



**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR**

**BEFORE
HON'BLE SHRI JUSTICE VIVEK AGARWAL
&
HON'BLE SHRI JUSTICE DEVNARAYAN MISHRA**

CRIMINAL REFERENCE CAPITAL No. 5 of 2023

IN REFERENCE

Versus

RAJARAM @ RAJKUMAR

Appearance:

Shri Yash Soni – Deputy Advocate General for the reference-petitioner.

Shri Sanjay Kumar Agrawal – Senior Advocate with Shri Mihir Agrawal, advocate for the Amicus Curiae.

WITH

CRIMINAL APPEAL No. 6308 of 2023

RAJARAM @ RAJKUMAR

Versus

THE STATE OF MADHYA PRADESH AND OTHERS

Appearance:

Shri Samar Singh Rajpoot – Advocate for the appellant.

Shri Yash Soni – Deputy Advocate General for the respondent/State.

Reserved on : 07.05.2025

Pronounced on : 19.06.2025



JUDGMENT

Per: Justice Devnarayan Mishra

The criminal appeal and the criminal reference have been filed being aggrieved of the judgment of conviction dated 20.04.2023 and sentence dated 21.04.2023 passed by learned Special Judge (POCSO Act), District Khandwa in S.C. No.125 of 2022, convicting the accused Rajkumar @ Rajaram with Death penalty for the offence punishable under Section 6 of the Protection of Children from Sexual Offences Act. He is also convicted under Section 307 of IPC and sentenced to undergo R.I. for Life with fine amount of Rs.2,000/- with default stipulation of one month, Section 363 of IPC and sentenced to undergo R.I. for 7 years with fine amount of Rs.2,000/- with default stipulation of one month, Section 450 of IPC and sentenced to undergo R.I. for 7 years with fine amount of Rs.2,000/- with default stipulation of one month and Section 201 of IPC and sentenced to undergo R.I. for 7 years with fine amount of Rs.2000/- with default stipulation of R.I. for one month.

2. In nutshell, the prosecution case before the trial Court was that on 25.10.2022, a four years minor girl daughter of PW-2 came from his village in the house of PW-1 along with PW-5. In the intervening night of 30-31.10.2022, the complainant (PW-1) along with his wife PW-6 was sleeping outside his hut whereas his son PW-7 and the victim were sleeping in the cot inside hut. PW-6 closed the door and put latch on the gate. In the morning at 05:00 AM, PW-6 went inside the house, she saw that PW-7 was sleeping alone in the cot and the victim was not in the cot. She inquired from PW-7. On that, he replied that he thought that the victim was sleeping with parents. After that, search was made in



nearby places and relations. Intimation was sent to her parents. On 30.10.2022, the appellant came into the hut of the PW-1 and demanded a cot to sleep. PW-1 had given him a cot and at some distance from the hut, the appellant was sleeping in the cot. In the morning, when they saw the appellant was also not found in his cot, hence on the doubt, the appellant was arrested. On his disclosure, the victim was recovered from the Mango Garden of Kripal Singh in injured and unconscious condition. The victim was immediately rushed to hospital where she was given first aid and after that from Khandwa, she was rushed to Bombay Hospital, Indore. From the spot, incriminating articles were recovered. After usual investigation, charge-sheet was submitted before the Special Judge (POCSO Act) for the offence punishable under Sections 363, 376(a), 376 (a b), 450, 307 and 201 of IPC and under Section 3/4, 5(m)/6, 5(i)/6, 5(r)/6 of the POCSO Act.

3. The trial Court framed the charges under above mentioned sections and on that appellant abjured the guilt and prayed for trial.

4. During trial, the trial Court examined the prosecution witnesses and examined the appellant under Section 313 of Cr.P.C. In that also, the appellant denied the charges and stated that he has been falsely implicated in the case but has not examined any defense witness. The trial Court after hearing the parties, passed the judgment. The trial Court has awarded the death sentence, hence sent a reference, on the side of the appellant, appeal has been preferred.

5. Amicus Curiae, Shri Sanjay K. Agrawal, learned Senior counsel submits that prosecution before the trial Court has failed to prove the guilt of the appellant. There is no eye-witness and the



appellant visited hut of the complainant (PW-1) is not mentioned in the FIR (Exhibit-P/1) and the story was developed after lodging of the FIR. Except DNA report, no incriminating circumstances have been found against the appellant and DNA report is not conclusive evidence. The trial Court has convicted the appellant only on that basis. Hence, the conviction cannot be sustained.

6. Learned counsel has further submitted that the prosecutrix was never examined before the Court nor before the police authority and even after a month, the statement of the prosecutrix were not recorded. In this case, the identification of the accused will come into question altogether that whether the appellant has committed sexual intercourse and alleged commission of attempt to murder and submitted that only on the basis of suspicion, the appellant has been prosecuted. The appellant has been solely convicted on the basis of the statement recorded under Section 27 of the Evidence Act that is inadmissible before the Court of law.

7. The depositions of parents, brother and other relatives of prosecutrix are merely based on suspicion as there is no eye-witness. The identification has not been made by the victim. The seized articles were seized from the open place whereby the seizure of articles and the spot of crime can be held doubtful as no one is able to plant those articles on the spot and as per the deposition of independent witness PW-19, Exhibit-P/26 and Exhibit-27, the articles were seized from shrubs, which itself is an open area and the clothes of the accused and the victim have also been seized from the open place and the victim was also recovered from the open place. No positive conclusive male



autosomal STR DNA of accused Rajkumar alias Rajaram was recovered from the body of the prosecutrix. Only the DNA profile of accused on the undergarment and Frock of the prosecutrix was found and the same DNA from the shirt and pants of the accused was found and submitted that act of the appellant does not fall in the category of rarest of the rare case and the appellant has been convicted on the concocted and fabricated evidence.

8. Learned counsel has submitted that the trial Court has failed to appreciate the prosecution evidence in proper perspective resulting into grave miscarriage of justice, in which the appellant/accused has been convicted and sentenced to capital punishment. Hence, the appeal be allowed.

9. Shri Agrawal, Amicus Curiae has further submitted that the appellant at the time of incident was 20 years of age and in that circumstances, if the sentence is maintained looking to the judgment of **Bhaggi @ Bhagirath @ Naranvs. State of M.P., (2024) 5 SCC 782**, it is submitted that the Court has to look into the fact whether the rape was barbaric and brutal or barbaric but not brutal and if the act is not found brutal, then the death sentence could not be awarded.

10. Shri Kamal Singh Rajput, learned counsel for appellant (in Cr.A.No.6308/2023) has submitted that all the witnesses are interested witnesses. There is no mention of the name of the appellant in the FIR. In the intervening night, he came and demanded a cot. The victim and the incriminating articles were recovered from the open place and the possibility of other persons throwing the victim on that place and recovery of articles from the open place, no inference can be draw



against the appellant. The prosecution has failed to prove that by the act of the appellant, the victim has become disabled or suffered any permanent injury or disability. Whole evidence was concocted after arrest of the appellant. There is no eye-witness. Hence, in the case of circumstantial evidence and looking to the age of the appellant and having no criminal record, the capital punishment could not be imposed. Learned counsel for the appellant has further submitted that the appellant at the time of incident was 20 years old. He is also a person of humble background and belongs to S.T. community, illiterate and from the marginal class of the society. Looking to these aspects, appeal be allowed and if appellant's conviction is upheld, capital sentence be converted into appropriate imprisonment.

11. Shri Yash Soni, learned Deputy Advocate General for the State has submitted that from the oral as well as scientific evidence particularly DNA profile, it is proved that only the appellant has committed the offence and prosecution has proved its case beyond the reasonable doubt and the trial Court by elaborate judgment and discussing the evidence has convicted the appellant. Hence, no interference is called for citing the judgments of **Manoharan v. State by Inspector of Police, (2019) 7 SCC 716**, **Rajendra Prasad v. State of Madhya Pradesh, (2020) 12 SCC 505**, **Dhananjay Chatterjee v. State of West Bengal, (1994) 2 SCC 2020** and **State of Maharashtra v. Goraksha Ambaji Adsul, (2011) 7 SCC 437**. Shri Soni has submitted that the appellant has kidnapped four years minor child and committed rape upon her and after throttling her left the victim in the



open place assuming that she had died. Thus, no leniency is required in favour of the appellant and appeal be dismissed.

12. Heard the parties and perused the record.

13. PW-1, PW-5 and PW-6 have clearly stated that their daughter and PW-5 went on Dussehra leave to victim house as they were relatives and when she was returning on 25.10.2022, the victim also came with PW-5 and PW-5 left the victim in her house and went to Khandwa for her study. This fact has been supported by PW-2, PW-3, PW-4 and PW-7 and there is no any contradiction on this point that originally the victim belongs to other place and she came in relation along with her relative sister PW-5 to the house of PW-1 and was residing with their family at the time of incident.

14. As to the age of the victim, all the prosecution witnesses have clearly stated that the victim was four years old particularly father of the victim (PW-2), mother of the victim (PW-3) have stated that their daughter was four years old.

15. Witness Maya Sanwle (PW-9) has stated that she is posted as ANM in Primary Health Center, Diwal, District Khandwa. The victim's mother aged about 23 years old, came on 20.07.2018 and at 7:10 PM was admitted and she delivered a baby child at 7:35 PM whose weight was 2.8 Kg. Asha worker Radha brought her for delivery in that Primary Health Center. She has brought the Birth Register from 2018 to the date of deposition, in which at Sr. No.28, there is mention of birth of the victim and relevant page of register is Exhibit-P/12 and copy of which is Exhibit-P/12-C and on that basis the Birth Certificate (Exhibit-P/7) was issued, in which the date of birth of the victim has been



mentioned as 20.07.2018. Thus, from the Exhibit-P/7 and Exhibit-P/12 and the statements of the witnesses, it is clear that the victim at the time of offence was 4 years, 3 months and 11 days. Defence has not questioned the statements of this witness.

16. Regarding the incident, the witness PW-1 has stated that on 30.10.2022, he along with his wife (PW-6) was sleeping outside their hut and the victim along with PW-7 was sleeping in the hut. At 02:00 O' Clock, in the night PW-6 went into the hut to drink water, she saw that victim was sleeping and when at 05:00 AM again PW-6 went into hut, the victim was not found on her cot. She asked PW-7 but he had stated that victim was not sleeping with him. After that they made the search nearby. This fact has been further supported by PW-7. The victim in the night was sleeping in hut and PW-7 was also sleeping along with her and in the morning she was not found on the cot and this intimation was sent to PW-2, PW-3, PW-4, PW-5 and the family members searched the victim in the nearby field, well and after that she was not found. Hence, PW-1 lodged a missing person report (Exhibit-P/1) in the Police Station.

17. This fact has been supported by the parents of the victim PW-2 and PW-3. First Information Report (Exhibit-P/1) was lodged on 31.10.2022 at 13:57 PM by A.S.I., Jitendra Tiwari (PW-31) and this witness has clearly corroborated the fact that on 31.10.2022, he was posted at Police Station, City Kotwali, Khandwa as ASI and on the information by PW-1 that a girl is missing between 2:00 to 5:00 hours in the night of 31.10.2022 and on that basis, he registered FIR (Exhibit-P/1).



18. On the point of role of the appellant, PW-1 has stated that the appellant was working in the Rajput Dhaba for last 1-1.5 years and on 11:00 PM, he came into their hut and demanded a cot to sleep. He provided a cot. On that, the appellant slept on the cot near electric pole. In the morning, when the victim was not found in the house and the appellant was also not found in the cot. He inquired regarding the appellant from the owner of the Rajput Dhaba, who informed him that the appellant was on leave. This fact has also been supported by PW-6 wife of PW-1.

19. Raju Chouhan (PW-13) owner of Rajput Dhaba has stated that the appellant was working in his Dhaba. One year prior to that, he also worked in Dhaba. The appellant was residing in the staff quarter situated behind the Dhaba. On the date of incident, the appellant worked in the Dhaba till evening and after taking half day salary Rs.130/- left the Dhaba at 07:00 PM. He was in Dhaba till 11:00 PM but appellant did not return and after closing the Dhaba, he went his home and on the next day at 09:00 AM, when he reached at Dhaba, the appellant was not found there. PW-1 came to his Dhaba and inquired about the victim and the appellant and informed that in the night, the appellant went into his hut and demanded a cot to sleep. On that, he told him that till the evening he was working in his Dhaba and after that he left the Dhaba.

20. This witness Raju Chouhan (PW-13) has further stated that in the evening, police brought the appellant and he was carried to the place where the victim was laying.

21. Devendra (PW-14) has stated that he was acquainted to the appellant as he was visiting Dhaba where the appellant was working. On



31.10.2022, Police caught the appellant from Ram Nagar Kalali. At that time, the appellant was wearing a blue-gray colored T-shirt and blue colour Jeans. Police prepared Panchnama (Exhibit-P/21) and the appellant was brought to Police Chowki, Ram Nagar and was interrogated. Police carried the appellant to the spot that was a mango orchard where the victim was found. At that time, the victim was found unconscious and wearing a frock and lower part of her body was naked. There was injury in the neck of the victim and blood was oozing from her private part. Panchanama (Exhibit-P.23) was prepared. After that appellant has also told that he has put the Heram (under garment of the victim) and his purse and slippers in the orchard. Police recovered and seized the jeans pant and shirt of the appellant. Appellant has also told to the police that he has put his pant, shirt and heram near the Titijoshi Petrol Pump in bushes, he will help to make recovery of all these things. Memorandum (Exhibit-P/22) was prepared. The appellant was arrested. Police recovered a pair of slippers, Aadhaar Card, purse containing Rs.130/- and also recovered the dry mango leafs. Blood and soil were found in the dry leafs. Police seized the articles and prepared Seizure Memo (Exhibit-P/26). Police went to sugarcane field and recovered the blood stained leafs that were having white colour sticky material on that and simple soil was also recovered. Police prepared seizure memo (Exhibit-P/28). Police also recovered mark-sheet and ration card of the appellant and prepared seizure memo (Exhibit-P/29).

22. Bharat (PW-19) has supported the statements of witness Devendra (PW-14) and this witness has also stated that the appellant was arrested from Ram Nagar Kalali and when he was interrogated, he



disclosed the place where he put the victim and in mango orchard, victim was found. At that time, the victim was only wearing frock. She was not having under garments. There was an injury in her throat and blood was oozing from private part of the victim. Panchnama (Exhibit-P/23) was prepared. From the spot, where the victim was found near to that place a pair of slippers, an Aadhaar Card and a purse containing Rs.130/- were recovered and from that place, dry leafs of mango tree and on those leafs, soil and blood was also found. After that Police along with the appellant went near the Titiyajoshi Petrol Pump and from the bushes, appellant's pant and shirt and victim's heram (under garment) were recovered and from the sugarcane field, the leafs were recovered and in the leafs there was blood and soil. From the appellant's mother, mark-sheet of Class-3 and family details certificate were seized and seizure memo (Exhibit-P/29) was prepared. Recovery of mark-sheet and Samagra I.D. have been also supported by his mother Sangita Bai (PW-18).

23. Subhash Navde, Investigating Officer (PW-36) has state that on 31.10.2022 at 6:10 PM, he apprehended the appellant from Ram Nagar Kalali in presence of Devendra (PW-14) and Bharat (PW-19) and after taking him in custody, he prepared the Custody Memo (Exhibit-P/21) and the appellant was brought to Ram Nagar Police Chowki and was interrogated and in interrogation, he disclosed that he can show the place where the victim was laying. On that, he prepared memorandum (Exhibit-P/22) and along with the appellant, Devendra and Bharat he reached in the mango orchard of Kripal Singh @ Satpal and on the place shown by the appellant, a search was made, the victim was found



unconscious. At that time, there only frock in the body of the victim and her lower part was necked and blood was found in the lower part of her body and an injury mark was found in the throat of the victim. He prepared Memorandum (Exhibit-P/23) and recovered the victim. On the same day, the appellant was arrested and Arrest Memo (Exhibit-24) was prepared. On the same day, on 31.10.2022, he inspected the spot and from that place one pair of mehroon colour slippers in which PU-Harhs Made-In-India was written and was of 9 number was found and a mehroon color purse in which two currency note of Rs.50, one currency note of Rs.20 and one currency note of Rs.10 were found and Aadhaar Card of the appellant was kept recovered. He further stated that from the spot where the victim was found, six dry leafs were recovered. There was blood stain in the leafs and simple soil and blood stained soil from the place were recovered. He prepared Seizure Memo (Exhibit-P/26) and sent the victim for treatment to District Hospital, Khandwa. He also submitted Identification Form for preservation of DNA from the body of the victim and also sought the opinion of the Medical Officer whether the victim is in position to give the statements or not. On 01.11.2022 at 02:10 AM, he reached at District Hospital, Ram Nagar and Head Constable received seven sealed packets, in which victim's anal slide, vulval slide, vaginal slide, nails sample, buckle, swab, frock, blood sample and the sample and the sample seal were received and Seizure Memo was prepared on 01.11.2022 at 10.10 AM. He along with the appellant reached near Titijajoshi Petrol Pump and on the instance of the appellant from bushes recovered a full shirt that was having blood stains, a blue and brown colour jeans pant having metallic buttons and



was having blood stain near the zip, a pink colour heram, in which there was sticky material was found were recovered and Seizure Memo (Exhibit-P/27) was prepared. On the same day on 01.11.2022 at 11:30 AM, on the instance of the appellant went to the sugarcane field of Pintu Pachore and prepared the Spot Map (Exhibit-P/30) and from that place at 11:50 recovered the leafs of sugarcane and other plants. In the sugarcane leafs, blood stain was found and some sticky gum like material were also found. From that spot simple soil, simple leafs and dry leafs were recovered and prepared the Seizure Memo (Exhibit-P/28) and make photograph of the spot and also recovered from her mother mark-sheet and Samagra I.D. of the family.

24. This witness further stated that appellant was sent for the medical examination. He requested the Medical Officer during the MLC of the appellant by providing the Identification Form affixing the photograph of appellant, which is Exhibit-P/32. On 01.11.2022 at 23:50 received four sealed packets from Constable Vijay that were sealed by the seal of District Hospital, Khandwa in which appellant's seman slide, nails clipping, pubic hair, blood sample and two samples of the seal were seized and Panchnama (Exhibit-P/57) was prepared and all these articles were sent to Joint Director, Regional, Forensic Science Laboratory, Jhoomar Ghat Rau through Exhibit-P/62 and receipt of the FSL is Exhibit-P/23 and the report receipt from the FSL is Exhibit-P/76.

25. Witness Dr. Sunil Makwane (PW-16) who is the Scientific Officer of Scene of Crime, Mobile Unit, Khargone has stated that on 01.11.2022, on getting information from Superintendent of Police, Khandwa, he along with Investigating Officer and police team reached



on the spot and visited the hut of the complainant. The hut was made of wooden plank. Except the door, there was no other exit or entry point. 80 meter distance from that hut, there was a sugarcane field. In the sugarcane field in 3x5 feet area, the grass was pressed and crop of sugarcane was leaning. Dry leafs of sugarcane, grass and in soil of 4x3 Inch area, blood stains were found and one of the sugarcane leaf, a sticky liquid was found and some spots of sticky material were also found on the soil. Other fields were without any crops. He also visited the spot where the victim was recovered that was 520 meter in the north-west side of the sugarcane field in the orchard of mango. From the spot, where the victim was recovered, grass and bushes were pressed and at this place, light scratch marks were found on the soil of about 3 x 3 inches area, which is said to have been formed by the seizure of grass, leaves and soil containing blood like substance. There were some scratch marks nearby and the scratching has been said to have been done to seize the grass leaves. There was an empty field on the north east and south side of the mango orchard. No other evidence was found during the inspection of this spot. He has also stated that he reached at the spot at 09:00 AM.

26. Thus, from the disclosure of the appellant, the victim in injured condition was recovered from mango orchard and the spot where the offence was committed was also identified and from that spot, Aadhaar Card, a pair of slippers and purse containing Rs.130/- of the appellant were recovered. Whereas whole family members and nearby persons have searched the victim and have not found the victim till the appellant was not arrested.



27. Dr. Raj Choudhary (PW-21) has stated that on 31.10.2022, he was in the panel of doctors, in which Dr. Nisha Pawar (PW-17) was also the member. Then, they examined the victim aged about 4 years and on examination, Dr. Raj Choudhary and Dr. Nisha Pawar have stated that there was an injury mark on both sides of neck measuring 1x0.5 cm, an abrasion in the left side of eyebrow and small injuries in the knee of left leg of the victim. On internal examination, there was a torn injury measuring 1x1x5 cm from vagina to anus. The victim was referred to pediatric surgeon for treatment. The victim at that time was semi conscious. Her pulse was 108, B.P. was 90/60 and oxygen saturation was 96. She also collected the nail clippings, vaginal slide, vulval slide, frock, anal swab, a buckle and blood sample for DNA examination and handed over to Subhash Navde (Investigating Officer). In their opinion, the victim suffered sexual assault. She has proved MLC report (Exhibit-P/37). In the cross-examination, this witness has clearly stated that the injury suffered by the victim may be caused by falling the victim on bushes. This fact has been further supported by Dr. Raj Choudhary (PW-21).

28. Witness Dr. Soniya Daga (PW-24) who was posted as Radiologist in Bombay Hospital, Indore, examined the victim on 18.11.2022 and stated that there was swelling in the sacrum bone on the right side of her spine as per Exhibit-P/44 and in Sonography as per Exhibit-P/45, there was infection in her urinary bladder. Dr. Devendra Patil (PW-25), who was the Gynecologist in Bombay Hospital, Indore has also examined the victim 01.11.2022 and opined that there was an injury in the vaginal area. It was a vertical tear, which was present in



lower end of vaginal. There was an abrasion mark with pressure in her neck measuring 1x0.5 cm and this doctor has exhibited MLC report (Exhibit-P/47).

29. Witness Dr. Rakesh Shukla (PW-27), on 13.11.2022, he examined the victim and found injury in the private part. The victim was afraid. There was a swelling in the brain due to deficiency of oxygen supply. He also found swelling in the bone of hip and injury may cause permanent disability or temporary disability.

30. Witness Dr. Ashok Jat (PW-26) has conducted medical examination of appellant on 01.11.2022 on the instance of the Investigating Officer, Police Station- Kotwali, Khandwa. On examination, no external injury was found. In the opinion of doctor, the appellant was competent for intercourse. His semen slide, nail clippings and pubic hair were taken and seized and also taken blood sample of the appellant for DNA examination and handed over it to Police Constable who brought the appellant for medical examination. OPD form is Exhibit-P/49 and MLC report is Exhibit-P/50. He prepared Identification Form of the appellant (Exhibit-P/32) and he signed it in D to D part and verified the photographs by putting his signature on the photograph in E to E part. He has also taken the thumb impression of the both the thumbs and certified both thumb impressions.

31. Material recovered from the victim and the appellant were sent to FSL. As per the FSL report, the soil, leafs, simple soil, simple leafs that were recovered from the spot have been marked as articles A/4066 to A/4071 and the blood stained soil that was recovered from the place where the victim was laying, dry leafs, simple soil, simple dry



leafs have been marked as A/4072 to A/4075. Article G to article J and in Vaginal Slide, Nail Sample, Anal Slide and Buccal Slid have been marked as Article L (A/4077), Nail sample Article M (A/4078), Anal Slide Article N (A/4079), Buccal Slide Article O (A/4080), Vaginal Slide Article P (A/4081), Victim's frock Article Q (A/4082), appellant's shirt Article R (A/4083), Jeans Pant Article S (A/4084), Seman Slide Article T (A/4085), Pubic Hair Article U (A/4086), Nail clipping Article V (A/4087), Blood sample of the victim Article W (A/4088), Heram Article K (A/4076) and Blood sample of the appellant Article X (A/4089). As per the FSL report (Exhibit-P/76), in the Vaginal swab, Anal swab, Buccal, Article L (A/4077), Anal slide Article N (A/4079). Buccal slide Article O (A/4080) and Vaginal slide Article P (A/4081) samples Low male (Y) Chromosomal STR DNA profile was found. From the spot seized leaf Article C (A/4068), male (Y) Chromosomal STR DNA profile was found and genetic marker matched with the (Y) Chromosomal STR found in the blood of the appellant Article X (A/4089) and from the Heram Article A (A/4076) (Y) Chromosomal STR matched with the DNA obtained from the blood sample of the appellant. In the frock that the victim was wearing at the time when she was recovered Article Q (A/4082) (Y) Chromosomal STR matched with the appellant Raj Kumar @ Rajaram and from the soil recovered from the spot where the offence was committed Article A (A/4066), the leafs Article B (A/4067), blood stained soil Article G (A/4072) and dry leafs Article H (A/4073) Woman Autosomal STR DNA was found that matched with the blood sample of the victim. From the leafs recovered from Article C (A/4068) and the Heram recovered from the appellant



Article K (A/4076) same DNA profile of the male was found that matched with the DNA profile of the blood obtained from the appellant.

32. In conclusion it has been found that leafs, Hiram, blood sample of the victim and semen of the appellant were found and the Article A, B, G and H, soil, leafs, blood stained soil and dry leafs that were respectively received from the spot and where the victim was laying. In the shirt and Jeans pant of the appellant, human blood was found and in the frock of the victim, DNA profile of the appellant was found and in the clothes of the appellant female Autosomal STR DNA profile of the victim was found.

33. In nutshell, from the spot where the offence was committed, the blood stain of the victim was found and in the leaf, the semen of the appellant was found. In the same way, from the place where the victim was recovered, blood stains were found. In the clothes of the victim, DNA profile of the appellant was found. In the same way, in the clothes of the appellant also DNA profile of the victim was found.

34. Thus, from this report (Exhibit-P/76), it is clear that the spot that was told by the appellant, blood stains and semen slide of the appellant were found and from the place where victim was recovered in unconscious condition, human blood of the victim and DNA profile of the appellant was found and in the clothes of the victim, DNA profile of the appellant was found and in the clothes of the appellant that were recovered at the instance of the appellant, the DNA of the victim was present. Thus, this establishes the identity of the appellant that the appellant had committed the offence as he disclosed the place where the offence of sexual assault was committed and after sexual assault, victim



was thrown. Furthermore, it is also clear that the person who committed the rape upon the victim proved by the DNA profile and from the medical examination of the victim, it is clear that the offence was committed as there was injury in the private part of the victim.

35. Furthermore, in this case, in the Identification Parade that was conducted by Mala Rai (PW-11), Raju Chouhan (PW-13) owner of the Dhaba where the appellant was working has identified the slippers of appellant recovered from the place of incident; this also establishes identity of the appellant.

36. Thus, from the above discussion, it is clear that appellant went to the hut of the complainant and demanded a cot to sleep at night and in the night, he after opening the gate of the hut carried the victim from her relative's house and committed rape upon the victim and thrown her in unconscious state treating her dead in the mango orchard. At the time offence, age of the victim was 4 years and three months and the appellant was 20 years old i.e. major person. Hence, the conviction of appellant under Sections 450, 363, 376 (a), 376AB, 307 and Section 201 of the Indian Penal Code and Sections 5/6 of the Protection of Children from Sexual Offences Act is sustained.

37. On the point of confirmation/maintaining the death sentence, the trial Court has held that due to offence, the victim become disable for the whole life but there is no medical evidence regarding that the victim has got the disability or she had suffered such an injury that she cannot live a normal life. Only on the basis of the statement of Dr. Rakesh Shukla (PW-27), which is based upon the M.R.I. report, but the doctor has not clearly opined that which part of the body was damaged



or sustained such an injury, by which the victim may be disabled for a life. Hence, this finding of the trial Court could not be sustained.

38. In this case, there are aggravating circumstances that the victim was four year old and the rape was committed upon such a kid and offence was committed in such a way that the private part of the victim was torn and after committing the offence, the victim was thrown in the solitary place treating her that she had died.

39. The mitigating circumstances in the case are that the appellant is youth of tribal community aged about 20 years. There is no adverse comment regarding his conduct. There is no report that he has previously committed any such type of offence and as per the statement of his mother, he left the parental house at the very early age and was working in the Dhaba and earning his bread. He is not properly educated.

40. In the case of **Bhaggi alias Bhagirath alias Naran vs. State of Madhya Pradesh** reported in **(2024) 5 SCC 782**, Hon'ble the Apex Court has considered in the case of kidnapping and rape of a minor that whether the rape is "barbaric and brutal" or whether "barbaric" but not "brutal". In that night, the act of the appellant could not be said to be "brutal" though "barbaric"

41. In the case of **State of Maharashtra vs. Goraksha Ambaji Adsul** reported in **(2011) 7 SCC 437** in para No.31 to 41, Hon'ble the Apex Court has considered the aspect of aggravating circumstances and mitigating circumstances and held as under:-

31. The legislative intent behind enacting Section 354(3) CrPC clearly demonstrates the concern of the legislature for taking away a human life and imposing



death penalty upon the accused. Concern for the dignity of the human life postulates resistance to taking a life through law's instrumentalities and that ought not to be done, save in the rarest of rare cases, unless the alternative option is unquestionably foreclosed. In exercise of its discretion, the court would also take into consideration the mitigating circumstances and their resultant effects.

32. The language of Section 354(3) demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, “*in the case of sentence of death, the special reasons for such sentence*” unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence. This is how the concept of the rarest of rare cases has emerged in law. Viewed from that angle, both the legislative provisions and judicial pronouncements are at ad idem in law. The death penalty should be imposed in the rarest of rare cases and that too for special reasons to be recorded. To put it simply, a death sentence is not a rule but an exception. Even the exception must satisfy the prerequisites contemplated under Section 354(3) CrPC in light of the dictum of the Court in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] .

33. The Constitution Bench judgment of this Court in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] has been summarised in para 38 in *Machhi Singh v. State of Punjab* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] and the following guidelines have been stated while considering the possibility of awarding sentence of death : (*Machhi Singh case* [(1983) 3 SCC 470 : 1983 SCC (Cri) 681] , SCC p. 489)

“(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 requires to be taken into consideration along with the circumstances of the ‘*crime*’.

(iii) Life imprisonment is the rule and death sentence is an exception. ... 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 have 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.”

(emphasis supplied)

34. The judgment in *Bachan Singh* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] , did not only state the above guidelines in some elaboration, but also specified the mitigating circumstances which could be considered by the Court while determining such serious issues and they are as follows : (SCC p. 750, para 206)

“206. ... ‘*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 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 impaired his capacity to appreciate the criminality of his conduct.””

35. Now, we may examine certain illustrations arising from the judicial pronouncements of this Court.

36. In *D.K. Basu v. State of W.B.* [(1997) 1 SCC 416 : 1997 SCC (Cri) 92] this Court took the view that custodial torture and consequential death in custody was an offence which fell in the category of the rarest of rare cases. While specifying the reasons in support of such decision, the Court awarded death penalty in that case.

37. In *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] this Court also spelt out in paras 56 to 58 that nature, motive, impact of a crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are the factors which the court may take into consideration while dealing with such cases. In that case the friends of the victim had called him to see a movie and after seeing the movie, a ransom call was made, but with the



fear of being caught, they murdered the victim. The Court felt that there was no evidence to show that the criminals were incapable of reforming themselves, that it was not a rarest of the rare case, and therefore, declined to award death sentence to the accused.

38. Interpersonal circumstances prevailing between the deceased and the accused was also held to be a relevant consideration in *Vashram Narshibhai Rajpara v. State of Gujarat* [(2002) 9 SCC 168 : 2003 SCC (Cri) 1112 : AIR 2002 SC 2211] where constant nagging by family was treated as the mitigating factor, if the accused is mentally unbalanced and as a result murders the family members. Similarly, the intensity of bitterness which prevailed and the escalation of simmering thoughts into a thirst for revenge and retaliation were also considered to be a relevant factor by this Court in different cases.

39. This Court in *Satishbhushan Bariyar* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] also considered various doctrines, principles and factors which would be considered by the Courts while dealing with such cases. The Court discussed in some elaboration the applicability of the doctrine of rehabilitation and the doctrine of prudence. While considering the application of the doctrine of rehabilitation and the extent of weightage to be given to the mitigating circumstances, it noticed the nature of the evidence and the background of the accused. The conviction in that case was entirely based upon the statement of the approver and was a case purely of circumstantial evidence. Thus, applying the doctrine of prudence, it noticed the fact that the accused were unemployed, young men in search of job and they were not criminals. In execution of a plan proposed by the appellant and accepted by others, they kidnapped a friend of theirs. The kidnapping was done with the



motive of procuring ransom from his family but later they murdered him because of the fear of getting caught, and later cut the body into pieces and disposed it off at different places. One of the accused had turned approver and as already noticed, the conviction was primarily based upon the statement of the approver.

40. Basing its reasoning on the application of doctrine of prudence and the version put forward by the accused, the Court, while declining to award death penalty and only awarding life imprisonment, held as under : (*Satishbhushan Bariyar case* [(2009) 6 SCC 498 : (2009) 2 SCC (Cri) 1150] , SCC pp. 551 & 559-60, paras 135, 168-69 & 171-73)

“135. Right to life, in its barest of connotation would imply right to mere survival. In this form, right to life is the most fundamental of all rights. Consequently, a punishment which aims at taking away life is the gravest punishment. Capital punishment imposes a limitation on the essential content of the fundamental right to life, eliminating it irretrievably. We realise the absolute nature of this right, in the sense that it is a source of all other rights. Other rights may be limited, and may even be withdrawn and then granted again, but their ultimate limit is to be found in the preservation of the right to life. Right to life is the essential content of all rights under the Constitution. If life is taken away, all other rights cease to exist.

168. We must, however, add that in a case of this nature where the entire prosecution case revolves round the statement of an approver or is dependant upon the circumstantial evidence, the prudence doctrine should be invoked. For the aforementioned purpose, at the stage of sentencing evaluation of evidence would not be permissible, the courts not



only have to solely depend upon the findings arrived at for the purpose of recording a judgment of conviction, but also consider the matter keeping in view the evidences which have been brought on record on behalf of the parties and in particular the accused for imposition of a lesser punishment. A statement of approver in regard to the manner in which crime has been committed vis-à-vis the role played by the accused, on the one hand, and that of the approver, on the other, must be tested on the touchstone of the prudence doctrine.

169. The accused persons were not criminals. They were friends. The deceased was said to have been selected because his father was rich. The motive, if any, was to collect some money. They were not professional killers. They have no criminal history. All were unemployed and were searching for jobs. Further, if age of the accused was a relevant factor for the High Court for not imposing death penalty on Accused 2 and 3, the same standard should have been applied to the case of the appellant also who was only two years older and still a young man in age. Accused 2 and 3 were as much a part of the crime as the appellant. Though it is true, that it was he who allegedly proposed the idea of kidnapping, but at the same time it must not be forgotten that the said plan was only executed when all the persons involved gave their consent thereto.

171. Section 354(3) of the Code of Criminal Procedure requires that when the conviction is for an offence punishable with death or in the alternative with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and in the case of sentence of death, the special reasons thereof. We do not



think that the reasons assigned by the courts below disclose any special reason to uphold the death penalty. The discretion granted to the courts must be exercised very cautiously especially because of the irrevocable character of death penalty. Requirements of law to assign special reasons should not be construed to be an empty formality.

172. We have previously noted that the judicial principles for imposition of death penalty are far from being uniform. Without going into the merits and demerits of such discretion and subjectivity, we must nevertheless reiterate the basic principle, stated repeatedly by this Court, that life imprisonment is the rule and death penalty an exception. Each case must therefore be analysed and the appropriateness of punishment determined on a case-by-case basis with death sentence not to be awarded save in the '*rarest of the rare*' case where reform is not possible. Keeping in mind at least this principle we do not think that any of the factors in the present case discussed above warrants the award of the death penalty. There are no special reasons to record the death penalty and the mitigating factors in the present case, discussed previously, are, in our opinion, sufficient to place it out of the '*rarest of rare*' category.

173. For the reasons aforementioned, we are of the opinion that this is not a case where death penalty should be imposed. The appellant, therefore, instead of being awarded death penalty, is sentenced to undergo rigorous imprisonment for life. Subject to the modification in the sentence of the appellant (A-1) mentioned hereinbefore, both the appeals of the appellant as also that of the State are dismissed."

(emphasis in original)



41. The above principle, as supported by case illustrations, clearly depicts the various precepts which would govern the exercise of judicial discretion by the courts within the parameters spelt out under Section 354(3) CrPC. Awarding of death sentence amounts to taking away the life of an individual, which is the most valuable right available, whether viewed from the constitutional point of view or from the human rights point of view. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty.

42. In the case of **Manoharan v. State**, reported in **(2019) 7 SCC 716** Hon'ble the Apex Court in para No.71 has discussed as under:-

71. Confession of crime has been treated as a mitigating circumstance by this Court in *Gurdeep Singh v. State (NCT of Delhi)* [*Gurdeep Singh v. State (NCT of Delhi)*, (2000) 1 SCC 498 : 2000 SCC (Cri) 449] , a case under the Terrorist and Disruptive Activities (Prevention) Act, 1987 to observe : (SCC p. 512, para 25)

“25. Before concluding we would like to record our conscientious feeling for the consideration by the legislature, if it deems fit and proper. Punishment to an accused in criminal jurisprudence is not merely to punish the wrongdoer but also to strike a warning to those who are in the same sphere of crime or to those intending to join in such crime. This punishment is also to reform such wrongdoers not to commit such offence in future. The long procedure and the arduous journey of the prosecution to find



the whole truth is achieved sometimes by turning on the accused as approvers. This is by giving incentive to an accused to speak the truth without fear of conviction. Now turning to the confessional statement, since it comes from the core of the heart through repentance, where such accused is even ready to undertake the consequential punishment under the law, it is this area which needs some encouragement to such an accused through some respite may be by reducing the period of punishment, such incentive would transform more such incoming accused to confess and speak the truth. This may help to transform an accused, to reach the truth and bring to an end successfully the prosecution of the case.”

43. The judgments of **Manoharan v. State by Inspector of Police, (2019) 7 SCC 716**, **Dhananjay Chatterjee v. State of West Bengal, (1994) 2 SCC 2020** and other judgments relied by the prosecution, these cases belong to rape, sexual assault by the gang and murder that treated aggravated circumstance. The principle laid down in these cases, are not applicable in the present case being the factual aspect different from the cited case laws.

44. Looking to the above observations and discussions, in this case, no doubt that appellant’s act was brutal as he has committed rape upon the victim of four years and three months of age and after committing rape also throttled her treating her dead and thrown the victim in such a place where she could not be searched and left the spot but it is also clear that he has not committed brutality. The background of the appellant is that he is uneducated youth of 20 years of age and belongs to the tribal community and his parents never tried to give him education and not properly take care of him, therefore he has left his



house and was self bread earner and living and working in a Dhaba (Restaurant). Atmosphere in the Dhaba is not such, by which it can be inferred that he was given the proper atmosphere to grow up. Hence, sentence imposed upon the appellant for the offence punishable under Sections 363, 450, 307, 201 of the Indian Penal Code is affirmed but his sentence for the offence punishable under Sections 6 of the POCSO Act is converted from Capital Punishment to the rigorous imprisonment of 25 years with the fine amount of Rs.10,000/- and in default of fine amount (actual incarceration without remission/commission under Section 432 and 433 of Code of Criminal Procedure), the appellant shall further suffer rigorous imprisonment of one year.

45. With the above modification, the reference is answered and appeal is partially **allowed**.

46. The case property be disposed of as per the order of the trial Court.

47. Supersession warrant of the appellant be prepared and sent to the concerned jail authority.

(VIVEK AGARWAL)
JUDGE

(DEVNARAYAN MISHRA)
JUDGE

VB*