

IN THE HIGH COURT OF MADHYA PRADESH AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUBODH ABHYANKAR

&

HON'BLE SHRI JUSTICE SATYENDRA KUMAR SINGH

CRIMINAL REFERENCE CAPITAL No.02 of 2020

Between:-

IN REFERENCE . (MADHYA PRADESH)

.....APPELLANT

(BY SHRI AMIT SINGH SISODIYA, GOVERNMENT ADVOCATE)

AND

**ANKIT VIJAYVARGIYA S/O KAMAL SINGH
VIJAYVARGIYA , AGED ABOUT 28 YEARS,
SHANKAR KHILONE WALE KA BAGICHA,
BUNGLOW NUMBER 121, MHOW (MADHYA
PRADESH)**

.....RESPONDENT

(BY SHRI S. K. MEENA, ADVOCATE)

CRIMINAL APPEAL No. 3665 of 2020

Between:-

**ANKIT S/O KAMAL SINGH VIJAYVARGIYA ,
AGED ABOUT 28 YEARS, OCCUPATION: PVT.
SERVICE SHANKAR KHILONE WALE KA
BAGICHA BUNGLOW NO. 121 MHOW
(MADHYA PRADESH)**

.....APPELLANT

(BY SHRI S.K. MEENA, ADVOCATE)

AND

**THE STATE OF MADHYA PRADESH STATION
HOUSE OFFICER THR.PS. MHOW (MADHYA
PRADESH)**

.....RESPONDENT

(BY SHRI AMIT SINGH SISODIYA, GOVERNMENT ADVOCATE)

Reserved on : 05.04.2022

Delivered on : 15.06.2022

*These appeals coming on for judgement this day, **JUSTICE
SUBODH ABHYANKAR** passed the following:*

J U D G E M E N T

1] This criminal reference has been sent by the 5th Additional Sessions Judge, Indore under Section 366 of Cr.P.C. for confirming capital sentence awarded to the present appellant. The appellant has also preferred a separate appeal assailing the impugned judgment dated 24.02.2020 passed in SPL Case No.53 of 2020 as he stands convicted by the trial Court as under:-

Conviction		Sentence		
Section	Act	Imprisonment	Fine	Imprisonment in lieu of Fine
363	IPC	Five years RI	Rs.1,000/-	5 months RI
366A	IPC	Five years RI	Rs.1,000/-	5 months RI
376AB	IPC	Life Imprisonment	Rs.1,000/-	5 months RI
376A	IPC	Death Sentence	-	-
302	IPC	Death Sentence	Rs.1,000/-	5 months RI
201	IPC	Five years RI	Rs.1,000/-	5 months RI
5(m) read with	POCSO Act	Life Imprisonment	Rs.1,000/-	5 months RI

Section 6				
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2] In brief, the facts giving rise to the present appeal are that on 02.12.2019, PW-1 father of the deceased/victim girl along with his wife PW-2 lodged a report that he is presently staying at a footpath opposite *Sai Mandir*, Mhow road, Mhow and is engaged in cleaning work near railway station and the PW-2 is living with him as his wife. He also has a daughter around four years old and on 01.12.2019, at around 11 O' clock in the night when he was sleeping along with his wife and daughter, another person Raju, who is garbage collector was also sleeping nearby. He got up around 5 O' clock visible morning of 02.12.2019, he saw his four years old daughter to be missing, thus, he and his wife searched their daughter in the nearby areas and came to know that behind *Prashanti* Hospital in a dilapidated bungalow a body of a girl was lying and when they went to see it, they found that their daughter was lying on a blue plastic sheet, her underwear was missing and frock was got above her waist and her vagina was also swelling. Thus, a report was lodged that some unidentified person had taken the girl while she was sleeping with them and after committing the rape on her has also murdered her. A case at Crime No.485 of 2019 under Sections 363, 366, 376, 376A, 376B, 302 and 201 of IPC and Section 5/ 6 of The Protection of Children from Sexual Offences Act, 2012 was registered.

3] During the course of investigation as the crowd was gathered around the girl's body, the police was not able to prepare *lash Panchnama* (inquest) at the spot and her body was immediately sent

to Madhya Bharat Hospital, Mhow where *safina* forms were also issued and *lash panchnama* was also prepared. Postmortem was conducted by PW-15 Dr. M. K. Mahobiya and PW-19 Dr. Rupali Joshi. The place of incident was also thoroughly investigated upon and various samples were also obtained from the soil and the plastic sheet on which the deceased was lying. A white metal ear ring was also seized from the spot. During the investigation on 04.12.2019 various CCTV footage were also searched in which a person was spotted running holding a girl in his hand and in the CCTV cameras of *Chopra Vatika*, the aforesaid person was clearly visible, who had put a black colour jacket and white colour shoe. He was also spotted in the CCTV footage of *Anand*. The CCTV footage were also procured in three different pen drives through Sub Inspector Ravindra Panwar. The person spotted in the CCTV footages was also searched in the area and when it was shown to Virendra of *Rupali Pansadan* and Gajani @ Ashish of the area, they identified the said person to be the present appellant Ankit Vijayvargiya, who resides in front of *Prashanti* Hospital and he usually comes to smoke *Bidi* in his shop. A panchnamas to this effect have also been prepared. The aforesaid person was found in his house, who informed his name to be Ankit Vijayvargiya and when inquired about the incident, he confessed having committed the offence. After his arrest, his black jacket, white shoe, a ear ring and mobile were also seized under Section 27 of the Evidence Act.

4] According to the accused, he had taken the deceased girl while

she was sleeping in front of *Sai Mandir* and then took her to a nearby old dilapidated bungalow and committed rape on her and as she was crying, he also strangled her. Appellant was also medically examined and after taking permission to obtain DNA from the Inspector General of Police and the trial Court, his DNA test was also conducted. During the course of investigation, the DVR relating to CCTV footage were also seized and the charge-sheet was filed against the appellant in the aforesaid Sections before the trial Court, who after recording the evidence has convicted the appellant under the aforesaid Sections and has awarded him capital sentence.

5] Counsel for the appellant has submitted that it is purely a case of circumstantial evidence and the appellant has been falsely implicated in the case on account of CCTV footage in which his identification cannot be verified distinctly. Counsel has also submitted that even otherwise the death penalty awarded to the appellant is on higher side as it is not one of those rarest of rare cases where the death penalty is must and where the chances of rehabilitation of the appellant are totally ruled out as the appellant is a young man aged 20 years old and has a full life ahead and there are no criminal antecedents. Hence, the death sentence may be remitted to the life imprisonment if this Court comes to the conclusion that no interference is warranted in the appellant's conviction.

6] Shri S. K. Meena, counsel appearing for the appellant has also relied upon the various decisions rendered by Hon'ble Supreme Court in the case of **Sebastian @ Chevithiyan Vs. State of Kerala**

decided in Cr.A. Nos.1568-1569 of 2008 dated 09.10.2009; Ravi Vs. The State of Maharashtra decided in Cr. A. No.1488-1489 of 2018 dated 03.10.2019; as well as this Court Vinod alias Rahul Chouhtha Vs. State of Madhya Pradesh reported as 2018 SCC OnLine MP 466; The State of Madhya Pradesh Vs. Naveen @ Ajay reported as 2018 SCC OnLine MP 952 and Anvar P.V. Vs. P. K. Basheer and others reported as (2014) 10 SCC 473.

7] Counsel appearing for the appellant has drawn the attention of this Court to a latest decision rendered by the Hon'ble Supreme Court in the case of *Mohammad Firoz Vs. State of M.P.* wherein also under the almost similar circumstances, the Hon'ble Supreme Court has reduced the sentence from capital punishment to a period of 20 years of imprisonment only instead of imprisonment for remainder of his natural life. Thus, it is submitted that the Hon'ble Supreme Court has found the case of such nature not worthy of imposing life imprisonment and he has been sentenced to 20 years imprisonment only. It is submitted that in the aforesaid case Mohammad Firoz (supra) the deceased was also four years old and in the present case also the deceased was also four years old and the appellant was aged 28 years. In the aforesaid case also the death was due to smothering as the deceased died due to deficiency of oxygen in the brain, due to pressing of mouth and neck and due to excessive injury in the genital organ. Thus, it is submitted that in the present case also the sentence awarded to the appellant be reduced in the same manner as in the case of **Mohammad Firoz (supra)**.

8] Counsel for the respondent/State, on the other hand, has opposed the prayer and it is submitted that no interference is called for as the learned Judge of the trial Court has rightly appreciated the evidence on record and has come to a conclusion that no penalty lesser than the capital punishment would be appropriate so as to do proper justice in the matter. Counsel has submitted that the deceased was a four years old girl had a full life ahead of her, which has been cut short by the appellant due to his salacious mind set. It is submitted that the appellant is a pervert and has no place in the society. Counsel has also referred to a recently decision of coordinate Bench of this Court in the case of **Irfan @ Bhayu Mevati Vs. State of M.P.** passed in **Cr.A. No.7215 of 2018 dated 09.09.2021** wherein also the allegation was of violent gang rape of the girl aged 7 years old.

9] Heard counsel for the parties and perused the record.

10] From the record, it is found that accused in his statement recorded under Section 313 of Cr.P.C. has taken a defence that at the time of the incident his wife had gone for delivery to her matrimonial home and has also examined his wife DW-1 Darshna and his mother DW-2 Kalabai. DW-1 has stated that the appellant was with her the entire night when the incident took place which is contradictory to the accused's statement.

11] So far as the prosecution evidence is concerned, prosecution has examined 30 witnesses in support of its case. FIR was lodged on 02.12.2019 at 12:11 AM about the incident, which took place in the

intervening night of 01.12.2019 and 02.12.2019 between 23:00 hours to 5:00 AM in the morning. FIR has been lodged by the father of the deceased PW-1 Vishal Chouhan alleging that his daughter aged four years was taken away by some unknown person while she was sleeping with his wife and subsequently as has already been observed as aforesaid the body of his daughter was found.

12] The postmortem was conducted by the PW-15 Dr. M. K. Mahobiya and PW-19 Dr. Rupali Joshi. PW-15 Dr. M. K. Mahobiya had found the following external and internal injuries on the person of the deceased:-

“बाहरी परीक्षण:- बाहरी परीक्षण में नाक एवं मुह से झाग के निशान, गर्दन पर दाहिनी साईड में रकड़ की चोट, गर्दन पर लेफ्ट साईड में रगड़ की चोटें, जो किसी नाखून की वजह से आ सकती है, दोनो हाथों की भुजाओं में 2 से 3 रगड़ की चोटें, दोनो जांघो मे 2 से 3 रकड़ की चोट थी।

आंतरिक परीक्षण:- आंतरिक परीक्षण में गर्दन की क्रीकाईड एवं हाईड कार्टिलेज टूटी थी, श्वासनली एवं इसोफेगस भी दबेकुचे थे, मृतिका के गुप्तांगों में जमा हुआ खुन था, बाकी सभी आंतरिक अंग कंजेस्टेड थे, जिन्हे हमें प्रजर्व कर सीलबंद कर पुलिस को विधिवत सौंपा था। मृतिका की मौत एंटीमार्टम पृकृति की थी, जो कि 24 घंटे के भीतर की आना संभावित थी।”

13] On the external examination it was found that she had sign of froth coming out of her nostril and mouth and on the right and left side of her neck there was abrasions, which can be caused by nails. On both her forearms 2-3 abrasions and on her thigh she had 2-3 abrasions.

14] On her internal examination, it was found that she had a fracture on her neck and her cricoid and hyoid cartilage had fractures; her esophagus of wind pipe were also crushed, she had blood in her vagina. The death was anti-mortem in nature and was caused within 24 hours time. Cause of death was due to asphyxia caused by strangulation.

15] PW-19 Dr. Rupali Joshi had given evidence in respect of the sexual assault committed on the deceased. She has stated that deceased's hymen was ruptured. It had a fresh injury having blood deposited in it. She also took two slides of her hymen and also seized a blue colour frock for further examination. She has suggested that such an injury can be caused if a person falls on the ground to which she has denied. However, she has admitted that such an injury can be caused if any object is inserted in the private part. PW-15 has also been suggested that such an injury can be caused if a person falls on the ground to which he has denied, however, it is admitted that such injury can be caused if a person falls on his neck.

16] Appellant's medical examination was conducted by PW/21 Dr. Hansraj Verma vide Ex.P/12 and apart from his competency to perform sexual intercourse, it was also found that he had no injuries on his genitalia and had no smegma present.

17] It is not disputed in the present case that there is no eyewitness account and the entire investigation revolves around the CCTV footage, coupled with the forensic reports. So far as the CCTV footage is concerned, the prosecution has examined PW-10

Virendra Chouhan, PW-12 Ashish @ Gajani in this regard as also PW-18 Hemant Chouhan and PW-24 Deepak Chouhan. PW-10 Virendra Chouhan has deposed that he knows the present appellant Ankit for last around 3 years as he has a *Paan – Bidi* shop near the railway station and the appellant used to come to his shop to purchase *bidi/cigarettes*. He has also stated that the appellant used to earn his livelihood by engaging himself in various occupations like at a times he would be cooking meals or would be playing D.J. and would also sale *paani batase*. He has also stated that near the railway station in the night while he was sitting near a fire to stay away from cold, at that time Ashish @ Gajani came to him and informed that Ankit the appellant is trying to molest an old woman in a cobbler shop and when he went to see the same, he found that the appellant wanted to take advantage of the old woman and he slapped the appellant couple of times and ran away from spot. On 04.12.2019 he was shown the video clip on a mobile by the police personnel and had identified the appellant Ankit. He had identified the appellant immediately after seeing the video clip and Ashish @ Gajani had also identified the appellant in the video clip. The video clip was also shown to him in the trial Court and he has again identified the person appearing in the video clip to be the appellant Ankit and he has also justified his identification by saying that he has known the appellant for last three years, who used to come to his shop every now and then to purchase *bidi*. The pen drive in which the video recording has been saved is proved as article A/1. In his cross-examination he has

denied that he has never seen Ankit before.

18] PW-11 Arvind Guru happens to be a *Pujari* at Mahadev Temple in which 8 CCTV cameras have been installed. In front of him the police has prepared two pen drives. The *panchnama* of which is proved as Ex.P/14. Certificate under Section 65-B of the Evidence Act is proved as Ex.P/22 by the witness.

19] PW-12 Ashish @ Gajani he has also stated that in the night when the incident took place, he was also sitting near the fire as the night was very cold, at that time Ankit had also come there and was smoking *bidi* at that time a woman aged 65-70 years was also sitting near the fire as he is a rickshaw driver, he took one passenger to some place and when he came back he saw that the appellant was not present there and he was informed that he has taken the old woman to some shelter and was trying to molest her. Virendra *Paanwala* PW-10 was also present on the spot and, hence, when they went to the said shelter, they saw that the appellant was raping the said woman and when they caught hold to the appellant Ankit, who ran away from the spot. This witness was also shown the CCTV footage and has identified the appellant immediately. In cross-examination, he has also admitted that Ankit was his friend, but has denied that he used to consume liquors at times. He has also stated that Ankit was also used to play D.J. in marriages and he used to bring horse in the marriages. He has also denied that he had any dispute with Ankit. The question was also put to him that appellant Ankit, who was present through video conferencing was wearing the same blue jacket

at the time when the incident took place, which he was wearing in the video conferencing, to which he has denied and stated that the Jacket was of black colour and has identified the appellant in the video clip and also that he was having something in his hand. He has admitted that he did not report the incident with the old woman to the police and has explained that since the appellant was his friend and he had tried to put some sense into him that he should not do such acts.

20] PW-13 Shailendra Shukla is the tent house owner before whom another CCTV footage vide Ex.P/15 was prepared by the police recovered from his office at villas square, Mhow. CCTV footages were saved in three pen drives. Other CCTV footage has been seized vide Ex.P/24 from the CCTV cameras of Sai Temple through PW-14 Subhash S/o Vasudev and proved as article A/3. PW-18 Hemant Chouhan is again a seizure witness of CCTV footage, the seizure memo of which is Ex.P/13. The footages were saved in three pen drives. Its *panchnama* was also prepared vide Ex.P/15 to 19. He has also witnessed the arrest memo of appellant, who was arrested vide Ex.P/29. Vide Ex.P/30 the police also recovered appellant's black jacket and white shoes as also a mobile phone and a white colour ear ring from the appellant.

21] From the cross-examination of the aforesaid witnesses, nothing substantive could be extracted by this Court. So far as the forensic evidence available on record is concerned, four FSL reports have been proved vide Exs.P/50, 51, 52 and 53 and two others have been

proved as Ex.P/92 and 93. Ex.P/50 is the list of articles sent to the Forensic Science Laboratory, Sagar and Ex.P/52 is another list containing viscera samples and the final report is proved vide Ex.P/92 and 93. Ex.P/93 which is positive in nature and it has been found that DNA profile of the source of articles of the deceased/victim matched with the male DNA profile of the articles seized from the appellant. Thus, the DNA report being positive is the substantial prove of the involvement of the appellant in the commission of the aforesaid offence and there is no reason for this Court also to take a different view from that of one taken by the trial Court in this regard. In view of the same, so far as the finding of guilt of the appellant is concerned, the same is hereby affirmed.

22] So far as the sentencing of the appellant is concerned, from the record it is found that the trial has proceeded on day to day basis and commenced on 12.12.2019, whereas the judgement was delivered by the learned Judge of the trial Court on 24.02.2020. Thus, within a period of three months the trial has been concluded. In his accused statement recorded u/s.313 of Cr.P.C., he has stated that he was taken into custody on 2nd and was beaten by the police, he has a little girl, he is innocent and his wife had gone for delivery at that time. The order sheets also reveal that the judgement was delivered on 24.02.2020 at 1:00 PM wherein he was found guilty and on the question of sentence the matter was kept at 5:00 PM, and at 5:00 PM the appellant was sentenced to capital punishment. The reasons for the same have been noted by the learned Judge of the trial Court

from paras 83 to 94. The learned Judge of the trial Court has noted that the appellant being a married and being a father of a minor daughter has committed the heinous offence of rape of a girl aged four years old and at the time of when this offence was being committed by him as the victim started to cry, he covered her mouth and committed her murder by strangulation. The learned judge of the trial court has also observed that while the appellant was committing the aforesaid offence, the deceased must have gone through the extreme pain and suffering, but by using his force the appellant also closed her mouth and committed rape on her and only to ensure that she should not recognize him, he also strangled her with such a force that her cricoid and hyoid cartilage were broken and her esophagus of wind pipe were also damaged, which act of the appellant shows his cruelty and thus by referring to the various judgments of the Supreme Court, the trial Court has come to a conclusion that the case falls within the category of rarest of rare and the appellant is entitled to be convicted with capital punishment.

23] So far as the judgment rendered by the Supreme Court in the case of **Mohammad Firoz (supra)** is concerned, the relevant paras of the same read as under:-

“40. As demonstrated earlier, once again one of the most barbaric and ugly human faces has surfaced. A tiny bud like girl was smothered by the appellant before she could blossom in this world. The monstrous acts of the appellant suffocated the victim to such an extent that she had no option but to leave this world. Once again, all the Constitutional guarantees have failed to protect the victim from the clutches of the demonizing acts of the appellant. In the opinion of the Court, any sympathy shown to the appellant would lead to miscarriage of justice. **However,**

it has been brought to the notice of this Court that in series of judgments, this Court has not treated such case as the rarest of rare case.

41. In case of *Bachan Singh v. State of Punjab* (supra), the Constitution Bench while upholding the constitutional validity of the death sentence held *inter alia* that the imposition of death penalty is required to be guided by the paramount beacons of the legislative policy discernible from sections 354(3) and 235(2) of the Cr.P.C., namely - (i) the extreme penalty can be inflicted only in the gravest cases of extreme culpability; and (ii) in making the choice of the sentence. In addition to the circumstances of the offence, due regard must be paid to the circumstances of the offender also. In *Machhi Singh v. State of Punjab*, a three-judge bench of this Court, after noting the principles laid down in *Bachan Singh's case* regarding the formula of “rarest of rare cases” for imposing the death sentence, observed that the guidelines indicated in *Bachan Singh's case* will have to be culled out and applied to the facts of each individual case where the question of imposing death sentence arises.

42. In the recent case of *Shatrughna Baban Meshram v. State of Maharashtra*, this court considering catena of earlier decisions in the light of section 302 read with section 376-A of IPC observed that as against section 302 IPC, while dealing with the cases under section 376-A IPC, a wider spectrum is available for consideration by the courts as to the punishment to be awarded. In the said case, this Court negated the submission made on behalf of the appellant-accused that in the case based on circumstantial evidence, the death sentence should be commuted to the life imprisonment. However, considering the facts that the accused had not consciously caused any injury with an intent to extinguish the life of the victim, and that the offence in that case was under Clause Fourthly of Section 300 IPC, this Court had commuted the sentence of death penalty to the life imprisonment. The facts and circumstances of the case on hand are on a better footing than the case of *Shatrughna Baban Meshram* with one distinction in that, Section 376A of IPC being applicable in the instant case.

43. Considering the above, we, while affirming the view taken by the courts below with regard to the conviction of the

appellant for the offences charged against him, deem it proper to commute, and accordingly commute the sentence of death for the sentence of imprisonment for life, for the offence punishable under Section 302 IPC. Since, Section 376A IPC is also applicable to the facts of the case, considering the gravity and seriousness of the offence, the sentence of imprisonment for the remainder of appellant's natural life would have been an appropriate sentence, however, we are reminded of what Oscar Wilde has said - "The only difference between the saint and the sinner is that every saint has a past and every sinner has a future". One of the basic principles of restorative justice as developed by this Court over the years, also is to give an opportunity to the offender to repair the damage caused, and to become a socially useful individual, when he is released from the jail. The maximum punishment prescribed may not always be the determinative factor for repairing the crippled psyche of the offender. Hence, while balancing the scales of retributive justice and restorative justice, we deem it appropriate to impose upon the appellant-accused, the sentence of imprisonment for a period of twenty years instead of imprisonment for the remainder of his natural life for the offence under section 376A, IPC. The conviction and sentence recorded by the courts below for the other offences under IPC and POCSO Act are affirmed. It is needless to say that all the punishments imposed shall run concurrently."

(emphasis supplied)

24] At this juncture, it would also be apt to refer to the injuries suffered by the victim in the case of *Shatrughna Baban Meshram v. State of Maharashtra, (2021) 1 SCC 596 : (2021) 1 SCC (Cri) 555, at page 626* the relevant paras of the same read as under:-

"5. The appellant was taken to PW 7 Dr Ulhas Digambar Lingawar for medical examination who found that:

"There was injury of abrasion on tip of the glans penis. The injury size was 5 mm × 3 mm. That injury was caused within 24 hours. The accused was found capable for sexual intercourse."

In response to queries by the investigating officer the said witness

had stated in his opinion, Ext. 46:

“(1) Yes, sign of sexual intercourse within 24 hrs., was present.

(2) Yes, injury mentioned in certificate can be possible, due to sexual intercourse.”

6. The post-mortem on the body of the victim was conducted on 12-2-2013 by a Board of five medical professionals and the Report, Ext. 53 noted:

“Evidence of perineal tear with merging of vaginal and anal orifice, details mentioned under Columns 17 & 21. Dried blood and faecal stains over genital and perineal region.”

6.1. Following injuries were found on the person of the victim:

“1. Multiple abrasions over right zygomatic region of sizes ranging from 0.5 cm × 0.5 cm to 0.3 cm × 0.2 cm, reddish.

2. Abrasion over left upper eyelid of size 0.5 cm × 0.5 cm, reddish.

3. Abrasion over right cheek of size 4 cm × 4 cm, reddish.

4. Abrasion over left cheek of size 8.5 cm × 7 cm, reddish.

5. Evidence of missing both upper and lower lips exposing labial fat with clean-cut margins seen periodically without blood infiltration (post-mortem in nature).

6. Lacerated wound over chin, midline of size 3 cm × 3 cm muscle deep with tissue missing, margins irregular and blood infiltrated, reddish.

7. Bite mark over and around right nipple over a region of size 5 cm × 5 cm, margins contused, reddish.

8. Bite mark over and around left nipple over a region of size 3 cm × 3 cm, margins contused, reddish.

9. Bite mark over abdomen, 1 cm right at the level of umbilicus over a region of size 4 cm × 3.5 cm, margins contused, reddish.

10. Bite mark over abdomen in the midline, 5 cm below the umbilicus, over a region of size 3 cm × 3 cm, margins contused, reddish.

11. Bite mark over pubic region in the midline, 9 cm below umbilicus, over a region of size 4 cm × 3.5 cm, margins contused, reddish.

12. Bite mark over lateral aspect of right shoulder, over a region of size 5 cm × 3 cm, margins contused, reddish.

13. Bite mark over right buttock, over a region of size 3 cm × 3 cm, margins contused, reddish.

14. Bite mark over right buttock, over a region of size 3 cm × 3 cm, margins contused, reddish, separated from Injury 13 by 1.5 cm.

15. Bite mark over right buttock, over a region of size 3 cm × 2.5 cm, margins contused, reddish separated from Injury 14 by 1 cm.

16. Bite mark over left buttock, over a region of size 3.7 cm × 3 cm, margins contused, reddish.

17. Multiple lacerations over vaginal and anal region merging vaginal and anal orifice (perineal tear at 3, 6 and 9 o'clock positions), margins irregular, blood infiltrated, reddish.

18. Abrasion over left knee joint region, on anterior aspect, of size 1 cm × 0.5 cm, reddish.

Note: 1. Injuries 1, 2, 3, 4 & 18 are caused by hard and rough surface.

2. Injury 5 is caused by sharp edged object.

3. Injury 6 is caused by nibbling by teeth (nibbling by bite).

4. Injuries 7 to 16 are caused by human bite.

5. Injury 17 is caused by forceful sexual assault.”

6.2. Under the heading “Internal Injuries” the corresponding observations in Column 21 were:

“Evidence of tear in the posterior vaginal wall with merging of vaginal and anal canal (perineal tear). Surface ragged, margins irregular, blood infiltrated and reddish, extending and tearing (perforating) the rectum, corresponding to Injury 17 under Column 17.”

6.3. On the effect of the injuries and the cause of death, the Report stated:

“(a) Whether the ante-mortem injuries found on the dead body were sufficient in the ordinary course of nature to cause death? : Yes

(b)(c) If yes, which of the injuries were individually sufficient in the ordinary course of nature to cause death? Which of the injuries collectively are sufficient in the ordinary course of nature to cause death? Injury 17 under Column 17 with its corresponding internal injuries mentioned under Column 21 with its consequences.

Opinion as to the cause of death : Shock and haemorrhage following perineal tear with multiple injuries.”

(emphasis supplied)

24. Whereas in the case of *Mohd. Firoz (supra)*, the injuries suffered by the victim and the resultant death have been found to be as under:-

“12. The post-mortem of the victim was conducted by PW-24 Dr.

Pradeep Gangadhar Dixit, Professor and H.O.D in Forensic Medicine Department, Medical College, Nagpur, on 30th April, 2013, along with his colleagues. He had recorded the following in the post-mortem note (Exhibit P-44) -

“1. The dead was wearing a shirt and Pajama of the Hospital. There were 8 teeth in upper portion and 10 temporary teeth on the lower portion of mouth. Right upper incisor tooth and left upper lateral incisor tooth were absent. Left upper central incisor tooth was loose with blue colored swollen gums of its surroundings.

1. On examination of the external genitals, I had found that labia majora and labia minora contused, oedematous with blue discolouration. Superficial partially healed vulva laceration present at 6 “O” clock position of size 0.3 cm × 0.3 cm. Vaginal canal oedematous and hyperemic. Hymen torn at 3.6 and 7 O'clock position. Dilatation of hymenal opening. Urethral meatus oedematous and bruised present.

2. The following injuries were found on the body of deceased:

1. Partially healed lacerated wound present over upper lip in midline involving mucosal area of size 0.2. cm × 0.2 cm muscle deep surrounding area contused, bluish.

2. Partially healed lacerated wound present over lower lip in midline involving mucosal area of size 0.2 × 0.2 cm muscle deep surrounding area contused, bluish.

3. Abrasion present over lateral aspect of neck on right side, 3 cm below tip of right mastoid bone of size 2 cm × 2 cm dark brown.

4. Abrasion present 2 cm below of injury no. 3 of size 2 cm × 0.3 cm.

5. Abrasion present over area overlying right submandibular region of size 0.3 cm × 0.3 cm.

6. Abrasion present over nape of neck on right side at the level of C-7 vertebra of size 0.4 cm x 0.4 cm.

7. Abrasion present over right intra scapular region of size 0.2 cm × 0.2 cm.

8. Abrasion present over left scapular region of size 1.5 cm × 0.5 cm.

9. Multiple abrasions present over lower portion of stomach at right side of size varying from 0.3 cm × 0.2 cm to 0.2. cm × 0.1 cm.

10. Multiple linear abrasions present over posterior aspect of left thigh, middle 1/3rd part over an area of size 4 cm × 3 cm of size varying from 4 cm × 0.2 cm to 3 cm × 0.1 cm.

11. Tracheotomy wound present over anterior aspect of neck with stiches in situ which is done for ventilator.

12. A hole over right side of next which is made to assess the central venous pressure.

13. Puncture marks present over both elbow of hands, upper portion of right wrist, dorsum of right hand and both legs for administering I.V. fluids.

14. On conducting internal examination of the body, I had found the following :-

1. Symptoms of pneumonia were found in her right lung. Blood clotted over internal muscles of the neck. All the organs were found congested. Brain was found edematous.”

13. The said doctor had deposed that all the injuries found on the body were ante-mortem and the opinion regarding the cause of death was kept reserved. Thereafter, on 15.05.2013, the histopathology report (Exhibit P-46) was received from the Pathology Department, Medical College, Nagpur, in which **the final cause of death reported was “bronchopneumonia and cerebral hypoxia, which was caused by smothering the nose and mouth.”**

In this case, the Supreme Court has not gone into the technical ground *i.e.*, whether the case is falling under ***Fourthly*** of S.300 of IPC or not.

25] On the aforementioned discussion, this court is of the considered view that with the parameters of cruelty set so high nowadays for an offence to fall under the ambit of rarest of rare, as has also been recorded by the Supreme Court in the case of ***Mohammad Firoz (supra) {please see para 40 (supra)}*** it is, if not impossible, but is very difficult for any person to get the death

penalty no matter how diabolic his actions are. It is also seen that even when the death penalty of an accused is affirmed by the Apex Court,, it would still not be acted upon leading to further suffering by the victims of the heinous crimes. The kith and kin of such victims who are also the victims, spent their lifetime in the hope that they would get some solace, some justice but all their hopes are crushed under the procedural system. This court is of the view that 'capital punishment' which is not awarded/executed within a reasonable time, loses its importance as a deterrence, as people have a very short memory and such offences usually get into oblivion, waiting for the next one to happen.

26] In such circumstances, this court is of the considered opinion that the Government must reconsider the provision of death penalty as a mode of punishment as deterrence so that at least the victims of such crimes would get on with their lives, accepting their fate and would be saved from nurturing a false hope for decades altogether.

27] Be that as it may, considering the totality of the evidence brought on record, viz., the death sentence was awarded to the appellant on the same day on which he was found guilty, depriving the appellant of his valuable right to bring to the notice of the court any mitigating circumstances in his favour, the injuries suffered by the victim, and the fact that the appellant who himself is a father of a minor daughter, is aged 30 years with no criminal record, chances of his rehabilitation cannot be ruled out, as also the various decisions rendered by the Supreme Court dealing with the subject mannter,

while affirming the conviction of the appellant as recorded by the Trial Court, **we find it fit to impose a sentence of Twenty Years instead of Death Penalty on the appellant.**

28] The present CRRFC **(Criminal Reference Capital) no. 02 of 2020** is decided accordingly, and the Criminal Appeal No.3665 of 2020 filed by the appellant is hereby *partly allowed*.

(Subodh Abhyankar)
Judge

(Satyendra Kumar Singh)
Judge

Pankaj