HIGH COURT OF MADHYA PRADESH AT JABALPUR

Division Bench : Hon'ble Shri Justice J.K.Maheshwari, Judge
Hon'ble Smt. Justice Anjuli Palo, Judge

Criminal Appeal No. 458/2019

Afjal Khan
Vs.
State of Madhya Pradesh

Shri Surendra Singh, learned Senior Counsel with Shri Siddharth Sharma, learned counsel for the accused/appellant.

Shri Som Mishra, learned Government Advocate for the State.

Criminal Reference No. 02/2019

In Reference
Received from 14th Addl. Sessions Judge, Bhopal
Vs.
Afjal Khan

Shri Som Mishra, learned Government Advocate for the State.

Shri Siddharth Sharma, learned Amicus Curiae for the respondent-accused.

JUDGMENT
(17/05/2019)

Per : Smt. Anjuli Palo, J :-

Being aggrieved by the judgment dated 22.12.2018, passed by the 18th Additional Sessions Judge, Bhopal (MP) in Session Trial No. 609/2017 convicting the accused as mentioned below, the Criminal Appeal No. 458/2019 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. 02/2019 has been made by Eighteenth Additional Sessions Judge, Bhopal under Section 366(1) of the Cr.P.C. The appellant has been convicted and sentenced as under :

Section	Act	Sentence	Fine	In default of fine
302	Indian Penal Code	Death penalty (to be hanged till death)	Nil	Nil
201	Indian Penal Code	R.I. for 10 years	Rs. 5,000/-	R.I. for 6 months
377	Indian Penal Code	R.I. for life imprisonment	Rs. 5,000/-	R.I. for 6 months
376(2)(F)	Indian Penal Code	R.I. for life imprisonment	Rs. 5,000/-	R.I. for 6 months
376(2)(I)	Indian Penal Code	R.I. for life till death	Rs. 5,000/-	R.I. for 6 months
376(2)(N)	Indian Penal Code	R.I. for life till death	Rs. 5,000/-	R.I. for 6 months
5(l)(m)(n) r/w 6	Protection of Children from Sexual Offences Act	-	-	-

2. As per the prosecution case, the prosecutrix (since deceased) aged six years was the younger daughter of the appellant. She was residing with her mother and the appellant. The appellant was annoyed and having suspicion on his wife-Farida of questionable character. He wanted to take revenge from his wife and her former husband. Therefore, he allured the prosecutrix with chocolates and was in occupation to commit unnatural intercourse and rape with her. On the date of incident i.e. 15.03.2017 at about 4:00 pm. After committing rape with the prosecutrix, he murdered her and then hanged her from the ceiling with the help of a *dupatta* in the upper floor of his house, and he fled away from the spot. The other daughters of the appellant came to the room and

saw the body of the deceased hanging from the ceiling. They informed other persons about the incident and brought down the body on floor. On receiving information about the incident, Police Station Koh-e-fiza registered merg under Section 174 of Cr.P.C. After conducting the postmortem, doctors found that, the deceased died due to asphyxia caused by strangulation. They also found that, the deceased had some bodily injuries. They opined that looking to the circumstances of the case and evidence available on record, there is a possibility of homicidal death and the possibility of commission of sexual violence also cannot be ruled out. Police registered offence under Sections 376(2)(i), 376(a), 377, 302 and 201 of IPC and Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences Act 2012 against unknown person.

3. After receiving the DNA test report, it was found that the DNA profile of the appellant matched with the DNA profile present in the vaginal swab of the prosecutrix and sperms were also present in the vaginal swab. Some samples were collected from the frock of the deceased in which DNA profile of the appellant was found. Due to the aforesaid evidence, police filed charge-sheet against the appellant under Sections 376(2)(i), 376(a), 377, 302 and 201 of IPC and Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences Act 2012.

4. After committal of the case, learned trial Court framed charges under Sections 377, 376(2)(f)(i)(n)(k), 302 and 201 of the Indian Penal Code and Section 5(l)(m)(n) read with Section 6 of Protection of

Children from Sexual Offences Act 2012. Appellant abjured guilt and pleaded that he has been falsely implicated by the police to protect the actual culprit. He also took the plea of alibi and examined defence witnesses in his support.

5. Learned trial Court mainly relied upon the testimony of Dr. Geeta Rani Gupta (PW-2) and came to the conclusion that reddish discoloration was present on the labia majora. There was contusion on the vaginal opening, vestibule and labia minora. All the injuries were recent, the anus of the deceased was dilated and its margins were irregular. Notching was present at 3 o'clock position and rugosity (anul folds) were partially lost. Some other external injuries were also present on her cheeks, mouth including the ligature mark on her neck and the tongue was pressed between her teeth. Thus, the doctors opined that the deceased was subjected to sexual violence and her death was homicidal in nature. The DNA sample taken from the deceased matched with the DNA profile of the appellant. In her vaginal swab, sperms were present. During the investigation, it was also found that the appellant had removed the structure where the offence was committed with the deceased with intent to disappear the evidence.

6. After considering the aforesaid facts and circumstances, the trial Court convicted the appellant and sentenced him as mentioned hereinabove and referred the matter to this Court for confirmation of the death sentence under Section 366 (I) of Cr.P.C. The appellant has challenged the findings of guilt recorded by learned trial Court by filing

the separate appeal, listed for analogous hearing.

7. Learned Senior Counsel appearing for the appellant contends that the FIR has been lodged after undue delay without assigning any reason. At the time of preparing *naksha panchayatnama*, police has not mentioned any marks of injuries over the dead body. It is submitted that the circumstances of the case indicate that, the deceased herself committed suicide due to shame about the sexual assault caused to her by some unknown person. He relied upon the judgments of the **Hon'ble Supreme Court in case of "Prem Singh vs. State of Punjab AIR 1997 SCC 221", "Amarjit Singh vs. State of Punjab, 1995 Supp (3) SCC 217"** and **State of Punjab vs. Bimal Kaur, AIR 1997 SC 221"**. Appellant is her father, hence, there is no possibility of committing rape with his own daughter. It is further argued by the learned counsel for the appellant that, the *dupatta* which was used by the deceased for hanging herself was not examined at the time of postmortem. Appellant tried to indicate that the real culprit was one Sunil, who is the tenant of the appellant, residing on the floor just below where the incident took place. It is also argued on behalf of the appellant that there are many other material lacunae in this case. There is no material evidence to prove that blood samples were properly taken and kept in safe custody. The evidence has been manipulated in this case to falsely implicate the appellant. It was further contended that conviction cannot be based only on the DNA and FSL reports. Hence, the impugned judgement is liable to be set aside and the appellant is entitled to be acquitted from the charges

levelled against him.

8. Learned Government Advocate for the respondent/State vehemently opposed the contentions of the counsel for the appellant, and argued in support of the findings recorded by the trial Court. It was contended that the learned trial Court has properly evaluated the entire evidence available on record and rightly convicted the appellant and awarded sentence befitting the crime. Hence, appeal filed by the appellant is liable to be dismissed and allowing the criminal reference, the death sentence may be confirmed.

9. Heard rival contentions of the learned counsel for the parties at length and perused the record. Now the question that arise for consideration is -

> "Whether the finding proving the charge by the trial Court to convict the appellant is just. If so, what sentence may be awarded in the facts of the case."

10. This case is purely based on circumstantial evidence collected by the prosecution. It is not in dispute that the deceased was aged six years only. Her mother Farida is married with the appellant who is the second wife. It is pertinent to note that she was not examined by any of the parties as a witness either by the prosecution or by the defence. She could be the best witness to testify the behaviour of the appellant towards the prosecutrix (since deceased) and the presence of the appellant at the time of incident.

11. Raju Yadav (PW-1), Arjun (PW-3), Reshma (PW-4), Ube-ur-

Rehman (PW-5) are the witnesses and neighbours who knew the appellant and his family. All these witnesses did not support the case of prosecution and declared hostile.

12. Ajay Rajput (PW-11), neighbour of the appellant has stated that on 15.03.2017 at about 7:00 pm, he heard screams of hue and cry from the appellant's house. When he reached on the scene of occurrence, he came to know that something has happened to the younger daughter of the appellant. With the help of a boy, he brought her to Tripti Hospital at Lalghati, where Doctors have refused to admit and referred her to Hamidia Hospital. He took her to the Hamidia Hospital and telephonically called the appellant, who reached at the hospital. In the meantime, it was informed that the prosecutrix had died. Later, Ajay Rajput (PW-11) came to know that the appellant himself had sexually assaulted her and committed murder of the prosecutrix. This testimony indicates that the deceased was brought to the hospital by Ajay Rajput (PW-11) and not by her own family members.

13. Arif Ali (PW-14) Head Constable has deposed that on 15.03.2017, he received a telephonic call about hanging of the deceased at her own residence. Thereafter, he registered the information in *rojnamcha sanha* (Ex. P/18). He said that in the information, it was mentioned that the appellant took the deceased to the hospital. Thereafter, he informed the incident to Incharge Police Station. Anil Bajpai (PW-16), Incharge, Police Station, Jahangirabad has corroborated the testimony of Arif Ali (PW-14) and stated that he received information from Hamidia Hospital

that the appellant had brought the deceased prosecutrix to the hospital. Thereafter, her body was kept in the mortuary. He registered FIR (Ex. P/19) on 04.07.2017 against unknown persons. He has further stated that, appellant refused to conduct autopsy of the deceased due to which he came under the sphere of suspicion. On 21.03.2017, Anil Bajpai (PW-16) received short postmortem report wherein the doctor had opined that the deceased was subjected to sexual violence. Later, he received the complete postmortem report and after receiving the anul & vaginal swab (Ex. P/20) & (Ex. P/21) and the clothes of the deceased, sent those articles to RFSL, Bhopal and FSL Sagar through the Superintendent of Police, Bhopal for chemical examination. Ex. P/22 are the FSL reports which confirms the presence of human sperms on the slide of vaginal swab of the deceased. Thereafter, he interrogated the suspected persons including the appellant and duly taken blood samples for DNA with the help of doctors and sent it for further examination to FSL, Sagar. On 15.09.2017, DNA report (Ex. P/25) has been received. The Experts have given the opinion that in the source of DNA taken from the deceased, Y chromosomes, STR DNA profile of the appellant were present. Accordingly, the appellant was interrogated by Anil Bajpai (PW-16) Incharge, PS Koh-e-fiza.

14. Memorandum (Ex. P/13) of the appellant was recorded wherein it was disclosed by him, that he wanted to take revenge with the wife Farida and the person whom he suspected to be the father of the deceased. Therefore, he was in search of opportunity since last 3 months.

On getting opportunities, he sexually exploited the deceased (prosecutrix) and in return he used to give her money and chocolates to keep mum. He used to perform unnatural sex with her and felt satisfied to his lust of revenge with wife. 8-9 days prior to the date of incident, he had a quarrel with his wife Farida. A day prior to the incident, he was sleeping in his room on the upper floor when the deceased came there and he sexually exploited her and gave her some money. At that time, he was so angry at his wife that he planned to kill the deceased. Appellant further stated in his memorandum that on the date of incident, at about 4:30 pm, he came to his house. His elder daughters were busy in singing and dancing on the first floor. He took the prosecutrix to the upper floor into his room. He further stated that he later prepared a *chabutra* (platform) on the bed using clothes so that it would appear that the prosecutrix herself climbed on the *chabutra* and committed suicide. Thereafter, he flee away from the spot and reached at his shop. After sometime, his daughter Kulsum telephonically informed him that the deceased has committed suicide. He reached his house, but someone had taken the deceased to Hamidia Hospital.

15. This version of Anil Bajpai (PW-16) is corroborated by the testimony of Ajay Rajput (PW-11) to some extent. In his memorandum, the appellant said that he did not want the autopsy of the deceased be conducted, therefore, he refused for the same. Appellant also demolished the structure of room during investigation where he committed the offence with the deceased. Investigating Officer Anil Bajpai (PW-16) found

malba (debris) of the demolished room on the spot. It is a very material and incriminating circumstance which was not challenged by the learned counsel for the appellant in his cross-examination. Such an act of the appellant is relevant to connect him with the crime, under Section 8 of the Evidence Act.

16. It is also a relevant issue, that what was the reason for the appellant to demolish the room in such a hurry, where the incident took place. It is a matter of investigation. Police may have got some clues about the possibility whether the deceased herself committed suicide or not, what was the height of the ceiling, whether it was possible for the deceased to climb on the heap of clothes *chabutra* to reach the ceiling and hang herself. Therefore, it is indicative of the fact that the room was demolished with intent to disappear the cogent evidence. We can not ignore such material circumstance helpful in establishing the intention of the appellant to the place where offence was committed with the deceased.

17. Dr. Geeta Rani Gupta (PW-2) who conducted autopsy of the deceased found the following external injuries on the body of the deceased :

(1) Reddish discolouration present over left cheek without any ecchymosis.

(2) Abrasion present over right side of back extending from 8 cm right to midline and from 2 cm below the inferior angle of scapula going upwards and tappered. It is broad at lower end side and tapper at upper end side, size 6x0.3 cm with reddish brown scab and marginal inflammation is present at upper end region, the scab is falling off at places. Duration of

injury is approximately 4 to 10 days.

(3) Abrasion is present over right side of maxillary prominence size 0.5x0.2 cm convexity is going upwards and laterally and concavity is directed downwards and medially. It is semi-lunar in shape.

(4) Two abrasion present over left side extending from 2.5 cm left to midline and 1 cm below the body of mandible size 0.2 cm in diameter and 0.5 cm apart.

(5) An abrasion is present over right cheek size 0.2 cm in diameter.

(6) An abrasion is present over right forearm on flexor aspect extending 9 cm above the wrist joint size 0.2 cm diameter.

(7) Multiple superficial abrasion present over right forearm or flexor aspect extending from 1 cm above the wrist joint in an area of 3.5 x 1 cm vertical directed downwards and laterally, size varies from pinhead to 0.8x0.2 cms. The uppermost is biggest in size 0.8x0.2 cm semi-lunar in upward.

(8) Abrasion present over left shoulder joint size 2x1 cm sagital extending from 5 cm right to midline.

(9) Abrasion present over right side of back extending from 4 cm right to midline and at 10th thoresic vertibra level size 1 x 0.2 cm directed downwards and laterally.

(10) Abrasion present over left side of back extending from 8 cm left to midline and 2 cm below the inferior angle of scapula size 2 x 0.5 cm vertical.

(11) Abrasion present over right side of superior angle of scapula size 1x0.3cm transverse.

(12) Ligature mark present over neck on full extension of neck.

Duration of injury No. 3 to 11 are fresh and red in colour, within 24 hours of the postmortem and simple in nature.

Dr. Geeta Rani Gupta (PW-2) found the following injuries on internal examination of the body of the deceased :

(1) The anal opening is dilated. Fecal matter is visible on left side, margins are irregular and scarred with notching at 3 o' clock position.

(2) Reddish dicolouration present over labia minora, contusion present at vaginal opening and its adjacent part of vestibule and labia minora, red in color, inflamed and fresh.

(3) Tongue was protruded between the teeth with marking of teeth.

18. The testimony of Dr. Geeta Rani Gupta (PW-2) clearly indicates that deceased died due to asphyxia as a result of hanging. The deceased had more than ten abrasions, of which some were large and some were small on several parts of her body, which shows that just before her death she was assaulted due to which she sustained those injuries. In addition to the aforesaid external injuries, there were injuries over her private parts. Swelling and the injuries were fresh which establish that just before her death, rape was committed with her. Her postmortem report (Ex. P/2) duly establish the commission of unnatural intercourse. Her anul part was badly affected. She was only six years old. Such type of injuries cannot be caused to her accidentally nor it can be imagined that she herself caused such type of injuries. We are not inclined to accept the contentions of learned counsel for the appellant that a minor girl of this age committed suicide due to shame. Her bodily injuries are sufficient to disagree with the contention of learned counsel.

19. Learned Senior Counsel for the appellant strongly contended that there is no evidence against the appellant available on record to connect him with the crime. He further contended that DNA report is not sufficient to convict the appellant because there is no proof that the sample taken by the police were kept safely and securely in accordance with the procedure prescribed. he prosecution has failed to establish that semen found on the frock of

the deceased belongs to the appellant. In the accused statement, appellant had specifically taken the plea that at night, he had some discharge which was later collected by the police and implanted the same with crime. In that context, learned Senior Counsel for the appellant has relied upon the judgment of Hon'ble Supreme Court in case of "**Mohd. Aman vs. State of Rajasthan (1997) 10 SCC 44"** and **"Valsala vs. State of Kerala, AIR 1994 SC 117"**.

20. After considering the procedures and rules which were produced by the learned Government Advocate to establish the procedure for taking the DNA samples and its preservation, we come to the conclusion that in the present case there is no reason to ignore the DNA profile report Ex. P/25, which is against the appellant. In case of "**Santosh Kumar Singh vs. State through CBI, (2010) 8 SCC 747"**, the Hon'ble Supreme Court has observed as under with regard to the DNA test report :

> "We feel that the trial court was not justified in rejecting the DNA report, as nothing adverse could be pointed out against the two experts who had submitted it. We must, therefore, accept the DNA report as being scientifically accurate and an exact science as held by this Court in **Smt. Kamti Devi v. Poshi Ram AIR 2001 SC 2226.** In arriving at its conclusions the trial court was also influenced by the fact that the semen swabs and slides and the blood samples of the appellant had not been kept in proper custody and had been tampered with, as already indicated above. We are of the opinion that the trial court was in error on this score. We, accordingly, endorse the conclusions of the High Court on circumstance No.9."

21. In FSL report (Ex. P/22) of the vaginal slide, vaginal swab, anul slide and anul swab, clothes of the deceased (Article A) to (Article F) semen and human sperm were found. On the *dupatta* and bed sheet (Article G) and (Article H) particles of saliva were found, On the skirt (Article F), *dupatta* (Article G) and bed sheet (Article H) human blood was found. On the bed sheet (Article H) human blood of group-B was found. This FSL report is duly corroborated by the testimony of Dr. Geeta Rani Gupta (PW-2). DNA Report Ex.-P/25 established that the genetic marker Y chromosomes STR DNA taken from the source of the deceased (Ex.F) matched with the Y chromosomes STR DNA profile of of the appellant. Whereas, the DNA profile and other suspects Devendra Yadav, Sunil Gavli and Rajat Rajput did not tally with the DNA taken from the frock of the deceased.

22. We find that the DNA sample has been duly/properly and procedurely taken and kept in safe custody. The procedures were rightly followed as mentioned in (Ex. P/23), (P/24), (P/25). Learned counsel strongly contended to create suspicion about the procedure for obtaining DNA sampling. It is pertinent to note that during cross-examination of Investigating Officer Anil Bajpai (PW-16) and expert Dr.Anil Kumar Singh (PW-18) and other concerned police personnel, no question has been asked by the counsel for the appellant about the safe custody of the samples and the procedure

adopted by them. Such defence cannot be taken for the first time at this stage by the learned Senior counsel for the appellant without showing any cogent evidence to support the contention to create a maze. It was established by the prosecution that when all the sample reached FSL Sagar and RFSL, Bhopal for DNA profile test, they found that the seals were intact. No suggestion was made during cross-examination of Experts from FSL and Police Officials that seals of the package/containers were tampered with. Hence, in our view the genuineness of samples could not be doubted. It cannot be ignored that scientists are eminent persons and that the laboratory is an esteemed institution in the country. Hence, the trial Court has rightly accepted the DNA report. In case of **Santosh Kumar Singh vs. State (2010) 9 SCC 747**, the Hon'ble Apex Court has held as under:

> "It is significant that not a single question was put to PW Dr. Lalji Singh as to the accuracy of the methodology or the procedure followed for the DNA profiling. The trial court has referred to a large number of text books and has given adverse findings on the accuracy of the tests carried out in the present case. We are unable to accept these conclusions as the court has substituted its own opinion ignoring the complexity of the issue on a highly technical subject, more particularly as the questions raised by the court had not been put to the expert witnesses. In **Bhagwan Das & Anr. vs. State of Rajasthan AIR 1957 SC 589** it has been held that it would be a dangerous doctrine to lay down that the report of an expert witness could be brushed aside by making reference to some text on that subject without such text

being put to the expert."

23. Further that the Investigating Officer Anil Bajpai (PW-16) strongly deposed that the appellant refused the postmortem of the body of the prosecutrix to be conducted. This statement has not been challenged by the appellant in the cross-examination nor he offered any explanation why he had not wanted the autopsy of the deceased to be conducted knowing that his daughter was subjected to such a heinous crime.

24. The learned counsel for the appellant repeatedly submitted that the police manipulated the case to falsely implicate the appellant with the crime but nowhere he explained why the police was interested in falsely implicating the appellant, what may be the object behind such implication or on whose insistence. Police is the investigating agency and is duty bound to conduct fair investigation. Under Section 114 of Evidence Act, there is a presumption in favor of a public servant such particularly, police that :

> "Court may presume existence of certain facts. —The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

25. In catena of cases, it was held that police personells perform their duty with utmost sincerity and honesty. The act of

police cannot be questioned without any justification or cause. If in all cases, the proceedings of police be treated as doubtful the prevention of crime would not be possible. Therefore, we are not inclined to accept the contentions raised by the learned Senior Counsel to disbelieve the police investigation.

26. Learned Senior Counsel for the appellant further contented that the trial Court wrongly ignored the defence evidence which proves that without any cogent evidence the appellant has wrongly convicted by the trial Court. The defence witness Anay Khan (DW-1) daughter of the appellant, deposed that at the time of the incident, the appellant was not present at their house. In the last line of the cross-examination, she admitted that now she was residing with her grand-mother and not with her parents. From the memorandum of the appellant, it shows that the appellant hated his wife because he suspect on her character and due to this reason he committed crime with his own daughter-prosecutrix. He also suspected that the prosecutrix was not his daughter.

27. Looking to the aforesaid circumstances it seems that Anay Khan (DW-1) has given false evidence to save her father. Her testimony is not reliable. She also admitted that at the time she was doing household chores, therefore, she would not be aware if someone climbed up her house. Similarly, other defence witnesses Emran (PW-2) admitted that he was not present with the appellant

24 hours. Neither he was aware as to when did the appellant left the shop, went anywhere and when did he returned back to his shop. Such type of evidence is not sufficient to establish the plea of alibi taken by the appellant.

28. In our opinion, the defence evidence is not sufficient to discard or disbelieve the DNA report Exhibit-P/25 which is against the appellant. The learned Trial Court rightly convicted the appellant under Sections 302, 201, 377, 376(2)(F), 376 (2)(I) and 376(2)(N) of the IPC.

29. Now, question arises whether the act of the appellant is liable to be punished with death sentence or some other sentence.

30. In the present case, the appellant has been convicted and sentenced with capital punishment under Section 302 of IPC. He has not been punished with death sentence for committing offence punishable under Section 5(m) read with Section 6 of the Protection of Children from the Sexual Offences Act 2012. Recently, in the case of **Prahalad vs. State of Rajasthan, 2018(4) Crimes 372 (SC)**, the Hon'ble Supreme Court has held that appellant does not have any criminal background, nor is he a habitual offender. Motive for the offence of murder is not clear and of course it is generally hidden, known to the accused only. Under such circumstances, the court will have to see as to whether the case at hand falls under the 'rarest of the rare' case category. In that case, the accused was also young during the relevant point of

time. Hence, the Hon'ble Supreme Court held that the duty is on the State to that there is no possibility of reform or re-habilitation of the accused. When the offence is not gruesome, not cold-blooded murder, nor is committed in a diabolical manner, the court will impose life imprisonment. In the case at hand, the mitigating factors outweigh the aggravating factors. The only aggravating factor in the matter is that the accused took advantage of his position in the victim's family for committing the murder of the minor girl in as much as the minor girl was treating the accused as her Mama (uncle).

31. We do not find that the murder has been committed with extreme brutality or that the same involves exceptional depravity. On the other hand, as mentioned in case of **Prahalad (**supra), the accused was young and the probability that he would commit criminal acts of violence in the future is not available on record. There is every probability that the accused can be reformed and rehabilitated. In this context, the observations made by the Honble Supreme Court in the case of **Bachan Singh v. State of Punjab (1980) 2 SCC 684**, is reproduced as follows:

> "209. There are 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 astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot be overemphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme

> infrequencya fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of the 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 the alternative option is unquestionably foreclosed."

32. Sentence has always been a vexed question as part of the principles of proportionality.

33. Learned Government Advocate has relied upon various judgments of the Hon'ble Supreme Court. In **Anil vs. State of Maharashtra, (2014) 4 SCC 69**, the Apex Court relying upon the judgment in case of **Shankar Kisanrao Khade vs. State of Maharastra, (2013) 5 SCC 549** has observed as under :

> "22. We have dealt with the various principles to be applied while awarding death sentence. In that case, we have referred to the cases wherein death penalty was awarded by this Court for murder of minor boys and girls and cases where death sentence had been commuted in the cases of murder of minor boys and girls. In **Shankar Kisanrao Khade** we have also extensively referred to the principles laid down in **Bachan Singh vs. State of Punjab, (1980) 2 SCC 684** and **Macchi Singh vs. State of Punjab,, (1983) 3 SCC 470** and the subsequent decisions. Applying the tests laid down in **Shankar Kisanrao Khade**, we are of the view that in the instant case the crime test and criminal test have been fully satisfied against the accused. Still, we have to apply the R-R test and examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of

> the community.
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> 27. The R-R test, we have already held in **Shankar Kisanrao Khade** case, 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 variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls, minors suffering from physical disability, old and infirm women, etc."
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> In **Bachan Singh (supra)**, the Supreme Court has categorically stated, "the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society", is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in **Santosh Kumar Satishbhushan Bariyar (supra)**. Many-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the Court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.

34. In the present case photographs and other evidence undisputably establish that the aforesaid frock was worn by the deceased at the time of the incident. Therefore, presence of allele of genetic marker from the DNA profile of the appellant duly

connects the appellant with the crime. It is sufficient to establish that only the appellant committed repeatedly rape and unnatural intercourse with the prosecutrix and thereafter, he intentionally demolished the room where the aforesaid offence was committed.

35. In case of "**Mofil Khan vs. State of Jharkhand (2015) 1 SCC 67"**, the Hon'ble Supreme Court relying upon various judgments has observed as under with regard to the approach and consideration for awarding sentence:

> "45. In **Haresh Mohandas Rajput v. State of Maharashtra (2011) 12 SCC 56, Dara Singh v. Republic of India (2011) 4 SCC 80 and Sudam v. State of Maharashtra (2011) 7 SCC 125**, this Court has opined that the death sentence must be awarded where the victims are innocent children and helpless women, especially when the crime is committed in the most cruel and inhuman manner which is extremely brutal, grotesque, diabolical and revolting.
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> 46. The Crime Test, Criminal Test and the "Rarest of the Rare" Test are certain tests evolved by this Court. The Tests basically examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community. The cases exhibiting a premeditation and meticulous execution of the plant to murder by levelling a calculated attack on the victim to annihilate him, have been held to be fit case for imposing death penalty. Where innocent minor children, unarmed persons, helpless women and old and infirm persons have been killed in a brutal manner by persons in dominating position, and where after ghastly murder displaying depraved mentality, the accused have shown no remorse, death penalty has been imposed. Where it is established that the accused is a hardened criminal and has committed murder in a diabolic manner and where it is felt that reformation and rehabilitation of such a person is impossible and if let free, he would be a menace to the society,

> this Court has not hesitated to confirm death sentence. Many a time, in cases of brutal murder, exhibiting depravity and callousness, this Court has acknowledged that need to send a deterrent message to those who may embark on such crimes in future. In some cases involving brutal murders, society's cry for justice has been taken note of by this Court, amongst other relevant factors. While deciding whether death penalty should be awarded or not, this Court has in each case, realising the irreversible nature of the sentence, pondered over the issue many times over. This Court has always kept in mind the caution sounded by the Constitution Bench in **Bachan Singh case** that Judges should never be bloodthirsty but wherever necessary in the interest of society identify the rarest of the rare case and exercise the tougher option of death penalty."

36. In case of **Santosh Kumar Singh (supra)**, the Hon'ble Supreme Court has observed as under with regard to the sentence awarded in the case:

> "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."

37. Looking to the nature of offence, particularly in such type of cases, direct evidence is not available, as the crime is committed by the culprit in a planned and clandestine manner, so that no witness or evidence remains against the culprit, particularly in a case where father has committed the heinous crime followed by murder of his 6 years old minor daughter.

38. Learned counsel for the appellant requested that the appellant has no criminal antecendent and would not be a menace to the society. There is a possibility of reformation and rehabilitation of accused. In case of **Anil (supra)**, the Hon'ble Supreme Court has held as under :

> "The legislative policy is discernible from Section 235(2) read with Section 354(3) of the Cr.P.C., that when culpability assumes the proportions of depravity, the Court has to give special reasons within the meaning of Section 354(3) for imposition of death sentence. Legislative policy is that when special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding appropriate sentence, that is the will of the people. We are of the view that incarceration of a further period of thirty years, without remission, in addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence."

39. In recent judgment, in the case of "**Sachin Kumar Singraha vs. State of MP in Criminal Appeal No. 473-474 of 2019"**, the Hon'ble Supreme Court imposed a sentence of life imprisonment with a minimum of 25 years of imprisonment (without remission) considering the judgment rendered in case of "**Parsuram vs. State of MP (Criminal Appeal Nos. 314-315 of 2013)"** wherein it was observed as under :

> "19……. keeping in mind the aggravating circumstances of the crime as recounted above, we feel that the sentence of life imprisonment *simpliciter* would be

grossly inadequate in the instant case."

40. Recently in the case of ***Channulal Verma vs. State of Chhattisgarh*** reported in ***2018 SCC Online SC 2570***, the three judges Bench of the Apex Court has taken into consideration the judgments of ***Machhi Singh, Bachan Singh*** *(supra)* and other judgments particularly the case of ***Santosh Kumar Satish Bariya vs. State of Maharashtra*** reported in ***(2009) 6 SCC 498*** and ***Shankar Kisanrao Khade*** and also considering the 262th Report of the Law Commission of the year 2015, which is as under:

"CHAPTER-I

INTRODUCTION

A. Reference from the Supreme Court

1.1.1. In Shankar kisanrao Khade v. State of Maharashtra ('Khade') (2013) 5 SCC 546 the Supreme Court of India, while dealing with an appeal on the issue of death sentence, expressed its concern with the lack of a coherent and consistent purpose and basis for awarding death and granting clemency. The Court specifically called for the intervention of the Law Commission of India ('the Commission') on these two issues, noting that :

> It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. **Perhaps**

> **the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal. (Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546 -para 148** (Emphasis supplied)
>
> It does not prima facie appear that two important organs of the State, that is, the judiciary and the executive are treating the life of convicts convicted of an offence punishable with death with different standards. **While the standard applied by the judiciary is that of the rarest of rare principle (however subjective or Judge-centric it may be in its application), the standard applied by the executive in granting commutation is not known.** Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the executive has taken a diametrically opposite opinion and has commuted the death penalty. **This may also need to be considered by the Law Commission of India. (2013) 5 SCC 546-para 149**. (Emphasis supplied)

1.1.2. Khade was not the first recent instance of the Supreme Court referring a question concerning the death penalty to the Commission. In Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra ('Bariyar') (2009) 6 SCC 498 lamenting the lack of empirical research on this issue, the Court observed :

> We are also aware that on 18.12.2007, the United Nations General Assembly adopted Resolution 62/149 calling upon countries that retain the death penalty to establish a worldwide moratorium on executions with a view to abolishing the death penalty. India is, however, one of the 59 nations that retain the death penalty. Credible research, perhaps by the Law Commission of India or the National Human Rights Commission may allow for an up-do-date and informed discussion and debate on the subject. (Emphasis supplied)

1.1.3. The present Report is thus largely driven by these references of the Supreme Court and the need for re-examination of the Commission's own recommendations on the death penalty in the light of changed circumstances."

23. Chapter -VII of Report No. 262 contains the Conclusions and

Recommendations. To quote :-

"A. Conclusions

7.1.1 The death penalty does not serve the penological goal of deterrence any more than life imprisonment. Further, life imprisonment under Indian law means imprisonment for the whole of life subject to just remissions which, in many states in cases of serious crimes, are granted only after many years of imprisonment which range from 30-60 years.

7.1.2 Retribution has an important role to play in punishment. However, it cannot be reduced to vengeance. The notion of "an eye for an eye, tooth for a tooth" has no place in our constitutionally mediated criminal justice system. Capital punishment fails to achieve any constitutionally valid penological goals.

7.1.3 In focusing on death penalty as the ultimate measure of justice to victims, the restorative and rehabilitative aspects of justice are lost sight of. Reliance on the death penalty diverts attention from other problems ailing the criminal justice system such as poor investigation, crime prevention and rights of victims of crime. It is essential that the State establish effective victim compensation schemes to rehabilitate victims of crime. At the same time, it is also essential that courts use the power granted to them under the Code of Criminal Procedure, 1973 to grant appropriate compensation to victims in suitable cases. The voices of victims and witnesses are often silenced by threats and other coercive techniques employed by powerful accused persons. Hence it is essential that a witness protection scheme also be established. The need for police reforms for better and more effective investigation and prosecution has also been universally felt for some time now and measures regarding the same need to be taken on a priority basis.

7.1.4 In the last decade, the Supreme Court has on numerous occasions expressed concern about arbitrary sentencing in death penalty cases. The Court has noted that it is difficult to distinguish cases where death penalty has been imposed from those where the alternative of life imprisonment has been applied. In the Court's own words "extremely uneven application of Bachan Singh has given rise to a state of uncertainty in capital sentencing law which clearly falls foul of constitutional due process and equality principle". The Court has also acknowledged erroneous imposition of the death sentence in contravention of Bachan Singh guidelines. Therefore, the constitutional regulation of capital punishment attempted in Bachan Singh has failed to prevent death sentences from being "arbitrarily and freakishly imposed".

7.1.5 There exists no principled method to remove such arbitrariness from capital sentencing. A rigid, standardization or

categorization of offences which does not take into account the difference between cases is arbitrary in that it treats different cases on the same footing. Anything less categorical, like the Bachan Singh framework itself, has demonstrably and admittedly failed.

7.1.6 Numerous committee reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the country is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some of the problems besetting the system. Death penalty operates within this context and therefore suffers from the same structural and systemic impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system also operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an adversarial criminal justice system.

7.1.7 Clemency powers usually come into play after a judicial conviction and sentencing of an offender. In exercise of these clemency powers, the President and Governor are empowered to scrutinize the record of the case and differ with the judicial verdict on the point of guilt or sentence. Even when they do not so differ, they are empowered to exercise their clemency powers to ameliorate hardship, correct error, or to do complete justice in a case by taking into account factors that are outside and beyond the judicial ken. They are also empowered to look at fresh evidence which was not placed before the courts. (Kehar Singh v. Union of India-(1989) 1 SCC 204 paras 7,10 & 16) Clemency powers, while exercisable for a wide range of considerations and on protean occasions, also function as the final safeguard against possibility of judicial error or miscarriage of justice. This casts a heavy responsibility on those wielding this power and necessitates a full application of mind, scrutiny of judicial records, and wide-ranging inquiries in adjudicating a clemency petition, especially one from a prisoner under a judicially confirmed death sentence who is on the very verge of execution. Further, the Supreme Court in Shatrughan Chauhan v. Union of India- (2014) 3 SCC1 -paras 55-56) has recorded various relevant considerations which are gone into by the Home Ministry while deciding mercy petitions.

7.1.8 The exercise of mercy powers under Article 72 and 161 have failed in acting as the final safeguard against miscarriage of justice in the imposition of the death sentence. The Supreme Court has repeatedly pointed out gaps and illegalities in how the executive confirms that retaining the death penalty is not a requirement for effectively responding to insurgency, terror or violent crime.

B. Recommendation

7.2.1 The Commission recommends that measures suggested in para 7.1.3 above, which include provisions for police reforms, witness protection scheme and victim compensation scheme should be taken up expeditiously by the government.

7.2.2 The march of our own jurisprudence—from removing the requirement of giving special reasons for imposing life imprisonment instead of death in 1955; to requiring special reasons for imposing the death penalty in 1973; to 1980 when the death penalty was restricted by the Supreme Court to rarest of rare cases – shows the direction in which we have to head. Informed also by the expanded and deepened contents and horizons of the right to life and strengthened due process requirements in the interactions between the state and the individual, prevailing standards of constitutional morality and human dignity, the Commission feels that time has come for India to move towards abolition of the death penalty.

7.2.3 Although there is no valid penological justification for treating terrorism differently from other crimes, concern is often raised that abolition of death penalty for terrorism related offences and waging war, will affect national security. However, given the concerns raised by the law makers, the commission does not see any reason to wait any longer to take the first step towards abolition of the death penalty for all offences other than terrorism related offences.

7.2.4 The Commission accordingly recommends that the death penalty be abolished for all crimes other than terrorism related offences and waging war." (Emphasis supplied)

In the said judgment, the crucial points discussed by the three Judges Bench are as under:

"52. Aggravating circumstances as pointed out above, of course, are not exhaustive so also the mitigating circumstances. In my considered view, the tests that we 5 (2013) 5 SCC 546 have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is, 100% and "criminal test" 0%, that is, no mitigating circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young

> age of the accused, not a menace to the society, no previous track record, etc. the "criminal test" may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the rarest of the rare case test (R-R test). R-R 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 variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the Judges." (Emphasis supplied)

41. In the aforesaid cases, the Hon'ble Apex Court found that as per the recommendation of the Law Commission, reformative approach ought to be adopted and commuted sentence setting aside the death penalty.

42. As discussed hereinabove, in the rarest of the rare cases, death sentence ought to be awarded. In case the other sentence as prescribed in the law are inappropriate. In this regard, the balance-sheet regarding aggravating and mitigating circumstances ought to be drawn in the facts of the individual cases. If we see in the facts of the present case, then ***aggravating circumstances are***:

1. Extremely brutal, diabolic and cruel act.
2. Victim being six years was a minor and helpless.

3. There may not be any provocation because the accused was in a dominating position.

4. Injuries were grievous with respect to sexual assault particularly in a case where the victim was the daughter of the appellant.

Mitigating circumstances:

1. It is a case of circumstantial evidence.

2. No evidence has been brought that the accused had the propensity of committing further crimes causing continuous threat to the society.

3. Nothing has been brought on record to show that the accused cannot be reformed or rehabilitated.

4. Other punishment options are unquestionably foreclosed.

5. Accused is not a professional killer or offender having any criminal antecedent.

6. The accused being a major having family with him, the possibility of reformation cannot be ruled out.

43. After perusal of the aforesaid balance-sheet of the aggravating and mitigating circumstances and looking to the facts of this case, where the possibility and options of other punishment are open, while upholding the conviction for the offence under Section 302 of the Indian Penal Code, however, in place of death penalty, the appellant is sentenced to undergo life imprisonment with a minimum of 30 years of imprisonment (without remission) and fine of Rs. 20,000/-, in default of payment of fine the appellant has to undergo further RI for six months. The conviction and

sentences awarded under Sections 201, 377, 376(2)(F), 376(2)(I) and 376(2)(N) of Indian Penal Code as awarded by the trial Court are just and hence, hereby maintained. The period of sentence already served by the appellant shall be set off.

44. Accordingly, the criminal appeal filed by the appellant is **partly allowed**. The criminal reference is answered accordingly.

45. Before parting with the case, we would like to record words of appreciation for the assistance provided by Shri Siddharth Sharma, *Amicus Curiae* who assisted this Court in disposal of the case. His assistance is duly acknowledged.

46. Let a copy of this judgment along with the record be sent back to the trial Court for communication.

(J.K.MAHESHWARI)
JUDGE

(SMT. ANJULI PALO)
JUDGE

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