed before the Court that he is a father of four children i.e three sons and one daughter(deceased) who was 4 and half year old at the time of incident. He runs a pan stall close to his house. His pan stall is closed in the afternoon from 2 to 4 p.m. he closes his shop daily at 2 p.m for lunch break and reopens it at 4 p.m.

12 According to him on 1<sup>st</sup> April, 2018 as usual after lunch-

break he left his house at 4 p.m.. At about 6 p.m, his elder son Ajay visited the pan stall only to inform his father that his younger sister had gone to play at about 4.30 p.m and did not return till 6 p.m. They had searched for her, but could not find her. He therefore, rushed to inform his father.

13           Upon hearing from his elder son, PW. 1 had searched for his daughter at all possible places. He inquired with the neighbours and relatives, but could not find his daughter and as a last resort, informed the police in the wee hours of 2<sup>nd</sup> April, 2018 about the missing child. He proved the contents of the missing report lodged by him which is marked at Exhibit 7.

14           PW. 1 has further deposed that on 2<sup>nd</sup> April, 2018 he had affixed the child's photographs at various places, he had distributed pamphlets and had also made announcement about the missing child from the Masjid. On 4<sup>th</sup> April, 2018, he had learnt from the children in the locality about the abandoned dead body of a child, which he identified as his own daughter. He reported to the police and thereafter, the investigation had got some momentum. The death of

the child was a harsh blow not only to the parents of deceased, but to the society as a whole.

15           According to PW 1, after the arrest of the accused, in the course of investigation, it has transpired that the accused owed rupees 1500/- to the complainant. He used to purchase cigarettes and tobacco from the pan stall of the complainant on credit. PW 1 had slapped him 8 months prior to the incident for non-payment of Rs.1,500/- and therefore, the accused in order to satisfy his vendetta had killed the daughter of the complainant. That the accused had made an extra-judicial confession to that effect in his presence before police and he had stated in his confession that he had sexually abused the daughter of the complainant, killed her by throttling her neck and then inflicted an injury on her head with a stone.

16           In the cross-examination, he has specifically stated that nobody had disclosed to him that his daughter was lastly seen with the accused or that the accused had carried the daughter of the complainant. He has also admitted that the accounts of the said transaction between him and accused was maintained by the accused

himself and the complainant did not have any document or any other material to show that the accused owed Rs. 1,500/- to the complainant. The statement of PW 1 was recorded on 4/4/2018, which is marked as Exhibit 9. The inquest panchnama was conducted in his presence and is marked at Exhibit 29.

17           It is pertinent to note that when the trial commenced and the evidence of the complainant was being recorded, there was no Advocate to represent the accused. It was only after recording of examination-in-chief of the complainant, an Advocate was appointed through legal aid panel to represent the accused.

18           PW 3 Kumar Chandrabhushan Mandal was working as a manager in the power loom owned by Akram Shaikh. According to him, the power loom is running in two shifts and 8 persons are working in each shift. The accused Aabed and PW 14 were working in the said power loom, whereas brother of accused was working in an adjacent industry. PW 3 claims to be acquainted with PW 1 as PW 1 was running a pan stall in close proximity. PW 3 maintained the attendance register of the workers in the power loom. On 4<sup>th</sup> April,

2018, the accused Aabed and his friend Irfan were on night duty. After 5<sup>th</sup> April, 2018, the accused absented himself from work.

19           The police had visited the power loom and had seized the pant, shirt and banian from the said power loom. PW 3 had handed over the attendance register to the police. PW 3 had further stated that Irfan had informed PW 3 that the accused Aabed had voluntarily disclosed to him that he had committed rape and murder of the victim and therefore, he had fled to his native place. The attendance register is marked at Exhibit 33. It is admitted in the cross-examination that the register was handed over to the police on 19<sup>th</sup> May, 2018. The said register does not bear the seal of the unit of the power loom or the signature of PW 3.

20           The autopsy was performed on the dead body of the victim on 5<sup>th</sup> April, 2018 by PW 4 Dr. Preetija Vedpathak and PW 18 Dr. Bhise who were attached to J J Hospital in Forensic Department. PW 4 was informed by PSI D. P. Kamble that the body of deceased was found in an open space near bushes behind Mohammadiya Masjid Bhiwandi. During the post mortem, following injuries were observed -

“2. On external examination of the body, following injuries were noted.

(i) Multiple oval to circular shaped lacerated wounds of size ranging from 0.5 x 1 cm. to 1.5 x 2 cm. over parieto occipital region scalp, scalp deep, with irregular margins, pale, without infiltration of blood;

(ii) Lacerated wound of size 4 x 3 cm. over high parieto occipital region of scalp with irregular margins, with underlying displaced fracture of skull bone, fractured piece of size 2 x 1.5 cm, margins irregular, reddish brown, with infiltration of blood with separation of skull vault along coronal, sagittal and lambdoid suture lines margins infiltrated with blood, reddish brown in colour. Length of separated coronal suture 21 cm, sagittal suture 12 cm & lambdoid suture 9 cm;

(iii) Lacerated wound of size 14 x 7 cm over lower half of face below nose, exposing underlying maxillary bones and mandible margins irregular, pale, without infiltration of blood;

(iv) Contusion of size 4 x 2 cm subcutaneous deep, reddish brown just above lateral aspect of right eyebrow;

(v) Contusion of size 4 x 3 cm bone deep, reddish brown, midfrontal area above glabella;

(vi) Amputation wound on right arm, 8 cm. below shoulder tip, 5 cm diameter, 13 cm circumference, exposing

muscles, soft tissue, humerus bone which exposes 4 cm of its lower end from the wound margins of wound and bone are irregular, pale, without infiltration of blood.

(vii) Amputation wound on left arm, 4 cm below shoulder tip, 4 cm diameter, 12 cm circumference exposing muscles, soft tissue, humerus bone which exposes 11 cm. of its lower end from the wound, margins of both wounds and bone are irregular, pale, without infiltration of blood;

(viii) Contusion of size 3 x 2 cm, subcutaneous deep, over left thigh anteromedially, reddish brown in colour;

(ix) Contusion of size 3 x 1 cm, subcutaneous deep, over right thigh anteromedially lower third region, reddish brown colour;

(x) Contusion of size 5 x 2 cm, subcutaneous deep, over right thigh posteromedially lower third region, reddish brown colour;

(xi) Incised wound, horizontal, of size 5 x 2 cm, subcutaneous deep, over left thigh lower third region laterally, margins cleancut, reddish brown with infiltration of blood;

(xii) Incise wound, oblique placed 3 x 1 cm, subcutaneous deep, over left thigh just below injury No. (xi), margins clean cut, reddish brown with infiltration of blood;

(xi) Lacerated wound of size 7 x 5 cm over right foot exposing two metatarsal bones with thin lower ends

irregularly cut, without infiltration of blood, wound also exposing muscles tendons, soft tissue, with irregular margins, pale, without infiltration of blood.”

According to PW 4, injury Nos. 2, 4, 5, 8, 9, 10, 11, and 12 were ante-mortem injuries while injury Nos. 1, 3, 6, 7 and 13 are postmortem injuries. The probable cause of death was due to “head injury with a fracture of underlying skull and amputation of both upper extremities.” It is therefore clear that injury Nos. 6 and 7, which are amputation wounds are postmortem injuries.

21           It is pertinent to note that the opinion of PW 4 to the extent that the victim was sexually assaulted, according to her, is based on the CA report, which indicated that there were semen stains on the pant of accused, which is at Exhibit 37 and there were semen stains on the frock of the deceased girl. It is candidly admitted by PW 4 in her cross-examination that the CA report at Exhibits 37 and 47 indicate that the semen stains are of human, however ABO grouping is inconclusive.

22           At this juncture, it would be necessary to refer to Exhibit 47, which is the CA report of the clothes of the deceased, her footwear,

earth collected from the spot. Article No. 4 is the frock of the deceased, whereas Article No. 5 is the bloomer of the deceased. The result of the analysis is as follows:

- 1) Exhibit 4 is stained with blood and appears to be decomposed.
- 2) No blood is detected on exhibit 2, 3 and 5.
- 3) No semen is detected on exhibit 1, 2, 3, 4 and 5.
- 4) Exhibit no. 4 semen – human – inconclusive.

23           The prosecution has examined PW 5 Rajiv Bansal to substantiate the circumstance of “last seen” theory. The said witness is the owner of a scrap material shop, which is situated in front of Golden Hotel, Devji Nagar. He was the customer of the complainant. He claims to be acquainted with the daughter of the complainant i.e. the deceased, since she was always seen playing on the ground adjacent to the pan shop of complainant. He also claims to be acquainted with the workers in the power loom unit, as they used to visit the Golden hotel for drinking tea. On 13<sup>th</sup> April, 2018, he returned from his native place. When he was sitting in Golden Hotel, drinking tea with Irshad Ansari, he saw the accused in the custody of the police. Upon inquiry

with Irshad Ansari, he learnt that the accused was arrested by the police for having committed a wrong deed with the daughter of the complainant. At that juncture, he recollected that on 1<sup>st</sup> April, 2018 at about 2.30 p.m., when he was proceeding on his motorcycle to his house, he had seen that one worker was accompanying the daughter of the complainant by holding her hand and was passing by Mohammadiya Masjid. He knew that the said person was a worker in the power loom unit, as he used to visit Golden Hotel for having tea. His statement was recorded on 14<sup>th</sup> April, 2018. PW 5 has elaborated that on 1<sup>st</sup> April, 2018 at about 2.30 p.m., when he was in his shop, he had received a telephonic message that his uncle in Uttar Pradesh was serious and therefore, he had rushed home to take a train to Uttar Pradesh and since he had gone to Uttar Pradesh, there was a delay in recording his statement. It is pertinent to note that in the cross-examination, he has admitted that he has not submitted his railway ticket to the police to show that he was indeed out of station for 14 days after the incident. Irshad Ansari is not examined by the prosecution.

24           The prosecution has examined PW 6 Nitin the brother of

the victim. He has disclosed before the Court that he used to play with his sister in the parking, which was in front of his father's Pan Stall. That on the day of incident also, he was playing with his sister in the afternoon, but when they were proceeding towards their house suddenly his sister went towards the Masjid for washing her face and thereafter, she did not return home. He identified the person arrested by the police as a person residing behind their house and that he was the uncle of Saima. The prosecution has not brought on record the identity of the parents of Saima and it is not known as to how the accused was related to anyone called Saima.

25 PW 14 Mohammad Irfan Shaikh is not only a co-worker of the accused, but was a room-mate of the accused and they hailed from the same village. According to him, on 4<sup>th</sup> April, 2018 he was on night duty. The accused was also on night duty at the power loom. At about 1 am. in the intervening night of 4th and 5th April, 2018 he along with the accused had been to Golden Hotel to take tea. At about 3 a.m the accused approached PW 14 in a frightened condition and informed him that he had seen the person who had taken away the little girl, but he had seen him from behind and therefore could not identify him.

Upon inquiry he also gave the name of the deceased. PW 14 had inquired with the accused as to whether the accused had done any misdeed. Upon denial by the accused, PW 14 told him to continue with his work and not to take tension about the death of the deceased. After sometime, the accused again approached PW 14 with a different story that one person had told him to bring the victim behind the Masjid, he obliged the person, and then he went to answer nature's call. After he returned he could not find the victim nor the person who had asked him to get the victim to the spot. The accused was asked by PW 14 as to whether he would be able to identify the person if shown to him. The accused still looked tensed and therefore, he was reassured by PW 14 not to worry, if he had not done anything wrong and that he should mind his business.

26 PW 14 has further stated that at about 5.am in the morning, again the accused approached him in a frightened condition and informed him that he was the one who had committed a grave blunder, by committing the murder of this small girl by "throttling her neck" since her father had slapped and humiliated him for the default of payment of the credit of rupees 1500/- and therefore, he murderd

the child out of vengeance. PW 14 then proceeded to the adjacent power loom unit and informed the elder brother of the accused namely Azmatullah i.e. PW 21 about the disclosure made to him by the accused. He also asked PW 21 to confront the accused. Accordingly, PW 21 spoke to his brother and thereafter, he requested PW 14 not to disclose about the act of the accused to anyone and maintain silence.

27           It is the case of PW 14 that one of his friend namely Atikur Rehman who hailed from his village had been to visit him. Police had learnt about Atikur Rehman's visit and thereafter, the police had summoned him for inquiry. After returning, Atikur Rehman informed PW 14 that the police had inquired with him about the murder of the victim. At that juncture, PW 14 had disclosed that he knows that the said murder is committed by Aabed and that he would inform the police about the same. He approached the police, his statement was recorded as per his say on 6<sup>th</sup> April, 2018 between 3 to 4 p.m. Thereafter, his statement was also recorded under Section 164 of Cr. P. C., which is at Exhibit 82.

28           The witness has also categorically admitted in the cross-

examination that immediately after the said disclosure by the accused he went to his native place at Darbhanga in Bihar state. That the accused had not disclosed the date and time when he had committed the murder of victim girl in his extra judicial confession.

29           It is a matter of record that Nazre Alam Shaikh was the first person to see the dead body. He disclosed the same to Yunus about the same. PW 15 recorded the statement of Nazre Alam Shaikh and Yunus, but they have not been examined by the prosecution.

30           PW 18 – Dr. Bhise had performed the autopsy on the dead body of the victim alongwith PW 4. The post-mortem notes are signed by PW4 and PW 18. It is pertinent to note that there is a categorical admission by PW 18 in the cross-examination that the body of the victim was decomposed, therefore, no sign of sexual assault could be seen. That the entire body was decomposed. There were maggots crawling over the body and in the body. It is not mentioned in the CA report, as to whether the sperms were alive or dead.

31           On 20<sup>th</sup> April, 2018 the accused was medically examined

by PW 19 Dr. Ansari Summayya Shamim, who has opined that the accused had given a history of sexual assault 20 days back. There was no external injury on his body neither any injury on his genital portion. On 20<sup>th</sup> April, 2018 when police had brought the accused for medical examination, a male doctor was not available and therefore, he was examined by PW 18.

32           The prosecution has also relied upon the evidence of PW 21 Mohammad Azmatullah who happens to be the brother of the accused. At the time of incident, his brother Abed and Sabid were working in Bhiwandi. They were residing in rental premises at Gautum Chawl separately. Irfan (PW 14) was known to him as he hailed from their village. That Abed and Sabid shared the room with PW 14. He has admitted that on 5<sup>th</sup> April 2018 at about 6 a.m. Irfan met him and disclosed to him the dialogue between himself and the accused. He requested him to meet the accused immediately. Therefore, he went to meet his brother Abed, but he found him sleeping. Later upon inquiry, Abed disclosed to PW 21 that he had admitted his guilt before Irfan. At that time, Abed was in a frightened condition. PW 21 abused him, left the spot and slept in his own room. On the same day, it appears that

Shabbir had requested PW 21 to talk to his mother about the act of Abed. However, since he was tensed, he did not have courage to talk to his mother. But on next day, he called upon his mother who inquired with him as to whether it was true that Abed had committed the murder of a small girl. He answered in the affirmative. She then informed him that Abed was to reach the village and he had left Mumbai by Chappra Express. PW 21 was constrained to divulge the said information to the police and at the same time, assured the police that he would co-operate in the process of arresting the accused. His statement was recorded on 6<sup>th</sup> April, 2018 and on 7<sup>th</sup> April, 2018 he proceeded to his native place along with the police. Upon reaching home, they learnt from the family members that Abed was sent to village Ganeshpura to the house of his grandmother.

33            That another brother of PW 21 namely Javed cooperated with the police and accompanied them to the house of his grandmother. The accused was apprehended. Upon inquiry, the accused had admitted his guilt before the police. The accused along with PW 21 was brought to Bhiwandi. PW 21 has then added that the accused had also admitted to have sexually assaulted the girl. It is

pertinent to note that the statement of PW 21 was recorded on 14<sup>th</sup> April, 2018. His statement was also recorded under Section 164 of Cr. P. C and is at Exhibit 105. It is elicited in the cross-examination that on the day when PW 21 was informed by PW 14 about the confession made to him, he had not immediately verified the truthfulness of the said statement from his brother. PW 21 had no knowledge about the accused chewing pan, but one day he found his brother under the influence of alcohol and as an elder brother, he had promptly sent him to their native place with a further note of caution that he shall not return to Mumbai ever again. PW 21 had also not inquired with the owner of the Power Loom.

34 PW 22 Rajendra Maine was attached to Bhoiwada Police Station as a police inspector and on 4<sup>th</sup> April, 2018 investigation in Crime No. 47/2018 was entrusted to him. The investigation in the missing complaint was with PSI N. D. Jadhav. According to PW 22, on 4<sup>th</sup> April, 2018 Nazre Alam had seen the dead body and had disclosed about the same to the people in the vicinity by shouting loudly. The father of the girl learnt about it from some children playing in the vicinity and identified the body to be that of his daughter and

informed the police. PW 22 had immediately taken steps and conducted the inquest panchnama, spot panchnama and seizure of clothes of deceased and then the body was sent for postmortem. On 6<sup>th</sup> April, 2018 the investigating agency had learnt from reliable sources that a worker in the power loom i.e Aabed had confessed before his co-worker Irfan about his role in the commission of the murder of child. The police therefore called upon Irfan and recorded his statement on 6<sup>th</sup> April, 2018. The statement of Irfan was also recorded under Section 164 of Cr. P. C. (exhibit 82). The police learnt from Irfan (PW14) that the brother of the accused Abed was also intimidated about the act committed by Abed and therefore, the statement of the brother of the accused was also recorded under Section 161 and 164 of Cr. P. C. Another brother of the accused namely Sabir was also summoned by the police and his statement was recorded under Section 161 and 164 of Cr. P. C. The police had learnt that after confessing before PW 14, the accused had left for his native place and therefore, the police along with PW 21 went by flight to Patna. The accused was then arrested at Seapol, Ganeshpuragaon. The accused was then produced before the court at Dharbhanga and transitional custody was obtained. The cell phone of the accused was seized vide panchnama Exh.108.

35           The accused is said to have disclosed before the police that he would show them the place where he had sexually assaulted the girl and killed her by crushing her head with a stone. The stone was recovered at the instance of the accused. The panchnama was also recorded in respect of the recovery of stone. On 13<sup>th</sup> April, 2018 the clothes (pant) was recovered at the instance of the accused u/s. 27 of Evidence Act, from the power loom of Akram Shaikh. The police had observed some stain on the inner side of the pant. The shirt of the accused was seized from the residence of the accused in Gautum Chawl.

36           **In fact, the advance death certificate was in the possession of the police on 11<sup>th</sup> April, 2018 itself.** It is admitted by PW 22 that there was also an inquiry with Irfan regarding his involvement in the present case. But, no separate report is filed along with the charge-sheet in respect of outcome of the said inquiry. After completion of investigation, the charge-sheet was filed on 6<sup>th</sup> July, 2018 for the offence punishable under Section 363, 302, 201, 364, 366-A and 376 of Indian Penal Code and Section 4, 8, 9(h) of Protection of Children from Sexual Offenses Act, 2012.

37           The learned Counsel for the Respondent has vehemently submitted that prosecution has failed to substantiate the charges levelled against the appellant. The learned Counsel has highlighted the observations in the post-mortem report and has submitted that there are no injuries on the private part of the victim. Column No. 15 of the post-mortem report indicates that no injuries were observed on the external genitals of the victim. All this, coupled with the fact that autopsy surgeons PW 4 and PW 18 had expressed their inability to give an opinion about sexual assault in their written opinion dated 20<sup>th</sup> June, 2018 and had further opined that it would be possible to give the said opinion only after receipt of the CA report. The CA report does not show the stains of semen on the frock of the deceased, but at the same time, it also indicates that human semen of inconclusive grouping was found on the frock. It is therefore, urged that the conviction for sexual assault for the offence under Section 376 (2) (I) of Indian Penal Code and the provision of Protection of Children from Sexual Offences Act, 2012 is based on an inconsistent CA report. The blood samples were not sent for DNA analysis. **That the injury on the thighs are caused by the thorny bushes, which had to be cut to facilitate the removal of the body from the thorny bushes.**

38           The evidence of PW 5 cannot be relied upon, as the statement of PW 5 was recorded 5 days after the arrest of the accused. In light of the timing mentioned in the missing complaint, the evidence of PW 5 cannot be relied upon, as PW 5 claims to have seen the child in the company of accused at 2.30 p.m., but in fact, the complainant was at home till 4.00 p.m.. Moreover, PW 5 had referred to a worker in the power loom. There are more than two power looms in the same area. He has not stated in detail about the power loom in which the said person was working. No test identification parade was held. That PW 5 claims to have seen the child in the custody of the accused, while he was passing by on his motorcycle, which is highly impossible. That the people in the vicinity have not been examined and hence, no reliance can be placed on the uncorroborated testimony of PW 5.

39           That the extra judicial confession also cannot be relied upon, as the accused is alleged to have confessed that he had killed the victim by throttling, but after the receipt of the postmortem report on 11<sup>th</sup> April, 2018, the accused is alleged to have stated that he had killed the victim by crushing her head with a stone. That, the extra judicial confession has to be read as a whole. There is no evidence of

throttling. Extra judicial confession is a weak piece of evidence and has to be considered with abundant caution. The recovery of a stone under Section 27 of the Indian Evidence Act also cannot be relied upon for the simple reason that the scene of offence panchnama was drawn on 4<sup>th</sup> April, 2018 itself and the spot was seen by all. The stone was lying on the same spot. The said stone was not shown to the autopsy surgeon.

40           The motive for the commission of the offence had not been proved. The complainant had no record to show that the accused was indebted to him. That the complainant had slapped the accused almost 10 months prior to the incident and that there was no immediate trigger for the commission of the offence.

41           It is also submitted that just because the accused had left for his native place and was arrested there, it cannot be said to be an incriminating circumstance. PW 14 had also left for his native place in Bihar soon after the dead body of the deceased was found. That the evidence of sexual assault and rape is a fabricated piece of evidence. The motive was stale and the act of absconding are mere fragments

which do not form a complete chain of circumstances. The accused was provided legal aid after two witnesses were examined and the same has caused prejudice to the defence of the accused. It is therefore prayed that the conviction of the accused for the offences with which he was charged be quashed and set aside. The accused deserves to be acquitted since the prosecution has failed to establish the guilt of the accused beyond reasonable doubt. The Learned Counsel for the Respondent has placed reliance on the following judgments of the Apex court :

- 1) Shivaji Shaebrao Bobde vs. State of Maharashtra<sup>1</sup>.
- 2) Shankarlal Gyarsilal Dixit vs. State of Maharashtra<sup>2</sup>.
- 3) Sharad Birdhichand Sarda vs. State of Maharashtra<sup>3</sup>.
- 4) Sevantilal Karsondas Modi vs. State of Maharashtra<sup>4</sup>.
- 5) Sahadevan and anr vs state of Tamil Nadu<sup>5</sup>.

42 Per contra, Ld. APP has submitted that the judgment of the trial court calls for no interference. That the injuries on the inner part

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1 (1973) 2 SCC 793.

2 AIR 1981 SC 765.

3 AIR 1984 SC 1622.

4 (1979) 2 SCC 58.

5 (2012) 6 SCC

of the thighs is a sufficient indication of sexual assault. That the body was found in a decomposed state with arms and legs amputated. PW 4 and PW 18 were unable to give an opinion about sexual assault in the absence of CA report because the body was highly decomposed and therefore, signs of sexual assault were not visible. Semen stains were found on the inner side of the pants of the accused. Finding of human semen of inconclusive grouping on the frock is sufficient evidence by itself to arrive at a conclusion that the accused is guilty of the offence which he disclosed to PW. 14. The remark that there was absence of semen on the frock of the victim could be genuine typographical error and hence, no benefit can be extended to the accused. That the traces of DNA were wiped out since the victim was preyed upon by animals. The Ld. APP submits that there is ample evidence about sexual assault and rape.

43           It is further submitted by the learned APP that the accused had motive to kill the victim and the same is brought to light by none other than the accused. The circumstance of the last seen is established through the evidence of PW 5. The admission of PW 1 that the victim had visited his shop at about 12 'O' clock needs to be taken into

consideration. That in the absence of effective cross-examination, no grounds can be raised in the appeal to hold that PW 1 has seen his child during the time he was at home i.e in the afternoon between 2 to 4 p.m. The extra judicial confession cannot be proceeded with a notion that it is a weak piece of evidence and has to be appreciated in the facts of a case. That the accused had made an extra judicial confession to a person who hailed from his native village, was his roommate, a co-worker and a good friend. The accused had reposed faith in PW 14 and had therefore admitted his guilt to him. The extra judicial confession is voluntary and truthful. That the mode of commission of offence is unveiled in the course of interrogation and that would establish that the accused is the perpetrator of the crime. PW 14 had no reason to falsely implicate the accused. The act of absconding soon after the recovery of dead body incriminates the accused and is incompatible with his innocence.

44           The Ld. APP had also filed an affidavit of the investigating officer PW 22 Rajendra Maine to justify the sentence of death penalty and has submitted that the accused had committed a ghastly act and he is beyond reformation or rehabilitation. The accused does not

deserve any sympathy, since he has committed a brutal, grotesque and barbaric act. He deserves to be eliminated from the society. The APP has lastly prayed that the criminal reference be answered in the affirmative by upholding the sentence of death penalty. Ld. APP has relied upon the following cases:

- 1) State of Uttar Pradesh vs. Satish<sup>6</sup>,
- 2) Raja vs. State by The Inspector of Police<sup>7</sup>,
- 3) Sanatan Naskar and Another vs. State of West Bengal<sup>8</sup>,
- 4) Vivek Kalra vs. State of Rajasthan<sup>9</sup>,
- 5) Nishi Kant Jha vs. State of Bihar<sup>10</sup>.

45           With the help of the Learned APP Mr. Sait and the Learned Counsel Miss Payoshi Roy for respondent, we have perused the evidence on record meticulously. On 1st April, 2018 the eldest son of the complainant rushed to his father at the Pan Stall at about 6 p.m., and informed him that his younger sister had gone to play at 4.30 p.m., but has not returned home till 6.00 p.m. It is the specific case of

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<sup>6</sup> (2005) 3 SCC 114.

<sup>7</sup> (2020) 15 SSC 562.

<sup>8</sup> (2010) 8 SCC 249.

<sup>9</sup> (2014) 12 SCC 439.

<sup>10</sup> (1969) 1 SCC 347.

the complainant that the shops remained closed between 2.00 p.m. to 4.00 p.m, and that he had left the house only at 4 p.m. It is specifically mentioned in the missing complaint that she had left the house as usual, at 4.30 p.m., to play on the ground just behind their house. Exhibit 7 is the first report in point of time which indicates the time of the victim leaving the house and there is no reason to draw any hypothesis that the father i.e. the complainant had not met his daughter in the afternoon break. Since it was summer season, the parents would not leave the children to play in the scorching afternoon. There is no ambiguity in respect of time and it is clear that the victim had left the house only at 4.30 p.m.

46           The evidence adduced by the prosecution to the extent that PW 5 had seen the victim at 2.30 in the afternoon in the company of accused needs to be dealt with by caution. PW 5 was only knowing the accused as a worker in the power loom industrial unit. There were several persons in the said unit. The statement of PW 5 is recorded on 14<sup>th</sup> April, 2018. There is no material on record to show that he was out of town for 14 days. No test identification parade is held and in the absence of any corroboration, it would be difficult to consider the said

contention of PW 5 that he had seen the deceased in the company of the accused. The submission of the Learned Counsel for the Respondent that in such cases the investigating agency has to ensure that the lacuna cannot be filled up subsequently, needs to be taken into consideration. Hence, we disbelieve PW 5 on the point of the evidence of “last seen”. The uncorroborated testimony of PW 5 would not inspire the confidence of the court. PW 5 appears to be a got up witness only in order to create a chain of circumstances.

47           The evidence of PW 6 appears to be recorded only to be in tune with the evidence of PW 5. It is the case of PW 6 that on their way home, his younger sister had suddenly dissociated with her brother PW 6. The exact time of the deceased leaving the company of her brother has not been mentioned by PW 6. That even when the parents were frantically searching for this missing girl, PW 6 had not informed his parents that she had run away towards the Masjid. In fact the parents should have inquired with PW 6 about the juncture at which she had left his company and with whom. There is a reference to Saima in the evidence of PW 6 who claims to have seen the accused, but her lineage has not been brought on record. The evidence of PW 6

does not even remotely indicate that the accused was seen in the vicinity of the chawl soon before the victim went missing.

48 In the present case, the prosecution seeks confirmation on the following grounds :

- 1) Motive
- 2) The extra judicial confession as was made to PW 14
- 3) Last seen with the accused as per the evidence of PW 5
- 4) The postmortem report
- 5) Recovery of the clothes of the accused.
- 6) The CA report
- 7) Abscondance of the accused from Mumbai.

49 As far as motive is concerned, PW 1 did not even remotely recollect that he had ever slapped someone much less the accused who is likely to take vengeance. PW 1 did not have any written account to show that the accused owed Rs. 1500/- to him and on failure to pay he had slapped him. According to PW 1, the account was maintained by the accused himself. In the course of investigation, there is no recovery of any document to show that the accused had maintained the

account. It is true that the motive was stale. Motive for committing a particular criminal act is in the mind of the perpetrator of the crime and it is not necessary that the victim would have any knowledge about the same. PW 1 also may have never imagined that such a stale incident may be still lingering in the mind of the accused. It appears that the said motive has come to light only from the accused as disclosed for the first time in his extra judicial confession to PW 14.

50           In fact, PW 14 appears to be a good friend of the accused and they hailed from the same place. That when PW 14 came to Mumbai and was unemployed, it was the accused who had introduced him to the owner of the power loom and had secured a job for PW 14. The accused shared the room with PW 14 and not with his own brother. The incident is of 1st April. The accused continued to work till 4<sup>th</sup> April, 2018. On 4<sup>th</sup> April, 2018 the dead body of the victim was found sometime in the afternoon and that disturbed the accused, he must have apprehended that the police may reach up to him. The guilty mind needed some respite and there was a frail hope that the good friend may be of some assistance, who would suggest some way out. He hoped that PW 14 would turn out to be a good Samaritan. The

accused had first made up stories that he had seen the person who had committed the offence of murder, but would not be able to identify him, since he saw him from behind. He then made up a story that he had left the child with an unknown person, but when PW 14 assured him that he should not worry as long as he had not done anything wrong. But he could not carry any more burden on his young heart. It was only at that juncture that the accused had to give a vent to his anguish and therefore, disclosed that he had committed the murder of the child by throttling her. Upon further inquiry, he disclosed that the father of the victim had assaulted him for non-payment of Rs. 1500/- and therefore, he killed his daughter. We may extract the said confession in the words of the accused, “*bacchi ka jo murder huva hay, use gala dabake maine hi mara*”. He further added “*uske baapne mereko pandhraso rupaey ke liye mara tha isiliye maine uske bacchi ko mara.*”

51 It is pertinent to note that in the first extra judicial confession there is no reference to having committed rape or the act of killing with a stone. The accused had reposed faith in PW 14 hoping that he would help him since he had admitted that he has committed a

blunder. In his words, he has said, “*Irfan bhai, mere se ek bahut badi galti ho gayee hai.*” but the whole episode took a different turn when PW 14 approached the brother of the accused and informed him about the extra judicial confession made to him by the accused. He even asked his brother PW 21 to verify from the accused.

52           It is true that an extra judicial confession is considered as a weak piece of evidence by itself. In a catena of decisions, the Supreme Court has laid the principle which would guide the judicial mind while dealing with various cases where the prosecution places implicit reliance upon extra judicial confession. All that is required is that the said confession should be voluntary. It should be truthful, it should inspire the confidence of the court. It should not suffer from any inherent probabilities or suffer from material discrepancies and it should be supported by cogent circumstance.

53           In the case of **Chhittar vs State of Rajasthan**<sup>11</sup>, the Supreme Court has held as follows:

*“the extra judicial confession should be taken as a whole*

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<sup>11</sup> AIR 1994 SC 214

*and should not suffer from any infirmity even if it is to be acted upon.”*

In the present case the accused has confessed that he had killed the girl by throttling in order to satisfy his vendetta against the father of the deceased. The motive was known to the accused alone. The confession was made voluntarily, free from threat and inducement and therefore, it carries with it the presumption of truth. It is not known as to why the statement of the accused was not recorded before a judicial magistrate.

54           The submission of the Learned Counsel for the Respondent that extra judicial confession is a weak piece of evidence is controverted by the Learned APP by relying upon the judgment of the apex court in the case of **State of Rajasthan vs Rajaram**<sup>12</sup>, wherein the Apex Court has held as follows:

*“an extra judicial confession, if voluntary and true and made in a fit state of mind, can be relied upon by the court. The confession will have to be proved like any other fact. The value of the evidence as to confession, like any other evidence, depends upon the veracity of the witness to whom it has made. The value of the*

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<sup>12</sup> (2003) Cr. L. J. 3901

*evidence depends on the reliability of the witness who gives the evidence. It is not open to any court to start with the presumption that extra judicial confession is a weak type of evidence. It would depend on the nature of the circumstance, the time when the confession was made and the credibility of witnesses who speak to such a confession. Such a confession can be relied upon and conviction can be founded there on if the evidence about the confession comes from the mouth of witnesses who appeared to be unbiased, not even remotely inimical to the accused, and in respect of whom nothing is brought out which may tend to indicate that h may have a motive for attributing an untruthful statement to the accused, the words spoken by the witness are clear unambiguous and unmistakably convey that the accused is the perpetrator and nothing is omitted by the witness which may militate against it. If the evidence relating to extra judicial confession is found credible after being tested on the touch stone of credibility and acceptability, it can solely form the basis of conviction. The requirement of corroboration is a matter of prudence and not an invariable rule of law. It is improbable that the accused would repose confidence on a person who is inimically deposed towards him and confess his guilt.”*

55 In the present case, the accused could not repose faith in

his brother due to past experience, as is brought on record by PW 21 himself. According to PW 21, on one occasion, he had found the accused under the influence of alcohol and had sent him back to the native place, where he stayed for eight months. But as far as PW 14 is concerned, the accused felt that he would cause no harm and may find a solution and therefore, he had reposed faith in him after telling him the truth. But, PW 14 divulged to the brother of the accused all that was told to him in good faith and further asked him to verify the same from the accused. The accused therefore, had no option and was constrained to leave Mumbai for his native place. There is no material on record to show that PW 14 or the brother of accused had any animus against him. They co-operated with the police so much so that the brother of the accused accompanied the police to their native village and co-operated with the police in arresting the accused.

56           The evidence of P.W. 3 that P.W. 14 had disclosed to him that the accused had made a voluntary confession about his guilt is not spelt out by P.W. 14. All that is established is the disclosure spelt out by P.W. 14. All that is established is the disclosure made to P.W. 21 by P.W. 14.

57            In this backdrop, we are of the opinion that the 1st extra judicial confession made to PW 14 is voluntary and truthful. And it is not necessary to presume at the threshold that it is a weak piece of evidence.

58            After being confronted by PW 21 within a few minutes of making the extra judicial confession, the accused was sure that there was no escape and therefore, early in the morning, he fled to his native place. This conduct of the accused needs to be appreciated under Section 8 of Indian Evidence Act. It is true that abscondance by itself would not be an incriminating circumstance and certainly cannot form a foundation for conviction. Some people escape from the scene of offence or run away from the public view after they apprehend unwarranted suspicion. That could be a case of self preservation, especially when there is an apprehension that one may be falsely implicated. But, in a case like a present one, there was no occasion to falsely implicate the accused. The accused was not harbouring under a cloud of suspicion and in fact, he was the one who by his extra Judicial confession brought the motive to light and voluntarily admitted before

PW 14 that he had committed the offence. And after being confronted by PW 21 he went to his native place.

59 From 1<sup>st</sup> April to 4<sup>th</sup> April, 2018, the dead body was not found and therefore, he could pretend to be normal, but the day the dead body was found, anguish and guilt had engulfed him and hence, he confessed before PW 14 voluntarily and therefore the abscondance of the accused assumes significance. There was no urgency for the accused to visit his native place, that too without informing his own brother. The accused under Section 313 of Code of Criminal Procedure, 1973 has also not given any plausible explanation for his disappearance from Bhiwandi over night.

60 In the case of **Matru Alias Girish Chandra Vs. State of UP**<sup>13</sup>, the Supreme Court has held that -

*“mere abscondance by itself does not necessarily lead to a firm conclusion of a guilty mind. Even an innocent mind may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self preservation. The act of absconding is no doubt relevant*

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<sup>13</sup> AIR 1971 SC 1050,

*piece of evidence to be considered along with other evidence but its value would always depend on the circumstance of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused.”*

In the present case, there was no question of self-preservation, much less, the complainant had suspected the accused of having committed the offence. It therefore, becomes one of the determining links in completing the chain of circumstantial evidence.

61 An arithmetical exactitude cannot be read into an extra judicial confession. All that needs to be seen is that, it was not induced by threat or coercion or any compulsion to divulge the commission of an offence.

62 The prosecution has also placed reliance upon the evidence of PW 5. His evidence needs to be considered with abundant caution for the following reasons:

I) According to PW 5, he saw the victim in the company of the accused at about 2.30 p.m. The evidence of PW 1 does not even remotely indicate that the girl was not indoors at 2.30 p.m. In fact, the missing complaint is sufficient to indicate that the victim had left the house at about 4.30 p.m. i.e. after PW 1 had left the house at 4.00 p.m. PW 6 also does not inform his parents that the victim had gone towards Masjid for washing her face in the afternoon. And therefore, it is difficult to accept that the child was missing since afternoon.

II) The statement of PW 5 is recorded on 14th April i.e. after the arrest of accused on 10th April.

III) PW 5 claims to know the accused as a worker in a power loom unit. He did not know the name of the accused nor the industry in which he was working. He had seen the accused in the custody of the police and then recollected that he had seen him with a small girl two weeks prior to 13<sup>th</sup> April 2018. None of the shop owners in the vicinity had seen the accused but PW 5 who was passing on a motorcycle claims to have had a glimpse of the accused when he was driving a motorcycle and recollected the whole episode. It is not even the case of PW 5

that he was acquainted with PW 1.

IV) He has not produced any material on record to show that he was not in Bhiwandi from 1st April to 13th April.

V) On 13th April also he simply says that he saw the accused in the custody of the police when he was sitting in the Golden Hotel. The time is not mentioned and it is not known as to why the police had taken the accused to Golden Hotel. Moreover the map at exhibit 113 shows that the road to Mohammadi Masjid is very close to the Pan Stall of PW 1 and that it is a secluded road to reach the scene of offence. On 13th April, the accused was taken to the power loom for the recovery of the clothes worn by him at the time of incident, but at that time, they had proceeded in a police Jeep. According to PW 22, there was no occasion for PW 5 to even see the accused in the custody of police. Exhibit 115 and 116 are the maps by which the police had taken the accused to the power loom for recovery of his pant. That on the same date and same time the pant is recovered from the Power Loom and the shirt which he had worn at the time of incident was recovered from his residential room at Gautum Chawl. It

cannot be ignored that he was sharing the room with four others. In the Power Loom also there were 16 workers and only one pant was found hanging behind the door. It is in this back drop that the evidence of PW 5 or the recovery of the clothes of the accused would not inspire the confidence of the court.

63 In view of the above discussion, the question as to whether the victim was sexually assaulted or raped before she was killed falls for consideration.

64 The postmortem notes at Exhibit 52 shows some contusions on the inner side of the thighs and incised wound on the left thigh lower third region of the victim. The Learned APP vehemently submits that it is a sufficient indication of having been sexually assaulted/raped. That column No. 15 of the postmortem notes reads as follows:

*“ no injuries to external genitals, no purging.”*

Column Nos. 10 to 13 show that postmortem lividity cannot be appreciated as vaginal orifice dilated with protrusion of cervix flabby.

65 PW. 4 Dr. Vedpathak stated in the examination-in-chief that the contusions and incised wounds over both the thighs of the body are caused due to sexual assault. In the same breath, PW 4 states that by a letter at Exhibit 51, the police had put up a query as to whether the victim was sexually assaulted. However, PW 4 as well as Dr. Bhise reserved their answer to the said question as they could not ascertain the same in the absence of CA report. That only after receipt of CA report a positive opinion was given about sexual assault. This makes it clear that upon external and internal examination an opinion of sexual assault could not be given. The Court cannot be oblivious of the fact that the body was exposed to rough weather and animals for four days. The body was found in thorny bushes. The thorny branches/stems had to be cut before the dead body was removed from the thorny bushes. The injuries to the thighs could have been caused by the thorny bushes.

66 The clothes of the deceased were sent to forensic laboratory for testing. The frock is marked as Article 4, whereas her undergarment was marked as Article 5. The result of analysis would

show that no semen is detected on Exh. 123. Thereafter, the result of analysis of species origin and blood grouping result was done, which shows semen – human – inconclusive. In this respect, it needs to be appreciated, column Nos. 10 and 12 of the postmortem notes read as follows:

*“No fluid oozing from nose, ears, neck and rest of body shows adipocere formation with yellowish color and rancid smell perceived with multiple maggots”*

In fact, ‘adipocere’ is grave wax which may appear on a corpse. Paste like ‘adipocere’ is also known as ‘corpse wax’ which is the product of the decomposition of ‘adipocere’ tissues. As per Dr. Ronal Munro, author of Forensic Medicine in Animal Abuse and Unlawful Killing states that ‘adipocere’ is caused by hydrolyses and hydrogenation of ‘adipocere’ leading to the formation of a waxy substance. It is off-white in colour, but can become stained with hemoglobin and other products of the putrefactive process. Preferential formation of ‘adipocere’ has been observed in body parts with open wounds. ‘Adipocere’ is a wax-like organic substance formed by the anaerobic bacterial hydrolyses of fat in tissue such as body fat in corpses. In its formation putrefaction is replaced by a permanent firm cast of fatty

tissues, internal organs and the face.

67 PW 18 has also stated categorically as follows:

*“it is true to say that said body was decomposed, therefore no signs of sexual assault were seen.”*

Dr. Bhise has further stated that he had given the final cause of death as, “ death due to head injury with fracture of underlying skull with sexual assault (Unnatural)”. But Dr. Vedpathak who conducted the postmortem along with Dr. Bhise has categorically stated that sexual assault could not be determined in the absence of CA report.

68 **In view of the CA report, an inference needs to be drawn that the opinion of sexual assault upon the victim could either be erroneous or misconceived. Column No. 8 of post-mortem notes (exhibit 52) shows that the clothes on the person of the deceased were wet due to decomposition fluid of dead body.** Learned APP has termed the findings in the CA report as “genuine typographical mistake”. We are at pains to consider the said submission. It is incumbent upon the prosecution to substantiate that there was rather sexual assault upon

the victim before she was done to death.

69           It is pertinent to note that the post-mortem notes were received by the investigating officer on 11<sup>th</sup> April, 2018 and on 11<sup>th</sup> May, 2018 the statement of PW 1 is recorded under Section 164 Cr. P. C., wherein he had stated that in the course of interrogation, at the police station in the presence of PW 1, the accused had stated that on the day of incident, he was under the influence of alcohol, he was deprived of self control, he saw the victim coming out of the Masjid, he therefore, took her to the open ground, committed sexual assault thereafter, he strangulated her and then assaulted her with a stone on her head.

70           A confession given in the police station is not admissible as it is under coercion or a pressure exerted upon the mind of the accused by the police and hence, the improved extra judicial confession cannot be taken into consideration. It is apparent on the face of the record that subsequently the extra judicial confession has changed its tenor and therefore, all that needs to be taken into consideration is the first extra judicial confession made to PW 14, as it appears to be voluntary,

truthful, inspires confidence of the court and it is corroborated by the evidence of abscondance of the accused soon after making a extra judicial confession. The first confession assigns motive, the act and the manner of commission of the offence.

71           The Learned Counsel for the Respondent has vehemently submitted that the medical evidence belies the first confession, since there is no evidence of throttling and strangulation, whereas medical evidence shows that the cause of death is “due to dead injury with fracture of underlying skull with amputation of both upper extremities”

72           We are of the opinion that the accused may have throttled her and pushed her into the bushes and she must have fallen on her head. This observation of ours is supported by medical evidence, wherein the doctor has specifically stated that the injury was caused due to falling on the stone. The injury is on the occipital region and therefore, the possibility that the stone was thrown on the head of the victim after she fell down is ruled out. Hair was found on the stone, which was well within the bushes. The inquest panchnama shows that

the branches of the thorny bushes had to be cut to retract the dead body from the bushes. There is no corroborating material to show the accused must have entered the bushes, since there were no scratches or abrasion on his body or face, which could have been otherwise observed by his co-workers and police when he was arrested. The fact that the stone was in the bushes is corroborated by the fact that the recovery of the said stone is shown under Section 27 of the Indian Evidence Act on 13th April 2018. It therefore, appears that the accused nurtured the belief that he has caused the death by throttling. It is true that the hyoid bone is intact. All that needs to be seen is the admission of guilt and motive to commit the offence.

73           Learned Counsel for the Respondent has drawn our attention to the statement recorded under Section 313 of Code of Criminal Procedure, 1973 and has submitted that Question Nos. 15 and 16 of the 313 statement of the accused apparently seemed to be a misleading question. The question reads as follows,

*“Q.15 : It has further come in his evidence that, he came to know from police that you committed the rape and murder of Miss “X” and therefore police visited at karkhana and seized your clothes i.e. pant, shirt and*

*baniyan from karkhana. He also issued attendance register to the police. It was sealed. When said register shown to him he identified it before the court. What have you to say about it?"*

In fact, what was seized from the karkhana was only pant and the shirt was seized from his house.

*"Q.16. It has further come in his evidence that, Irfan came on the work and told him that you told to the Irfan that you have committed rape and murder of Miss "X" and therefore, you ran away at your native place. Therefore, said witness narrated said incident to the police and accordingly, police recorded his statement. He identified you before the Court. What have you to say about it?"*

In fact the accused had disclosed to Irfan that he had committed the murder of victim by throttling.

74 At the same time, the mitigating circumstances also need to be considered as far as the accused is concerned, it needs to be considered that he must have never had a safe, loving atmosphere in his house. Due to the economic stringency, he had started working at the age of 18 to earn his living. There was no love lost between the

siblings. His own brother had no knowledge that he was ever slapped by someone. But at the same time, the act committed by him is brutal and deserves no leniency. Although the offence is barbaric and heinous, what falls for consideration is whether death penalty is the only punishment that needs to be imposed. The State has failed to bring before us any material to show that there is no scope for reformation or rehabilitation. In the case of **Mofil Khan and anr. v/s. The State of Jharkhand**<sup>14</sup>, the Apex Court has held that -

*“8. One of the mitigating circumstances is the probability of the accused being reformed and rehabilitated. The State is under a duty to procure evidence to establish that there is no possibility of reformation and rehabilitation of the accused. Death sentence ought not to be imposed, save in the rarest of the rare cases when the alternative option of a lesser punishment is unquestionably foreclosed (See: [Bachan Singh v. State of Punjab](#)<sup>9</sup>). To satisfy that the sentencing aim of reformation is unachievable, rendering life imprisonment completely futile, the Court will have to highlight clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigour when the Court focuses on the circumstances relating to the criminal, along*

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<sup>14</sup> RP(Criminal) No. 641/2015 in Criminal Appeal No. 1795/2009 dated 26/11/2021

*with other circumstances (See: [Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra](#)(2009) 6 SCC 498). [In Rajendra Pralhadrao Wasnik v. State of Maharashtra](#)(2019) 12 SCC 460, this Court dealt with the review of this Court confirming death sentence and observed as under:*

*“45. The law laid down by various decisions of this Court clearly and unequivocally mandates that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence. This is one of the mandates of the “special reasons” requirement of [Section 354\(3\)](#) CrPC and ought not to be taken lightly since it involves snuffing out the life of a person. To effectuate this mandate, it is the obligation on the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, inter alia, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make-up, contact with his family and so on. Similarly, the convict can produce evidence on these issues as well.”*

It is a settled cardinal principle that it is not just a crime which the Court should take into consideration but also the criminal, the state of his mind, his socio economic background.

75 It is incumbent upon the courts to take into consideration reformation, rehabilitation and reintegration of convict into society. The Supreme Court in catena of decision has guided lower court to

take into consideration criminals and not the crime alone. A Court will have to decide as to whether the case falls into the category of “rarest of rare cases”. In the present case, we are of the opinion that the case of the appellant does not fall into the category of the rarest of rare case. We have also considered that this is not a case where any other sentence is unquestionably foreclosed. The material on record indicates that the appellant is not a hardened criminal and therefore, there is every hope that he could be reformed, rehabilitated and reintegrated into the society.

76 We are guided by the observations of the Apex Court in the case of **Sachin Kumar Singhraha v/s. State of M.P.**<sup>15</sup>. The Supreme Court has held as follows :

*“23. However, in our considered opinion, the courts may not have been justified in imposing the death sentence on the accused-appellant. As has been well settled, life imprisonment is the rule to which the death penalty is the exception. Death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and circumstances of the crime. As held by this Court in the*

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<sup>15</sup> (2019) 8 SCC 371

*case of Santosh Kumar Singh v. State through C.B.I., (2010) 9 SCC 747, sentencing is a difficult task and often vexes the mind of the Court, but where the option is between life imprisonment and a death sentence, if the court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser punishment be awarded.*

24. *We have considered the aggravating and mitigating circumstances for the imposition of the death sentence on the accused/appellant. He has committed a heinous offence in a premeditated manner, as is indicated by the false pretext given to PW 4 to gain custody of the victim. He not only abused the faith reposed in him by the PW 4, but also exploited the innocence and helplessness of a child as young as five years of age. At the same time, we are not convinced that the probability of reform of the accused/appellant is low, in the absence of prior offending history and keeping in mind his overall conduct.”*

77           The accused is an young man. At the time of commission of the offence, the accused was hardly 20 years of age. Satisfaction of personal vendetta had overpowered him momentarily and in that moment of deprivation of self control, he had committed the offence. What needs to be appreciated and take into consideration is his first

statement before PW 14 which is to the extent that he had committed a grave blunder which in his own words is as follows, “ *mujhse bahut badi galti huwi hai.*” this expression by itself would demonstrate the remorse which he was going through. It was a realization and repentance for having committed the offence unthoughtfully. It is true that a small child was victimized and was made a subject of the hostile and diabolical act of the appellant, the said act cannot be forgiven by considering the age of the accused alone.

78           It is not a case of false implication or mistaken identity the act is brought to light by none other than the accused and the said material in the form of extra judicial confession has surfaced and consequently brought to the notice of investigating officer who promptly arrested the accused at his native place with the help of none other than the brother of the accused himself. The family of the accused had also not made any efforts to cause disappearance of evidence or the disappearance of the accused, no attempts were made by the accused or family members to win over PW 14 who hailed from the native place of the accused. The brother of the accused has supported the prosecution. That the accused was given legal aid to

defend himself but the said aid was extended to him after examination of two witnesses. The accused has no criminal antecedent. It would be obligatory on the part of the prosecution to substantiate that reformation and rehabilitation of the convict is impossible and that the accused deserve to be eliminated.

79 In the case of **Sangeet & Anr v/s. State of Haryana**<sup>16</sup>, the Supreme Court has held that -

*“In the sentencing process, both the crime and the criminal are equally important.”*

Therefore, while considering the prelude to the offence, we cannot be oblivious of the guidelines of the Supreme Court in the cases of **Bachan Singh v/s. State of Punjab**<sup>17</sup>, **Santosh Bariyar v/s. State of Maharashtra**<sup>18</sup>, **Rajendra Wasnik v/s. State of Maharashtra**<sup>19</sup>.

80 The age of the accused needs to be taken into consideration. He was hardly 20 years of age at the time of commission of the offence. The fact that he had confessed about his

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<sup>16</sup> (2013) 2 SCC 452.

<sup>17</sup> (1980) 2 SCC 684.

<sup>18</sup> (2009) 6 SCC 498.

<sup>19</sup> (2019) 12 SCC 460.

guilt would show that he had repented for the act committed by him.

81           There is no specific finding about one of the cause of death being sexual assault and as against it, there is a specific question that sexual assault was determined only on the basis of CA report. In view of this, the Respondent deserves to be acquitted under section 376 of the Indian Penal Code and section 4, 8, 9(h) and 10 of the Protection of Children from Sexual Offences Act. The offence committed by the accused does not fall in the category of Section 366-A of the Indian Penal Code and therefore, he deserves to be acquitted of the said offence. However, the fact that he had taken away the girl from lawful custody of her father, conviction for offence punishable under section 364, 363 and 201 of the Indian Penal Code deserves to be maintained.

82           We have appointed Ms. Priyanka Chavan to espouse the cause of the victim. She has assisted us. She has drawn our attention to the directions of the learned Special Judge that after realisation of the fine amount it shall be given to the parents of the deceased girl after the appeal period is over.

83           The District Legal service, Thane to award compensation to the parents of the deceased girl as per rules. It is submitted that the sentence of fine would commence only after the substantive sentence is served by the convict. The appellant herein is sentenced to life imprisonment. He is not supported by his family and therefore, there was no occasion to pay fine amount and hence, it would cause injustice to the victim. It is submitted that it was incumbent upon the learned Special Judge to specify the quantum of compensation to the parents of the victim.

84           On 27<sup>th</sup> October 2021, the learned APP had submitted that the compensation of amount of Rs.3 Lakhs has been granted to the parents of the victim under the Manodhairya Scheme. Bhiwandi Police had made efforts to get complainant from U.P. with the help of Police and an account would be opened in the name of the complainant and the amount of compensation would be deposited in the said account. The learned Counsel for the Respondent has drawn our attention to a catena of decisions of the Supreme Court to substantiate her contention that in such cases like the present one the Courts must exercise the powers under section 357(1) of Code of Criminal

Procedure, 1973 liberally so as to meet the ends of justice. The learned Counsel has also drawn our attention to Chapter 15 of the Law Commission of India 154<sup>th</sup> Report in which the Law Commission had taken into consideration the observations of the Supreme Court in the case of **Hari Kishan & anr. Vs. Sukhbirsingh & ors.**<sup>20</sup>, wherein the Court had pertinently observed as follows :

*“It may be noted that this power of Courts to award compensation is not ancillary to other sentences to pass an addition thereto. This power was intended to do something to reassure the victim that he or she has not been frightened in the criminal justice system. It is a measure of responding appropriately to crime as well of reconciling the victim with the offender. We, therefore, recommend to all Courts to exercise this power liberally so as to meet the ends of justice in a better way.”*

The learned Counsel has also placed reliance upon the various resolutions passed by the Government of Maharashtra. To buttress her arguments, the learned Counsel has also placed reliance upon the judgment of the Apex Court in the case of **Nipun Saxena and Anr. Vs. Union of India and Ors.**<sup>21</sup> reported in . We appreciate the assistance extended by the learned Counsel appointed for the victim.

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<sup>20</sup> 1988 AIR 2127.

<sup>21</sup> (2019) 13 SCC 715

85            In view of the above discussion, it can be said that a young lad who was hardly 20 years old had suddenly thought of seeking vengeance for the humiliation that he faced at the hands of PW 1. There is no material to show that he was over-powered by lust. There is no evidence of sexual assault and therefore, the accused deserve to be acquitted for Section 376 of Indian Penal Code and Section 4, 8, 9 (h) and 10 of Protection of Children from Sexual Offences Act, 2012. The conviction of the accused for offence punishable under section 302 of the Indian Penal Code needs to be maintained. However, sentence of the accused deserves to be modified to Life Imprisonment as not being the rarest of rare case. It is further pertinent to note that since the accused had abducted the victim from the lawful custody of P.W. 1, conviction and sentence under section 363, 364 and 201 of the Indian Penal Code is maintained. Hence, following order is passed :

### **ORDER**

1. The reference of confirmation of the death sentence awarded to the respondent vide Judgment and Order dated 8<sup>th</sup> March, 2019 passed by the Additional Sessions Judge & Special Judge under POCSO Act, Thane in Special Case(Child

Protection) No. 159 of 2018 is answered in the negative.

2. The conviction of the Respondent for offence punishable under Section 302 of Indian Penal Code is upheld and confirmed. However, the sentence is modified. The appellant is sentenced to suffer imprisonment for life and to pay fine of Rs. 5,000/- (Rs. Five Thousand only), in default to suffer further RI for 6 months.

3. The conviction and sentence of the Respondent for the the offence punishable under Section 376 of Indian Penal Code and Section 4, 8, 9(h) and 10 of Protection of Children from Sexual Offences Act is quashed and set aside.

4 The conviction and sentence of the Respondent for offence punishable under section 363, 364 and 201 of the Indian Penal Code is maintained.

5. The sentence for offence punishable under section 302, 363, 364 and 201 of Indian Penal Code shall run concurrently.

6 The accused is acquitted of the offence punishable under section 366A of the Indian Penal Code.

7 The appellant is entitled to the set off for the period already undergone.

8. The Registrar Judicial shall send the copy of this judgment to the District Legal Services Authority, Thane within 2 weeks.

9. The District Legal Services Authority, Thane shall pay compensation to PW 1 in a sum of Rs. 5,00,000/- ( Five Lakhs) within 6 months from the date of receipt of this order.

10. The Counsel Miss. Priyanka Chavan is entitled to Professional fees as per rules to be paid by High Court Legal Services Committee.

11 The Confirmation Case stands disposed of on the above terms.

**(PRITHVIRAJ K. CHAVAN, J)**

**(SMT. SADHANA S. JADHAV, J)**