RAVISHANKAR @ BABA VISHWAKARMA A

v.

THE STATE OF MADHYA PRADESH

(Criminal Appeal Nos. 1523-1524 of 2019)

OCTOBER 03, 2019 B

[R. F. NARIMAN, R. SUBHASH REDDY AND SURYA KANT, JJ.]

Sentence/Sentencing: Rape/murder of minor – Conviction based on circumstantial evidence – Imposition of death sentence – Held: There is no absolute principle of law that no death sentence can be awarded in a case where conviction is based on circumstantial evidence – Such a standard would be ripe for abuse by seasoned criminals who always make sure to destroy direct evidence – Further, in many cases of rape and murder of children, the victims owing to their tender age can put up no resistance – In such cases, it is extremely likely that there would be no ocular evidence – It cannot, therefore, be said that in every such case notwithstanding that the prosecution has proved the case beyond reasonable doubt, the Court must not award capital punishment for the mere reason that the offender has not been seen committing the crime by an eye-witness – Such a reasoning, if applied uniformly and mechanically will have devastating effects on the society which is a dominant stakeholder in the administration of our criminal justice system. C D E

Sentence/Sentencing: Death sentence – Residual doubt – This Court has increasingly become cognizant of 'residual doubt' in many recent cases which effectively create a higher standard of proof over and above the 'beyond reasonable doubt' standard used at the stage of conviction, as a safeguard against routine capital sentencing, keeping in mind the irreversibility of death. F

Penal Code, 1860: ss.363, 366, 376(2)(m), 376(2)(n), 376-A, 302 and 201 – Rape and murder of minor girl – Trial court held appellant guilty of kidnapping a 13 years old girl committing rape on her and killing her by throttling and thereafter destroying evidence by throwing her half naked body in dry well – Trial court as well as High Court awarded death sentence – On appeal, held: G H

A *This is a case of circumstantial evidence which is supported by ocular and medico-scientific evidence – DNA evidence using the established STR technique proved that appellant committed sexual intercourse with the deceased – Various injuries on her body along with signs of struggle proved that such crime was committed in a*
B *barbaric manner – A slipper was recovered through the appellant which was later identified as belonging to the deceased, giving finality to the circumstantial chain – The findings of kidnapping, rape, resultant death and destruction of evidence were proved beyond reasonable doubt, as evidenced by concurrent findings of the Courts below – As regards the sentencing, there were some*
C *residual doubts – A crucial witness for constructing the last seen theory, was partly inconsistent in cross-examination and quickly jumped from one statement to the other – Two other prosecution witnesses had seen the appellant feeding biscuits to the deceased one year before the incident and their long delay in reporting the*
D *same failed to inspire confidence – The mother of the deceased deposed that the wife and daughter of the appellant came to her house and demanded the return of the money which she had borrowed from them but failed to mention that she suspected the appellant of committing the crime initially – Ligature marks on the neck evidencing throttling were noted by doctors and in the*
E *postmortem report, but find no mention in the panchnama prepared by the police – Viscera samples sent for chemical testing were spoiled and hence remained unexamined – Although nails' scrappings of the accused were collected, no report was produced to show that DNA of the deceased was present – All these factors of course have*
F *no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal – However, 'residual doubt' as a mitigating factor would effectively raise the standard of proof for imposing the death sentence – This case falls short of the 'rarest of rare' cases where the death sentence alone deserves to be awarded to the appellant – Death penalty is set aside*
G *and is substituted with the life imprisonment.*

Penal Code, 1860: s. 376A – Conviction under – High Court while confirming death sentence observed that the girl was found bleeding due to forcible sexual intercourse - which fact, however, is not supported by medical evidence – Held: Such erroneous finding

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has no impact on conviction under s.376A for a bare perusal of the section shows that only the factum of death of the victim during the offence of rape is required, and such death need not be with any guilty intention or be a natural consequence of the act of rape only – It is worded broadly enough to include death by any act committed by the accused if done contemporaneously with the crime of rape – Any other interpretation would defeat the object of ensuring safety of women.

Partly allowing the appeals, the Court

HELD: 1. The prosecution effectively proved that deceased was 'last seen' with the appellant and on earlier occasions too was seen being enticed by the appellant. DNA evidence using the established STR technique proved that appellant committed sexual intercourse with the deceased. Deceased was proved to be a minor using school records. Various injuries on her body along with signs of struggle proved that such crime was committed in a barbaric manner. A slipper was recovered through the appellant which was later identified as belonging to the deceased, giving finality to the circumstantial chain. No effective challenge was made against any medical or DNA reports. There can thus be no second opinion against the guilt of the appellant and his consequential conviction. [Para 37][301-D-G]

Pantangi Balarama Venkata Ganesh v. State of Andhra Pradesh **(2009) 14 SCC 607 : [2009] 11 SCR 636;** *Dharam Deo Yadav v. State of Uttar Pradesh* **(2014) 5 SCC 509 : [2014] 8 SCR 650 – relied on.**

2. The Trial Court awarded death sentence after drawing a balance-sheet weighing 'mitigating' circumstances against `aggravating' circumstances. The High Court noted that there was bleeding due to sexual intercourse and that there was no possibility of reform owing to the appellant's denial of his crimes. Accordingly, it held that awarding death penalty was justified. The High Court while confirming death observed that the girl was found bleeding due to forcible sexual intercourse - which fact, however, is not supported by medical evidence. However, such erroneous finding has no impact on conviction under Section 376A

A **of the I.P.C. for a bare perusal of the section shows that only the factum of death of the victim during the offence of rape is required, and such death need not be with any guilty intention or be a natural consequence of the act of rape only. It is worded broadly enough to include death by any act committed by the accused if done**
B **contemporaneously with the crime of rape. [Paras 39, 60][302-C-D; 309-C-E]**

Bachan Singh v State of Punjab **(1980) 2 SCC 684 – followed**

Rameshbhai Chandubhai Rathod v. State of Gujarat
C **(2011) 2 SCC 764 : [2011] 1 SCR 829;** *Ashok Debbarma v. State of Tripura* **(2014) 4 SCC 747 : [2014] 4 SCR 287;** *Krishnan v. State* **(2003) 7 SCC 56 : [2003] 1 Suppl. SCR 771 – relied on.**

3. In the instant case, there are some residual doubts. A
D **crucial witness for constructing the last seen theory, P.W.5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other. Two other witnesses, P.W.6 and P.W.7 had seen the appellant feeding biscuits to the deceased one year before the incident and their long delay in reporting the same**
E **fails to inspire confidence. The mother of the deceased deposed that the wife and daughter of the appellant came to her house and demanded the return of the money which she had borrowed from them but failed to mention that she suspected the appellant of committing the crime initially. Ligature marks on the neck evidencing throttling were noted by P.W.20 and P.W.12 and in**
F **the postmortem report, but find no mention in the panchnama prepared by the police. Viscera samples sent for chemical testing were spoiled and hence remained unexamined. Although nails' scrapings of the accused were collected, no report has been produced to show that DNA of the deceased was present. Another**
G **initial suspect, 'B' absconded during investigation, hence, gave rise to the possibility of involvement of more than one person. All these factors of course have no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal. Use of such 'residual doubt' as a mitigating**

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factor would effectively raise the standard of proof for imposing the death sentence, the benefit of which would be availed of not by the innocent only. However, it would be a misconception to make a cost-benefit comparison between cost to society owing to acquittal of one guilty versus loss of life of a perceived innocent. This is because the alternative to death does not necessarily imply setting the convict free. Thus this case falls short of the 'rarest of rare' cases where the death sentence alone deserves to be awarded to the appellant. In the light of all the cumulative circumstances that the cause of justice will be effectively served by invoking the concept of special sentencing theory. The death penalty as awarded by the courts below is set aside and is substituted with the imprisonment for life. [Paras 61, 62, 64, 65][310-E-H; 311-A-B, D-F]

Swamy Shraddananda @ Murali Manohar Mishra v. State of Karnataka **(2008) 13 SCC 767 : [2008] 11 SCR 93;** *Union of India v. Sriharan alias Murugan and others* **(2016) 7 SCC 1 : [2015] 14 SCR 613 – relied on.**

Bhupinder Sharma v. State of Himachal Pradesh **(2003) 8 SCC 551 : [2003] 4 Suppl. SCR 792;** *Machhi Singh and others v. State of Punjab* **(1983) 3 SCC 470 : [1983] 3 SCR 413;** *Mukesh and another v. State (NCT of Delhi) and others* **(2017) 6 SCC 1 : [2017] 6 SCR 1;** *Vasanta Sampat Dupare v. State of Maharashtra* **(2017) 6 SCC 631 : [2017] 3 SCR 850;** *Khushwinder Singh v. State of Punjab* **(2019) 4 SCC 415[2019] 3 SCR 446;** *Manoharan v. Inspector of Police* **(2019) SCC online SC 951;** *Rajindra Pralhadrao Wasnik v. State of Maharashtra in Review Petition* **(Crl.) Nos. 306-307/ 2013 – referred to.**

State v. McKinney **74 S.W.3d 291 (Tenn. 2002);** *Herrera v. Collins,* **506 U.S. 390 (1993) – referred to.**

Report of the Committee on Amendments to Criminal Law, headed by Justice J.S. Verma, former Chief Justice of India – referred to.

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Case Law Reference

[2003] 4 Suppl. SCR 792	**referred to**	**Para 6**
[2009] 11 SCR 636	**relied on**	**Para 38**
[2014] 8 SCR 650	**relied on**	**Para 38**
(1980) 2 SCC 684	**followed**	**Para 40**
[1983] 3 SCR 413	**referred to**	**Para 41**
[2008] 11 SCR 93	**relied on**	**Para 46**
[2017] 3 SCR 850	**referred to**	**Para 50**
[2019] 3 SCR 446	**referred to**	**Para 51**
[2011] 1 SCR 829	**relied on**	**Para 56**
[2014] 4 SCR 287	**relied on**	**Para 58**
[2003] 1 Suppl. SCR 771	**relied on**	**Para 59**
[2015] 14 SCR 613	**relied on**	**Para 64**
[2017] 6 SCR 1	**referred to**	**Para 64**

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CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1523-1524 of 2019.

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From the Judgment and Order dated 06.12.2016 of the High Court of Madhya Pradesh Principal Seat at Jabalpur in Criminal Appeal No.2175 of 2016 and against Criminal Reference 2 of 2016.

Ms. Asha Gopalan Nair, Ms. Nivedita Nair, Advs. for the Appellant.

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Sunil Fernandes, AAG, Zeeshan Diwan, Ms. Nupur Kumar, Ms. Priyansh Indra Sharma, Arjun Garg, Advs. for the Respondent.

The Judgment of the Court was delivered by

SURYA KANT, J.

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1. Delay condoned. Leave granted.

2. Hovering between life and death, the appellant assails the judgment dated 6th December, 2016 passed by the High Court of Madhya Pradesh at Jabalpur whereby the death reference made by the IIIrd Additional Sessions Judge, Gadarwara, District Narsinghpur (M.P.) has been confirmed and the appellant's criminal appeal has been dismissed.

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Background:

3. The appellant was tried for having committed offences under Sections 363, 366, 376(2)(i), 376(2)(n), 376(2)(j), 376(2)(m), 376-A, 302 and 201 of the Indian Penal Code (for short IPC) and alternatively under the corresponding provisions of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO Act'). Through judgment and order dated 19th July 2016, the Trial Court held the appellant guilty of kidnapping a 13 year-old girl, committing rape on her, killing her by throttling and thereafter destroying the evidence by throwing her half naked body in a dry well. These crimes were held as being 'rarest of the rare' and the appellant was sentenced to death under Section 376-A of the Indian Penal Code, 1860 (I.P.C.). In terms of Section 366 of the Code of Criminal Procedure, 1973 (Cr.P.C.), the Trial Court made a reference to the High Court for confirmation of the death sentence. The appellant also filed criminal appeal challenging this judgment and order passed by the Trial Court. The High Court on 6th December 2016, through a common order, both dismissed his appeal and confirmed the Trial Court's death reference giving rise to this special leave petition.

4. At the outset, it must be mentioned that when the appellant's special leave petition came up for hearing before a Three Judge Bench of this Court on 10th January, 2018, the following order was passed:

> **"Mr. Arjun Garg, learned counsel for the State prays for two weeks' time to argue the matter on the conversion of sentence from death to life, as we are not inclined to interfere with the conviction.**
>
> **xxx xxx xxx"**

5. Thus, the limited issue which survives for our consideration is whether or not the appellant deserves to be imposed with the extreme sentence of death penalty?

6. As noted by this Court in ***Bhupinder Sharma v. State of Himachal Pradesh***[1]**,** that the mandate of not disclosing identities of the victims of sexual offences under Section 228A of I.P.C. ought to be observed in spirit even by this Court:

[1] (2003) 8 SCC 551

A "2. We do not propose to mention name of the victim. Section 228-A of the Indian Penal Code, 1860 (in short the "IPC") makes disclosure of identity of victim of certain offences punishable. Printing or publishing name of any matter which may make known the identity of any person against whom an offence under Sections 376, 376-A, 376-B, 376-C or 376-D is alleged or found to have been committed can be punished. True it is the restriction does not relate to printing or publication of judgment by High Court or Supreme Court. But keeping in view the social object of preventing social victimization or ostracisms of the victim of a sexual offence for which Section 228-A has been enacted, it would be appropriate that in the judgments, be it of High Court or lower Court, the name of the victim should not be indicated. We have chosen to describe her as ' victim' in the judgment."

We are thus not disclosing the victim's name and instead are referring to her as the "deceased" throughout this judgment.

D **Relevant Facts:**

7. The necessary facts are to the following effect: P.W.3 (Purushottam Kaurav – grandfather of the deceased), resident of village Baglai filed a report at the Police Station at Gotitoria on 22nd May, 2015 at about 4.00 p.m. giving information of the disappearance of his 13 year old granddaughter. The deceased and her 11 year old brother Harinarayan were children of the informant's younger son, Satyaprakash and had been staying with their mother at the latter's parental home in the neighbouring village, Chargaon, for the last four months. The deceased visited the informant's home in village Baglai with her mother at around 10 a.m. the previous day. The deceased did a few household chores while her mother cooked food for the family. Later, she went out to play with her friend who lived in the neighbourhood. Upon returning back she told her mother that she was not feeling good and requested that they should return back to her maternal uncle's home in Chargaon. Her mother assured her that they would return later that afternoon and both of them went to sleep. Upon waking up at 3.00 p.m., the mother discovered that the deceased was not around. The mother made unsuccessful enquiries in the neighbourhood and later asked the deceased's 11 year old brother to go and enquire whether she had gone to Chargaon on her own. The brother came back in the evening without any news of the victim. Thinking that their daughter might have gone to her paternal aunt's home

in the nearby village of Aadegaon, both parents slept. Next morning enquiries were made at Aadegaon but it was informed that the deceased had not gone there either. Worried, the mother herself left for her parental home at around 9-10 a.m. and informed her brother Vishram that the victim was missing. Vishram and the deceased's mother set out on a wide search in the neighbourhoods of Chargaon with little result. Whilst returning back to Baglai, the mother identified the deceased's salwar and one chappal on the embankment of the water-channel which divided the villages of Baglai and Chargaon. Upon reaching her matrimonial home in Baglai, the mother informed her father-in-law about her daughter's disappearance who then approached the police. P.W.3 thereafter narrated facts of deceased's disappearance and gave description of his grand daughter who was studying in Class 6 at that time. The Police, accordingly, registered a crime case under Section 363, IPC.

8. Subsequently the police took P.W.3 to the spot where the salwar and the chappal were recovered. Upon a local search of the area with some villagers and relatives, the semi-nude body of the deceased was discovered lying in a supine position in a dry well. The dead body was taken out of the well and it was duly identified by her grandfather, P.W.3. A spot map of the place of occurrence was drawn, and Seizure Panchnama of black colour salwar and one Chappal of the deceased was also prepared.

9. P.W.20 (Harsha Singh, Senior Scientific Officer) advised the police on handling the body of the deceased and later inspected the decomposing dead body at 9:45 p.m. at the Government Hospital, Chichli. After noticing various injuries including ligature marks on the neck, she gave a report that death of the deceased was homicidal. P.W.12 (Dr. Kinshu Jaiswal) conducted postmortem of the body next morning at 9 a.m. Examining the decayed state of the body, P.W. 12 estimated time of death 48-72 hours before. She noted various injuries on the body including a ruptured hymen, congested trachea and pale lungs. Vaginal slides were prepared and sent for inspection. Hyoid bone, femur bone and three jars of the viscera (containing pieces of stomach, small intestine, heart, lungs, liver, spleen, kidney as well as separate salt solution sample) were also sent for examination. Importantly, it was noticed that the skull and vertebrae were intact. The vaginal slides, salwar and fiber chappal of the deceased were sent to Forensic Science Laboratory, Sagar (FSL,

A Sagar) for DNA profiling, whereas the sealed container(s) with different parts of the deceased's body were sent to the Medico-legal Institute, Bhopal for chemical testing. Subsequently, the dead body of the deceased was handed over to the family for last rites and statements of some witnesses were recorded under Section 164 of Cr.P.C. before a Judicial Magistrate.

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10. During the course of investigation, blood samples of various suspects were taken for DNA analysis. As part of the first batch, blood samples of Hargovind Kaurav, Nandi alias Anand Vanshkar and Baba alias Ashok Kaurav were taken and sent to FSL, Sagar for DNA matching on 14th June, 2015. Later on 22nd June, 2015 samples of the appellant (Baba alias Ravishankar Vishwakarma), Roopram alias Ruppu Kaurav and Manoj alias Halke Yadav was similarly sent for DNA analysis. After confirmation by the FSL stating that only the DNA extracted from the appellant matched with that on the vaginal slide of the deceased, the appellant was arrested on 20th July, 2015. Charge sheets were filed against him by the investigating agency on 18th September, 2015.

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Trial Court's Analysis:

11. The Trial Court formulated various questions for consideration including determination of the age of the deceased, factum of kidnapping by accused, commission of rape, causing death by throttling and destruction of evidence by dumping the dead body by the appellant.

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12. With a view to bring home the appellant's guilt, the prosecution examined as many as 24 witnesses, whereas none were examined by the appellant in defence. A brief summarisation of the testimonies of important witnesses and evidences has been made hereunder.

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13. P.W.1 (Sukhram Kotwar) who was posted as Gram Kotwar at Baglai, admitted to accompanying the grand father of the deceased (P.W.3) to the police station to lodge a missing report of the deceased. He also found location of the deceased's body and was a witness to seizure of the slipper, panchnama and later to the collection of three blood samples and arrest of the appellant by the police.

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14. P.W. 2 (Shobhabai — mother of the deceased) stated in her deposition that she knew the appellant, for she had borrowed money from his family in the past. She claimed to be living in her parental home in village Chargaon, which was separated by a water channel from her

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matrimonial village of Baglai, since the past few months for treatment of an eye injury. She had returned to her in-laws' house on the morning of 21st May, 2015 with the deceased. When she reached home, the wife and daughter of the accused came and asked her to repay the borrowed money. After some time her daughter (the deceased) told her that she was going to play with her friend Priyanka at her house. The deceased came back from her friend's house and told P.W.2 that she was not feeling good and requested that she be taken back to her maternal uncle's house in Chargaon. At about 3.00 p.m., the witness found that her daughter was not there at their home. Her husband enquired from Priyanka's house but came to know that deceased was not there. P.W.2, thereafter, called her son and sent him to her parental home at Chargaon about 5.00 p.m. Her son came back home and informed that the deceased was not found in Chargaon also. She again sent her son to Chargaon to look out for her properly. It was, however, confirmed that the deceased had not gone to Chargaon and she could not be found anywhere till 6.00 p.m. Thinking that the deceased might have gone to her parental aunt's house in Aadegaon, P.W.2 and her husband slept for the night. The next morning P.W.2 got a telephonic call made to Satyaprakash's sister in Aadegaon but failed to trace the deceased there as well. A search was made on the motorcycle at the houses of various relatives and while P.W.2 was returning to Baglai from her parental home along with her nephew, Dharmendra, she spotted and identified the salwar and slipper of the deceased which were lying on the roadside on the embankment of the water channel separating Baglai from Chargaon. P.W.2 then informed her father-in-law, P.W.3, and then the matter was reported to the Police. The Police thereafter started looking for her daughter and then she got to know that the dead body of her daughter was located inside the well of one Darshan Kaurav. P.W.2 did not suspect anyone at that time. In cross-examination she admitted that she had told the police that one Abhishek alias Pillu of the village used to offer paan masala to the deceased and that police had also gone to Baba alias Ashok's house for his interrogation and for conducting Narco test but he fled the next day from the village.

15. P.W.3 (Purushottam Kaurav) — grandfather of the deceased-victim has deposed regarding lodging of the missing report with the Police and also stated that he identified the dead body of his granddaughter upon recovery from a dry well. He too admitted that a person named

A Baba alias Ashok was called by the Police but he had fled and that some more persons were also interrogated by the Police.

16. P.W.4 (Satyaprakash), the father of the deceased, narrated the efforts put in by him and other relatives for the search of his daughter and how during that search the dead body was found in the dry well
B constructed in the field of Darshan Kaurav.

17. P.W.5 (Sharda) who is well acquainted with the appellant as well as the family of the deceased is also a crucial prosecution witness. He deposed that on the fateful day at about 3.00 p.m. he, along with his wife Aalop Bai, was going on a bicycle when both of them spotted the
C appellant with the deceased who was wearing a black frock and black pant 'near the peepal tree, near the field of Natthu Patel'. He has further stated that his statement was recorded by the Police two days after the incident and that "it is true that the Police had committed assault with me also. It is true that Police had stated that they would arrest the rascal and they committed an assault so I had stated out of nervousness." In
D the very next breath, he, however, denied that the police had assaulted and were forcing him to give false testimony before the Court.

18. P.W.6 (Itta alias Kichchu) has stated that about a year prior to the incident while he had gone to defecate near a reservoir after disposing of some cowdung, he had seen the appellant feeding biscuits to the
E deceased at the water channel near the shrubs. He told this fact to P.W.7 (Nimma Jeeji), who was harvesting sugarcane in the field of one Shatrughn Patel. In his cross-examination, he admitted that his statement was recorded one and a half months' after the incident by the Police.

19. P.W.7 (Nimma Bai) endorsed the statement of P.W.6 to the
F extent that about one year before the occurrence, P.W.6 had told her that the appellant was feeding biscuits to the deceased. She has admitted in her cross-examination that she herself had not seen the appellant feeding biscuits to the deceased.

20. P.W.10 (Kuldeep Kaurav, a teacher in the Government Middle
G School, Chargaon) produced school records to prove that the deceased was admitted in 6th standard on 16th June, 2014 and as per the date of her birth she was hardly 13 years old.

21. P.W.13 (Rajesh Kaurav) who was Patwari, testified that he prepared spot map of the place of incident and that afterwards he took

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signatures of people present in the vicinity and dispatched them to the Station House Officer. In cross-examination, he admitted that details of the well were not mentioned in the spot map, but volunteered that the well was abandoned and had shrubs growing in it and the grass/crops growing outside had hampered the well's visibility from the Baglai-Chargaon road which was situated 20 feet away.

22. P.W.14 (Hargovind Kaurav) was the cousin of the deceased who admitted to seeing the deceased's body in a dry well in a supine position. He stated that the well was not visible from the road and volunteered that he was witness to the appellant's statement(s) before the police and also witnessed seizure of the second slipper from a nearby water channel later.

23. P.W.15 (Prakashchand Mehra) is son of the Kotwar of Chargaon and testified that the spot map and panchnama were prepared before him, blood samples of three suspects (including appellant) were taken in his presence and the missing slipper was seized by the police with him. In cross-examination, however, he admitted that he was not present during interrogation of the appellant by the police.

24. P.W.17 (Sanjay Kumar Nagvanshi) was the Tehsildar at Gadarwara in August, 2015. He stated that he got conducted identification proceedings to match the slipper recovered through the appellant to ensure that it belonged to the deceased. He testified to procuring similar looking black slippers from his staff members and mixing them with the slipper received from the police station. Although both P.W.2 and P.W.3 were called by him, he testified that only P.W.2 came into his office and identified the deceased's slipper correctly.

25. P.W.18 (M.D. Yadav) was posted as Assistant Sub-Inspector at police station Chichli and was the police officer who lodged the missing report on the basis of information given by P.W.3 on the afternoon of 22nd May, 2015. He also testified to seizing the slipper and salwar presented by P.W.2.

26. P.W.19 (C.M. Shukla) was posted as S.H.O. who got prepared spot map and was also present during identification proceedings of the deceased's body. Upon being confronted during cross-examination as to why the time of disappearance was recored as 10.00 p.m. in the Roznamcha, he explained that it was a mistake.

A 27. P.W.21 (Krishnakant Kaurav) was posted as a Gram Rozgar Sahayak in Gram Panchayat Chargaon and testified to witnessing interrogation of the appellant, especially his disclosure of location of the missing slipper and recovery of the same.

28. P.W.22 (Niyazul Khan) was the Inspector who got blood sample
B of the appellant extracted at the Government Hospital, Chichli and prepared seizure memo of sealed vials containing blood of the appellant and two others, and forwarded them to FSL Sagar. The Trial Court refused permission to the Defence Counsel to ask questions relating to the FIR, postmortem report and Roznamcha holding that questions relating to investigation only conducted by the witness could be asked from him.
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29. P.W.23 (D.V.S. Sagar) was posted as Station House Officer at Police Station Chichli and testified to recording memorandum statement of accused in presence of P.W.15 and P.W.20, on which basis he seized the missing black fibre slipper of right leg from near the shrubs under a tree near the spot of incident in Darshan Kaurav's field.
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30. P.W.24 (Rajkumar Dixit) was the Head Constable who seized sealed viscera jars and vaginal slides which were produced by Head Constable Chetram. He admitted to not checking the sealed parcels himself and stated that he safely locked them in a locker at the police station.
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31. Over and above the above-mentioned oral testimonies, we may now refer to the medico-scientific evidence led by the prosecution to connect the appellant with the crime.

32. P.W.8 (Dr. R.R. Chaudhary), a Senior Scientific Officer from
F FSL, Sagar has deposed that on 4th June, 2015 he examined three exhibits; Slide marked as Ex. A , Salwar marked as Ex. B and Chappal marked as Ex. C which belonged to the deceased. In the course of examination, human sperms were found on the slide (Ex. 'A') of the deceased, however, only human blood was found on the salwar (Ex. 'B'). No blood or semen was found on the slipper (Ex. 'C'). The blood group of
G the blood stained on the salwar could not be detected as a lot of dirt was stuck on it.

33. P.W.9 (Dr. C.S. Jain) was posted as Forensic Expert-Analysis at Medico-Legal Institute, Bhopal on 12th June, 2015 when three viscera jars (Exs. 'D', 'E' and 'F') comprising different parts of the body of
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deceased were received with their seals intact. However, when opened these viscera samples were discovered in a condition unfit for examination as the liquid had turned stinky and dusty, and the tissues had decayed. After comparing the postmortem report, evaluation of time and the sequence of the events as also the report of the State Forensic Science Laboratory, P.W.9 opined as follows, which could not be discredited at all in his cross-examination:

> "12. Opinion :- After the analysis of facts described in the documents which have been examined on the basis of my subject knowledge, articles of books and experience gained from the 10984 post mortems conducted by me for continuously more than 33 years I am of the opinion that:-
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> 1. The deceased died due to throttling.
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> 2. Sexual intercourse was performed with the deceased before her death which amounted to rape on considering the age.
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> 3. The deceased was dragged before her death and injuries indicating the struggle were also present.
>
> 4. The slides and salwar of the deceased were kept for D.N.A. examination. I did not know their result up to the preparation of the report otherwise other opinion could also be expressed. It would be appropriate to enclose the said report in the case after obtaining it immediately. If the person/s performing sexual intercourse with the deceased are known then the D.N.A of their sperms should be matched with the D.N.A. of the sperms present in the vaginal slides because if they matched then it would be scientifically confirmed that the sexual intercourse was performed by them. In this regard my report is ExP-11 which is in 5 pages. The A to A part on it bears my signature."

34. P.W.11 (Dr. Pankaj Srivastava) was posted as Scientific Officer at the DNA Unit of FSL, Sagar during the period, 24th June, 2015 to 20th July, 2015 and he submitted the DNA test report which shows that the DNA extracted from the appellant's blood matched with DNA from the vaginal smear slide and salwar of the deceased. It has been specifically been recorded that bodily fluids of the other five suspects were not found present in the source vaginal slide or salwar of the victim. The witness was subjected to an extremely lengthy cross-examination

A but nothing that could distract the conclusion he has drawn in the report referred to above. His opinion is extracted hereunder:

> "1….
>
> 1. Male D.N.A. profile was found on the source vaginal smear slide and salwar of the deceased …...
>
> B
>
> 2. The body fluids of suspect Hargovind Kaurav, suspect Nandi @ Anand and suspect Baba @ Ashok were not found present in the source vaginal slide and salwar of the deceased …...
>
> 3. The body fluids of suspect Roopram and suspect Manoj were not found present in the source vaginal slide and salwar of the deceased ……...
>
> C
>
> 4. The D.N.A. profile matching with that of the suspect Baba @ Ravishankar was found present in the source vaginal slide and salwar of the deceased ……...
>
> D
>
> 2. The opinion given by me in regard to the suspect Hargovind Kaurav, Nandi @ Anand Kaurav and Baba @ Ashok is ExP-15 which is in 3 pages and the A to A part on it bears my signature. The opinion given by me in regard to the suspect Baba @ Ravishankar, Roopram @ Ruppu Kaurav and Manoj @ Halke Yadav is ExP-16 which is in 2 pages and the A to A part on it bears my signature."
>
> E

35. P.W.12 (Dr. Kinshuk Jaiswal), who was posted as Medical Officer at Government Hospital Chichli on 23rd May, 2015, at at 9.00 a.m. conducted postmortem on the dead body of the deceased. She has stated that the putrefaction of the body had started and foul smelling odour was present. She estimated time of death at 48-72 hours before or possibly earlier depending upon environmental conditions. She also found chara (fodder) inside the hair of the deceased and deposed that two vaginal slides of the deceased were sent for examination. What she noticed in the postmortem examination was as follows:

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> "Abrasions present in the whole left portion of the body of the deceased. Extending from lateral aspect of left arm to left forearm 15 cm x 3.5 cm irregular in shape. Left thigh lateral 8 cm x 3 cm. Left leg (lateral) 7.5 cm x 2.5 cm irregular shape. Left buttock 15 cm x 4.5 cm irregular. Neck swollen. Contusions present on anterior aspect of neck both sides. Contusions present over right

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axillary area 5 cm x 2.5 cm over left supraclavicular area (6 cm x 2 cm), left arm (5 cm x 2.5 cm), left scapular area (8 cm x 2.5 cm). Contusion present over right thigh medical aspect (10 cm x 2.5 cm). Perineal area swollen and edematous. Pubic hair absent. Hymen ruptured. Two vaginal slides prepared and send + for biochemical examination. Feaces passed. Contusion present over left foot (dorsally) 3.5 cm x 1.5 cm and contusion present over right palm (palmar aspect) of size 2 cm x 1.5 cm. ….*(sic.)*"

36. P.W.16 (Dr. Kshipra Kaurav) was posted as Medical Officer at Government Hospital, Chichli on 8th July, 2015 when she was asked to take the blood sample of the appellant which she kept in a vial, sealed it and handed it over to the SHO who prepared the seizure memorandum Ex. P-5. She has volunteered in her cross-examination that the blood samples of two more persons were also taken prior to that of the appellant on the same day and that photographs of all the persons whose blood samples were taken were duly attested. She further volunteered that the identification Form Ex. P-9 along with photographs of the appellant were also attested by her.

37. Essentially, this is a case of circumstantial evidence which is supported by occular and medico-scientific evidence. The prosecution has effectively proved that deceased was 'last seen' with the appellant and on earlier occasions too was seen being enticed by the appellant. DNA evidence using the established STR technique has proved that appellant committed sexual intercourse with the deceased. Deceased has been proven to be a minor using school records. Various injuries on her body along with signs of struggle proved that such crime was committed in a barbaric manner. Death has been established as being homicidal and caused by throttling, and has been estimated during the time when the deceased was seen with the appellant. A slipper have been recovered through the appellant which has later been identified as belonging to the deceased, giving finality to the circumstantial chain. The appellant has been unable to offer any alibi and his defence merely rests on deflecting guilt on to the family of the deceased, which is without a shred of evidence. Further, no effective challenge has been made against any medical or DNA reports. There can thus be no second opinion against the guilt of the appellant and his consequential conviction.

38. The findings of kidnapping, rape, resultant death and destruction of evidence have hence been proven beyond reasonable doubt, as

A evidenced by concurrent findings of the Courts below. Even this Court on 10th January, 2018 has confirmed the conviction of the appellant keeping in view the fact that DNA typing carries high probative value for scientific evidence, is often more reliable than ocular evidence. It goes without saying that in (i) ***Pantangi Balarama Venkata Ganesh vs. State of Andhra Pradesh***[2] and (ii) ***Dharam Deo Yadav*** vs. ***State of Uttar Pradesh***[3]**,** this Court has unequivocally held that DNA test, even if not infallible, is nearly an accurate scientific evidence which can be a strong foundation for the findings in a criminal case.

Sentencing :

C 39. The core issue that we are left with to decide is the nature of punishment to be awarded to the appellant. The Trial Court awarded death sentence after drawing a balance-sheet weighing 'mitigating' circumstances against 'aggravating' circumstances. It noted that lack of criminal antecedents and a large number of dependants were outweighed by appellant's mature (40-50) age, heinousness of offence, D adverse reaction of society, pre-planned manner of crime, injuries on body of deceased and lack of regret during trial. The High Court noted that there was bleeding due to sexual intercourse and that there was no possibility of reform owing to the appellant's denial of his crimes. Accordingly, it held that awarding death penalty was justified.

E 40. The question as to why and in what circumstances should the extreme sentence of death be awarded has been pondered upon by this Court since many a decades. The Constitution Bench of this Court in ***Bachan Singh vs. State of Punjab***[4] evolved the principle of life imprisonment as the 'rule' and death penalty as an 'exception'. It further F mandated consideration of the probability of reform or rehabilitation of the criminal. It, thus, formed the genesis of the 'rarest of the rare' doctrine for awarding the sentence of death.

41. This was further developed in ***Machhi Singh and others vs. State of Punjab***[5] where this Court held that as part of the 'rarest of G rare' test, the Court should address itself as to whether; (i) there is something uncommon about the crime which renders sentence of

[2] (2009) 14 SCC 607
[3] (2014) 5 SCC 509
[4] (1980) 2 SCC 684
H [5] (1983) 3 SCC 470

imprisonment for life inadequate and calls for a death sentence; (ii) the circumstances are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender. Further, this Court ruled that :

> "(*i*) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
>
> (*ii*) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
>
> (*iii*) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
>
> (*iv*) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

42. There have been an umpteen number of judgments where this Court has steadily restricted the circumstances for award of death penalty and has increased the burden of showing special reasons before mandating death penalty, as mandated under Section 354(3) of the Cr.P.C.

43. This exercise of drawing a balance sheet of aggravating and mitigating circumstances whilst keeping in mind the peculiarity of facts and circumstances of each case has nevertheless been very tedious. It has resulted in a lack of unanimity of standard amongst different Benches resulting in differential standards for award of capital punishment.

44. Many protagonists of abolishment of death penalty have been passionately urging this Court to not award death in cases of circumstantial proof claiming an inherent weakness in cases without ocular evidence. They highlight an ever-remaining possibility of reform and rehabilitation

A and ask this Court to be cognizant of social, economic and educational conditions of the accused.

45. Simultaneously, however, a parallel line of thought has strongly advocated that death be imposed to maintain proportionality of sentencing and to further the therories of deterence effect and societal retribution. B These people contend that sentencing should be society-centric instead of being judge-centric and make use of a cost-benefit analysis to contend that the miniscule possibility of putting to death an innocent man is more than justified in the face of the alternative of endangering the life of many more by setting a convict free after spending 14-20 years in imprisonment. This possibility, they further state, is already well C safeguarded against by a 'beyond reasonable doubt' standard at the stage of conviction.

46. Ostensibly to tackle such a conundrum between awarding death or mere 14-20 years of imprisonment, in ***Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka[6],*** a three-Judge D Bench of this Court evolved a hybrid special category of sentence and ruled that the Court could commute the death sentence and substitue it with life imprisonment with the direction that the convict would not be released from prison for the rest of his life. After acknowledging that "the truth of the matter is that the question of death penalty is not free E from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the Judges constituting the Bench", this Court went on to hold as follows:

> "92. The matter may be looked at from a slightly different angle. F The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh *or it may be highly disproportionately inadequate*. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare G category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term

H [6] (2008) 13 SCC 767

of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898] besides being in accord with the modern trends in penology.

94. In the light of the discussions made above we are clearly of the view that there is a good and strong basis for the Court to substitute a death sentence by life imprisonment or by a term in excess of fourteen years and further to direct that the convict must not be released from the prison for the rest of his life or for the actual term as specified in the order, as the case may be."

47. The special sentencing theory evolved in ***Swamy Shraddananda (supra)*** has got the seal of approval of the Constitution Bench of this Court in ***Union of India vs. Sriharan alias Murugan and others***[7]**,** laying down as follows:

"**105.** We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in

[7] (2016) 7 SCC 1

A this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty, can be exercised only by the High Court and the Supreme Court and not by any other inferior court.

B 106. Viewed in that respect, we state that the ratio laid down in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] that a special category of sentence; instead of death; for a term exceeding 14 years and put that category beyond application of remission is well founded and we answer the said question in the C affirmative. We are, therefore, not in agreement with the opinion expressed by this Court in *Sangeet* v. *State of Haryana* [*Sangeet* v. *State of Haryana*, (2013) 2 SCC 452 : (2013) 2 SCC (Cri) 611] that the deprival of remission power of the appropriate Government by awarding sentences of 20 or 25 years or without any remission as not permissible is not in consonance with the law and we D specifically overrule the same."

48. Regardless of the suggestive middle path this Court has, when the occasion demanded, confirmed death sentences in many horrenduous, barberic and superlative crimes especially which involve kidnapping, rape and cold blooded murder of tender age children.

E 49. In ***Mukesh and another vs. State (NCT of Delhi) and others***[8]***,*** faced with an instance of gang rape and brutal murder, this Court found that aggravating circumstances like diabolic nature of the crime, brazenness and coldness with which such acts were committed and the inhuman extent to which the accused could go to satisfy their lust, would F outweigh mitigating circumstances.

50. In ***Vasanta Sampat Dupare vs. State of Maharashtra***[9]***,*** a little child was raped and brutally murdered. The death penalty was confirmed by this Court. Thereafter, a review petition was heard in open court and the death penalty was reconfirmed regardless of the convict G having completed a bachelors preparatory programme, having kept an unblemished jail record and acquiring some other reformative qualifications during the course of trial. This Court was of the view that the extreme depravity and barberic manner in which the crime was

[8] (2017) 6 SCC 1

H [9] (2017) 6 SCC 631

committed and the fact that the victim was a helpless child of 4 years clearly outweighed the mitigating circumstances in that case.

51. In ***Khushwinder Singh vs. State of Punjab***[10]**,** this Court affirmed the death sentence of the accused who had killed six innocent persons including two minors by kidnapping, drugging them with sleeping pills and then pushing them into a canal.

52. In ***Manoharan Vs. Inspector of Police***[11]**,** a three-Judge Bench (by majority) affirmed the death sentence of the accused who along with his co-accused was found guilty of gangraping a 10 years' old minor girl and committing her brutal murder along with her 7 years' old brother by throwing them into a canal and causing their death by drowning.

53. Equally, there are several other instances including the recent instance in ***Rajindra Pralhadrao Wasnik v. State of Maharashtra in Review Petition(Crl.) Nos. 306-307/2013*** where this Court commuted death sentence even in the case of rape and murder of tender age children like 3-4 year olds after taking notice of the peculiar facts and circumstances of that case as well as the factor that the convictions were founded upon circumstancial evidence and though DNA Test was held but its report was withheld and not produced by the prosecution for the reasons best known to it.

54. On a detailed examination of precedents, it appears to us that it would be totally imprudent to lay down an absolute principle of law that no death sentence can be awarded in a case where conviction is based on circumstantial evidence. Such a standard would be ripe for abuse by seasoned criminals who always make sure to destroy direct evidence. Further in many cases of rape and murder of children, the victims owing to their tender age can put up no resistence. In such cases it is extremely likely that there would be no ocular evidence. It cannot, therefore, be said that in every such case nothwthstanding that the prosecution has proved the case beyond reasonable doubt, the Court must not award capital punishment for the mere reason that the offender has not been seen committing the crime by an eye-witness. Such a reasoning, if applied uniformally and mechanically will have devastating effects on the society which is a dominant stakeholder in the administration of our criminal justice system.

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[10] (2019) 4 SCC 415

[11] (2019) SCConline SC 951

A 55. Further, another nascent evolution in the theory of death sentencing can be distilled. This Court has increasingly become cognizant of 'residual doubt' in many recent cases which effectively create a higher standard of proof over and above the 'beyond reasonable doubt' standard used at the stage of conviction, as a safeguard against routine capital sentencing, keeping in mind the irreversibility of death.

B 56. In ***Rameshbhai Chandubhai Rathod vs. State of Gujarat***,[12] this Court noted that reliance on merely 'plausible' evidences to prove a circumstantial chain and award death penalty would be "*in defiance of any reasoning which brings a case within the category of the "rarest of rare cases"."* Further, various discrepancies in other important links C in the circumstantial chain as well as lack of any cogent reason by the High Court for not accepting the retraction of the confession statement of the accused was noted. Acting upon such various gaps in the prosecution evidence as well as in light of other mitigating circumstances, like the possibility that there were others involved in the crime, this Court refused to confirm the sentence of death despite upholding conviction.

D 57. Such imposition of a higher standard of proof for purposes of death sentencing over and above 'beyond reasonable doubt' necessary for criminal conviction is similar to the "residual doubt" metric adopted by this Court in ***Ashok Debbarma vs. State of Tripura***[13] wherein it was noted that:

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> **"*in our criminal justice system, for recording guilt of the accused, it is not necessary that the prosecution should prove the case with absolute or mathematical certainty, but only beyond reasonable doubt. Criminal Courts, while examining whether any doubt is beyond reasonable doubt, may carry in*** F ***their mind, some "residual doubt", even though the Courts are convinced of the accused persons' guilt beyond reasonable doubt.*"**

58. ***Ashok Debbarma (supra)*** drew a distinction between a 'residual doubt', which is any remaining or lingering doubt about the G defendant's guilt which might remain at the sentencing stage despite satisfaction of the 'beyond a reasonable doubt' standard during conviction, and reasonable doubts which as defined in ***Krishan v. State***[14] are "actual

[12] (2011) 2 SCC 764
[13] (2014) 4 SCC 747
H [14] (2003) 7 SCC 56

and substantive, and not merely imaginary, trivial or merely possible". These 'residual doubts' although not relevant for conviction, would tilt towards mitigating circumstance to be taken note of whilst considering whether the case falls under the 'rarest of rare' category.

59. This theory is also recognised in other jurisdictions like the United States, where some state courts like the Supreme Court of Tennessey in ***State vs. McKinney***[15] have explained that residual doubt of guilt is a valid non-statutory mitigating circumstance during the sentencing stage and have allowed for new evidence during sentencing proceedings related to defendant's character, background history, physical condition etc.

60. The above cited principles have been minutely observed by us, taking into consideration the peculiar facts and circumstances of the case in hand. At the outset, we would highlight that the High Court while confirming death has observed that the girl was found bleeding due to forcible sexual intercourse — which fact, however, is not supported by medical evidence. However, such erroneous finding has no impact on conviction under Section 376A of the I.P.C. for a bare perusal of the section shows that only the factum of death of the victim during the offence of rape is required, and such death need not be with any guilty intention or be a natural consequence of the act of rape only. It is worded broadly enough to include death by any act committed by the accused if done contemporaneously with the crime of rape. Any other interpretation would defeat the object of ensuring safety of women and would perpetuate the earlier loophole of the rapists claiming lack of intention to cause death to seek a reduced charge under Section 304 of I.P.C. as noted in the ***Report of the Committee on Amendments to Criminal Law,*** headed by Justice J.S. Verma, former Chief Justice of India:

> "22. While we believe that enhanced penalties in a substantial number of sexual assault cases can be adjudged on the basis of the law laid down in the aforesaid cases, certain situations warrant a specific treatment. We believe that where the offence of sexual assault, particularly 'gang rapes', is accompanied by such brutality and violence that it leads to death or a Persistent Vegetative State (or 'PVS' in medical terminology), punishment must be severe – with the minimum punishment being life imprisonment. While we

[15] 74 S.W.3d 291 (Tenn. 2002)

A appreciate the argument that where such offences result in death, the case may also be tried under Section 302 of the IPC as a 'rarest of the rare' case, we must acknowledge that many such cases may actually fall within the ambit of Section 304 (Part II) since the 'intention to kill' may often not be established. In the B case of violence resulting in Persistent Vegetative State is concerned, we are reminded of the moving story of Aruna Shanbagh, the young nurse who was brutally raped and lived the rest of her life (i.e. almost 36 years) in a Persistent Vegetative State.

C 23. In our opinion, such situations must be treated differently because the concerted effort to rape and to inflict violence may disclose an intention deserving an enhanced punishment. We have therefore recommended that a specific provision, namely, Section 376 (3) should be inserted in the Indian Penal Code to deal with the offence of "rape followed by death or resulting in a Persistent D Vegetative State"."

61. In the present case, there are some residual doubts in our mind. A crucial witness for constructing the last seen theory, P.W.5 is partly inconsistent in cross-examination and quickly jumps from one statement to the other. Two other witnesses, P.W.6 and P.W.7 had seen E the appellant feeding biscuits to the deceased one year before the incident and their long delay in reporting the same fails to inspire confidence. The mother of the deceased has deposed that the wife and daughter of the appellant came to her house and demanded the return of the money which she had borrowed from them but failed to mention that she F suspected the appellant of commiting the crime initially. Ligature marks on the neck evidencing throttling were noted by P.W.20 and P.W.12 and in the postmortem report, but find no mention in the panchnama prepared by the police. Viscera samples sent for chemical testing were spoilt and hence remained unexamined. Although nails' scrappings of the accused were collected, no report has been produced to show that DNA of the G deceased was present. Another initial suspect, Baba alias Ashok Kaurav absconded during investigation, hence, gave rise to the possibility of involvment of more than one person. All these factors of course have no impact in formation of the chain of evidence and are wholly insufficient to create reasonable doubt to earn acquittal.

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62. We are cognizant of the fact that use of such 'residual doubt' as a mitigating factor would effectively raise the standard of proof for imposing the death sentence, the benefit of which would be availed of not by the innocent only. However, it would be a misconception to make a cost-benefit comparison between cost to society owing to acquittal of one guilty versus loss of life of a perceived innocent. This is because the alternative to death does not necessarily imply setting the convict free.

63. As noted by the United States Supreme Court in ***Herrera v. Collins***,[16] "*it is an unalterable fact that our judicial system, like the human beings who administer it, is fallible*." However, death being irrevocable, there lies a greater degree of responsibility on the Court for an indepth scruitiny of the entire material on record. Still further, qualitatively, the penalty imposed by awarding death is much different than in incarceration, both for the convict and for the state. Hence, a corresponding distinction in requisite standards of proof by taking note of 'residual doubt' during sentencing would not be unwarranted.

64. We are thus of the considered view that the present case falls short of the 'rarest of rare' cases where the death sentence alone deserves to be awarded to the appellant. It appears to us in the light of all the cumulative circumstances that the cause of justice will be effectively served by invoking the concept of special sentencing theory as evolved by this Court in ***Swamy Shraddananda (supra)*** and approved in ***Sriharan case*** (supra).

65. For the reasons aforesaid, the appeal is allowed in part to the extent that the death penalty as awarded by the courts below is set aside and is substituted with the imprisonment for life with a direction that no remission shall be granted to the appellant and he shall remain in prison for the rest of his life.

Devika Gujral Appeals partly allowed.

[16] 506 U.S. 390 (1993)