HIGH COURT OF MADHYA PRADESH AT JABALPUR

Criminal Appeal No. 2756/2017

Vinay

Vs

State of Madhya Pradesh

&

CRRFC No. 04/2017

In Reference

Vs.

Vinay

Present : Hon'ble Shri Justice S.K.Seth, Judge
Hon'ble Smt. Justice Anjuli Palo, Judge

Shri Khalid Noor Fakhruddin, Advocate for the appellant-Vinay.
Shri Bramhdatt Singh, Government Advocate for the respondent-State.

Whether approved for reporting : **Yes**

Law laid down :- (i) Conviction can be based upon the evidence of child witness and circumstantial evidence.
(ii) DNA analysis report can be considered for holding the accused guilty.

Significant Paragraphs : - 13 & 29 to 35.

JUDGMENT
(23/11/2017)

Per : Smt. Anjuli Palo, J :-

1. The above criminal appeal is preferred by the appellant, to set aside the impugned judgment of conviction and

sentence. The criminal reference (CRRFC No. 04/2017) has been referred under Section 366 (A) of Criminal Procedure Code, 1973 by Second Addl. Session Judge, Multai, District Betul. Both these cases arise out of judgment dated 22.06.2017 passed in Session Trial No. 13/2017 whereby the appellant has been convicted and sentenced as under, therefore are being decided by this common judgment:

Section	**Act**	**Sentence**	**Fine**	**In default of fine**
449	Indian Penal Code	R.I. for Life Imprisonment	Rs. 25,000/-	R.I. For 1 year
376-A	Indian Penal Code	Death Sentence	-	-
376-D	Indian Penal Code	R.I. for life imprisonment	Rs. 25,000/-	R.I. for 1 year
302	Indian Penal Code	Death Sentence	Rs. 25,000/-	R.I. For 1 year
6	Protection of Children from Sexual Offence	(awarded death sentence in the major offence under Section 376-A of IPC		

2. Brief facts of the prosecution case is that, appellant is the uncle of the victim. The victim was a minor girl aged about 13 years. On 16.11.2016 at about 3:00 to 5:30 p.m. she was alone at her house in village Raiseda, Police Station Amla, District Betul. Her parents had gone to village Deopipariya leaving behind their children at home. At the time of incident, the siblings of the victim were not present at the house with the victim. At about 4:30 pm, appellant along with his two friends Mukesh and Ashok (both are juvenile) came there. Finding her alone, appellant and his juvenile

friends committed rape one after the other. After committing rape, they killed her by hitting her head with a stone, strangulated her and hanged her from the roof with a red coloured saree. When her brother Rupesh (PW-6) and sister Rubina (PW-5) returned home from the school, they saw their sister/victim dead, hanging from the roof and the appellant along with other accused persons namely Mukesh and Ashok were present on the spot. Rupesh, brother of the victim ran towards the village and called Laxman and other persons for help. In the meanwhile, the body of the victim was brought down by appellant. Laxman (PW-4) along with other persons came there and saw the injuries of the victim. They saw that there was no clothes on the lower part of her body, there were injuries over her neck and bleeding from her private genital parts. Laxman informed the parents of the victim and reported the incident to the Police Station Amla. Offence was registered against the appellant and his associates (juvenile in conflict with law). After investigation, charge-sheet was filed by the police under Section 376(A)(D), 449, 302 of IPC r/w Section 5(i)(j)(k)/6 and Section 4 of Protection of Children from Sexual Offences Act, 2012 before the concerned Court.

3. After committal of the case, learned Trial Court framed charges under Section 449, 376(A)(D), 302 of Indian Penal Code and Section 6 of Protection of Children from Sexual Offences Act.

The appellant abjured his guilt and pleaded that he is innocent and was falsely implicated by the police.

4. After considering the entire evidence on record, the learned trial Court found the appellant guilty of committing the aforesaid offences. With regard to the above, the trial Court found that the ocular evidence is duly corroborated by the medical evidence and DNA profile report of the victim tallied with the DNA sample of the appellant. At the time of incident, the victim was aged about 13 years. She sustained severe injuries on her neck and genital parts. Doctors and experts proved that after committing gang rape with her, the victim was killed by strangulation and she was hanged from the roof, so that it would look like a case of suicide. Thus, appellant was convicted and sentenced as mentioned in paragraph one of this judgment.

5. The matter is referred to this Court under section 366(A) of Criminal Procedure Code for confirmation of the death sentence of the appellant awarded by the learned Trial Court. In the opinion of the learned Trial Court, the crime committed by the appellant is heinous in nature. If liberal view was taken with regard to punishment, the society would be unsafe and people would lose faith from the administration of justice.

6. The criminal appeal under section 374(2) of the Cr.P.C., 1973 is filed by the appellant on the ground that the learned Trial Court

has committed legal errors in appreciation of evidence of prosecution witness and material brought on record. Learned Trial Court wrongly relied upon the evidence of child witnesses Sabina (PW-5) and Rupesh (PW-6) (minor sister and brother of the victim). The prosecution story is not corroborated by independent witness. There are several doubts and lacuna in the prosecution case, the chain of circumstantial evidence is not complete in this case. The DNA reports and its conclusions are not correct. DNA report is unreliable and untrustworthy. Therefore, prosecution has failed to prove its case beyond reasonable doubt. Hence, the appellant is entitled to be acquitted from the charges leveled against him.

7. We have heard rival submissions at length. Carefully perused the record.

8. The questions for consideration before us are as follows :

(i) Whether the trial Court committed error in convicting the appellant in the facts and circumstances of the case?

(ii) Whether the present case comes under the purview of "rarest of the rare" case for capital punishment?

9. All the relatives of the victim clearly stated that the victim was a minor. Her age was proved by her parents and relatives particularly Lakhanlal Verma (PW-10) proved her date of birth as 27.07.2004. The entry in the admission register (Exh. P/10) and school certificate (Exh. P/11) also corroborated the same. The

testimony of Lakhanlal (PW-10) is reliable. In our considered view, the learned Trial Court has rightly appreciated in paragraphs 11 to 14 of the impugned judgment with regard to age determination of the victim. In case of **Ashwani Kumar Saxena Vs. State of MP [AIR 2013 SC 553]**, the Supreme Court has held as under :-

> In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the Court or the Board or, as the case may be, the Committee by seeking evidence by obtaining –
>
> (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof;
>
> (ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;
>
> (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

10. In case of **Jarnail Singh Vs. State of Haryana [(2013) 7 SCC 263]**, the Hon'ble Supreme Court has made it clear that Rule of Juvenile Justice Act, 2002 should be the basis for determination of age of the child victim as well as the child in conflict with law.

11. Therefore, the school register (Exh. P/10), is reliable piece of evidence to hold that the victim was minor on the date of occurrence. Further, the appellant has also not claimed that the victim was a major. The learned Trial Court has rightly held the age of the victim as 13 years.

12. It is not in dispute that on 16.11.2016 at the time of incident, the parents of the victim were not present at home. It is admitted by

the appellant that the parents of the victim went to village Deopipariya leaving behind their children alone at home. The appellant has also admitted that he is the uncle of victim. The victim was found dead in her house. In the accused statement under Section 313 of Cr.P.C., (question No. 5), the appellant admitted these facts. The appellant has admitted that, at around 4:30 pm when brother and sister of victim Rupesh and Sabina returned home from their school he was present on the spot near the dead body of the victim, alongwith the juveniles Ashok and Mukesh.

13. Hence, after considering the aforesaid admissions it is not in dispute that Sabina (9 years old) and Rupesh (5 years old) saw the appellant at their house with the body of the victim just after the incident. As these facts are admitted by appellant himself, hence, the question with regard to the fact that they are child witnesses and not reliable, does not arise. A child witness is competent witness under Section 118 of Cr.P.C. Further, in the cross-examination, presence of appellant is duly established. Their testimony is very important. Section 6 of the Evidence Act defines relevancy of facts forming part of same transaction. Though, the aforesaid facts are not in issue, they are so connected with a fact in issue as to form part of the same transaction, are relevant with regard to circumstantial evidence. Similarly, those facts are relevant under Section 8 of the Indian Evidence Act as motive, preparation and previous or

subsequent conduct of the accused. Both the witnesses clearly stated that, they returned home from the school at about 4:30 pm. The incident took place during 3:00 pm to 4:30 pm. The appellant had not disclosed / explained the reason as to why the appellant along with other juvenile co-accused was present there.

14. Sabina (PW-5) and Rupesh (PW-6) also deposed that, at that time their sister (victim) was hanging from the roof and her body was taken down by the appellant. This fact was also admitted by appellant in question No. 3. Sabina (PW-5) deposed that she saw injury over her sister's neck.

15. Sabina (PW-5) also stated that, appellant went to Laxman to inform him about the incident. This testimony is corroborated by Laxman (PW-4). Laxman deposed that the appellant informed him that “victim committed suicide”. Then he came to the spot. He saw the injuries of the victim over her neck and bleeding from her private parts. After receiving the intimation from Laxman (PW-4), parents of the victim, Somji (PW-1) and Rundo (PW-15) came and saw the victim in injured condition and they corroborated the testimony of Sabina (PW-5), Rupesh (PW-6) and Laxman (PW-4).

16. Shri S.K.Yadav (PW-20), the Investigation Officer deposed that on 16.11.2016, father of the victim, Somji (PW-1) lodged the report. Thereafter, he went to the spot and saw injuries over the neck of the victim and bleeding. He recorded *dehati nalishi* (Exh.

P/38). Learned counsel for the appellant raised objection that the above reports were against the unknown persons. Hence, offence is not made out against the appellant.

17. After the incident, at about 12:30 am in the night, Dr. Deepti Shrivastav (PW-24) Sr. Scientific Officer, Scene of Crime Unit inspected the spot. She found blood on the spot, red saree and black legging of the victim which were handed over to the police. The testimony of Dr. Deepti Shrivastav (PW-14) is unchallenged. On 17.11.2016, S.K.Yadav (PW-20) seized the blood stained red saree, black legging, soil, blood stained *kathdi*, one *phavda* (spade), pointed stone of about 8-10 kg vide seizure memo (Exh. P/4) before witnesses Nakul and Sonu. Sonu (PW-3) punch witness duly corroborated the testimony of S.K.Yadav (PW-20) Investigation Officer. In his cross-examination, he explained that all the above items were seized from the spot. Hence, seizure of above articles is found reliable.

18. Rundo (PW-15) mother of the victim, Somji (PW-1) father of the victim, Laxman (PW-4) and Sarje Rao (PW-22) saw the bleeding from the private part of the victim. From the testimony of Dr. Anand Malviya (PW-11) Medical Officer who conducted the post-mortem of the victim, that he found an incised wound of about 8 x 1 x 3 cms at 7 O' clock position and bleeding in her vagina. He found lacerated wound on the hind side of the vagina.

There was dry blood on her private parts, both thighs and buttocks. He also found multiple lacerated abrasion over both the breasts of the victim as shown in the post mortem report (Exh. P/12) which may have been caused by human bite. As per his opinion, the victim was sexually assaulted and ravished and those injuries were caused within 24 hours of the post-mortem. Dr. Malviya (PW-11) found the following other injuries on her body :

(i) Abrasion of size 1/2 x 1/2 cm. on the right side of the face.
(ii) Abrasion of size 2x1/2 cm on the left side of the face.
(iii) Abrasion of size 3x1/2 cm on the left side of the mandible.
(iv) Abrasion of size 2x1cm on the left side of the face.
(v) A lacerated wound of size 1x1/2x1/2 cm on the back side of the head.
(vi) A ligature mark around the neck of size 29 cm in length indicative of the fact that the victim was killed by tying rope along her heck and pulling it tight.
(vii) Another ligature mark below the first ligature mark of size 29 cm long and 3 cm wide.
(viii) Third ligature mark below the second ligature mark similar in nature.

19. Dr. Anand Malviya (PW-11) was firm in his opinion in his cross-examination that ligature mark found on the dead body could not be caused by suicide. He further explained that in suicidal cases, the ligature mark is in slightly slanting position. In case of murder, the ligature mark is circular around the neck. In his opinion, the above injuries on the neck were not caused due to suicide. His evidence proves that the victim died due to asphyxia and her death

was not suicidal in nature. Dr. Anand Malviya (PW-11) clearly opined that the victim was sexually assaulted and thereafter, she was murdered. This opinion was also jointly made by Lady Doctor Pratima Raghuvanshi. There is nothing on record to discard the evidence of the medical officers who conducted the post-mortem and opined that there was sexual assault on the victim before she died due to strangulation and there had been ligature marks. Thus, we find the medical report (Exh. P/12) wholly reliable.

20. We are in firm opinion and in agreement with the findings of the learned Trial Court that the victim was murdered after committing rape. In our considered view, there is no possibility that the victim herself had committed suicide.

21. Rajnikant (PW-7) and Sachin Dewangi (PW-9), Constables both witnesses established that on 17.11.2016 they received clothes of the victim (Article N), her vaginal slide (Article O), pubic hair & skin (Article P), a hair (Article Q), vaginal swab (Article R) and impression of human bite on her chest (Article T), etc. in presence of witness Sushil Dhurve (PW-12) Constable, after chemical examination. Sushil (PW-12) also corroborated the above evidence.

22. As per the FSL report, Dr. D.K.Pandey (PW-25) has confirmed that he found blood stains on the soil (Article A) collected from the place of incident, *kathdi* (Article C), red saree (Article D), black legging (Article E), pointed stone (Article F) and *phavda* (Article

G). He also confirmed that on black legging (Article E) and *phavda* (Article G), human blood was present. He also found semen present over the *kathdi* (Article C), red saree (Article D) and black legging (Article E). Similarly, after microscopic examination, he found sperms over the aforesaid articles.

23. As per chemical analysis report (Exh. P/12), the above articles were stained with human blood. The medical evidence referred earlier as well as the investigation panchanama point out that victim was sexually assaulted before murder. There is no reason to disbelieve the above evidence. We do not see any cogent reason to interfere with the finding of fact recorded by the Trial Court on this count.

24. Learned counsel for the appellant tried to rebut the FSL examination after suggesting very common questions which are not sufficient to discard the FSL report (Exh. P/57). Such report is also corroborative piece of evidence which establish that before the causing death, the victim was forcibly raped.

25. Learned counsel for the appellant contended that all the above facts are not sufficient to connect the appellant with the crime. He had himself informed about the incident to Laxman (PW-04). There is no eye-witness of the incident. Further, the incident took place during the day time. There are so many people residing in the neighborhood. No one heard the hue &

cry of the victim. We are not in agreement with the above contention. Such type of crime is committed in lonesome places and also where there is least chance of being caught. Therefore, in such type of crimes, normally no witness is available nor expected from the prosecution in that regard. Conviction can be based on such circumstantial evidence.

26. In case of **Prakash Vs. State of Rajasthan [2013 Cri. L.J. 2040]**, Hon'ble Supreme Court has held as under:

> In a leading decision of this Court in Sharad Birdhichand Sarda vs. State of Maharashtra, (1984) 4 SCC 116, this Court elaborately considered the standard of proof required for recording a conviction on the basis of circumstantial evidence and laid down the golden principles of standard of proof required in a case sought to be established on the basis of circumstantial evidence which are as follows:
>
> "153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established: (1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.
>
> It may be noted here that this Court indicated that the circumstances concerned "must or should" and not "may be" established. There is not only a grammatical but a legal distinction between "may be proved" and "must be or should be proved" as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra, (1973) 2 SCC 793 where the observations were made: [SCC para 19, p. 807): "Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between 'may

> be' and 'must be' is long and divides vague conjectures from sure conclusions." (2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty, (3) the circumstances should be of a conclusive nature and tendency, (4) they should exclude every possible hypothesis except the one to be proved, and (5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.
>
> 154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence."

27. To link the appellant with the crime, S.K.Yadav (PW-20) deposed that he recorded the memorandum of the appellant under Section 27 of the Indian Evidence Act before Akhilesh (PW-2) and Imrat. As per the memorandum of the appellant, a green faded printed *chunari/dupatta* thrown behind the house of the victim was recovered. According to memorandum (Exh. P/1) said chunari was seized by the police vide seizure memo (Exh P/2) on 18.11.2016 as Article K/4. The aforesaid testimony is corroborated by Akhilesh (PW-2). We find no material contradiction with regard to the seizure of *chunari*. The testimony of both the witness Akhilesh (PW-2) and S.K.Yadav (PW-20) with regard to Exhibit P/1 is found reliable.

28. The DNA test report (Exh. P/54) is available on record. Dr. Rupesh Kumar (PW-23) Medical Officer who had examined the

appellant on 18.11.2016, deposed that the blood sample of the appellant was taken by him in presence of Shiv Kumar Yadav and Ammilal pursuant to application Exh. P/56. The medical examination of the appellant was conducted by Dr. Rupesh Kumar. The report is Exh. P/46. In the opinion of Dr. Rupesh Kumar the appellant is capable of intercourse. Dr. Rupesh Kumar prepared two semen slides and recovered underwear of the appellant and his pubic hair. After properly sealing all the articles he handed over the same to the police. In the Court, Dr. Rupesh Kumar duly identified the appellant. We find no irregularity in his proceedings.

29. Dr. Pankaj Shrivastav (PW-26), Scientist who has experience of conducting DNA test in about 2500 cases and examined various DNA test reports. In the case at hand, following articles were examined by him :

Sl. No.	**Packet**	**Materials found inside**	**Whose/from whom**
1	N	Clothes	Victim Ravina
2	O	Vaginal Slide	Victim Ravina
3	P	Pubic hair	Victim Ravina
4	Q	Hair	Spot
5	R	Vaginal Swab	Victim Ravina
6	U	Nails	Victim Ravina
7	K1	Underwear	Accused Vinay
8	L1	Underwear	Accused Mukesh
9	M1	Underwear	Accused Ashok
10	K4	Chunri	Accused Vinay
11	M4	Underwear	Accused Ashok
12	V	Blood Sample	Accused Vinay
13	W	Blood Sample	Accused Ashok
14	X	Blood Sample	Accused Mukesh

30. Dr. Pankaj Shrivastav found male DNA profile of more than one individual on the clothes of the victim (Article N) and vaginal slides of the victim (Article O). He further opined that the same were similar to the male DNA profile of appellant with cloth (Article N) of the victim and her vaginal swab (Article R). Dr. Pankaj Shrivastav clearly stated that presence of atleast one more male is detectable on the victim. Dr. Pankaj Shrivastav (PW-26) found similar DNA profile from the blood sample taken from the appellant and on the chunari (Article K4). He clearly found the presence of appellant's DNA.

(i) Article V was detected on the source of Article K/4.

(ii) Accused Ashok and Mukesh cannot be excluded by this DNA report.

(iii) Accused Ashok can be excluded by this DNA report (Exh. P/54).

31. We find the DNA report Exh. P/54 is reliable to sustain the conviction.

32. In order to establish a live link between the accused persons and the incident, the Deoxyribonucleic Acid (DNA) test report is a scientific evidence. In a recent case of **Mukesh Vs. State (NCT) of Delhi [(2017) 6 SCC 1]**, the importance of DNA test has been broadly analysed by the Supreme Court. The Supreme Court considered various cases of DNA test. In case of **Rajkumar Vs. State of MP [(2014) 5 SCC 353]** the case of rape and murder of a

14 year old girl, the DNA test established presence of semen of the accused in the vaginal swab of the victim. The clothes of the victim were also found having the accused semen spots. It was held that the conviction of the appellant was recorded relying on the DNA report is proper. Similarly, in case of **Santosh Kumar Singh Vs. State [(2010) 9 SCC 747]** a young girl was raped and murdered. The DNA reports were relied upon by the High Court and approved by the Supreme Court. The Supreme Court held that the DNA report has been scientifically accurate and exact science as held by the Supreme Court in case of **Kamti Devi Vs. Koshiram [(2001) 5 SCC 311]**.

33. In **Kamti Devi case (supra)** the Supreme Court has observed that, "we may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement with De-oxirybonucleic Acid (DNA) as well as Ribo Nucleic Acid (RNA) tests were not even in contemplation of the legislature. The result of a genuine DNA test is said to be scientifically accurate.

34. In the light of principles laid down in above case laws and other case laws, in case of **Mukesh** (supra) the Hon'ble Supreme Court held as under :

> "DNA technology accurately identifies criminals. DNA profiling is now a statutory scheme under Section 53 of Cr.P.C. And such profiling is a must in case of examination of rape victims as per Section 164-A of Cr.P.C. DNA report deserves to be

> accepted unless it is absolutely dented. If the sampling is proper and if there is no evidence of tampering of sample, DNA Test report is to be accepted.

35. In the present case, it is established that the semen and sperms were found on the *kathdi* (Article C), red saree (Article D) and legging (Article E) of the victim. As per DNA report (Exh. P/54), on the clothes (Article N) and vaginal swab (Article R) and chunari (Article K4) of the victim, the presence of the appellant's DNA was detected. This scientific evidence clearly link the appellant with the crime. In statement under Section 313 of Cr.P.C., appellant could not offer any explanation with regard to the presence of his semen, sperms and DNA on the above articles. In case of **Mukesh** (supra), the Apex Court has also held as under:

> "Courts below rightly took note of DNA analysis report in finding accused guilty. There is no plausible explanation from accused as to matching DNA profile generated from their clothes with DNA profile of victim and PW1."

36. The appellant is the uncle of the victim. Appellant was very well acquainted with the victim as well as her family members. It is admitted that the parents of the victim had gone out on the fateful day. The victim was alone in her home. Such a circumstance gave temptation to the appellant to commit offence.

37. This brings us to the circumstance that any other person or outsider may not know that the victim's family members had gone out and she was alone in her house. Her parents would not return till

night. Outsider would not know that the victim is alone in the house. Any stranger, after committing the crime would have ran away leaving the dead body at home and would not make any attempt to prove that the victim committed suicide.

38. In case of **State of Himachal Pradesh Vs. Sanjay Kumar @ Sunny [(2017) 2 SCC 51].**

> Various studies show that in more than 80% cases of such abuses, perpetrators have acquaintance with the victims who are not strangers – Danger is more within than outside – Most of the time, acquaintance rapes, when the culprit is a family member, are not even reported for various reasons, no difficult to fathom. The strongest among those is the fear of attracting social stigma. Another deterring factor which many times prevents such victims or their families to lodge a complaint is that they find whole process of criminal justice system extremely intimidating coupled with absence of victim protection mechanism. Therefore, time is ripe to bring about significant reforms in the criminal justice system as well. Equally there is also a dire need to have a survivor-centric approach towards victims of sexual violence, particularly, the children, keeping in view the traumatic long-lasting effects on such victims.

39. The appellant himself stated that he came to her home with two other persons. In this case, it was alleged that the victim was gang-raped by three accused persons, one after another. At that time, she was alone in her home. Further, she may not have expected that her own relative will commit rape with her. She was a helpless victim.

40. The Courts while trying an accused on the charge of rape must deal with the case with utmost sensitivity, examine the broader probability of a case and not get swayed by minor contradiction or insignificant discrepancies in the evidence of witness which are not of a substantial character.

41. After considering the entire prosecution case, we find an important link to connect the appellant with the case is that in the accused statement, in question No. 37 with regard to his memorandum under Section 27 of the Evidence Act, he admitted that he along with other two juveniles in conflict with law, Mukesh and Ashok brought the crabs which they had caught from the dam but in the accused statement under Section 313 of Cr.P.C. he had denied that the crabs were crushed by them at the house of the victim. The testimony of the S.K.Yadav, Investigation Officer (PW-20) and Akhilesh (PW-2) is unrebutted that the appellant also stated that the crabs were crushed by them at the house of the victim on *silbatta*.

42. In the spot map (Exh. P/20) prepared by S.K.Yadav, at the place indicated as 'G', it was shown that silbatta and a container on which some remaining flesh of the crabs were found. This fact establishes that the appellant was present at the house of the victim, in the absence of the family members of the victim. If the incident would have happened before their reaching the spot for crushing the

crabs, they ought to have informed other persons about the same but, nothing of that sort happened. This conduct of appellant show that he was present with the victim when she was alive at the time of incident.

43. As per the statement of Laxman (PW-4), it was established that appellant gave false intimation to him that the victim had committed suicide.

44. The appellant could not offer any explanation whatsoever as to how the sperm and semens were found in the vaginal swab and clothes of the victim. Therefore, we also come to the same conclusion, as arrived at by the learned trial Court, that the appellant and his associates (juvenile in conflict with law) went to the house of the victim knowing well that her parents were not at the home and thereafter taking advantage of her loneliness and helplessness, forcibly committed rape on her, thereafter murdered her by throttling, strangulating her and finally hanged her on the roof with a saree. Doctor had found injuries and the Investigating Officer found a pointed stone and *phavda* near the place of incident. After considering the testimony of Dr. Anil Maliviya, we find his evidence to be reliable that after the victim was killed, dead body was hanged from the roof by the accused persons.

45. We find the following circumstantial evidence against the appellant :-

1. The appellant is a relative (uncle) of the victim. He knew that at what time the victim was alone at her house.

2. Blood stains, semen and sperms which were found in the vaginal swab, clothes, etc. tallied with the DNA profile of the appellant and other juvenile accused.

3. The appellant could not offer any explanation as to whatsoever how his semens and sperms were present in the vagina of the victim.

4. On the date of incident at about 4:30 pm, brother Rupesh and sister Sabina of the victim saw the appellant along with his juvenile friends near the dead body of the victim at their house. No explanation has been offered in this regard as to how they were present on the spot at the time of incident.

5. The appellant admitted that they had caught crabs. S.K.Yadav (PW-20) deposed from the memorandum that the appellant informed that crabs were crushed by them in the house of the victim. This establishes the fact that the appellant was present at the house of the victim. They have not given in any explanation as to whether the incident took place before they reached the house of the victim.

6. After committing murder of the victim, the appellant gave false information to his brother that the victim had committed suicide.

46. In such circumstances, all the above facts sufficiently establish hypothesis of the guilt of the appellant, that is to say, they should not be explainable on any other hypothesis except that the appellant is guilty. The circumstances are conclusive in nature and tendency. The circumstance exclude every possible hypothesis except that the accused appellant is culprit. The chain of evidence is complete without leaving any reasonable ground for the conclusion consistent

with the innocence of the appellant and show that in all human probability the act must have been done by the appellant only. Thus, the appellant is rightly convicted by the trial Court for the charges leveled against him.

47. Learned counsel for the appellant contended that looking to the overall facts and circumstances of the case and socio-economic background of the appellant, the present case is not the 'rarest of rare case'. The sentence of death penalty is not justified in the present case. He places reliance on the following cases :-

(i) Criminal Appeal No. 864/2013 Judgment dated 01.09.2016 (Shyam Singh @ Bhima Vs. State of MP).
(ii) Criminal Appeal Nos. 292-293/2014 Judgment dated 16.09.2016 (Tattu Lodhi @ Pancham Lodhi Vs. State of MP).
(iii) Criminal Appeal Nos. 1481-1482/2014 Judgment dated 08.09.2016 (Rajesh Vs. State of M.P.).
(iv) Criminal Appeal Nos. 1584-1585/2014 Judgment dated 15.09.2016 (Govindswamy Vs. State of Kerala).
(v) Criminal Appeal Nos. 1720-1721/2014 Judgment dated 21.09.2016 (Kamlesh @ Ghati Vs. State fo MP).
(vi) B.Kumar Vs. Inspector of Police 2016 (1) MPLJ (Criminal (SC) 189).
(vii) State of MP vs. Kailash, 2017 (1) MPLJ (Criminal) 424.
(viii) In reference Judge Vs. Phoolchand Rathore, 2017 (2) MPLJ (Criminal) 231 (I).
(ix) State of MP Vs. Anil, 2016 (3) MPLJ (Criminal) 211.
(x) In reference Judge Vs. Arvindalias Chhotu Thakur, 2015 (1) MPLJ (Criminal) 167.

48. In the above referred cases, it was held that if the accused comes from a deprived socio-economic background without any criminal history and his conduct, while in custody, does not suffer from any blemish, the possibility of reformation on the materials on

record cannot be ruled out. In such condition, instead of death penalty, the punishment of life imprisonment subject to the provisions of remission, etc. under the Code of Criminal Procedure, 1973 would be adequate to meet the ends of justice.

49. In the case of **Mukesh** (supra), Hon'ble Supreme Court has referred to the following cases:

> **"Dhananjoy Chatterjee Vs. State of W.B [(1994) 2 SCC 220]**, a security guard who was entrusted with the security of a residential apartment had raped and murdered an eighteen year old inhabitant of one of the flats in the said apartment, between 5.30 p.m. And 5.45 p.m. The entire case of the prosecution was based on circumstantial evidence. However, the Court found that it was a fit case for imposing death penalty. Following observed of the Court while imposing death penalty is worth quoting :
>
> In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

In case of **Shankar Kisanrao Khade Vs. State of Maharashtra [(2013) 5 SCC 546]**, the Hon'ble Supreme Court after analysing various cases of rape and murder, wherein death sentence was confirmed by the Apex Court, in paragraph 122 briefly laid down the grounds which weighed with the Court in confirming the death penalty and the same read as under :

The principal reasons for confirming the death penalty in the above cases include :

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (Jumman Khan vs. State of UP [(1991) 1 SCC 752], Dhananjoy Chatterjee Vs. State of W.B. [(1994) 2 SCC 220], Laxman Naik Vs. State of Orissa (1994) 3 SCC 381 , Kamta Tiwari Vs. State of MP [(1996) 6 SCC 250], Nirmal Singh Vs. State of Haryana [(1999) 3 SCC 670], Jai Kumar Vs. State of MP [(1999) 5 SCC 1], State of Uttar Pradesh v. Satish [(2005) 3 SCC 114], Bantu v. State of Uttar Pradesh, [(2008) 11 SCC 113], Ankush Maruti Shinde Vs. State of Maharashtra [(2009) 6 SCC 667], B.A. Umesh Vs. High Court of Karnataka [(2011) 3 SCC 85], Mohd. Mannan Vs. State of Bihar [(2011) 5 SCC 317] and Rajendra Prahladrao Wasnik Vs. State of Maharashtra) [(2012) 4 SCC 37];

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (Dhananjoy Chatterjee, Jai Kumar, Ankush Maruti Shinde and Mohd. Mannan);

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar, B.A. Umesh and Mohd. Mannan);
(4) the victims were defenceless (Dhananjoy Chatterjee, Laxman Naik, Kamta Tewari, Ankush Maruti Shinde, Mohd. Mannan and Rajendra Pralhadrao Wasnik);
(5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee, Laxman Naik, Kamta Tewari, Nirmal Singh, Jai Kumar, Ankush Maruti Shinde, B.A. Umesh and Mohd. Mannan) and in three cases the antecedents or the prior history of the convict was taken into consideration (Shivu, B.A. Umesh and Rajendra Prahladrao Wasnik).

In **Shankar Kisanrao Khade** (supra) case wherein the Hon'ble Supreme Court has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in such commutation. Paragraphs 106 reads as under:

A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include :-
(1) the young age of the accused (Amit v. State of Maharashtra [(2003) 8 SCC 93] aged 20 years, Rahul aged 24 years, Santosh Kumar Singh Vs. State [(2010) 9 SCC 747] aged 24 years, Rameshbhai Chandubhai Rathod vs. State of Gujarat [(2011) 2 SCC 764] (2) aged 28 years and Amit v. State of Uttar Pradesh [(2012) 4 SCC 107] aged 28 years);
(2) the possibility of reforming and rehabilitating the accused (Santosh Kumar Singh and Amit v. State of Uttar Pradesh) the accused, incidentally, were young when they committed the crime;
(3) the accused had no prior criminal record (Nirmal Singh, Raju, Bantu, Amit v. State of Maharashtra, Surendra Pal Shivbalakpal, Rahul and Amit v. State of Uttar Pradesh);
(4) the accused was not likely to be a menace or threat or danger to society or the community (Nirmal Singh, Mohd. Chaman, Raju, Bantu,

> Surendra Pal Shivbalakpal [(2005) 3 SCC 127], Rahul vs. State of Maharashtra [(2005) 10 SCC 322] and Amit v. State of Uttar Pradesh).
> (5) A few other reasons need to be mentioned such as the accused having been acquitted by one the Courts (State of Tamil Nadu v. Suresh [(1998) 2 SCC 372], State of Maharashtra v. Suresh [(1998) 2 SCC 372], State of Maharashtra vs. Bharat Fakira Dhiwar [(2002) 1 SCC 622], Mansingh and Santosh Kumar Singh;
> (6) the crime was not premeditated (Kumudi Lal vs. State of UP [(1999) 4 SCC 108], Akhtar vs. State of UP [(1999) 6 SCC 60], Raju and Amrit Singh [(2006) 12 SCC 79]);
> (7) the case was one of circumstantial evidence (Mansingh and Bishnu Prasad Sinha [(2007) 11 SCC 467]).
>
> In one case, commutation was ordered since there was apparently no 'exceptional' feature warranting a death penalty (Kumudi Lal) and in another case because the Trial Court had awarded life sentence but the High Court enhanced it to death (Haresh Mohandas Rajput [(2011) 12 SCC 56]).
>
> In case of **Mukesh** (supra) Hon'ble Supreme Court had held that :
> Where a crime is committed with extreme brutality and the collective conscience of the society is shocked, courts must award death penalty, irrespective of their personal opinion as regards desirability of death penalty. By not imposing a death sentence in such cases, the courts may do injustice to the society at large.
>
> The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half naked in the wintery night, with grievous injuries."

50. Accordingly, this Court must also ascertain the mitigating and aggravating circumstances pertaining to the crime as also the criminal.

51. Now the residual question that remains to be decided is whether the death penalty is appropriate punishment in the case?

52. The learned Government Advocate submitted that the present case is clearly a case which comes under the category of “rarest of rare” case as per the decision of the Hon'ble Supreme Court in case of **Mukesh** (supra)**, Bachan Singh [AIR 1980 SC 898] and Machhi Singh & Ors. [1983 AIR 957].** Taking into consideration the offence and age of the victim, he submits that this is a case of rape and brutal murder of an innocent and helpless young girl in her teens.

53. We are of the considered view that in the facts and circumstances of the case, it would be appropriate to impose the alternative punishment for life, following the guidelines given in the case of **Selvam vs. State [AIR 2014 SC 1911]** and **Rajkumar vs. State of MP [(2014) 5 SCC 353]** instead of death sentence.

54. We seriously considered the mitigating circumstances in favours of the conviction. The appellant belongs to schedule tribe without criminal antecedents.

55. The prosecution has not proved the probability that the conviction cannot be reformed and rehabilitated and the probability that he would continue to commit criminal acts

and thereby would pose threat to the society. Thus, appeal filed by the appellant is partly allowed.

56. Accordingly, we uphold the conviction of the appellant under Sections 449, 376(A), 376(D) and 302 of IPC and Section 6 of Protection of Children from Sexual Offences Act, however, we set aside the death sentence awarded to the appellant and instead direct him to undergo life imprisonment (life long without remission) for the offences under Sections 449, 376(A), 376(D) and 302 of IPC.

57. Accordingly, the reference made by the learned trial Court is discharged. Subject to above modification, for the aforesaid reasons, the criminal appeal is partly allowed.

(S.K.SETH)
JUDGE

(SMT. ANJULI PALO)
JUDGE

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