

HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE DIVISION BENCH JUSTICE J.K.MAHESHWARI
&
JUSTICE AKHIL KUMAR SRIVASTAVA

Criminal Reference No.5/2018

IN REFERENCE
(Received From II Additional Sessions Judge
Khurai, District Sagar

Versus

Sunil Adiwasi
S/o Hargovind Adiwasi
Aged 21 years
Occupation Labour
R/o Villge Ujnet
Police Station Bandari
District Sagar (MP)

ACCUSED

Criminal Appeal No.5015/2018

Sunil Adiwasi
S/o Hargovind Adiwasi
Aged 21 years
Occupation Labour
R/o Villge Ujnet
Police Station Bandari
District Sagar (MP)

APPELLANT

Versus

State of M.P. through
Police Station Bandari
District Sagar (MP)

RESPONDENT

For the Accused : Shri , P.S.Gaharwar, Advocate.
For the State : Shri Anubhav Jain, Government Advocate &
Smt.Manjeet P.S.Chuckal, Panel Lawyer.

JUDGMENT

17.8.2018

Per : J.K.MAHESHWARI, J

Being aggrieved by the judgment dated 19/06/2018 passed in Special Sessions Trial No.16/2017 by the Second Additional Sessions Judge Khurai, District Sagar convicting the accused for the charge under Sections 376A, 302, 342, 201/511 of the Indian Penal Code (hereinafter shall be referred to as "I.P.C") so also for the offence under Section 6 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter shall be referred to as "POCSO Act") and directing him to undergo death sentence, rigorous imprisonment for life, rigorous imprisonment for three years and three years with fine and default stipulation, the Criminal Appeal No.5015/2018 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.5/2018 has been made by Second Additional Sessions Judge Khurai, District Sagar under Section 366(1) of the Cr.P.C.

2. As per the prosecution story, on 13/04/2017 at about 11:00 am, a nine year old girl rushed towards the field near the Power House and the alleged hut of the accused to collect Mahua from the trees and when she did not return back, her neighbour and relatives started searching her and on seeing them near the Power House, the accused ran away from his hut. The mother of the prosecutrix, namely, Dameti (PW.2) entered into the hut under apprehension and saw the body of her daughter is tied in a white plastic bag. She immediately called her husband complainant Laxman (PW.1). The body of the prosecutrix tied in a white plastic bag was also seen by Gokal (PW.3), Khushal (PW.5), Kanhaiya, Pravesh Rani, However, keeping the dead body of the girl on floor, they visited to the Police Station to lodge the report. The merg

intimation was registered vide Exhibit P/1 and thereafter the first information report was lodged by Laxman (PW.1) vide Exhibit P/2.

3. On the basis of the information, the police investigation commenced and they immediately rushed towards the spot. Statements of the witnesses were recorded. Naksha Panchayatnama was prepared vide Exhibit P/4. The seizures of the white plastic bag, shirt and clothes of the girl including her *chappal* were made. The postmortem of the dead body of the deceased/prosecutrix was conducted by Dr. Rohit Pant (PW.7) vide Exhibit P/7. The accused was arrested by the Police on 15/04/2017. The slides of the vaginal-swab of the prosecutrix and the semen of accused were prepared and sent to the Forensic Science Laboratory for examination. Certain articles from "A" to "I" were sent for D.N.A. examination vide Exhibits P/31, P/32, P/33 to which the reports have been received vide Exhibits P/34, P/35. After completion of the investigation, the Challan was filed to the Court of Judicial Magistrate First Class Khurai, District Sagar but as the case was triable by the Court of Sessions, therefore, it was committed to the Court of Sessions wherefrom it was received to the Second Additional Sessions Judge Khurai, District Sagar for trial.

4. The Trial Court framed the charges against the accused under Sections 376A, 302, 342, 201/511 of the IPC and Section 6 of the POCSO Act. The charges were read over to the accused, who abjured his guilty and demanded for trial taking the defence of false implication because he belonged to the tribal community in the village and residing separately from the family.

5. The Trial Court found it to be a case of circumstantial evidence. The Court relying upon the testimony of Laxman (PW.1), Dameti (PW.2) and Gokal (PW.3), Ravishankar (PW.4), Khushal (PW.5) recorded the finding that while they were making search of the

prosecutrix near the Power House, the accused ran away from his hut. The Trial Court also relied upon the testimony of Dr.Rohit Pant (PW.7), who conducted the postmortem of the deceased/prosecutrix vide Exhibit P/7 and Dr.S.Jain (PW.8), who conducted the medical examination of accused vide Exhibit P/8 and found that the sign of commission of rape on the person of the prosecutrix was present and she was found dead due to asphyxia in a hut, which is corroborated by the D.N.A report (Exhibit P/34). The Court observed that the charges levelled against the accused are found prove beyond reasonable doubt. The Trial Court also observed that this is one of the case wherein an offence is committed with a girl below the age of 12 years, therefore, taking the aid of Section 42 of the POCSO Act, awarded the capital punishment of death to the accused being rarest of rare case for committing rape and murder. Being aggrieved by the said judgment of conviction and order of death sentence, the accused has filed Criminal Appeal No.5015/2018 and for confirmation of the death sentence, the Second Additional Sessions Judge Khurai, District Sagar has made Criminal Reference No.5/2018 to this Court.

6. Shri P.S.Gaharwar, learned counsel representing the accused has strenuously urged that looking to the F.I.R (Exhibit P/2) and the statements of Laxman (PW.1), Dameti (PW.2), Gokal (PW.3), the time of the incident varies. The alleged hut wherefrom the body of the deceased/prosecutrix was recovered at the place where only the Power House is situated and no inhabitants are residing and anybody can enter in the said hut. The hut may be accessible by others being situated at the distant place. Merely lying the body of the deceased/prosecutrix in the said hut is not sufficient to implicate the accused for the alleged offence. It is also urged that the evidence to run away from the hut by the accused is not sufficient to prove the charges as levelled against him. It is true that the accused is the person residing in the said hut but this itself is not sufficient to prove the allegation of commission of rape

and murder of prosecutrix against him. It is contended that looking to the postmortem report and the internal examination of the deceased conducted by the doctor, all the internal parts of the body of the deceased/prosecutrix were found in order. No external or internal injury has been seen. It is not a case of strangulation but it is a case of asphyxia, therefore, merely for the said reason, the intention to commit the murder of the prosecutrix after rape cannot be gathered without having any cogent evidence on record. It is urged that the prosecution is not able to prove its case beyond reasonable doubt even for committing rape or murder of the prosecutrix by the accused in absence of any eye-witness to the incident. The prosecution has also not brought any evidence to the effect that the accused after committing the rape attempted to commit murder of her and on seeing the persons, he ran away from the spot. Lastly, it is prayed that it is not a rarest of rare case of commission of rape and murder so that the accused could be dealt with by the capital punishment, however, prayed for alteration of sentence.

7. In support of the said contention, learned counsel for the accused has placed reliance on various judgments of Hon'ble the 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

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. He has also placed reliance on the judgment of **Bombay High Court in Case No.1/2007 in Reference Additional Sessions Judge Hingoli Versus Bhagwat & Another decided on 11.1.2018** converted the capital punishment having commission of the rape and murder of the similar circumstances, took note that both the accused are between 18 to 19 years having no criminal antecedents, therefore, it is not rarest of the rare case and directed for life imprisonment not less than 30 years without remission.

8. On the other hand, Shri Anubhav Jain, learned Government Advocate and Smt.Manjeet P.S.Chuckal, Panel Lawyer representing the respondent/State have argued in support of the findings recorded by the Trial Court and contended that the minor discrepancy as regards the timing of the incident is not sufficient particularly when the finding is recorded by the Court in a case of circumstantial evidence proving the commission of the offence by those circumstances completing chain beyond reasonable doubt. In a case where a minor girl aged about 9 years is raped and murdered adherence to the demand of the society, the capital punishment as directed by the Court is just and proper. In such cases, interference by the High Court is not warranted. In support of their contention, reliance has been placed on the Division Bench Judgments of this Court in **Criminal Reference No.5/2017 received from District & Sessions Judge Dindori Versus Bhagwani & Another decided on 9.5.2018** and **Criminal Reference No.5/2015 received from First Additional Sessions Judge Maihar, District Satna Versus Sachin Kumar Singhraha decided on 3.3.2016** wherein the reference made to the Court has been answered maintaining the capital punishment. Reliance has also been placed on the Judgment of Hon'ble the Supreme Court in the case of **B.A.Umesh Versus Registrar General, State of Karnataka**

reported in (2011) 3 SCC 85. It is contended that in this case the prosecutrix died during commission of rape due to asphyxia as per postmortem report. The said asphyxia would come within the purview of causing injuries as specified in Section 376A of the I.P.C resulting into her death. In such cases, the penalty for whole life of imprisonment or punishment of death has been specified in Section 376A of the I.P.C. In the present case, the trial was conducted against the accused for the offence under Sections 376A, 302, 342, 201/511 of the I.P.C so also the offence under Section 6 of the POCSO Act, therefore, with the aid of Section 42 of the POCSO Act, the death penalty as directed by the Trial Court is just and proper to which interference is not warranted by this Court.

9. After hearing learned counsel appearing on behalf of both the parties, it is not a case of eye-witness account. The conviction and sentence is based on impeachable circumstance brought by the prosecution to prove the charge against the accused at home. The F.I.R was lodged by Laxman (PW.1) stating that at about 11:00 am, her daughter had gone to collect the Mahua from tree. When she did not return, he alongwith other family members started searching her and when they reached nearby to hut situated near the Power House, they saw the accused running away from the said hut. Under apprehension, his wife Dameti (PW.2) entered in the said hut and saw the body of her daughter tied in a white plastic bag inside the hut. She immediately called her husband and other family members and thereafter they proceeded to the police station for lodging the first information report. In the Court statement, Laxman (PW.1) deposed that her daughter had left the house at about 8 in the morning and when she did not return upto 11, they started searching her. By the said narration, the time varies from the first information report. His testimony is ocular on the point to see the incident inside the hut in place of his wife stating that he has seen the foot of her daughter laid in a white plastic bag. He also

deposed that he has opened the white plastic bag and found her daughter to be dead and thereafter he immediately proceeded to the police station for lodging the first information report. Dameti (PW.2) (mother of prosecutrix) deposed that her daughter had gone to collect the Mahua from trees at around 7 to 8 am in the morning. She did not say that she alone entered in the said hut and opened the white plastic bag. Similar is the statement of Gokal (PW.3), who is the uncle of the prosecutrix. Ravishankar (PW.4) and Khushal (PW.5) have also deposed regarding the visit of the prosecutrix to collect Mahua but the testimony of all the witnesses remained in-ocular on the point that the accused ran away from the said hut. It is also apparent that there is a difference of three hours in the timing of the incident as mentioned in the first information report (Exhibit P/2) and in the statement of the complainant Laxman (PW.1). If it is correlated with the mere intimation (Exhibit P/1), it reveals that the incident was shown in between 11 am to 16 pm. The first information report lodged at 17 pm though the police station is only one kilometer far away from the place of incident. However, the said change of timing is having some substance but looking to the in-ocular testimony of Laxman (PW.1), Dameti (PW.2) and Gokal (PW.3), Ravishankar (PW.4), Khushal (PW.5), who saw the accused running away from the spot corroborating the same with the medical and scientific evidence i.e. opinion of the doctor as well as D.N.A. report, the allegation of commission of rape upon the prosecutrix has been proved by the prosecution beyond reasonable doubt. On the point of murder of the prosecutrix, nothing has been brought in the evidence that under what circumstance she died. In the postmortem report (Exhibit P/7), no external injuries were found on the person of the deceased and the internal parts of body were also healthy and the cause of death is asphyxia. As per Medical Jurisprudence, Asphyxia has different kinds. In the present case, looking to the statement of Dr.Rohit Pant (PW.7), who conducted the postmortem of the deceased (Exhibit P/7), it can safely be observed that the said

asphyxia may be due to suffocation, which may occur because of smothering or closure of the mouth or nostrils. But, in the postmortem report, no sign is available either on the mouth or on the nostrils that using force by the accused over the face, smothering took place. In the present case as to how the asphyxia took place is not explained either by the medical evidence or by any cogent evidence brought on record. On perusal of the medical of the girl, the sign of commission of rape is present but brutality to the body is not present though she was found dead. Therefore, in the said incriminating circumstances in which the accused was last seen while running away from his hut and the person of prosecutrix/deceased was found coupled with the sign of rape, the finding recorded on the said charge appears to be just. But, similarly looking to the postmortem report (Exhibit P/7) and the other evidence brought on record, the intention of accused to cause death of the prosecutrix does not reflect. The cause of death is asphyxia, which may be possible by smothering. In any case, in our considered opinion, the finding of conviction recorded against the accused for the offences under Sections 376A, 302, 342, 201/511 of the I.P.C and Section 6 of the POCSO Act do not warrant interference in the facts of the present case.

10. Now the question arises for consideration in the aforesaid evidence and the circumstances as to whether this is one of 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 the imprisonment for life. In this regard, the guidance can be taken from the various judgments of Hon'ble the Supreme Court.

11. The constitutional validity of the provision of Section 302 of the I.P.C and Section 354(2) of the Cr.P.C was put to challenge before Hon'ble the Supreme Court 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. The “aggravating circumstances” suggested in **Bachan Singh (supra)** are reproduced as under:-

“Aggravating circumstances:- A Court may, however, in the following cases impose the penalty of death in its discretion:-

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed -

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under [Section 43](#) of the Cr.P.C, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under [Section 37](#) and [Section 129](#) of the said Code.”

The mitigating circumstances explained in **Bachan Singh (supra)** are reproduced as under:-

“Mitigating circumstances:- In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:-

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

- (2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.
- (3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.
- (4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.
- (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
- (6) That the accused acted under the duress or domination of another person.
- (7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.”

12. 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".

13. The Full Bench of Hon'ble 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.

14. 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."

15. In the case of **Hareh 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.”

16. 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 “society-centric” 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.”

17. 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.”

18. 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.

19. Learned Government Advocate and Panel Lawyer representing the respondent/State has relied upon two Division Bench Judgments of this Court in the cases of **Bhagwani (supra)** and **Sachin Kumar Singhraha (supra)**. In **Bhagwani (supra)**, the girl aged 11 years was raped and thereafter throttled to her death and the death sentence has been confirmed by this Court. Similar is the position in the case of **Sachin Kumar Singhraha (supra)** wherein a 5 year girl was raped and throttled to her death and various injuries were found on her person. Both the above referred cases are distinguishable on facts except the age of the girl and commission of rape and the manner in which the girls done away with brutality was the factor aggravated to find those cases within the connotation “the rarest of the rare case”.

20. In the present case as discussed hereinabove, the sign of commission of rape on the person of the prosecutrix by the accused is on record but the cause of death is asphyxia by unknown reason. The mitigating circumstances to the accused in the present case is that he was only 21 years of age on the date of commission of the offence while in above referred two cases, the age of the accused persons were between 32 to 33 years. Nothing has been brought on record by the prosecution that the accused was having any criminal antecedent. On the other hand, the record indicates that he was left by his mother and residing alone, therefore, the accused was the first offender living separate from his family at the age of 21 year and the probability of his being rehabilitation and reformation is there, cannot be ruled out. Nothing is available on record to suggest that he cannot be a useful

member of 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. Therefore, the judgments of **Bhagwani (supra)** and **Sachin Kumar Singhraha (supra)** relied by learned Government Advocate and Panel Lawyer representing the respondent/State are distinguishable and of no help to them. The judgment of **B.A.Umesh (supra)** relied by the Government Advocate and Panel Lawyer representing the respondent/State is also distinguishable from the facts of the present case because in **B.A.Umesh (supra)**, there was a violent sexual assault on a minor girl having injuries on her body that includes the private part and the Apex Court has upheld the capital punishment.

21. Now reverting to the argument of Section 42 of the POCSO Act with respect to the alternative punishment, when an act or omission constitutes an offence of Section 376A of the I.P.C coupled with the offence punishable under the provisions of the POCSO Act and on found guilty to the accused for such offence, the punishment under the POCSO Act or under the provisions of the I.P.C, whichever is greater in degree may be awarded. In the present case, the charge under Section 376A of the I.P.C has been framed coupled with the charge of Section 6 of POCSO Act. The punishment is prescribed in Section 6 of POCSO Act of not less than “ten years which may extend to imprisonment for life and also liable to fine”. While in Section 376A of the I.P.C, if any offence has been committed punishable under Sub-section (1) of Sub-section (2) of Section 376 of the I.P.C and in course of such commission inflicts an injury which causes the death of the woman or the causes the woman to be in a persistent vegetative state then such accused shall be punished with the sentence not less than twenty year which may extend to the imprisonment for life (for remainder life of that person or with death). Therefore, the distinction which is drawn from the punishment specified under Sub-section (1) or Sub-section (2) of Section 376 to make out a case of Section 376A of I.P.C in commission of

rape, the infliction of injury which causes the death of a woman or causes the woman to be in a persistent vegetative state is essential then the sentence of Section 376A of the I.P.C is greater from sentence as specified in Section 6 of POCSO Act may be awarded. In this regard, we have already discussed above that on the person of the deceased either on the external part of the body or the internal parameters, no external or internal injury has been found which may cause the death of the woman. The argument advanced that asphyxia would fall within the connotation of infliction of injury causing death but the said argument do not find support from the medical evidence because either on the face or on the nostrils or any other part of the body including throttling, no signs of injury were found, therefore, the argument advanced by learned Government Advocate and Panel Lawyer for the State in this regard is hereby repelled.

22. In view of the foregoing discussion, looking to “the aggravating circumstances” and “the mitigating circumstances” as indicated hereinabove, in our considered opinion, it is not one of “the rarest of the rare case” wherein capital punishment to hang the accused till death awarded by the Trial Court can be maintained. Therefore, maintaining the finding of conviction of the accused for the charge of Sections 376A and 302 of the I.P.C and Section 6 of the POCSO Act, he is sentenced for the remainder life subject to any remission by the Government for good reasons as specified in **Ramraj (supra)** and the sentence as specified in **Rameshbhai Chandubhai Rathod (supra)**.

23. Accordingly, the Criminal Reference No.5/2018 made by the Second Additional Sessions Judge Khurai, District Sagar under Section 366(1) of the Cr.P.C for confirmation of the death penalty of the accused is answered. The Criminal Appeal No.5015/2018 filed by the accused stands allowed in part and the finding of conviction is maintained for the charges under Sections 376A, 302, 342, 201/511 of the IPC and

Section 6 of the POCSO Act but the capital punishment for the offence under Section 376A of the I.P.C stands set aside instead the accused is sentenced for the remainder life subject to remission. The conviction and sentence of the accused for the offences under Sections 302, 342, 201/511 of the IPC and Section 6 of the POCSO Act is also maintained with a direction to run all the sentences concurrently.

24. Let copy of this judgment be retained in the record of Criminal Appeal No.5015/2018.

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

(J.K.Maheshwari)
Judge

(Akhil Kumar Srivastava)
Judge

amit

