(2019) 05 MP CK 0043

Madhya Pradesh High Court

Case No: Criminal Appeal No. 458 Of 2019

Afjal Khan		APPELLANT
	Vs	
State Of Madhya Pradesh		RESPONDENT

Date of Decision: May 17, 2019

Acts Referred:

- Code Of Criminal Procedure, 1973 - Section 174, 235(2), 354(3), 366(1)
- Indian Penal Code, 1860 - Section 201, 302, 376(2)(i), 376(2)(f)(i)(n)(k), 376(a), 376(2)(F), 376(2)(N) , 377
- Protection Of Children From Sexual Offences Act, 2012 - Section 5(m), 5(l)(m)(n), 6
- Evidence Act, 1872 - Section 8, 114

Hon'ble Judges: J.K. Maheshwari, J; Anjuli Palo, J

Bench: Division Bench

Advocate: Surendra Singh, Siddharth Sharma, Som Mishra

Final Decision: Partly Allowed

Judgement

Section,Act,Sentence,Fine,In default of fine

302,Indian Penal Code,"Death penalty (to be

hanged till death)",Nil,Nil

201,Indian Penal Code,R.I. for 10 years,"Rs. 5,000/",R.I. for 6 months

377,Indian Penal Code,R.I. for life till death,"Rs. 5,000/",R.I. for 6 months

376(2)(F),Indian Penal Code,R.I. for life till death,"Rs. 5,000/",R.I. for 6 months

376(2)(I),Indian Penal Code,R.I. for life till death,"Rs. 5,000/",R.I. for 6 months

376(2)(N),Indian Penal Code,R.I. for life till death,"Rs. 5,000/",R.I. for 6 months

5(l)(m)(n) r/w 6,"Protection of

Children from Sexual

Offences Act",-,-,-

of the findings recorded by the trial Court. It was contended that the learned trial Court has properly evaluated the entire evidence available on record,,,,

and rightly convicted the appellant and awarded sentence befitting the crime. Hence, appeal filed by the appellant is liable to be dismissed and allowing",,,,

the criminal reference, the death sentence may be confirmed.",,,,

9. Heard rival contentions of the learned counsel for the parties at length and perused the record. Now the question that arise for consideration is -,,,,

â€œWhether the finding proving the charge by the trial Court to convict the appellant is just. If so, what sentence may be awarded in the facts of the",,,,

case.â€,,,,

10. This case is purely based on circumstantial evidence collected by the prosecution. It is not in dispute that the deceased was aged six years only.,,,,

Her mother Farida is married with the appellant who is the second wife. It is pertinent to note that she was not examined by any of the parties as a,,,,

witness either by the prosecution or by the defence. She could be the best witness to testify the behaviour of the appellant towards the prosecutrix,,,,

(since deceased) and the presence of the appellant at the time of incident.,,,,

11. Raju Yadav (PW-1), Arjun (PW-3), Reshma (PW-4), Ube-ur- Rehman (PW-5) are the witnesses and neighbours who knew the appellant and his",,,,

family. All these witnesses did not support the case of prosecution and declared hostile.,,,,

12. Ajay Rajput (PW-11), neighbour of the appellant has stated that on 15.03.2017 at about 7:00 pm, he heard screams of hue and cry from the",,,,

appellantâ€™s house. When he reached on the scene of occurrence, he came to know that something has happened to the younger daughter of the",,,,

appellant. With the help of a boy, he brought her to Tripti Hospital at Lalghati, where Doctors have refused to admit and referred her to Hamidia",,,,

Hospital. He took her to the Hamidia Hospital and telephonically called the appellant, who reached at the hospital. In the meantime, it was informed",,,,

that the prosecutrix had died. Later, Ajay Rajput (PW-11) came to know that the appellant himself had sexually assaulted her and committed murder",,,,

of the prosecutrix. This testimony indicates that the deceased was brought to the hospital by Ajay Rajput (PW-11) and not by her own family,,,,

members.,,,,

13. Arif Ali (PW-14) Head Constable has deposed that on 15.03.2017, he received a telephonic call about hanging of the deceased at her own",,,,

residence. Thereafter, he registered the information in rojnamcha sanha (Ex. P/18). He said that in the information, it was mentioned that the appellant",,,,

took the deceased to the hospital. Thereafter, he informed the incident to Incharge Police Station. Anil Bajpai (PW-16), Incharge, Police Station,",,,,

Jahangirabad has corroborated the testimony of Arif Ali (PW-14) and stated that he received information from Hamidia Hospital that the appellant,,,,

had brought the deceased prosecutrix to the hospital. Thereafter, her body was kept in the mortuary. He registered FIR (Ex. P/19) on 04.07.2017",,,,

against unknown persons. He has further stated that, appellant refused to conduct autopsy of the deceased due to which he came under the sphere of",,,,

suspicion. On 21.03.2017, Anil Bajpai (PW-16) received short postmortem report wherein the doctor had opined that the deceased was subjected to",,,,

sexual violence. Later, he received the complete postmortem report and after receiving the anul & vaginal swab (Ex. P/20) & (Ex. P/21) and the",,,,

clothes of the deceased, sent those articles to RFSL, Bhopal and FSL Sagar through the Superintendent of Police, Bhopal for chemical examination.",,,,

Ex. P/22 are the FSL reports which confirms the presence of human sperms on the slide of vaginal swab of the deceased. Thereafter, he interrogated",,,,

the suspected persons including the appellant and duly taken blood samples for DNA with the help of doctors and sent it for further examination to,,,,

FSL, Sagar. On 15.09.2017, DNA report (Ex. P/25) has been received. The Experts have given the opinion that in the source of DNA taken from the",,,,

deceased, Y chromosomes, STR DNA profile of the appellant were present. Accordingly, the appellant was interrogated by Anil Bajpai (PW-16)",,,,

Incharge, PS Koh-e-fiza.",,,,

14. Memorandum (Ex. P/13) of the appellant was recorded wherein it was disclosed by him, that he wanted to take revenge with the wife Farida and",,,,

the person whom he suspected to be the father of the deceased. Therefore, he was in search of opportunity since last 3 months.",,,,

On getting opportunities, he sexually exploited the deceased (prosecutrix) and in return he used to give her money and chocolates to keep mum. He",,,,

used to perform unnatural sex with her and felt satisfied to his lust of revenge with wife. 8-9 days prior to the date of incident, he had a quarrel with",,,,

his wife Farida. A day prior to the incident, he was sleeping in his room on the upper floor when the deceased came there and he sexually exploited",,,,

her and gave her some money. At that time, he was so angry at his wife that he planned to kill the deceased. Appellant further stated in his",,,,

memorandum that on the date of incident, at about 4:30 pm, he came to his house. His elder daughters were busy in singing and dancing on the first",,,,

floor. He took the prosecutrix to the upper floor into his room. He further stated that he later prepared a chabutra (platform) on the bed using clothes,,,,

so that it would appear that the prosecutrix herself climbed on the chabutra and committed suicide. Thereafter, he flee away from the spot and",,,,

reached at his shop. After sometime, his daughter Kulsum telephonically informed him that the deceased has committed suicide. He reached his",,,,

house, but someone had taken the deceased to Hamidia Hospital.",,,,

15. This version of Anil Bajpai (PW-16) is corroborated by the testimony of Ajay Rajput (PW-11) to some extent. In his memorandum, the appellant",,,,

said that he did not want the autopsy of the deceased be conducted, therefore, he refused for the same. Appellant also demolished the structure of",,,,

room during investigation where he committed the offence with the deceased. Investigating Officer Anil Bajpai (PW-16) found malba (debris) of the,,,,

demolished room on the spot. It is a very material and incriminating circumstance which was not challenged by the learned counsel for the appellant in,,,,

his cross-examination. Such an act of the appellant is relevant to connect him with the crime, under Section 8 of the Evidence Act.",,,,

16. It is also a relevant issue, that what was the reason for the appellant to demolish the room in such a hurry, where the incident took place. It is a",,,,

matter of investigation. Police may have got some clues about the possibility whether the deceased herself committed suicide or not, what was the",,,,

height of the ceiling, whether it was possible for the deceased to climb on the heap of clothes chabutra to reach the ceiling and hang herself.",,,,

Therefore, it is indicative of the fact that the room was demolished with intent to disappear the cogent evidence. We can not ignore such material",,,,

circumstance helpful in establishing the intention of the appellant to the place where offence was committed with the deceased.,,,,

17. Dr. Geeta Rani Gupta (PW-2) who conducted autopsy of the deceased found the following external injuries on the body of the deceased :,,,,

(1) Reddish discolouration present over left cheek without any ecchymosis.,,,,

(2) Abrasion present over right side of back extending from 8 cm right to midline and from 2 cm below the inferior angle of scapula going upwards,,,,

and tappered. It is broad at lower end side and tapper at upper end side, size 6x0.3 cm with reddish brown scab and marginal inflammation is present",,,,

at upper end region, the scab is falling off at places. Duration of injury is approximately 4 to 10 days.",,,,

(3) Abrasion is present over right side of maxillary prominence size 0.5x0.2 cm convexity is going upwards and laterally and concavity is directed,,,,

downwards and medially. It is semi-lunar in shape.,,,,

(4) Two abrasion present over left side extending from 2.5 cm left to midline and 1 cm below the body of mandible size 0.2 cm in diameter and 0.5 cm,,,,

apart.,,,,

(5) An abrasion is present over right cheek size 0.2 cm in diameter.,,,,

(6) An abrasion is present over right forearm on flexor aspect extending 9 cm above the wrist joint size 0.2 cm diameter.,,,,

(7) Multiple superficial abrasion present over right forearm or flexor aspect extending from 1 cm above the wrist joint in an area of 3.5 x 1 cm vertical,,,,

directed downwards and laterally, size varies from pinhead to 0.8x0.2 cms. The uppermost is biggest in size 0.8x0.2 cm semi-lunar in upward.",,,,

(8) Abrasion present over left shoulder joint size 2x1 cm sagital extending from 5 cm right to midline.,,,,

(9) Abrasion present over right side of back extending from 4 cm right to midline and at 10th thoresic vertibra level size 1 x 0.2 cm directed,,,,

downwards and laterally.,,,,

(10) Abrasion present over left side of back extending from 8 cm left to midline and 2 cm below the inferior angle of scapula size 2 x 0.5 cm vertical.,,,,

(11) Abrasion present over right side of superior angle of scapula size 1x0.3cm transverse.,,,,

(12) Ligature mark present over neck on full extension of neck.,,,,

Duration of injury No. 3 to 11 are fresh and red in colour, within 24 hours of the postmortem and simple in nature.",,,,

Dr. Geeta Rani Gupta (PW-2) found the following injuries on internal examination of the body of the deceased :,,,,

(1) The anal opening is dilated. Fecal matter is visible on left side, margins are irregular and scarred with notching at 3 oâ€™ clock position.",,,,

(2) Reddish dicolouration present over labia minora, contusion present at vaginal opening and its adjacent part of vestibule and labia minora, red in",,,,

color, inflamed and fresh.",,,,

(3) Tongue was protruded between the teeth with marking of teeth.,,,,

18. The testimony of Dr. Geeta Rani Gupta (PW-2) clearly indicates that deceased died due to asphyxia as a result of hanging. The deceased had,,,,

more than ten abrasions, of which some were large and some were small on several parts of her body, which shows that just before her death she",,,,

was assaulted due to which she sustained those injuries. In addition to the aforesaid external injuries, there were injuries over her private parts.",,,,

Swelling and the injuries were fresh which establish that just before her death, rape was committed with her. Her postmortem report (Ex. P/2) duly",,,,

establish the commission of unnatural intercourse. Her anul part was badly affected. She was only six years old. Such type of injuries cannot be,,,,

caused to her accidentally nor it can be imagined that she herself caused such type of injuries. We are not inclined to accept the contentions of learned,,,,

counsel for the appellant that a minor girl of this age committed suicide due to shame. Her bodily injuries are sufficient to disagree with the contention,,,,

of learned counsel.,,,,

19. Learned Senior Counsel for the appellant strongly contended that there is no evidence against the appellant available on record to connect him with,,,,

the crime. He further contended that DNA report is not sufficient to convict the appellant because there is no proof that the sample taken by the,,,,

police were kept safely and securely in accordance with the procedure prescribed. he prosecution has failed to establish that semen found on the,,,,

frock of the deceased belongs to the appellant. In the accused statement, appellant had specifically taken the plea that at night, he had some discharge",,,,

which was later collected by the police and implanted the same with crime. In that context, learned Senior Counsel for the appellant has relied upon",,,,

the judgment of Honâ€™ble Supreme Court in case of â€œMohd. Aman vs. State of Rajasthan (1997) 10 SCC 44â€ and â€œValsala vs. State of,,,,

Kerala, AIR 1994 SC 117â€.",,,,

20. After considering the procedures and rules which were produced by the learned Government Advocate to establish the procedure for taking the,,,,

DNA samples and its preservation, we come to the conclusion that in the present case there is no reason to ignore the DNA profile report Ex. P/25,",,,,

which is against the appellant. In case of â€œSantosh Kumar Singh vs. State through CBI, (2010) 8 SCC 747â€, the Honâ€™ble Supreme Court has",,,,

observed as under with regard to the DNA test report :,,,,

â€œWe feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had",,,,

submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in Smt. Kamti",,,,

Devi v. Poshi Ram AIR 2001 SC 2226. In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides,,,,

and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the",,,,

opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on circumstance No.9.â€",,,,

21. In FSL report (Ex. P/22) of the vaginal slide, vaginal swab, anul slide and anul swab, clothes of the deceased (Article A) to (Article F) semen and",,,,

human sperm were found. On the dupatta and bed sheet (Article G) and (Article H) particles of saliva were found, On the skirt (Article F), dupatta",,,,

(Article G) and bed sheet (Article H) human blood was found. On the bed sheet (Article H) human blood of group-B was found. This FSL report is,,,,

duly corroborated by the testimony of Dr. Geeta Rani Gupta (PW-2). DNA Report Ex.-P/25 established that the genetic marker Y chromosomes,,,,

STR DNA taken from the source of the deceased (Ex.F) matched with the Y chromosomes STR DNA profile of of the appellant. Whereas, the",,,,

DNA profile and other suspects Devendra Yadav, Sunil Gavli and Rajat Rajput did not tally with the DNA taken from the frock of the deceased.",,,,

22. We find that the DNA sample has been duly/properly and procedurely taken and kept in safe custody. The procedures were rightly followed as,,,,

mentioned in (Ex. P/23), (P/24), (P/25). Learned counsel strongly contended to create suspicion about the procedure for obtaining DNA sampling. It is",,,,

pertinent to note that during cross-examination of Investigating Officer Anil Bajpai (PW-16) and expert Dr.Anil Kumar Singh (PW-18) and other,,,,

concerned police personnel, no question has been asked by the counsel for the appellant about the safe custody of the samples and the procedure",,,,

adopted by them. Such defence cannot be taken for the first time at this stage by the learned Senior counsel for the appellant without showing any,,,,

cogent evidence to support the contention to create a maze. It was established by the prosecution that when all the sample reached FSL Sagar and,,,,

RFSL, Bhopal for DNA profile test, they found that the seals were intact. No suggestion was made during cross-examination of Experts from FSL",,,,

and Police Officials that seals of the package/containers were tampered with. Hence, in our view the genuineness of samples could not be doubted. It",,,,

cannot be ignored that scientists are eminent persons and that the laboratory is an esteemed institution in the country. Hence, the trial Court has rightly",,,,

accepted the DNA report. In case of Santosh Kumar Singh vs. State (2010) 9 SCC 747, the Honâ€™ble Apex Court has held as under:",,,,

â€œIt is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the,,,,

DNA profiling. The trial court has referred to a large number of text books and has given adverse findings on the accuracy of the tests carried out in,,,,

the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a,,,,

highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In Bhagwan Das & Anr. vs.",,,,

State of Rajasthan AIR 1957 SC 589 it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be,,,,

brushed aside by making reference to some text on that subject without such text being put to the expert.â€,,,,

23. Further that the Investigating Officer Anil Bajpai (PW-16) strongly deposed that the appellant refused the postmortem of the body of the,,,,

prosecutrix to be conducted. This statement has not been challenged by the appellant in the cross-examination nor he offered any explanation why he,,,,

had not wanted the autopsy of the deceased to be conducted knowing that his daughter was subjected to such a heinous crime.,,,,

24. The learned counsel for the appellant repeatedly submitted that the police manipulated the case to falsely implicate the appellant with the crime but,,,,

nowhere he explained why the police was interested in falsely implicating the appellant, what may be the object behind such implication or on whose",,,,

insistence. Police is the investigating agency and is duty bound to conduct fair investigation. Under Section 114 of Evidence Act, there is a",,,,

presumption in favor of a public servant such particularly, police that :",,,,

â€œCourt may presume existence of certain facts. â€"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 the facts of the particular",,,,

case.â€,,,,

25. In catena of cases, it was held that police personells perform their duty with utmost sincerity and honesty. The act of police cannot be questioned",,,,

without any justification or cause. If in all cases, the proceedings of police be treated as doubtful the prevention of crime would not be possible.",,,,

Therefore, we are not inclined to accept the contentions raised by the learned Senior Counsel to disbelieve the police investigation.",,,,

26. Learned Senior Counsel for the appellant further contented that the trial Court wrongly ignored the defence evidence which proves that without,,,,

any cogent evidence the appellant has wrongly convicted by the trial Court. The defence witness Anay Khan (DW-1) daughter of the appellant,",,,,

deposed that at the time of the incident, the appellant was not present at their house. In the last line of the cross-examination, she admitted that now",,,,

she was residing with her grand-mother and not with her parents. From the memorandum of the appellant, it shows that the appellant hated his wife",,,,

because he suspect on her character and due to this reason he committed crime with his own daughter-prosecutrix. He also suspected that the,,,,

prosecutrix was not his daughter.,,,,

27. Looking to the aforesaid circumstances it seems that Anay Khan (DW-1) has given false evidence to save her father. Her testimony is not,,,,

reliable. She also admitted that at the time she was doing household chores, therefore, she would not be aware if someone climbed up her house.",,,,

Similarly, other defence witnesses Emran (PW-2) admitted that he was not present with the appellant 24 hours. Neither he was aware as to when did",,,,

the appellant left the shop, went anywhere and when did he returned back to his shop. Such type of evidence is not sufficient to establish the plea of",,,,

alibi taken by the appellant.,,,,

28. In our opinion, the defence evidence is not sufficient to discard or disbelieve the DNA report Exhibit-P/25 which is against the appellant. The",,,,

learned Trial Court rightly convicted the appellant under Sections 302, 201, 377, 376(2)(F), 376 (2)(I) and 376(2)(N) of the IPC.",,,,

29. Now, question arises whether the act of the appellant is liable to be punished with death sentence or some other sentence.",,,,

30. In the present case, the appellant has been convicted and sentenced with capital punishment under Section 302 of IPC. He has not been punished",,,,

with death sentence for committing offence punishable under Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences,,,,

Act 2012. Recently, in the case of Prahalad vs. State of Rajasthan, 2018(4) Crimes 372 (SC,) the Honâ€™ble Supreme Court has held that appellant",,,,

does not have any criminal background, nor is he a habitual offender. Motive for the offence of murder is not clear and of course it is generally hidden,",,,,

known to the accused only. Under such circumstances, the court will have to see as to whether the case at hand falls under the â€˜rarest of the",,,,

rareâ€™ case category. In that case, the accused was also young during the relevant point of time. Hence, the Honâ€™ble Supreme Court held that",,,,

the duty is on the State to that there is no possibility of reform or re-habilitation of the accused. When the offence is not gruesome, not cold-blooded",,,,

murder, nor is committed in a diabolical manner, the court will impose life imprisonment. In the case at hand, the mitigating factors outweigh the",,,,

aggravating factors. The only aggravating factor in the matter is that the accused took advantage of his position in the victimâ€™s family for,,,,

committing the murder of the minor girl in as much as the minor girl was treating the accused as her Mama (uncle).,,,,

31. We do not find that the murder has been committed with extreme brutality or that the same involves exceptional depravity. On the other hand, as",,,,

mentioned in case of Prahalad (supra), the accused was young and the probability that he would commit criminal acts of violence in the future is not",,,,

available on record. There is every probability that the accused can be reformed and rehabilitated. In this context, the observations made by the",,,,

Honble Supreme Court in the case of Bachan Singh v. State of Punjab (1980) 2 SCC 684, is reproduced as follows:",,,,

â€œ209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of,,,,

aggravation. â€œWe cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and,,,,

undulating society.â€ Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must",,,,

receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be,,,,

bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that",,,,

in the past, courts have inflicted the extreme penalty with extreme infrequencya fact which attests to the caution and compassion which they have",,,,

always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts,",,,,

aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern,",,,,

directed along the highroad of legislative policy outlined in Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and",,,,

death sentence an exception. A real and abiding concern for the dignity of the human life postulates resistance to taking a life through lawâ€™s,,,,

instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed.â€,,,,

32. Sentence has always been a vexed question as part of the principles of proportionality.,,,,

33. Learned Government Advocate has relied upon various judgments of the Honâ€™ble Supreme Court. InA nil vs. State of Maharashtra, (2014) 4",,,,

SCC 69, the Apex Court relying upon the judgment in case of Shankar Kisanrao Khade vs. State of Maharastra, (2013) 5 SCC 54 9has observed as",,,,

under :,,,,

â€œ22. We have dealt with the various principles to be applied while awarding death sentence. In that case, we have referred to the cases wherein",,,,

death penalty was awarded by this Court for murder of minor boys and girls and cases where death sentence had been commuted in the cases of,,,,

murder of minor boys and girls. In Shankar Kisanrao Khade we have also extensively referred to the principles laid down in Bachan Singh vs. State of,,,,

Punjab, (1980) 2 SCC 684 and Macchi Singh vs. State of Punjab,, (1983) 3 SCC 470 and the subsequent decisions. Applying the tests laid down in",,,,

Shankar Kisanrao Khade , we are of the view that in the instant case the crime test and criminal test have been fully satisfied against the accused.",,,,

Still, we have to apply the R -R test and examine whether the society abhors such crimes and whether such crimes shock the conscience of the",,,,

society and attract intense and extreme indignation of the community.,,,,

27. The R-R test, we have already held in Shankar Kisanrao Khade case, depends upon the perception of the society that is â€œsociety-centricâ€ and",,,,

not â€œJudge-centricâ€, that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that",,,,

test, the court has to look into variety of factors like societyâ€™s abhorrence, extreme indignation and antipathy to certain types of crimes like sexual",,,,

assault and murder of minor girls, minors suffering from physical disability, old and infirm women, etc.â€",,,,

In Bachan Singh (supra), the Supreme Court has categorically stated, â€œthe probability that the accused would not commit criminal acts of violence",,,,

as would constitute a continuing threat to the societyâ€, is a relevant circumstance, that must be given great weight in the determination of sentence.",,,,

This was further expressed in,,,,

Santosh Kumar Satishbhushan Bariyar (supra). Many-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of",,,,

a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of",,,,

the Court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the",,,,

accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls",,,,

for additional materials. We, therefore, direct that the criminal courts, while dealing with offences like Section 302 IPC, after conviction, may, in",,,,

appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and",,,,

circumstances of each case.,,,,

34. In the present case photographs and other evidence undisputably establish that the aforesaid frock was worn by the deceased at the time of the,,,,

incident. Therefore, presence of allele of genetic marker from the DNA profile of the appellant duly connects the appellant with the crime. It is",,,,

sufficient to establish that only the appellant committed repeatedly rape and unnatural intercourse with the prosecutrix and thereafter, he intentionally",,,,

demolished the room where the aforesaid offence was committed.,,,,

35. In case of â€œMofil Khan vs. State of Jharkhand (2015) 1 SCC 67â€ ,the Honâ€™ble Supreme Court relying upon various judgments has",,,,

observed as under with regard to the approach and consideration for awarding sentence:,,,,

â€œ45. In Haresh Mohandas Rajput v. State of Maharashtra (2011) 12 SCC 56, Dara Singh v. Republic of India (2011) 4 SCC 80 and Sudam v. State",,,,

of Maharashtra (2011) 7 SCC 125, this Court has opined that the death sentence must be awarded where the victims are innocent children and",,,,

helpless women, especially when the crime is committed in the most cruel and inhuman manner which is extremely brutal, grotesque, diabolical and",,,,

revolting.,,,,

46. The Crime Test, Criminal Test and the â€œRarest of the Rareâ€ Test are certain tests evolved by this Court. The Tests basically examine",,,,

whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of,,,,

the community. The cases exhibiting a premeditation and meticulous execution of the plant to murder by levelling a calculated attack on the victim to,,,,

annihilate him, have been held to be fit case for imposing death penalty. Where innocent minor children, unarmed persons, helpless women and old and",,,,

infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly murder displaying depraved mentality, the",,,,

accused have shown no remorse, death penalty has been imposed. Where it is established that the accused is a hardened criminal and has committed",,,,

murder in a diabolic manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace",,,,

to the society, this Court has not hesitated to confirm death sentence. Many a time, in cases of brutal murder, exhibiting depravity and callousness, this",,,,

Court has acknowledged that need to send a deterrent message to those who may embark on such crimes in future. In some cases involving brutal,,,,

murders, societyâ€™s cry for justice has been taken note of by this Court, amongst other relevant factors. While deciding whether death penalty",,,,

should be awarded or not, this Court has in each case, realising the irreversible nature of the sentence, pondered over the issue many times over. This",,,,

Court has always kept in mind the caution sounded by the Constitution Bench in Bachan Singh case that Judges should never be bloodthirsty but,,,,

wherever necessary in the interest of society identify the rarest of the rare case and exercise the tougher option of death penalty.â€,,,,

36. In case of Santosh Kumar Singh (supra), the Honâ€™ble Supreme Court has observed as under with regard to the sentence awarded in the case:",,,,

â€œUndoubtedly the sentencing part is a difficult one and often exercises the mind of the Court but where the option is between a life sentence and a,,,,

death sentence, the options are indeed extremely limited and if the court itself feels some difficulty in awarding one or the other, it is only appropriate",,,,

that the lesser sentence should be awarded. This is the underlying philosophy behind `the rarest of the rare' principle.â€,,,,

37. Looking to the nature of offence, particularly in such type of cases, direct evidence is not available, as the crime is committed by the culprit in a",,,,

planned and clandestine manner, so that no witness or evidence remains against the culprit, particularly in a case where father has committed the",,,,

heinous crime followed by murder of his 6 years old minor daughter.,,,,

38. Learned counsel for the appellant requested that the appellant has no criminal antecendent and would not be a menace to the society. There is a,,,,

possibility of reformation and rehabilitation of accused. In case of Anil (supra), the Honâ€™ble Supreme Court has held as under :",,,,

â€œThe legislative policy is discernible from Section 235(2) read with Section 354(3) of the Cr.P.C., that when culpability assumes the proportions of",,,,

depravity, the Court has to give special reasons within the meaning of Section 354(3) for imposition of death sentence. Legislative policy is that when",,,,

special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding",,,,

appropriate sentence, that is the will of the people. We are of the view that incarceration of a further period of thirty years, without remission, in",,,,

addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence.â€",,,,

39. In recent judgment, in the case of â€œSachin Kumar Singraha vs. State of MP in Criminal Appeal No. 473-474 of 2019â€, the Honâ€™ble",,,,

Supreme Court imposed a sentence of life imprisonment with a minimum of 25 years of imprisonment (without remission) considering the judgment,,,,

rendered in case of â€œParsuram vs. State of MP (Criminal Appeal Nos. 314-315 of 2013)â€ wherein it was observed as under :,,,,

â€œ19â€¦â€¦â€¦â€¦.. keeping in mind the aggravating circumstances of the crime as recounted above, we feel that the sentence of life imprisonment",,,,

simpliciter would be grossly inadequate in the instant case.â€,,,,

40. Recently in the case of Channulal Verma vs. State of Chhattisgarh reported in 2018 SCC Online SC 2570, the three judges Bench of the Apex",,,,

Court has taken into consideration the judgments of Machhi Singh, Bachan Singh (supra) and other judgments particularly the case of Santosh Kumar",,,,

Satish Bariya vs. State of Maharashtra reported in (2009) 6 SCC 498 and Shankar Kisanrao Khade and also considering the 262th Report of the Law,,,,

Commission of the year 2015, which is as under:",,,,

â€œCHAPTER-I,,,,

INTRODUCTION,,,,

A. Reference from the Supreme Court,,,,

1.1.1. In Shankar kisanrao Khade v. State of Maharashtra (â€˜Khadeâ€™) (2013) 5 SCC 546 the Supreme Court of India, while dealing with an",,,,

appeal on the issue of death sentence, expressed its concern with the lack of a coherent and consistent purpose and basis for awarding death and",,,,

granting clemency. The Court specifically called for the intervention of the Law Commission of India (â€˜the Commissionâ€™) on these two issues,",,,,

noting that :,,,,

It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not",,,,

known to the courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of",,,,

people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the,,,,

alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of,,,,

uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can,,,,

resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal. (Shankar,,,,

Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 -para 148 (Emphasis supplied),,,,

It does not prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted",,,,

of an offence punishable with death with different standards. While the standard applied by the judiciary is that of the rarest of rare principle (however,,,,

subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known. Therefore, it could",,,,

happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in",,,,

awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion",,,,

and has commuted the death penalty. This may also need to be considered by the Law Commission of India. (2013) 5 SCC 546-para 149. (Emphasis,,,,

supplied),,,,

1.1.2. Khade was not the first recent instance of the Supreme Court referring a question concerning the death penalty to the Commission. InS antosh,,,,

Kumar Satishbhushan Bariyar v. State of Maharashtra (â€˜Bariyarâ€™) (2009) 6 SCC 49 8lamenting the lack of empirical research on this issue, the",,,,

Court observed :,,,,

We are also aware that on 18.12.2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death",,,,

penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that",,,,

retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up-",,,,

do-date and informed discussion and debate on the subject. (Emphasis supplied),,,,

1.1.3. The present Report is thus largely driven by these references of the Supreme Court and the need for re-examination of the Commissionâ€™s,,,,

own recommendations on the death penalty in the light of changed circumstances.â€,,,,

23. Chapter -VII of Report No. 262 contains the Conclusions and Recommendations. To quote :-,,,,

â€œA. Conclusions,,,,

7.1.1 The death penalty does not serve the penological goal of deterrence any more than life imprisonment. Further, life imprisonment under Indian",,,,

law means imprisonment for the whole of life subject to just remissions which, in many states in cases of serious crimes, are granted only after many",,,,

years of imprisonment which range from 30-60 years.,,,,

7.1.2 Retribution has an important role to play in punishment. However, it cannot be reduced to vengeance. The notion of â€œan eye for an eye, tooth",,,,

for a toothâ€ has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid,,,,

penological goals.,,,,

7.1.3 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of.",,,,

Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and",,,,

rights of victims of crime. It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same,,,,

time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to",,,,

victims in suitable cases. The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful,,,,

accused persons. Hence it is essential that a witness protection scheme also be established. The need for police reforms for better and more effective,,,,

investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.,,,,

7.1.4 In the last decade, the Supreme Court has on numerous occasions expressed concern about arbitrary sentencing in death penalty cases. The",,,,

Court has noted that it is difficult to distinguish cases where death penalty has been imposed from those where the alternative of life imprisonment has,,,,

been applied. In the Courtâ€™s own words â€œextremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital,,,,

sentencing law which clearly falls foul of constitutional due process and equality principleâ€. The Court has also acknowledged erroneous imposition,,,,

of the death sentence in contravention of Bachan Singh guidelines. Therefore, the constitutional regulation of capital punishment attempted in Bachan",,,,

Singh has failed to prevent death sentences from being â€œarbitrarily and freakishly imposedâ€.,,,,

7.1.5 There exists no principled method to remove such arbitrariness from capital sentencing. A rigid, standardization or categorization of offences",,,,

which does not take into account the difference between cases is arbitrary in that it treats different cases on the same footing. Anything less,,,,

categorical, like the Bachan Singh framework itself, has demonstrably and admittedly failed.",,,,

7.1.6 Numerous committee reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the,,,,

country is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid",,,,

are some of the problems besetting the system. Death penalty operates within this context and therefore suffers from the same structural and,,,,

systemic impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system also,,,,

operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an,,,,

adversarial criminal justice system.,,,,

7.1.7 Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the",,,,

President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even,,,,

when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a",,,,

case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence which was not,,,,

placed before the courts. (Kehar Singh v. Union of India-(1989) 1 SCC 204 paras 7,10 & 16) Clemency powers, while exercisable for a wide range of",,,,

considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a",,,,

heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide-ranging inquiries in",,,,

adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution.",,,,

Further, the Supreme Court in Shatrughan Chauhan v. Union of India- (2014) 3 SCC 1 - paras 55- 56) has recorded various relevant considerations",,,,

which are gone into by the Home Ministry while deciding mercy petitions.,,,,

7.1.8 The exercise of mercy powers under Article 72 and 161 have failed in acting as the final safeguard against miscarriage of justice in the,,,,

imposition of the death sentence. The Supreme Court has repeatedly pointed out gaps and illegalities in how the executive confirms that retaining the,,,,

death penalty is not a requirement for effectively responding to insurgency, terror or violent crime.",,,,

B. Recommendation,,,,

7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection",,,,

scheme and victim compensation scheme should be taken up expeditiously by the government.,,,,

7.2.2 The march of our own jurisprudenceâ€"from removing the requirement of giving special reasons for imposing life imprisonment instead of death,,,,

in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to,,,,

rarest of rare cases â€" shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the,,,,

right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional",,,,

morality and human dignity, the Commission feels that time has come for India to move towards abolition of the death penalty.",,,,

7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of",,,,

death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the",,,,

commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism,,,,

related offences.,,,,

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging,,,,

war.â€ (Emphasis supplied),,,,

In the said judgment, the crucial points discussed by the three Judges Bench are as under:",,,,

â€œ52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view,",,,,

the tests that we 5 (2013) 5 SCC 546 have to apply, while awarding death sentence are â€œcrime testâ€, â€œcriminal testâ€ and the â€œR-R testâ€",,,,

and not the â€œbalancing testâ€. To award death sentence, the â€œcrime testâ€ has to be fully satisfied, that is, 100% and â€œcriminal testâ€ 0%,",,,,

that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the",,,,

crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record, etc. the â€œcriminal testâ€ may",,,,

favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and",,,,

no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R test depends upon the",,,,

perception of the society that is â€œsociety - centricâ€ and not â€œJudge -centricâ€, that is, whether the society will approve the awarding of death",,,,

sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme",,,,

indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical",,,,

disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since",,,,

situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges.â€ (Emphasis supplied)",,,,

41. In the aforesaid cases, the Honâ€™ble Apex Court found that as per the recommendation of the Law Commission, reformative approach ought to",,,,

be adopted and commuted sentence setting aside the death penalty.,,,,

42. As discussed hereinabove, in the rarest of the rare cases, death sentence ought to be awarded. In case the other sentence as prescribed in the law",,,,

are inappropriate. In this regard, the balance-sheet regarding aggravating and mitigating circumstances ought to be drawn in the facts of the individual",,,,

cases. If we see in the facts of the present case, then aggravating circumstances are:",,,,

1. Extremely brutal, diabolic and cruel act.",,,,

2. Victim being six years was a minor and helpless.,,,,

3. There may not be any provocation because the accused was in a dominating position.,,,,

4. Injuries were grievous with respect to sexual assault particularly in a case where the victim was the daughter of the appellant.,,,,

Mitigating circumstances:,,,,

1. It is a case of circumstantial evidence.,,,,

2. No evidence has been brought that the accused had the propensity of committing further crimes causing continuous threat to the society.,,,,

3. Nothing has been brought on record to show that the accused cannot be reformed or rehabilitated.,,,,

4. Other punishment options are unquestionably foreclosed.,,,,

5. Accused is not a professional killer or offender having any criminal antecedent.,,,,

6. The accused being a major having family with him, the possibility of reformation cannot be ruled out.",,,,

43. After perusal of the aforesaid balance-sheet of the aggravating and mitigating circumstances and looking to the facts of this case, where the",,,,

possibility and options of other punishment are open, while upholding the conviction for the offence under Section 302 of the Indian Penal Code,",,,,

however, in place of death penalty, the appellant is sentenced to undergo life imprisonment with a minimum of 30 years of imprisonment (without",,,,

remission) and fine of Rs. 20,000/-, in default of payment of fine the appellant has to undergo further RI for six months. The conviction and sentences",,,,

awarded under Sections 201, 377, 376(2)(F), 376(2)(I) and 376(2)(N) of Indian Penal Code as awarded by the trial Court are just and hence, hereby",,,,

maintained. The period of sentence already served by the appellant shall be set off.,,,,

44. Accordingly, the criminal appeal filed by the appellant is partly allowed. The criminal reference is answered accordingly.",,,,

45. Before parting with the case, we would like to record words of appreciation for the assistance provided by Shri Siddharth Sharma, Amicus Curiae",,,,

who assisted this Court in disposal of the case. His assistance is duly acknowledged.,,,,

Let a copy of this judgment along with the record be sent back to the trial Court for communication.,,,,