

*** THE HON'BLE THE CHIEF JUSTICE RAGHVENDRA SINGH
CHAUHAN
AND
THE HON'BLE SRI JUSTICE A. ABHISHEK REDDY**

**+ CRIMINAL APPEAL No.685 OF 2019
AND
REFERRED TRIAL No.1 OF 2019**

% Date: 12-11-2019

Polepaka Praveen @ Pawan

... Appellant

v.

\$ The State of Telangana, rep. by its Public Prosecutor

... Respondent

! Counsel for the Appellant : Mr. Dominic Fernandes

^ Counsel for respondent : Mr. C. Pratap Reddy,
Public Prosecutor

Amicus Curiae : Mr. T. Niranjan Reddy,
Senior Counsel

< **GIST:**

> **HEAD NOTE:**

? **CASES REFERRED:**

1. (1980) 2 SCC 684
2. (1983) 3 SCC 470
3. AIR 1958 SC 66
4. (2002) 3 SCC 76
5. (2015) 16 SCC 492
6. (2017) 4 SCC 393
7. AIR 2002 SC 3164
8. (2019) 7 SCC 1
9. (2013) 2 SCC 713

**THE HON'BLE THE CHIEF JUSTICE RAGHVENDRA SINGH CHAUHAN
AND
THE HONOURABLE SRI JUSTICE A. ABHISHEK REDDY**

**CRIMINAL APPEAL No. 685 OF 2019
&
REFERRED TRIAL No. 1 of 2019**

COMMON JUDGMENT: (Per Hon'ble the Chief Justice Raghvendra Singh Chauhan)

Both these cases, namely Criminal Appeal No.685 of 2019, filed by Polepaka Praveen @ Pawan, the accused, and reference proceedings in R.T. No. 1 of 2019 for confirmation of the death sentence, emanate from the same impugned judgment, namely judgment dated 08.08.2019, passed by the Special Judge for Trial of Cases under Protection of Children from Sexual Offences Act-cum-I Additional Sessions Judge at Wanaparthi, in Special Sessions Case No. 95 of 2019. By the said judgment, the learned trial court has convicted and sentenced the appellant as under:

Offence convicted for	Sentence imposed
Section 302 IPC	Death sentence, and to pay a fine of Rs.1,000/-, and suffer simple imprisonment for three months in default thereof.
Section 449 IPC	Undergo imprisonment for life, to pay a fine of Rs.500/-, and to suffer simple imprisonment for three months in default thereof.
Section 376-A IPC	Undergo rigorous imprisonment for twenty years.
Section 376-AB IPC	Undergo rigorous imprisonment for twenty years, to pay a fine of Rs.1,000/-, and to suffer simple imprisonment for three months in default thereof.

Section 363 IPC	Undergo rigorous imprisonment for five years, to pay a fine of Rs.500/- and to suffer simple imprisonment for three months in default thereof.
Section 379 IPC	Undergo rigorous imprisonment for two years.
Section 5(i) r/w 6 of the Protection of Children from Sexual Offences Act, 2012	Undergo imprisonment for life, to pay a fine of Rs.1,000/-, and to suffer simple imprisonment for three months in default thereof.
Section 5(m) r/w 6 of the Protection of Children from Sexual Offences Act, 2012	Undergo imprisonment for life, to pay a fine of Rs.1,000/-, and to suffer simple imprisonment for three months in default thereof.

All the substantive sentences were directed to run concurrently. Since both the criminal appeal and the referred trial arise out of the same judgment, they are being heard together, and are being decided by this common judgment.

Briefly the facts of the case are that on 17.06.2019, K. Jangaiah (L.W. 3), his wife, K. Rachana (P.W. 2) along with their nine month old daughter (hereinafter referred to as 'deceased child') visited his in-laws place at Kumarpally, Hanamkonda. After dropping his wife and daughter off, in the morning of 18.06.2019, K. Jangaiah (L.W. 3) left for Hyderabad. On 18.06.2019, around 11:30 p.m., all the family members of K. Rachana (P.W. 2) including her father, J. Yadagiri (L.W. 4), and brothers, J. Bharath Kumar (P.W. 1), and J. Narsimha Raju @ Raju (L.W. 6), along with the deceased child, and the tenants of the family, namely E. Anusha (P.W. 8) and E. Mounika (L.W. 15), after closing the doors, went to the terrace of the house to sleep. Around

1:30 a.m., K. Rachana (P.W. 2) woke up, and found her daughter, who was sleeping by her side, missing. She not only woke up all her family members, but also woke up the tenants. The said tenants also found their mobile phones missing. Immediately, the maternal uncle of the deceased child, J. Bharath Kumar (P.W. 1) informed the Police Control Room about his missing niece. During the course of search, J. Bharath Kumar (P.W. 1) found one person carrying an infant, wrapped in a towel, on his shoulder, in the lane between Congress Bhavan and Budha Bhavan. When J. Bharath Kumar (P.W. 1) intercepted him, the person dropped the infant on the ground, and tried to escape. However, J. Bharath Kumar (P.W. 1) managed to catch hold of the person. On being questioned, the person revealed his name as Praveen. Furthermore, J. Bharath Kumar (P.W. 1) discovered that the baby dropped on the ground, by the accused, is none other than his niece. Meanwhile, his friends, and his brother Narsimha Raju (L.W. 6) came to the spot. They assaulted the accused. The police, who were searching for the baby, also reached the spot. They took the accused into their custody. On receipt of information over phone, Rachana (P.W. 2), mother of the deceased child, along with other family members, reached the spot. Noticing bleeding from the private parts of deceased child, immediately they took the deceased child to the Maxcare Hospital, Hanamkonda. Dr. O. Ravi Raj (P.W. 14), after examination,

declared the child as “brought dead”. He issued the wound certificate (Ex. P. 11).

The Police shifted the accused to Rohini Super Specialty Hospital, Hanamkonda, for treatment of his injuries sustained at the hands of J. Bharath Kumar (P.W. 1) and others. Dr. K. Sathish (P.W. 16) administered first aid treatment to the accused; he issued the wound certificate (Ex.P. 14). On 19.06.2019, on the basis of report (Ex. P. 1), given by J. Bharath Kumar (P.W. 1), the police registered a formal FIR, namely FIR No. 196 of 2019 for offences under Sections 302, 449, 376A, 376AB, 363, 379 of IPC, and under Sections 5(i) r/w Section 6 and 5(m) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 against the accused.

In order to support its case, the prosecution examined thirty witnesses, submitted thirty-six documents, and produced six material objects. On the other hand, the defense neither examined any witnesses, nor submitted any document to buttress its case. After appreciating the evidence, by judgment dated 08.08.2019, the learned trial court convicted and sentenced the appellant as aforementioned. Hence, the present appeal before this Court by the accused person, and the reference proceedings for confirmation of the death sentence awarded to him.

Mr. Dominic Fernandes has argued the appeal filed by the appellant, whereas Mr. T. Niranjan Reddy, the learned Senior Advocate, was appointed as *amicus curiae* by this Court in order to assist the Court on behalf of the accused in the reference proceedings.

Mr. Dominic Fernandes has not only argued on the merits of the case, but has also argued with regard to the sentence imposed by the learned trial court. On the other hand, Mr. T. Niranjan Reddy, the learned Senior Counsel, has argued only about the sentence imposed by the learned trial court.

As far as the merits of the case are concerned, Mr. Dominic Fernandes has raised the following contentions:-

Firstly, there is a great discrepancy in the prosecution case with regard to the timings when the transfer of data was made by the CCTV Technician, K. Indraneel (P.W. 4). According to K. Indraneel (P.W. 4), on 20.06.2019, at 10:00 a.m., he extracted the CCTV video footage from the Digital Video Recorder (DVR) through a Pen drive, and transferred the data from the Pen drive to the Digital Versatile Disc (DVD). However, according to the *motbir* witness, G. Saikumar (P.W. 22), the transfer of data from DVR to the DVD was done around 10:30 a.m. on 20.06.2019 under seizure panchanama (Ex. P. 26). Even according to seizure panchanama (Ex. P. 26), the time is shown as 10:30 a.m.

But according to the charge-sheet, the time of transferring the electronic evidence is shown as 4:30 p.m. Therefore, there is a discrepancy with regard to the timing when the electronic evidence was transferred from DVR to DVD. Furthermore, according to K. Indraneel (P.W. 4), he had transferred the data from DVR to a Pen drive, and then from the Pen drive to a DVD. But, according to G. Saikumar (P.W. 22), the data was transferred directly from DVR to DVD without the usage of Pen drive. The prosecution has, thus, submitted contradictory evidence; the case of the prosecution cannot be relied upon.

Secondly, according to potency certificate of the accused (Ex. P. 29), the circumference of the penis in flaccid state is shown as eleven cms. However, the circumference of the erect penis is shown as ten cms. According to the learned counsel, the circumference of an erect penis has to be more than the circumference of a flaccid penis. Therefore, the Potency Certificate (Ex. P. 29) is an unreliable piece of evidence. Hence, the testimony of Dr. Raza Mailk Khan (P.W. 24), who had examined the accused for his potency, cannot be relied upon.

Thirdly, the complete copy of the FSL Report (Ex. P. 31) is unavailable in the record produced before this Court. While the FSL Report (Ex. P. 31) claims that human semen and spermatozoa are detected on item Nos. 1, 2 and 3, it is unclear as to what these item Nos. 1, 2 and 3 are. Therefore,

even the FSL Report (Ex. P. 31) does not support the case of the prosecution. Hence, the prosecution has failed to establish the linking evidence to prove that the alleged offence was, indeed, committed by the accused.

Lastly, the DNA Report (Ex. P. 30) also mentions item Nos. 1, 2 and 3. However, even the said report does not indicate as to what are item Nos. 1, 2 and 3. Hence, the conclusion drawn with regard to the presence of DNA is inconclusive evidence. Therefore, the learned trial court has erred in relying on the DNA Report (Ex. P. 30). Thus, the learned trial court has erred in not only convicting the appellant of offence under Section 302 read with Section 376-AB IPC, but in also sentencing him to death penalty.

Both the learned Senior Counsel, Mr. T. Niranjan Reddy, and Mr. Dominic Fernandes, have vehemently argued with regard to the imposition of the capital punishment upon the appellant. Relying on the case of **Bachan Singh v. State of Punjab**¹, the learned counsel have argued that imposition of life imprisonment is the rule, and the imposition of death penalty is an exception. According to **Bachan Singh** (supra), the capital punishment can be imposed only in cases which are considered to be 'rarest of the rare'. However, the present case does not fall within the said category.

¹ (1980) 2 SCC 684

Secondly, while selecting a sentence where various sentences are available to the trial court, and while imposing a sentence, the trial court cannot confine its consideration “principally or merely” to the circumstances of the crime. In fact, the trial court is required to consider both the circumstances of the crime, and the position of the criminal. While considering both these circumstances, the learned trial court is required to weigh “the aggravating and the mitigating circumstances” of the case.

Thirdly, relying on the case of **Machhi Singh v. State of Punjab**², the learned counsel claim that the test laid down in the said case needs to be applied to the present case. The test prescribed is to examine the (a) manner of commission of murder, (b) motive for commission of murder, (c) to see if the nature of the crime is anti-social or socially abhorrent, (d) to see the magnitude of the crime, and lastly (e) to consider the personality of victim of murder. According to the learned counsel, all the five factors have to be seen holistically rather than selecting one of them, and by over emphasizing its importance.

Fourthly, according to the learned counsel, although it is unfortunate that a nine month-old child has been allegedly raped, and murdered by the accused, but according to the medical evidence, the child had died of asphyxia. Therefore,

² (1983) 3 SCC 470

the act is not “an extremely brutal” or “grotesque” or “abhorrent” or “diabolical” or “revolting” or “committed in a dastardly manner”, which would arouse intense or extreme indignation of the community. Furthermore, the crime is neither anti-social, nor socially abhorrent. Similarly, the magnitude of the crime is limited to an individual, and does not involve the elimination of a family, or a large number of persons of a particular community or locality. Therefore, the magnitude of the crime is a limited one. Thus, even if one were to consider the aggravating factors of the case, even then, the case does not fall within the ambit of being ‘rarest of the rare case’.

Fifthly, according to the case of the prosecution, the appellant is a twenty-five year old young man., who belongs to the Scheduled Caste community. He is a coolie. Therefore, the appellant belongs to the lower social and economic strata of the society. He is an illiterate poor youth, who is hardly employed. Thus, the appellant faces social difficulties and financial hardship, which may even endanger his very survival. In order to survive, allegedly he had once tried to commit theft of a chain, for which he is facing a criminal trial. Even in the present case, he is alleged to have stolen two mobile phones belonging to E. Anusha (P.W. 8), and E. Mounika (L.W. 15). Thus, the appellant faces a life of struggle and strife. Furthermore, his condition is aggravated by the fact that, according to the prosecution case, his wife

had left him. Therefore, the appellant has limited means of fulfilling his sexual desires/physical needs. Moreover, even according to the prosecution, the appellant did not pre-plan the alleged kidnapping, and the alleged rape of the deceased child. It seems that he had entered the house with an intention of merely committing theft. Therefore, his initial intention was not to commit the alleged rape, and the alleged murder. His intention was a limited one to commit theft. According to the learned counsel, these are mitigating factors in favor of the appellant.

Further, according to the statement of the appellant recorded under Section 228 of Cr. P. C., initially, he had admitted before the trial court that the alleged offences were committed by him, but under the influence of alcohol. Only subsequently, he has not stated the said fact in his statement recorded under Section 313 of Cr. P. C. But it is a well-settled principle of criminal law that the statement made at the first instance contains the kernel of truth. A subsequent statement may either exaggerate the truth, or eliminate it in toto. Therefore, the appellant may be justified in claiming that the alleged offences were committed by him under the influence of alcohol. Although the learned trial court has observed that “the appellant did not show any remorse during the trial”, but nonetheless, according to the prosecution, the appellant had allegedly “confessed” his guilt before the witnesses. And certainly, “confessed” his guilt before the

learned trial court in his statement under Section 228 of Cr.P.C. Relying on the case of **Gounder v. State of Madras**³, the learned counsel have pleaded that confession itself is an act of remorse. Therefore, the learned trial court is unjustified in claiming that the appellant did not display any remorse for the alleged offence committed by him.

Sixthly, both the learned counsel have pleaded that between imposing a life imprisonment, and death penalty, there are still other sentences, which were available with the learned trial court, namely, the trial court could have sentenced the appellant to sentence of thirty years without parole, or relying on the case of **Rajendra Pralhaderao Wasnik v. State of Maharashtra** (Review Petition (Criminal) No.306-307 of 2013), even a life imprisonment can be imposed with a rider that the convict shall not be released from custody for the rest of his normal life. Hence, there was no reason for inflicting the harshest of the punishment, namely the capital punishment upon a young man.

Seventhly, relying on the case of **Lehna v. State of Haryana**⁴, the learned counsel have pleaded that the prosecution has failed to establish the fact that there is no possibility of the appellant reforming or rehabilitating himself.

³ AIR 1958 SC 66

⁴ (2002) 3 SCC 76

Lastly, relying on the case of **Kalu Khan v. State of Rajasthan**⁵, the learned counsel have pleaded that giving and taking of life is a divine act. Since life imprisonment would serve the object of reformation and retribution, and yet of prevention, the court should not have imposed the death penalty. Relying on the case of **Sunil v. State of Madhya Pradesh**⁶, wherein a twenty-five year old young man had committed rape on a four year old child, the learned counsel have argued that even in such a scenario, the Hon'ble Supreme Court did not sentence him to death on the premise that looking at his young age, he could still be reformed and rehabilitated. Therefore, the "young age" of the culprit is a strong factor, which should be considered as a mitigating circumstance.

Even in the case of **Rajendra Pralhaderao Wasnik** (supra), the appellant therein was held guilty of rape and murder of three year old child. Yet, the death sentence was substituted by life imprisonment with the rider that the convict shall not be released for the rest of the life. Even in the case of **Parsuram v. State of Madhya Pradesh** (Criminal Appeal Nos. 314-315 of 2013), decided on 19-02-2019, the Hon'ble Supreme Court has commuted the death sentence to life imprisonment although even in the said case, a twenty year old young man had committed rape, and murder of a

⁵ (2015) 16 SCC 492

⁶ (2017) 4 SCC 393

minor girl. Hence, according to both the counsel, the present case is a fit case for commutation of the sentence from death to life imprisonment.

On the other hand, Mr. Pratap Reddy, the learned Public Prosecutor, has raised the following counter-arguments both with regard to the merits of the case, and with regard to the capital punishment imposed upon the accused:-

Firstly, the discrepancies pointed out by Mr. Dominic Fernandes with regard to the evidence produced by the prosecution are minor discrepancies. Therefore, they are not fatal to the case of the prosecution.

Secondly, as far as the merits of the case are concerned, the prosecution has a watertight case against the accused. For, according to the prosecution, J. Bharath Kumar (P.W. 1) had intercepted the accused while he was carrying the dead body of the child rapped in a towel. The accused had dropped the child on the ground. The child was rushed to the Maxcare Hospital, where Dr. O. Ravi Raj (P.W. 14) declared the child as "brought dead". According to the testimony of Dr. O. Ravi Raj (P.W. 14), on 19.06.2019, he had examined a baby child (the deceased child). He had discovered that she was bleeding around the Perineal region. The injury was grievous in nature. He had proven the wound certificate issued by Dr. K. Venkat Reddy as Ex. P. 12. According to this

witness, since the patient was unresponsive, he had declared her as “brought dead”. Furthermore, according to the Post-Mortem Examination Report (Ex. P. 28), the deceased child had suffered seven injuries including a laceration (tear) present in the lower angle of the vagina to the anterior wall of the anus including rectum. According to the Post-Mortem Report (Ex. P. 28), the deceased child had died due to “*smothering along with vaginal laceration*”. Moreover, by using the DNA fingerprinting, the prosecution had submitted the DNA Report of the accused (Ex. P. 30). According to the said report, the DNA belonging to the accused was found on the cotton swab (item 1), and on the undershirt worn by the deceased child. Thus, the prosecution had presented a watertight case against the accused.

Thirdly, the accused has never challenged the fact that he was caught on the CCTV belonging to N. Raju (P.W. 5). Therefore, it is immaterial that while K. Indraneel (P.W. 4) deposed that he had extracted the CCTV video footage from DVR to a Pen drive, and transferred the data from the Pen drive to the DVD, and yet, according to G. Saikumar (P.W. 12), the data was transferred directly from the DVR to DVD. Even if there is some discrepancy with regard to the timing when the data was transferred, whether at 10:30 a.m. or at 4:30 p.m., such discrepancy is insignificant, as the accused has never claimed that his image is not in the CCTV, which belonged to N. Raju (P.W. 5).

Fourthly, even if the potency certificate (Ex. P. 29) claims that the circumference of the penis of the accused, in a flaccid state, was 11 cms, and the circumference of his erect penis was 10 cms, it would not be fatal to the case of the prosecution. For, according to the potency certificate (Ex. P. 29), the accused was capable of performing sexual intercourse. Further, the accused has never claimed that he is impotent. Furthermore, the Post-Mortem Report (Ex. P. 28) clearly indicates that the vagina was ruptured. Moreover, the presence of semen, belonging to the accused, in the cotton swab proves the fact that there was not only penetration, but also ejaculation. Therefore, the minor discrepancy pointed out by the learned counsel for the appellant in the potency certificate (Ex. P. 29) is immaterial.

Lastly, even if the first page of the FSL Report (Ex. P. 31) is unavailable in the record, the first page can be called for by this Court in order to see as to what were item Nos. 1, 2 and 3 mentioned in the FSL Report.

As far as the imposition of the capital punishment is concerned, Mr. Pratap Reddy has vehemently argued that a nine-month old child has been subjected to sexual intercourse, and killed by the accused.

Secondly, the accused had committed the crime in order to satisfy his lust.

Thirdly, the brutal murder of a child after subjecting the child to rape, shocks the conscience of the society at large. Therefore, the case falls within the category of “the rarest of the rare”. Hence, the harshest punishment has rightly been imposed by the learned trial court.

Fourthly, in the rarest of the rare cases, the punishment should be so deterrent as to set an example for others in order to deter them from committing a similar offence. The learned trial court has also noticed the fact that throughout the trial, the appellant did not show any sense of remorse for the crime committed by him. Therefore, he deserves no mercy from the court. Hence, the learned trial court was justified in imposing the capital punishment upon the appellant.

Lastly, relying on the case of **Ravi v. State of Maharashtra** (Crl. A. Nos. 1488-1489 of 2018, decided by the Hon’ble Supreme Court on 03.10.2019), the learned counsel has pleaded that even in the said case, a two-year old child was raped and murdered. In the said case, the Hon’ble Supreme Court has upheld the death penalty. Hence, the learned Public Prosecutor has supported the impugned judgment.

Heard the learned counsel for the parties, perused the impugned judgment and examined the record.

Needless to say the prosecution must establish its case beyond a reasonable doubt by producing cogent and convincing evidence. Even in the case of circumstantial evidence, the prosecution is required to establish its case through preponderance of possibility by linking all the circumstances in a complete chain, which would unerringly point to the guilt of the accused, and which should be inconsistent with the hypothesis of his innocence.

In the case of **Bodh Raj @ Bodha v. State of Jammu and Kashmir**⁷, the Hon'ble Supreme Court has laid down the principle to be applied while dealing with a case of circumstantial evidence. The principles are as under:-

(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established;

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused. That is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(3) The circumstances should be of a conclusive nature and tendency;

(4) They should exclude very possible hypothesis except the one to be proved; and

(5) There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

⁷ AIR 2002 SC 3164

It is, indeed, trite to state that minor contradictions do not endanger the prosecution case. Therefore, minor contradictions can be ignored provided that both the foundations and the super-structure of the prosecution case can withstand the critical analysis of judicial scrutiny.

In the present case, the prosecution has succeeded in establishing a complete chain of circumstances, which unerringly point to the guilt of the accused. For, the prosecution has submitted sufficient oral and documentary evidence to conclude its case against the appellant. J. Bharath Kumar (P.W. 1), K. Rachana (P.W. 2) and E. Anusha (P.W. 8) in unison inform the court that on 18.06.2018 having taken the dinner, the family members, and the tenants of the family had gone to the terrace to sleep around 11:30 p.m. According to K. Rachana (P.W. 2), around 1:30 a.m., when she woke up to answer the call of nature, suddenly she realized that her small daughter was missing from her side. Immediately, she woke up her parents and brothers and told them about the missing child. Moreover, E. Anusha (P.W. 8), and E. Mounika (L.W. 15), the tenants of the family, who were also sleeping on the terrace found that their mobile phones were missing from their sides. According to K. Rachana (P.W. 2), her brothers called their friends on the phone, and informed them about the missing child.

According to J. Bharath Kumar (P.W. 1), with an apprehension that somebody kidnapped the child for ransom,

the family started looking for the child in the streets. On his information, his relatives and friends joined the family for searching the child. According to this witness, *“in between 2:00 and 2:30 a.m., on that night, I found the accused carrying the baby wrapped in the towel in the lane in between Congress Bhavan and Budha Bhavan. Even while proceeding on the bike, I asked the accused to stop, for which he forcibly thrown (sic) the baby on the ground and started running. I chased the accused and caught hold of him, but the accused pushed me and tried to escape. I beat the accused with hands. I raised cries. On hearing the cries, the inmates of the nearby houses woke up and came out. In the meanwhile, my brother and his friends namely Narsimha Raju (LW6) (P.W. 5), Md. Amjad (LW10) (P.W. 6), and S. Vinod Kumar (LW11) came there on bikes in search of the child. As we all caught the accused, he told us that he committed rape on the child and killed her and pleaded for mercy. Then we found (name of the deceased child purposefully withheld) with bleeding from her vagina and lips. We also found two cell phones by the side of (the deceased child). Even before start searching for the child, we alerted police by calling 100. After we caught hold of the accused and found the dead body of the child, Hanamkonda police arrived there. Thereafter, on our information, my parents, my sister, Rachana and others came there. Police took the accused to the police station. We shifted the (deceased child) to Maxcare hospital, Hanamkonda. The doctors after*

examining the (deceased child) declared that she was brought dead. The doctors also told us that a child was subjected to rape”.

The prosecution had also produced the electronic evidence in the form of the recording CCTV, which was installed in the house of N. Raju (P.W. 5). In order to prove the veracity and authenticity of the electronic evidence, the prosecution examined K. Indraneel (P.W. 4), and N. Raju (P.W. 5). The prosecution also submitted the DVD as M.O. 2 containing the video that was recorded on 19.06.2019 about 3:00 a.m. In the DVD, according to K. Indraneel (P.W. 4), *“one can see a man proceeding with a baby on his shoulder towards Congress Bhavan, a person chasing him on a bike, further chasing the same person on foot by a person including beating him with hands, gathering of some more persons, two more persons coming out of their houses without shirts and further proceedings of two persons towards Congress Bhavan”.* Thus, even the electronic evidence fortifies the case of the prosecution. For, it corroborates the testimony of J. Bharath Kumar (P.W. 1).

N. Raju (P.W. 5) also informs the Court that *“in the month of January, 2019, I got arranged four (4) CC TV cameras on my house. In the morning hours of 20.6.2019, ACP Hanamkonda and some other police officials came to our house along with CC TV Technician and checked the CC TV footage in my DVR. With my permission, the said police with the help of*

technician extracted the footage that was recorded on the early hours of 19.6.2019. ...Police extracted the CC TV footage from my DVR in the presence of panch witnesses under a cover of panchanama. Police obtained my signature also on the panchanama”.

Shaik Niyazuddin (P.W. 9), one of the tenants of N. Raju (P.W. 5), informs the court that *“I am staying in a room in the ground floor as a tenant in the house of N. Raju (P.W. 5). Our owner, N. Raju (P.W. 5) is staying in the third floor of his house. Our owner arranged CC TV cameras on his house. Around 3:00 a.m., on 19.6.2019 (on intervening night 18/19.6.2019), on hearing some sounds, I woke up and came out of the room. I found some people beating the accused herein at a distance of 100 meters from our house. My presence can be seen in the MO2 DVD (MO2 is exhibited in the open court), where the witness can be seen with a lungi without shirt. The other person (in MO2 DVD), who came out of the house with lungi without shirt is another tenant of P.W. 5. On the right side of our house, I noticed a small girl with injuries on the ground. The police present there took the accused into their custody”.*

Furthermore, the prosecution has established the fact that the deceased child was rushed to Maxcare Hospital by J. Bharath Kumar (P.W. 1) and other witnesses. Dr. O. Ravi Raj (P.W. 14) examined the injuries on the body of the deceased child. According to Dr. O. Ravi Raj (P.W. 14), he discovered *“bleeding present around perineal region”.*

According to him, this was grievous injury. Moreover, according to this witness, *“by the time of my examination, the patient was unresponsive state with no central pulse and the same was informed to J. Narsimha Raju (LW6) who brought her”*. Moreover, *“the baby (the deceased child) was brought dead to our hospital. As the patient was unresponsive state, I examined her, noted the details and finally declared her as brought dead in between 3:45 and 4:00 a.m.”*

Dr. K. Sathish (P.W. 16) had examined the accused, and found certain injuries upon him such as laceration of 2 x ½ x ½ cms size on the face, and small abrasions over the face and hands. Therefore, this witness corroborates the statement of J. Bharath Kumar (P.W. 1) that the accused was assaulted by him and others when they caught hold of him at the dead of the night.

In order to firmly establish the live link between the accused and the alleged offence, the vaginal swabs, the clothes of the deceased child, and the blood sample of the accused were sent to the FSL for its analysis. According to DNA Report (Ex. P. 30), dated 05.07.2019, the FSL had examined the DNA present in the cotton swabs and the Glass slides and the inner *banian* (undershirt) of the deceased child with the blood samples collected from the accused. The FSL had concluded that *“the DNA present in the cotton swabs, Glass slides, and in the banian of the baby are matching with*

the DNA profile of Polepaka Praveen @ Pawan, and conclusively proves that they are of the same biological origin”.

Moreover, according to the Post-Mortem Report (Ex. P. 28), the cause of death of the child was smothering along with vaginal laceration (vaginal tear). Hence, the child had died a homicidal death. Therefore, through cogent and convincing, oral and documentary evidence, the prosecution has succeeded in establishing its case against the appellant.

Although Mr. Dominic Fernandes has vehemently pleaded that there are certain discrepancies, both with regard to the time when the electronic data was transferred from DVR to the DVD, and with regard to whether such transfer was made directly from DVR to DVD, or was made by using a Pen drive or not? But, such minor discrepancies do not cast a shadow of doubt on the veracity of the prosecution case.

Moreover, merely because according to the potency certificate (Ex. P. 29), the circumference of the flaccid penis of the accused is more than the circumference of the erect penis, it is a minor discrepancy, which does not destabilize the case of the prosecution. Therefore, neither of these two minor discrepancies is fatal to the prosecution case.

Noticing the fact that the first page of the FSL Report (Ex. P. 31) was not sent to this court, this court has called for the same from the learned trial court. The first page clearly indicates that item No. 1 is four cotton swabs; item No. 2 is

three glass slides with dried smear; and item No. 3 is a white and light blue color *banian* with dark brown stains. Therefore, merely because the said page was missing from the record sent by the learned trial court to this court, again does not demolish the prosecution case.

As far as the merits of the case are concerned, the prosecution has firmly established its case against the appellant. For, all the circumstances unerringly point towards his guilty. None of the circumstances establish his innocence. Therefore, the prosecution has succeeded in interlinking all the circumstances so as to form a complete chain leading to the conclusion that the appellant and only the appellant could have committed the offence of rape and murder of the deceased child.

This takes us to the most crucial question of this case: whether the learned trial court is legally justified in imposing death penalty on the appellant or not?

The imposition of a capital punishment has taxed the imagination of the judicial mind. For, the imposition of the death penalty has moral implications, legal consequences, and societal effects. Therefore, the world over the common man, the Legislators and the Judges are divided over the issue whether, in fact, death penalty should continue to be inflicted by way of punishment upon an accused or not?

The abolitionists of death penalty have pleaded that to give life or to take away life is a divine function, which cannot be bestowed upon mere mortals. Moreover, there is no empirical data to prove that imposition of death penalty, indeed, leads to decline in the commission of the offence for which death penalty has been prescribed as one of the punishments. Comparative studies in the United States have clearly shown that the crime rate in the States which permit capital punishment, and the crime rate in the States which prohibit capital punishment, more or less, remains the same. Thus, according to abolitionists of capital punishment, the argument of deterrent effect of the capital punishment is a highly misplaced and presumptive argument. The abolitionists further argue that the modern civilization has traveled far away from the primitive idea when Hammurabi, the first lawgiver of the West, had prescribed the punishment as “*an eye for an eye, a tooth for a tooth*”. Therefore, punishment is no longer meant to be retributive in nature. Merely because the life of a victim has been lost, it would not justify in depriving the life of the criminal. For revenge, in whatever disguise, cannot be claimed by a modern civilized society.

This School has further contended that the philosophy behind ‘punishment’ is to reform the criminal. By imposing the capital punishment, both the society and the State admit their failure in reforming the offender. However, every effort

should be made by the society and the State to reform the criminal while he is incarcerated.

This School further pleads that the imposition of the death penalty is highly disproportionate to the offence. For, while the deceased may have died an instant death, or while the deceased may have suffered certain trauma prior to his death, but by keeping the prisoner on death row for number of years, the pain and agony brought about by the frightful thought that he may die tomorrow, inflicts unimaginable pain and agony on the accused. Therefore, death penalty is cruel and unusual punishment. Such punishment cannot be sanctified by a Constitution which values the dignity of life.

Lastly, the abolitionists of death penalty claim that even a prisoner has a right to live with dignity. Although his personal liberty may be cribbed, cabined and confined, but nonetheless, his right to breathe his life as an individual should continue to exist. It is also their theory that considering the futility of imposing the capital punishment, about 160 countries have deleted the provisions of death penalty from their penal laws. Thus, the majority of the countries in the world do not have capital punishments in their statutes. Therefore, India needs to re-think about the imposition of the capital punishment, and to realign itself with the majority of the nations of the world. According to the abolitionists of capital punishment, India is a vibrant Democratic Republic. It is a Democratic Republic, which is

known for its liberalism, and for its human rights record. The existence of capital punishment in the Indian Penal Code is a blotch on the pristine image of the nation as the largest democracy in the world.

On the other hand, the retentionists of capital punishment have stressed on the fact that those who violate the law in such a gruesome manner which shocks the conscience of the society, those who defy the command of the law, those who rattle the society from within, deserve no mercy. The society has a right to deny life to those who continue to pose a danger to the wellbeing, and to the tranquility of the society at large.

This school of thought equally argues that the punishment prescribed should be so harsh as to deter the potential offender from committing the crime. Therefore, the prescription of the death penalty is a preventive measure taken by the society, rather than, a curative one. Therefore, the imposition of capital punishment is justified, even if it is the harshest punishment that can be inflicted upon a human being.

Lastly, that in the Indian context, the debate with regard to the imposition or non-imposition of death penalty, is a futile discussion. For, death penalty has been prescribed as a punishment not only under Indian Penal Code, but even under specialized laws like the Protection of Children from

Sexual Offences Act, 2012. Despite the challenge to the constitutional validity of Section 302 IPC, in the case of **Bachhan Singh (supra)**, the Hon'ble Supreme Court has upheld its constitutional validity. Therefore, to listen to the abolitionists of death penalty is to waste one's time.

To impose the death penalty or not to impose the death penalty is an existentialist question faced by the courts. However, in a series of cases, the Hon'ble Supreme Court has resolved this dilemma. In the case of **Bachan Singh (supra)**, the Hon'ble Supreme Court has clearly opined that where life imprisonment is the rule, death penalty is the exception. Death penalty can be imposed only in "the rarest of the rare cases". Therefore, the courts are required to consider the issue whether the case falls within "the rarest of the rare" category or not?

In the case of **Bachan Singh (supra)**, the Hon'ble Supreme Court had clearly opined that before death penalty can be imposed upon an alleged offender, the courts must consider the circumstances of the crime, and of the criminal. Therefore, the courts need to perform a balancing act between the aggravating and the mitigating circumstances surrounding a case without fettering judicial discretion. The Hon'ble Supreme Court has illustrated some of the aggravating circumstances such as (a) pre-planned manner of the execution of the crime, (b) calculated cold-blooded murders, (c) murders diabolically conceived and cruelly

executed, (d) the weapon used and the manner of their use, and (e) the horrendous feature of the crime and the helpless state of the victim.

In paragraph 202 of the Report, quoting Dr. Chitale, the Hon'ble Supreme Court has given the following illustrations for "the aggravating circumstances" as under:-

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

(b) if the murder involves exceptional depravity; or

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

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

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

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

In paragraph 206 of the Report, the Hon'ble Supreme Court has illustrated as to what would be the "mitigating circumstances" which would be kept in mind as under:-

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

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect unpaired his capacity to appreciate the criminality of his conduct.

In the case of **Machhi Singh** (supra), the Hon'ble Supreme Court had opined that in order to determine whether the case falls within the category of "rarest of the rare", which would invite the imposition of a death sentence, the court should consider two issues:

(i) Is there something uncommon about the crime, which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(ii) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favor of the offender?

Moreover, in the said case, the Hon'ble Supreme Court had laid down five "tests" which should be applied while considering the possible imposition of the death penalty. They are as under:-

1) *When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or dastardly manner so as to arouse intense and extreme indignation of the community.*

2) *When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward, or cold-blooded murder for gains of a person vis-à-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course of betrayal of the mother land.*

3) *When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.*

4) *When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.*

5) *When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.*

The Hon'ble Supreme Court had also opined that the court is required to take a holistic view while considering these factors, and should not choose merely one test to be applied while ignoring the other factors. The Apex Court had clearly opined that *“if upon taking an over all global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test, for the rarest of the rare case, the circumstances of*

the case are such the death sentence is warranted, the court would proceed to do so”.

The principles and the factors prescribed by the Hon’ble Supreme Court have been followed consistently by the judiciary. Recently, in the case of **Accused ‘X’ v. State of Maharashtra**⁸, the Hon’ble Supreme Court has opined:

It is established that sentencing is a socio-legal process wherein a judge finds an appropriate punishment for the accused considering factual circumstances and equities. Sentencing in India, is a midway between judicial intuition and strict application of rule of law. In light of the fact that the legislature provided for discretion to the Judges to give punishment, it becomes important to exercise the same in a principled manner. In India, sentencing is mostly led by “guideline judgments” in the death penalty context, while many other countries like United Kingdom and United States of America, provide a basic framework in sentencing guidelines. A strict fixed punishment approach in sentencing cannot be acceptable, as the Judge needs to have sufficient discretion as well”.

The Hon’ble Supreme Court further held as under:-

The Supreme Court may not lay down a “definitive sentencing policy”, which is rather a legislative function. However, the courts in India have addressed this problem in a principled manner having regard to judicial standards and principles. These judicially set principles not only serve as instructive guidelines, but also preserve the required discretion of the trial Judges while sentencing. Such an effort has already been initiated by the Supreme Court, in Sunil Dutt Sharma, (2014) 4 SCC 375, when the sentencing guidelines evolved in the context of death penalty were applied to a lesser sentence as well. However, achieving sentencing uniformity may not only require judicial efforts, but even the legislature may be required to step in.

⁸ (2019) 7 SCC 1

The Apex Court further held as under:-

In any case, considering that a large part of the exercise of sentencing discretion is principled, a Judge in India needs to keep in mind broad purposes of punishment, which are deterrence, incapacitation, rehabilitation, retribution and reparation (wherever applicable), unless particularly specified by the legislature as to the choice. The purposes identified above, mark a shift in law from crime-oriented sentencing to a holistic approach wherein the crime, criminal and victim have to be taken into consideration collectively.

Therefore, while sentencing the appellant the above noted principles have to be kept in mind.

Unfortunately, a young child has been raped and killed. The rape and murder of a young child does disturb the conscience of the society, and of the court. For, the loss of a child is an irreparable loss to the parents. Further, such a person, if not incapacitated, would continue to be threat to the society at large. Thus, the court should fulfill the cry for justice of the victim's family; the court must protect the society from such a looming danger.

However, simultaneously, the court should objectively weigh the evidence to see if the imposition of the death penalty is the only option for the court, or a punishment can be chosen which would incapacitate the culprit, would deter others from committing such a crime in future, which would permit the society to reform the culprit, and would still fulfill the need of justice of the society.

In the present case, although a murder has occurred, it was not a pre-planned murder. In fact, there is no evidence to show that the appellant had entered the house of the complainant with the sole object of killing the child. The fact that the appellant had tried to snatch a chain, on an earlier occasion, the fact, that in the present case, he had picked up two mobile phones from the scene of the crime, clearly indicates that he had entered the house with the intention to commit theft, and not to commit the murder of the child. Hence, the element of “pre-planning” is conspicuously missing.

Moreover, the appellant has smothered the child during the act of rape so as to stop the child from crying out loud. But he has neither harmed, nor mutilated the child’s body after killing her. According to the prosecution, he had wrapped the body in a towel and was carrying the dead body when he was intercepted by J. Bharath Kumar (P. W. 1). Hence, his intention was to make the evidence of his illegal act disappear. Hence, his action is neither “*extremely brutal*”, nor “*grotesque*”, nor “*diabolical*”, nor “*revolting*”, nor “*carried out in a dastardly manner so as to arouse intense and extreme indignation of the community*”. Thus, the case does not fulfill the tests prescribed in the case of **Bachan Singh** (supra) and **Machhi Singh** (supra). Therefore, the case does not fall within the extreme category of “rarest of the rare”.

The learned Trial Court has noted that the appellant did not show any “remorse” for his action. But J. Bharath Kumar (P. W. 1) claims in his testimony that the appellant apologized for his action when he was caught. Moreover, at the earliest opportunity of recording of the statement of the accused under Section 228 of Cr. P. C., the appellant confessed to having committed the crime. In the case of **Gounder** (supra), the Hon’ble Supreme Court has held that confession is an expression of remorse. Thus, the learned trial court is unjustified in concluding that the appellant did not show any remorse.

Furthermore, admittedly the appellant is a young man, only twenty-five years old; undoubtedly, he belongs to a backward caste; undoubtedly, he is an illiterate; undoubtedly, working as a coolie, he is poor; admittedly, he has never committed a grievous crime. The only crime he had ever committed allegedly was to attempt to commit theft. Hence, the prosecution has not produced any evidence to show that the appellant is beyond reformation. Moreover, by imposing the death penalty, the society and the state admit that they are incapable of reforming the accused. But a young life has to be given a chance to reform himself/herself. The state and the society must try their level best to reform an accused. By throwing a young life into the mouth of death, the society and the state abdicate their primary duty to reform the offender. Hence, while sentencing the appellant a via-media has to be

discovered to reform the appellant, but to protect the society from him.

Section 302 IPC merely prescribes either life imprisonment or death. However, keeping in mind the nuances and the varied circumstances of the case, the Hon'ble Supreme Court has laid down other categories of punishment available to the courts. Thus, presently it is not necessary that the accused should be subjected either to life imprisonment or to death. In the case of **Gurvail Singh @ Gala v. State of Punjab**⁹, the Hon'ble Supreme Court has held that although, in practical terms, the life imprisonment means the imprisonment for fourteen years, but the same can be extended by judicial sentencing to thirty years with or without parole. Moreover, in the case of **Nand Kishore v. State of Madhya Pradesh** (Crl.A. Nos.88-89 of 2019, decided on 18.01.2019), the Hon'ble Supreme Court has held that an accused can be sentenced to imprisonment with or without the benefit of remission. Therefore, while imposing a punishment, the court has four different options with regard to the punishment to be inflicted upon an accused convicted under Section 302 IPC.

The two new terms of punishment prescribed by the Apex Court balance the conflict between the right of the accused, and cry for justice by the society. Furthermore,

⁹ (2013) 2 SCC 713

these two freshly created options equally balance the reformatory theory of punishment on one side, and of the right of the society to be protected from a potential menace. Hence, while selecting the punishment, the other options, available between life imprisonment and death sentence, should also be considered by the court.

Furthermore, it may be beneficial for the criminal justice system to select the middle path between life and death, and to incarcerate the accused either for thirty years without parole, or for the rest of his life without remission. By selecting such a middle path, the criminal justice system acknowledges both the significance of a life, and simultaneously protects the society from volatile and dangerous persons. Moreover, it gives a chance to the society and the State to try to reform an accused to the best of the ability of the society, and the State. Neither the society, nor the State should readily admit that it has failed to reform a person. The endeavour of the society, and the State should be to recondition the psychology of an accused, and to make him a productive member of the society at large. Even while a prisoner is incarcerated, he can be reformed to the extent that he can be employed within the jail administration, and that he becomes a role model for the other under-trial convicted prisoners, as a person who has taken on a new avatar.

Further, the middle path also permits the court to balance the twin aspects of Article 21 of the Constitution of

India; while it limits the personal liberty of the accused, it does not deprive the accused of his life. Therefore, such a term of punishment would, indeed, be in consonance with Article 21 of the Constitution of India — an Article which has been held to be the heart and sole of the Constitution of India.

Hence, while considering the different aspects of this case, this court upholds the conviction of the appellant for offences under Sections 302, 449, 376A, 376AB, 363, 379 of IPC, and under Sections 5(i) r/w Section 6 and 5(m) r/w Section 6 of the Protection of Children from Sexual Offences Act, 2012 but reduces the sentence for the offence under Section 302 IPC from one of capital punishment to life sentence with the rider that the appellant shall not be granted any remission and shall not be released till his last breath. The fine amount imposed for the offence under Section 302 IPC is hereby confirmed. The other sentences imposed by the learned trial court for the other offences mentioned hereinabove are also confirmed. The sentences shall run concurrently.

In the result, the Criminal Appeal is partly allowed; the Referred Trial is answered accordingly.

RAGHVENDRA SINGH CHAUHAN, CJ

A. ABHISHEK REDDY, J

12th November, 2019
 Note: LR copy be marked.
 (By order) Tsr