IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.3 of 2018

Arising out of PS. Case No.-67 Year-2017 Thana- MANJHAGARH District- Gopalganj

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The State of Bihar

... ... Petitioner/s

Versus

Ajit Kumar, Son of Gautam Prasad, resident of Village- Manjhagarh, Karnpura, Police Station- Manjhagarh, District- Gopalganj.

... ... Respondent/s

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with

CRIMINAL APPEAL (DB) No. 888 of 2018

Arising out of PS. Case No.-67 Year-2017 Thana- MANJHAGARH District- Gopalganj

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Ajit Kumar, Son of Gautam Prasad, resident of Village- Manjhagarh, Karnpura, Police Station- Manjhagarh, District- Gopalganj.

... ... Appellant/s

Versus

The State of Bihar

... ... Respondent/s

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Appearance:
(In DEATH REFERENCE No. 3 of 2018)
For the Petitioner/s : Mr. Shivesh Chandra Mishra, APP

For the Respondent/s : Mr. Ravindra Kumar, Advocate
Mr. Rajesh Roy, Advocate

(In CRIMINAL APPEAL (DB) No. 888 of 2018)
For the Appellant/s : Mr. Ravindra Kumar, Advocate
Mr. Rajesh Roy, Advocate

For the Respondent/s : Mr. Shivesh Chandra Mishra, APP

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CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE S. KUMAR
C.A.V. JUDGMENT
(Per: HONOURABLE THE CHIEF JUSTICE)

Date: 20-10-2020

Accused Ajit Kumar and Vishal Kumar enticed and kidnapped the prosecutrix (hereinafter referred to as 'the

deceased'), a minor girl, from the guardianship of her parents residing in Village Pipra (Bihar) and took her first to Patna (Bihar) and then to Vadodara (Gujarat) where she was subjected to gang rape and burnt to death.

2. In crux, this is the case of the prosecution, concerning which accused Ajit Kumar stands convicted for committing an offence punishable under Sections 363, 366A, 120B, 302, 376(D) of the Indian Penal Code and Section 6(g) of the Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as "POCSO Act, 2012).

3. Concerning an offence under Section 302 I.P.C., the accused stands sentenced to be hanged by the neck till his death. No separate sentence about the other crimes stands passed.

4. Resultantly, **Death Reference No. 03 of 2018**, titled as **The State of Bihar Vs. Ajit Kumar** is before us for confirmation of such a sentence of death.

5. The accused has challenged the correctness of the findings returned, the judgment of conviction; and the sentence, vide connected **Cr. Appeal (DB) No. 888 of 2018** titled as **Ajit Kumar Vs. The State of Bihar.**

6. It is the prosecution case that on 19th April 2017, Amir Imamul Haque Hemja (P.W.3) informed the police at Police

Station Manjhagarh, Gopalganj district (Bihar) that since 10th March 2017 his daughter, i.e. the deceased (name concealed), was missing. Two persons namely accused Ajit Kumar and Vishal Kumar, on the pretext of solemnizing marriage allured her to travel with them from Bihar to Gujarat where she was subjected to torture and accused Ajit Kumar subjected her to sexual assault prompting her to set herself on fire on 19th April 2017, which version stands improvised by the complainant that the accused set her on fire. On 20th April 2017, officials of the Police Station, Manjhagarh (Bihar) informed him of the death of his daughter who died of burn injuries. He travelled to Vadodara (Gujarat) with his relatives Md. Imran Ali and Kamran Ali and identified the dead body of the deceased. Based on a signed statement of Amir Hamja (P.W.3), the police lodged U.D. Case No. 25 of 2017 at Makarpura Police Station, Vadodara (Gujarat) which subsequently stood transferred to Police Station Manjhagarh (Bihar) where F.I.R. No. 67 of 2017 dated 29th April 2017 was registered. The investigation was carried out both in Gujarat and Bihar and charge-sheet presented in the Court on 24th April 2017 only against accused Ajit Kumar with investigation qua other accused Vishal Kumar and Govind Prasad also involved in the crime, kept pending.

7. On 30th August 2017, the Trial Judge charged Ajit Kumar for having committed offences punishable under the Indian Penal Code and the POCSO Act, to which he pleaded not guilty and claimed trial.

8. The chart showing the Sections of the Indian Penal Code and the POCSO Act is given below: -

FIR under Sections	**Charge-sheet under sections**	**Charge under sections**
363, 366, 376, 306, 114 I.P.C. & 4/8/12 of the POCSO Act	363, 366(A), 376, 302, 120B, 34 I.P.C. & 4/8/12 of the POCSO Act	363/34, 366(A)/ 34. 120B, 302/ 34. 376(D) I.P.C. & 6 (G) POCSO Act.

9. For establishing the guilt of the accused, in all, the prosecution examined six witnesses.

10. The trial court found the statements of the witnesses to be inspiring in confidence; beyond a shadow of reasonable doubt; and there being nothing on record “to disbelieve the prosecution version”. For convicting the accused under Sections 363 and 366A/34 I.P.C., the trial judge relied upon the sole testimony of relatives of the deceased; and for convicting foran offence under Section 302 I.P.C. the Trial Court referred to and relied upon the testimony of doctor (P.W.5) and Investigating Officers (P.W.4 & P.W.6) and for convicting under Section 376(D)

I.P.C. and 6 (g) POCSO Act, the trial judge took benefit from the admission made by accused Ajit Kumar in his confessional statement dated 21st April 2020 (Exhibit-5) recorded by P.W.6 to the effect that he had sustained burn injuries on his body.

11. We deem more appropriate to extract the sentencing part of the judgment since it pertains to Capital Punishment. It reads as under:

> "The convict produced from the custody.
>
> Heard the learned counsel for the convict on the point of sentence and learned Spl. P.P.
>
> Learned counsel for the convict has submitted that convict has not been previously convicted for any offence and he has clear previous record, so a lenient view may kindly be taken in awarding the sentence. It is also submitted that this case is not come within the purview of rarest of rare case.
>
> Contrary to this, Spl. PP. has opposed the submission and submitted that in case of kidnapping, gang rape and murder, caused shock to the society and it is a case of rarest of rare and hence, it would be necessary to the court to notice the impact of crime on the community, more particularly when a minor girl has been made victim of such type of offence, hence, maximum punishment as prescribed by legislature should be awarded to the convict for such crime in the society and a lesson should be spread in the society. In

this regard learned Spl. P.P. has cited an observation of Hon'ble High Court of Bombay (State of Maharastrav.Viran Gyanlal Rajpur) 2015(2) Crimes 472 (Bom) D.B. in which it has been held that *"Kidnapping, rape and murder- Death sentence - confirmation of- held - The modus-operandi of the accused clearly shows that he would be a menace to the society and there is no possibility of the accused being reformed.*",

Considering the nature of the offence, manner of its commission and upon evaluating the aggravating and mitigating circumstances, this is a case which falls in the category of rarest of rare cases.

Considering the facts and circumstances of the case and the gravity and magnitude of the offence, the sentence should be inproportional, thereby encouraging the criminal and ultimate justice to suffer and it should be seen that crime does not go unpunished and victim of crime and also society as the satisfaction with justice done to it.

Considering the above facts and circumstances of the case together with gravity of the offence, I sentence the convict Ajit Kumar to death u/s 302 I.P.C. He is ordered to be hanged by neck till his death subject to confirmation by the Hon'ble Court.

In view of extreme penalty awarded, no separate sentence need be passed u/s 363, 366A, 120B, 376(D) IP.C. and 6(g) POCSO Act.

Let warrant of commitment under sentence of death be and the same is hereby issued."

12. Whole of the judgment runs into nine pages. To our reading, the trial judge has in a perfunctory manner referred to the evidence and not furnished any cogent, much less legally sustainable reasons in arriving at conclusions, holding the accused guilty of each one of the charged offences.

13. Here only we may point out that the Trial Court did not discuss the issue of non-examination of material witnesses including the lady of the house from where the body of the deceased was recovered; what is the effect of not conducting the Test Identification Parade; non-placing on record or exhibiting of material documents including the Aadhar Card of the deceased which was allegedly found in the room where the body of the deceased was recovered. Also, whether the prosecution witnesses inspired confidence and this testimony fully established the prosecution case beyond a reasonable doubt was not discussed. The trial judge appears to have not carefully considered the statutory provisions making the confessional statement admissible.

14. For establishing the charges, the prosecution has to prove at least that (a) in March 2017 the accused Ajit Kumar and Vishal Kumar had enticed and taken away the deceased, a minor i.e. below the age of 18 years, without the consent of her lawful guardian; (b) she was seduced by either of the accused persons

namely Ajit Kumar and Vishal Kumar to have illicit intercourse with another person which perhaps may be Govind Prasad; (c) and that all of them had agreed to commit an illegal act with an intent of causing bodily injury and thereby set the deceased on fire by pouring kerosene oil; (d) but prior to that, in furtherance of a common intention, together subjected her to sexual assault.

15. Hence, we proceed to examine the evidence both oral as well as documentary.

16. In all prosecution examined three sets of six witnesses which are classified as under:

I. Relation of the deceased.

1. Ms. Sahista Parvin (sister of the deceased)[P.W.1];

2. Ms. Chanda Khatoon (mother of the deceased)[P.W. 2];

3. Mr. Amir Hamja (father of the deceased)[P.W. 3];

II. Police Officers who conduced investigation

4. Mr. Vishwanath Prasad (Investigating Officer of Manjhagarh Police Station Case No. 67 of 2017)[P.W.4];

5. Mr. V.N. Mahida (Investigating Officer of U.D. Case No. 25 of 2017 registered at Makarpura Police Station)[P.W.6]

III. Expert who conducted the postmortem

6. Dr. Nirav Rana [P.W. 5]

17. As far as documentary evidence is concerned, the prosecution has placed on record and proved the following documents:

1. **Exhibit-1**, Signature appended by Amir Hamja (P.W.3) on 23rd April, 2017 on the Ferdbeyan, i.e. his signed statement of same date;
2. **Exhibit-1/1**, Endorsement dated 29th April 2017 of the Investigating Officer over written complaint (Exhibit-1) on the basis of which Manjhagarh P.S. Case No.67 of 2017 was registered;
3. **Exhibit-2**, Postmortem report dated 20.04.2017;
4. **Exhibit-2/1**, Writing (undated) of doctor (P.W.6) on the upper part of the postmortem report (Exhibit-2);
5. **Exhibit- 2/2**, Carbon copy of Final Cause of Death Certificate dated 26th February2018;
6. **Exhibit-3**, Inquest Report dated 19.04.2017;
7. **Exhibit-4**, F.I.R. No.00/2017 dated 24th April2017registered at Makarpur Police Station (Gujarat) based on the signed statement of Amir Hamja (P.W.3);
8. **Exhibit-5**, Confessional statement of accused Ajit Kumar dated 21st April 2017.

18. We firstly discuss the prosecution case emanating out of documentary evidence.

19. Based on a signed statement dated 23rd April 2017 of Amir Hamja (P.W. 3), V.N. Mahida, Sub Inspector of Police, Makarpur Police Station, Vadodara City (Gujarat) (P.W. 6) [Page-

77/83] registered F.I.R. No. 00/17 dated 24th April 2017, which led to the identification of the dead body, note appended (Exhibit-2/1) over Post Mortem Report dated 20th April 2017(Exhibit-2) [Page-100]. The said F.I.R. No.00/17 dated 24th April 2017 (Exhibit-4) was forwarded vide communication dated 24th April 2017 [page-81] to Police Station Incharge, Manjhagarh Police Station, District-Gopalganj (Bihar) on the basis of which F.I.R. No. 67/2017 dated 29th April2017 (Exhibit-1) [Page-73] was registered at the said Police Station, in relation to which there is also an endorsement dated 29th April 2017 (Exhibit-1/1) [Page-85] by the Officer in charge of Police Station Manjhagarh (Bihar).

20. The first written account of the case set up by the family of the deceased emanates from the signed statement of Amir Hamja (Exhibit-1) dated 23th April 2017, recorded by P.W.6. In crux, father of the deceased stated that since 10th March 2017, his daughter i.e. the deceased, was missing from his house. Though he searched for her but could not find her in the village. When it came to his knowledge that she was living with accused Ajit Kumar and Vishal Kumar at Patna, he went there and searched for them at different places but to no avail. Later, he learnt that the accused had taken her to Delhi and from there to Vadodara (Gujarat) where she was subjected to torture and accused Ajit Kumar subjected her to

sexual assault. Orally, he narrated all this to the police officials at Police Station, Manjhagarh (Bihar) on 19th April 2017. On 20th April 2017, the police of Police Station Manjhagarh informed him that charred body of his daughter was kept in the mortuary at Vadodara. Immediately he came to Delhi from where he took his two co-brothers, namely, Md. Imran Ali and Kamran Ali and reached Makarpura Police Station, Vadodara (Gujarat) where he made a statement on 23th April 2017 (Exhibit-1). Then, he visited the mortuary and identified the dead body to be that of his daughter and looking at her condition; last rites performed there itself. He suspected complicity of accused Ajit Kumar and Vishal Kumar in the crime.

21. We may observe that the factum of the recording of the statement; identification of the dead body; registration of an F.I.R. based on a signed statement which was forwarded to the Police Station Manjhagarh (Bihar) has come in the statement of P.W. 6., who also states that he recorded the disclosure statement of accused Ajit Kumar (Exhibit-5).

22. At this juncture, without examining the admissibility of this disclosure statement, only satisfying our conscience of what stands admitted by the accused, we briefly state so. None other than the Investigating Officer signed the same. Also,

there is no witness to same, nor any fact discovered pursuant thereto. Even the accused was not got medically examined. Nor the Police Officer testified correctness of the contents thereof. The accused says that the deceased travelled with him from Bihar to Delhi and then to Vadodara. He had solemnized his marriage with the deceased. On 19th April 2017, on a particular issue, an altercation took place, because of which after pouring kerosene oil on her body, she set herself on fire. He tried to douse the fire, resulting into burning of his bread and suffering burn injuries on the hand. In a perplexed state, on the advice of Santosh Prasad, he left the spot for Delhi.

23. Significantly, when we compare and contrast both these statements, we find nowhere to be recorded that it was the accused who had either poured the kerosene oil on the deceased or set her on fire. Also, he had not subjected her to rape or kidnapped her with the intent of making her have sex with someone else. From both of these documents, it can't be inferred that the accused had enticed the deceased from the lawful custody of her parents.

24. Significantly, the dead body, as per the Inquest Report was taken into possession on 20th April 2017. The police did register a case. Now what investigation was conducted from 20th to 23rd April, 2017 the record is conspicuously silent. It is not the case

of the prosecution; father of the deceased, or that of the Investigating Officer that the accused was present on the spot at the time when police reached the site of crime. It is not the case of the Investigating Officer that the accused had to be traced through some source. Then how did the Investigating Officer reach up to him, or identify him to be the very same person, whom the complainant was referring to, is not on record? It is not the case of the prosecution or the witnesses, of either of the accused getting identified at Vadodara or in Bihar. Also, Ajit Kumar was not got medically examined for establishing any injury sustained by him.

25. Travelling further we notice that the F.I.R. registered at Vadodara was forwarded vide communication dated 24th April 2017 (Exhibit-4) to Police Station Manjhagarh (Bihar) where on 29th April 2017 F.I.R. No. 67/17 was registered by P.W. 4.

26. Significantly, even in Bihar in his investigation, he did not record any statement of the witnesses.

27. This takes us to another issue as to how did the police at Bihar reach out to the family of the deceased? And how is it that the police at Gujarat got in touch with the police at Bihar? Here the chain is broken and the link missing.

28. According to the father, he had orally brought the factum of his missing daughter to the notice at Police Station

Manjhagarh (Bihar). This was on 19th April 2017.The following day, when police informed him of the death, he first travelled to Delhi to meet his brothers from where along with them, he travelled to Vadodara. Significantly, there is nothing on record to establish such a fact. Be that as it may, the factum of consultation, due deliberation and afterthought of having supplied oral information to the police on 19th April 2017 on getting registered a complaint at Vadodara on 23rd April 2017 is not ruled out. Why is it that the father did not register the complaint at Bihar itself on 20th April 2017? For after all, by that time, he was already aware of the identity of the accused as also occurrence of all the incidents in Bihar and Gujarat.

29. Starting now, we shall elaborately discuss the testimony of all the witnesses but have briefly touched the same at the threshold only to highlight the discrepancies, variations, contradictions, lack of proof beyond reasonable doubt and the missing links in the chain of the prosecution case.

30. In the aforesaid backdrop, we firstly take note of the law on what all is required to be considered in proving the charged offence based on circumstantial evidence.

Circumstantial Evidence

31. To prove the commission of offense beyond reasonable doubt based on circumstantial evidence, an unbroken

chain of circumstances pointing to the guilt of the accused alone has to be established. It is settled position of law that where there is no direct or ocular evidence of the crime, the guilt of the accused can be proved by circumstantial evidence, but then, circumstances from which conclusion of guilt must be drawn must be fully proved and be conclusive in nature to fully connect the accused with the crime. All links in the chain of circumstances must be proved beyond reasonable doubt, the proved circumstances must be consistent only with the hypothesis of guilt of the accused alone and non-else, as also inconsistent with his innocence.

32. In **Gargi v. State of Haryana (2019) 9 SCC 738**, the Hon'ble Apex Court, by referring to numerous relevant decisions of the Court, has discussed in detail, the principles governing circumstantial evidence (para 17- 18.6). The same are summarized as follows:

(i) Evidence may either be direct or circumstantial. Circumstantial evidence is the one where other facts are proved from which the existence of fact in issue may either be logically inferred, or at least rendered more probable.

(ii) Three tests ought to be satisfied where a decision rests solely on circumstantial evidence - firstly, all circumstances from which inference of guilt is drawn must be cogently and firmly established, secondly, the circumstances must unerringly point towards the guilt of the accused, and thirdly, the circumstances taken together must form a chain so complete that it becomes incapable of explanation on any reasonable hypothesis

except for the guilt of the accused.[**Chandmal v. State of Rajasthan (1976) 1 SCC 621**, **State of U.P. v. Hari Mohan (2000) 8 SCC 598**, **Raj Kumar Singh v. State of Rajasthan (2013) 5 SCC 722**, **Ganpat Singh v. State of M.P. (2017) 16 SCC 353**, **Baiju Kumar Soni v. State of Jharkhand (2019) 7 SCC 773, Rajender v. State (NCT of Delhi) (2019) 10 SCC 623**]

(iii) All circumstances concerned "must or should" and not "may be" established, the circumstances should be of a conclusive nature and tendency.[**Hanumant Govind Nargundkar v. State of M.P. AIR 1952 SC 343**, **Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793**, **CBI v. Mahender Singh Dahiya (2011) 3 SCC 109**, **Ramesh Harijan v. State of U.P. (2012) 5 SCC 777**, **Sujit Biswas v. State of Assam (2013) 12 SCC 406**, **Anjan Kumar Sarma v. State of Assam (2017) 14 SCC 359**]

33. Further, in **Kali Ram vs. State of Himachal Pradesh (1973) 2 SCC 808**, the Court observed that:

> "25. Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. This principle has a special relevance in cases where in the guilt of the accused is sought to be established by circumstantial evidence."

34. It is also a matter of accepted position that while appreciating circumstantial evidence, the Court must adopt a very cautious approach and great caution must be taken to evaluate circumstantial evidence. [**Hanumant Govind Nargundkar v. State**

of M.P. AIR 1952 SC 343, **Gurpreet Singh v. State of Haryana (2002) 8 SCC 18**, **Ram Singh v. Sonia (2007) 3 SCC 1**, **Musheer Khan v. State of M.P. (2010) 2 SCC 748**]

Proof Beyond Reasonable Doubt

35. It is trite law that in criminal cases, the burden of proof on the prosecution is one of proof beyond reasonable doubt as opposed to a preponderance of possibilities. The Hon'ble Apex Court in **Shivaji Sahabrao Bobade v. State of Maharashtra (1973) 2 SCC 793** held that:

> "6. ...The dangers of exaggerated devotion to the rule of benefit of doubt at the expense of social defence and to the soothing sentiment that all acquittals are always good regardless of justice to the victim and the community, demand especial emphasis in the contemporary contest of escalating crime and escape. The judicial instrument has a public accountability. The cherished principles of golden thread of proof beyond reasonable doubt which runs through the web of our law should not be stretched morbidly to embrace every hunch, hesitancy and degree of doubt. The excessive solicitude reflected in the attitude that a thousand guilty men may go but one innocent martyr shall not suffer is a false dilemma. Only reasonable doubts belong to the accused. Otherwise any practical system of justice will then break down and lose credibility with the community. The evil of acquitting a guilty person light heartedly as a learned author [Glanville Williams in 'Proof of Guilt'] has sapiently observed, goes much beyond the simple fact that just one guilty person has gone unpunished. If unmerited acquittals become general, they tend to lead to a cynical disregard of the law, and this in turn leads to a public demand for harsher legal presumptions against indicted 'persons' and more severe punishment of those who

are found guilty. Thus, too frequent acquittals of the guilty may lead to a ferocious penal law, eventually eroding the judicial protection of the guiltless. ... In short, our jurisprudential enthusiasm for presumed innocence must be moderated by the pragmatic need to make criminal justice potent and realistic. A balance has to be struck between chasing chance possibilities as good enough to set the delinquent free and chopping the logic of preponderant probability to punish marginal innocents. We have adopted these cautions in analysing the evidence and appraising the soundness of the contrary conclusions reached by the Courts below. Certainly, in the last analysis reasonable doubts must operate to the advantage of the appellant. In India the law has been laid down on these times long ago." (emphasis supplied)

36. In **State of Karnataka v. J. Jayalalitha (2017) 6 SCC 263**, the Hon'ble Apex Court held that:

"225. The proof beyond reasonable doubt is only a guideline and not a fetish and that a guilty man cannot get away with it because the truth suffers from infirmity, when projected through human processes ...thus whether a meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty men must be callously allowed to escape.

226. In the same vein, this Court in **Ashok Debbarma v. State of Tripura (2014) 4 SCC 747** expounded that 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 and the criminal courts, while examining whether any doubt is beyond reasonable doubt, may carry in their mind some "residual doubt" even though the courts are convinced of the accused persons' guilt beyond reasonable doubt." (emphasis supplied)

37. Here only we may observe that even though in the signed complaint, reference was only of two accused persons namely Ajit Kumar and Vishal Kumar but in the charge-sheet, we find there is a reference of a third person i.e. Govind Prasad @ Govinda. We may not be misunderstood to have expressed any opinion on their complicity, for investigation against them is pending, but on record, there is no documentary evidence establishing their complicity in the alleged crime.

38. Coming to the oral evidence, firstly we deal with the testimony of the doctor, namely Dr. Nirav Rana (P.W.5). He has only proved the postmortem report dated 20th April 2017 (Exhibit-2) as also the Final Report indicating the cause of death (Exhibit 2/2). A perusal of his testimony, also the documents he has proved establishing conduct of postmortem of the deceased on 20th April 2017 and that she died due to “shock following burns”.

39. Significantly, other than this material, there is no documentary or other tangible evidence, indicating the burn injuries to have been caused by pouring kerosene oil. It only belies the prosecution version of burn injuries caused as a result of inflammable material such as kerosene.

40. At this juncture, we may remind that the first written document prepared to record missing of the girl child is a

signed statement dated 23th April 2020 based on which F.I.R. No. 00/17 dated 24th April 2017 (Exhibit-4) was registered at Police Station Makarpura, Vadodara City (Gujarat).

41. But prior to that, as we notice from the testimony of P.W. 6, one report termed as Unnatural Death Case No. 25/2017 registered at Police Station, Makarpura (Gujarat). However, this report only indicates the dead body to be taken into custody and sent for postmortem and nothing more than that. No name of the deceased; suspect; or the witness is recorded or mentioned therein.

42. Here only we may record that testimony of the witnesses is hearsay in nature.

43. The law on hearsay evidence is now well settled. We reiterate as under.

Evidentiary value of Hearsay Evidence

44. Hearsay evidence refers to a statement of fact averred by person who was not privy to the transaction himself/herself, but received the same from a third person. The rule on admissibility of hearsay evidence is not res integra. It is well settled that hearsay evidence is not admissible as proof of a fact, except for in certain accepted exceptions.

45. Section 6 of the Indian Evidence Act, 1872 provides that relevant facts for a case would be those, which form part of the

same transaction. Section 60 of the Indian Evidence Act, 1872 that is also known as the 'direct evidence rule', provides that oral evidence is generally admissible if the person giving the evidence has personal knowledge of the fact deposed by him. The person giving evidence on a fact must be the one who has seen/heard/perceived the fact.

46. In the case of **Jagdish Narain v. State of U.P. (1996) 8 SCC 199**, the Hon'ble Apex Court clearly summarized the position on admissibility of hearsay evidence:

> "9. ...While preparing a site plan an investigating Police Officer can certainly record what he sees and observes, for that will be direct and substantive evidence being based on his personal knowledge; but as, he was not probably present when the incident took place, he has to derive knowledge as to when, when and how it happened from persons who had seen the incident. When a witness testifies about what he heard from somebody else it is ordinarily not admissible in evidence being hearsay, but if the person from whom he heard is examined to give direct evidence within the meaning of Section 60 of the Evidence Act, 1872 the former's evidence would be admissible to corroborate the latter in accordance with Section 157 CrPC (*sic* Evidence Act). ..."

47. In **Balram Prasad Agrawal v. State of Bihar (1997) 9 SCC 338**, the Hon'ble Apex Court accepted the contention that hearsay evidence was unoriginal, derivative, transmitted and second-hand. The witness is merely reporting not what he himself saw or heard or came to observe by their own bodily senses, but

what he had learned through the medium of a third person. Therefore, unless the author of the statement is examined and is subjected to cross examination, the statement would remain in the realm of hearsay and not be admissible.

48. The inadmissibility of hearsay evidence comes from the idea that a person having no personal knowledge of a fact must not be allowed to give evidence of the same. In the case of **Kalyan Kumar Gogoi v. Ashutosh Agnihotri (2011) 2 SCC 532**, the Hon'ble Apex Court discussed the various reasons for which hearsay evidence cannot be taken as admissible:

> "38. The reasons why hearsay evidence is not received as relevant evidence are:
> (a) the person giving such evidence does not feel any responsibility. The law requires all evidence to be given under personal responsibility, i.e., every witness must give his testimony, under such circumstance, as expose him to all the penalties of falsehood. If the person giving hearsay evidence is cornered, he has a line of escape by saying "I do not know, but so and so told me",
> (b) truth is diluted and diminished with each repetition and
> (c) if permitted, gives ample scope for playing fraud by saying "someone told me that.....". It would be attaching importance to false rumour flying from one foul lip to another. Thus statement of witnesses based on information received from others is inadmissible." (emphasis supplied)

49. This takes us to the issue, how the Investigating Officer (P.W.6) acquire knowledge of complicity of the instant

accused in the crime or for that matter gathered information of whereabouts of the deceased.

50. In Court, he states that on 19th April 2017 he got information of "a burnt dead body of a lady" in Yashoda colony. He went and took the same into his custody. In the room where the dead body was lying, he found an Aadhar Card from which he could ascertain the particulars of the deceased, hailing to be from district Gopalganj (Bihar). As such, he informed the police at Police Station Manjhagarh (having jurisdiction of the address indicated in the Aadhar Card) and after registering the case, prepared the Inquest Report (Exhibit-3). But his testimony is not corroborated by any document. No entry of information of dead body; his visit to the spot; finding the Aadhar Card or taking it into possession or contacting the Police in Bihar is recorded anywhere. No document of proof substantiating any such fact is on record. Is he really telling the truth?

51. Further, he admits that during the investigation, he found none else to be present in the room and found smell of kerosene emanating from the dead body. But there is no supportive, much less corroborative, material on record to such effect.

52. Further, the landlady of the house, whose particulars he does not disclose- nor is she a cited witness, informed

him that for last 3-4 days “people were living in her house as tenant” and that the deceased was living with one boy named Ajit Kumar. But who was the tenant; who let out the premises and to whom; who is this Ajit Kumar; and who are all those "people" living in the room, are all facts which remain unverified or undisclosed.

53. Still further, at 11 P.M., the landlady (owner of the house-whom also he does not name) seeing the black smoke coming out of the room rushed to the spot and noticed the girl burning. The boy fled away. But who is this lady? What is the exact address of the house? What is her name? remains undisclosed. Who is this boy who fled away? She never identified the accused to be the very same Ajit Kumar with whom the deceased was living or had fled away from the spot.

54. Still further, he states that he registered F.I.R. No.00/2017 dated 24th April 2017 (Exhibit-4) and sent the dead body for postmortem. During the investigation, he recorded the confessional statement of accused Ajit Kumar who admitted to being in the room when the deceased set herself on fire. Also, at the Police Station father of the deceased met him who was informed of the incident. All documents including the birth certificate of the

accused and the deceased were forwarded along with the F.I.R. to Police Station Manjhagarh.

55. Significantly, this witness does not disclose who is the father of the deceased; in Court he neither names nor identifies P.W. 3 to be the very same person whom he had met or whose statement (Exhibit-1) he had recorded; how did he reach to accused Ajit Kumar or learnt of his complicity in the crime; what all investigation he conducted with respect to which of the incidents of the charged offences; whether complicity of any other person in the crime was ruled out or not; why he did not place on record the Aadhar Card found in the room from where the dead body was found; what all was found or recovered from the room; who is the owner of the house; particulars of the land lady who had seen smoke come out of the room; why he did not examine or record statement of the owner or land lady of the house; whether Ajit Kumar so named by the land lady was the very same person whose confessional statement he had recorded; who no independent person was associated in recording so; why no Test Identification Parade was got conducted, are all questions left open to be guessed to ones imagination. Most importantly, he does not state that the landlady had seen the herein accused "Ajit Kumar" at the time of occurrence of the incident.

56. Though he states having recorded her statement, and that of other persons in the vicinity, but admits the same not to be available on the date of deposition. Here he appears to be not telling the truth, for he had already forwarded the F.I.R. to the Police Station Manjhagarh, and admits not to have investigated the matter concerning any other crime. If that were so, why the said statements, if any, were not forwarded along with the FIR remains unexplained.

57. Here, we wish to highlight another contradiction. The father of the deceased had not met the Officer prior to 23rd April, 2017. The Officer does not state that the police at Bihar had informed him of the girl being kidnapped, more so by the present appellant. The confessional statement is dated 21st of April, 2017. If this were true, then how is it that on the 20th of April, 2017 itself, the Police at Bihar, furnished information of the assailant to the mother and the sister of the deceased?

58. Contradictions are glaring, shocking the foundation and genesis of the prosecution case.

59. P.W. 3, father of the deceased, states that deceased, aged about 16 years, was found missing from her house. For 15 days he searched for her. Learning that she was living with Ajit Kumar (accused) and Vishal Kumar he visited Patna but could

find none. On 19th April 2017 he orally informed the police. The next day (20th April 2017) he was called at Police Station Manjhagarh (Bihar) and reported that the dead body of his daughter, who had died of burn injuries, was kept for conducting postmortem in a hospital. On 16th April 2017 deceased and the accused went to Vadodara, where with the help of Govind Prasad, they rented an accommodation and 19th April 2017 after altercation with the deceased on her protesting sexual assault set her on fire by pouring kerosene oil.

60. In the cross-examination part of his testimony, witness admits not to have witnessed any one of the incidents. The kidnapping was not in his presence, nor did he lodge any written complaint with anyone. His explanation of belatedly furnishing oral information to the Sub Inspector of Police doesn't inspire confidence, for he doesn't even remember his name, nor did he report the matter to anyone of the authorities; members of the community; relatives or friend. Significantly, he doesn't allege any threat or intimidation from any person, much less side of any one of the accused person.

61. What is his basis of acquiring knowledge of sexual assault or death caused as a result of pouring kerosene oil remains undisclosed.

62. As per his version, he visited Vadodara along with Imran and Kamran, but then they are neither cited nor examined in Court. Why so? Is not clear from the record. Significantly, he doesn't state that at Vadodara, he met P.W.6 from whom he learnt of the incident. Nor does he disclose the person from whom he learnt of such fact in Gujarat. Most significantly, he does not state that either of the accused persons had enticed his daughter for committing sexual assault or that they had kidnapped her. Also, he is silent of the source of acquiring knowledge of the presence of the deceased at Patna. His testimony, hearsay in nature, uncorroborated, uninspiring in confidence, in any event, does not establish any one of the ingredients essential for establishing the charged offence.

63. P.W. 2 is the mother of the deceased. As per her testimony, the deceased 16 years of age was kidnapped by Ajit Kumar and Vishal Kumar which fact she learnt from a co-villager Swaminath Sah, who also was never associated by the police during investigation nor examined in Court.

64. Further, she, along with her husband, searched for the accused and the deceased at Patna and that her husband orally registered a complaint at Manjhagarh (Bihar). But then it is not her husband's case that both of them visited Patna. To this extent, there is major contradiction, belying the version of her visit to Patna. But

what falsifies her testimony, is her deposition that it was the police who informed her that "Ajit, Vishal, Govinda Prasad together committed rape on her at Yashoda Colony in Vadodara in the State of Gujarat and killed her by sprinkling kerosene oil and burning her alive". No police officer states such fact. P.W. 6 does not state so. In fact, he doesn't even refer to Vishal or Govind Prasad. Is it that she also travelled to Vadodara (Gujarat) and not revealing the truth. In any event, her testimony is hearsay in nature, uncorroborated and unsubstantiated by any person.

65. We now examine the testimony of P.W. 1, sister of the deceased, who has deposed that on 10th March 2017 she found the deceased missing from her room. After a few days, she got to know that the deceased was at Patna with Vishal Kumar and Ajit Kumar. Her father, i.e. P.W. 3 went to search for them, but none could be traced. On 19th April, her father orally complained with the police, and on 20th April, at the Police Station, they were informed that Ajit Kumar and Vishal Kumar had taken the deceased to Vadodara (Gujarat) where both of them committed sexual assault and after quarrelling, set her on fire.

66. Her statement of sexual assault is contradictory and confusing. Initially, she states that both Ajit Kumar and Vishal Kumar committed an act of sexual assault, but subsequently, she

says that it was Ajit. If that were so, then obviously the prosecution case of multiple sexual assaults stands falsified. Her version stands uncorroborated, in fact, belied by both the police officials as also her father.

67. Thus, to our mind, the testimony of all the three members, on the issue of kidnapping, sexual assault and murder, based on hearsay, is wholly uninspiring in evidence, apart from being self-contradictory. None of these witnesses alleges intimidation, threat or apprehension of any nature from the accused. Or any pressure from anyone. None of them contended that the deceased was forcibly taken away by the accused. None of them asserts that in Bihar, where the deceased was staying with the accused, she was subjected to sexual assault.

68. This now takes us to the testimony of the last witness, namely, P.W. 4, the Investigating Officer posted at Manjhagarh Police Station (Bihar) who conducted the investigation only within the State of Bihar, for, he admits not to have visited Gujarat for conducting any investigation.

69. So, for what all transpired in Gujarat one has to again examine the testimony of P.W. 6, but before that, let us see what this officer has deposed, establishing the prosecution case.

70. Closer scrutiny of his testimony reveals the prosecution not to have established any one of the ingredients of the charged offence.

71. He only states of receiving information of the death of a girl in Vadodara, which he passed on to the informant (referred to the father of the deceased), who visited Vadodara, and on return, got the papers of the investigation conducted at Vadodara based on which, he registered Police Case No. 67/17 dated 29th April, 2017. He visited the house from where the deceased had left in the morning on 10th March, 2017.

72. This witness does not state that it was he who informed either of the members of the family of the deceased; the manner and by whom the crime was committed; and with what motive and purpose. Most significantly his testimony is utterly silent on the factum of (a) kidnapping; (b) enticement; (c) sexual assault; (d) conspiracy; (e) burning of the deceased by pouring kerosene oil; (f) having informed the relatives of the complicity of the accused in the crime.

Faulty/Deficient Investigation

73. Hon'ble Apex Court has time and again upheld the principle that the benefit of doubt arising out of faulty investigation accrues in favor of the accused and not the prosecution. This stems

form the idea that the prosecution must establish guilt beyond reasonable doubt.

74. In **Kailash Gour v. State of Assam (2012) 2 SCC 34** the Court observed that:

> "43. ...The benefit arising out of faulty investigation ought to go to the accused and not to the prosecution. So also, the quality and credibility of the evidence required to bring home the guilt of the accused cannot be different in cases where investigation is satisfactory vis-a-vis cases in which it is not. ..."

75. More recently upheld in **State of U.P. v. Wasif Haider (2019) 2 SCC 303**. However, it is also trite position of law that faulty investigation cannot be a determinate factor and would not be sufficient to throw out a case where there is credible prosecution version, such as a credible eyewitness for the case exists. [**State of U.P. v. Jagdeo (2003) 1 SCC 456**, **Motilal v. State of Rajasthan (2009) 7 SCC 454**]

76. Moreover, the Hon'ble Apex Court has also held that in certain cases of faulty and deficient investigation, and in the interest of justice, the High Court had the authority to remand the case for a retrial. In the case of **Zahira Habibulla Sheikh v. State of Gujarat (Best Bakery Case) (2004) 4 SCC 158**, the Hon'ble Apex Court while directing a retrial on the grounds of faulty and dishonest investigation, held that:

> "70. ...There are several infirmaries that ate telltale even to the naked eye of even an ordinary common man. The High Court has come to a definite conclusion that the investigation carried out by the police was dishonest and faulty. That was and should have been sufficient justification to direct a retrial of the case. ..."

77. In **Pooja Pal v. Union of India (2016) 3 SCC 135** the Hon'ble Apex Court observed that a fair and complete investigation and trial as well as the solemn duty of the courts to ensure the discernment of truth to administer even handed justice as institutions of trust of public faith and confidence was essential. Therefore, where the quality of investigation and the trial trivialized the cause of justice, the Courts could take further remedial intervention by way of further investigation, reinvestigation, additional evidence, retrial etc., for the furtherance of statutory objectives justice dispensing as contemplated under law. Citing **Mohd Hussain v. State (Government of NCT of Delhi) (2012) 9 SCC 408**, the Court however left a word of caution that the guiding factor for a retail had to be the demand of justice. A *de novo* trial or retrial of the accused must only be ordered by the appellate court in exceptional and rare cases and only when such course becomes indispensable to avert the failure of justice.

78. Here only we may reiterate that the factum of death of the deceased and her identity is not in doubt. Nor is it

disputed. It was an unnatural death which took place at Vadodara (Gujarat). Except for oral version of P.W. 6 of smelling kerosene oil from the dead body, there is no tangible evidence, documentary in nature, lending credence to such a version of the prosecution.

79. As already observed, the prosecution never examined any person from the vicinity of crime-even the landlady/ owner of the house. Persons accompanying P.W. 3 within Bihar and up to Vadodara (Gujarat) were also not examined. Perhaps, they would have revealed what exactly transpired in Gujarat or how family members of the deceased learnt about the involvement of the accused in the crime.

80. There is no direct eye-witness to the occurrence. And for establishing its case on circumstantial evidence, the prosecution relies upon two sets of evidence and both oral (a) the statement of the family members which also is hearsay based on the information furnished by the police officers,which fact, even not corroborated and (b) the inculpatory statement i.e. the confessional statement of the accused.

81. In so far as the first set of evidence is concerned, we have discussed the testimonies and find none of the ingredients constituting any one of the offences established. There is no direct evidence. It is all circumstantial and hearsay in nature which is

uncorroborated and unworthy of credence. According to P.W. 1, it was the brother of the accused who had arranged for the rented accommodation at Vadodara, whose complicity in the crime is also not ruled out. What is the outcome of the investigation of other accused is not evident from the record. The complicity of any person, other than the accused, pointing finger of guilt only towards him and not his innocence, and involvement of none other than the accused is not established, much less beyond doubt, through the evidence led by the prosecution. No explanation for not filing any written complaint between 10th March until alleged oral complaint lodged on 19th April is forthcoming on record. There is no reasonable or plausible explanation of why the third person who went in search of the deceased at Patna or Vadodara were not examined. Who is that police officer with whom the complaint oral in nature was lodged is not clear from the record; why there was inordinate delay in lodging the complaint, which incidentally was the date of the crime, remains unexplained. It is not that the complainant was in any manner precluded from registering the complaint.

82. According to the prosecution, the crime took place at three places- (i). at Pipra village, Manjhagarh Police Station,

Gopalganj, Bihar; (ii) Patna City and (iii) Yashoda Colony, Makarpura Police Station.

83. With respect to the first place of crime, P.Ws. 1, 2 and 3 do not state that they had seen the appellant or anyone of his companions, at their home or in the village. It is also not their case that they had seen the appellant visit the village establishing any contact, much less seducing the deceased and that without consent, take her away from the lawful custody of the guardian. All that they state is that the girl was found to be missing from the morning of 10th March 2017.

84. Concerning the second place of occurrence, P.W.3 states that he visited Patna which version is contradicted by his wife (P.W.2) who says that she also went. But, both don't reveal where all they went and whom all they met. There is only one isolated statement that he searched for them in several places. Also, he does not state that there he had made any inquiry either from the police or third parties.

85. Concerning the third place of occurrence i.e. Vadodara none of the witnesses examined in Court have witnessed the incident. And as already observed, no inculpatory evidence, be it of whatsoever nature, even remotely indicating the presence of the accused was collected from the spot during the course of the

investigation. Thus, even by way of circumstantial evidence, the said fact cannot be said to have been established.

86. Can it be said that the girl was minor, below 18 years of age? In this regard, we may straight away come to the postmortem report as also the Inquest Report, which states the age of the deceased to be 20 years. P.Ws. 1 to 3 orally sounds the age to be 16 years, which fact, in the postmortem report stood recorded subsequently. But then there is no other document to establish such a point. No medical test for obtaining the age was got conducted. The Aadhar Card which the Police Officer allegedly found on the spot of crime i.e. Vadodara, has not been placed on record. Thus, the version which has come on record about the age cannot be believed to be16 years or that the deceased was of minor age.

87. Thus, on the first set of evidence, we do not find the prosecution to have established its case in any manner.

88. This takes us to the second set of evidence i.e. the confessional statement of the accused. Is it permissible for the Court to rely upon the same? If so, then is it prudent to hold the accused guilty concerning all the charged crime solely on the basis of such a statement? For this we proceed to firstly discuss the law on the issue.

Evidentiary value of Self-confession Statement of the Accused given to the Police

89. Section 25, 26 and 27 of the Indian Evidence Act, 1872, lay down the law on admissibility of confession statements under Indian law. They provide as follows:

> "25. Confession to police-officer not to be proved. — No confession made to a police officer, shall be proved as against a person accused of any offence.
>
> 26. Confession by accused while in custody of police not to be proved against him. — No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.
>
> 27. How much of information received from accused may be proved. — Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved."

90. These provisions reflect the constitutional safeguards provided under Article 20(3) of the Constitution of India, which states that no accused of an offence shall be compelled into being a witness against himself.

91. The Sections, read with article 20(3) of the Constitution of India make it amply clear that a confession made by any person to a police officer is inadmissible as evidence, except for the singular cases where such statement results in a consequent discovery of fact. It is also not res integra that confessional statements made to the

police by the accused cannot be a basis to prove the guilt of the accused. [**Aghnoo Nagesia v. State of Bihar AIR 1966 SC 119**, **Vsanta Sampat Dupare v State of Maharashtra** (2015) 1 SCC 253, **Ishwari Lal Yadav v State of Chhattisgarh** (2019) 10 SCC 437]

92. In the case of **State of UP v Deoman Upadhyay AIR 1960 SC 1125**, a constitution bench of the Hon'ble Apex Court explained the idea behind Sections 24-27 of the Act:

> "17. Section 25 and 26 are manifestly intended to hit at an evil, viz., to guard against the danger of receiving in evidence testimony from tainted sources about statements made by persons accused of offences. But these sections form part of a statute which codifies the law relating to the relevancy of evidence and proof of facts in judicial proceedings. The State is as much concerned with punishing offenders who may be proved guilty of committing offences as it is concerned with protecting persons who may be compelled to give confessional statements. If s. 27 renders information admissible on the ground that the discovery of a fact pursuant to a statement made by a person in custody is a guarantee of the truth of the statement made by him, and the legislature has chosen to make on that ground an exception to the rule prohibiting proof of such statement, that rule is not to be deemed unconstitutional, because of the possibility of abnormal instances to which the legislature might have, but has not extended the rule." (emphasis supplied)

93. On interpretation of Section 27 of the Act, the Hon'ble Apex Court in **Bodhraj alias Bodha v. State of Jammu and Kashmir (2002) 8 SCC 45** has observed that:

> "18. ...The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate. The ban as imposed by the preceding sections was presumably inspired by the fear of the Legislature that a person under police influence might be induced to confess by the exercise of undue pressure. If all that is required to lift the ban be the inclusion in the confession of information relating to an object subsequently produced, it seems reasonable to suppose that the persuasive powers of the police will prove equal to the occasion, and that in practice the ban will lose its effect. The object of the provision i.e. Section 27 was to provide for the admission of evidence which but for the existence of the section could not in consequences of the preceding sections, be admitted in evidence. It would appear that under Section 27 as it stands in order to render the evidence leading to discovery of any fact admissible, the information must come from any accused in custody of the police.... The basic idea embedded in Section 27 of the Evidence Act is the doctrine of confirmation by subsequent events. The doctrine is founded on the principle that if any fact is discovered as a search made on the strength of any information obtained from a prisoner, such a discovery is a guarantee that the information supplied by the prisoner is true. The information might be confessional or non-inculpatory in nature but if it results in discovery of a fact, it becomes a reliable information." (emphasis supplied)

94. Therefore, it is clear that in the event that the requirement of Section 27 of the Act are met with i.e. (1) a fact is discovered (2) discovery is in consequence of the confession statement, then the part of the statement that relates to the fact discovered becomes admissible in evidence.

95. It also fairly settled that interpretation that the "fact discovered" envisaged in the section embraces the place from which the object was produced, the knowledge of the accused as to it, but the information given must relate distinctly to that effect. [**State of Maharashtra v. Damu (2000) 6 SCC 269**, **State of Punjab v. Gurnam Kaur (2009) 11 SCC 225**, **Bhagwan Dass v. State (NCT) of Delhi (2011) 6 SCC 396**, **Rumi Bora Dutta v. State of Assam (2013) 7 SCC 417**]

96. It is also settled position that Section 27 only becomes applicable when the confession statement leads to the discovery of a new fact. In **Madhu v. State of Kerala (2012) 2 SCC 399** the Hon'ble Apex Court clarified that:

> "47. ... The exception postulated under Section 27 of the Indian Evidence Act is applicable only if the confessional statement leads to the discovery of some new fact. The relevance under the exception postulated by Section 27 aforesaid, is limited '...as it relates distinctly to the fact thereby discovered....'. The rationale behind Section 27 of the Indian Evidence Act is, that the facts in question would have remained unknown but for the disclosure of the same by the accused."

97. In **Charandas Swami v. State of Gujarat (2017) 7 SCC 177**, the Hon'ble Apex Court summarized the principles under Section 27:

> "59.In our view, the decision in the case of Navjot Sandhu (Supra) [**State (NCT of Delhi) v. Navjot Sandhu alias Afsan Guru (2005) 11 SCC 600]** has adverted to all the

previous decisions and restated the legal position.

..."121. The first requisite condition for utilising Section 27 in support of the prosecution case is that the investigating police officer should depose that he discovered a fact in consequence of the information received from an Accused person in police custody. Thus, there must be a discovery of fact not within the knowledge of police officer as a consequence of information received. Of course, it is axiomatic that the information or disclosure should be free from any element of compulsion. The next component of Section 27 relates to the nature and extent of information that can be proved. It is only so much of the information as relates distinctly to the fact thereby discovered that can be proved and nothing more. ...The rationale behind this provision is that, if a fact is actually discovered in consequence of the information supplied, it affords some guarantee that the information is true and can therefore be safely allowed to be admitted in evidence as an incriminating factor against the accused. ...

60. This Court has restated the legal position that the facts need not be self-probatory and the word "fact" as contemplated by Section 27 is not limited to "actual physical material object". It further noted that the discovery of fact arises by reason of the fact that the information given by the Accused exhibited the knowledge or the mental awareness of the informant as to its existence at a particular place. In paragraph 128, the Court noted the statement of law in Udai Bhan (Supra) [**Udai Bhan v. State of UP (1962) Supp 2 SCR 830**] that, "A discovery of a fact includes the object found, the place from which it is produced and the knowledge of the Accused as to its existence." (emphasis supplied)

Presumption of facts: relevance of Section 110-114 of the Indian Evidence Act

98. The presumption of certain facts by the Courts in the absence of direct evidence of an offence has been an accepted practice. However certain principles guide such exercise of such presumption. The presumption must be an inference of fact drawn from another proved fact that is likely to flow as a common course of natural events, human conduct and public/private business vis-a-vis the facts. The Courts in drawing such presumption must look at the facts from an angle of common sense and common experience of man.

99. The Hon'ble Apex Court in **Limbaji and Ors v. State of Maharashtra (2001) 10 SCC 340** observed that:

> "9. ...A presumption of fact is a type of circumstantial evidence which in the absence of direct evidence becomes a valuable tool in the hands of the Court to reach the truth without unduly diluting the presumption in favour of the innocence of the accused which is the foundation of our Criminal Law. It is an inference of fact drawn from another proved fact taking due note of common experience and common course of events. Holmes J. in Greer v. US [245 USR 559] remarked "a presumption upon a matter of fact, when it is not merely a disguise for some other principle, means that common experience shows the fact to be so generally true that courts may notice the truth". ... Section 114 enjoins: "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." Having due regard to the germane considerations set out in the Section, certain presumptions which the Court can draw are illustratively set out. It is obvious that they are not exhaustive or comprehensive. The

> presumption under Section 114 is, of course, rebuttable. When once the presumption is drawn, the duty of producing evidence to the contra so as to rebut the presumption is cast on the party who is subjected to the rigour of that presumption. Before drawing the presumption as to the existence of a fact on which there is no direct evidence, the facts of the particular case should remain uppermost in the mind of the Judge.These facts should be looked into from the angle of common sense, common experience of men and matters and then a conscious decision has to be arrived at whether to draw the presumption or not." (emphasis supplied)

100. In **State of A.P. v. Vasudeva Rao (2004) 9 SCC 319**, reiterating the principles for presumption, noted a word of caution in the judicial exercise of presumption, holding that:

> "17. …Law gives absolute discretion to the Court to presume the existence of any fact which it thinks likely to have happened. In that process the Court may have regard to common course of natural events, human conduct, public or private business vis-a-vis the facts of the particular case. The discretion is clearly envisaged in Section 114 of the Evidence Act. 18. ...While inferring the existence of a fact from another, the Court is only applying a process of intelligent reasoning which the mind of a prudent man would do under similar circumstances. Presumption is not the final conclusion to be drawn from other facts. But it could as well be final if it remains undisturbed later. 19. ...Unless the presumption is disproved or dispelled or rebutted the Court can treat the presumption as tantamounting to proof. However, as a caution of prudence we have to observe that it may be unsafe to use that presumption to draw yet another discretionary presumption unless there is a statutory compulsion. This Court has indicated so in Suresh Budharmal Kalani v. State of Maharashtra (1998) 7 SCC 337 "A presumption can be

drawn only from facts and not from other presumptions by a process of probable and logical reasoning"."

(emphasis supplied)

101. Applying the aforesaid principles, can it be said that the confessional statement led to discovery of any new fact. Well, there is nothing on record to establish the same. Even in Court, Police Officer does not reveal having noticed the injuries on the body of the accused. No medical examination was conducted. Neither the accused was confronted nor any such fact, the confessional statement, put to any one of the witnesses. In any event, the veracity of such statement, more so in the absence of any independent person is extremely doubtful, if not a concoction to support the prosecution case. As such, the statement, in view of the principles enunciated discussed supra, is wholly inadmissible, having no evidentiary value in law.

102. We find that the trial court has committed a grave error in not putting the entire set of circumstances to the accused in the statement under Section 313 Cr.P.C. For better appreciation, we reproduce the full statement recorded under Section 313 Cr.P.C herein below:

Schedule XLLII High Court 3 (Old) (M) 85

FORM OF RECORDED EXAMINATION OF ACCUSED PERSON

(Section 313 the Criminal Procedure)

The examination of the Ajit Kumar aged about 22 years

taken before of me ए.डी.जे.-I J.Magistrate Class at गोपालगंज
on the 24 वी day of अप्रैल 2018 (in the) Language interparated by हिन्दी
my name is अजित कुमार my fathers name is गौतम प्रसाद
my age is 20 year I am by religion हिन्दु my Nationality भारतीय and
belong to schedule catste/scheduled tribe I am by occupation
my home is at mauza माझागढ़ कर्णपुरा Police Station माझागढ़ District गोपालगंज

प्रश्न- क्या आपने साक्ष्य सुना है ?
उत्तर- जी हां
प्रश्न- आपके विरुद्ध साक्ष्य है कि दिनांक 9/10-3-17 की रात्रि मे समीरन नाज नाबालिग लड़की अमीर हेमजा साकिन पोपरा पूरा माझागढ को आप सह अभियुक्त विशालकुमार के साथ अपहरण करके यशोदा कलौनी थाना मकरपुरा बडोदरा सी0टी0 (गुजरात) बलात्कार लेजाकर बलात्कार किया ?
उत्तर- जी नही
प्रश्न- आपके विरुद्ध साक्ष्य है कि दिनांक 19/04/2017 को समीरन नाज से झगड़ा करके उसके शरीर पर किरासन तेल छिड़क कर आग लगाकर हत्या कर दिये ?
उत्तर- जी नही
प्रश्न- आपको सफाई में क्या कहना है ? मुझे केस में झूठा फंसाया गया है
उत्तर- अजित कुमार

Signature of Magistrat's Session Judge

This above examination was taken in my presence and bearing the containce of the accused of the Statement made by the accused it was read over to accused of interpreted to him the language he understand and admitted by him to be correct.

अजित कुमार

Signature of Magistrate Session Judge
24/4/18

* Signature of Mark of the accused

Translated version of the statement

"Question-Have your heard the evidence?
Answer- Yes
Question-The evidence against you is that on 09/10-3-17 at night, you along with co-accused, Vishal Kumar kidnapped SamiranNaj, minor girl, Amir Hemja, R/o Pipra, P.S.-Manjhagarh and raped her

after taking her to Yasoda Colony, P.S.-Makarpura, Vadodara C.T. (Gujarat)?
Answer- No
Question-The evidence against you is that on 19/04/2017, you quarrelled with Samiran Naj, sprinkled kerosene oil on her body and murdered her after burning her?
Answer- No
Question-What have you got to say in defence?
Answer-I have been falsely implicated in the case."

103. Notably, the circumstance of the confessional statement has not even been put to the accused. Equally, the case leading to the guilt of the accused in relation to conviction under Sections 363, 366A, 120B, 376(D) and 302 of the Indian Penal Code cannot be said to have been put to the accused.

Significance of Examination of the Accused under Section 313 of the Code

104. Section 313 of the Code gives the trial Court a power of examination of the accused before the Court. Under this section, the accused is given an opportunity to explain any circumstance appearing in evidence against him.

105. This opportunity given to the accused has been held to be part of a fair trial. In **State of Maharashtra v. Sukhdev Singh (1992) 3 SCC 700**, the Hon'ble Apex Court held that it is the duty of the trial court to make the benefit of Section 313 available to the accused:

> "50. Section 313 of the Code is a statutory provision and embodies the fundamental principle of fairness based on the maxim audi alteram partem. It is trite law that the attention of the accused muse be specifically invited to inculpatory pieces of evidence or circumstances laid on record with a view to giving him an opportunity to offer an explanation if he chooses to do so. The section imposes a heavy duty on the court to take great care to ensure that the incriminating circumstances are put to the accused and his response solicited. The words "shall question him" clearly bring out the mandatory character of the clause and cast an imperative duty on court and confer a corresponding right on the accused to an opportunity to offer his explanation for such incriminating material appearing against him. ...Therefore, no matter how weak or scanty the prosecution evidence is in regard to a certain incriminating material, it is the duty of the Court to examine the accused and seek his explanation thereon."
>
> (emphasis supplied)

106. In the case of **Basavaraj R Patil v. State of Karnataka (2000) 8 SCC 740**, the Hon'ble Apex Court further explained the obligation of the trial courts vis-a-vis Section 313 of the Code, by observing that:

> "20. ...The word 'may' in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him." (emphasis supplied)

107. In **Lallu Manji v. State of Jharkhand (2003) 2 SCC 401**, the Hon'ble Apex Court stated that where opportunity under Section 313 of the code was not afforded to the accused, the incriminating pieces of evidence available in prosecution evidence could not be relied on for the purpose of recording the conviction of the accused persons. In **Naval Kishore Singh v. State of Bihar (2004) 7 SCC 502**, while upholding that Section 313 constituted a part of fair trial of the accused, the Court held that the High Court could very well remit the case to the Sessions Court for proper examination. This has also been held in **Raj Kumar Singh v. State of Rajasthan (2013) 5 SCC 722**, **Nav Singh v. State of Haryana (2015) 1 SCC 496**.

108. Most recently a three judge bench of the Hon'ble Apex Court in **Maheshwar Tigga v. State of Jharkhand (2020) SCC On Line SC 779** has held that:

> "9. It stands well settled that circumstances not put to the accused under Section 313 Cr.P.C. cannot be used against him, and must be excluded from consideration. In a criminal trial, the importance of questions put to an accused are the basic principles of natural justice as it provides him the opportunity not only to furnish his defense, but also to explain the incriminating circumstances against him.

109. In **Parminder Kaur v. State of Punjab 2020 SCC Online SC605**, The Hon'ble Apex Court has gone as far to state, in relation of Section 313 of the Code, that:

> "21. ...Such opportunity is a valuable right of the accused to seek justice and defend oneself. Failure of the trial court to fairly apply its mind and consider defence, could endanger the conviction itself. ..."

110. However, it is clarified that the accused in not per se entitled for acquittal on ground of non-compliance with mandatory provision of Section 313. The accused must show that some was cause or likely to be caused to him from the error or omission in compliance with the provisions of the Code. The non-compliance with Section 313 would vitiate the trial if material prejudice were caused to the accused. Where important incriminating circumstances were not put to the accused during examination under Section 313, it was held that the prosecution could not place reliance on the piece of evidence. [**Kuldip Singh v. State of Delhi (2003) 12 SCC 528, Paramjeet Singh v. State of Uttarakhand (2010) 10 SCC 439, Nav Singh v. State of Haryana (2015) 1 SCC 496, Yogesh Singh v. Mahabeer Singh (2017) 11 SCC 195**]

111. We may reiterate, that the offence under Sections 363, 366A, 376 and 120B I.P.C. cannot be said to have been established to the testimonies of P.Ws. 1, 2 and 3, which in any case are hearsay in nature, without disclosing the complicity of the

accused. On the issue of sexual assault, there is no evidence at all. The testimony of P.Ws. 1, 2 and 3 lacks credence. None found any telltale signs of rape on the spot or the body of the deceased. There is neither medical nor any scientific evidence indicating such fact. The theory of the accused pouring kerosene oil and setting the deceased on fire is also not borne out of the record, for P.W. 6 has not ruled out the possibility of suicide. He has deposed that "cannot say it is suicidal, homicidal or accidental." Also, what was the original version recorded in the Case Diary is not on record.

112. Applying the principles of law to the attending facts, as referred to and discussed (supra), affirmatively, we are of the view that the prosecution has not been able to establish any one of the charges against accused Ajit Kumar. Not only the investigation is incomplete and defective, but also material evidence is missing. The chain for establishing the case by way of circumstantial evidence is not linked, in fact, broken repeatedly and as such one cannot presume specific facts or events based on the preponderance of probability. Oral proof as we have discussed is all hearsay in nature, which, in any event, remains uncorroborated. The witnesses also cannot be said to have deposed full facts. Also, the statements each one of them stands contradicted on material aspects. Certainly, to our mind, their evidence is not of sterling quality, much

less worthy credence. Concoction on material facts is there. We need not repeat the same. Yes, homicidal death has taken place. But then the prosecution has failed to reach to the real assailant and acquittal of the present accused, certainly would not lead to failure or travesty of justice. Presumption of specific facts, based on the self-inculpatory statement alone, which in any event, in our considered view, is inadmissible in evidence cannot be relied upon for establishing any one of the charges.

113. We have already noticed the perfunctory manner in examining the accused under Section 313 Cr. P.C.

114. Undoubtedly, the Trial Judge ought to have been more careful in putting out each one of the material circumstances, enabling the accused to answer the same, understand evidence to be led in rebuttal. Absence of which, according to us has caused material prejudice to the accused. After all, we are dealing with a heinous crime sought to be established, based on circumstantial evidence.

115. Perhaps the Trial Judge got swayed with the gravity of crime which undoubtedly is heinous in nature. But this is where the Judge's role comes in, to decide judiciously in removing the husk from the chaff. The Trial Judge presumed and assumed without discussing, the veracity of fruitfulness of the testimonies of the

witnesses, for they have to depose truthfully; who informed the father, his daughter is kidnapped? And by accused Ajit Kumar and Vishal Kumar? for committing an offence of illicit intercourse is not discussed while convicting the accused under Section 363, 366(A)/34 IPC. Perhaps, the principle weighed with the Judge was to apply the preponderance of probabilities, and not beyond a reasonable doubt. In a criminal trial, the onus to prove criminal charge is on the prosecution and not the accused. It is this principle which the Trial Judge forgot in holding that "there is nothing available on the case record to disbelieve the version" having considered the plea taken by the defence. The defence set up by the accused is of mere denial. To our mind, the explanation furnished for non-examining the spot witness, i.e. landlady at Borada is legally unsustainable. To support the argument, the Trial Judge referred to the testimony of P.W.4, who also does not disclose anything establishing such fact, as we have noticed earlier. The existence of the confessional statement was what weighed with the learned Judge for convicting the accused, but its relevance or admissibility was never considered and examined. The law of admissibility for a confessional statement though taken note of but not correctly applied.

116. The decision of the trial court suffers from an error in appreciation of principles of evidentiary law. In **Ram Chander v. State of Haryana, (1981) 3 SCC 191**, the Hon'ble Apex Court put to itself, the question of the role of a judge trying a criminal case. The Court observed that:

> "2. ...If a criminal court is to be an effective instrument in dispensing justice, the presiding judge must cease to be a spectator and a mere recording machine. He must become a participant in the trial by evincing intelligent active interest by putting questions to witnesses in order to ascertain the truth."

117. This was the reason for giving wide powers to explore very avenue and discover the truth to the presiding judge. The Court further observed that the Court therefore had to actively participate in the trial to elicit the truth and to protect the weak and the innocent, at the same time balancing the fact that it must not assume the role of the prosecutor. Using Lord Dennings' words, the Court in the preceding decision held:

> "4. ... The Court, the prosecution and the defence must work as a team whose goal is justice, a team whose captain is the judge. The judge, like the conductor of a choir, must, by force of personality, induce his team to work in harmony; subdue the raucous, encourage the timid, conspire with the young, flatter and old."

118. This has been reiterated in **State of Rajasthan v. ANI (1997) 6 SCC 162**, where the Hon'ble Apex Court yet again held that it was the power and duty of the trial court to put any question to the witnesses and the parties at any point in order to ascertain the and discover the relevant facts. The power given under Section 165 of the Evidence Act was intended to be an unbridled power to the courts only for the reason that necessity for eliciting the truth is primary in a criminal trial.

> "As upheld by the Hon'ble Apex Court, the role of the higher courts is also to point out errors in law and to lay down jurisprudence to guide the decision-making of the lower courts. Keeping this in mind we have reiterated the principles that ought to have been followed by judicial officers in their decisions, more so in their capital punishment sentencing. A decision without appreciation of principles of law and facts leads to a travesty of justice. We hope and expect these principles are taken cognizance in all decisions of the courts."

119. Reading of the sentencing part of the judgment, reproduced supra, one finds the Trial Judge, to have only concluded, without assigning any reason, that the nature of the offence and the manner in which it was committed to fall within the category of 'rarest of rare cases'.

Principles of Capital Punishment Sentencing

120. Judicial decisions over the years have developed the following principles, which guide the death penalty sentencing by the courts:

I. Rarest of rare cases: The normal rule of punishment for murder is sentence for life and exception is death penalty. Death penalty must only be given in **rarest of the rare cases**. To depart from the normal rule and give death sentence. [**Bachan Singh v. State of Punjab (1980) 2 SCC 684**, **Macchi Singh v. State of Punjab (1983) 3 SCC 470**, **Mithu Singh v. State of Punjab (1983) 2 SCC 277**, **Santosh Kumar Sarish Bhushan Bariar (2009) 6 SCC 498, Om Prakash v. State of Haryana (1999) 3 SCC 19**, **Dharmendrasinh v. State of Gujarat (2002) 4 SCC 679, IshwariLalYadav v. State of Chhattisgarh (2019) 10 SCC 423**]. Exceptional Circumstances are not limited to cases where security of state and society and public interest in general are at issue. [**Bachan Singh v. State of Punjab (1980) 2 SCC 684**]

II. Judicial discretion on sentencing must be accompanied by application of judicial mind, and governed by rule of law. [**Jagmohan Singh v. State of UP (1973) 1 SCC 20, Bachan Singh v. State of Punjab (1980) 2 SCC 684**, **Mithu Singh v. State of Punjab (1983) 2 SCC 277**, **State of Punjab v. Dalbir Singh (2013) 3 SCC 346**, **Ravi v. The State of Maharashtra (2019) 9 SCC 622**]

III. The judgment must be supported by special reasons. [Section 354 (3) of the Code; **Balwant Singh v. State of Punjab (1976) 1 SCC 425, Bachan Singh v. State of Punjab (1980) 2 SCC 684**,**Allauddin Mian v. State of Bihar (1989) 3 SCC 5**, **Shashi Nayar v. Union (1992) 1 SCC 96**, **Swamy Shraddananda (2) v. State of Karnataka (2008) 13 SCC 767**, **Deepak Rai v. State of Bihar (2013) 10 SCC 421**, **Sandesh v. State of Maharashtra (2013) 2 SCC 479**]

IV. Balancing of aggravating and mitigating circumstances: As listing all possible aggravating and mitigating circumstances is not possible, judicial discretion on a case-

to-case basis depending on an analysis of facts and circumstances of each case is the best safeguard. Doctrine of proportionality of gravity of offence and punishment becomes relevant. [**Jagmohan Singh v. State of UP (1973) 1 SCC 20, Rajendra Prasad v. State of UP (1979) 3 SCC 646, Bachan Singh v. State of Punjab (1980) 2 SCC 684, Macchi Singh v. State of Punjab (1983) 3 SCC 470**,**Vashram Narshibhai Rajpara v. State of Gujarat (2002) 9 SCC 168**, **Om Prakash v. State of Haryana (1999) 3 SCC 19**, **Dharmendra Sinha v. State of Gujarat (2002) 4 SCC 679, Santosh Kumar Sarish Bhushan Bariar (2009) 6 SCC 498**, **Vsanta Sampat Dupare v. State of Maharashtra (2017) 6 SCC 631**, **Khushwinder Singh v. State of Punjab(2019) 4 SCC 415**, **Ishwari Lal Yadav v. State of Chhattisgarh (2019) 10 SCC 423**]

V. Weightage to every relevant circumstance relating to the crime and the criminal: Weightage must be given to the motive, manner and anti-social or abhorrent nature, magnitude of the crime, personality of the victim i.e. the court must examine the manner in which the crime is committed, offender's mental condition at the relevant time, motive of offence, brutality with which crime was committed and who it was committed on. [**Bachan Singh v. State of Punjab (1980) 2 SCC 684, Macchi Singh v. State of Punjab (1983) 3 SCC 470, Dharmendrasinh v. State of Gujarat (2002) 4 SCC 679**, **Mohan v. State of T.N. (1998) 5 SCC 336**, **State of UP v. Sanjay Kumar (2012) 8 SCC 537**, **Shabnam v. State of U.P. (2015) 6 SCC 632**, **Ishwari Lal Yadav v. State of Chhattisgarh (2019) 10 SCC 423**]

VI. Residual doubt becomes a mitigating circumstance, more so, for cases based on circumstantial evidence. [**Ashok Debbarma v. State of Tripura (2014) 4 SCC 747**, **Ravishankar v. State of MP (2019) 9 SCC 689**, **Sudam v. State of Maharashtra (2019) 9 SCC 388**]

VII. Judicial approach must be cautious, circumspect and careful. Court must exercise prudence, and each court - from Sessions court to the Supreme Court - must peruse and analyze facts of the case at hand and reach independent conclusion. [**Bachan Singh v. State of Punjab (1980) 2**

SCC 684, Dharmendrasinh v. State of Gujarat (2002) 4 SCC 679, **Sandesh v. State of Maharashtra (2013) 2 SCC 479**]

VIII. Sessions court, in particular, must rigorously apply the rarest of rare case principle, they cannot do lip service to application of judicious mind, and their discretion is liable to be corrected by superior courts as a safeguard. [Section 366 of the Code; **Sandesh v. State of Maharashtra (2013) 2 SCC 479**, **State of Punjab v. Dalbir Singh (2013) 3 SCC 346**]

IX. Principle of retribution: Capital punishment is based on the principle of denunciation of wrongdoing. It is a reflection of revulsion felt by society against crimes so outrageous that the wrongdoer gets 'punishment they deserve' - where life imprisonment is an inadequate punishment for the crime. [**Rajendra Prasad v. State of UP (1979) 3 SCC 646**,**Bachan Singh v. State of Punjab (1980) 2 SCC 684**, **Ravi v. The State of Maharashtra (2019) 9 SCC 622**,**Manoharan v. State (2020) 5 SCC 782**]

X. Doctrine of rehabilitation: The court must take into account where there is a possibility of rehabilitation of the offender and not determine the punishment on the ground of proportionality alone. [**Dharmendrasinh v. State of Gujarat (2002) 4 SCC 679, Sushil Sharma v. State (NCT of Delhi) (2014) 4 SCC 317**, **Ravi v. The State of Maharashtra (2019) 9 SCC 622**]

XI. The court must not be an oracle of the public opinion and recognize limits to judicial power. They must ensure that individual rights guaranteed by the constitution are at a higher pedestal than public opinion. [**Om Prakash v. State of Haryana (1999) 3 SCC 19, Dharmendrasinh v. State of Gujarat (2002) 4 SCC 679**, **Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498**]

121. What is the basis of his conclusion of the case being the rarest of rare cases is not discussed. What are the special

reasons for grant of capital punishment; whether there were any mitigating circumstances; what was the mental state, motive, or the brutality of the crime were never thought of much less considered by the learned trial judge. The approach adopted is casual and perfunctory in nature, unmindful of the consequences of the decision which when implemented becomes irrevocable and irreversible.

122. We are unable to persuade ourselves to agree with the Trial Judge, either on the sentence of awarding death penalty or applying the principles of sentencing. The sentence for each one of the offences was required to be pronounced which, perhaps Trial Judge forgot to do so.

123. The Death Reference is answered accordingly.

124. For all the aforesaid reasons, we allow the appeal filed by accused Ajit Kumar and set aside the judgment of conviction dated 25th June 2018 and order of sentence dated 30th June 2018 passed in Manjhagarh P.S. Case No.67 of 2017 (C.I.S. no.177 of 2017) by the learned 1st Additional Sessions Judge, Gopalganj (Bihar).

125. The accused Ajit Kumar is in jail. He be released forthwith unless required in any other case.

126. Registrar (List) shall ensure the communication of the judgment to all concerned, also by an electronic mode. Equally, learned counsel for the State is directed to do so.

(Sanjay Karol, CJ)

S. Kumar, J I agree**.**

(S. Kumar, J)

K.C.Jha/-

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