

HON' BLE SRI JUSTICE C.PRAVEEN KUMAR

AND

HON' BLE SMT. JUSTICE T. RAJANI

CRIMINAL APPEAL No.231 OF 2017

And

REFERRED TRIAL No. 1 of 2017

COMMON JUDGMENT : (per Hon' ble Sri Justice C.Praveen Kumar)

1) The sole accused in Sessions Case No.32 of 2016 on the file of the I Additional Sessions Judge, Karimnagar filed Crl.A.No.231 of 2017, was tried on four charges. The first charge was under Section 376 (2) (f) (i) of IPC, for committing rape on a minor girl by name Thogari Vinayasree @ Vinny (hereinafter referred to as "the deceased"), aged about 3 ½ years in his house on 27.02.2016 between 3.30 p.m., and 7.00 p.m. The second charge was under Section 302 IPC, for causing the death of the deceased by pressing her neck and then hitting her head to a wooden plank edge till her death. The third charge was under Section 201 IPC for screening the evidence by keeping the dead body of the deceased under the basket in his house. The last charge was under Section 6 of the POCSO Act. Vide judgment dated 22.12.2016, the learned Additional Sessions Judge, convicted and sentenced him as under:

U/ s. 302 IPC	The accused is sentenced to Death and he is directed to be hanged till his death for committing murder of Thogari Vinayashree subject to confirmation by High Court as per Section 366 Cr.P.C.
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U/ s. 376 (2) (f) (i) IPC	To suffer Life imprisonment and to pay a fine of Rs.500/-, in default to suffer simple imprisonment for a period of one month
U/ s. 201 IPC	To suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs.500/-, in default to suffer simple imprisonment for a period of one month
U/ s. 6 of POCSO Act	To suffer Life imprisonment and to pay a fine of Rs.500/- in default to suffer simple imprisonment for a period of one month

2) For confirmation of the sentence of death penalty by way of hanging, the learned Additional Sessions Judge addressed a letter to this Court which was taken on file as Referred Trial No.1 of 2017. The Criminal Appeal filed by the accused against his conviction and sentence is CrI.A.No.321 of 2017.

3) Since both the appeal and Referred Trial arise out of the same judgment, they are being disposed of by this common judgment.

4) The facts as culled out from the evidence of the prosecution witnesses are as under:

i) The deceased and PW.5 are the daughters of Pws.1 and 2. PWs.3, 4, 6 and 7 are residents of Damerakunta village. The accused is the neighbour of PWs.1 and 2. PW.2 was working as an anganwadi teacher. On 27.02.2016, PWs.1 and 2 went to duty by dropping their children in the school. After school hours, PW.5, the deceased and one Niranjana were returning to their home from school. While they were passing in front of the house of the accused, he called them and stated to the deceased that

he would give some berries and detained her with him. He threatened PW.5 and Niranjana to leave the said place. Thereafter both of them went to their house. It is said that PW.2, who returned home did not find the deceased. Then she searched for her but in vain. Thereafter, she called her husband, who was working as a Homeguard, and informed him about the missing of the deceased. Immediately her husband came to the house and all of them searched for the deceased. Later they asked PW.5 about the deceased. Then PW.5 is said to have informed them that while she along with the deceased and Niranjana were returning to house, the accused called them and detained the deceased by offering some chocolates and berries. Basing on the said information, PWs. 1 and 2 went to the house of the accused, which was situated by the side of their house, but the said house was locked. They searched for the deceased in that night but they could not find her. On the next day, one P.Venkataiah (PW.3) informed that while he was peeping through window, found the frock of the deceased by the side of the basket. With the help of a stick, he lifted the basket and found the dead body of the deceased. Basing on the information given by PW.3, all of them went to the house of the accused, broke open the lock and found the dead body of the deceased in the basket. They noticed that the dead body being naked with bite marks, injury on the head and also blood oozing from her private parts.

ii) On 28.02.2016 at about 11.00 a.m., while PW.15-the Sub-Inspector of Police, was present in the police station he received a report from PW.1, basing on which he registered a case in Crime No.28 of 2016 for the offences punishable under Section 302, 376 (f) of IPC and Section 6 of POCSO Act and issued the first information report, which is marked as Ex.P14. Subsequent investigation was handed over to PW.16-the Inspector of Police.

iii) After receipt of the copy of the first information report, PW.16-the Inspector of Police visited the scene of offence, which is in the house of the accused. He got photographed the dead body with the help of PW.4 and also videographed the scene and dead body. Later he held inquest over the dead body of the deceased in the presence of PW.8 and another. Ex.P3 is the inquest report. He also prepared a panchanama of the scene and also rough sketch of the scene which are enclosed in Ex.P4-the crime details form. During the said proceedings he seized Mos.1 to 7 from the scene of offence. After recording the statements of PWs.1 to 6, he sent the dead body for postmortem examination.

iv) PW.11-the Civil Assistant Surgeon, Government Area Hospital, Godavarikani and Dr.D.Chandra Shekar, conducted autopsy over the dead body of the deceased and preserved vaginal swabs for detection of semen and spermatozoa. For DNA analysis, sample of blood was sent to RFSL, Hyderabad. Ex.P7 is

the postmortem report. After receiving the RFSL report (Ex.P8) and DNA report (Ex.P9), he opined that the cause of death was “shock due to brutal sexual assault on minor girl, with asphyxia due to throttling of neck and hemorrhage due to head injury with intracranial hemorrhage”. Ex.P10 is the final opinion.

v) PW.17-the A.S.P., Godavarikani conducted further investigation in this case. His evidence discloses that on 04.03.2016 at 4.00 p.m., on reliable information, he apprehended the accused at the outskirts of Suraram village and interrogated him in the presence of PW.9 and another. During interrogation the accused voluntarily confessed about the commission of offence. Ex.P5 is the confession panchanama. On 05.03.2016 he visited Damerakunta village, examined and recorded the statement of PW.7. He filed a requisition before the Prl.Judicial Magistrate of First Class, Godavarikani, to record the statement of PW.6 under Section 164 Cr.P.C.

5) After completing the investigation and after collecting all the material papers, PW.17 filed a charge sheet before the Court of I Additional Sessions Judge, Karimnagar, which was taken on file as S.C.No.32 of 2016. On appearance, copies of documents were furnished to the accused as contemplated under Section 207 Cr.P.C.

6) Basing on the material available on record, charges under Sections 376 (2) (f) (i), 302 and 201 IPC and Section 6 of the POCSO Act, came to be framed, read over and explained to the

accused, to which the accused pleaded not guilty and claimed to be tried.

7) To substantiate its case, the prosecution examined PWs.1 to 17 and got marked Exs.P1 to P15 and MOs.1 to 7. After the closure of evidence, the accused was examined under Section 313 Cr.P.C., with reference to the incriminating circumstances appearing against him, in the evidence of the prosecution witnesses, to which he denied. Neither oral nor documentary evidence was produced on behalf of the accused.

8) Relying upon the evidence of PWs.1, 2, 3 and 5 coupled with the medical evidence, the trial Court convicted the accused in the manner referred to above. Challenging the same, the present appeal came to be filed.

9) Learned counsel for the appellant mainly submits that there is absolutely no evidence on record to show that the accused was present in the house at the time of accident. He further submits that though PW.5 was examined to prove that the accused accosted the deceased by offering chocolates and berries, but the same appears to be improper since PW.5 never disclosed about the same at the earliest point of time to the parents when they enquired about the deceased. He submits that the sole circumstance of the dead body being present in the house along with injuries by itself may not be sufficient to convict the accused. It is urged that even if it is established to be true, the

accused cannot be sentenced to capital punishment. He relied upon various judgments of the Apex Court in support of his plea.

10) On the other hand, the learned Public Prosecutor would contend that having regard to the manner in which the offence is committed and in the absence of any explanation is being given with regard to the presence of the dead body in the house, pleads that it is a fit case awarding death sentence as appropriate punishment.

11) The point that arises for consideration is whether the accused was responsible for the death of the deceased and if so, whether the trial Court was right in awarding the death sentence.

12) As seen from the record, the case of the prosecution is that on the date of incident ie., 27.02.2016, PW.5 and the deceased were dropped in the school by PW.2, who is their mother. The evidence of PW.5 would show that after the school hours, herself, deceased and one Niranjana, while returning home and when they were passing in front of the house of the accused, he called them and offered some berries to the deceased and then detained her. Thereafter he threatened PW.5 and Niranjana to leave the said place. It would be useful to extract the evidence of PW.5, which is as under:

“On the date of the incident, myself, OW7-Neeranjana and the deceased Vinaysree were returning home from the school to our house. When we were passing in front

of the house of the accused, the accused called us and he stated to Vinaysree that he would give regupandlu to Vinaysree and detained her with him and he threatened me and Neerajan (LW.7) and to go away from said place. Then we both went to our house. After we returned to the house my sister did not return to the house.”

13) Though PW.5 was cross-examined, nothing useful came to be elicited to discredit her testimony.

14) Coming to the evidence of PWs.1 and 2, it is to be noticed that PW.2 in her evidence deposed that on 27.02.2016 she dropped her children at school, went to duty and returned home at 5.00 p.m. Though her elder daughter was at home, she did not find her younger daughter (deceased). She searched for her but could not trace her. Then she telephoned to her husband and informed him about the missing of their younger daughter. Immediately her husband came and searched for the deceased but in vain. They claimed to have asked PW.5, who informed them about the accused detaining the deceased by offering the chocolates and berries and also threatening PW.5 and Nirajan to leave the place. The evidence of PWs.1 and 2 further shows that they went to the house of the accused but it was locked. They searched for the deceased in that night but could not trace her.

15) PW.3 is also a resident of Damerakunta village. In his evidence states that on 27.02.2016 in the evening he was informed by PW.2 that her daughter did not return from the school. His evidence is to the effect that through the elder

daughter of PWs.1 and 2, they came to know about the accused detaining the deceased by offering chocolates and also taking her in the house. However, on the next day while searching for the daughter of PWs.1 and 2, he peeped through the window of the house of the accused and he found a frock by the side of the basket. Suspecting foul play, he lifted the basket with a stick and found the body of the deceased under the basket. Immediately he called PWs.1 and 2 and informed them about the same. PWs.1 and 2 and other villagers gathered at the scene, broke open the door and found the dead body of the deceased under the basket. They noticed that the dead body naked with bite marks over the body. They also noticed injury on head and blood oozing from private parts. Thereafter, PW.1 lodged a report with PW.15-the Sub-Inspector of Police, which is marked as Ex.P1.

16) From the above, it is clear that PW.5 is said to have last seen the accused with the deceased, meaning thereby that on the date of incident, while they were returning from the school, the accused called them, offered chocolates and detained the deceased with him, while threatening PW.5 and Niranjana to leave the place and thereafter the accused is said to have taken the deceased into his house. It appears that the version of PW.5 with regard to accused detaining the deceased was never informed by her to her parents when they enquired her about the deceased. As stated earlier, the evidence of PW.3 is to the

[illegible]

“Immediately my wife made a phone call to me when I was on duty, then I rushed to the house and enquired with my elder daughter, Hinduja and he along with his relatives searched for my younger daughter in the surrounding villages and also in our village. Today ie. 28.02.2016, till 10.30 a.m., as the whereabouts of my daughter are not known, on suspicion and found the frock of my daughter on the corner besides a basket (gampa),

immediately entered into the house by opening the lock of the house and found my daughter dead in naked position under the basket. There were injuries on the cheek and has bitten indiscriminately on other parts of my daughter and there were tooth marks and blood was oozing from her private parts of my daughter.”

17) From the contents of the first information report referred to above, it stands established that PW.5 never furnished any information to PWs.1 and 2, about the accused detaining the deceased. On the other hand, on 28.02.2016 at about 10.30 a.m., on suspicion PW.3 peeped through the window of the house of the accused and noticed frock of the deceased by the side of the basket. Immediately thereafter they broke open the lock and noticed the dead body of the deceased under the basket. In the absence of any explanation given by PW.5 as to why she did not disclose the information to her parents though they questioned her, a doubt arises as to whether really all three of them were returning from the school together. But however one strong circumstance which establishes the presence of the accused in the house at that time and also hold him guilty, is the D.N.A. report.

18) PW.14-the Assistant Director, DNA in FSL, Hyderabad, in his evidence deposed that on 04.03.2016 he received a plastic jar containing cotton swabs from serology section vide FSL file No. SER/ 263/ 2016, dated 09.03.2016. The items which were sent to him for analysis are as under:

1. A cotton swab marked

2. A torn green colour netted frock with polyester lining and pink colour lace with dirty stains marked
3. A torn yellow colour mill made underwear with dirty stains
4. A torn blue and light brown colour checks design cotton bed sheet with dark brown stains
5. A cotton swab
6. A cotton swab with dirty stains
7. Blood sample collected from Jakkula Venkataswamy (accused)

19) He further deposed that D.N.A. was extracted from item Nos.1 to 7 and subjected to Autosomal STR analysis by using investigator ID plex plus primer kit. They noticed that there is no amplification of DNA in Item No.5. The D.N.A. profiles obtained from item Nos.1, 2, 3 and 6 were compared with the DNA profiles obtained from item No.7 (blood sample collected from the accused) and it was found that the allelic pattern of item Nos.1, 2, 3 and 6 are matching with the allelic pattern of DNA profile of item No.7. The conclusion was as under:

“The autosomal STR analysis indicated that the seminal stains on source of item No.1 (cotton swab) source of item No.2 (frock), source of item No.3 (underwear) and source of item No.6 (cotton swab) are matching with the DNA profile of the deceased and they are of the same biological origin.”

20) The said D.N.A. profile was marked as Ex.P12 and DNA report was marked as Ex.P13.

21) Though the learned counsel for the appellant tried to contend that it is only an opinion evidence and the same cannot be made the basis to convict the accused, but in the absence of any cross-examination of PW.14, we feel that the said document can be made the basis to hold the accused was responsible for the incident. The finding of the reports coupled with the evidence of PW.2, who speaks about the motive for the accused to commit the crime amply established that it was the accused alone who was responsible for the incident.

22) Coming to the question as to whether the sentence of death awarded by the trial Court warrants interference, we intend to refer to the evidence of PW.2 and the authorities on the subject.

23) PW.2, who is the mother of the deceased, in her evidence in chief itself states that the accused is a vagabond, not doing any work and habituated to bad vices. It was further deposed by her that the accused used to drunk and harass his wife, pursuant to which his wife and children left him and went away. It was further stated by her that the accused used to beat his wife, which was objected to by PW.1. It is said that the accused is a relative as son by courtesy to PW.1 and due to which he said to have admonished him, but the accused, who developed a grouse against them, committed the present offence.

24) Though the evidence of PWs.1 to 3 shows that number of bite marks on the body of the deceased, but the evidence of the doctor shows that multiple ants bite marks present on chest and

abdominal region and left thigh and leg. With these two circumstances in the backdrop we feel that the trial Court was not justified in awarding death sentence.

25) Unless a case falls under rarest of the rare cases, the capital punishment cannot be imposed. In *Bachan Singh vs State of Punjab*¹ the Apex Court while upholding the constitutional validity of capital sentence, revisited the law relating to death sentence at that point of time and held that normal rule is awarding of “life sentence”, imposition of death sentence being justified, only in the rarest of rare cases, when the option of awarding sentence of life imprisonment is unquestionably foreclosed. By virtue of *Bachan Singh* case (1 supra) “life imprisonment became the rule and ‘death sentence’ an exception. The focus was shifted from ‘crime’ to the ‘crime and criminal’”. The principles laid down in *Bachan Singh* case (1 supra) were considered in *Machhi Singh v. State of Punjab*² and were summarized as under:

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

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

¹ (1980) 2 SCC 684

² (1983) 3 SCC 470

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

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

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances 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.”

26) In *Ramnaresh v. State of Chhattisgarh*³ the Apex Court held lay down a nearly exhaustive list of aggravating and mitigating circumstances, which are as under:

“Aggravating circumstances (1) The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping, etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

³ (2012) 4 SCC 257

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty Under Section 43 Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold-blooded murder without provocation.

(11) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances (1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.”

27) In *Shankar Kisanrao Khade v. State of Maharashtra*⁴ the Apex Court has exhaustively analysed the case of rape and murder where death penalty was converted to that of imprisonment for life and some of the factors that weighed with the Court in such commutation, reads as under:-

“ 106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

- (1) the young age of the accused
- (2) the possibility of reforming and rehabilitating the accused
- (3) the accused had no prior criminal record
- (4) the accused was not likely to be a menace or threat or danger to society or the community
- (5) a few other reasons need to be mentioned such as the accused having been acquitted by one of the courts
- (6) the crime was not premeditated
- (7) the case was one of circumstantial evidence.”

28) In the said Case, the Apex Court while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and

⁴ (2013) 5 SCC 546

murder of a minor, discussed the sentencing policy in India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the prima facie difference in the standard of yardsticks adopted by two organs of the government viz. Judiciary and the Executive in treating the life of convicts convicted for an offence punishable with death and recommended to the Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under:

“148. 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.”

29) In *Sunil v. State of Madhya Pradesh*⁵ the Apex Court dealt with a case where the accused, who was aged about 25 years is

⁵ (2017) 4 SCC 393

said to have committed rape and murder of four year old child. While dealing with the sentence to be imposed, the Court held as under:

“The fact that the accused can be reformed and rehabilitated; the probability that the accused would not commit similar criminal acts; that the accused would not be a continuing threat to the society, are the other circumstances which could not but have been ignored by the learned trial Court and the High Court.”

30) Keeping the guidelines laid down in the judgments referred to above, we intend to see whether the sentence to death awarded by the trial Court was proper?

31) As seen from the findings given by the trial Court, while awarding death sentence, the trial Court was carried away by the confession made by the accused. There was no material on record to show that the accused was a naxalite and that he was given an opportunity to live a respectable life in the society. On the other hand, the evidence of PW.2, would show that the accused was also related to them and he happens to be the son of PW.1 by courtesy. There were some disputes between PW.1 and the accused, when PW.1 chastised the accused for bringing home woman. Pw.2 further states that keeping this in background, the accused committed the offence.

32) As extracted above, in *Shankar Kisanrao Khade v. State of Maharashtra* (4 supra) and in *Sunil v. State of M.P.* (5 supra) the Apex Court while taking into consideration certain

factual aspects converted death penalty into one of imprisonment for life. As the accused was aged about 30 years, having no prior criminal record; accused not likely to be a menace or threat or danger to society or the community and the case being based only on recovery of dead body in the house of the accused and DNA profiles and as there is no possibility of rehabilitating the accused, we are of the view that it would be appropriate to convert the death sentence imposed to imprisonment for whole of his life without any extension of benefits of remissions. Accordingly, the sentence of death is *set aside* and in place he shall undergo the imprisonment for life in full.

33) The reference is accordingly answered and the Criminal Appeal is partly allowed only to the extent of sentence confirming the conviction under Section 302 IPC.

34) Consequently, miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

JUSTICE T. RAJANI

11.07.2018
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