



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 23.11.2021

Delivered on : 03.12.2021

CORAM

**THE HONOURABLE MR.JUSTICE S.VAIDYANATHAN
AND**

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

R.T. (MD)No.3 of 2021

and

CRL.A. (MD)No.300 of 2021

R.T. (MD)No.3 of 2021:

State Rep. by
The Inspector of Police,
All Women Police Station,
Keeranur.

(Crime No.11 of 2019)

... Complainant

-vs-

Danish Patel

... Respondent

Referred Trial under Section 366 of the Code of Criminal Procedure on the judgment of the learned Sessions Judge, (Mahila Court), Pudukkottai, in Spl.S.C.No.6 of 2020, dated 18.02.2021.

For Complainant :: Mr.Hassan Mohammed Jinnah
State Public Prosecutor

For Respondent :: Mr.N.Pragalathan

CRL.A . (MD)No.300 of 2021:

Danish Patel

... Appellant/Sole Accused

-vs-

State Rep. by
The Inspector of Police,
All Women Police Station,
Pudukkottai District.

(Crime No.11 of 2019)

... Respondent/Complainant

Criminal Appeal filed under Section 374 (2) of the Code of Criminal Procedure against the judgment of the learned Sessions Judge, (Mahila Court), Pudukkottai, in Spl.S.C.No.6 of 2020, dated 18.02.2021.



For Appellant :: Mr.N.Pragalathan
For Respondent :: Mr.Hassan Mohammed Jinnah
State Public Prosecutor

COMMON JUDGMENT

S.VAIDYANATHAN, J.

AND

G.JAYACHANDRAN, J.

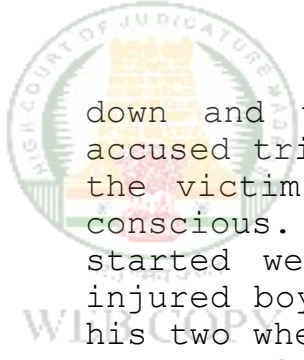
The reference in R.T.(MD) No.3 of 2021, is made by the learned Sessions Judge, (Mahila Court), Pudukkottai, under Section 366 Cr.P.C., seeking confirmation of capital punishment imposed on the accused. CrI.A.(MD)No.300 of 2021, is filed by the accused challenging the conviction and sentence imposed on him and both the matters are heard together and disposed of by this common Judgment.

2.Danish Patel, aged about 32 years (2019), S/o.Amrendra Patel, who is the sole accused in Spl S.C.No.6 of 2020, on the file of Mahila Court at Pudukkottai, was found guilty of offences under Sections 363 and 302 of I.P.C. and Sections 5(i) r/w 6(1), 5(j) (iv) r/w 6(1) and 5(k) r/w 6(1) of the Protection of Children from Sexual Offences Act [hereinafter referred to as 'the POCSO Act'], vide judgement dated 18.02.2021 by the trial Court.

3.He was sentenced to undergo life imprisonment for the offence under Section 302 of I.P.C., 7 years rigorous imprisonment for the offence under Section 363 IPC and death sentence for the offences under Sections 5(i) r/w 6(1), 5(k) r/w 6(1) and 5(j) (iv) r/w 6(1) of the POCSO Act, subject to confirmation by this Court in terms of Section 366 Cr.P.C. Accordingly, the Referred Trial(MD)No.3 of 2021 seeking confirmation of the death sentence is before us along with the appeal filed by the sole accused being aggrieved of the conviction and sentence.

The case of the prosecution:-

4.On 18.12.2019 the de-facto complainant Pugalenthil (PW-1) came to Keeranur All Women Police Station along with the accused Danish Patel and a two wheeler bearing Registration No.TN-55-AV-6568 and gave a complaint (Ex.P-1) alleging that, while he was standing at the bus stop of the Odukur Bazaar, at about 2.00 p.m. he saw the accused taking the mentally challenged victim boy aged about 17 years towards Kottapalam Road in the above mentioned two wheeler. Thereafter, he went to his home to have lunch. At about 2.30 p.m. he received a call from Chitra (PW-3), wife of Murugesan, that somebody doing something to the victim boy near the bush. Hearing this, P.W.1 along with the neighboring residents Selvaraj and Manikandan rushed to the place where Chitra was grazing her cattle. On the information of Chitra, they went to the graveyard area and inside Kaliyaperumal Dhoor Dal field, they saw the victim boy lying face



down and the accused near the victim boy. On seeing them, the accused tried to flee. They caught hold of the accused. On examining the victim, they found injuries all over his body and he was not conscious. After sometime, the boy regained consciousness and started weeping showing his bleeding anus and the accused. The injured boy was taken to the hospital. They brought the accused and his two wheeler to the Police Station for action against the accused person, who had committed penetrative sexual assault on a mentally challenged minor boy.

5.Smt.Sumaiyabanu, (P.W.15) Sub-Inspector of Police attached to All Women Police Station, Keeranur, received the complaint and registered F.I.R. (Ex.P.20) in Crime No.11 of 2019 under Section 363 and 5(k) r/w 6 of the POCSO Act, 2012 on 18.12.2019 at 18.00 hours. The investigation of the case was taken up by Smt.Kavitha, Inspector of Police (P.W.16). The confession statement of the accused was recorded. His clothe were seized under Mahazar. She arrested the accused and produced him before the learned Judicial Magistrate for remand.

6.In the hospital, the Investigation Officer recorded the statement of the victim and same was video-graphed by P.W.14. While the investigation was underway, the victim boy died in the hospital on 06.01.2020 at 15.10 hours. Hence, the Sections were altered to Sections 363 and 302 IPC and Section 5(i) r/w 6(1), 5(j)(iv) r/w 6 (1) and Section 5(k) r/w 6(1) of the POCSO Act. On the request by the Investigation Officer, the learned Judicial Magistrate recorded the statements of Chitra, Pugazhendhi and the father of the victim boy under Section 164 of Cr.P.C. on 08.01.2020 (Ex.P.2 to Ex.P.5). The statements of other witnesses were recorded under Section 161 of Cr.P.C. The accident report from Keeranur Government Hospital (Ex.P.11) and the postmortem report from Pudukkottai Government Hospital (Ex.P.14 and Ex.P.15). On completion of the investigation, final report against the accused filed.

7.After serving copies of document relied by the prosecution, the below charges were framed by the Special Court against the accused.

Charge 1: For kidnapping the victim minor boy on 18.12.2019 from lawful guardianship with intention to commit sexual offence, thereby, committed offence under Section 363 of I.P.C.

Charge 2: For committing aggravated penetrative sexual assault on the victim boy by inserting a stick into the anus of the victim boy and penis into the anus of the victim boy, thus, caused injury to the sexual organ of the victim boy, thereby, committed offence under Section 5(i) r/w. Section 6 (1) of the POCSO Act.

Charge 3: For committing aggravated penetrative sexual assault on the victim boy knowing well he is mentally



boy and penis into the anus of the victim boy, thus, caused injury to the sexual organ of the victim boy, thereby, committed offence under Section 5(k) r/w Section 6 (1) of the POCSO Act.

Charge 4: In continuation of the above charges, for causing the death of the victim boy on 06.01.2020 due to the injuries caused by committing aggravated penetrative sexual assault on the victim boy, thereby, committed offence under Section 5(j)(iv) r/w. Section 6 (1) of the POCSO Act.

Charge 5: For causing death of the victim boy in the manner stated as above, thereby, committed an offence under Section 302 of IPC.

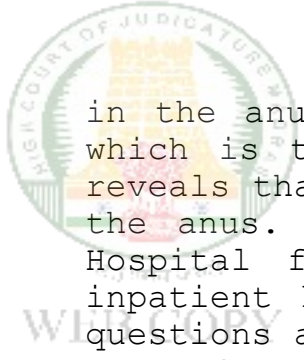
8.The accused denied the charges and claimed to be tried. The prosecution to prove the charges had examined 16 witnesses. Marked 32 exhibits and 10 Material Objects. No witness and no exhibits on behalf of the defence.

9.The trial Court after considering the evidence before it had concluded that the accused is guilty of the above charges and for the proven charges under the POCSO Act, the accused has to be hanged till death, subject to confirmation of this Court. Insofar as the I.P.C. offences are concerned, life sentence and fine of Rs 20,000/-, in default, 2 years simple imprisonment under Section 302 of I.P.C. and 7 years rigorous imprisonment and fine of Rs.10,000/-, in default, 2 months simple imprisonment under Section 363 of I.P.C., were imposed.

10.Thus, the judgment of the trial Court imposing death sentence is before this Court for confirmation and to test whether the prosecution has proved the guilt of the charges framed and if so whether the death penalty is the appropriate sentence.

11.The State through the learned Public Prosecutor, submitted that, it is a case of aggravated penetrative assault and murder of a mentally challenged minor boy. The accused taking advantage of the victim's incapacity of understanding, had committed the crime to satisfy his sexual lust contrary to nature. The victim was seen with the accused by P.W.1 when the accused was taking the victim boy in the two wheeler. Subsequently, P.W.3 had seen them together while she was grazing cattle near the graveyard. In her testimony, P.W.3 has vividly deposed that suspecting the accused, a Hindi speaking man, bring the mentally challenged boy of that locality to the secluded place, she enquired the accused. Not being satisfied with his reply and sensing danger to the victim boy, she called P.W.1 over her cellphone and informed about this. Soon thereafter, P.W.1 and others rushed to the spot. They saw the boy lying unconscious with bleeding from his anus and the accused trying to flee on seeing them. The accused was apprehended, the victim was taken to the hospital. P.W.9 the duty doctor. who medically examined the victim

<https://hccservices.courts.mpp.gov.in/hccservices>

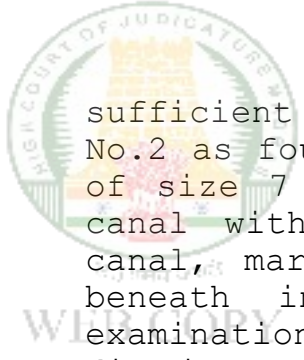


in the anus and it was bleeding. The Accident Register [Ex.P.11], which is the contemporaneous document maintained by the Hospital, reveals that nail scratches on the face of the boy and bleeding from the anus. The victim boy was referred to Pudukkottai Government Hospital for further treatment and P.W.12, who admitted him as inpatient had clearly deposed that the boy did not answer to his questions and he was mentally challenged person. That apart, the boy was referred to the Department of Psychiatry in Pudukkottai Hospital and on examination of the victim boy on 24.12.2019, P.W.8 has certified that the victim boy is having intellectual disability (severe) and its percentage is 80. Through Ex.P.12 and the testimony of the School Headmistress (P.W.10) the age of the victim boy was proved as 17 years at the time of incident and his date of birth is 14.11.2002.

12. Therefore, the learned State Public Prosecutor submitted that the prosecution has proved its case beyond doubt through ocular evidence and medical evidence that the accused kidnapped the minor from the lawful guardian to the field of P.W.6, near the graveyard and committed aggravated penetrative sexual offence. The evidence of P.W.1 and P.W.3 is cogent and stands un-impeached. The accused was caught red handed at the place of occurrence and handed over to the Police. The Doctor has opined that the injury found in the anus has caused septicemia. Due to anal canal perforation Septicemia has occurred and due to Septicemia, the victim had died. There is clear nexus to cause - anal canal perforation and the effect - death. The trial Court has rightly held that the accused has committed the act of aggravated penetrative sexual offence leading to death of the victim boy. Hence, submitted that the finding of the trial Court that the accused committed murder of the mentally challenged boy, aged about 17 years, is well founded and to be confirmed. The learned Public Prosecutor submitted that the crime committed by the accused is grave and crude, therefore, proportionate to the gravity of the crime, the accused has to be punished and the punishment must be not only be retributive and reformatory, but also have a deterrent effect.

13. The learned State Public Prosecutor, Mr. Hasan Mohammed Jinnah besides submitting the facts of the case, also fairly placed the sentencing policy evolved through Indian and Foreign case laws regarding capital sentence *vis-a-vis* offence against children and the litmus test laid to identify rarest of the rare case.

14. The learned counsel appearing for the accused / appellant submitted that the trial Court erred in not properly appreciating the contradictions in the ocular evidence and the medical evidence regarding the injuries found on the body of the victim. The trial Court ignored to consider the fact that the victim boy died 19 days after the alleged incident. The final opinion (Ex.P.15) of the postmortem Doctor says that, "the death is due to septicemia consequent upon anal canal perforation consequent upon Injury No.2, which is



sufficient to cause death in ordinary course of nature''. The Injury No.2 as found in the postmortem certificate Ex.P.14 is a laceration of size 7 x 0.25 cm present over six 'o' clock position of anal canal with yellowish foul smelling pus oozing out through anal canal, margins of injuries are irregular with contusion present beneath injury along pelvic floor muscles. In the cross-examination, the postmortem Doctor (P.W.13) admits that a person may die in ordinary course due to septicemia. Therefore, the learned counsel for the accused would submit that, the cause of death is not the injuries alleged to have caused by the accused, but due to septicemia caused due to medical negligence. The trial Court erred in ignoring 19 days interval between the date of occurrence and the date of death.

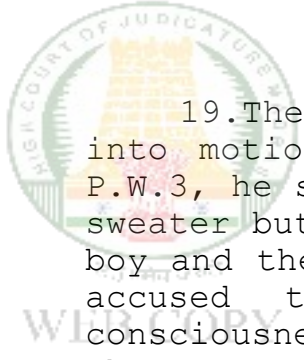
15.The learned counsel for the accused/appellant submitted that the trial Court in its judgment holding the accused guilty for the grave offence of committing aggravated penetrative sexual assault and murder is without adequate evidence and in any event, the case does not fall within the meaning of rarest of the rare case to impose capital punishment.

16.The submissions made by the learned Public Prosecutor and the learned counsel for the accused heard. The impugned judgment of the trial Court together with the depositions of P.W.1 to P.W.16 and Ex.P.1 to Ex.P.32 perused.

17.This is a case of direct evidence and the accused being caught red handed at the place of crime, where the victim boy was lying unconscious with bleeding in anus. The duty of the Court is to meticulously scrutinize the evidence of the alleged eyewitnesses to rule out any falsification or embellishment. In the instant case, the accused is from North India and the witnesses for the prosecution have no prior animosity or enmity with the accused to depose falsely against him.

The gist and the assessment of evidence:

18.The prosecution witness P.W.11 - Kannaiyan has deposed that he know the accused. At the time of occurrence, the accused was working in his crusher company (Velan Crusher) as Ittachi Operator. The accused hails from Gujarat. He is working in Tamil Nadu for nearly 10 and 12 years. So, the accused can talk Tamil. Karuppaiah (P.W.7) had deposed that he know the accused and he is working in the crusher at Kullathur along with him. He had deposed that on the fateful day, the accused borrowed his two wheeler bearing Registration No.TN-55-AU-6568 Hero Splendor (M.O.1) and left the working place at about 12.30 hours. In or around 2.00 p.m. P.W.1 had seen the accused near Keeranur Bazaar taking the victim in the two wheeler. About 2.30 p.m., Smt. Chitra [P.W.3] on seeing the accused with the victim, had enquired the accused. Having not satisfied in his response and getting suspicion about him, she has



19.The evidence of P.W.1 de-facto complainant, who set the law into motion reveals that when P.W.1 went to the spot along with P.W.3, he saw the victim boy lying unconscious, his pant removed and sweater buttons unfastened. The accused was standing near the victim boy and the two wheeler (M.O.1) parked nearby. On seeing them, the accused to fled, but they caught him. After regaining consciousness, the victim had started weeping showing his anus and the accused. P.W.1 has noticed bleeding in the anus of the victim boy. P.W.1 has identified the dress of the accused as well the dress of the victim boy and they are marked as M.O.2 to M.O.5.

20.This witness has given statement before the learned Judicial Magistrate under Section 164 Cr.P.C. and same is marked as Ex.P.2. Under Section 157 of the Evidence Act, the previous statement of the witness to the Magistrate is admissible in evidence for corroboration or contradictions of the later testimony. In this case, the previous statement of P.W.1 (Ex.P.2) recorded by the learned Judicial Magistrate under Section 164 of the Cr.P.C. substantially in corroboration to the subsequent testimony. The witness was subjected to cross-examination and the testimony of this witness stay unassailed.

21.The testimony of P.W.3 Chitra substantially synchronizes with the testimony of P.W.1. She has alerted the Villagers immediately on suspecting the accused taking the mentally challenged boy with him to a secluded place. She is a cattle grazer, native of that village. Her testimony is natural and inspires the confidence of the Court without an iota of doubt. The testimony of P.W.1 and P.W.3, who are the star witnesses to the crime in this case, had deposed naturally and cogently, corroborating each other.

22.To rule out any false implication of the accused in this case, the testimony of P.W.7 and P.W.11 is taken for consideration. The employment of the accused in the Crusher Company is spoken by P.W.7 and P.W.11. Lending the two wheeler M.O.1 to the accused on the day of occurrence, is spoken by P.W.7. The evidence of these two witnesses read along with the testimony of P.W.1 and P.W.3, lead to the irresistible conclusion that the act of aggravated penetrative sexual assault, by the accused, causing bodily harm to the sexual organ of the victim boy is the cause for the death of the mentally challenged minor boy, the son of P.W.2.

23.In the instant case, it is essential to take note of the fact that the date of occurrence is 18.12.2019 about 2.30 p.m. and the date of death is 06.01.2020 about 1.30 p.m. Therefore, to hold the accused guilty of committing culpable homicide amounting to murder or otherwise, the medical records and the testimony of the Doctors, who treated or clinically examined the victim is crucial.

24.On examining, we find the Accident Register maintained at <https://hcrs.mca.gov.in/services/> is marked as Ex.P.11 and the Doctor, who recorded

Ex.P.11, is examined as P.W.9. From the said exhibit and the testimony related to the Accident Register, it is sufficient to hold that the victim was conscious when brought to the Hospital for treatment and he was not responding to the command. Nail mark on his face and external anal injury with bleeding noticed. Since there was no adequate equipments in the said Hospital to treat the victim, he was referred to Pudukkottai Government Hospital. At Pudukkottai Hospital on 23.12.2019, the statement of the victim boy recorded and videographed. On 24.12.2019, during the course of the treatment, the victim boy was clinically examined by the Psychiatry Doctor Elamaran (P.W.8). He on clinically examining the victim had certified that the boy suffers 80% intellectual disability (Ex.P.9). The victim boy had responded to the questions of P.W.8 through sign language. The boy died on 06.01.2020. The Postmortem Certificate (Ex.P.14) discloses the following antemortem external and internal injuries:-

'External Examination (Injuries):-

1. A black scabbed linear abrasion of size 10 cm. present over back of left thigh lower one third.

2. Laceration of size 7 x 0.25 cm present over six 'o' clock position of anal canal with yellowish fowl smelling pus oozing out through the anal canal, margins of injury are irregular with contusion present beneath injury along pelvic floor muscles. Anal swab collected and sent for bacteriological analysis.

Internal Examination:-

Scalp : Unremarkable.

Skull : Unremarkable.

Brain and Meninges : Unremarkable.

Mouth, Pharynx and Esophagus : Unremarkable.

Neck : Hyoid bone intact.

Thorax : Chest wall, Ribs/Sternum and Cartilage, Lungs:- Bilateral lung adherent to chest wall. There was greenish yellow pus flaks around bilateral lungs and interlobar fissures. Each Lung weights 720 and 600 gms. On cut section, there was postero basal bronchopneumic consolidation with exudation of yellowish green pus pockets. Thoracic cavity contains 500 ml of straw colored fluid, portion of lungs send for histopathology examination report.

Heart : Unremarkable, uncut heart sent for histopathology examination.

Peritoneum: Contains 1.5 L of greenish yellow fluid mixed with greenish yellowish fowl smelling pus present over all organs of abdomen, swab collected and sent for bacteriological analysis.

Liver : Yellowish green pus present over on cut section congested, portion sent for



chemical analysis, portion sent for histopathology examination.

Stomach : Contains 500 ml of yellowish fluid, stomach with its contents sent for chemical analysis.

Spleen : Unremarkable.

Intestine : Portion of small intestine with its contents sent for chemical analysis, perforation of size 0.5 x 0.5 c.m. present over posterior wall of anal canal 7 c.m. above anal orifice corresponding to injury No.2.

Kidneys: Congested, Half of each kidney sent for chemical analysis and portion for histopathology examination.

Bladder : Empty, Walls Unremarkable.

Spinal Column and Cord : Not Exposed.

Opinion:

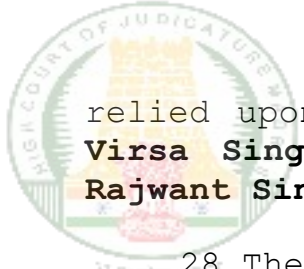
The cause of death in this case would be given after receipt of chemical, histopathology examination and bacteriological study reports."

Thus, from the medical records, it is clear that the perforation of size 0.5 x 0.5 cm present over the posterior wall of anal canal 7 cm above anal orifice is the cause for septicemia. The said perforation is consequent upon the lacerated wound size 7 x 0.25 cm. present over six 'o' clock position of anal canal. The said lacerated wound and perforation is caused by the accused by inserting the Thuvarai stalk [M.O.8]. The insertion of Thuvarai stalk into the anal of the victim boy is spoken by P.W.1 and P.W.3. This Court finds no reason to disbelieve the evidence of these two witnesses. Therefore, though there is interval of 19 days from the date of commission of crime and the death, as pointed out by the learned Public Prosecutor, the link between the cause and the effect is without any intervention. Septicemia due to the perforation cannot in this case be taken as an independent intervening factor or aggravating factor.

25. It is evident that the perforation in the intestine found 7 cms. above anal orifice is due to forcible insertion of the stalk [M.O.8] into the anal of the victim boy by the accused.

26. The trial Court taking into consideration the evidence regarding the mental disability of the victim, his age and the nature of injury caused to the victim, has held that in view of the dual presumptions under Sections 29 and 30 of the POCSO Act in respect of act and culpable mental state, the accused is liable to be punished with death sentence.

27. That apart, the trial Court has concluded that the case falls under Section 300(3) of I.P.C. hence it is culpable homicide amounting to murder punishable under Section 302 of I.P.C. Accordingly, the trial Court has imposed life sentence to the accused. To arrive at the said conclusion, the trial Court has



relied upon the four-point test laid by the Hon'ble Apex Court in **Virsa Singh vs. State of Punjab [AIR 1958 SC 465]**, followed in **Rajwant Singh vs. State of Kerala [AIR 1966 SC 1874]**.

28.The finding of the trial Court that the death caused by the accused is a culpable homicide amounting to murder is assailed in the appeal filed by the accused and the learned counsel for the accused contented that the trial Court has drawn the presumption clauses under the POCSO Act to the I.P.C. offence (Section 302 of I.P.C.) and erred in holding it is culpable homicide amounting to murder, ignoring the failure of the prosecution to positively prove the intention to cause death or the intention of causing such bodily injury as is likely to cause death or sufficient in the ordinary course of nature to cause death or the said injury was caused by the accused knowingly it will cause death. P.W.13, the postmortem Doctor has categorically stated that the cause of death was septicemia, therefore, imposition of life sentence for offence under Section 302 IPC is legally and factually incorrect.

29.To appreciate the above submission, it is necessary to read Section 299 of I.P.C., which explains what is culpable homicide.

'299.Culpable homicide.-

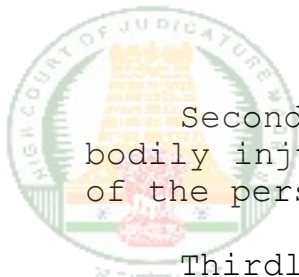
Whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

Explanation 1.—A person who causes bodily injury, to another who is labouring under a disorder, disease or bodily infirmity, and thereby accelerates the death of that other, shall be deemed to have caused his death.

Explanation 2.—Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death, although by resorting to proper remedies and skilful treatment the death might have been prevented.

Explanation 3.—The causing of the death of a child in the mother's womb is not homicide. But it may amount to culpable homicide to cause the death of a living child, if any part of that child has been brought forth, though the child may not have breathed or been completely born.'

30.Section 300 of I.P.C. says culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or



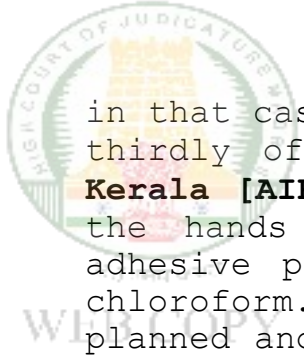
Secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or

Thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or

Fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

31.The trial Court has brought the case under Section 300(3) of I.P.C. Therefore, for more clarity and brevity to understand when Section 300(3) of I.P.C. gets attracted, this Court wish to rely upon the following passage in the subsequent judgment of the Hon'ble Apex Court rendered in **Kikar Singh vs. State of Rajasthan [1993 AIR 2426]**, which covers the two judgments relied by the trial Court.

32.In **Virsa Singh vs. State of Punjab [AIR 1958 SC 465]**, a leading forerunner on the point, the Hon'ble Apex Court held that the prosecution must prove that bodily injury is present. The nature of the injury must be proved. Thirdly, it must be proved that there was an intention to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended. Once these three elements are proved to be present, the Court must further proceed with the enquiry and find that the prosecution has proved that the injury described is sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender. Once these four elements are established by the prosecution the offence of murder falls under clause thirdly of Section 300 of I.P.C. It matters not that there was no intention to cause death or that there was no intention even to cause death in the ordinary course of nature. Once it is proved that the intention to cause the bodily injury actually found to be present, the rest of the enquiry is purely objective to be deduced by inference. But where no evidence or explanation is given about why the accused thrust a spear into the abdomen of the deceased with such force that it penetrated the bowels and three coils of the intestines came out of the wound and that digested food oozed out from cuts in three places, it would be perverse to conclude that he did not intend to inflict the injury that he did. The question whether there is intention or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the accused intended to inflict the injury in question. It was held



in that case that the offence was one of murder falling under clause thirdly of Section 302 of I.P.C. In **Rajwant Singh v. State of Kerala [AIR 1996 SC 1874]**, the bodily injury consisted of tying up the hands and the feet of the victim, closing the mouth with adhesive plaster and plugging the nostrils with cotton soaked in chloroform. All these acts were deliberate acts which had been pre-planned and, therefore, this Court held that the acts satisfied the objective tests of clause 3 of Section 300 of I.P.C. and were held to be sufficient in the ordinary course to cause death. Accordingly, it was one punishable under Section 302 of I.P.C.

33. With the above clarity on Section 302 (3) of I.P.C., if the facts of the instant case is put to the four point test enunciated by the Hon'ble Apex Court in **Virsa Singh case** [cited supra], the prosecution has proved the first two tests namely, the bodily injury and the nature of injury. The third test whether the accused intend to cause that particular injury namely, perforation of size 0.5 x 0.5 cm. present over posterior wall of anal canal 7 cm. above anal orifice corresponding to the lacerated wound of size 7 x 0.25 cm. present over 6 'o' clock position of anal canal, the Doctor who conducted postmortem has opined that the septicemia is cause for death. The postmortem certificate and the explanation given by the witness indicates that septicemia occurred due to the perforation on the posterior wall of the anal canal 7 cm. above anal orifice consequent to the lacerated wound on the orifice. Thus, it is clearly said that the cause of death is septicemia and septicemia was due to the injuries noted externally and internally on the anal canal. P.W.13 the postmortem Doctor has further deposed that, the tissues near the anal canal are very soft and easily tearable. So, it is possible for perforation of intestine if any foreign body is inserted into anal canal.

34. The trial Court, referring the opinion of the postmortem Doctor had concluded that death would not have occurred, but for Injury No.2 caused to the deceased victim boy which had developed complications, like, infection and eventually resulting in death.

35. The evidence before the Court if tested for offence of murder in isolation, the explanation given by the Doctor indicates that the external and internal injuries by itself not sufficient to cause death, but for septicemia. The accused's intention to cause the said bodily injuries was not to cause death, but to satisfy his lust. The death was after 19 days and it was due to septicemia. But, then, insertion of a foreign body [M.O.8] into the anal canal which has caused the lacerated wound of size 7 cm. in 6 'o' clock position at orifice and a perforated wound of size 0.5 x 0.5 cm. about 7 cm. above orifice of anal canal is the cause for septicemia which is sufficient in the ordinary course of nature to cause the death.



36.Thus, the prosecution able to establish that the death was caused due to the injury, but failed to prove that the particular injury was intended by the accused.

37.Clause 3 of Section 300 of I.P.C. as explained by the Hon'ble Apex Court to punish under Section 302 of I.P.C. the bodily injury caused must be the injury intended to be inflicted. Whereas, to punish under Section 304 (i) of I.P.C., it is sufficient to prove intention to cause such bodily injury as is likely to cause death. (Emphasis added)

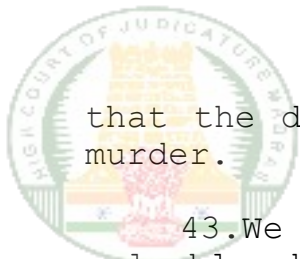
38.In this case, the insertion of stalk into the anal canal is the intentional act and such act is likely to cause death if septicemia develops as in this case. The prosecution though able to prove that the victim died due to septicemia and septicemia is sufficient in the ordinary course of nature to cause the death, it has failed to prove that the injury caused to the victim with the intention to cause that particular injury.

39.To attract Clause 3 of Section 300 of I.P.C., the act must be done with the intention to cause bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause the death.

40.The trial Court erred in misinterpreting the testimony of the Postmortem Doctor [P.W.13], who has explained in his deposition that the septicemia is sufficient in the ordinary course of nature to cause death. The Doctor has not opined that lacerated wound or the perforation in the anal canal is sufficient in the ordinary course of nature to cause death.

41.Therefore, we hold that the death of the victim fall under the definition of culpable homicide not amounting to murder and deserve punishment under Section 304 (ii) of I.P.C., since the death is caused without any intention to cause death and such bodily injury is not likely to cause the death *per se* but for the infection caused.

42.Yet another reason for this Court to arrive at this conclusion is the Videograph [M.O.10] recorded on 20.12.2019 while the statement of the victim boy was recorded. In the said Video, we see the boy sitting between his father and mother on the hospital bed and answering the questions through sign whenever he is able to understand the question or else keeping quiet. When asked to walk, he was able to walk few steps very slowly. The boy was able to sit on his back comfortable on 20.12.2019 *i.e.*, two days after the occurrence. Therefore, the yellowish fowl smelling pus oozing out through anal canal and septicemia noticed during postmortem must have been the cause of infection developed later. Hence, it is held



that the death of the victim is culpable homicide not amounting to murder.

43. We hasten to add and make it clear that, we hold it is not a culpable homicide amounting to murder only for the restricted purpose of deciding the charge for offence under Section 302 of I.P.C. Whereas, in respect of the POCSO Act, the legislatures in Section 5(j)(iv) of the POCSO Act have consciously not used the expression 'murder' but had used the expression 'death'. Therefore, it is clear from the language employed in the special Act, namely, the POCSO Act, to prove the charge under Section 5(j)(iv) of the POCSO Act, it is sufficient for the prosecution to prove that the accused had committed penetrative sexual assault on a child, which caused death of the child. It is not material whether such death is culpable homicide amounting to murder or not amounting to murder.

44. In this case, as discussed earlier, the prosecution has proved beyond doubt that the victim child was subjected to aggravated penetrative sexual assault by causing hurt in the sexual organ, the said hurt in turn, has caused the death of the victim child. Also, the witness for prosecution has categorically proved the mental disability of the victim child. Thus, the act of the accused falls under three different categories of aggravated penetrative sexual assault enlisted under Section 5 of the POCSO Act, the punishment for all these categories is prescribed under Section 6 (1) of the Act, as 'Rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death'.

45. The scheme of the POCSO Act is to protect children from sexual offence and to punish the perpetrator of the crime against the children. The act has categorized five kinds of sexual offences against children. They are listed below in the descending order, based on the gravity of crime:

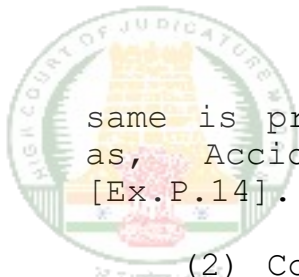
- (i) Aggravated penetrative sexual assault,
- (ii) Penetrative sexual assault,
- (iii) Aggravated sexual assault,
- (iv) Sexual assault, and
- (v) Sexual harassment.

46. Section 5 (a) to 5 (u) of the POCSO Act enlists 21 forms of aggravated sexual assault and Section 6 prescribes the following 3 kinds of punishment for aggravated sexual assault.

- (i) Rigorous Imprisonment for a term of not less than 20 years.
- (ii) Imprisonment for life.
- (iii) Death.

47. In the instant case, the accused had caused,

<https://hcservices.ecourts.gov.in/hcservices/> injury to the sexual organ of the victim child. The



same is proved through the eyewitnesses and medical records, such as, Accident Register [Ex.P.11] and Postmortem certificate [Ex.P.14].

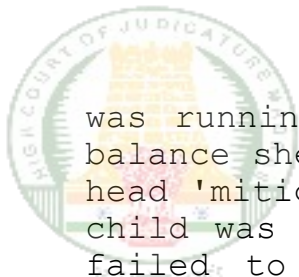
(2) Committed the crime taking advantage of the child's mental disability. The same is proved through P.W.1 to P.W.5, P.W.8 to P.W.10 and P.W.12 and the mental ability certificate [Ex.P.9] issued by P.W.8.

(3) The penetrative sexual assault has caused the death of the victim child. The same is proved through the evidence of P.W.13 and the Postmortem Certificate [Ex.P.14].

48.The trial Court has drawn a balance sheet to compare the aggravating circumstances and mitigating circumstances to justify the death sentence. The aggravating circumstances to impose death sentence as shown in the said table are:

Sl.No.	Aggravating circumstances
1.	The Diabolic nature of the crime, the manner of committing the crime, the aggravated penetrative sexual assault (homosex) on the mentally retarded boy child and the causing the injuries on the anus and body of the deceased using Thuvarai stalk which had punctured the intestine resulting in septicemia. The accused having committed the brutality after previous planning.
2.	The horrific act reflecting the inhuman extent to which the accused had gone to satisfy his lust.
3.	The incident having shooked the conscience of the society at large. (committing homosex with a mentally retarded boy child).
4.	The Injury No.2 and the injury in the intestine of the victim boy child, shows the suffering of the helpless and mentally retarded boy child and the accused having had a mental culpable state of mind had kidnapped the victim boy child and had executed the crime.
5.	If the accused is given less sentence, he would be a threat to the Society. There is no probability of the accused that he would not commit criminal acts of violence and there is no probability of the accused being reformed and rehabilitated. If lesser punishment is given, it would shake the confidence of the public in the administration of criminal justice system and the Society would lose faith in the rule of law.
6.	The prosecution evidence is cogent, corroborative reliable, trustworthy and not shaken during cross-examination and there is no residual doubt in the prosecution case.

49.The sole mitigating circumstance shown in favour of the accused by the learned Trial Judge is, the age of the accused who

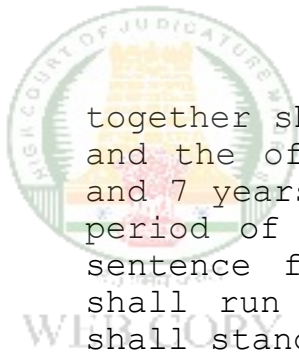


was running 32 years then. Whereas the trial Court while drawing balance sheet has miserably failed to add two more factors under the head 'mitigating circumstances', namely, (a) the death of the victim child was after 19 days due to septicemia, and (b) the prosecution failed to prove that the accused caused that particular injury (perforation in intestine - anal canal) with intention to cause death. If these two factors are added in the balance sheet under the head 'mitigating circumstances', it would have outweighed the aggravated circumstances and needle of the balance will turn towards the scale of mitigating circumstances.

50. In the result, the judgment of the trial Court is interfered and modified as below:-

Offence	Conviction and sentence by the trial Court	Conviction and sentence by this Court
302 of I.P.C.	Life imprisonment and fine of Rs 20,000/-, in default, simple imprisonment for 2 months.	Modified. Convicted and sentenced under Section 304 (ii) of I.P.C. Sentenced to undergo 10 years rigorous imprisonment and pay a fine of Rs 20,000/-, in default, to undergo simple imprisonment for 2 months.
363 of I.P.C.	Rigorous imprisonment of 7 years and fine of Rs.10,000/-, in default, to undergo simple imprisonment for 2 months.	Confirmed.
5(i) r/w 6(1) of the POCSO Act	Sentenced to death and be hanged by neck till his death.	Modified. Rigorous imprisonment for a term of twenty years and pay a fine of Rs 10,000/- in default, to undergo 6 months simple imprisonment.
5(j) (iv) r/w 6(1) of the POCSO Act	Sentenced to death and be hanged by neck till his death.	Modified. Rigorous imprisonment for a term of twenty years and pay a fine of Rs 10,000/- in default, to undergo 6 months simple imprisonment.
5(k) r/w 6(1) of the POCSO Act	Sentenced to death and be hanged by neck till his death.	Modified. Rigorous Imprisonment for a term of twenty years and pay a fine of Rs 10,000/- in default, to undergo 6 months simple imprisonment.

51. Taking note of the gravity of the offence, this Court orders the person to serve sentence in respect of offence under the POCSO Act



together shall run concurrently (Rigorous Imprisonment for 20 years) and the offence under the I.P.C. (10 years for 304 (ii) of I.P.C. and 7 years for 363 of I.P.C.) shall together run concurrently, the period of sentence for offence under the POCSO Act and period of sentence for the offence under the I.P.C. (20 years + 10 years) shall run consecutively. The period of sentence already undergone shall stand set off under Section 428 of Cr.P.C.

52.In respect of disposal of the material objects, the trial Court order stands confirmed. The order of the trial Court regarding compensation to the victim family also shall stand confirmed.

53.With the above modification, CrI.A.(MD)No.300 of 2021 is partly allowed and the reference in R.T.(MD) No.3 of 2021 is answered accordingly.

Sd/-

Assistant Registrar (CS-II)

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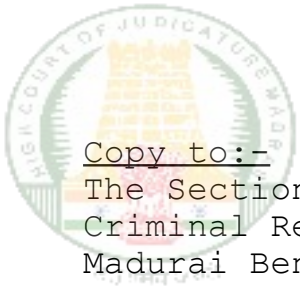
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Sub Assistant Registrar(CS)

smn2

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Pudukkottai.
- 2.The Judicial Magistrate,
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- 3.The District Collector,
Pudukkottai.
- 4.Director General of Police,
Mylapore,
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- 5.The Inspector of Police,
All Women Police Station,
Keeranur.
- 6.The Superintendent,
Central Prison,
Trichy.
- 7.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
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common Judgment in

R.T.(MD) No.3 of 2021 and
Criminal Appeal (MD) No.300 of 2021

**Delivered on
03.12.2021**

SM(CO)

GC(09.12.2021) 18P 11C