State Vs. Mukesh Kumar

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Court : Delhi

Decided On : Nov-19-2013

Judge : Indermeet Kaur

Appellant : State

Respondent : Mukesh Kumar

Judgement :

* IN THE HIGH COURT OF DELHI AT NEW DELHI % Judgment reserved on:10.10.2013 Judgment delivered on:19.11.2013 DEATH SENTENCE REF. 6/2010 STATE ..... Petitioner Through Ms.Richa Kapoor, APP. + versus MUKESH KUMAR Through + CRL.A. 96/2011 MUKESH KUMAR Through ..... Respondent Mr.Manu Sharma, Mr.Abhir Datt and Mr.Ali Jethhmalani, Advocates. ..... Appellant Mr.Manu Sharma, Mr.Abhir Datt and Mr.Ali Jethhmalani, Advocates. versus STATE Through ..... Respondent Ms.Richa Kapoor, APP. CORAM: HON'BLE MR. JUSTICE KAILASH GAMBHIR HON'BLE MS. JUSTICE INDERMEET KAUR INDERMEET KAUR, J.

1 Sunita (PW-10) the mother of the victim Neha had made a complaint in Police Station Okhla Industrial Area on 12.06.2005 at about 01:30 PM which was to the effect that her daughter aged three years named Neha had been taken away by the appellant Mukesh on the pretext of giving her toffee; this was in the morning at 08:30 AM; since then Neha had not returned and inspite of frantic efforts made by her and her husband to search for her daughter, she was not traceable. 2 On this

complaint of Sunita (Ex.PW-12/A), the rukka (Ex.PW- 12/B) was dispatched and was received by ASI Shanti (PW-4) who registered the formal FIR under Section 363 of the IPC. Inspector Sunil Kumar (PW-12) along with PW-10 reached the house of the complainant. They met Manoj Thakur, the father of the victim. The appellant was also found present at the spot. He was interrogated. He made a disclosure statement (Ex.PW-10/C). He disclosed that he had taken baby Neha to the empty Container Depot, Badarpur near Tughlakabad Railway Station where he had committed rape on her and later on killed her. 3 PW-12 along with the father of the victim Manoj Thakur, constable Jai Prakash (PW-6A), HC Shokender (PW-9) accompanied by the public witness Rajesh (PW-2) reached the spot and at the pointing out of the appellant container No.PCIU328676 was checked; naked body of the victim Neha was found lying there; near the body, a blue coloured T shirt, a blue underwear, blue chappal and frock with blood were lying. 4 Inspector Sunil Kumar the then SHO (PW-12) was informed who also reached the spot. Crime team was summoned of whom SI R.S. Naruka (PW-8) was In-charge. Photographs were taken by HC Ram Pal (PW-5) negatives of which have been proved as Ex PW-5/A/1-15 and positives were proved as Ex PW-5/B/1-15 vide memo Ex.PW-6/A. No finger prints were found at the spot. 5 The T shirt, underwear, chappal and tagri as also the hair sample of the victim and her two blood samples were also taken into possession vide a separate memo Ex.PW-2/A. The appellant also got recovered the weapon of offence i.e. the blood stained knife which was recovered from near the railway line Tughlakabad Railway Station and was seized and taken into possession vide memo Ex.PW-2/B. 6 Scaled site plan was prepared by SI Mahesh Kumar (PW-11), the draftsman proved as Ex.PW-11/A. 7 The dead body was sent to the mortuary. On the following day i.e. 13.06.2005, the post mortem on the victim was conducted. The following injuries were noted upon her person.

1. Linear abrasion of size 4 cm with contusion 1x1 cm on left side chin.

2. Multiple linear cut marks, horizontally placed of size 6 to 18 cm on anterior chest wall situated 5 cm below nipple skin deep with clotted blood.

3. Incised wound of size 5 x2 xm x bone deep with clotted blood at right side of injury no.2 on anterior chest wall.

4. Linear cut wound on thoraeo abdominal region anteriorly 10 cm in length situated 4 cm below injury no.2.

5. Incised wound of size 19 x9 cm x abdominal cavity on anterior abdominal wall extending from 4 cm below xiphisternum to 1 cm above anal opening involving vaginal structures and exposing abdominal contents. There were tears in the stomach of size 5 x 4cm on anterior superior surface with spilling of contents. Small and large intestine along with mesentry and omentum were found cut at multiple places with gangrenous changes of intestine with mesenteric ihaemetomos. Urinary bladder and vaginal vault involving public symphasis were splitted into fragments with clotted blood. There was haemoperitoneum with clotted blood about 500 ml. The blood sample and gauge piece along with two anal and vaginal swabs were preserved, sealed and handed over to IO. The time since death was about 24 to 28 hours. The cause of death in this case was haemorrhagic shock due to ante mortem injury no.5 which was sufficient to cause death in ordinary course of nature. Injury no.5 was caused by sharp edged weapon. The post mortem report is Ex. PW-3/A which bears my signatures at point A.

8 Dr Sanjeev Lalwani (PW-3) had also given his opinion on the knife which was allegedly used in the crime; the sketch of the knife having a blade of 10 cms was prepared by the doctor and it was opined vide opinion Ex.PW-3/A that this weapon could have caused the injuries suffered by the victim. 9 Exhibits which included the vaginal swab, her anal swab, her blood sample as also the blood samples of the accused were sent to the CFSL and the CFSL vide its report Ex.PW-7/I opined blood group B on the T shirt of the victim; this was also the blood group of the accused. Semen stains were also detected on the T shirt and vaginal swab of the victim as also on the underwear of the accused. 10 This was the sum total of evidence both oral and documentary collected by it. 11 In his statement recorded under Section 313 of the Code of Criminal Procedure (hereinafter referred to as the Cr.PC), the accused pleaded innocence. He admitted that although he had

taken baby Neha with him in the morning at 08:00 AM but thereafter dropped her back at her house at 09:30 AM; he has been falsely implicated in the present case. 12 No evidence was led in defence. 13 On the basis of the aforenoted evidence collected by the prosecution, the appellant was convicted under Section 302 of the Indian Penal Code (hereinafter referred to as the IPC) for having committed the murder of the victim; the motive attributed upon the appellant was the act of rape which he had committed and in order to save himself from the crime, he had killed baby Neha and having committed the offence in a shocking and brutal fashion, the trial Judge had thought it a fit case to be categorized under the head of rarest of rare; the accused had accordingly been sentenced to death. 14 Needless to state that under the provisions of Section 366 of the Cr.PC, death sentence is required to be confirmed and for the said purpose, the present death reference has been preferred by the State. 15 Conversely the appellant is also aggrieved by the judgment. He is assailing his conviction. 16 Arguments have been addressed by the learned public prosecutor. It is pointed out that in no manner does the evidence marshalled by the trial Judge call for any interference; the trial Judge has rightly relied upon the testimony of the mother who had last seen the accused with the deceased which had been fortified by the testimony of the public witness (PW-2); submission being that this fact that the accused had taken the deceased with him at 08:00 AM has also been admitted by him in his statement recorded under Section 313 of the Cr.PC but he had stated that he had left the victim back at her house at 09:30 AM which has not been substantiated; if this was the position, the parents would not have been frantically searching for their daughter and after their search when they could not locate their daughter, the mother had ultimately lodged the complaint in the police station at 01:30 PM. Further submission being that act of rape committed upon the victim (which has been fortified by the report of the CFSL) substantiates the motive on the part of the appellant which was to kill the victim as he had committed this untoward act upon her. The act of rape has been proved by the fact that semen stains were detected not only on the vaginal swab and the T shirt of the victim but also on the underwear of the accused. Further submission being that the CFSL in its report had categorically stated that the seals were intact when the exhibits were received in the CFSL and as such there was no possibility of tampering of the exhibits. On the point of sentence, it

has been submitted by the learned public prosecutor that this is one of the rarest of rare case as admittedly the victim was a child aged three years; she was helpless; the post-mortem shows that she has been ripped apart right from the vagina up to the abdomen and the body was in fact found in two parts. Nothing could be more rare than the manner in which crime has been committed which was a gruesome act on the part of the appellant for which he deserves no leniency. 17 Arguments have been refuted by the learned counsel for the appellant not only on the merits of the case but also on the point of sentence. Arguments have been addressed in detail. Written submissions have also been filed. Submission of the learned counsel for the appellant being that this is admittedly a case of circumstantial evidence; there is no eye-witness to this version. The circumstance of last seen which has been projected by the prosecution is weak; testimony of PW-10 Sunita who is the mother of the victim is shaky and there are several contradictions in her version. This circumstance also cannot be believed for the reason that it has been admitted by the appellant in his answer to question No 3 in his statement under Section 313 of the Cr.PC that although he had taken Neha in the morning at 08:00 AM but he has satisfactorily explained that he had left her back at her house at 09:30 AM. Apart from the version of PW-10, the testimony of PW-2 who was a neighbour is also not worthy of any credence as in his crossexamination he has admitted that PW-10 had told him that the appellant had taken Neha on the pretext of giving her toffee; submission being that the testimony of PW-2 has to be rejected outright as he is only a witness of hearsay. Reliance has been placed upon MANU/DE/1770/2009 Arvind @ Chotu & Ors. Vs. State (Delhi High Court) to support his stand that the theory of last seen has to be disbelieved where there is nothing to show that the deceased was at the place from where the dead-body was recovered. Reliance has also been placed upon (2005) 11 SCC133Murlidhar Vs. State of Rajasthan (SC) to support a submission that where the provisions of Section 106 of the Evidence Act are pressed, the prosecution must show that the facts were especially within the knowledge of the accused in order to shift the burden of proving its case and where this itself is lacking, provisions of this Section would not apply. The circumstance of last seen is thus a weak evidence. If this circumstance is ignored, there is no other evidence with the prosecution to nail the appellant. The recovery of the dead-body which

has been alleged to be at the instance of the accused also does not fall within the parameters of Section 27 of the Indian Evidence Act as Ajay Pratap Singh (PW-6) who was working in the container department at the relevant time has in his examination-in-chief clearly stated that the police was informed by him intimating that the dead-body of a girl was lying in the container depot; as such the version of the prosecution that the dead-body was recovered pursuant to the disclosure statement of the appellant is a false version; he was also not declared hostile by the public prosecutor. Further submission being that the recovery of the so called knife is also liable to be dis-believed as the recovery had been effected from the railway siding of Tughlakabad Railway Station which is a public place and at the time of its seizure no blood has also been noted upon it. To support this submission, reliance has been placed upon the landmark judgment of the Privy Council reported as AIR (34) 1947 PC67Pulukuri Kottaya & Ors. Vs. Emperor as also the judgment of the Apex Court reported as (2002) 2 SCC426State of Haryana Vs. Ram Singh. Submission being that where there are interested witnesses who are associated with the recovery, a doubt is created on such a recovery and benefit of this suspicion must accrue in favour of the accused. Reliance has also been placed upon (1997) 3 SCC759Rahim Beg Vs. State of UP as also another judgment of the Apex Court (2005) 5 SCC Raja Ram Vs. State of Rajasthan to support a submission that a witness who did not support the prosecution case and the prosecutor has declared him hostile, such a witness if relied upon by the defence, would bind the prosecution. The scientific evidence is also to be discarded for the reason that there is no link evidence evidencing the fact that after the seizure of the sample exhibits, the same were deposited in the malkhana and there is no evidence forthcoming on this score. No witness has also come into the witness box to establish the fact that exhibits have in fact been sent to the CFSL; submission being that the exhibits had been sent to the CFSL on 24.08.2005 and had been examined almost one year later i.e. July, 2006; there is every possibility of the tampering of the exhibits and as such no reliance can be placed upon the report of the CFSL which is also liable to be discarded. The T shirt of the victim when seized did not evidence any stains of semen but how semen was detected in the report of the CFSL remains unexplained. Reliance has also been placed upon (1991) 1 SCC286Kishore Chand Vs. State of HP.

Submission being that in a serious offence like murder, great care and circumspection have to be adduced by the investigating agency and in the absence of an honest, sincere and dispassionate investigation, the benefit must accrue in favour of the accused. Reliance has also been placed upon (2010) 1 SCC249Sanatan Naskar Vs. State of West Bengal to support a stand that answers given by the accused in his statement under Section 313 of the Cr.PC are not strict evidence and such a statement cannot be considered in isolation but in the totality of the evidence collected by the prosecution. Applying this analogy even assuming that there was certain informations elicited by the accused in this statement under Section 313 of the Cr.PC, such statements not being an evidence in the strict sense cannot be used by the prosecution for any purpose. No explanation has been given by the prosecution for the delay in compliance with the provisions of Section 157 of the Cr.PC; there is delay of 11 days which has also been noted by the trial Judge. On all counts, the version of the prosecution suffers from various infirmities and benefit of doubt accordingly has to accrue in favour of the appellant; he is entitled to an acquittal. 18 In the alternate, on the point of sentence it has been submitted that even presuming that the conviction of the appellant calls for no interference; it not being a rarest of rare case, the lesser punishment of life imprisonment should have been inflicted and not the death penalty. The mitigating factors in favour of the appellant have been highlighted which are that the accused was young at the time of the incident being 22 years of age; he did not abscond; even as per the prosecution, he had taken the victim to buy sweets; it was not a pre-ordained crime. To establish this argument, reliance has been placed upon the landmark judgment of the Apex Court reported as (1980) 2 SCC684Bachan Singh Vs. State of Punjab as also the subsequent judgment of the Supreme Court in (2009) 5 SCC749Ramsh Bhai Chandubhai Rathod Vs. State of Gujarat as also (2011) 7 SCC437State of Maharashtra Vs. Goraksha Ambaji Adsul and (2012) 4 SCC257Ramnaresh Vs. State of Chhatisgarh. 19 In rejoinder the submissions have been refuted; on the delay in sending the FIR to the senior officer, it has been pointed out that it is only a procedural lapse, if any and would not affect the merits of the case which otherwise stands fully established. 20 We have heard the arguments of the learned counsel for the parties and appreciated their respective submissions. 21

This case is based on circumstantial evidence. There is no eye- witness. 22 The law on the circumstantial evidence is settled. In 2010 (2) SCC583Aftab Ahmad Anasari v. State of Uttaranchal etc. the Honble Apex Court has made the following observations:

In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact must be proved individually and only thereafter the Court should consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of the guilt. If the combined effect of all the facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself/themselves, is/are not decisive. The circumstances proved should be such as to exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution case succeeds in a case of circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever extravagant and fanciful it might be. There must be a chain of evidence so far complete as not to leave any reasonable ground for conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability, the act must have been done by the accused. Where the various links in a chain are in themselves complete, then a false plea or a false defence may be called into aid only to lend assurance to the Court.

23 Unless and until all links in the chain stand complete, the conviction of the appellant cannot be ordered. It is on this touch stone that the evidence collected by the prosecution has to be viewed and appreciated. 24.(i) Circumstance of last seen The strongest circumstance relied upon by the prosecution is the circumstance of last seen and to advance this proposition reliance has been placed upon the versions of PW-10 Sunita the mother of the victim and PW-2 Rajesh the neighbour. 25 PW-10 is the mother of the three years old victim. She has on oath deposed that her husband and the accused Mukesh were both working in the barber shop of Jaleshwar (PW-1). The accused was well known to them; he had some time ago left the job. On the fateful day which was in the monsoon in the year 2006, the accused came to her house at 08:00 AM in the

morning. He asked her for a sum of Rs.1,500/-; she refused; he took her daughter Neha on the pretext of giving toffee to her despite protest raised by PW-10. The accused exhorted that he will bring Neha back after giving her toffee. Neha did not return. PW-10 asked PW-2 to visit the shop of her husband to inquire about the accused and her daughter; PW-2 came back along with her husband and they kept searching for Neha but she could not be found. PW-10 met the accused on the way; he was drunk; on query he replied that he had left Neha at the house. Since Neha could not be located, the police was informed. 26 In her cross-examination, she reiterated that the accused had come to her house at 08:00 AM in the morning; she had told her neighbour Rajesh (PW-2) that her daughter had been taken by the accused and had not turned up till 09:00 AM; when she met Mukesh at about 11:00 AM, he was in a drunk condition; the police came to their house at 12:00 noon. 27 This version of PW-10 clearly and categorically establishes that the accused had taken Neha at 08:00 AM in the morning of fateful day on the pretext of giving her toffee; when she did not return back PW-10 asked PW-2 to find out about the whereabouts of the appellant and to inform her husband; inspite of search, Neha could not be located; when PW-10 met the accused at about 11:00 AM, he was in an intoxicated condition and informed her that he had already left Neha but Neha could not be found; police complaint was lodged. Nothing has been elicited in her cross-examination to discredit or shake this version. The witness stood firm on her ground. In fact in the statement of the accused recorded under Section 313 of the Cr.PC in answer to question No.3, he admitted that although he had taken Neha with him in the morning but he had dropped her back at 09:30 AM. No further explanation has been tendered by the appellant on this count. Since he had taken Neha from the custody of her mother, it is not his version that he had returned her back to the custody to her mother. No satisfactory explanation has been furnished by the accused on this count. Once he had admitted the taking away of Neha he had to show when, how, what time and in whose custody he left her back. He has failed to do so. This fact was especially within his knowledge; Section 106 of the Evidence Act lays down the rule what when the accused does not throw light upon the facts which are especially within his knowledge, the Court can consider it as his failure to adduce an explanation and is an additional link which completes the chain of circumstantial evidence. 28

In AIR 2007 SC144State of Rajasthan Vs. Kashi Ram the Apex Court, in this context, has held as under:

The principle is well settled. The provisions of Section 106 of the Evidence Act, 1872 itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the Court to be probable and satisfactory. If he does so, he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence, if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatiable with his innocence, the Court can consider his failure to adduce any explanation, as an additional link which completes the chain. 29 The version of PW-10 was sought to be corroborated by PW-2, the neighbour who deposed that on the fateful day, Neha had been taken by the appellant and when she did not return, he was asked by PW-10 to look for her. In his cross-examination this witness has however stated that this information about the appellant having taken Neha with him was told to him by PW-10; admittedly he being a hearsay witness, the trial Court had rightly not relied upon his version. However the version of PW-2 to the extent that he had gone looking for Neha at the asking of PW-10 remains unchallenged. 30 Jaleshwar (PW-1) was the person who was running the barber shop where both, the father of the victim namely Manoj Thakur and the appellant were working. He knew the appellant Mukesh who had been asked to leave the job as his work was dissatisfactory. PW-1 has also corroborated the versions of PW-10 and PW-2 to the extent that PW-2 had come to his shop inquiring from him about the whereabouts of the appellant; the father of the victim who was present in shop also left the shop looking for his daughter. 31 The post mortem conducted on

13.06.2005 had related the time of death back to 12.06.2005 between 08:00 AM to 12:00 noon; proximity of time also stood established. 32 In 2007(2) ACR1994(SC) State of Goa Vs. Sanjay Thakaran & Anr. it was held as under:

The circumstance of last seen together would normally be taken into consideration for finding the accused guilty of the offence charged with when it is established by the prosecution that the time gap between the point of time when the accused and the deceased were found together alive and when the deceased was found dead is so small that possibility of any other person being with the deceased could completely be ruled out. The time gap between the accused persons seen in the company of the deceased and the detection of the crime would be a material consideration for appreciation of the evidence and placing reliance on it as a circumstance against the accused.

33 The time gap between the accused having last been seen in the company of the deceased and detection of the crime was also a material consideration as a circumstance against the accused. This evidence thus clearly establishes the circumstance of last seen. 34.(ii) Recovery of dead body The second circumstance relied upon by the prosecution is the recovery of the dead body which had been allegedly effected pursuant to the disclosure statement made by the appellant. 35 On the identification of PW-10, the appellant has been arrested. This was on the same day i.e. on 06.03.2008. His arrest memo Ex.PW10/A shows his time of arrest as 04:15 PM. His personal search Ex.PW10/B was conducted. He made a disclosure statement Ex.PW-10/C and pursuant to this disclosure, he had led the police party comprising of Inspector Sunil Kumar (PW-12), HC Shokender (PW09), constable Jai Prakash (PW-6A) to a PRC container depot, Badarpur Railway line where on his pointing out in container No.PCIU328676 the naked body of victim Neha was found; her mouth was towards the floor of the container. Further version of the prosecution being that the in-charge container depot Ajay Pratap Singh (PW-6) was also present. 36 The vehement submission of the learned counsel for the appellant has been that the version of PW-6 demolishes this circumstance as in his examination-in-chief he has made a clear and categorical statement that the police was informed by him; submission being that no cross-examination has been effected of this witness by the learned public prosecutor; in his cross-examination,

PW-6 had stated that he had informed the police at 02:10. Submission being reiterated that the police had been informed of the dead body lying in the container depot at 02:10 PM, the question of the recovery of the dead body which was made between 04:00-05:00 PM in the evening (pursuant to the disclosure statement of the appellant) is an eye-wash and has no evidentiary value; it does not fit within the parameters of Section 27 of the Indian Evidence Act. 37 The version of the police witnesses on this score i.e. testimonies of PW-12, PW-9 & PW-6A has been consistent. They have all deposed that it was at the pointing out of the accused that the dead body of the victim was recovered from the container depot; the accused had led the police party to this container depot. PW-6 was also present and his statement was recorded. These testimonies reflect the version of the prosecution that the testimony of PW-6 was recorded after the recovery had been effected. 38 To better appreciate this circumstance, the case diaries of the case have been requisitioned and perused by the Court to arrive at a final finding in this matter. They have been examined. The case diaries show that two DDs had been recorded on 12.06.2005; the first DD related to investigation carried out up to 05:00 PM and the second DD related to the details of the investigation carried out after 05:00 PM up to 11:45 PM. On a perusal of these entries, it is noticed that in the first DD (in which investigation was carried out up to 05:00 PM) the details of the recovery of the dead-body having been effected from the container depot pursuant to the disclosure statement of the accused has been recorded. This is clear from a perusal of these notings. In the second DD entry (which related to investigation after 05:00 PM), the Investigating Officer has recorded that the statements of the witnesses were recorded subsequently which included the statement of Ajay Pratap Singh (PW-6). 39 This sets the controversy at rest. The entry in these case diaries show that the statement of Ajay Pratap Singh (PW-6) had been recorded after 05:00 PM and as such his deposition that he had informed the police at 02:10 PM about the dead-body of the victim lying in the container depot is wholly incorrect. 40 Under Section 172 of the Cr.P.C., the Court has the unfettered power to examine the entries in the case diary which is maintained by the Investigating Officer. This is a very important safeguard. The legislature has reposed complete trust in the court which is conducting the inquiry or the trial. It has empowered the Court to call for any such relevant case diary, if

there is any inconsistency or contradiction arising in the context of the case diary the Court can use the entries for the purpose of contradicting the Police Officer. This is based on the premise that ultimately there can be no better custodian or guardian of the interest of justice than the Court trying the case. No Court will deny to itself the power to make use of the entries in the diary to the advantage of the accused by contradicting the Police Officer with reference to the contents of the diary. 41 In AIR 1989 SC144Mukund Lal v. Union of India & Anr., , the Supreme Court while upholding the constitutional validity of Section 172(3) of the Cr.P.C. had inter alia held:

The public interest requirement from the stand point of the need to ensure a fair trial for an accused is more than sufficiently met by the power conferred on the Court, which is the ultimate custodian of the interest of justice and can always be trusted to be vigilant to ensure that the interest of accused persons standing the trial, is fully safeguarded. This is a factor which must be accorded its due weight. There would be no prejudice or failure of justice to the accused person since the Court can be trusted to look into the police diary for the purpose of protecting his interest.

42 There is no doubt that PW-6 had not been cross-examined by the public prosecutor conducing the trial in the court below; this is a lapse on his part; whether it was inadvertent or intentional is a question mark?. However the benefit of this lapse does not accrue to the appellant. 43 PW-2 is an independent witness. He was the neighbour of the victim. He was also a witness to the recovery. Nothing has been elicited in the cross-examination of PW-2 which could shake his testimony. He had signed the memos; the pointing out memo has been proved as Ex.PW-2/C; the dead body of the victim was seized vide memo Ex.PW-6/A; the container was also seized vide memo Ex.PW-7/X1. 44 The accused in his statement under Section 313 of the Cr.PC in answer to question No.20 has also stated that the police had arrested him on the same day at 10:30 AM. The fact of his arrest thus stands admitted. For the sake of argument, even if it is presumed that the appellant had been arrested at 10:30 AM, the version of the prosecution is that the recovery had been effected thereafter i.e. between 04:15 PM to 05:00 PM which again would be after his disclosure statement had been recorded. Since the

version of PW-6 has been dis-believed, even if the arrest time is taken as 10:30 AM, this would in no manner advance the version of the appellant. 45 This circumstance also stands established. 46.(iii) Recovery of weapon of offence The recovery of the knife at the instance of the accused is the third circumstance; the accused had allegedly got it recovered pursuant to his disclosure statement. As noted supra, the disclosure statement of the accused was recorded in the evening of 12.06.2005; he had led the police party i.e. PW-12, PW-9 & PW-6A and the independent witness PW-2 to the spot. After the dead body was recovered, he had also led the investigating team to the railway siding of Tughlakabad from where a blood stained knife was recovered. The same was taken into possession vide memo Ex.PW-2/B. This memo has been signed by PW-2 the independent witness apart from the police witnesses. The post mortem doctor (PW-3) had examined this knife and as per his opinion (Ex.PW3/A), he had opined that injuries No.2, 3, 4 & 5 caused upon the victim could have been caused by this weapon of offence. This weapon had also been sent to the CFSL. Blood could not be detected on this exhibit and as such the vehement argument of the learned counsel for the appellant on this score is that this reveals that this was a planted recovery as if blood had been noted on the knife when it was seized, there is no explanation as to why it could not be detected at the time when it was examined by the CFSL. 47 To examine this point, certain dates are relevant. The seizure of the knife had been effected on 12.06.2005. The post mortem doctor had examined it on 13.06.2005 i.e. one day after the date of the incident. It was noted to have blood like stains on it. After examination it was resealed with the seal of the AIIMS Hospital. It was received in the CFSL on 24.08.2005 but was finally examined in the department only on 06.07.2006 i.e. after a gap of 11 months. In this period of time, the possibility of the blood stains having disappeared from the knife cannot be ruled out. This argument is thus futile. 48 This circumstance also stands established. 49 (iv) Scientific Evidence The scientific evidence collected by the prosecution is in the nature of the CFSL report proved in the testimony of the scientific expert Dr. A.K. Shrivastava examined as PW-13. He was an M.Sc. in Botany and had undergone training of forensic biology and serology. He has on oath deposed that on 24.08.2005, 14 sealed parcels were received in his office along with the forwarding letter. He had examined them; this report recites that

these 14 parcels of case FIR No.545/2005, PS Okhla Industrial Area were duly received in his office; the description of the parcels and condition of the seals satisfied that the seals were intact as per the forwarding letter. Out of the 14 parcels examined, seven parcels were those which had been sealed by the Investigating Officer having the seal of AM. These exhibits included the T shirt of the victim; the underwear of the accused, his blood sample as also a black filamentous material described as hair. The remaining parcels were sealed with the seal of the Department of forensic Medicine, AIIMS, New Delhi and included the vaginal swab of the deceased, her anal swab, her underwear and blood sample. In the statement recorded under Section 313 of the Cr.PC, the accused in response to question No.13 had also admitted that his underwear has been seized and his blood sample had also been taken by the doctor. 50 The FSL report (Ex.PW-7/I) had detected semen stains on the T shirt and on the vaginal swab of the victim of blood group B which were also detected on the underwear of the appellant. Merely because semen was not noticed by the naked eye on the T shirt at the time of its seizure does not rule out the possibility of semen to be detected on its chemical examination. 51 The submission of the appellant that there was possibility of tampering of samples is wholly excluded by what has been noted supra. 14 parcels had been received in the CFSL of which seven parcels were duly sealed by the Investigating Officer having the seal of AM and the balance seven parcels having the seal of AIIMS. The CFSL in its report specifically recites that the seals were intact when the parcels were received in the department. Possibility of tampering is thus excluded. 52 This piece of evidence was another nail in the coffin of the accused. 53 (v) Medical Evidence The medical evidence was the post-mortem report which has been proved by PW-3. This report has opined the time of death between 08:00 AM to 12:00 noon of 12.06.2005 which was the probable time of the murder of the victim. Besides matching in time, the injuries as depicted in the post mortem could have been caused by the weapon (Ex.P8) which had been got recovered by the accused at his instance. This was another piece of corroborative evidence. 54 (vi) Motive The motive of the crime appears to be the fact that the appellant had murdered baby Neha in order to hide his crime which was the crime of rape which he had committed. 55 Record thus establishes the version of the prosecution. Evidence both oral and documentary

has established that Neha had been taken away by the appellant at about 08:00 AM in the morning of 12.06.2005 inspite of protests by her mother (PW-10) on the pretext that the accused would buy her toffee but when she did not return to the house; PW-10 informed her neighbour Rajesh (PW-2) who went to inform her husband at the barber shop of PW-1 where the accused till sometime ago was also a co-worker. Inspite of frantic search, the child could not be found. At about 11:00 AM when PW-10 met the accused who was in a state of intoxication while admitting that he had taken Neha at 08:00 AM he informed PW-10 that he had dropped Neha at the house at 09:30 AM. However this was false as the search for the child had continued; obviously for the reason that the child had not been dropped back to the house. The child had been taken from the custody of PW-10 but it is not the case of the accused that he had put her back in the custody of her mother. Once he has taken the child from the custody of her mother, it was his bounden duty to have explained to whom, how and in what circumstances he had left her back. He had failed to do so. His answers in his statement under Section 313 of the Cr.PC were false and misleading. The post mortem report also establishes that the victim stood killed between 08:00 AM to 12 noon. At 11 AM when PW-10 met the accused who was in a drunk state, he had already committed the offence. At 01:30 PM, PW-10 went to the local police station to lodge her complaint. She had named the appellant. On her statement, the rukka was taken at 02:15 PM and the FIR under Section 363 of the IPC was registered. It was only later when the dead body of the victim was recovered, the offence was converted from Section 363 of the IPC to Section 302 of the IPC. The argument of the learned counsel for the appellant that there was delay in sending the FIR to the senior officer and there has been a non-compliance of Section 157 of the Cr.PC which is essentially a safeguard to ensure that no manipulation is carried out in the FIR, would not be prejudicial to the accused as it is the case of the accused himself that he has already stood arrested on the same day and as such non-compliance of this provision even if presuming it to be a correct argument not having prejudiced the accused would not in any manner advance his defence. 56 In (1985) 4 SCC80Pattipati Venkaiah Vs. State of Andhra Pradesh, the Apex Court while commenting on the delay in sending the FIR to the concerned Court had noted that mere delay in the absence of prejudice to the accused cannot be

conclusive that the investigation was tainted and the prosecution case is unsupportable. In the instant case, initially the FIR had been registered under Section 363 of the IPC and it was only later on after the dead body was recovered that it was converted to an offence under Section 302 of the IPC. In fact no crossexamination has been effected on this score upon any of the witnesses of the prosecution. 57 The prosecution has been able to prove its case to the hilt. The conviction of the appellant in no manner calls for no interference. We are not inclined to interfere with the impugned judgment. 58 On sentence: On the point of sentence, learned counsel for the parties have been heard. The judgments relied upon by the respective counsel and the law laid down by the Apex Court in cases where death penalty has been ordered have also been perused. 59 Judgments relied upon by the learned counsel for the appellant Learned counsel for the appellant has relied upon the landmark judgment of the Constitution Bench in (1980) 2 SCC684Bachan Singh Vs. State of Punjab. In Bachan Singh, the constitutional validity of death penalty for murder as provided in Section 302 of the IPC as also the sentencing procedure as contained in Section 354 (3) of the Code was considered. In one part of the judgment, it was observed that judges should not be blood thirsty. Relevant observations of the Apex Court made therein read as under:

Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency - a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through laws instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.

60 (1983) 3 SCC470Machhi Singh & Ors. v. State of Punjab was a three Judge Bench judgment of the Apex Court wherein in a family feud 17 murders were committed in quick succession in five incidents on the same night. The death sentence in that scenario had been confirmed. 61 In (2009) 5 SCC740Rameshbhai Chandubhai Rathod Vs. State of Gujarat, the Apex Court while maintaining the conviction of the appellant for double murder of the victims had converted the death sentence awarded to the appellant to one of life imprisonment. The Court had also considered the fact that the appellant was languishing in jail for more than six years. 62 In (2011) 7 SCC437State of Maharashtra Vs. Goraksha Ambaji Adsul, a Division Bench of the Apex Court had converted the death penalty to life imprisonment and had noted that impersonal circumstances and family nagging was a mitigating factor in favour of the appellant. 63 In (2012) 4 SCC257Ram Naresh and Others Vs. State of Chattisgarh, the conviction for gang rape and murder was based on the sole testimony of the eye-witness. Conviction was maintained but the accused persons being in the age group of 21-30 years was noted to be a mitigating factor in favour of the appellants; the Apex Court did not think it to be a fit case falling within the exception of the term rarest of rare and had accordingly reduced the sentence to one of life imprisonment; this was for a specified term of 21 years. 64 Judgments relied upon the learned public prosecutor Conversely the judgments relied upon by the learned public prosecutor are cases where the death penalty had been confirmed. 65 In (1991) 1 SCC752Jumman Khan Vs. State of Uttar Pardesh, the Supreme Court had confirmed the death penalty awarded to the appellant for rape and murder of a six year old child noting it to be a reprehensible and gruesome murder to satisfy his lust. 66 In (1991) 5 SCC1Jai Kumar Vs. State of Madhya Pradesh, rape of a pregnant woman followed by the murder of her eight year child had led to the confirmation of the death sentence of the accused. 67 In (1994) 3 SCC381Laxman Naik Vs. State of Orissa, the accused who was the guardian of the helpless victim i.e. his seven year old niece and being a cold blooded, brutal and diabolical murder, the death penalty had been confirmed. 68 In (1994) 2 SCC220Dhananjoy Chatterjee Vs. State of West Bengal, the death penalty of the 27 year old accused was confirmed for rape of a school girl of 18 years. 69 In (1996) 6 SCC250Kamta Tiwari Vs. State of Madhya Pradesh, the Court had noted

that no mitigating circumstance could be found in favour of the appellant as the perpetrator of the crime was in fact the guardian, being in a position of trust, which he had totally betrayed. 70 In (2007) 4 SCC713Shivu & Anr. Vs. Registrar General, High Court of Karnataka, the death sentence awarded by the trial Court and confirmed by the High Court was up-held by the Apex Court. In this case, the accused was aged 20-22 years and he had committed the offence of murder and rape of an 18 year old girl. 71 In (2008) 11 SCC113Bantu Vs. State of Uttar Pradesh, the offence was an act of rape and murder of a five year old child which included insertion of a wooden stick in her vagina to the extent of 33 cms to masquerade the crime as an accident. This had weighed in the mind of the Court while confirming the death penalty. 72 In (2008) 15 SCC269Shaivaji Vs. State of Maharashtra, the depraved act of father in raping and murdering his nine year old child had led to confirmation of the death sentence. 73 In (2010) 9 SCC1Atbir Vs. Govt. of NCT of Delhi where 37 injuries had been inflicted on the body of three innocent persons and being a case of triple murder, the death penalty stood confirmed. 74 In (2011) 5 SCC317Mohd. Mannan Vs. State of Bihar, a 42 years old man had raped and killed a seven year old child after inflicting several atrocities upon her which was evident from the injuries suffered by her; the death sentence stood confirmed. 75 In (2012) 4 SCC37Rajendra Prathaadrao Wasnik Vs. State of Maharashtra where the father had raped his own child, the death penalty awarded was confirmed. 76 The legal proposition emanating from the legislations and enunciated in these judgments has been appreciated. 77 The Code of Criminal Procedure, 1973 (Cr.P.C.) has incorporated Section 354 (3) where imprisonment for life for capital offences is the rule and death penalty is to be accorded as an exception for which special reasons have to be stated. This provision marks a significant shift in the legislative policy underlying the Code of 1908 which was in force immediately before 01.04.1974 and according to which both the alternative sentences of death and imprisonment of life were provided for murder and other capital offences. Now according to this changed legislative policy which is patent on the face of Section 354 (3), the normal punishment for murder is imprisonment for life and death penalty is an exception. 78 Section 354 (3) of the Code of Criminal Procedure, 1973 reads herein as under:

354. Language and contents of Judgment. (1) (2). (3) When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence.

79 The legislative policy discernible from Section 235(2) of the Cr. P.C. reads as follows:

235. Judgment of acquittal or conviction. (1) (2) If the accused is convicted, the Judge shall, unless he proceeds in accordance with the provisions of section 360, hear the accused on the question of sentence, and then pass sentence on him according to law.

80 These provisions first came up for interpretation and consideration in the case reported as AIR 1976 SC230Balwant Singh Vs. State of Punjab. 81 The scope and implications of Section 354(3) were summed up as follows:

Under this provision the court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances. It is necessary nor is it possible to make a catalogue of the special reasons which may justify the passing of the death sentence in a case.

82 Section 235 (2) provides for a bifurcated trial and specifically gives the accused a right of a pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have consistently been held by the Courts to be the policy underlined in Section 354(3), having a bearing on the choice of sentence. 83 Justice V.R. Krishan Iyer, speaking for the Bench, in the case reported in AIR 1974 SC799 Ediga Anamma Vs. State of A.P. had observed that pre-planned, calculated, cold-blooded murder is an aggravating circumstance; the weapon used and the manner of use, the horrendous features of the crime and

hapless and the helpless state of the victim and the like; steel the heart of the law for a sterner sentence. 84 In (1979) 3 SCC646Rajendra Prasad Vs. State of U.P. the Supreme Court had reversed this view taken in Ediga Anamma (supra). After the enactment of Section 354(3) murder most foul was not the test. The shocking nature of the crime or the number of murders was also not the criterion. It was said that the focus has now completely shifted from the crime to the criminal. Special reasons necessary for imposing death penalty must relate not to the crime as such but to the criminal. 85 Thus the theory of the aggravating and the mitigating circumstances depending on the facts of the particular cases had taken birth. However, more often these two aspects were so intertwined that it became difficult to give a separate treatment to each of the them. 86 In Bachan Singh (supra) the suggestions given by Dr.Chitale (relying upon the statute of States in USA framed after the judgment reported in 33 L Ed 2d 346 titled Furman Vs. Georgia) had been approved by the Apex Court and the following list were indicators of the aggravating circumstances:

Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion: (a) if the murder has been committed after previous planning and involves extreme brutality; or (b) if the murder involves exceptional depravity; or (c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed (i) while such member or public servant was on duty; or (ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or (d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Cr PC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

87 The mitigating circumstances suggested by Dr. Chitale also met the approval of the Apex Court and were recited as follows:

Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances: (1) That the offence was committed under the influence of extreme mental or emotional disturbance. (2) The age of the accused. It the accused is young or old, he shall not be sentenced to death. (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society. (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above. (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence. (6) That the accused acted under the duress or domination of another person. (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

88 The Apex Court in this case had noted that the discretion to be exercised by the judge in the matter of sentence would be after the balancing of both the aggravating and the mitigating circumstances of the crime. The relevant facts and circumstances impinging on the nature and circumstances of the crime could be brought on record at the preconviction stage but while making a choice of the sentence under Section 302 of the IPC the court would be concerned with the circumstances connected with the particular crime under inquiry as also the criminal. 89 Thus the Apex Court had ruled that the legislative policy discernible from Section 235(2) read with Section 354(3) was that in fixing the degree of punishment or making the choice of sentence for various offences, including the one under Section 302 IPC, the Court should not confine its consideration principally or merely to the circumstances connected with the particular crime, but also give a due consideration to the circumstances of the criminal. 90 Attuned to this legislative policy the following propositions were cast. (a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence. (b) While considering the question of sentence to be imposed for the offence of murder under Section 302, Penal Code, the court must have regard to every relevant circumstance relating to

the crime as well as the criminal. If the court finds, but no otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence. 91 After the judgment of Bachan Singh (supra) there have been a plethora of cases laying down the considerations to be followed by the Courts while imposing punishment for a conviction under Section 302 IPC. The Courts have time and again noted that there is little agreement amongst penologists and jurists as to what information about the crime and criminal is relevant and what is not relevant for fixing the dose of punishment. Further, criminal cases do not fall into set behavioristic patterns; there are infinite, unpredictable and unforeseeable variations; two cases are not exactly identical; each case is having its own distinctive features. A standardisation of the sentencing process which leaves little room for judicial discretion would in fact tend to sacrifice justice at the altar; such a mechanical standardization was not appreciated. The Apex Court has gone on to note that the sentencing discretion is a policy which belongs to the sphere of legislation and where the Parliament as a matter of sound legislative policy has not deliberately restricted, controlled or standardised the sentencing discretion any further than that which has been encompassed within the broad contours delineated in Section 354(3), the Court would not by overlapping its bounds rush to do what the Parliament in its wisdom, warily did not do. 92 Thus what has been consistently followed by the superior courts is that keeping in view the paramount beacons of the legislative policy as contained in Section 354(3) and Section 235(2) of the Cr.P.C., the extreme penalty of death may be inflicted only in the gravest cases of extreme culpability. In making the choice of the sentence, in addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also. 93 No straightjacket formula can be laid down. Each case has to be tested on its own facts. What can however be culled out is that for persons convicted of murder, life imprisonment is the rule and death sentence is an exception. It is only in the case of rarest of rare that the alternative option of taking human life is permitted for which special reasons have to be recorded. 94 In a recent judgment of the Apex Court delivered as recently as on 08.10.2013 Sushil Sharma Vs. the State NCT of Delhi, a three Judge Bench of the Apex Court had

an occasion to consider the law on sentencing in capital offences. While tracing the history of the aforenoted pronouncement, it had noted that mere brutality of the murder or the number of persons killed or the manner in which the body is disposed of may not always be the persuasive factor to impose death penalty. Depending upon the peculiar facts of the case even where the murder has been brutal, the option for life imprisonment has been exercised. In one case, time spent by the accused in the death cell had also been taken into consideration along with the other circumstances to commute his sentence into life imprisonment. Where the accused had no criminal antecedents and where there was no evidence to show that the accused was beyond reformation and rehabilitation or that he would revert back to similar crimes in future, the Courts time and again have leaned in favour of life imprisonment. In such cases, the doctrine of proportionality and the theory of deterrence have to be given a back seat. The theory of reformation and rehabilitation has prevailed over the idea of retribution. He was sentenced by the Apex Court wherein the caution sounded by the Constitution Bench in Bachan Singh being that judges should never be bloodthirsty but wherever necessary in the interest of the society in the rarest of rare case, the tough option of death penalty may be exercised must be kept in mind. 95 In Sushil Sharma (supra) the Apex Court while endeavoring to strike a balance between the aggravating and the mitigating circumstances of the said case had noted the following facts:

We must now examine the present case in light of our observations in the preceding paragraphs. The appellant was the State President of the Youth Congress in Delhi. The deceased was a qualified pilot and she was also the State General Secretary of Youth Congress (Girls Wing), Delhi. She was an independent lady, who was capable of taking her own decisions. From the evidence on record, it cannot be said that she was not in touch with people residing outside the four walls of her house. Evidence discloses that even on the date of incident at around 4.00 p.m. she had contacted PW-12 Matloob Karim. woman. She was not a poor illiterate hapless Considering the social status of the deceased, it would be difficult to come to the conclusion that the appellant was in a dominant position qua her. The appellant was deeply in love with the deceased and knowing full well that the deceased was very close to PW-12 Matloob Karim, he married her hoping that the deceased would settle down with him and lead a

happy life. The evidence on record establishes that they were living together and were married but unfortunately, it appears that the deceased was still in touch with PW-12 Matloob Karim. It appears that the appellant was extremely possessive of the deceased. The evidence on record shows that the appellant suspected her fidelity and the murder was the result of this possessiveness. We have noted that when the appellant was taken to Lady Hardinge Mortuary and when the dead body was shown to him, he started weeping. It would be difficult, therefore, to say that he was remorseless. The fact that he absconded is undoubtedly a circumstance which will have to be taken against him, but the same, in our considered view, would be more relevant to the issue of culpability of the accused which we have already decided against him rather than the question of what would be the appropriate sentence to be awarded which is presently under consideration. The medical evidence does not establish that the dead body of the deceased was cut. The second post-mortem report states that no opinion could be given as to whether the dead body was cut as dislocation could be due to burning of the dead body. There is no recovery of any weapon like chopper which could suggest that the appellant had cut the dead body. It is pertinent to note that no member of the family of the deceased came forward to depose against the appellant. In fact, in his evidence, PW-81 IO Niranjan Singh stated that the brother and sister-in-law of the deceased stated that they were under the obligation of the appellant and they would not like to depose against him. Murder was the outcome of strained personal relationship. It was not an offence against the Society. The appellant has no criminal antecedents. He is not a confirmed criminal and no evidence is led by the State to indicate that he is likely to revert to such crimes in future. It is, therefore, not possible in the facts of the case to say that there is no chance of the appellant being reformed and rehabilitated. We do not think that that option is closed. Though it may not be strictly relevant, we may mention that the appellant is the only son of his parents, who are old and infirm. As of today, the appellant has spent more than 10 years in death cell. Undoubtedly, the offence is brutal but the brutality alone would not justify death sentence in this case. The above mitigating circumstances persuade us to commute the death sentence Crl. Appeal No.96/2011 & Death Ref. No.06/2010 to life imprisonment. In several Page 47 of 51 judgments, some of which, we have referred to hereinabove, this Court has

made it clear that life sentence is for the whole of remaining life subject to the remission granted by the appropriate Government under Section 432 of the Cr.P.C., which, in turn, is subject to the procedural checks mentioned in the said provision and further substantive checks in Section 433-A of the Cr.P.C. We are inclined to issue the same direction. 96 In view of the aforentoed pronouncements including the most recent one of Sushil Sharma (supra), what can be said is that both the aggravating and mitigating circumstances of the case must be considered and a right balance should be struck. 97 It is, therefore, necessary to see whether the circumstances of the crime in the instant case are such that there is no alternative but to impose the death sentence upon the appellant and what would be the special reasons for imposing such a sentence. 98 In this case the aggravating circumstance is the fact that there was a hapless and helpless child aged around three years who was the victim of the crime. She was done to death by cutting her open, splitting her body in almost two parts with a knife after committing rape upon her. The next aggravating circumstance urged by the learned public prosecutor which also finds favour with this Court is that the accused had taken the victim promising her to buy a toffee; there was a trust reposed in the appellant but he had betrayed this trust. 99 The mitigating circumstances pleaded in favour of the accused are that he is young in years; he was aged 22 years at the time of the incident. The second circumstance is that the accused had taken the victim promising her a toffee; this was not extraordinary; he had on earlier occasions also been visiting their house as is evident from the version of PW-10. However, something obviously went amiss on that day; his mind-set got perverted; it led him to commit this dastardly act. The accused was in a state of inebriation when he met PW-10 at around noon on the same day. This is evident from the versions of PW-2 & PW-10. This act may thus not qualify as a pre-ordained or a pre-planned act. The post mortem report reveals that injury No.5 was the fatal injury; it was sufficient to cause death in the ordinary course of nature. It was caused by a sharp edged weapon. This injury was in the abdominal cavity which had ruptured the stomach and the intestines. There is no evidence to suggest that the body of the victim was intentionally ripped apart to qualify as a diabolic act which has been the thrust of the argument of the learned Prosecutor to seek a death penalty. The weapon is a knife having a blade of 10 cms; it may well

qualify as a kitchen knife. The accused also did not run away. Admittedly the accused also has no criminal antecedents; he was known to the parents of the victim and was living in the same vicinity. These facts are relevant, adding to his mitigating circumstances. 100 In this background the question which arises is whether the presence of such an accused in the largesse of society is so abhorrent that it is necessary that his life must be wiped out?. Conversely, if there is a possibility of his rehabilitation the rehabilitative theory presupposing that such a person be given a chance to reform himself must prevail. 101 The aforenoted situation persuades us to commute the death sentence to life imprisonment. The death sentence is accordingly commuted to life imprisonment. 102 Learned public prosecutor in this context has relied upon (2001) 4 SCC458Subhash Chander Vs. Kishan Lal, AIR 2008 SC3040 Swamy Shraddanand @ Murli Manohar Mishra Vs. State of Karnataka & (2010) 1 SCC58Sebastian Vs. State of Kerala; submission being that even if the Court thinks it to be a fit case to commute the death sentence to life imprisonment, it should be up to the last breath of his life and he should remain in jail for his entire life. 103 In Subhash Chander (Supra), the accused had murdered the entire family of the appellant. In Swamy Shraddanand (supra), the accused had killed the deceased in a planned and cold blooded manner and had devised the plan so that the victim could not know till the very end even for a moment that she was betrayed by the one she had trusted the most. In Sebastina (supra), the accused was a pedophile. 104 This factual scenario may not strictly apply to the present case. We are accordingly not inclined to issue any such direction. Accordingly while maintaining the conviction of the appellant under Section 302 of the IPC we commute his death sentence to a sentence of life imprisonment. 105 Death Reference is answered accordingly. Appeal is also disposed of in the above terms. INDERMEET KAUR, J KAILASH GAMBHIR, J NOVEMBER19 2013/A