IN THE HIGH COURT OF ORISSA, CUTTACK

DSREF No.01 of 2022

From judgment and order dated 29.11.2022 passed by the Adhoc Addl. Sessions Judge, F.T.S.C., POCSO, Jagatsinghpur in Special G.R. Case No.30 of 2014.

State of Odisha

-Versus-

1. Sk. Asif Alli @ Md. Asif Iqbal
2. Sk. Akil Alli ..... Condemned Prisoners/ Accused Persons

For State of Odisha: - Mr. Bibhu Prasad Tripathy
Addl. Govt. Advocate

For Condemned Prisoners/Accused: - Sk. Zafarulla
Advocate

CRLA No.120 of 2023

Sk. Asif Alli @ Md. Asif Iqbal ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Sk. Zafarulla
Advocate

For Respondent: - Mr. Bibhu Prasad Tripathy
Addl. Govt. Advocate

CRLA No.121 of 2023

Sk. Akil Alli ..... Appellant

-Versus-

State of Odisha ..... Respondent

For Appellant: - Sk. Zafarulla
Advocate

For Respondent: - Mr. Bibhu Prasad Tripathy
Addl. Govt. Advocate

P R E S E N T:

THE HONOURABLE MR. JUSTICE S.K. SAHOO

AND

THE HONOURABLE MR. JUSTICE R.K. PATTANAIK

Date of Hearing: 14.05.2024 Date of Judgment: 20.06.2024

S.K. Sahoo, J. The reference under section 366 of the Code of Criminal Procedure, 1973 has been submitted to this Court by the learned Adhoc Addl. Sessions Judge, F.T.S.C., POCSO, Jagatsinghpur (hereinafter 'the trial Court') in Special G.R. Case No.30 of 2014 for confirmation of death sentence imposed on Sk. Asif Alli @ Md. Asif Iqbal and Sk. Akil Alli (hereinafter 'the appellants') vide judgment and order dated 29.11.2022 and accordingly, DSREF No.01 of 2022 has been instituted. CRLA

No.120 of 2023 has been filed by appellant Sk. Asif Alli @ Md. Asif Iqbal and CRLA No.121 of 2023 has been filed by appellant Sk. Akil Alli challenging the self-same judgment and order of conviction passed by the learned trial Court.

The appellants along with Sk. Abid Alli faced trial in the trial Court for commission of offences punishable under sections 302/376-A/376-D read with section 120-B of the Indian Penal Code (hereinafter 'the I.P.C.') and section 6 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter 'POCSO Act') on the accusation that on 21.08.2014 in between 2.00 p.m. to 11.00 p.m. in the house of Sk. Khairuddin at village Manu Mohalla under Tirtol police station in Jagatsinghpur district, they made criminal conspiracy and committed gang rape and aggravated penetrative sexual assault on the minor victim girl (hereinafter 'the deceased') and inflicted injuries which caused death of the deceased.

The learned trial Court vide impugned judgment and order dated 29.11.2022 found the appellants guilty for the offences punishable under sections 302/376-A/376-D of the I.P.C. and section 6 of the POCSO Act and awarded them death sentence for the offence under section 302 of the I.P.C. so also sentenced each of them to undergo imprisonment for life for the

offence under section 376-A of the I.P.C., which shall mean imprisonment for the remainder of natural life, R.I. for a period of twenty years and to pay a fine of Rs.50,000/- (rupees fifty thousand), in default, to undergo R.I. for a further period of one year for the offence under section 376-D of the I.P.C., however, no separate sentence was awarded for the offence under section 6 of the POCSO Act in view of the section 42 of the said Act. The substantive sentences awarded to the appellants were directed to run concurrently.

The accused Sk. Abid Alli, who faced trial along with the appellants, was found not guilty for the offences punishable under sections 302/376-A/376-D/120-B of the I.P.C. and section 6 of the POCSO Act and accordingly, he was acquitted of all the charges.

Since both the DSREF and the criminal appeals arise out of the same judgment, with the consent of learned counsel for both the parties, those were heard analogously and are disposed of by this common judgment.

Prosecution Case:

2. The prosecution case, as per the first information report (hereinafter F.I.R.) (Ext.3) lodged by P.W.7 Tara Bibi, is that on 21.08.2014 at about 2.00 p.m., the deceased along with

her cousin brother Sk. Farhan Alli (P.W.17) had been to a nearby shop of their house to purchase chocolates. As there was delay of the deceased in returning home, at about 3.00 p.m., P.W.7 and others searched for the deceased but failed to trace her out. Some co-villagers found the deceased on the Taza of one Sk. Khairuddin in an unconscious state and immediately they shifted her to Tendakuda Primary Health Centre, but the doctor advised them to take the deceased to S.C.B. Medical College and Hospital, Cuttack (hereafter 'S.C.B.M.C.H, Cuttack'). On being asked, the doctor told them that somebody had throttled her neck after committing rape on her. While being shifted to S.C.B.M.C.H, Cuttack, on the way the deceased died and therefore, P.W.7 and others returned back to the village carrying the dead body of the deceased. On enquiry, P.W.17 informed that the appellants gagged the mouth of the deceased and took her away by lifting her in arms while they were returning home after purchasing chocolates. P.W.7 suspected that both the appellants after committing rape on the deceased had strangulated her to death.

On receipt of the written report from P.W.7 which was scribed by P.W.9 Siraj Ul Haque, Sri S.K. Panda, A.S.I. of Krushnanandapur outpost made Station Diary Entry No.300

dated 21.08.14 and sent the report to the Inspector in-charge of Tirtol police station for registration and accordingly, the Inspector in-charge of Tirtol police station, namely, Dayanidhi Nayak (P.W.27) registered Tirtol P.S. Case No.183 dated 21.08.2014 under sections 376-A/376(2)(f)(g) of the I.P.C. and section 6 of the POCSO Act against the appellants at 11.45 p.m. and he himself took up the investigation of the case.

During the course of investigation, the I.O. (P.W.27) visited the spot during the intervening night of 21.08.2014 and 22.08.2014, examined the witnesses and recorded their statements, sent requisition to the S.P., Jagatsinghpur for deputation of scientific team to the spot to assist him during investigation and for collection of material evidence. The local people apprehended the appellant Sk. Akil Alli and on the same night at about 3.30 a.m., the I.O. seized the wearing apparels of the appellant Sk. Akil Alli in presence of the witnesses as per seizure list Ext.6 and at about 3.45 a.m., he arrested the appellant Sk. Akil Alli and sent him to Medical Officer (P.W.28), C.H.C., Manijang for medical examination through escort party.

On 22.08.2014 in the morning at about 6.50 a.m., the I.O. visited the place of occurrence and prepared the spot map vide Ext.20 and during spot visit, he found a quilt, inner

garments, towel, plastic chappal, cigarette pups, glass bottles and Aska 40 liquor bottles, thumps up plastic bottles, a pair of golden ear rings at the spot. On the same day at about 7.20 a.m., he conducted inquest over the dead body of the deceased in presence of her family members and other witnesses and prepared inquest report (Ext.1). At about 8.20 a.m., he sent the dead body of the deceased to C.D.M.O., D.H.H., Jagatsinghpur through escort party for post mortem examination and opinion. On 22.08.2014 at about 1.30 p.m., the scientific team of S.F.S.L., Rasulgarh and staff of D.F.S.L., Jagatsinghpur arrived at the spot and inspected the spot. The I.O. examined the seizure witnesses and Sri Chunuram Murmu, S.O., S.F.S.L., Rasulgarh, Bhubaneswar and recorded their statements. During inspection of the spot by the Scientific Officer, three chance finger prints were detected from the bottles (Aska 40 bottles). The chance finger prints were developed with white powder and marked as Ext.A, B and Ext.B/1. At about 5.30 p.m., the I.O. (P.W.27) seized two sealed vials containing the sample pubic hair and sample semen of the appellant Sk. Akil Alli on production of escorting constable B.B. Singh collected during the medical examination of the appellant in presence of the witnesses as per seizure list (Ext.7). On the same day at about

7.30 p.m., the I.O. forwarded the appellant Sk. Akil Alli to the Court.

On 23.08.2014, the I.O. made prayer before the Court for recording the statement of the informant (P.W.7) under section 164 of Cr.P.C. and on 25.08.2014, as per the direction of S.P., Jagatsinghpur, a special team was formed to apprehend the accused persons and raid was conducted at different places. On 04.09.2014, the I.O. received the post mortem report from the A.D.M.O., D.H.H., Jagatsinghpur.

On 05.09.2014 at about 3.00 p.m., the I.O. apprehended the accused Sk. Abid Alli and appellant Sk. Asif Alli at Bhubaneswar and seized one Nokia mobile phone during the personal search of appellant Sk. Asif Alli in presence of the witnesses. On the same day, the I.O. also seized one Honda Activa scooty bearing regd. no. OD 21 B 0693 and one Samsung Mobile handset during the personal search of accused Sk. Abid Alli and then, the I.O. brought both the accused Sk. Abid Alli and the appellant Sk. Asif Alli to Tirtol police station and seized the wearing apparels of the appellant Sk. Asif Alli in presence of the witnesses and prepared the seizure list marked as Ext.9 and sent the accused Sk. Abid Alli and appellant Sk. Asif Alli to M.O., C.H.C., Manijanga for medical examination and opinion. The I.O.

received the spot visit report along with the photographs of the spot from the Scientific Officer, S.F.S.L. through post. On 06.09.2014, the I.O. received the medical examination report of the accused Sk. Abid Alli and appellant Sk. Asif Alli and at about 11.45 a.m., he arrested both of them and seized the biological exhibits on production of the escort officer, S.I. Govinda Majhi in presence of witnesses and prepared the seizure list Ext.11. On the same day at about 6.00 p.m., he forwarded the accused Sk. Abid Alli and the appellant Sk. Asif Alli to the Court.

On 09.09.2014, the I.O. seized the school admission register of Kalinga Public School, Tala Barei, Krishnanandapur on production by P.W.14 Kalpana Beura, the Principal of the School in presence of witnesses and prepared the seizure list (Ext.13), in which the date of birth of the deceased was mentioned as 16.03.2008 and left the same in zima of P.W.14 by executing zimanama (Ext.14). On the same day at about 2.00 p.m., the I.O. seized the original birth certificate of the deceased on production by uncle of the deceased, namely, Ayub Ali @ Tuku and prepared the seizure list (Ext.10) and left the same in his zima executing zimanama (Ext.21). On 20.09.2014, the I.O. made prayer before the Court to send the seized exhibits to S.F.S.L., Rasulgarh for chemical examination and opinion vide

Ext.24. On 25.09.2014, he also made prayer to the Court for passing necessary order for collection of finger print of the appellant Sk. Akil Alli from Sub-Jail, Jagatsinghpur and on the very day, as per the direction of the Court, the finger print was collected. The Scientific Officer, D.F.S.L. finger print and team also collected finger prints of the appellant Sk. Asif Alli and accused Sk. Abid Alli from the Sub-Jail, Jagatsinghpur after obtaining the order of the Court. The I.O. made requisition to the S.P., Jagatsinghpur to send the chance finger prints collected from Aska 40 bottles, which were transferred to a C.D. along with specimen ten digit finger print slips of the accused Sk. Abid Alli and the appellants to the Director, State Finger Print Bureau, Rasulgarh, Bhubaneswar for necessary comparison and opinion. On 1.20 p.m., the I.O. seized the O.P.D. ticket of the deceased on production by P.W.21 in presence of the witnesses and prepared the seizure list Ext.17.

On completion of investigation, P.W.27 submitted charge sheet dated 21.10.2014 under sections 376-A/376-D/120-B of the I.P.C. and section 6 of the POCSO Act against the accused Sk. Abid Alli, Sk. Asif Alli @ Md. Asif Iqbal (appellant in CRLA No.120 of 2023) and Sk. Akil Alli (appellant in CRLA No.121 of 2023) and one Sk. Abdul Karim Ali showing him as

absconder before the learned S.D.J.M., Jagatsinghpur, which was forwarded to the learned Sessions Judge -cum- Special Judge, Jagatsinghpur on 22.08.2014 and the learned Special Judge, Jagatsinghpur took cognizance of offences under sections 376-A/376-D/120-B of the I.P.C. and section 6 of the POCSO Act.

Framing of Charge:

3. The learned trial Court framed charges as aforesaid against the appellants so also the accused Sk. Abid Alli on 17.11.2014 and since all of them refuted the charges, pleaded not guilty and claimed to be tried, the sessions trial procedure was resorted to prosecute them and establish their guilt.

Prosecution Witnesses, Exhibits & Material Objects:

4. During the course of trial, in order to prove its case, the prosecution has examined as many as twenty nine witnesses.

P.W.1 Sk. Wamik Alli stated that on the fateful day when he along with others was present in the field of Akhandalmani, at about 6 p.m. he found the appellant Sk. Asif Alli and accused Sk. Abid Alli and Sk. Abdul Karim Alli going towards village Kolta in a red colour Activa scooty. He further stated to have learnt about the missing of the deceased for which he along with others started for searching the deceased.

Upon hearing a hulla, he came to the house of one Sk. Khairuddin, where P.W.2 Sk. Sikandar Basa rescued the deceased in a naked condition with injury on the neck and near the ear drum, after which the deceased was brought to her house and then shifted to the medical.

P.W.2 Sk. Sikandar Basa stated that on the date of occurrence, he heard an announcement from the Masjid about the missing of the deceased and accordingly, started searching for her along with others. He further stated that during such search, P.W.3 Sk. Mustakin Alli found the deceased lying on the Taza of the house of one Sk. Khairuddin, who called others in a loud voice to the spot. Upon reaching there, he found the deceased was lying naked in an unconscious state. He also stated to have noticed nail marks on the belly, back and knee and blood patches on the thigh of the deceased. He further stated that he brought the deceased from that place and handed her over to P.W.1 who took the child to her house. He also stated that he along with others enquired from P.W.17, the brother of the deceased, who stated that while he and the deceased were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and appellant Sk. Asif Alli lifted and took her.

P.W.3 Sk. Mustakim Alli stated that after coming to know that the deceased was found missing, he enquired from P.W.17 about the deceased, who disclosed that when he and the deceased were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and Sk. Asif Alli lifted and took her away. He further stated that upon seeing the deceased on the Taza of the underground house of Sk. Khairuddin, he alarmed after which P.W.2 rescued the deceased from the Taza in a naked condition and then the deceased was first shifted to her house and then to Tendakuda Hospital.

P.W.4 Md. Mustakim Naimee stated that while he was playing in Akhandalmani field, he came to know about the missing of the deceased after which he along with P.Ws.1, 2 and 3 searched for her. After a while they found the deceased lying on the Taza of the house of one Sk. Khairuddin. He further stated that after rescuing the deceased, they took her to her house and subsequently, he along with P.W.2 shifted the deceased to Tendakuda medical. He is also a witness to the inquest over the dead body of the deceased.

P.W.5 Musaraf Alli stated that on the date of occurrence, when he was returning from Masjid after reading

Namaz at about 02.00 to 02.30 p.m., he saw the appellants Sk. Akil Alli and Sk. Asif Alli were standing near the house of Sk. Khairuddin and they were trembling, worried and looking nervous.

P.W.6 Sk. Mashkur Alli stated that while he was returning to his village on the date of occurrence, he saw the appellants, accused Sk. Abid Alli and Sk. Abdul Karim Alli were taking liquor on the verandah of one Manu Mian at about 12.30 p.m. and talking with each other. He further stated that the police came and seized certain items from the spot and prepared the seizure list vide Ext.2. He identified the material objects (M.Os.) in the Court.

P.W.7 Tara Bibi is the informant of the case and she was the aunt of the deceased. She supported the prosecution case and stated that the deceased had been to purchase chocolate with P.W.17 but did not return home. She further stated about the search to trace the deceased and the body of deceased was found from the Taza of the house of Khairuddin in naked condition with injuries on different parts of her body. She further stated that P.W.17 disclosed before them about the appellants taking away the deceased by lifting her while they were returning from the shop after purchasing chocolates. She is

a witness to the preparation of the inquest report vide Ext.1. She is also a witness to the seizure of the wearing apparels of the deceased by the police vide Ext.4. She identified the garments of the deceased which were marked as M.Os. V, X and XIII in the Court.

P.W.8 Diptiranjan Ray was working as a constable in Tirtol police station and he is a witness to the seizure of the wearing apparels of the appellant Sk. Akil Alli as per seizure list Ext.6. He is also a witness to the seizure of the biological exhibits of the appellant Sk. Akil Alli and the deceased as per seizure lists Exts.7 and 8 respectively. He is also a witness to the seizure of the wearing apparels of the appellants Sk. Asif Alli and Sk. Abid Alli as per seizure lists Exts.9 and 10 respectively.

P.W.9 Siraj Ul Haque is the scribe of the F.I.R. He is also a witness to the seizure of the blood-stained wearing apparels of the deceased and school certificate of the deceased vide seizure lists Exts.4 and 10 respectively.

P.W.10 Sk. Kalim Ulla is a witness to the seizure of the blood-stained wearing apparels of the deceased and school certificate of the deceased as per seizure lists Exts.4 and 10 respectively. He is also a witness to the preparation of inquest report vide Ext.1.

P.W.11 Govinda Majhi was the Sub-Inspector of Police, Tirtol Police Station, who is a witness to the seizure of the wearing apparels of the appellant Sk. Akil Alli as per seizure list Ext.6. He is also a witness to the seizure of the biological exhibits of the appellant Sk. Akil Alli as per seizure list Ext.7 and also a witness to the seizure of sealed vials containing the biological exhibits of all the appellants as per seizure list Ext.11.

P.W.12 Lachaman Sethi was posted as the S.I. of Police, Tirtol police station. He is a witness to the seizure of two parcel sealed packets as per seizure list Ext.8. He is also a witness to the seizure of Honda Activa scooty as well as one Samsung mobile phone on production by accused Sk. Abid Alli as per seizure list Ext.12. He is also a witness to the seizure of Nokia mobile phone on production by appellant Sk. Asif Alli.

P.W.13 Pabitra Kumar Dalai was working as the Asst. Teacher at Kalinga Public School, Krishnanandapur and he is a witness to the seizure of school admission register of the deceased as per seizure list Ext.13.

P.W.14 Kalpana Beura was working as the Principal of Kalinga Public School, Krishnanandapur. She produced the school admission register (Ext.15) of the deceased before the police which was seized as per seizure list Ext.13. After

verification of the register, the police left the same in her zima as per zimanama Ext.14.

P.W.15 Johra Bibi stated that the deceased was her niece. She further stated that when she enquired from P.W.17 the whereabouts of the deceased, he stated that while he and the deceased were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and the appellant Sk. Asif Alli took her away towards the house of one Sk. Khairuddin. She is also a witness to the preparation of the inquest report vide Ext.1.

P.W.16 Bibhuti Bhusan Singh was the police constable who is a witness to the seizure of one Nokia mobile phone from the possession of appellant Sk. Asif Alli as per the seizure list vide Ext.13. He is also a witness to the seizure of one Activa scooty from the possession of appellant Sk. Abid Alli as per seizure list Ext.12.

P.W.17 Sk. Farhan Alli is the cousin brother of the deceased, who stated that on the date of occurrence while he and his deceased sister were returning after purchasing chocolates, the appellant Sk. Akil Alli gagged the mouth of the deceased and the appellant Sk. Asif Alli lifted her and went away. He stated that the accused Sk. Abid Alli and Sk. Abdul Karim Alli

were with them. He further stated to have disclosed the aforesaid fact to his tuition Miss (P.W.26), P.W.7, P.W.15 and to the police.

P.W.18 Prasanna Kumar Sahoo was working as a police constable who is a witness to the seizure of the sealed vials containing the biological exhibits of the appellants Sk. Akil Alli and Sk. Asif Alli as per seizure list Ext.11.

P.W.19 Sk. Seraj Alli is a shopkeeper, who is also a co-villager of the deceased. He stated that on the date of occurrence, the deceased and P.W.17 came to his shop to purchase chocolates at about 02.00 to 02.30 p.m. and after taking chocolates, they went away. He further stated that on that evening, he came to know that the deceased had been raped and killed.

P.W.20 Sricharan Rout was working as the Assistant Sub-Inspector of Police in Paradeep Lock police station. He is a witness to the seizure of the wearing apparels of the appellant Sk. Asif Alli and accused Sk. Abid Alli as per seizure lists Exts.9 and 10 respectively.

P.W.21 Dr. Amrit Kumar Behera was working as the Medical Officer, P.H.C., New Tendakura. He stated that on the date of occurrence, the deceased was brought by some people to

the P.H.C. and she was in a senseless condition. He stated to have found some nail marks on the neck of the deceased and some marks on the back of the deceased. He also found redness with blood stain in the pubic area of the private part of the deceased. He referred her to the S.C.B.M.C.H., Cuttack for further treatment.

P.W.22 Kishore Chandra Mohanty was working as the attendant in the P.H.C., New Tendakura. He is a witness to the seizure of the O.P.D. ticket vide seizure list Ext.17.

P.W.23 Sk. Wahid Alli is the uncle of the deceased. He stated to have seen the appellants along with other accused persons sitting on the verandah of one Manu Mian and taking liquor while talking with each other. When he learnt about the missing of the deceased, he along with others made announcement from the Masjid. He further stated that when the deceased was rescued, she was found lying naked with injuries on her person.

P.W.24 Mir Zaural Haque is a witness to the seizure of one plastic jari containing glass, burnt cigarette and some other articles as per seizure list Ext.2.

P.W.25 Dr. Soumya Ranjan Nayak was the Assistant Professor, F.M.T., S.C.B.M.H, Cuttack who along with Dr.

Gopabandhu Patra, conducted post mortem examination over the dead body of the deceased on police requisition. He proved his report vide Ext.19.

P.W.26 Alakananda Sethy was the tuition Miss of the deceased, who stated that on the fateful day, though she had gone to give tuition, the deceased did not turn up for the same for which she sent another child to call the deceased but the said child could not find her. She further mentioned that P.W.17, the brother of the deceased came for the tuition that day. She was declared hostile by the prosecution.

P.W.27 Dayanidhi Naik was working as the I.I.C. of Tirtol police station who is the Investigating Officer of this case.

P.W.28 Dr. Nigamananda Tripathy was posted as Medical Officer, Manijanga C.H.C., who on police requisition, medically examined the appellant Sk. Akil Alli and found him capable of having sexual intercourse. He proved his report vide Ext.27.

P.W.29 Dr. Debasis Mahali was working as the Medical Officer, Manijanga C.H.C., who on police requisition, medically examined the appellant Sk. Asif Alli and found him capable of having sexual intercourse. He proved his report vide Ext.28.

The prosecution exhibited twenty nine documents. Ext.1 is the inquest report, Ext.2 is the seizure list in respect of one quilt, one panty, one napkin, dress of the deceased, one glass, one thumbs up bottle and other articles, Ext.3 is the F.I.R., Ext.4 is the seizure list in respect of wearing apparels of the deceased, Ext.5 is the 164 Cr.P.C. statement of the informant (P.W.7), Ext.6 is the seizure list in respect of wearing apparels of the appellant Sk. Akil Alli, Ext.7 is the seizure list in respect of biological exhibits of the appellant Sk. Akil Alli, Ext.8 is the seizure list in respect of the nail clippings and pubic hair and biological exhibits of the deceased along with the command certificate of the escort constable, Ext.9 is the seizure list in respect of wearing apparels of the appellant Sk. Asif Alli, Ext.10 is the seizure list in respect of wearing apparels of the accused Sk. Abid Alli, Ext.11 is the seizure list in respect of biological exhibits of the accused Sk. Abid Alli and the appellants in sealed vials, Ext.12 is the seizure list in respect of one maroon colour Honda Active bearing regd. no.OD 21B 0693 and one Samsung mobile phone on production by the accused Sk. Abid Alli, Ext.13 is the seizure list in respect of the school admission register, Ext.14 is the zimanama, Ext.15 is the school admission register, Ext.17 is the seizure list in respect of the outdoor ticket bearing

OPD No.4643-D dated 21.08.2014, Ext.18 is the O.P.D. ticket, Ext.19 is the P.M. report, Ext.20 is the spot map, Ext.21 is the zimanama, Ext.22 is the original birth certificate, Ext.23 is the payer made by P.W.27 to send the seized exhibits to S.F.S.L., Bhubaneswar, Ext.24 is the forwarding report, Ext.25 is the C.E. report, Ext.26 is the opinion report of the Director of Finger Print, Bhubaneswar, Ext.27 is the Medical Report of P.W.28 and Ext.28 and Ext.29 are the medical reports of P.W.29.

The prosecution also proved sixteen material objects. M.O.I is the napkin, M.O.II is the lungi, M.O.III is the quilt, M.O.IV is the panty, M.O.V is the semiz, M.O.VI is the full pant, M.O.VII is the blue colour jean pant, M.O.VIII is the jean pant, M.O.IX is the Chadi, M.O.X is the inner garment of the victim, M.O.Xl is the inner banian (Ganji), M.O.XII is another banian (Ganji), M.O.XIII is the pink colour panty of the victim, M.O.XIV is the T-shirt and maroon colour full shirt, M.O.XV is the sealed vial containing sample of semen, pubic hair, both loose and plucked and nail clipping and scrapping and M.O.XVI is the vial containing sample semen, pubic hair, nail clipping and scrapping of accused Sk. Abid Alli.

Defence Plea:

5. The defence plea of the appellants is one of denial of occurrence and of false implication. No witness was examined on behalf of the defence nor any document was exhibited.

Findings of the Trial Court:

6. The learned trial Court taking into account the evidence of P.Ws.1, 2, 7, 15, 21 & 25 coupled with the inquest report (Ext.1) and post mortem examination report (Ext.19) finding came to hold that the prosecution has established that the death of the deceased was a homicidal one. It was further held that there are no eye witnesses to the occurrence and the case is based on circumstantial evidence. The learned trial Court jotted down the following six circumstances emerging from the records, which are as follows:-

> **(i)** The deceased was last seen with the appellants;
>
> **(ii)** The appellants were seen taking liquor in the verandah of the house of one Manu Mian and gossiping among themselves on 21.08.2014 at about 12.00 p.m. to 12.30 p.m.;
>
> **(iii)** The appellants were found trembling, worried and nervous near the house of Sk. Khairuddin;

(iv) Leaving the village Manu Mahala the appellant Sk. Asif Alli, accused Sk. Abid Alli and Sk. Abdul Karim Alli in a Hero Honda Activa scooty at about 6.00 p.m. on 21.08.2014;

(v) Detection of finger print of right index finger of appellant Sk. Asif Alli by State Finger Print Bureau from the Aska 40 bottle recovered from the spot;

(vi) Conduct of the appellant Sk. Asif Alli and Sk. Abid Alli in absconding from the village.

So far as the circumstance no.(i) is concerned, the learned trial Court taking into account the evidence of P.W.17, held that there is nothing to disbelieve in his evidence that appellant Sk. Akil Alli gagged the mouth of the deceased and appellant Sk. Asif Alli lifted her and they took her. It was further held that after the appellants took the deceased as per the evidence of P.W.17, nobody had seen the deceased till she was recovered from the Taza of the abandoned house of Sk. Khairuddin in a senseless and seriously injured condition and she succumbed to her injuries prior to 8 p.m. and in absence of any explanation from the appellants, it can safely be concluded that they were the authors of the crime.

So far as the circumstance no.(ii) is concerned, the learned trial Court came to hold that the evidence of P.W.6 and

P.W.23 that they had seen the accused persons taking liquor in the varandah of the house of Manu Mian at about 12 p.m. or 12.30 p.m. might be a circumstance against the accused persons, but it cannot be safely concluded that all the accused persons were the authors of the crime and it is not sufficient to connect accused Sk. Abid Alli that he was also involved in the crime as possibility cannot be ruled out that he might have left the company of appellants Sk. Asif Alli and Sk. Akil Alli after taking liquor in the varandah of the house of Manu Mian.

So far as the circumstance no.(iii) is concerned, the learned trial Court held that the evidence of P.W.5 that he had seen the appellants standing near the house of Sk. Khairuddin is a circumstance to connect the appellants with the crime. Since they were planning to lift the victim on the way of her return, they might be worried and nervous.

So far as the circumstance no.(iv) is concerned, the learned trial Court held that mere evidence of P.W.1 that the accused Sk. Abid Alli was seen going towards village Kolta in a Hero Honda Activa scooty along with appellant Sk. Asif Alli and Sk. Karim Alli is not sufficient to hold that accused Sk. Abid Alli is also responsible for the crime along with the appellants and it

cannot be safely concluded that the accused Sk. Abid Alli is also involved in the crime.

So far as the circumstance no.(v) is concerned, the learned trial Court held that detection of right index finger print of appellant Sk. Asif Alli on Aska 40 liquor bottle recovered from the spot clearly proved his presence at the spot i.e. in the house of Sk. Khairuddin and his involvement in the alleged crime against the victim.

So far as the circumstance no.(vi) is concerned, the learned trial Court held that absconding of appellant Sk. Asif Alli from 21.08.2014 to 05.09.2014 is a strong circumstance against him which completes the chain against him to hold that he is one of the authors of crime along with appellant Sk. Akil Alli. However, it was held that the absconding of Sk. Abid Alli from 21.08.2014 to 05.09.2014 cannot be regarded as a strong circumstance against him in the absence of any other substantial circumstance to complete the chain of circumstances to hold that he was one of the authors of the crime.

The learned trial Court held that the prosecution has successfully established the circumstances against the appellants and the chain of evidence is so complete as not to leave any reasonable ground for the conclusion consistent with their

innocence and the facts so established against them are consistent only with hypothesis of the guilt of the appellants and in all human probability, they had committed the ghastly act and responsible for the crime against the deceased. However, it was held that the prosecution has failed to prove the chain of circumstances against the accused Sk. Abid Alli to hold him as one of the authors of the crime. Taking into account the evidence of the doctor (P.W.25) and the post mortem report (Ext.19) findings so also the chemical examination report (Ext.25) and the ocular evidence of the witnesses (P.Ws.1, 2, 3, 4, 7 & 15) and also the evidence of the doctor (P.W.21) who examined the deceased first in a senseless condition, the learned trial Court held that all the circumstances taken together made it clear that the appellants had committed rape on the deceased who was under twelve years of age and that the deceased was subjected to gang rape. Accordingly, while acquitting the accused Sk. Abid Alli of all the charges, found the appellants guilty under sections 302/376-A/376-D of the I.P.C. and section 6 of POCSO Act.

The learned trial Court after holding the appellants guilty under various offences, on the very day also heard on the question of sentence and came to hold that the appellants ravished the deceased who was a minor girl aged about six years

and the offences are serious and heinous in nature and against the norms of a healthy society and it revealed a dirty and perverted mind of human beings who had no control over their carnal desires. The number of injuries found on the deceased showed that she was mercilessly ravished and killed to satisfy their carnal desire. Taking into account the criminal antecedents of the appellant Sk. Asif Alli, it was held that after being released on bail on 20.08.2014 in a case under section 307 of I.P.C., he committed the offences in the present case on 21.08.2014 and thus there is no chance of his reformation. It was further held that the appellants had taken away the deceased, who was a minor girl aged about six years, with deliberate intention in order to commit rape and murder and therefore, it comes within the category of rarest of rare case warranting capital punishment to meet the ends of justice.

Submission of parties:

7. Sk. Zafarulla, learned counsel for the appellants argued that out of six circumstances jotted down by the learned trial Court, circumstances nos. (iv), (v) and (vi) are not applicable for the appellant Sk. Akil Alli and circumstances nos. (ii) & (iii) are not so clinching against the said appellant and therefore, basing only on circumstance no. (i) i.e. the last seen

evidence as adduced by P.W.17, it would be too risky to convict the appellant Sk. Akil Alli under any of the offences charged. According to him, the sole witness P.W.17 who deposed about the last seen being a child witness, cannot be relied upon as he has exaggerated his version by naming two accused persons for the first time in Court which shows that he had been tutored to speak such names. Though P.W.17 stated that he had disclosed about the appellants taking away the deceased before his mother but the prosecution did not choose to examine the mother of P.W.17. Similarly P.W.17 stated that he had disclosed also before his tuition Miss (P.W.26) but she has also not supported the prosecution case, for which she has been declared hostile. He placed reliance in the case of **Bhagwan Singh & others -Vrs.- State of M.P. reported in (2003) 3 Supreme Court Cases 21** wherein it is held that evidence of child is required to be evaluated carefully because he is an easy prey to tutoring.

The learned counsel further argued that the second circumstance that the appellants were seen taking liquor on the verandah of the house of one Manu Mian and gossiping among themselves on the date of occurrence at about 12 p.m. to 12.30 p.m. along with accused Sk. Abid Alli (acquitted) and Sk. Abdul Karim Alli (absconder) which was two hours before the time of

occurrence as deposed to by P.W.6 and P.W.23 cannot be itself a clinching evidence, particularly when as per the evidence of P.W.6, the accused persons used to take liquor in the verandah of Manu Mian regularly.

The learned counsel further argued that so far as the third circumstance regarding the appellants were found trembling, worried and nervous near the house of Sk. Khairuddin is concerned, the finding of the learned trial Court that both the appellants were planning to lift the deceased on the way of her return for which they might be looking worried and nervous is totally a hypothetical finding, which cannot be construed as a conclusive circumstance.

It is argued that so far as the fourth circumstance is concerned, the evidence of P.W.1 that he along with 40-50 persons were in the field of Akhandalmani when he found the appellant Sk. Asif Alli, accused Sk. Abid Alli (acquitted) and Sk. Abdul Karim Alli (absconding) to be going towards village Kolta in a red colour Activa is not supported by any other witnesses. The evidence of P.W.1 indicates that after seeing the accused persons going towards village Kolta, he came to know about the missing of the deceased and also came to the house of Sk. Khairuddin where the body of the deceased was detected lying in

a naked condition with injuries and since he was the relative brother of the father of the deceased so also the husband of the informant, it was expected of him to disclose about what he had seen before them at least after P.W.17 stated about the appellants lifted away the deceased while she was returning purchasing chocolates and therefore, it is very difficult to accept the evidence of P.W.1 and utilise this circumstance against the appellant Sk. Asif Alli.

The learned counsel argued that so far as the fifth circumstance i.e. the detection of finger print of right index finger of the appellant Sk. Asif Alli from Aska 40 bottle recovered from the spot is concerned, the two seizure witnesses i.e., P.W.6 & P.W.24 have not specifically stated regarding the seizure of Aska 40 bottle. Similarly, though the evidence of the I.O. (P.W.27) is that there was collection of chance finger prints from Aska 40 bottles by the Scientific Officer which were developed with white powder and marked as Exts.A, B & B-1, but the concerned Scientific Officer was not examined during trial. It is argued that the finger print expert who prepared the report has not been examined but the report has been simply marked as Ext.26 by the I.O. (P.W.27). Even the Aska 40 bottles in which three chance finger prints were detected and it was developed,

were not produced in Court during trial to be marked as M.O. It is further argued that as per the finger print examination report marked as Ext.26, the chance prints marked as 'A & B-1' said to have been detected on different Aska 40 bottles were found to be partial, faint, smudged and devoid of required number of clear ridge details for comparison and opinion and for such reason, no definite opinion could be furnished in respect of chance prints marked as 'A & B-1', however only chance print marked as 'B' said to have been detected on Aska 40 liquor bottle tallied with specimen print marked 'X' said to be the right index finger print of appellant Sk. Asif Alli @ Md. Asif Iqbal. Learned counsel argued that the finding as per Ext.26 was not put to the appellant Sk. Asif Alli in his accused statement to afford him an opportunity to explain the same and therefore, it must be completely excluded from consideration and cannot be utilised against him as one of the circumstances.

The learned counsel further argued that the sixth circumstance i.e. the absconding of the appellant Sk. Asif Alli from the village cannot be said to be such a strong circumstance which without the aid of other clinching circumstantial evidence can form a chain so complete to arrive at the conclusion that he is guilty of the offences charged and therefore, it is a fit case

where benefit of doubt should be extended in favour of the appellants. He further argued relying on the decision of the Hon'ble Supreme Court in the case of **Shankar Kisanrao Khade -Vrs.- State of Maharashtra reported in (2013) 55 Orissa Criminal Reports (SC) 623** that in the event the appellants are found guilty, in view of their age, family background and the reports received from different authorities as per the orders of this Court, the death sentence should be commuted to life imprisonment.

8. Mr. Bibhu Prasad Tripathy, learned Additional Government Advocate, on the other hand supported the impugned judgment and argued that the evidence of last seen as deposed to by P.W.17 is very natural and convincing and even though he is a child witness, but the learned trial Court after putting some questions found that he was able to answer the questions rationally and therefore, declared him to be a competent witness. The evidence of P.W.17 having not been shaken in the cross-examination and being corroborated by the evidence of P.Ws.2, 3, 7 & 15 before whom he made disclosure about the occurrence, the learned trial Court has rightly placed reliance on such evidence. Reliance was placed on the decisions of the Hon'ble Supreme Court in case of **Panchhi & others**

-Vrs.- State of U.P. reported in (1998) 7 Supreme Court Cases 177 and **State of Madhya Pradesh -Vrs.- Ramesh & another reported in (2011) 4 Supreme Court Cases 786**. According to Mr. Tripathy, the last seen evidence adduced by P.W.17 in the factual scenario is very relevant as the place of lifting of the deceased by the appellants was very close to the place from where her body was recovered in a naked condition having injuries and the appellants have failed to explain what they did with the deceased after taking her while she was coming with P.W.17 and when they parted with the company of the deceased. He placed reliance in the case of **Ram Gopal -Vrs.- State of Madhya Pradesh reported in (2023) 5 Supreme Court Cases 534**. Reliance was also placed in the decision of the Hon'ble Supreme Court in the case of **Somasundaram @ Somu -Vrs.- State reported in (2020) 7 Supreme Court Cases 722**.

The learned counsel for the State further argued that the evidence of the witnesses relating to taking of liquor by the appellants and the other accused persons on the verandah of Manu Mian prior to the occurrence and the trembling, worried and nervous condition of the appellants near the spot house are very clinching and such evidence has not been shattered in the

cross-examination. He submitted that the detection of finger print of Sk. Asif Alli from Aska 40 bottle which was seized from the spot has been rightly utilised by the learned trial Court against the said appellant and non-examination of finger print expert and non-production of Aska 40 bottles for marking as M.Os. cannot be a ground to discard such evidence. Reliance was placed on the decision of the Hon'ble Supreme Court in case of **Shri Phool Kumar -Vrs.- Delhi Administration reported in (1975) 1 Supreme Court Cases 797**. It is argued that even if no direct questions have been put to the appellant Sk. Asif Alli with regard to matching of one chance finger print from Aska 40 bottle recovered at spot marked as 'B' with his specimen finger print marked as 'X', the same cannot be a ground not to utilise it as an incriminating circumstance. Reliance was placed on the decisions of the Hon'ble Supreme Court in the case of **Paramjit Singh -Vrs.- State of Uttarakhand reported in A.I.R. 2011 S.C. 200** and **Nar Singh -Vrs.- State of Haryana reported in (2015) 1 Supreme Court Cases 496**.

It is argued that the learned trial Court has rightly held the chain of circumstances to be complete pointing towards the guilt of the appellants and therefore, the criminal appeals preferred by the appellants being devoid of merits should be

dismissed. He further argued that in view of the age of the deceased, the manner in which she was lifted while coming with her cousin brother (P.W.17) after purchasing chocolates in the broad day light and subsequently found in a naked condition and what had been done with her in a devilish manner as would be evident from the post mortem report finding, the learned trial Court was quite justified in imposing death sentence on the appellants. He placed reliance in the cases of **Ravi -Vrs.- State of Maharashtra reported in (2019) 9 Supreme Court Cases 622**, **Manoharan -Vrs.- State reported in (2019) 7 Supreme Court Cases 716**, **Laxman Naik -Vrs.- State of Orissa reported in (1994) 3 Supreme Court Cases 381** and **Dhananjoy Chatterjee -Vrs.- State reported in (1994) 2 Supreme Court Cases 220**.

Principle for appreciating the case based on circumstantial evidence:

9. There is no dispute that there is no direct evidence as to who committed the rape and murder of the deceased and how. The prosecution case hinges on circumstantial evidence. It is well established rule of criminal justice that fouler the crime, the higher should be the degree of proof. A moral opinion howsoever strong or genuine cannot be a substitute for legal

proof. When a case is based on circumstantial evidence, a very careful, cautious and meticulous scrutinisation of the evidence is necessary.

In the case of **Sharad Birdhichand Sarada -Vrs.- State of Maharashtra reported in A.I.R. 1984 S.C. 1622**, it is held that the circumstances from which the conclusion of guilt is to be drawn against an accused should be fully established. The facts so established should be consistent with the hypothesis of the guilt of the accused and they should not be explainable on any other hypothesis except that the accused is guilty. The circumstances should be of conclusive nature and tendency. They should exclude a brief possible hypothesis except the one to be proved. 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 in all human probabilities that the act must have been done by the accused. These five golden principles for appreciation of a case based on circumstantial evidence have been named as 'Panchsheel'. In the case of **Gambhir -Vrs.- State of Maharashtra reported in A.I.R. 1982 S.C. 1157,** the Hon'ble Supreme Court held that the circumstantial evidence should not only be consistent with the guilt of the accused but should be inconsistent with his

innocence. In the case of **Jaharlal Das -Vrs.- State of Orissa reported in (1991) 4 Orissa Criminal Reports (SC) 278,** the Hon'ble Supreme Court held that it is to be borne in mind as a caution that in cases depending largely upon circumstantial evidence, there is always a danger that the conjecture or suspicion may take the place of legal proof and such suspicion howsoever strong cannot be allowed to take the place of proof. The Court has to be watchful and ensure that conjectures and suspicions do not take the place of legal proof. The Court must satisfy itself that the various circumstances in the chain of evidence should be established clearly and that the completed chain must be such as to rule out a reasonable likelihood of the innocence of the child.

In the light of legal position about the circumstantial evidence, it is to be examined whether the circumstantial evidence in the instant case satisfies the requirements of law.

The first three circumstances relied upon by the trial Court is common to both the appellants to be discussed first, which are as follows:-

(i) 'Last seen' theory i.e. the appellants and the deceased were last seen together;

(ii) Conduct of the appellants i.e. the appellants were seen taking liquor in the verandah of the house of one Manu Mian and gossiping among themselves on 21.08.2014 at about 12.00 p.m. to 12.30 p.m.;

(iii) The appellants were found trembling, worried and nervous near the house of Sk. Khairuddin;

First Circumstance : 'Last seen' theory i.e. the appellants and the deceased were last seen together:

10. On this circumstance, the relevant witness is P.W.17, the cousin brother of the deceased. He was aged about seven years when he deposed in Court on 04.02.2016. He stated that the informant (P.W.7) was his aunt and the deceased was his sister and on the date of occurrence, when he along with the deceased was returning after purchasing some chocolates, on the way appellant Sk. Asif Alli asked the deceased as to whose daughter she was, to which the deceased replied that she was the daughter of Taz and then Sk. Akil Alli gagged the mouth of the deceased and the appellant Sk. Asif Alli lifted the deceased and took her away. He further stated that the accused Abid (Sk. Abid Alli) and Karim (Sk. Abdul Karim Alli) were along with the appellants. He stated to have disclosed the fact to his mother,

tuition Miss (P.W.26) so also to the informant (P.W.7) and to the police.

Admittedly, the mother of P.W.17 has not been examined and the tuition Miss (P.W.26) has not supported the prosecution case.

Though P.W.17 implicated accused persons Abid and Karim, but it has been confronted to him and proved through the I.O. (P.W.27) that he has not stated in his statement recorded under section 161 of Cr.P.C. that the accused persons Abid and Karim were present when the appellants lifted away the deceased. He further stated to have been to the shop to purchase chocolates with the deceased at about 2.00 p.m. and that they were returning home at about 3.00 p.m. He stated not to have met any known person when they had been to purchase chocolates and were returning home. Thus the implication of accused Abid (Sk. Abid Alli) and Karim (Sk. Abdul Karim Alli) was made by P.W.17 for the first time in Court, which was more than a year and five months after the occurrence.

P.W.7 has stated that when they enquired from P.W.17, he disclosed that while he along with the deceased was returning from the shop after purchasing chocolates, appellant Sk. Akil Alli called the deceased and gagged her mouth and

appellant Sk. Asif Alli lifted her and took her. Thus P.W.17 has not implicated accused Abid and Karim to be in the company of the appellants before P.W.7 and that is how in the first information report (Ext.3) lodged by P.W.7, the names of accused Abid and Karim did not find place. In the F.I.R., P.W.7 has mentioned that when she asked P.W.17, he disclosed that while returning home, the appellants lifted away the deceased gagging her mouth.

P.W.2 has also stated that P.W.17 disclosed before them that the appellant Sk. Akil Alli gagged the mouth of the deceased and appellant Sk. Asif Alli lifted her away and thus, P.W.17 has not implicated accused persons Abid and Karim before P.W.2.

Thus, it is apparent that P.W.17 has neither disclosed before P.W.2 and P.W.7 about any role played by the accused persons Abid and Karim nor he has stated before the I.O. in his previous statement about their presence at the spot when the deceased was lifted and taken away by the appellants and for the first time, such a statement has been made by him during trial.

Whether P.W.17 was a competent witness to testify?

10.1. P.W.17 is a child witness and aged about seven years. Thus, in view of section 118 of the Evidence Act, it is to be seen whether he was a competent witness to testify.

In the case of **P. Ramesh -Vrs.- State reported in (2019) 20 Supreme Court Cases 593**, the Hon'ble Supreme Court held that the trial Judge was required to determine as to whether the child witness was in a fit and competent state of mind to depose and was able to understand the purpose for being present on the occasion. Prior to the recording of evidence of a child witness, the trial Court must undertake the exercise of posing relevant questions to determine the capacity of the child witness to provide rational answers. This exercise would allow the Court to determine whether the child has the intellectual and cognitive skills to recollect and narrate the incidents of the crime. Section 118 of the Evidence Act, 1872 deals with the competence of a person to testify before the Court. Section 4 of the Oaths Act, 1969 requires all witnesses to take oath or affirmation, with an exception for child witnesses under the age of twelve years. Therefore, if the Court is satisfied that the child witness below the age of twelve years is a competent witness, such a witness can be examined without oath or affirmation. It is

further held that in order to determine the competency of a child witness, the Judge has to form her or his opinion. The Judge is at the liberty to test the capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the Court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the Court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined.

Before recording the evidence of P.W.17, the learned trial Judge put some formal questions to him like his name, father's name, name of the school, what was the place where he

had come and the purpose in coming to the Court. Since P.W.17 answered all the questions correctly, the learned trial Judge noted down that the witness is able to answer the questions rationally and therefore, he is a competent witness. However, oath was not administered to him as he was seven years of age.

No challenge has been made by the learned counsel for the appellants regarding the competency of P.W.17 to depose.

The admissibility of evidence or acceptability of evidence of a child witness is not solely dependent on his competency. It is well settled that a child witness is prone to tutoring and there is every possibility that under influence, such witness might have been posed to give out a version by persons who may have influence on him. Thus, the testimony of a child witness should be evaluated more carefully and only be accepted after greatest caution and circumspection.

In the cross-examination, suggestion has been given to P.W.17 that he was deposing falsehood being tutored by P.W.7 and P.W.15 to which he denied. In the case of **Ramesh** (supra), it is held by the Hon'ble Supreme Court that deposition of a child witness may require corroboration but in case his deposition inspires the confidence of the Court and there is no

embellishment or improvement therein, the Court may rely upon his evidence. The evidence of a child witness must be evaluated more carefully with greater circumspection because he is susceptible to tutoring. Only in case there is evidence on record to show that the child has been tutored, the Court can reject his statement partly or fully. However, an inference as to whether child has been tutored or not, can be drawn from the contents of his deposition. In the case of **Panchhi** (supra), the Hon'ble Supreme Court held that it is not the law that if a witness is a child, his evidence shall be rejected, even if it is found reliable. The law is that evidence of a child witness must be evaluated more carefully and with greater circumspection because a child is susceptible to be swayed by what others telling and thus a child witness is an easy to prey to tutoring. Courts have laid down that evidence of a child witness must find adequate corroboration before it is relied on. It is more of a rule of practical wisdom than law.

The main plank of argument by the learned counsel for the appellants is that there is every possibility of tutoring to him and that is the reason why he implicated two accused persons for the first time in Court i.e. accused Abid and Karim even though he has not implicated them before police so also

while making disclosure about the occurrence before P.W.2 and the informant (P.W.7). The question that now crops up for consideration as to whether the evidence of P.W.17 is to be totally rejected as he has implicated two accused persons i.e. Abid and Karim for the first time during trial. The maxim *falsus in uno falsus in omnibus* i.e. false in one thing false in all is not a sound rule to apply in the condition in our country. It means that if any witness makes a statement which may be incorrect to some extent, it does not inevitably follow that the other portion of his statement, which is correct, has also to be disbelieved. It is very difficult to find a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. The Courts should make efforts to disengage the truth from falsehood, and to shift the grain from the chaff and where the truth and falsehood are so intermingled so as to make it impossible to separate them, the evidence has to be rejected in entirety. It is a misconception that a witness has to be believed in toto or disbelieved in toto. The Court must appraise the evidence to see as to what extent it is worthy of acceptance and merely because in one respect, the Court considers it insufficient to rely the testimony of a witness, it does not necessarily follow as a matter of fact that it must be

discarded in all respect as well. Therefore, implication of two accused persons namely, Abid and Karim for the first time in Court during trial by P.W.17 itself cannot be a ground to disbelieve his evidence rather his evidence is required to be carefully assessed and to see if there is any corroboration to his evidence or not. The possibility of coming to his knowledge regarding the involvement of accused persons namely, Abid and Karim afterwards from other sources cannot be ruled out and therefore, he might have been tempted to speak against them in the witness-box. Bereft of implication of two accused Abid and Karim, nothing has been brought out in the cross-examination to discard his evidence, rather his evidence is very natural, clear, cogent and trustworthy. P.W.7 has stated that the deceased had gone to the shop to purchase chocolate along with P.W.17. P.W.19 has stated that on the date of occurrence at about 2 p.m. to 2.30 p.m. the deceased and P.W.17 had come to his stationery shop for chocolate and took chocolate and went away. The evidence of these two witnesses i.e. P.W.7 and P.W.19 lend corroboration to the evidence of P.W.17 that the latter was with the deceased at the time of occurrence. Thus the presence of P.W.17 with the deceased, his conduct in disclosing before others

what happened with the deceased is relevant and admissible as res gestae under section 6 of Evidence Act.

In the case of **Anjan Kumar Sarma and others -Vrs.- State of Assam reported in (2017) 14 Supreme Court Cases 359**, it is held that the circumstance of last seen together cannot by itself form the basis of holding the accused guilty of the offence. In a case where other links have been satisfactorily made out and the circumstance pointed to the guilt of the accused, the circumstance of last seen together and absence of explanation would provide an additional link which completes the chain and in the absence of proof of other circumstances, the only circumstance of last seen together and absence of satisfactory explanation cannot be made the basis of conviction.

In the case of **Ram Gopal** (supra), it is held that once the theory of 'last seen together' was established by the prosecution, the accused was expected to offer some explanation as to when and under what circumstances he had parted the company of the deceased. It is true that the burden to prove the guilt of the accused is always on the prosecution, however, in view of section 106 of the Evidence Act, when any fact is within the knowledge of any person, the burden on of proving that fact

is upon whom. Of course, section 106 of the Evidence Act is certainly not intended to relieve the prosecution of its duty to prove the guilt of the accused, nonetheless, it is also equally settled legal position that if the accused does not throw any light upon the facts which are proved to be within the special knowledge, in view of section 106 of the Evidence Act, such failure on the part of the accused may be used against the accused as it may provide an additional link in the chain of circumstances required to be proved against him. In the case based on circumstantial evidence, furnishing or non-furnishing of the explanation by the accused would be a crucial fact, when the theory of last seen together as propounded by the prosecution was proved against him. Though the last seen theory as propounded by the prosecution in a case based on circumstantial evidence may be a weak kind of evidence by itself to base conviction solely on such theory, when the said theory is proved 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 does owe an explanation under section 106 of the Evidence Act with regard with the circumstances under which death might have taken place. If the accused offers no explanation or furnishes a

wrong explanation, absconds, motive is established and some other corroborative evidence in the form of recovery of weapon etc. forming a chain of circumstance is established, the conviction could be based on such evidence.

In the case of **Somasundaram @ Somu** (supra), where specific charges under sections 347/365/364 of the I.P.C. were framed, it is held by the Hon'ble Supreme Court that the abduction followed by murder in appropriate cases can enable a Court to presume that the abductor is the murderer. The principle is that after abduction, the abductor would be in a position to explain what happened to his victim and if he failed to do so, it is only natural and logical that an irresistible inference may be drawn that he has done away with the hapless victim. Section 106 of the Evidence Act would come to the assistance of the prosecution.

In the case in hand, however, there is neither any charge of abduction nor any charge of illegal confinement. In the accused statement, the learned trial Court has put specific questions to the appellants on the evidence of P.W.17 but except stating that the same was false, nothing further has been stated by the appellants.

Therefore, I am of the humble view that the learned trial Court has rightly placed reliance on the evidence of P.W.17 and held that the last seen theory has been established by the prosecution. The evidence of P.W.17 that the appellants and the deceased were last seen together when both of them lifted away the deceased while she was returning with him after purchasing chocolates from the village shop can be used as one of the incriminating circumstance against the appellants as has been rightly done by the learned trial Court, but in my humble view, such circumstance of last seen in itself cannot be held sufficient to record the finding of guilt of the appellants.

Thus the first circumstance i.e. last seen theory even though proved by the prosecution has to be taken into account along with the other circumstances to see whether the chain of evidence has been established clearly and that it forms a completed chain.

Second Circumstance: Conduct of the appellants in taking liquor in the verandah of the house of one Manu Mian:

11. The second circumstance relied upon by the prosecution is that on 21.08.2014 at about 12.00 p.m. to 12.30 p.m., the appellants were seen taking liquor in the verandah of

the house of one Manu Mian and gossiping among them which is being deposed to by P.W.6 and P.W.23.

P.W.6 has stated that on the occurrence day, while he was coming to his village Krushnanandapur, he saw the appellants and the accused persons namely, Sk. Abid and Sk. Karim were taking liquor at about 12.30 noon on the varandah of the house of Manu Mian and they were talking with each other. In the cross-examination, he has stated that the accused persons used to take liquor in the varandah of Manu Mian regularly. P.W.23 has also stated to have seen the appellants and the accused persons namely, Sk. Abid Alli and Sk. Karim Alli taking liquor in the varandah of Manu Mian and gossiping among them on the date of occurrence at about 12 noon.

The time when the appellants and the two other accused persons were seen taking liquor was much before the time when P.W.17 with the deceased came to purchase chocolates and after purchasing were returning home. P.W.17 has stated that he had been to the shop with the deceased to purchase chocolate at about 2 p.m. and was returning at about 3 p.m. Similarly P.W.19 has stated that on the date of occurrence at about 2 p.m. to 2.30 p.m., the deceased and P.W.17 had come to his stationery shop for purchasing chocolate. As

deposed to by P.W.6, the appellants and the accused persons namely, Sk. Abid and Sk. Karim used to take liquor in the varandah of Manu Mian regularly. Learned trial Court has held that from this circumstance, it cannot be safely concluded that all the accused persons were the authors of the crime. It was further held that the possibility of accused Sk. Abid Alli leaving the company of the appellants after taking liquor from the varandah of the house of Manu Mian cannot be ruled out.

Thus, the second circumstance i.e. the appellants were seen taking liquor in the verandah of the house of one Manu Mian and gossiping among themselves and the other two accused persons were also with them, as proved by the prosecution is not by itself sufficient to connect the appellants with the crime. It is to be considered along with the other proved circumstances to see whether the chain of evidence is so complete as to unerringly point towards the guilt of the appellants.

Third Circumstance : Appellants were found trembling, worried and nervous near the house of Sk. Khairuddin:

12. The third circumstance i.e the appellants were found trembling, worried and nervous near the house of Sk. Khairuddin is concerned, P.W.5 is the sole witness on this circumstance.

P.W.5 has stated that on the date of occurrence at about 2 p.m. to 2.30 p.m. while he was returning from Masjid after Namaz, he found the appellants near the house of Sk. Khairuddin and they were found trembling, looking worried and nervous and then he went to his house.

The learned trial Court held that since the appellants were planning to lift the victim on the way of her return, they might be worried and nervous. It is nothing but a hypothetical conclusion. There is nothing on record that the deceased and P.W.17 had passed by that way by that time to purchase chocolates from the stationery shop of P.W.19 and that the appellants had seen them. According to P.W.17, he had been to the shop with the deceased to purchase chocolate at about 2 p.m. and was returning at about 3 p.m.

The conclusion arrived at should be sensible and reasonable. It must be based on reasons rather than imaginations and emotions. P.W.5 stated that he was a close relative of the deceased and the deceased belonged to her family. It is true that related witness is not necessarily a false witness, but when P.W.5 was just passing by that way near the house of Sk. Khairuddin after Namaj in Masjid and there is no evidence how much time he observed both the appellants and

found them trembling, looking worried and nervous, even if the evidence of P.W.5 is accepted, it cannot be said with certainty that it was before the lifting of the deceased as held by the learned trial Court. Trembling, looking worried and nervousness can be for a variety of reasons and it cannot be said with certainty that it was only for the reasons assigned by the trial Court. The body of the deceased was located on the Taza of the house of Sk. Khairuddin at about 5.30 p.m. as stated by the informant (P.W.7) and the appellants were found near the house of Sk. Khairuddin at about 2 p.m. to 2.30 p.m. as stated by P.W.5.

Thus, the third circumstance as proved by the prosecution, i.e the appellants were found trembling, worried and nervous near the house of Sk. Khairuddin, in my humble view is not so clinching by itself to arrive at the conclusion as reached by the trial Court or sufficient to connect the appellants with the crime and it is to be considered along with the other proved circumstances.

Summed up : Circumstances against the appellant Sk. Akil Alli:-

13. The three circumstances which are appearing against appellant Sk. Akil Alli as discussed above, I am of the humble

view that though through the evidence of P.W.17, the prosecution has successfully proved that on the date of occurrence in the afternoon, both the appellants lifted away the deceased while she was returning after purchasing chocolates and thus the appellants and the deceased were last seen together, but such circumstance of last seen coupled with the circumstance that the appellant Sk. Akil Alli was seen taking liquor in the verandah of the house of Manu Mian with appellant Sk. Asif Alli and the other two accused i.e. Sk. Abid Alli and Sk. Abdul Karim Alli so also the circumstance that he along with the appellant Sk. Asif Alli was found trembling, worried and nervous near the house of Sk. Khairuddin in the afternoon on the date of occurrence do not form a complete chain to record the finding that it is consistent only with the hypothesis of guilt of the appellant Sk. Akil Alli and totally inconsistent with his innocence and prove the charges against him beyond all reasonable doubt. The circumstances proved raised an amount of suspicion, but suspicion, howsoever strong, cannot be a substitute for proof of the guilt of the appellant beyond reasonable doubt.

There is no evidence against appellant Sk. Akil Alli that he tried to flee or abscond from his village. He was apprehended by local people and handed over to the I.O.

(P.W.27) on the night of occurrence. The appellant was examined by the doctor (P.W.28) at C.H.C., Manijanga on police requisition and he was found capable of committing sexual intercourse and his pubic hair and sample semen were collected by the doctor and kept in sealed vials and handed over to the escorting constable, which in turn were seized by the I.O. (P.W.27), who also seized the wearing apparels of the appellant i.e. blue colour check lungi and one half vest on being produced by him as per seizure list Ext.6. The forwarding report for chemical examination, which was marked as Ext.24, would indicate that the check lungi of the appellant Sk. Akil Alli was marked as Ext.'P', his half vest was marked as Ext.'P-1', pubic hair of the appellant was marked as Ext.'Q' and sample semen of the appellant collected in a sealed bottle was marked as Ext.'Q-1'. The nature of examination sought for so far as these four exhibits, which relate to the appellant Sk. Akil Alli were **(i)** whether Exts.'P' & 'P-1' contained any blood stain and if so, whether it tallied with Exts.'B', 'E' & 'L' i.e. the wearing apparels of the deceased; **(ii)** whether Exts.'P' and 'P-1' contained any vaginal swab and if so, whether it tallied with Ext.'M-1' (vaginal swab); **(iii)** whether any blood stain/seminal stain detected in Ext.'A' i.e. the kantha seized from the spot and did it tally with

Ext.'Q-1', **(iv)** whether the stains detected in Exts.'B' & 'L' i.e. the wearing apparels of the deceased tallied with Ext.'Q-1' and **(v)** whether Ext.'Q' tallied with any hair detected from Ext.'A'. The chemical examination report (Ext.25) indicates that in Exts.'P' & 'P-1', no blood, no semen and no vaginal secretion stain were noticed and similarly in Ext.'Q', no blood and no semen were noticed. So far as Ext.'Q-1' is concerned, it was found to be deteriorated due to preservation in liquid state. Admittedly, no finger print of the appellant Sk. Akil Alli was found to be tallying with the chance finger prints detected on Aska 40 liquor bottles found at the spot.

Therefore, from the three proved circumstances, it is difficult to sustain the conviction of the appellant Sk. Akil Alli under sections 302/376-A/376-D of the I.P.C. and section 6 of the POCSO Act and accordingly, the same is hereby set aside and the appellant is acquitted of all the charges.

14. Before proceeding further to discuss about the remaining three circumstances, which are against Sk. Asif Alli @ Md. Asif Iqbal, it would be apt to discuss whether prosecution has proved that the deceased was subjected to rape and she met with a homicidal death.

Whether the deceased was subjected to rape and she met with a homicidal death:

14.1. The deceased was first detected on the Taza of the house of Sk. Khairuddin by P.W.3 who found her in a naked condition. P.W.2 stated to have noticed nail marks on the belly and backside and knee of the victim and he also found blood patches on the thigh. P.W.15 has stated that the victim was recovered in a senseless and naked condition and she had sustained bleeding injuries on her person including her genital. P.W.7 has stated that she found the victim naked and senseless when she was rescued from Taza of the house of Sk. Khairuddin. She also found injuries on the chest, shoulder, below the ear, back and knee of the deceased and she had sustained bleeding injuries on her private part and there was dried blood in her private part and that they covered the body of the deceased with bed sheet and shifted her to Tendakunda Hospital. P.W.21 Dr. Amrit Kumar Behera who was the Medical Officer in New Tendakuda C.H.C. examined the deceased and he stated that when some persons brought the deceased to him on 21.08.2014 at about 6.30 p.m., he found the deceased was in a senseless condition having some nail marks on her neck and some marks on the back. He also found redness with blood stain in her

private part (in pubic area) for which he referred her to S.C.B.M.C.H., Cuttack for further treatment. He proved the OPD ticket vide Ext.18, which was seized by the I.O. as per seizure list Ext.17. While the deceased was being shifted to the hospital at Cuttack, on the way near Kandarpur, she died for which P.W.7 and others who were carrying her returned back to the village. The inquest report marked as Ext.1 also indicates that the deceased had sustained injuries on different parts of her body including bleeding injuries on her vagina.

P.W.25 Dr. Saumya Ranjan Naik, Assistant Professor, F.M.T., S.C.B.M.C.H., Cuttack conducted post mortem examination over the dead body of the deceased on 22.08.2014 and noticed the following injuries :-

External injuries:

(i) Genital area found swollen and edematous and fluid blood found coming out from the vaginal opening. Labia Majora and labia minora found contused, posterior commissure found contused and lacerated. Vaginal opening found stretched and the margins were seen contused and lacerated. There was wide gaping of vaginal cutlet and vaginal canal. Hymen found completely lacerated, mostly on the posterior aspect;

(ii) Abrasion looking red (3 cm x 1 cm) present on right breast;

(iii) Abrasion looking red (4 cm x 0.5 cm) present on right side front of abdomen vertically 1 cm lateral to umbilicus;

(iv) Scratch abrasion (2 cm x 0.1 cm) present on right side zygomatic area;

(v) Abrasion (0.7 cm x 0.2 cm) present on middle of left pinna;

(vi) Abrasion (1 cm x 1 cm) on front of left knee;

(vii) Abrasion (2 cm x 2 cm) on lateral aspect of left knee;

(viii) Multiple scratch abrasions of length varying from 1 cm to 5 cm present on left side back of chest 6 cm below scapula;

(ix) Multiple small abraded contusions over an area of abdomen at the level of LI (6 cm x 4 cm) present on mid line;

(x) Multiple small abrasions (3 cm x 1 cm) present on sacral area;

(xi) Multiple small abrasions present on left scapula shoulder;

(xii) Multiple small abrasions present on right scapula;

(xiii) Multiple small abrasions present on front and right side of neck.

On dissection:

Left side lateral wall of vaginal canal found torn and lacerated and the margins were found contused. About 200 fluid blood found within pelvic cavity. Structures of the neck were found intact without any extravasations of blood. Stomach contained 300 grams partially digested food particles without emitting any characteristic odour, mucosa is healthy. All other organs were intact and pale.

The doctor (P.W.25) has stated in his evidence that external injuries nos.(ii) to (xiii) found on the dead body were ante mortem in nature and might have been caused by hard and blunt trauma or contact with hard and rough surface. He has further opined that external injury no.(i) along with corresponding internal injuries were ante mortem in nature and consistent with forceful thrusting and could have been caused due to penetration of male organ. As per his opinion, death of the deceased was due to shock and hemorrhage as a result of injuries to genital track which were fatal in ordinary course of

nature. According to him, age of injuries were of fresh duration at the time of death, time since death was within 12 to 24 hours prior to autopsy and the death was within 12 to 24 hours prior to autopsy and the death was homicidal in nature. During cross-examination, P.W.25 has clearly denied the suggestion put to him by the learned defence counsel by saying that the injuries on the vagina were not possible by fall on hard surface or by inserting a wooden substance in the vagina.

In view of the oral as well as medical evidence, I am of the humble view that the deceased was subjected to rape and on account of rape, external injuries were caused on different parts of her body including injuries to genital track which were fatal in ordinary course of nature and it also caused shock and hemorrhage which resulted in her death and her death was homicidal in nature. The learned counsel for the appellants has not challenged this aspect though it is his contention that there is insufficient evidence on record to hold the appellants liable for such offences.

Remaining three circumstances:

15. The remaining three circumstances which are against the appellant Sk. Asif Alli @ Md. Asif Iqbal are to be discussed now.

Fourth Circumstance : Appellant Sk. Asif Alli was found leaving village Manu Mahala on the date of occurrence:

16. The fourth circumstance i.e. the appellant Sk. Asif Alli was found leaving village Manu Mahala in a Hero Honda Activa scooty on the date of occurrence i.e. on 21.08.2014 at about 6 p.m. with the accused Sk. Abid Alli and Sk. Abdul Karim Alli, has been deposed to by P.W.1 Sk. Wamik Alli who is the sole witness on this circumstance. He has stated that on the date of occurrence in the afternoon, while he along with others were in the field of Akhandalmani, they found the appellant Sk. Asif Alli along with accused Sk. Abid Alli (acquitted) and Sk. Karim Alli (absconding) were going towards village Kolta in a red colour Activa. In the cross-examination, P.W.1 has stated that he went to Akhandalmani field at about 4 p.m. and returned to his house at about 5.20 p.m. He further stated that by the time of his arrival at Akhandalmani field, around forty to fifty persons were there. He further stated that he was examined by the police in front of the house of the deceased on the night of occurrence.

It is the contention of the learned counsel for the appellants that even though there are many others present at Akhandalmani field, only P.W.1 was examined to prove this circumstance. Learned counsel for the State submitted that in

the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of evidence that is important.

Adverting to the contentions raised, law is well settled that section 134 of the Evidence Act does not provide for any particular number of witnesses and it would be permissible for the Court to record a finding regarding any particular aspect of the prosecution case on the evidence of a solitary witness if his evidence is found to be credible, reliable, in tune with the case of the prosecution and inspires implicit confidence. It is not the quantity but quality of evidence adduced by the witness that matters for determining the guilt or innocence of the accused. The testimony of a sole witness must be confidence-inspiring and beyond suspicion, thus, leaving no doubt in the mind of the Court.

The evidence of P.W.1 who is related to the father of the deceased as brother cannot be doubted on the ground of relationship as related witnesses are not necessarily false witnesses. Unless their evidence suffers from serious infirmity or raises considerable doubt in the mind of the Court, it would not be proper to discard their evidence straight away. Evidence of P.W.1 has not been shattered or discredited by the defence in spite of searching cross-examination. He disclosed before police

what he had seen when he was examined on the night of occurrence The leaving of village Manu Mahala by the appellant Sk. Asif Alli along with the other two might not have been noticed by others present in Akhandalmani field as they just passed through that way. P.W.4 was present in Akhandalmani field and he was playing football when he came to know about the missing of the deceased but he has not stated about this circumstance. Non-examination of other witnesses to prove the same circumstance is immaterial.

After carefully assessing the evidence of P.W.1, I find him to be a reliable witness and through his evidence, the prosecution has successfully proved the fourth circumstance.

Fifth Circumstance : Detection of finger print of appellant Sk. Asif Alli by State Finger Print Bureau from the Aska 40 bottle found at the spot:

17. The fifth circumstance relied upon by the prosecution is that the right index finger print of the appellant Sk. Asif Alli was detected by the State Finger Print Bureau from the Aska 40 bottle recovered from the spot.

P.W.27, the I.O. has stated that the scientific team of S.F.S.L., Rasulgarh and staff of D.F.S.L., Jagatsinghpur arrived at the spot on 22.08.2014 at 1.30 pm. and inspected the

spot and as per seizure list Ext.2, three nos. of Aska 40 bottles along with other articles were seized in presence of witnesses at 3.30 p.m. The seizure list Ext.2 though does not specifically indicate seizure of Aska 40 bottles, but it indicates about seizure of three nos. of glass bottles marked as Exts. 'J', 'J/1' and 'J/2'. The I.O. (P.W.27) has further stated that during inspection of spot by the Scientific Officer Chunuram Murmu, State F.S.L., Rasulgarh, Bhubaneswar, three chance finger prints were detected from the bottles (Aska 40 bottles) by the Finger Print Sub-Inspector, Jagatsinghpur and the chance finger prints were developed with white powder and marked as Exts.'A', 'B' & 'B-1'. Ext.2 also indicates in column no.2 regarding production of different articles by Scientific Officer Chunuram Murmu, State S.F.S.L., Rasulgarh, Bhubaneswar before the I.O. and the I.O. has also stated that on 22.08.2014 at about 3.30 p.m. he seized the articles after those were handed over to him by the S.F.S.L. Officer.

P.Ws.6 & 24 are the witnesses to the seizure list Ext.2. P.W.6 while proving his signature in seizure list Ext.2, has stated about seizure of different articles as per the said seizure list. P.W.24 has also stated about the seizure of articles by the I.O. as per seizure list Ext.2 and he has also proved his signature

thereon. Learned counsel for the appellants contended that neither P.W.6 nor P.W.24 has specifically stated about the seizure of three nos. of Aska 40 bottles under seizure list Ext.2. Such a contention cannot be attached with any importance since their evidence as seizure witnesses has not been shattered or discredited by the defence rather it is getting corroboration from the evidence of the I.O.

It is argued by the learned counsel for the appellants that during trial, the prosecution has not examined the Scientific Officer Chunuram Murmu or any other officer who assisted him during the spot inspection and detected and developed three chance finger prints from the Aska 40 bottles. The liquor bottles were not produced in Court during trial and the photo images of chance prints marked as A, B and B-1 in a CD along with their photo enlargements on the basis of which Finger Print Examination Report (Ext.26) was prepared were also not produced during trial and therefore, no importance is to be attached to the findings recorded by the Director, State Finger Print Bureau, Rasulgarh, Bhubaneswar in Ext.26. Learned counsel for the State on the other hand argued that since spot inspection by the scientific officials is not in dispute which is

otherwise proved by oral as well as documentary evidence, non-examination of such officials is immaterial.

The evidence of the I.O. (P.W.27) indicates that on 05.09.2014, after he apprehended the appellant Sk. Asif Alli at Bhubaneswar along with accused Sk. Abid Ali (acquitted), they were sent to Medical Officer, C.H.C., Manijanga for necessary medical examination and opinion. The escort party produced the medical examination reports, biological exhibits collected from the appellants in sealed vials which were seized and then the appellant Sk. Asif Alli and accused Sk. Abid Ali were arrested on 06.09.2014 and forwarded to Court on that very day, which would be evident from the order sheet dated 06.09.2014. The evidence of the I.O. and the case records further indicate that the specimen finger prints of Sk. Asif Alli and other accused persons were collected and the I.O. made requisition to S.P., Jagatsingpur through FPSI, DFSL, Jagatsinghpur to send the chance finger prints collected from Aska 40 bottles which were transferred to a CD along with specimen ten digit finger print slips of the suspects including the appellant Sk. Asif Alli to the Director, State Finger Print Bureau, Rasulgarh, Bhubaneswar for necessary examination and opinion and accordingly, the same were dispatched through FPSI, Jagatsinghpur and the report

(Ext.26) goes against the appellant Sk. Asif Alli. Non-examination of Scientific Officer who detected and developed chance finger prints and non-production of Aska 40 bottles in Court during trial cannot be a ground to discard the evidenciary value of Ext.26. No suggestion has been given by the defence to the I.O. that there was no seizure of Aska 40 bottles from the spot. Photo images of chance prints along with their photo enlargements including CD and specimen finger prints are very much available on record and those are part and parcel of Ext.26, which indicates that the chance print marked as Ext.'B' said to have been detected on Aska 40 liquor bottle tallied with specimen print marked Ext.'X' said to be the right index finger print of the appellant Sk. Asif Alli.

In the case of **Phool Kumar** (supra) on which reliance was placed by the learned counsel for the State, it is held that the clinching evidence against the appellant was his thumb impression on the kunda of the cash box. It was conclusively proved to be his on the opinion of the expert. The report of the expert was used as evidence by the prosecution without examining him in Court. Neither the Court thought it fit nor the prosecution or the accused filed any application to summon and examine the expert as to the subject matter of his

report. The Court was bound to summon the expert if the accused would have filed any such application for his examination. That not having been done, the grievance of the appellant apropos the report of the expert being used without his examination in Court had no substance.

The examination of expert is crucial especially if reliance is placed on the finger print report to suspect the guilt of the accused. The I.O. has stated that the Scientific Officer, DFSL finger print and team collected the finger prints of three accused persons from the Sub-Jail, Jagatsinghpur after obtaining the order of the Court. Specific questions have been put to the appellant Sk. Asif Alli in the accused statement relating to detection of Aska 40 liquor bottles during spot visit, visit of scientific team of SFSL, Rasulgarh and staff of DFSL, Jagatsinghpur to the spot and seizure of three numbers of Aska 40 bottles as per seizure list, but the appellant simply answered that he could not say. Ext.26 has been marked on admission. No application was filed from the side of accused persons to summon the Scientific Officer or expert for his examination. Therefore, non-examination of the Scientific Officer or the expert who prepared the report cannot be a ground not to give importance to Ext.26. It is correct that inadvertently no direct

question has been put to the appellant Sk. Asif Alli on the finding of Ext.26 in the accused statement, but it has been held by the Hon'ble Supreme Court in the case of **Paramjeet Singh** (supra) that the provisions of section 313 of Cr.P.C. make it obligatory for the Court to question the accused on the evidence and circumstances against him so as to offer him an opportunity to explain the same, but, it would not be enough for the accused to show that he has not been questioned or examined on a particular circumstance, instead he must show that such non-examination has actually and materially prejudiced him and has resulted in the failure of justice. In other words, in the event of an inadvertent omission on the part of the Court to question the accused on any incriminating circumstance cannot ipso facto vitiate the trial unless it is shown that some material prejudice was caused to the accused by the omission of the Court.

In the case of **Nar Singh** (supra), contention was raised from the side of the appellant that since Ballistic Expert opinion was not put to the appellant in his statement recorded under section 313 of Cr.P.C., it must be completely excluded from consideration. The Hon'ble Court held that when the trial Court is required to act in accordance with the mandatory provisions of section 313 of Cr.P.C., failure on the part of the

trial Court to comply with the mandate of the law, cannot automatically enure to the benefit of the accused. Any omission on the part of the Court to question the accused on any incriminating circumstance would not ipso facto vitiate the trial, unless some material prejudice is shown to have been caused to the accused. It was further held that in so far as non-compliance of mandatory provisions of section 313 of Cr.P.C., it is an error essentially committed by the learned Sessions Judge. Since justice suffers in the hands of the Court, the same has to be corrected or rectified in the appeal. The question whether a trial is vitiated or not depends upon the degree of the error and the accused must show that non-compliance of section 313 of Cr.P.C. has materially prejudiced him or is likely to cause prejudice to him. Merely because of defective questioning under section 313 of Cr.P.C., it cannot be inferred that any prejudice had been caused to the accused, even assuming that some incriminating circumstances in the prosecution case had been left out. When prejudice to the accused is alleged, it has to be shown that accused has suffered some disability or detriment in relation to the safeguard given to him under section 313 of Cr.P.C. Such prejudice should also demonstrate that it has occasioned failure of justice to the accused. The burden is upon the accused to

prove that prejudice has been caused to him or in the facts and circumstances of the case, such prejudice may be implicit and the Court may draw an inference of such prejudice. Facts of each case have to be examined to determine whether actually any prejudice has been caused to the appellant due to omission of some incriminating circumstances being put to the accused. Whenever a plea of non-compliance of section 313 of Cr.P.C. is raised, it is within the powers of the appellate Court to examine and further examine the convict or the counsel appearing for the accused and the said answers shall be taken into consideration for deciding the matter. If the accused is unable to offer the appellate Court any reasonable explanation of such circumstance, the Court may assume that the accused has no acceptable explanation to offer. In the facts and circumstances of the case, if the appellate Court comes to the conclusion that no prejudice was caused or no failure of justice was occasioned, the appellate Court will hear and decide the matter upon merits.

It is pertinent to note that live link was provided to the jail where the appellants were lodged and they were provided opportunity to see the entire hearing proceeding. One learned State Counsel from the District Court also remained present with them throughout the proceeding as per our

direction to explain them the argument advanced and interactions between the Bench and the learned counsel for the respective parties. During course of hearing, when we expressed our willingness to provide an opportunity to the appellant Sk. Asif Alli to explain the finding of Ext.26 against him by way of recording additional accused statement under section 313 of Cr.P.C., if he so desires, the learned counsel for the appellants after taking instruction was reluctant to avail such opportunity.

In the case in hand, the defence has not disputed the visit of scientific team to the spot, the seizure of Aska 40 liquor bottles from the spot on being produced by the Scientific Officer, the detection and development of chance finger prints from such bottles, the collection of specimen ten digit finger prints of the appellant Sk. Asif Alli from jail and its dispatch to State Finger Print Bureau, Bhubaneswar for examination. In fact, the same has been proved through oral as well as documentary evidence. The learned counsel for the appellant has failed to show as to what material prejudice was caused to the appellant by the omission of the Court to put direct question on Ext.26.

In view of the foregoing discussions, when chance finger prints were detected and developed from the three Aska 40 liquor bottles found at the spot and one chance print marked

'B' tallied with specimen right index finger print of the appellant Sk. Asif Alli and there is no suspicious feature in it, the prosecution can be said to have proved the fifth circumstance against the appellant Sk. Asif Alli beyond all reasonable doubt. It cannot be lost sight of the fact the Aska 40 liquor bottles were found at the spot which was inside the bunker of the house of Sk. Khairuddin where the wearing apparels of the deceased which were identified by the informant (P.W.7) so also the dead body of the deceased was found in a naked condition on the Taza of the underground room which is a very clinching evidence against the appellant Sk. Asif Alli.

Sixth Circumstance : Conduct of the appellant Sk. Asif Alli in absconding from the village after occurrence:

18. The occurrence in question took place on 21.08.2014 in the afternoon and as already discussed under the heading of fourth circumstance that the appellant Sk. Asif Alli was found leaving the village Manu Mohalla in a Hero Honda Activa Scooty with two co-accused persons on the same day at about 6.00 p.m. The Investigating Officer (P.W.27) has stated that on 22.08.2014, only appellant Sk. Akil Alli was apprehended by the local people and was arrested by him in the occurrence night, but when he searched for the other accused persons inside the

village, they were found absent. The I.O. has further stated that as per the direction of the S.P., Jagatsinghpur, a special team was formed to apprehend the accused persons and raid was conducted at different places. On 05.09.2014 at about 3.00 p.m., the appellant Sk. Asif Alli so also the co-accused Sk. Abid Alli (acquitted) were apprehended at Bhubaneswar by the I.O. and they were brought to Tirtol police station. Specific question has been put to the appellant regarding his apprehension at Bhubaneswar in the accused statement but he simply answered he did not know.

The evidence has come on record through the I.O. that the appellant Sk. Asif Alli was an accused in a case of murder in connection with Tirtol P.S. Case No.197 of 2011. Another case under section 307 of the I.P.C. was instituted against him in connection with Tirtol P.S. Case No.89 of 2014 in which he was forwarded to Court and released on bail on 20.08.2014 i.e. the previous day of the occurrence.

The conduct of the appellant Sk. Asif Alli in absconding away from his village on the date of occurrence till he was apprehended by the I.O. was a circumstance duly proved by the prosecution against him. No explanation has been rendered by the appellant in regard to his absence from his

village and he was not available to the police in spite of their best efforts to trace him. Thus, the sixth circumstance relating to the conduct of the appellant in absconding from his village has been duly proved by the prosecution and this absconding of the appellant along with other incriminating circumstances as proved by the prosecution goes a great way to point his culpability.

Summed up : Circumstances against appellant Sk. Asif Alli @ Md. Asif Iqbal:

19. All the sixth circumstances which are appearing against the appellant Sk. Asif Alli as discussed above, are of a conclusive nature and have been fully established by the prosecution. The facts established are consistent with the hypothesis of guilt of the appellant and it is not explainable under any of the hypothesis except that the appellant is guilty. The chain of evidence is so complete that it does not leave any reasonable ground for the conclusion consistent with innocence of the appellant rather when the circumstances are collectively considered, the same lead only to the irresistible conclusion that the appellant is the perpetrator of the crime in question.

Charges proved against appellant Sk. Asif Alli @ Md. Asif Iqbal:

20. In my humble view, the prosecution has established the charge under section 302 of the I.P.C. against the appellant Sk. Asif Alli particularly in view of the oral evidence adduced by the witnesses relating to the manner in which the body of the deceased was found in the Taza of the house of Sk. Khairuddin, the inquest report so also the post mortem report findings.

The prosecution has also proved through the evidence of the doctor (P.W.25) who conducted post mortem examination and the oral evidence of the witnesses regarding the manner in which the body of the deceased was found in a naked condition with multiple injuries on different parts of the body including genital area that the appellant has not only committed an offence of rape on the deceased but in course of such commission, he inflicted the injuries which resulted in the death of the deceased and therefore, the learned trial Court has rightly found the appellant guilty under section 376-A of the I.P.C.

So far as the charge under section 376-D of the I.P.C. which relates to commission of gang rape is concerned, since one of the accused, who faced trial, namely, Sk. Abid Alli has been acquitted by the learned trial Court and appellant Sk.

Akil Alli has been acquitted by virtue of this judgment, it would not be proper to convict the appellant under section 376-D of the I.P.C.

Coming to the charge under section 6 of the POCSO Act which deals with punishment for aggravated penetrative sexual assault defined under section 5 of the said Act, the ingredients of the offence can be satisfied if someone, inter alia, commits penetrative sexual assault on a child below twelve years. 'Penetrative sexual assault' has been defined under section 3 of the said Act and in view of the evidence of the doctor (P.W.25), I am of the view that the necessary ingredients are satisfied. So far as the age of the deceased is concerned, the evidence of P.W.14, the Principal of Kalinga Public School, Krishnanandapur where the deceased was prosecuting her studies as a student of L.K.G. indicates that her date of birth was 16.03.2008 as per the school admission register which was seized by the police during investigation and left in the zima of P.W.14. The original birth certificate of the deceased was seized by the I.O. as per seizure list Ext.10 on 09.09.2014 on being produced by the uncle of the deceased and it also reflects the date of birth of the deceased to be 16.03.2008. Since the occurrence in question took place on 21.08.2014, the

prosecution has proved that the deceased was a child below twelve years. The learned counsel for the appellant has not challenged the evidence relating to the age of the deceased. Therefore, the prosecution has successfully established the charge under section 6 of the POCSO Act against the appellant Sk. Asif Alli.

21. In view of the foregoing discussion, I am of the view that the prosecution has failed to establish the charge under section 376-D of the I.P.C. against the appellant Sk. Asif Alli and accordingly, he is acquitted of such charge, however he is found guilty under sections 302/376-A of the I.P.C. and section 6 of the POCSO Act.

Sentence:

22. The learned trial Court has awarded life imprisonment for the offence under section 376-A of the I.P.C., which shall mean imprisonment for the remainder of his natural life. This section gives a discretion to the Court to impose punishment 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 for imprisonment for the remainder of that person's natural life, and with fine or with death. In view of the age of the deceased at the time of

occurrence and the manner in which rape has been committed which ultimately caused the death of the deceased, I am of the view that the sentence awarded by the learned trial Court for such offence is perfectly justified and no interference is called for with the same.

The learned trial Court has rightly not imposed any sentence for the conviction of the appellant Sk. Asif Alli for the charge under section 6 of the POCSO Act in view of section 42 of the said Act.

23. So far as the the offence under section 302 of the I.P.C. is concerned, the learned trial Court has awarded death sentence to the appellant Sk. Asif Alli and ordered that he be hanged by neck till he is dead.

The only question that now remains to be decided is whether this case falls in the category of rarest of rare case, justifying capital punishment. The learned Hon'ble Supreme Court in several judgments has awarded capital punishment, where rape and murder have been committed on a minor girl, after striking a balance between the aggravating and mitigating circumstances. Several other factors like the young age of the accused, the possibility of reformation, lack of intention to

murder consequent to rape etc. have also gone into judicial mind.

It seems that on the date of pronouncement of order of conviction i.e. on 29.11.2022, hearing on the question of sentence was made and death sentence was awarded. The learned trial Court after noting down the principles rendered by the Hon'ble Supreme Court in different cases relating to awarding of death sentence, has been pleased to hold that the deceased was a minor victim aged about six years and the offences are serious and heinous in nature and against the norms of a healthy society. The act reveals a dirty and perverted mind of human being who has no control over his carnal desires. The number of injuries found on the deceased show that she was mercilessly ravished and killed to satisfy the carnal desires. The learned trial Court also took into account the criminal background of the appellant as he was involved previously not only in a case under section 302 of the I.P.C. but also in another case under section 307 of the I.P.C. and was released on bail on 20.08.2014 and committed the offence in the present case on the very next day. The learned trial Court held that there was no chance of reformation of the appellant in the near future. The deceased was well known to the appellant as he was a co-

villager and the deceased was taken away with deliberate intention in an ill mind in order to commit rape and murder, which comes within the category of rarest of rare case warranting capital punishment to meet the ends of justice. The learned trial Court further held that imposition of capital punishment on the appellant would be an example for other wrongdoers of similar nature in the society, which is necessitated in order to protect and safeguard the female children's interest in the country and accordingly, imposed death sentence on the appellant.

During course of argument, on 30.04.2024 learned counsel for the appellants argued that passing of death sentence on the date of conviction by the learned trial Court was not justified. The learned counsel for the State brought to the notice of the Court the decision of the Hon'ble Supreme Court rendered in the case of **Sundar @ Sundarrajan -Vrs.- State by Inspector of Police reported in 2023 LiveLaw (SC) 217**. After going through the ratio laid down in the said decision, we deemed it proper to call for a report to the Superintendent of Circle Jail, Choudwar, Cuttack regarding (i) conduct of the appellants in jail; (ii) information on appellants' involvement in any other case; (iii) details of the appellants acquiring education

in jail and (iv) details of appellants' medical records. On 02.05.2024, after considering the submission of the learned counsel for the appellants so also the learned counsel for the State, this Court took suo motu cognizance of the fact regarding the procedure followed by the trial Court at the time of hearing on sentence. Taking into account various decisions of the Hon'ble Supreme Court on the point, we were of the view that there was no proper and meaningful hearing on the question of sentence which was necessary in order to do complete justice. We also held that no opportunity was afforded to the appellants to submit any material in support of mitigating circumstances during course of hearing on the question of sentence. After observing that hearing on the question of sentence has to be real and effective and not a mere formality and that if a meaningful hearing was not taken up by a Court while considering the sentence imposed and inflicted upon the convict, it would cause serious prejudice to him, we afforded an opportunity to the appellants inviting from them such data to be furnished in the shape of affidavits and also directed the Jail Authority to do the needful in that regard. We directed the Senior Superintendent, Circle Jail, Cuttack at Choudwar to collect all the information on the past life of the convicts, psychological conditions and their

conduct post- conviction obtaining reports accordingly by taking service and necessary assistance from the Probation Officer and such other officers including a Psychologist or Jail Doctor or any Medical Officer attending the prison.

In pursuance of such order, the mother of the appellant filed an affidavit dated 09.05.2024 indicating therein that at the time of occurrence, his son was working in an auto garage as a colour mistri and the entire family depended on the income of the appellant, who was a young boy aged about twenty five years at the time of occurrence and though he has got previous criminal antecedents but he has no previous conviction. It is further stated in the affidavit that during incarceration, her son had reformed and he should be rehabilitated to the extent that he could live in the society.

As per the order dated 02.05.2024, the learned Additional Government Advocate also produced the social reports of both the appellants submitted by the Regional Probation Officer, Cuttack, Psychological condition reports of both the appellants submitted by Psychiatrist, Circle Jail, Cuttack at Choudwar and present conduct and behaviour inside the Circle Jail, Cuttack at Choudwar from Senior Superintendent, Circle Jail, Cuttack at Choudwar. The Regional Probation Officer in his

report dated 08.05.2024 has stated that he met the mother of the appellant Sk. Asif Alli, who was aged about sixty three years and ascertained from her that the appellant was the eldest son of the family and was working as a labourer in a private shop (radium work), Mumbai for his livelihood to maintain the family. The family of the appellant has got no landed property and the mother of the appellant was suffering from eye sight problem and psychological imbalance after the death of her husband. The two sisters of the appellant are unmarried and stated that their marriage proposal could not be settled due to non-acceptance of their family in the society. It is observed that the family have no means to face the situation in the village and the family is struggling for the livelihood as there is no earning member in the family and they are remaining in fear psychosis and the mother of the appellant is behaving irrationally with unsettled mind. So far as education background of the appellant is concerned, he passed matriculation in third division in the year 2010 and the school leaving certificate reflects good in character/conduct during his school days and he had no adverse report as per the school report. The appellant was a good cricket and football player and after matriculation, he discontinued his higher studies due to financial problems as reported by his family members. So

far as social life and past life of the appellant is concerned, it appears that prior to the offence in question, the appellant was involved in seven cases, out of which in three cases, he has been acquitted. The villagers and village committee members expressed their displeasure against the appellant for his criminal act and they were very disgusted, aggravated and grudged towards the appellant and therefore, the life of the appellant is in danger in his village. The villagers are not providing any support to the family of the appellant for which the family members are suffering a lot. The Senior Superintendent, Circle Jail, Cuttack at Choudwar has submitted a report wherein it is mentioned that the conduct and behaviour of the appellant inside prison at present is normal, his behaviour and attitude towards other co-prisoners as well as the staff is cordial. He is maintaining every discipline of jail administration and there is no adverse report against him during his entire period of confinement in prison. No prison offence was committed by the appellant inside the jail during the period of his imprisonment. The Psychiatrist, Circle Jail, Cuttack at Choudwar has given a report relating to the psychological condition of the appellant wherein it is mentioned that the appellant is doing his daily routine activities properly, offering prayer to God many times in a day and coping with the

co-inmates well and regarding the sentence, the appellant is ready to accept his punishment as he has surrendered before the God. On mental status examination, mild degree of anxiety was noticed and no other mental abnormality was detected and on surrendering before the God, the appellant was able to keep the mental state in balance. The Senior Superintendent, Circle Jail, Cuttack at Choudwar has also reported that the conduct of the appellant inside the jail is normal and he has not acquired any further education in jail after his admission to jail.

The learned counsel for the appellants placed reliance in the case of **Shankar Kisanrao Khade** (supra), wherein Hon'ble Justice K.S. Radhakrishnan (as His Lordship then was) held as follows:

> "28……In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test"

may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R lest). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges.

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38. Therefore, the mere pendency of few criminal cases as such is not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases. High Court was, therefore, in error in holding that those are

> relevant factors to be considered in awarding appropriate sentence."

In the said case, even though the victim was a minor girl aged about 11 years, intellectually challenged and the accused repeatedly raped the girl for few days, ultimately strangulated her to death and the Hon'ble Justice K.S. Radhakrishnan held that both 'crime test' and 'criminal test' are independently satisfied against the accused, but considering the entire facts and circumstances of the case, the death sentence awarded to the accused was converted to rigorous imprisonment for life. Hon'ble Justice Madan B. Lokur (as His Lordship then was) also agreed with such view.

Now the decisions cited by the learned counsel for the State on death penalty are to be discussed. In the case of **Ravi** (supra), Hon'ble Justice Surya Kant speaking for himself and for Justice R.F. Nariman (as His Lordship then was) held as follows:-

> "62. In the light of above discussion, we are of the considered opinion that sentencing in this case has to be judged keeping in view the parameters originating from ***Bachan Singh*** and ***Machhi Singh*** cases and which have since been strengthened, explained, distinguished or followed in a catena of subsequent decisions,

some of which have been cited above. Having said that, it may be seen that the victim was barely a two-year old baby whom the appellant kidnapped and apparently kept on assaulting over 4-5 hours till she breathed her last. The appellant who had no control over his carnal desires surpassed all natural, social and legal limits just to satiate his sexual hunger. He ruthlessly finished a life which was yet to bloom. The appellant instead of showing fatherly love, affection and protection to the child against the evils of the society, rather made her the victim of lust. It is a case where trust has been betrayed and social values are impaired. The unnatural sex with a two-year old toddler exhibits a dirty and perverted mind, showcasing a horrifying tale of brutality. The appellant meticulously executed his nefarious design by locking one door of his house from the outside and bolting the other one from the inside so as to deceive people into believing that nobody was inside. The appellant was thus in his full senses while he indulged in this senseless act. The appellant has not shown any remorse or repentance for the gory crime, rather he opted to remain silent in his 313 Cr.P.C. statement. His deliberate, well-designed silence with a standard defence of 'false' accusation reveals his lack of kindness or compassion and leads to believe

that he can never be reformed. That being so, this Court cannot write of the capital punishment so long as it is inscribed in the statute book."

Hon'ble Justice R. Subhash Reddy (as His Lordship then was) dissented on the question of sentence and held as follows:-

"76. In this case, learned counsel for the appellant has contended that the trial Court as well as the High Court, fell in error in confining nature and brutality of crime alone, to award the sentence of death. It is submitted that nature of crime alone is not sufficient to impose the sentence of death, unless State proves by leading cogent evidence that the convict is beyond reform and rehabilitation. It is submitted that the socio-economic conditions of the convict and the circumstances under which crime is committed are equally relevant for the purpose of considering whether a death penalty is to be imposed or not. It is submitted that as the case on hand, rests on circumstantial evidence, same is also the ground not to impose capital punishment, of death.

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98. I am clear in my mind that in this case on hand, the mitigating circumstances of the appellant, dominate over the aggravating

> circumstances, to modify the death sentence to that of life imprisonment. Even as per the case of prosecution, the appellant was under influence of liquor at the time of committing the offence, and there is no evidence on record from the side of prosecution, to show that there is no possibility of reformation and rehabilitation of the Appellant. Further, age of the appellant was 25 years at the relevant time and conviction is solely based on circumstantial evidence. Taking all such aspects into consideration, the death penalty imposed on the appellant is to be modified to that of life imprisonment, for the offence under section 302 Indian Penal Code."

In the case of **Manoharan** (supra), Hon'ble Justice R.F. Nariman (as His Lordship then was) speaking for himself and for Justice Surya Kant held as follows:-

> "34. In the circumstances, we have no doubt that the trial Court and High Court have correctly applied and balanced aggravating circumstances with mitigating circumstances to find that the crime committed was cold-blooded and involves the rape of a minor girl and murder of two children in the most heinous fashion possible. No remorse has been shown by the appellant at all and given the nature of the crime as stated in paragraph 84 of the High Court's judgment it is unlikely that the appellant, if set

free, would not be capable of committing such a crime yet again. The fact that the appellant made a confessional statement would not, on the facts of this case, mean that he showed remorse for committing such a heinous crime. He did not stand by this confessional statement, but falsely retracted only those parts of the statement which implicated him of both the rape of the young girl and the murder of both her and her little brother. Consequently, we confirm the death sentence and dismiss the appeals."

Hon'ble Justice Sanjiv Khanna dissented on the question of sentence and held as follows:-

"44. The expression 'rarest of rare' literally means rarest even in the rare, i.e. a rarest case of an extreme nature. The expression and the choice of words, means that punishment by death is an extremely narrow and confined rare exception. The normal, if not an unexceptional rule, is punishment for life, which rule can be trimmed and upended only when the award of sentence for life is unquestionably foreclosed. Thus, capital punishment is awarded and invoked only if the facts and material produced by the prosecution disdainfully and fully establish that the option of imprisonment for life will not suffice and is wholly disproportionate

and therefore the case belongs to the 'rarest of rare' category.

xx xx xx xx xx

55. When we come to the facts of the present case, one has to but agree that the offence or the crime was brutal, ruthless and cruel as two innocent children aged 7 to 10 lost their lives, and there is substantial medical and other evidence to show that the young girl was mercilessly sexually abused and raped by the Appellant and Mohanakrishnan (since deceased). Thereafter the children were administered poison and thrown into a canal to die. The pain and trauma suffered by the small children who were not at fault and the agony of the parents and grandmother are immense, incalculable and would remain forever. The punishment must be severe. Yet to award death penalty we must examine and answer the second question, i.e. balance out the aggravating circumstances by giving weightage to the mitigating circumstances and decide whether punishment of life imprisonment is foreclosed. Then and then alone the case would fall under the 'rarest of rare' category. While doing so, we should account for the majority dictum in **V. Sriharan** (supra) that where life imprisonment is considered to be disproportionate or inadequate, then the Court may direct sentence for life imprisonment,

without any right to remission i.e. imprisonment for the entire course of life with no recourse to remission, subject to the power that may be exercised under Articles 72 and 161 of the Constitution.

xx xx xx xx xx

73. The appellant's partial retraction has been rightly disbelieved for good reasons, including the statement of the appellant under Section 313 Cr.P.C. in the Court accepting and admitting that his confession was recorded by the Magistrate. The retraction by itself, I would observe, should not be treated as absence of remorse or repentance, albeit an afterthought or on advice propelled by fear that the appellant in view of his admission may face the gallows, and that the earlier confession made seeking forgiveness would be the cause of his death. A thought of doubt and attempt to retract had surfaced on account of belief that the sense of remorse, repentance and forgiveness would not be appreciated and given due regard, cannot be ruled out. Benefit in this regard must go to the Appellant.

74. The other mitigating factors in favour of the appellant are his young age, he was 23 years of age at the time of occurrence and he belongs to a poor family. He has aged parents and is a first-time offender as recorded in the

judgment/order of the trial court. Further, the appellant Manoharan was not initially involved in the abduction and kidnapping of the children. He was not the mastermind. Mohanakrishnan (since deceased) had thought, conceived and had single-handedly executed the plan to abduct the children. The appellant did join him thereafter and was with Mohanakrishnan (since deceased). Subsequently the devil in Mohanakrishnan (since deceased) took over and he sexually assaulted and raped the small girl, while the appellant kept quiet. Later the appellant too sexually assaulted and committed rape. Thereupon, poison was administered to the children before throwing them into the canal. The offence committed was heinous and deplorable.

75…….In view of the aforesaid discussion and on balancing aggravating and mitigating circumstances, in my opinion, the present case does not fall under the category of 'rarest of rare' case i.e. there is no alternative but to impose death sentence. It would fall within the special category of cases, where the appellant should be directed to suffer sentence for life i.e. till his natural death, without remission/commutation under sections 432 and 433 Code of Criminal Procedure. To this extent, I would allow the appeal."

In the case of **Laxman Naik** (supra), the Hon'ble Supreme Court held that the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty, it may be noticed that there are absolutely no mitigating circumstances in the case. The appellant seems to have acted in a beastly manner as after satisfying his lust, he thought that the victim might expose him for the commission of the offence of forcible rape on her to the family members and other, the appellant with a view to screen the evidence of his crime also put an end to the life of innocent girl who had seen only seven summers. The evidence on record is indicative of the fact as to how diabolically the appellant had conceived of his plan and brutally executed it and such a calculated, cold blooded and brutal murder of a girl of a very tender age after committing rape on her would undoubtedly fall in the category of rarest of the rare case attracting no punishment other than the capital punishment.

In the case of **Dhananjoy Chatterjee** (supra), the Hon'ble Supreme Court held that the object of sentencing should be to see that the crime does not go unpunished and the victim

of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an overall view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration. It is further held that the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

In the case of **Santosh Kumar Satishbhushan Bariyar -Vrs.- State of Maharashtra reported in (2009) 6 Supreme Court Cases 498**, it is held that life imprisonment

can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable.

Keeping in view the ratio laid down in the decisions discussed above, it is borne out of record that the offence was committed against a girl child aged about six years in a most horrendous, devilish and barbaric manner, but the case is based on circumstantial evidence and there is no material on record that the crime was committed in a pre-planned manner. It seems that both the appellants noticed the deceased in the company of his cousin brother (P.W.17) while they were returning after purchasing chocolates and then the deceased was lifted away and she was subjected to rape during course of which she sustained injuries on different parts of her body and her death was due to shock and haemorrhage as a result of injuries to genital track which were fatal in ordinary course of nature. No harm has been caused to P.W.17 while lifting away the deceased even though the appellants must have been aware that P.W.17 is likely to disclose about their misdeeds before the family members and others. The post mortem report (Ext.19) does not indicate any specific method was applied by the culprit for committing the death of the deceased. Though the appellant has got criminal antecedents but he has not been found guilty in

those cases rather he has been acquitted in three cases as would be evident from the social report submitted by Regional Probation Officer, Cuttack. Therefore, the mere pendency of criminal cases cannot be considered as relevant factors for awarding death sentence in view of the ratio laid down by the Hon'ble Supreme Court in the case of **Shankar Kisanrao Khade** (supra). The date of birth of the appellant as per the report submitted by Regional Probation Officer, Cuttack is 13.03.1989 and therefore, he was aged about 26 years as on the date of occurrence. He is a family man and having old mother aged about 63 years and two unmarried sisters and he was the sole bread earner of his family and working as a colour mistri in Mumbai and the financial condition of the family is not good. His character and conduct was good in school and he has passed matriculation in the year 2010. He could not continue his higher studies due to financial problems in the family. He was a good cricket and football player during his teen age. Even though he is in judicial custody for about ten years, but the reports submitted by Jail Superintendent and the Psychiatrist indicate that his conduct and behaviour inside prison is normal, his behaviour towards co-prisoners as well as staff is cordial and he is maintaining every discipline of the jail administration. Neither

there is any adverse report against him during the entire period of confinement nor he has committed any prison offence. He is offering prayer to God many times in a day and he is ready to accept the punishment as he has surrendered before God.

The punishment should not be disproportionately great is a corollary of just deserts and it is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt. There is no cogent evidence that the appellant is beyond reform and rehabilitation. Considering the entire facts and circumstances, the aggravating circumstances and mitigating circumstances, it cannot be said that capital punishment is the only option for the appellant and that the option of imprisonment for life will not suffice and is wholly disproportionate.

In view of the foregoing discussions, I am inclined to commute the death sentence awarded to the appellant for the offence under section 302 of the I.P.C. to life imprisonment, which shall mean the remainder of his natural death, without remission/commutation under sections 432 and 433 Code of Criminal Procedure.

Victim Compensation:

24. The learned trial Court has awarded compensation of Rs.1,50,000/- (rupees one lakh fifty thousand) to be paid to the parents of the deceased. The State Government of Odisha in exercise of powers conferred by the provisions of section 357-A of Cr.P.C. has formulated the Odisha Victim Compensation Scheme, 2017. Schedule-II of the scheme deals with compensation scheme for woman victims or survivors of sexual assault or other crimes. In case of death (loss of life), the minimum limit of compensation is Rs. 5 Lakh and the upper limit of compensation is Rs.10 Lakh. In the factual scenario and particularly taking into account the age of the deceased, the maximum compensation amount i.e. Rs. 10,000,00/- (rupees ten lakh) as provided under Schedule-II is awarded which is to be paid to the father and mother of the deceased. If any compensation amount has already been disbursed to the parents of the deceased as per the order of the learned trial Court, the same shall be adjusted and District Legal Services Authority, Jagatsinghpur shall take immediate steps to pay the balance amount of compensation within four weeks from today.

Conclusion:

25. In view of the discussions, CRLA No.121 of 2023 filed by the appellant Sk. Akil Alli is allowed. The conviction of the appellant Sk. Akil Alli under sections 302/376-A/376-D of the I.P.C. and section 6 of the POCSO Act is hereby set aside and the appellant is acquitted of all the charges. He shall be set at liberty forthwith if his detention is not required in any other case.

CRLA No.120 of 2023 filed by appellant Sk. Asif Alli @ Md. Asif Iqbal is allowed in part. The conviction of the appellant Sk. Asif Alli @ Md. Asif Iqbal under section 376-D of the I.P.C. is hereby set aside, however his conviction under sections 302/376-A of the I.P.C. and section 6 of the POCSO Act is upheld. The sentence of life imprisonment awarded by the learned trial Court to the appellant Sk. Asif Alli @ Md. Asif Iqbal for the offence under section 376-A of the I.P.C., which shall mean imprisonment for the remainder of his natural life, stands confirmed. No separate sentence is awarded to the appellant Sk. Asif Alli @ Md. Asif Iqbal for his conviction under section 6 of the POCSO Act. The death sentence awarded to the appellant Sk. Asif Alli @ Md. Asif Iqbal for the offence under section 302 of the I.P.C. is commuted to life imprisonment, which shall mean till his

natural death, without remission/commutation under sections 432 and 433 Code of Criminal Procedure.

Accordingly, Death Sentence Reference is answered in negative.

Before parting with the case, I would like to put on record my deep appreciation to Sk. Zafarulla, learned counsel for the appellants for the preparation and presentation of the case and assisting the Court in arriving at the decision above mentioned. This Court also appreciates the extremely valuable assistance provided by Mr. Bibhu Prasad Tripathy, learned Addl. Govt. Advocate.

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S.K. Sahoo, J.

R.K. Pattanaik, J. I agree.

.....
R.K. Pattanaik, J.

Orissa High Court, Cuttack
The 20th June 2024/M.K.Rout/RKMishra/Sipun