

HIGH COURT OF MADHYA PRADESH : JABALPUR**Criminal Reference No.06/2018****In Reference**

(Received from 1st Additional Sessions Judge/Special Judge, POCSO Act) Rehli, District Sagar).

In reference -Versus- Bhaggi @ Bhagirath @ Naran

Criminal Appeal No.5725/2018

Bhaggi @ Bhagirath @ Naran -Versus- State of Madhya Pradesh

CORAM :

**Hon'ble Shri Justice Hemant Gupta, Chief Justice.
Hon'ble Shri Justice Vijay Kumar Shukla, Judge.**

Shri Manish Tiwari and Shri Vinod Tiwari, Advocates for the appellant.
Smt.Namrata Agrawal, Government Advocate for the State.

<i>Whether approved for reporting?</i>	
<i>Law laid down</i>	
<i>Significant paragraph Nos.</i>	

JUDGMENT

(Jabalpur dt.: .10.2018)

Per : V.K. Shukla, J.-

The reference has been made for confirmation of order of capital punishment of death awarded in Special Session Trial No.15/2018, passed by First Additional Sessions Judge/Special Judge, Rehli, District Sagar, whereby the accused has been convicted under Section 376(A B) amended by Act No. 22/2018) and 363 of IPC. The accused

has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
U/s 363 of IPC.	R.I. for 7 years with fine of Rs,500/-,in default of payment of fine, R.I. for 2 months
U/s 376(AB) of IPC	Death sentence, subject to confirmation by this court.

2. The convict has filed Criminal Appeal No.5725/2018 against the said judgment, therefore, both the reference and appeal are taken up for hearing together and are being disposed of by common order.

3. Prosecution story in short is that on 21-05-2018, complainant Munni Bai (PW-8) grandmother of the victim lodged a report to the effect that she lives at Khamariya and on 21-05-2018 at about 7.30 p.m. she was in her house, then her grand daughter PW-1 aged about 7 years went to take mango, then she heard her voice from the house of Rajaram Baba Thakur Mandir, then she including Teekaram and Saroj Rani ran to temple saw that the prosecutrix was necked and the accused was also in the same condition. Thereafter, the accused had fled from the spot. The prosecutrix was taken by Teekaram and Sarojrani

to her mother, where the prosecutrix disclosed in presence of the all the persons that when she was going to take mango then on the way, the accused met her and asked that he would give her "Namkeen" and had taken her at temple and violated her and when she cried then Saroj and Teekaram came over there and the accused had fled.

4. On the basis of report lodged by PW-8 Smt.Munni Bai, FIR Ex.P-15 was registered. The police investigation commenced. The prosecutrix was sent for medical examination. She was examined by PW-3 Dr.Saroj Bhuriya on 22-05-2018 at 1.30 A.M. Her report is Ex.P-4.The statements of victim under Section 161 were recorded by PW-25 Preeti Jain, Sub Inspector in presence of constable PW-6 Shashi and videography was done by PW-5 Anurag Tiwari. The statements are contained in DVD marked as 'Article A-1' and the same was played before the trial court. Statement under Section 164 was recorded, which is Ex.P-1. The accused was arrested on 22-05-2018 at 5.50 P.M. On disclosure statement under Section 27 of Evidence Act, clothes were seized vide Ex.P-18 and seizure of underwear is Ex.P-8 by PW-4 Amit Upadhyay. The accused was sent for medical examination on 22-05-2018. He was examined by PW-9 Dr. Sanjay Rai and his MLC is Ex.P-7. The date of

birth of the prosecutrix according to the prosecution is 27-06-2010. In support of the age, the headmaster of the Govt. Girls Primary School Khamariya, Rehli (PW-7) was examined. She proved the certificate Ex.P-14 based upon Entry No.1804 of date of birth register which was exhibited as Ex.P-13. PW-13 Chandrabha also proved the birth certificate Ex.P-20. The vaginal slide 'Article C', underwear 'Article-D' and swab 'Article F' were prepared vide Ex. P-34 to Ex.P-37. The DNA profile was also done by the prosecution.

5. After completing investigation, challan was filed before the competent court. The charges were framed under Section 363, 376 (AB) IPC of Amended Act and under Section 3/4 and 5E/6 of the Protection of Children from Sexual Offences Act. 2012. The charges were read over to the accused. The accused abjured his guilt and demanded for trial taking the defence of false implication.

6. Before adverting to the rival contentions of the learned counsel for the parties, it is apposite to refer the provisions of Criminal Law (Amendment) Ordinance, 2018 by which Section 376-AB was inserted after Section 376-A, which reads as under :

“376AB. Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and with fine or with death:

Provided further that any fine imposed under this section shall be paid to the victim.”

The said Ordinance came into force from 21-04-2018. Later the same has been made enactment by the Parliament by Criminal Law (Amendment) Act, 2018 (Act No.22 of 2018). The Act was brought to amend the provisions of Indian Penal Code, Indian Evidence Act, 1872 and the Code of Criminal Procedure, 1973 and the Protection of Children from Sexual Offences Act, 2012. The said Act of Parliament received assent of the President on 11-08-2018 and the same was made effective w.e.f. 21st day of April, 2018 and therefore, the present case is covered by the provisions of Amended Act 22 of 2018. By the aforesaid insertion of new Section 376-AB, the provision has been made that whoever commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person’s natural life, and with fine or with death. The proviso reads that such fine shall be just

and reasonable to meet the medical expenses and rehabilitation of the victim. Thus, by the aforesaid new provision in a case of rape on a woman under twelve years of age, minimum sentence of rigorous imprisonment is not less than twenty years, but the same may extend to imprisonment for life would mean natural life of the victim. Thus, in such cases the rigorous imprisonment would not be less than twenty years and the same would be coupled with fine or the court may award death sentence.

7. In the light of the aforesaid amendment, learned counsel for the State submitted that in the present case, the allegation is that the accused had committed rape with a girl of about 7 years and therefore, he has been rightly awarded the death sentence.

8. On the other hand learned counsel appearing for the victim argued that in the facts of the present case, the conviction of death sentence awarded to the accused is not sustainable. He submitted that the manner in which the alleged offence is committed is not barbaric and brutal, therefore, present case does not fall within 'rarest of rare case' to award death sentence. He relied on the various judgments of the Hon'ble Supreme Court in the cases of **Bachan Singh Versus State of Punjab** reported in **AIR 1980**

SC 898, Machhi Singh & Others Versus State of Punjab reported in **AIR 1983 SC 957**. He has also placed reliance on the judgment of Hon'ble the Supreme Court in the case of **Amit Versus State of Uttar Pradesh** reported in **AIR 2012 SC 1433** to contend that in absence of having any evidence that the accused may repeat a similar crime in future, the possibility of his reform cannot be ruled out in the coming years looking to the age and under such circumstances, the Hon'ble Supreme Court in the said case relying upon the judgment of **Rameshbhai Chandubhai Rathod Versus State of Gujarat** reported in **AIR 2011 SC 803** converted the death penalty into the imprisonment for life for the remaining term. He has further placed reliance on the 6 judgment of Hon'ble the Supreme Court in the case of **Panchhi & Another Versus State of U.P** reported in **(1998) 7 SCC 177** to explain the circumstance as to when the death penalty is not justified.

9. On the other hand the learned counsel for the State submitted that in the present case the accused has committed rape with a child of 7 years age and in view of the provision of Section 376(AB), the accused has been rightly awarded death sentence. Learned counsel referred the judgments passed by a Coordinate Bench of this court in **Criminal Reference No.07/2017 (In Reference received from District & Sessions Judge,Dindori Vs.**

Bhagwani and another) dated 09-05-2018 and also **the judgment dated 08-08-2018 passed in Criminal Reference No. 01/2018 (In Reference Vs. Vinod alias Rahul Chouhtha)**, and submitted that in the case of **Bhagwani (supra)**, a girl aged about 11 years was victimized and murdered and in the case of **Vinod alias Rahul Chouhtha(supra)**, a child of 4 years was raped and murdered and this court expressed concern over the alarming increased in the recent incident of child rape coupled with rising and anger of the society confirmed the death sentence while maintaining the conviction and sentence.

10. Newly inserted Section 376-AB in the Penal Code provides that in the case of rape with a woman under 12 years of age, minimum rigorous imprisonment has been provided not less than twenty years which may extend to imprisonment for life which shall mean natural life and with fine. Thus, the test for awarding the death sentence in the case of woman under 12 years of age shall be still the same which has been laid down in the various judgments prior to the amendment i.e. 'rarest of rare case'.

11. The conviction and sentence in the present case is based on consideration of direct evidence, evidence of

accused coming from place of incident and the medical and scientific reports.

12. F.I.R. (Ex.P-1) was lodged by Munni Bai (PW-8) grand-mother of the prosecutrix on 21.05.2018 at about 23:35 hours in Police Station Rehali District Sagar. She stated that the accused is known to her and he is resident of the same village. The victim is her grand-daughter. She resides at home alongwith her younger son namely Chandrabhan. Prosecutrix is the daughter of Chandrabhan. On the date of incident at about 7:30 p.m. the prosecutrix went to take mango, after some time she heard voice of the victim from *Raja Ram Baba Thakur Mandir*. Teeka Ram and Saroj Rani who reside near the temple, rushed at the spot. They saw that the prosecutrix was naked and the accused was also in naked condition and the accused was violating the prosecutrix. The accused had fled from the spot. The prosecutrix was taken by Teeka Rakm and Saroj Rani to her mother. She disclosed the entire incident in the presence of all these persons that when she was going to take mango then on the way accused met her and asked that he would give her "*Namkin*" and had taken her to the temple. He had removed his undergarments and had also removed the undergarments of the prosecutrix and violated her. Her

mouth was also gagged.

13. There is direct evidence of three witnesses i.e. prosecutrix (PW-1), Saroj Rani (PW-2) and Teeka Ram (PW-14). The prosecutrix was examined as a witness. Being a child witness, the trial Court before recording her evidence, recorded his satisfaction about the competence of the witness. On query, he found that the prosecutrix was able to understand the queries made by the Court. She narrated the incident that the accused is known to her. About one month back he met her near the *Sagaun* tree when she was going to take mango from the house of her aunty. The accused asked her that he would give her “*Namkin*” and then took her to the temple. He removed her undergarments and also his undergarments. She stated that firstly he inserted his finger on her private part and then he violated her as well. She felt acute pain and cried. Thereafter, her ‘*Bade Papa*’ (Elder brother of her father) Teeka Ram and her ‘*Badi Mammai*’ Saroj Rani wife of Teeka Ram reached at the spot. The accused ran away from there. They had brought her at home. The testimony of this child/victim was corroborated with the testimony of Saroj Rani (PW-2) ‘*Bari Mammai*’ of the prosecutrix. She stated that the accused is known to her as he is resident of same

village. The prosecutrix is daughter of her 'Devar' (brother-in-law). About a month back, when she was at home, she heard the shouting of the prosecutrix and then she alongwith her husband Teeka Ram rushed to the temple. They saw the accused was in naked condition and also the prosecutrix was undressed. He was laying over the prosecutrix and was violating her. He ran away from the spot. The prosecutrix was crying and there was bleeding from her private part. They had taken the prosecutrix to her mother. Thereafter, she was taken to the police station Rehali and a report was lodged by her grand-mother.

14. Another witness who had seen the incident is Teeka Ram (PW-14). He also narrated the same which was stated by the prosecutrix (PW-1) and Saroj Rani (PW-2). The accused is known to him. The prosecutrix is daughter of his younger brother. About a month back when he was at home, he heard the shouting of the prosecutrix then he and his wife rushed towards the temple and saw the accused in the naked condition. He was drunk. The accused was over her and was violating. When they reached at the spot, the accused had run away. He saw that the prosecutrix was crying and there was bleeding from her private part. She was taken to her mother and thereafter, they went to the

police station where the report was lodged by Munni Bai grand-mother of the prosecutrix.

15. In addition to these witnesses, there is also the evidence of seeing the accused coming running from the place of incident. Aashish Singh (PW-11) stated that the accused is known to him as he is resident of the same village. The prosecutrix is also known to him. About a month back, on the date of incident he was going from bus stand Rehali to his home. He was talking with one Sunil Valmiki opposite the shop of one Manoj Kumar Tiwari. He saw that one person coming from the temple where the incident had taken place. He was running and carrying his trouser in his hand. He and Sunil chased him and tried to catch hold him but he managed to escape. He further stated that thereafter, he saw that Teeka Ram and his wife were coming from the temple side alongwith a child and she was crying. Teekaram told him that she is the daughter Chandrabhan and she has been violated by the accused. He further stated that she was taken to the home and there she had narrated the entire incident. Sunil Kumar Tiwari (PW-12) also narrated the same which was stated by Ashish (PW-11). He also stated that the accused is known to him and when he was standing opposite the shop of Manoj

Tiwari, Ashish came over there and when they were talking to each other. He saw one person coming very fast from the temple and was carrying his trouser in his hand. When they tried to stop him, he managed to run away. Ashish Singh (PW-11) and Sunil (PW-12) witness to subsequent conduct of the accused which is relevant under Section 8 of the Evidence Act.

16. Thus, there is direct evidence of prosecutrix (PW-1), Saroj Rani (PW-2) and Teeka Ram (PW-14) and there is evidence of seeing accused running from the temple side carrying trouser in his hand immediately after the incident. There are other witnesses i.e. PW-10 Shanti Bai she is mother of the prosecutrix who has also supported the case of the prosecution. She is the hearsay witness as the incident was disclosed to her by the victim. In para-3 & 4 of her deposition, she stated that the blood was oozing from the private part of the prosecutrix. Munni Bai (PW-8) is grand-mother of the prosecutrix, she is the complainant who lodged the F.I.R. She also supported the case of the prosecution but she is also hearsay witness. She stated that on the date of incident when she was at home, her grand-daughter aged about 7 years went to take mango then she listened her voice from the *Raja Ram Baba Thakur Temple*,

then her son Teekaram and his wife Saroj Rani immediately rushed to the spot and then they had seen the accused is violating the prosecutrix. She was brought to the home and when she enquired about the incident, she narrated the entire story that when she was going to take mango, then the accused had asked her to give '*Namkin*' and had taken her to the temple and then violated her.

17. Chandrabhan (PW-13) father of the prosecutrix stated that at the time of incident he was at his pan (betel) shop. He saw that his younger brother Teeka Ram, sister-in-law Saroj Rani were going towards his house alongwith his daughter. He immediately rushed to the house. The daughter was crying. His elder brother Teeka Ram and his wife Saroj Rani narrated the entire incident to him. The prosecutrix stated that the accused offered '*Namkin*' to her and had taken her to the temple and violated her.

18. R.A. Chauraha (PW-20) is the In-charge of the Police Station, he stated that the complainant Munni Bai (PW-8) alongwith other family members and prosecutrix aged about 8 years came to the police station on 21.05.2018 and on the report of PW-8 he registered the F.I.R. Copy of the report is Ex.P-9.

19. The prosecutrix was sent for medical examination. She was examined by Dr. Saroj Bhuria (PW-3). Her report dt. 22.05.2018 is Ex.P-4. She found recent sexual activities. The hymen of the prosecutrix was ruptured and blood was oozing. There was no other external injuries on her part. The said report was proved by her.

20. The statement of prosecutrix was recorded by Preeti Jain (PW-25) who was working as Sub-Inspector in presence of other Constable Shashi (PW-6) and videography was done by Anurag Tiwari (PW-5). The statements contained in DVD were marked as Articiel A-1 and was played in the Court (Para-26 of the judgment of the trial Court). The statement of the prosecutrix recorded under Section 164 Cr.P.C. which was marked as Ex.P-4. The accused arrested on 22.05.2018. On his discovery statement under Section 27 of the Indian Evidence Act the cloths were seized vide Ex.P-18 by PW-15 and the underwear was sized vide Ex.P-8 by PW-4. The accused was sent for medical Examination. His energy is Ex.P-7 and was examined by Dr. Sanjay Rai (PW-9). The accused was found to be competent for sexual intercourse and his blood sample were taken. His report is Ex.P-7. The prosecution also produced the DNA Report Ex.P-34 to Ex.P-37 which was

proved by R.A. Chauraha (PW-20) who is the Investigating Officer of the case. In the DNA Report Ex.P-34 “Y Chromosome on Vaginal slide Article ‘C’; underwear Article ‘D’ and swab Article ‘F’ matches with that of accused (The accused DNA generated from blood sample). Female Autosomal STR DNA Profile from place of incident Article ‘A’ Matches with victim. Mixed autosomal DNA profile from underwear of accused Article I matches with victim.

21. The age of the prosecutrix has been proved by the prosecution by producing birth certificate Ex.P-14. Her date of birth is 27.06.2010. The said certificate is based upon entry No. 1804 of the date of birth register Ex.P-12 and *Dakhila Kharij Panji* Ex.P-3 which is proved by PW-7 Sabra Begam, who is the Headmaster of Government Girls Primary School, Khamaria Rehali. PW-13 Chandrabhan father of the prosecutrix deposed that the date of birth of the victim is 27.06.2010 and has proved the birth certificate in para-12 of his deposition. Thus the prosecutrix is aged about eight years of age on the date of incident.

22. Thus, the oral evidence of PW-1 (prosecutrix), Saroj Rani (PW-2) and Teeka Ram (PW-14) fully corroborated with the medical report Ex. P-4 of the victim by Dr. Saroj Bhuria (PW-3) and also by scientific report DNA

Ex.P-37. The prosecution has proved that the age of prosecutrix as less than 12 years at the time of the incident and she has been violated by the accused.

23. Now the question arises for consideration in the facts, evidence and circumstances of the present case as discussed as to whether this is one of the 'rarest and rare case, wherein the penalty of death may be confirmed on account of aggravating circumstances or due to having some mitigating circumstances, it may be converted into the imprisonment for life not less than 20 years or with fine.

24. In the case of **Bachan Singh (supra)** the Apex Court by the majority view has declined to interfere into the matter but drawn the guidelines on the "aggravating circumstances" and "mitigating circumstances" and directed that the Court has to decide each case in their own facts looking to those circumstances. It is laid down that aggravating and mitigating circumstances should be considered. Those are shown as follows.

- [i] Aggravating circumstances (para 202):*
- (a) Preplanned murder with extreme brutality.*
- (b) Exception depravity*
- (c) Murder of Military Officer or Police Officer or any public Officer on duty. In consequence of anything done during discharge of duty.*
- (d) Murder of a person who had rendered assistance to the Magistrate or a Police in*

discharging their duties.

[ii] Mitigating Circumstances (para 206):

- (a) Commission of offence under the influence of extreme mental or emotional disturbance.*
- (b) If the accused is young or old, he shall not be sentenced to death.*
- (c) Probability of the accused not committing criminal act of violence as would constitute a continuing threat to the society.*
- (d) Probability of reformation or rehabilitation of the accused.*
- (e) Murder committed in fact showing that accused believed that he was morally justified in committing the offence.*
- (f) Murder under duress or domination of another person.*
- (g) Mentally defective condition of the accused impairing capacity to appreciate criminality of his conduct.*

[iii] In para 207, extreme youth has been recognized as a strong ground for leniency.

In the case of **Bachan Singh (supra)**, the Apex Court referring both “aggravating circumstances” and “mitigating circumstances” has further observed that these are undoubtedly relevant circumstances must be given great weight in determination of the sentence but there may be numerous other circumstances justifying the passing of the lighter sentence as there are countervailing circumstances of aggravation. “We cannot obviously feed into a judicial computer all such situations since they are astrologically imponderables in an imperfect and undulating society. The scope and concept mitigating factors in the area of death penalty must receive a liberal and expansive construction by the Court in accord with sentencing policy.

The Judges should never be bloodthirsty. Hanging of the murderers has never been too good for them. It is imperative of voice the concerned that the Courts aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with ever more scrupulous care and humane concern directed along the highroad of legislative policy outlined in Section 354(3) of the Cr.P.C. For a person convicted of murder, life imprisonment is rule and the death sentence is exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when alternative option is unquestionably foreclosed”.

25. The Supreme Court in the case of **Machhi Singh (supra)**, relying upon the guidelines drawn by the Apex Court in **Bachan Singh (supra)** laid down the test on the individual facts while pronouncing the sentence. In Paragraph Nos.37,38,39, the Apex Court has observed as under:-

37. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

(ii) *Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.*

(iii) *Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.*

(iv) *A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.*

38. *In order to apply these guidelines inter-alia the following questions may be asked and answered:*

(a) *Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?*

(b) *Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?*

39. *If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.*

26. In the case of **Mofil Khan Versus State of Jharkhand reported in (2015) 1 SCC 67**, the Hon'ble Apex Court has explained the meaning of "the rarest of rare case". The relevant portion of Paragraph No.64 is reproduced as under:-

“The rarest of the rare case” exists when an accused would be a menace, threat and antithetical to harmony in the society. Especially in cases where an accused does not act on provocation, acting on the spur of the moment but meticulously executes a deliberately planned crime in spite of understanding the probable consequence of his act, the death sentence may be the most appropriate punishment.”

27. In the case of ***Haresh Mohandas Rajput Versus State of Maharashtra reported in (2011) 12 SCC 56***, the Apex Court has emphasized the connotation “the rarest of the rare”. The relevant portion of Paragraph No.56 is reproduced as under:-

“The rarest of the rare case comes when a convict would be menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of “the rarest of the rare case.”

28. In the case of ***Anil @ Anthony Arikswamy Joseph Versus State of Maharashtra reported in (2014) 4 SCC 69***, the Apex Court in Paragraph No.27 has clarified the real test of “the rarest of the rare case” which is reproduced as under:-

“The rarest of the rare test depends upon the perception of the society that is “societycentric” and not “Judge-centric”, 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 the variety of factors like society’s abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc.”

29. In the case of **Santosh Kumar Versus State Through C.B.I reported in (2010) 9 SCC 747**, the Apex Court has explained the philosophy behind “the rarest of the rare case”. The relevant portion of in Paragraph No.98 is reproduced as under:-

“Undoubtedly, 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.”

30. In the case of **Rameshbhai Chandubhai Rathod (supra)**, the Apex Court has held that it is now well settled that as on today the broad principle is that the death sentence is to be awarded only in exceptional cases. The Court deciding the issue has accepted the view by one of the Judge whereby in a similar case of rape and murder of a minor girl below the age of 12 years, the Court has given weightage to the fact that the appellant was a young man only 27 years of age. It was obligatory on the Trial Court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of the society in case he was given a change to do so. The Apex Court relying upon the judgment of **Ramraj Versus State of Chhattisgarh reported in (2010)**

1 SCC 573 and Mulla & Another Versus State of Uttar Pradesh reported in (2010) 3 SCC 508, has observed that the term “imprisonment for life” which is found in Section 302 of the I.P.C, would mean “imprisonment for the natural life” of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure, however, converted the capital punishment into the punishment for imprisonment of life. In **Mulla's case (supra)**, the Apex Court has said: “We are in complete agreement with the above dictum of this Court. It is open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the length of imprisonment which will suffice the offence committed. Thus, we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.” Therefore, the Apex Court has given the punishment of life sentence, which may extend to their full life subject to any remission by the Government for good reasons. Thus, relying upon the ratio of **Ramraj (supra) and Mulla (supra)**, the Apex Court in the case of **Rameshbhai Chandubhai Rathod (supra)**

maintained the same sentence in the similar terms. Therefore, by the three Judges Bench, the Apex Court recognized that it is obligatory on the Trial Court to have given a finding as to a possible rehabilitation and reformation and the possibility cannot be ruled out that he may be a useful member of the society in case he is given a chance.

31. In a judgment reported as **(2017) 6 SCC 631 (Vasanta Sampat Dupare vs. State of Maharashtra)**, wherein, the Court observed that the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances). Another three judges Bench in **Mukesh and another Vs. State (NCT of Delhi) and others (2017)6 SCC 1** maintained the death sentence on the 4 accused persons. The review against the said judgment bearing **Review Petition (Cri.) No.570/2017 (Mukesh Vs. State of NCT of Delhi)** was dismissed on 09-07-2018. In the cases of rape coupled with murder, the death sentence was maintained by the Apex Court in several judgments reported in **(2008) 11 SCC 113 (Bantu Vs. State of Uttar Pradesh)**, **(2009) 6 SCC 667 (Ankush Maruti Shinde Vs. State of Maharashtra)** and **(2015) 6 SCC 632 (Shabnam etc. Vs.**

State of Uttar Pradesh.

32. It is a horrendous crime when a child of four years is violated by a person, who is living in the close vicinity of the family of the child and thus, was known to the child. He prompted the child to come with him so as to take her to her father and then violated and killed her. The Supreme Court in a judgment rendered in **Shankar Kisanrao Khade vs. State of Maharashtra, (2013) 5 SCC 546**, examined the entire case law where the penalty of death sentence was set aside in the case of an offence under Section 376 of IPC. The Court laid down the aggravating circumstances called "crime test", mitigating circumstances called "criminal test" and "the rarest of rare cases test". It was held that the nature, motive, impact of crime, culpability, quality of evidence, socioeconomic circumstances, impossibility of rehabilitation are some of the factors, the Court may take into consideration while commuting the death sentence into imprisonment for life.

33. In the following cases, the death penalty was commuted to the imprisonment for life where a minor girl was raped and murdered by applying aforesaid principles.

- (i) *In the case of Kumudi Lal Vs. State of U.P. (1999)4 SCC 108, death penalty was commuted into imprisonment. It was a case where 14 years girl was*

raped and killed by strangulation.

- (ii) *In **Raju Vs. State of Haryana (2001)9 SCC 50**, the Court commuted death sentence to life imprisonment in case where a girl of 11 years was raped and murdered. The Court noticed that the accused had no intention to murder her, but on the spur of the moment, without any premeditation, he gave two brick blows which caused the death. It was further noticed that the accused had no previous record or would be a threat to the society.*
- (iii) *In the case of **Bantu Vs. State of M.P. (2001)9 SCC 615**, in a case where a girl of 6 years who was raped and murdered by a boy who less than 22 years, the death sentenced was commuted to that of life imprisonment.*
- (iv) *In the case of **State of Maharashtra Vs. Suresh (2000)1 SCC 471**, a girl of 4 years was raped and murdered.*
- (v) *In the case of **Amrit Singh Vs. State of Punjab (2006) 12 SCC 79** where a 7-8 years old girl was raped and murdered by the accused of 31 years.*
- (vi) *In the case of **Rameshbhai Chandubhai Rathod (2) Vs. State of Gujrat (2011)2 SCC 764**, the age of the prosecutrix was 8 years. She was raped and murdered.*
- (vii) *In the case of **Surendra Pal Shivbalakpal Vs. State of Gujrat (2005) 3 SCC 127**, an accused of 36 years old had committed rape and murder of minor girl.*
- (viii) *In the case of **Amit Vs. State of Maharashtra (2003)8 SCC 93**, an accused aged about 20 years had raped and murdered a girl of 11-12 years. In the aforesaid cases mentioned above, where the death sentence was commuted to imprisonment for life.*

34. In the present case the important consideration is the manner in which the alleged offence is committed. The evidence of Dr. Saroj Bhuriya (PW-3) is relevant. She stated that there was no external injury on the person of the prosecutrix, specially on her neck, chick, chest, abdomen and thigh. She also did not find any injuries on the outer part of the genital part of the prosecutrix. She has found

the hymen was ruptured recently and there was bleeding. The injury was ordinary in nature. She further stated that the same could have been possibly be caused by hard and blunt object as well. The evidence has established that a minor child was violated by the accused. However, there was no other injury injury inflicted him either on the other parts of the body and also on the private part. Thus the manner in which the offence is committed is not barbaric and brutal. We have given our anxious consideration to the material on record and find that though the offence is condemnable, reprehensible, vicious and a deplorable act of violence but the same does not fall within the aggravating circumstances namely extreme depravity and the barbaric manner in which the crime was committed. Taking into consideration the totality of the facts, nature, motive and the manner of the offence and further that nothing has been brought on record by the prosecution that the accused was having any criminal antecedent and the possibility of being rehabilitation and reformation has also not been ruled out. Nothing is available on record to suggest that he cannot be useful for the society. In our considered opinion, it is not a case in which the alternative punishment would not be sufficient to the facts of the case.

35. Accordingly the Criminal Reference No. 06/2018 made by the 1st Additional Sessions Judge/Special Judge, POCSO Act, Rehali, District Saga under Section 366(1) of the Cr.P.C. for confirmation of the death penalty of the accused is answered but the capital punishment for the offence under Section 376(AB) is commuted to the imprisonment for life which shall mean imprisonment for natural life and the conviction and sentence under Section 366 of IPC is maintained. The Criminal Appeal No. 5725/2018 filed by the accused stands disposed of in the manner as delineated above.

36. Let a copy of this judgment be retained in the record of Criminal Appeal No. 5725/2018.

37. Office is directed to send a copy of this Judgment immediately to the trial Court concerned to take appropriate steps as per law.

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE