2024 INSC 987

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL Nos. _________ of 2024
(@ Special Leave Petition (Crl.) Nos. 9015-9016 of 2019)

SAMBHUBHAI RAISANGBHAI PADHIYAR — APPELLANT(s)

VERSUS

STATE OF GUJARAT — RESPONDENT(s)

WITH

Special Leave Petition (Crl.) No. 9162/2021

J U D G M E N T

K.V. Viswanathan, J.

Criminal Appeal Nos. _________ of 2024
(@ Special Leave Petition (Crl.) Nos. 9015-9016 of 2019)

1. Leave granted.

2. Wednesday, 13th April 2016 dawned normally for the family of Pravingiri Gosai (PW-9), a farmer, who also alternated as the temple priest at Piludara village under the Vedaj Police Station, Bharuch District in the State of Gujarat. However, by dusk the situation had turned macabre for them, when their four-year old child was found murdered in the village outskirts.

3. The appellant herein stood trial for the offences of kidnapping, sexual assault and murder of the said child and was convicted and sentenced to death by the Trial Court. The High Court of Gujarat at Ahmedabad, by the judgment dated 03.04.2019 in R/Criminal Confirmation Case No. 2 of 2018 with R/Criminal Appeal No. 1207 of 2018, confirmed the conviction and sentence of death imposed on him for the offences punishable under Sections 302, 364, and 377 of the Indian Penal Code (for short 'IPC') and Sections 4 and 6 of the Protection of Children from Sexual offences Act, 2012 (for

short ‘POCSO Act’). The appellant is before us in appeal by way of special leave.

Brief Facts:

4. Pravingiri Gosai (PW-9) and his wife Artiben (PW-13.2) left their house at 06:00 a.m. in the morning of 13.04.2016 to get fodder for their cattle leaving their two small children Rohit @ Shital, aged about four years, the deceased and Rajeshwari, aged three months, along with PW-9’s mother at home. When they returned at 11.00 a.m., PW-9’s mother and children were at home. PW-9 left again to install a Dish TV in the village and returned at around 1 O’clock. He noticed that Rohit was not at home and when he inquired from his wife Arti, she replied that Rohit was playing near the temple and had not been seen since long. The desperate father continued his inquiries when PW-10 Jyotsnaben, his sister-in-law, who lived in the neighborhood told him that when Rohit was playing near the temple about 12:30 PM, the appellant who belonged to their village took the deceased and when she inquired from the appellant as to where

he was taking the deceased, the appellant in spite of being dissuaded from doing so, told her that he will buy the child ice-cream and return in a while.

5. Since Rohit had not returned, PW-9 continued his search in the village when he met the appellant under a jamun tree behind the Pir Dargah at the bank of the lake at about 2 O'clock. When PW-9 inquired about his son with the appellant, the appellant told him that he gave the deceased ice-cream to eat and sent him home. PW-9 went home and when Rohit was not there, he came back to the lake, the appellant was not found. PW-13.2 Artiben, the mother of the deceased also carried out the search carried out and after receiving information from PW-11 Manoj Kumar Parmar that the deceased was taken by the appellant, she along with her sister-in-law PW-10, and daughter went to the appellant's house. The appellant's mother was there and the appellant was not there. They left a message with the appellant's mother that the appellant may be told to send their son (deceased) back home.

6. PW-9 continued his inquiries and search when he received a call from Manoj Kumar Parmar (PW-11) who asked PW-9 to come to the bank of the lake behind the Pir Dargah. When PW-9 reached the spot, he found the dead body of his son lying naked near the bushes.

7. PW-9 lodged a complaint around 06:45 at the Vedaj Police Station which resulted in registration of an FIR and the subsequent proceedings. After the inquest, the body of the deceased was sent for postmortem to BKS Medical College Vadodara. The postmortem report reveals that death was due to asphyxia due to throttling. A number of injuries were found on the body of the deceased which are as follows:

> "The following injuries were observed during the external examination of the dead body.
>
> (1) Multiple scratch abrasions of size varying from 0.1 cm x 0.5 cm to 1.5 cm x 0.1 cm with underlying contusions of size varying from 1 cm x 1 cm to 2.5 cm x 2 cm present over perianal region. Perianal skin swollen, reddish in colour. Anal orifice dilated, roomy diameter of anal orifice is 2.5 cm. Part of rectum protruded out through anal orifice.

(2) A bite mark in form of pressure abrasion of size 4 cm x 3.5 cm present over right cheek, 3 cm above right angle of mandible and 4 cm right to midline.

(3) Multiple laceration of size varying from 0.5 cm x 0.2 cm to 1 cm x 0.2 cm x tissue deep with underlying contusions of size varying from 1 cm x 0.5 cm to 1.5 cm x 1 cm present over inner aspects of both lips.

(4) Multiple crescentic shaped abrasions of size varying from 0.5 cm x 0.1 cm to 1.2 cm x 0.1 cm in an area of 5 cm x 3 cm present over left side of neck, 3.5 cm left to midline and 2 cm below chin.

(5) Two abrasions of size 1.5 cm x 0.5 cm and 0.5 cm x 0.2 cm present over right side of the neck, 1.5 cm below chin and 2 cm, 3 cm right to midline respectively.

(6) Multiple scratch abrasions of size varying from 8.5 cm x 0.5 cm to 2.5 cm x 0.5 cm present in an area of 20 cm x 9 cm, over back of right thigh.

Note: All abrasions and contusions are reddish in colour. Margins of all lacerated wounds are irregular and contused with red clotted blood over it.

All of the above mentioned injuries were antemortem in origin."

It will be clear from the above that the deceased was also subjected to penetrative sexual assault through the anus. PW-8 Dr. Kalpesh Kumar who led the postmortem team has

categorically opined that the cause of death was asphyxia due to throttling. In view of this, there is no iota of doubt that the deceased had a homicidal death. The only question that arises is as to whether there is any evidence against the appellant to convict him for the offences charged.

8. The appellant was arrested (at about 20:45 hrs. to 21:26 hrs.) on 14.04.2016 and his medical examination revealed that there were injury marks on his genitals as spoken to by PW-7 Dr. Kamlesh Kumar.

9. The prosecution attempts to rely on the discovery panchnama (Exh.18) to reinforce their case that it was pursuant to the appellant’s statement that the place of occurrence was discovered. PW-4 Bharat Kumar and PW-5 Arjun Sinh were examined in support of the said purported discovery panchnama. This document, however, is seriously disputed by the defence. According to the defence, the panchnama (Exh.9) of the place of the occurrence was already drawn on 14.04.2016

between 16:00 hrs and 18:30 hrs and by the time the discovery panchnama (Exh.18) was drawn at around 09:00 a.m. on 15.04.2016, the place of occurrence was already known to the prosecution.

10. It is also the case of the prosecution that as part of the same transaction when the place of occurrence was discovered and after the said panchnama was drawn at around 09:00 a.m. on 15.04.2016, the accused voluntarily expressed willingness to show the place where he had thrown the clothes of the victim and in pursuance thereof the recovery panchnama (Exh.21) was drawn up between 09:15 hours and 09:45 hrs on 15.04.2016 and a light pink coloured Tshirt and a red coloured leggings were recovered The prosecution has examined PW-6 Maheshbhai in support of the recoveries. The defence has strongly objected to the admissibility of the recoveries on the ground that no statement of the accused was recorded on this aspect and that what is available is merely a purported recovery carried out. We have considered this aspect in the later part of

the judgment coupled with the applicability of Section 8 of the Evidence Act to see if the conduct of the accused in leading to the place where the clothes of the deceased were found would be admissible in evidence.

11. We have heard Ms. Uttara Babbar, learned senior counsel for the appellant, appearing pro bono, who presented the case comprehensively and filed detailed written submissions. We have also heard Ms. Swati Ghildiyal, learned counsel for the State who in ably advancing the State's case, left no stone unturned in countering the submissions of the learned senior counsel for the appellant. Detailed written submissions were also filed by her. We have perused the records including the records of the trial court.

12. The case rests on circumstantial evidence. We are conscious of the five golden principles repeatedly reiterated by this Court which are to be borne in mind in cases involved with circumstantial evidence. In the leading case of ***Sharad***

Birdhichand Sarda vs State of Maharashtra, (1984) 4 SCC 116, it was held as under:-

> **"153**. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:
>
> "(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 Crl LJ 1783] where the observations were made:
>
> "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may be' and 'must be' is long and divides vague conjectures from sure conclusions."
>
> (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,
>
> (3) the circumstances should be of a conclusive nature and tendency,

> (4) they should exclude every possible hypothesis except the one to be proved, and
>
> (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."

Approaching the case at hand with the above principles in mind, we find the following.

<u>Circumstance No. 1: The appellant last seen with the deceased</u>

13. It is the consistent case of the prosecution that the deceased child Rohit @ Shital was barely four years old and was playing near his house when the accused took him from there under the pretext of getting him ice-cream. PW-10 Jyotsnaben, who was the aunt of the deceased and who lived nearby, clearly deposed that on the day of the incident when she was cooking near the front side of the house, the appellant came to her and asked for water. Thereafter, while leaving, the

accused took the victim. When she asked the appellant where he was taking the victim, the appellant replied that he was taking the victim to get ice-cream and he will send him after that. When PW-10 told him not to do so, the appellant stated that he would send him back after getting the child ice-cream, and so saying took the child with him.

14. It is undisputed that the family of the deceased knew the appellant and his family. PW-10 further deposed that when after a long time the deceased did not return, she informed the same to her sister-in-law PW-13.2 Artiben. PW-10 maintained her narration in the cross where it also emerges that she searched for child at the ice-cream shop of Kabo and Yogesh in the village and was told that the victim had not been there.

15. The deposition of PW-10 Jyotsnaben is fully corroborated by the evidence given by PW-11 Manoj Kumar. PW-11 states that he was running a garment shop at Piludara village; that on the day of the incident, the appellant Shambhu passed by his

shop at about 12 O'clock; that Pravingiri's son was with the appellant; that on being asked the appellant informed that he was going to the shop of Kaliya to get ice-cream. PW-11 also stated that when the appellant was passing by the shop along with victim, PW-12 Somabhai Ranchhodbhai, Ranjitbhai Fatesang and Raysangbhai Manorbhai were also present. The defence contends that PW-12 did not support the case of the prosecution and was declared hostile. This aspect of the matter does not detract from the clinching evidence of the evidence of aunt of the deceased - PW-10 Jyotsnaben which we find very natural or the evidence of PW-11 Manoj Kumar who had no reason to falsely depose to the said fact. The only suggestion given to PW-11 is that he was deposing because he was friend of the father of the deceased. We are not persuaded to discredit the testimony of PW-11 on this score.

16. Apart from PW-10 and PW-11, PW-13.1 Sursangbhai also speaks about the appellant taking the deceased and the appellant stating that he was going to get the child ice-cream. PW-13.1

states that thereafter he went inside the house and left for the farm. It was strongly contended by the defence that in the cross-examination, he had deposed that he had not seen the appellant passing by the shop along with the deceased. The portion of the cross-examination has to be read in the context of the earlier statements occurring therein. They are as follows:

> "It is not true that Manojbhai's shop is located at the distance of half kilometer from my house. It is true that Manojbhai's shop is in the market it is true that Manojbhai runs business of ice cream and other goods. Kaliya's shop is located in the other market. I had reached Manojbhai's shop at about 1 o'clock. It is true that the market was open and there was movement of people. It is true that I had not seen Shambhu passing by the shop along with the son of Pravin. Pravin bhai Maharaj is my friend. I do not know his family members."

It will be seen that PW-13.1 states that he reached Manojbhai's shop at about 1 O'clock and that market was open and there was movement of people and thereafter the statement occurs that he had not seen appellant passing by along with the son of Pravingiri. Mrs. Swati Ghildiyal, learned counsel for the State,

in her written submissions, has furnished the portion as in Gujarati which was also read to us and translated at the time of the oral hearing. According to the learned counsel for the State, the particular sentence only meant that PW-13.1, did not see the appellant leaving or going away from the shop and that this was only because he had gone into his house prior to that. We are inclined to accept the meaning as it comes out from the Gujarati version. The small discrepancies insofar as the timings are concerned are only natural as the witnesses were deposing nearly two years after the incident. They are not material discrepancies.

17. Hence, it is undisputed that between 12:00 and 01:00 PM, the appellant went to the neighborhood of the house of the deceased and partook water from the aunt PW-10, engaged in a conversation with her and in spite of being dissuaded, took the deceased child under the pretext of buying him ice-cream. The time lag between the accused being last seen and the sighting of the dead body lying is also extremely short. PW-11 Manoj

Kumar states that at about 5 O'clock in the evening when they were searching for the victim and when they were near the boundary wall of the lake near the Dargah, some persons informed them that a dead body was lying in the acacia bushes behind the Dargah.

18. The incident has clearly occurred between 12:00 noon and 05:00 PM on 13.04.2016. The timing is also corroborated by the doctor PW-8 who did the postmortem on 14.04.2016 between 03:35 PM and 04:45 PM and he further deposed that death would have occurred 24 to 36 hours before the postmortem. There are some important aspects which require to be noticed here and that is what brings out the clinching nature of the case against the appellant.

19. The deceased, aged between three and a half and four years, was a small child, just out of toddlerhood and at the pre-school stage. This is very significant because when the appellant has from the neighborhood of the house of the

deceased taken the deceased one would expect that the small child would be brought back and dropped at the house. The appellant offered no explanation as to what happened after the time he spent with the child and has no case that he handed over the child to any other person or that he dropped the child home. Unlike in the case of grownups, where an explanation about the manner of parting company could in a given case be acceptable in the case of a small child who has been picked up from neighborhood of his house, it would be normal to expect that the small child would be dropped back home or an explanation about entrusting of the child to another person to be safely taken home is given. The appellant's lack of explanation is to say the least baffling.

20. According to PW-9 the father of the deceased, when he went in search of the child for the second time to the area where PW-11 had told him about the appellant having proceeded with child, PW-9 actually met with the appellant and asked about the deceased. The appellant on asking told PW-9 that he gave ice-

cream to the deceased and sent him. This statement in the deposition is also mentioned at the earliest point in the First Information Report lodged on 13.04.2016 at about 07:30 PM in the evening.

21. It is well settled that if the accused is last seen with the deceased and particularly in a case of this nature when the time gap between the last seen stage and occurrence of death is so short, the accused must offer a plausible explanation as to how he parted company with the deceased and the explanation offered must be satisfactory. Section 106 of the Evidence Act mandates that when any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. It is on this principle that this Court has repeatedly held that if an accused fails to offer an explanation, he fails to discharge the burden cast upon him under Section 106 and if he fails to offer a reasonable explanation that itself provides an additional link in the chain of circumstances [See ***State of Rajasthan Vs. Kashiram*** (2006) 12 SCC 254 and ***Pappu Vs. State of UP*** (2022) 10 SCC 321].

Circumstance No. 2: Found in the vicinity of the scene of crime at about the time of crime:

22. Both in the First Information Report and in the evidence, PW-9 speaks about his going to the lake. It is not in dispute that it was this place, viz, near the boundary wall of the lake behind the Dargah of Pir in the acacia bushes, the body of the deceased was found naked at around 5 O'clock on 13.04.2016. The presence of the accused at the scene of crime in the afternoon at about 2 O'clock in the background of the evidence of last seen of PW-10, 11 and 13.2, is a clear link in the chain of circumstances which point to the guilt of the accused. If one couples this fact with the fact that he was not at home around the time when PW-10 Jyotsnaben and PW13.2 Artiben, the mother visited the house of the appellant, it reinforces the evidence of PW-9 that in the afternoon, on the date of crime, the appellant was at the place of the crime and the deceased who was taken from the house was not with him at that moment.

Circumstance No. 3: Injury on the private parts of the accused

23. PW-7, Dr. Kamlesh Kumar who examined the accused on 15.04.2016 deposed that there was injury on the genitals of the accused. Exh.P-27 certificate also reveals that there were abrasions on the prepuce of the accused. It will be seen from the injuries on the deceased as reflected in the evidence of PW-8 Dr. Kalpesh and the postmortem report Exh. P.28 that the perianal region of the deceased had multiple scratch abrasions with the underlying contusions; that the perianal skin was swollen and reddish in colour; the anal orifice dilated, roomy and that part of the rectum protruded out through the anal orifice. The doctor has also opined that these injuries were antemortem in origin. The abrasions in the prepuce of the accused were there even two days after the incident. The only suggestion in the cross-examination to the doctor raised that if a person scratches the genitals a lot, signs of contusions could be observed. No other explanation is offered. Considering the

overall facts, we are inclined to accept this circumstance as an additional link in the chain of circumstances.

<u>Circumstance No. 4: Conduct under Section 8 of the Evidence Act:</u>

24. Irrespective of the admissibility of the discovery, panchnama (Exh.18) and the recovery panchnama Exh. 21 and irrespective of the admissibility of the recovery of the clothes of the deceased on the statement of the accused, we find that the conduct of the appellant in leading the investigation team and the panchas and pointing out where the apparel of the deceased was hidden would be admissible. In this case PW-17, the Investigating Officer has clearly deposed that the accused showed willingness to show the place where he had thrown the clothes. PW-17, his team and the panchas reached by walking to the place as indicated by the accused. This Court in ***A.N. Venkatesh and another*** v. ***State of Karnataka (2005) 7 SCC***

714 relying on ***Prakash Chand v. State (Delhi Admn.), (1949) 3 SCC 90*** held as under:

> "9. By virtue of Section 8 of the Evidence Act, the conduct of the accused person is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact. The evidence of the circumstance, simpliciter, that the accused pointed out to the police officer, the place where the dead body of the kidnapped boy was found and on their pointing out the body was exhumed, would be admissible as conduct under Section 8 irrespective of the fact whether the statement made by the accused contemporaneously with or antecedent to such conduct falls within the purview of Section 27 or not as held by this Court in *Prakash Chand* v. *State (Delhi Admn.)* [(1979) 3 SCC 90 : 1979 SCC (Cri) 656 : AIR 1979 SC 400] . Even if we hold that the disclosure statement made by the accused-appellants (Exts. P-15 and P-16) is not admissible under Section 27 of the Evidence Act, still it is relevant under Section 8. The evidence of the investigating officer and PWs 1, 2, 7 and PW 4 the spot mahazar witness that the accused had taken them to the spot and pointed out the place where the dead body was buried, is an admissible piece of evidence under Section 8 as the conduct of the accused. Presence of A-1 and A-2 at a place where ransom demand was to be fulfilled and their action of fleeing on spotting the police party is a relevant circumstance and are admissible under Section 8 of the Evidence Act."

We take this as an additional link in the chain of circumstances.

Circumstance No. 5: Matching of Blood Group

25. Blood group on the clothes of the deceased tallied with the blood group of the accused as per Exh.50, the Serological Analysis Report. PW-9 the father of the deceased identified the clothes worn by the deceased on the fateful day. PW-17 the Investigating Officer Gajendra Kumar has clearly deposed that the apparel of the deceased was recovered near the situs of the crime. PW-7 Dr. Kamlesh Kumar who medically examined the appellant deposed that samples of pubic hair, blood, saliva, semen and nails were obtained of the accused and he further deposed that the samples were sealed and the Muddamal was sent for further investigation through police constable to FSL, Surat. Coming back to PW-17, he deposed about receiving the sealed samples and keeping it in safe custody. Thereafter, he deposed that a forwarding note was prepared for analysis of the aforementioned Muddamal and the sealed samples to FSL,

Surat and that a constable was deputed to submit the same to FSL, Surat. The receipt obtained was duly filed. The Biological and Serological Reports received from FSL, Surat were marked as Exh.49 and Exh.50 respectively. The Serological analysis clearly showed that the small trouser (leggings), the anal swab (semen) and the perianal swab (semen) had blood of group O. The accused had also blood group O. We are satisfied with the chain of custody as emerging from the evidence. The defence has a case that sample mark H mentioned in Exh.47 which is the forwarding letter to the forensic science laboratory has neither been analyzed in the biological analysis Exh.49 or in the serological analysis Exh.50 and hence tampering cannot be ruled out. The State has countered the submission by contending that sample mark 'H' in Exh.47 is a Khaki cover and is not an item recovered from the accused and as such the State counsel contends that in all likelihood sample mark H was a cover in which all other samples were put. The matching of the blood group has occurred in sample F1 which is the anal

swab (semen) and F2 perianal swab (semen). The blood group of the aforesaid semen was found to be O. It should be noted that the sample of semen of appellant along with blood and saliva in sample no. G1 to G4 also had blood group O. The judgment in ***Prakash*** Vs. ***State of Karnataka*** (2014) 12 SCC 133 cited by the appellant also does not advance the case of the defence. It is clear from the facts of the case, that the blood sample therein was decomposed and its original grouping could not be determined. In any event, coupled with other circumstances indicated hereinabove, we are inclined to consider the matching of blood group as an additional link in the chain as far as the facts of this case is concerned.

26. The argument of Ms. Uttara Babbar, learned senior counsel is that no DNA test was carried out. No doubt, the DNA test was not carried out and it would have been better for the prosecution to have done the same. However, keeping the overall conspectus of the case in mind, we do not think that not conducting DNA test was fatal to the prosecution. We draw

support from the judgment of this Court in ***Veerendra v. State of Madhya Pradesh, (2022) 8 SCC 668,*** wherein it was held as under:

> "**53.** In view of the nature of the provision under Section 53-ACrPC and the decisions referred to, we are also of the considered view that the lapse or omission (purposeful or otherwise) to carry out DNA profiling, by itself, cannot be permitted to decide the fate of a trial for the offence of rape especially, when it is combined with the commission of the offence of murder as in case of acquittal only on account of such a flaw or defect in the investigation the cause of criminal justice would become the victim. The upshot of this discussion is that even if such a flaw had occurred in the investigation in a given case, the court has still a duty to consider whether the materials and evidence available on record before it, are enough and cogent to prove the case of the prosecution. In a case which rests on circumstantial evidence, the Court has to consider whether, despite such a lapse, the various links in the chain of circumstances form a complete chain pointing to the guilt of the accused alone in exclusion of all hypothesis of innocence in his favour."

27. In view of the circumstances elucidated above, we do not feel the need to comment upon the admissibility of the discovery panchnama Exh.P.18 and the recovery panchnama Exh.P.21. Even

eschewing the aspect of discovery under Section 27, we have found that other circumstantial evidence does exist pointing to the guilt of the appellant.

Presumption under the POCSO Act

28. It is clearly established in evidence that the deceased was subjected to a brutal sexual assault. The injuries as evidenced in the postmortem report Exh.P.28 particularly injury no. 1 clearly indicate that the deceased was subjected to aggressive penetrative sexual assault. The injury on the prepuce of the penis of the accused along with the matching of the blood group coupled with other circumstantial evidence clearly constitute foundational facts for raising presumption under Sections 29 and 30 of the POCSO Act. Sections 29 and 30 of the POCSO Act reads as under:

> "**29. Presumption as to certain offences**.—Where a person is prosecuted for committing or abetting or attempting to commit any offence under Sections 3, 5, 7 and Section 9 of this Act, the Special Court shall presume, that such person has committed or abetted or attempted to commit the offence, as the case may be unless the contrary is proved.

> **30. Presumption of culpable mental state:-** (1) In any prosecution for any offence under this Act which requires a culpable mental state on the part of the accused, the Special Court shall presume the existence of such mental state but it shall be a defence for the accused to prove the fact that he had no such mental state with respect to the act charged as an offence in that prosecution.
>
> (2) For the purposes of this section, a fact is said to be proved only when the Special Court believes it to exist beyond reasonable doubt and not merely when its existence is established by a preponderance of probability."

29. It will be seen that presumption under Section 29 is available where the foundational facts exist for commission of offence under Section 5 of the POCSO Act. Section 5 of the POCSO Act deals with aggravated penetrative sexual assault and Section 6 speaks of punishment for aggravated penetrative sexual assault. Section 3 of the POCSO Act defines what penetrative sexual assault is. The relevant Sections are extracted hereinbelow.

> "**3. Penetrative sexual assault.** - A person is said to commit "penetrative sexual assault" if-
>
> (a) he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

5. Aggravated penetrative sexual assault.— (*i*) whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child; or

(m) whoever commits penetrative sexual assault on a child below twelve years; or

6. Punishment for aggravated penetrative sexual assault.—(1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.

(2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim.]

30. The manner in which the appellant enticed the deceased child under the pretext of buying ice-cream in spite of being dissuaded by the aunt (PW-10) and without the consent of the lawful guardians also makes out an offence under Section 364 of IPC. The aggravated penetrative sexual assault clearly establishes offence under Section 377 of IPC and Sections 4 and 6 of the

POCSO Act. The appellant has not rebutted the presumption by adducing proof to the contrary.

31. For the reasons stated above, we are satisfied that the circumstances enumerated hereinabove are fully established; that the circumstances so established are consistent only with the hypothesis of the guilt of the accused and are not explainable by any other hypothesis; that the circumstances are conclusive in nature and further that the chain of circumstance is so complete as to point to the conclusion that the appellant is guilty of the offences charged. In view of the same, we uphold the conviction as imposed by the Trial Court and confirmed by the High Court.

Sentence:

32. The Trial Court has imposed the sentence of death and the High Court has confirmed the same. It is time for us to draw up a balance sheet of the aggravating and mitigating circumstances to decide whether the case falls in the category of rarest of rare case. We also need to examine whether the sentence of life

imprisonment is foreclosed and the possibility of reformation is completely ruled out.

33. Without doubt, the crime committed by the appellant was diabolic in character. He enticed the innocent child by tempting him with ice-cream and brutally sodomized and murdered the four-year old. The appellant also mercilessly strangulated the deceased. The post-mortem report clearly indicated that death was due to asphyxia by throttling.

34. On the mitigating side, the appellant was 24 years of age when the incident happened; he had no criminal antecedents; the appellant hails from a low socio-economic household as the Mitigation Investigation Report filed by Ms. Komal of Project 39A, pursuant to the order of this Court dated 05.10.2023 indicates. The mitigation report further indicates that experts have opined that the appellant is diagnosed with moderate intensity psychotic features and intellectual disability and that the appellant had in his early childhood contacted Tuberculosis Meningitis

(TBM). The appellant, according to the report, maintains family ties with his 64-year-old mother who takes care of his 10 year old daughter. The appellant's wife has deserted him.

35. By an order of 05.10.2023, we also called for the conduct and behaviour of the appellant from the Superintendent of Vadodara Central Jail as well as a report on his mental health. The report from the Superintendent of Vadoara Jail indicates, that the behaviour of the appellant in prison is completely normal and that his conduct in jail is good. The report from the Hospital for Mental Health indicates that the appellant has no psychiatric problem at present. The report does indicate a feeling of remorse in the appellant. The appellant has contended that the projective test adopted by the Hospital for Mental Health has its limitations for reliability. Be that as it may.

36. Considering the overall facts and circumstances, we hold that the present is not a case where it can be said that the possibility of reformation is completely ruled out. The option of

life imprisonment is also not foreclosed. The case does not fall in the category of rarest of rare case. We are of the opinion that ends of justice would be met if we adopt the path carved out in ***Swami Shraddananda*** Vs. ***State of Karnataka*** (2008) 13 SCC 767.

37. Even though the case of the appellant falls short of the rarest of rare category, considering the nature of the crime, we are strongly of the view that a sentence of life imprisonment which normally works out for 14 years would be grossly disproportionate and inadequate. Having regard to the nature of the offence, a sentence of imprisonment for a prescribed period without remission would alone be proportionate to the crime and also not jeopardize the public confidence in the efficacy of the legal system.

38. This Court recently in ***Nawas Alias Mulanavas*** Vs. ***State of Kerala*** (2024) SCC OnLine SC 315, adverting to this aspect had the following to say :-

> "29. How much is too much and how much is too little? This is the difficult area we have tried to

address here. As rightly observed, there can be no straitjacket formulae. Pegging the point up to which remission powers cannot be invoked is an exercise that has to be carefully undertaken and the discretion should be exercised on reasonable grounds. The spectrum is very large. The principle in Swamy Shraddananda (supra) as affirmed in V. Sriharan (supra) was evolved as the normally accepted norm of 14 years was found to be grossly disproportionate on the lower side. At the same time, since it is a matter concerning the liberty of the individual, courts should also guard against any disproportion in the imposition, on the higher side too. A delicate balance has to be struck. While undue leniency, which will affect the public confidence and the efficacy of the legal system, should not be shown, at the same time, since a good part of the convict's life with freedom is being sliced away (except in cases where the Court decides to impose imprisonment till rest of the full life), in view of his incarceration, care should be taken that the period fixed is also not harsh and excessive. While by the very nature of the task mathematical exactitude is an impossibility, that will not deter the Court from imposing a period of sentence which will constitute "a just dessert" for the convict….."

39. Applying this principle, we hold that a sentence of imprisonment for a period of 25 (twenty-five) years without remission would be 'a just desert'.

40. The trial Court had sentenced the appellant to death under Section 302 IPC, to simple imprisonment of 10 (ten) years and a fine of Rs.10,000/- for offence under Section 364 and to life imprisonment and a fine of Rs.10,000/- for offence under Section 6 of the POCSO Act. No separate sentences were awarded for offences punishable under Section 4 of the POCSO Act and Section 377 of IPC. The trial Court had directed that the accused should suffer all the above ordered punishments together. The High Court had confirmed the death sentence and dismissed the appeal of the appellant.

41. In view of what we have held hereinabove, while maintaining the conviction under Sections 302, 364, 377 of IPC and Sections 4 and 6 of the POCSO Act, we set aside the sentence of death for the offence under Section 302 and substitute the same

with that of rigorous imprisonment for a period of 25 (twenty-five) years without remission. We also order that the sentence imposed for offences under Section 364 IPC (10 years S.I. and Rs. 10,000/- fine) and Section 6 of the POCSO Act (life imprisonment and Rs.10,000/- fine) shall run concurrently with the sentence of rigorous imprisonment for a period of 25 years without remission, which we have presently ordered.

42. The appeals shall stand partly allowed in the above terms. Considering the socio-economic condition of the accused on the facts of the present case, we set aside the fine amounts imposed.

Special Leave Petition (Crl.) No. 9162 of 2021:

43. This Special Leave Petition arises out of an order of the High Court of Gujarat at Ahmedabad in R/Special Criminal Application No.18906 of 2021 whereby the High Court denied parole to the petitioner.

44. In view of the judgment passed in Criminal Appeal (Arising out of SLP (Crl.) No. 9015-9016 of 2019, no orders are required to be passed in this Special Leave Petition. The Special Leave Petition is, accordingly, dismissed. However, the dismissal of the Special Leave Petition will not debar the petitioner from availing such remedies as are available under law and in accordance with our judgment rendered hereinabove.

……………………………J.
[**B.R. GAVAI**]

……………………………J.
[**ARAVIND KUMAR**]

……………………………J.
[**K. V. VISWANATHAN**]

New Delhi;
17th December, 2024.