

**HIGH COURT OF MADHYA PRADESH AT JABALPUR**

**Division Bench: Hon'ble Shri Justice S.K.Seth, Judge & Hon'ble Smt. Justice Anjali Palo, Judge**

**Criminal Reference No. 13/2018**

In Reference  
Received from 4<sup>th</sup> Addl. Sessions Judge, Chhatarpur

Vs.

Touheed Musalman

**Criminal Appeal No. 6090/2018**

Touheed Musalman

Vs.

State of Madhya Pradesh

---

Shri S.K.Rai, Government Advocate for the State.  
Shri M.Shafiqullah, Advocate for the accused/appellant.

---

**Whether approved for reporting ?                      Yes**

---

**Law laid down :-** It is not appropriate to award 'death sentence' in every case. To award death sentence, some factors are necessary to be considered, such as the age of culprit, manner of commission of offence and possibilities of reformation of accused, etc.

---

**Significant Paragraphs :-** 23, 25 and 26

---

**JUDGMENT**  
**(30/10/2018)**

**Per : Smt. Anjali Palo, J :-**

Being aggrieved by the judgment dated 06.08.2018 passed in Special Case No. 47/2018 passed by IV Additional Session Judge, Chhatarpur (MP) convicting the accused for charges under

Sections 376(A)(B) and 450 of Indian Penal Code (hereinafter referred to as "IPC") and directing him to undergo death sentence and rigorous imprisonment for 10 years with default stipulations, the Criminal Appeal No. 6090/2018 has been filed under Section 374(2) of the Code of Criminal Procedure (hereinafter shall be referred to as "Cr.P.C.) by the accused/appellant and for confirmation of the death sentence, Criminal Reference No. 13/2018 has been made by Fourth Additional Sessions Judge, Chhatarpur under Section 366(1) of the Cr.P.C.

2. The prosecution case in nutshell is that on 24.04.2018 at about 10:00 to 10:30 PM, the prosecutrix aged about 3 years was in her room. Her mother Pushpa Sahu (PW-1) went outside the house to give rope to her brother-in-law Manju @Jhagdu Sahu (PW-9) and she was talking to him. In the meanwhile, appellant/accused entered in her house. He committed rape with the prosecutrix. When she cried, her mother Pushpa Sahu came into the room and saw the appellant in naked condition. She also saw bleeding from the private parts of the prosecutrix. Clothes of the appellant were also blood stained. Thereafter, Pushpa Sahu made hue and cry. Hearing the noise, neighbours came there and saw the appellant. On the information by neighbors police reached there and recorded Dehati Nalishi (Ex. P/14) as narrated by Pushpa. FIR (Ex. P/10) was registered against the appellant/accused for offences under Sections

376, 450 of the Indian Penal Code and Section 3/4 of Protection of Children from Sexual Offences. After medical examination and due investigation chargesheet was filed before the Court against the appellant by Police Station Rajnagar, District Chhatarpur.

3. After conducting trial, the trial Court found that the appellant, finding an opportunity, committed rape with the prosecutrix who was aged about 3 years. The prosecution case is corroborated by evidence of eye-witnesses, medical evidence and DNA test report. Hence, the trial Court convicted the appellant under Sections 376(A)(B) and 450 of IPC and awarded capital punishment.

4. Being aggrieved by the said judgment, the appellant/accused has filed Criminal Appeal No. 6090/2018 and for confirmation of the death sentence, the Fourth Additional Sessions Judge, Chhatarpur (MP) has made Criminal Reference No. 13/2018 to this Court under Section 366(1) of Criminal Procedure Code.

5. Learned counsel for the appellant/accused contended that the judgment passed by the trial Court is based on presumptions and assumptions by mis-appreciating the evidence available on record. The learned trial Court ignored that appellant has been arrested on the same day but his medical examination was conducted after 16 hours. This indicates that the appellant was not caught red-handed on the spot. It is also alleged that the medical evidence has not supported the prosecution case. In fact, he was sitting in a shop

belonging to his aunt (*chachi*) in inebriated condition. Some persons came there and slapped him due to which his T-shirt was blood stained. Learned trial Court erred by imposing capital punishment on the appellant as the offence committed by him was not grave and brutal. Hence, the appellant has prayed to set aside the impugned judgment and sentence by allowing the appeal and he be acquitted from the charges levelled against him.

6. Learned Government strongly opposed the contentions of the appellant and supported the findings of the learned trial Court and also submitted that in such type of offence, capital punishment is just and proper.

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

8. In question number 2 of the accused statement (recorded under Section 313 of Cr.P.C.), the appellant/accused admitted that at the time of incident, the prosecutrix was about three years old. Ramdeen Sahu (PW-5) who is an eye-witness deposed that, the appellant resided in the same locality near the house of the prosecutrix which is indicative of the fact that he very well knew about the prosecutrix and her family.

9. As per Pushpa Sahu (PW-1) mother of the prosecutrix, father of the prosecutrix was not present at the house on the date of incident. He was outside the district. On the date of incident, at

about 10:00 pm, Pushpa Sahu (PW-1) went outside the house to give rope to her brother-in-law Jhagdu Sahu (PW-9) thereafter, she talked to him for sometime. Taking advantage of the situation, appellant/accused got into the house and finding the prosecutrix alone in the room, he committed rape with her. Hearing the hue and cry of the prosecutrix, Pushpa (PW-1) rushed inside to find the appellant naked lying on top of the prosecutrix. She took the prosecutrix in her hand and found that there was bleeding from the private parts. Even the clothes of the appellant/accused were blood stained. On hearing noise, her neighbours Jhagdu Sahu (PW-5), Savita Yadav (PW-3), Subhadra Bai (PW-2), Nitesh Rajak (PW-4) and Ramdeen Sahu (PW-5) came to the spot. They also witnessed the injuries of the prosecutrix. The appellant was also present in the room. On information, police reached and lodged Dehati Nalishi (Ex.P/14) according to Pushpa (PW-1).

**10.** K.D.Singh (PW-15) SHO corroborated the aforesaid evidence and stated that he sent the prosecutrix for medical examination. He further stated that the blood stained clothes of the prosecutrix and the appellant along with blood samples were sent to FSL for DNA tests. It has come in the DNA test report (Ex. P/21) that the blood stains found on the clothes of the appellant matched with the DNA and blood samples of the prosecutrix. This evidence itself is conclusive in nature against the appellant.

**11.** Dr. Sakshi Gangele (PW-6) who examined the prosecutrix found bleeding from her vagina and abrasion of about 1x1 cm at 6 o'clock position extending upto anal region. Hymen was torn at 6 o'clock position. Her condition was unstable. Dr. Sakshi clearly opined that rape was committed with the prosecutrix.

**12.** The testimony of Dr. Sakshi Gangele (PW-6) and the medical report of the prosecutrix (Ex.P/2) duly supported the prosecution case. Her report also indicates that at the time of incident, the prosecutrix was aged about three years. During the medical examination, Dr. Sakshi also prepared videography and photographs which is on record as Article A-1, A-2, B and C with certificate under Section 65-B of the Evidence Act.

**13.** However, learned counsel for the appellant has contended that no external injury has been found on the body of the prosecutrix which implies that no incident has happened with the prosecutrix. He also contended that the doctor has not found any blood stains on the undergarments of the prosecutrix.

**14.** The aforesaid contention of the defence cannot be accepted because it is on record that the prosecutrix is an innocent child aged about 3 years. She was not aware of sexual assault on her due to which the appellant/accused committed rape on her without any resistance from the prosecutrix, hence no question of external injury arises in such circumstances. The second contention of the

learned counsel for the appellant with regard to blood stains on the undergarments of the prosecutrix is also unfounded because Pushpa (PW-1) mother of the prosecutrix has clearly stated that at the time of incident, prosecutrix was bleeding from her private parts which indicates that she was not wearing any undergarments.

**15.** Ramdeen Sahu (PW-5) and Subhadra Bai (PW-2) neighbour of the prosecutrix has supported the testimony of Pushpa Sahu (PW-1). They reached the spot immediately and saw the appellant in objectionable position with the prosecutrix. Clothes of the appellant/accused were blood stained. This evidence is found unshaken and unrebutted.

**16.** Appellant took the defence that he was a witness in the case of Raju and Dilshad. Therefore, he was falsely implicated by the neighbours of the prosecutrix with the help of mother of the prosecutrix.

**17.** Pushpa Sahu (PW-1) clearly denied the aforesaid contention of the defence. She also stated that she does not know Raju and Dilshad. Moreover, family members of a minor girl would not create a false story for implicating anyone in such matters as the dignity and future of an innocent girl is also at stake. It is pertinent to mention here that the prosecutrix and her mother had no enmity or intention to falsely implicate the appellant in such crime. Further, the evidence available on record point towards the guilt of the

appellant/accused beyond any reasonable doubt. The appellant has failed to offer any explanation about his presence inside the house of the prosecutrix during the night hours in objectionable condition.

**18.** Dr. Bharatlal (PW-10) examined the appellant on 25.04.2018, found the appellant to be capable of performing intercourse. At that time, appellant was not under influence of any intoxication or alcohol. The testimony of Dr. Bharatlal is found un rebutted. It creates doubt over the defence taken by the appellant that at the time of incident he was under influence of intoxication.

**19.** Appellant had also contended that he was sitting at the shop of his aunt when a boy came and put the prosecutrix in his lap. To establish his defence, defence witness Pannalal Yadav (DW-1) stated that the appellant was sitting at one grocery shop after consuming liquor. Appellant and his witness Pannalal both have not disclosed the name of the owner of the grocery shop nor the aunt (*chachi*) has been examined in support of the defence of the appellant. Pannalal Yadav (DW-1) partly supported the prosecution story that he heard noise of Pushpa Sahu (PW-1) and saw the neighbours had gathered. He also went there. Pushpa informed them about the incident with her daughter. He stated that police came and arrested the appellant.

**20.** The prosecution witnesses and partly the defence witness Pannalal Yadav (DW-1) support the prosecution story. The testimony



of Investigating Officer K.D.Singh (PW-15) and DNA test report Ex. P/21 clearly indicates towards the offence committed by the appellant beyond any reasonable doubt.

21. The learned trial Court evaluated the prosecution evidence in the right perspective and considered the facts in correct approach. Hence, in the considered opinion of this Court, the finding of conviction recorded against the appellant/accused for the offences under Sections 376(A)(B) and 450 of IPC do not warrant interference in the facts of the present case.

22. Now the question arises for consideration, in the facts and circumstances of the present case as discussed, whether this is one of the “rarest of 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 imprisonment for life.

23. Learned counsel for the appellant has placed reliance upon judgment of this Court in case of **In reference vs. Sunil Adiwasi (Criminal Reference No. 05/2018)** and submitted that the death sentence is not appropriate in the present case. Appellant/accused is aged about 19-20 years old. He has no criminal antecedent. He is a first offender. Hence, he is liable to get opportunity of rehabilitation and reformation. On the other hand, learned Government Advocate has prayed for confirmation of the

death sentence of the appellant in the light of recent amendment in the punishment for the offence under Section 376 of IPC.

24. As per the amended provisions of criminal law (by ordinance 2018) wherein Section 376AB was inserted after Section 376A which reads as under :

“376AB - Person committing an offence of rape on a woman under twelve years of age shall be sentenced with rigorous imprisonment of not less than 20 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.”

25. In our considered opinion in the instant case the alleged offence is not committed in barbaric and brutal manner, hence it does not fall within “rarest of rare” case to award death sentence. In case of **Amit vs. State of Uttar Pradesh, AIR 2012 SC 1433**, the Supreme Court held 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 Supreme Court converted the death sentence into the life imprisonment for remaining term.

26. Recently, the coordinate Bench this Court in Criminal Reference No. 06/2018 and Criminal Appeal No. 5726/2018 **Bhaggi @ Bhagirath @ Naran vs. State of Madhya Pradesh** vide judgment dated 11.10.2018, after following the principles laid down in cases of **Kumudi Lal vs. State of UP (1999) 4 SCC 108; Raju**

**vs. State of Haryana vs. State of Haryana (2001) 9 SCC 50; Bantu vs. State of MP (2001) 9 SCC 615, State of Maharashtra vs. Suresh (2000) 1 SCC 471; Amrit Singh vs. State of Punjab (2006) 12 SCC 79; Rameshbhai Chandhubhai Rathod vs. State of Gujrat (2011) 2 SCC 764; Surendra Pal Shivbalakpal vs. State of Gujrat (2005) 3 SCC 127 and Amit vs. State of Maharashtra (2003) 8 SCC 93**, the capital punishment under Section 376 AB of the Indian Penal Code was commuted to imprisonment for life. Similar approach has been opted by other coordinate Bench of this Court in case of **Sunil Adiwasi vs. State of MP** (Criminal Appeal No. 5015/2018) dated 17.08.2018. Hence, we are of the same opinion in the case at hand.

27. Accordingly, the Criminal Reference No. 13/2018 made by Fourth Additional Sessions Judge, District Chhatarpur (MP) under Section 366(1) of the Cr.P.C. for confirmation of the death penalty of the accused is answered. The Criminal Appeal No. 6090/2018 filed by appellant/accused stands **allowed in part**. The conviction under Section 376AB is maintained, but the capital punishment is hereby commuted to life imprisonment which shall mean imprisonment for remainder of natural life with fine of Rs. 15,000/- which is to be paid to the prosecutrix as compensation under Section 357 of Cr.P.C. In default of payment of fine amount, further RI for 1 years. The conviction and sentence awarded by the trial Court under Section

450 of the IPC is hereby maintained with a direction to run all sentences concurrently.

**28.** Let a copy of this judgment be retained in the record of Criminal Appeal No. 6090/2018.

**29.** Office is directed to send a copy of this judgment immediately to the Trial Court concerned to take appropriate steps as per law.

**(S.K.SETH)  
JUDGE**

**(SMT. ANJULI PALO)  
JUDGE**