

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

DR 03 of 2021

With

CRA 146 of 2021

Asgar Chowdhury

Vs.

State of West Bengal

For the Appellant : Mr. Sekhar Kr. Basu, Ld. Sr. Adv.
 Mr. Soubhik Mitter, Adv.
 Mr. Syed Nasirul Hossain, Adv.
 Ms. Rajnandini Das, Adv.

For the State : Mr. Rudradipta Nandy, Ld. APP
 Ms. Sonali Das, Adv.
 Ms. Sreeparna Das, Adv.

For the de facto : Md. Sabir Ahmed, Adv.
 Complainant Md. Abdur Rakib, Adv.
 Mr. Biswajit Sarkar, Adv.

Hearing Concluded on : December 02, 2022
 Judgement on : December 12, 2022

DEBANGSU BASAK, J.:-

1. A Death Reference and an appeal have been heard analogously as they emanate out of the same police case and the same judgement of conviction dated March 4, 2021 and the order of sentence dated March 5, 2021. By the impugned judgement of conviction and the order of sentence, the learned

Additional Sessions Judge, Bolpur, Birbhum in Sessions Trial No. 09 (March)/2019 arising out of Special (POCSO) Case No. 10 of 2018 has convicted the appellant in CRA No. 146 of 2021 under Sections 376A and 302 of the Indian Penal Code, 1860 and awarded a sentence of death.

2. A lady had been brutally raped. She had died out of the injuries suffered during the rape. She had been brought dead to the hospital. The father of the victim had lodged a police complaint on April 12, 2018 stating that, on April 12, 2018 at around 10 o'clock in the morning the victim went to the rural hospital to visit a doctor. At around 11:30 AM when he was returning home he heard a noise coming from inside the hospital whereupon he had entered the hospital. Going there, he had found the victim, who was his daughter, lying dead in a bleeding condition inside the hospital. He had learnt from the civic police on duty that the appellant had admitted his daughter, the victim, to the hospital when she was already dead and then the appellant fled away. He had claimed that, the appellant enticed the victim and took her to the upper floor of the abandoned quarter inside the hospital premises and raped and killed her.

3. The written complaint of the father of the victim had been registered as a first information report being FIR No. 43/18 dated April 12, 2018 under Sections 376A/302/109/506 of the Indian Penal Code, 1860. On completion of the investigations, the police had submitted a charge sheet against the appellant. The court had framed charges against the appellant on March 11, 2019 under Sections 376A/302/506 of the Indian Penal Code, 1860 and under Section 6 of the Protection of Children Against Sexual Offences Act, 2012. The appellant had pleaded not guilty and claimed to be tried.

4. At the trial, the prosecution had examined 20 witnesses. The prosecution had tendered documentary evidence being Exhibit 1 to 17. The appellant had been examined under Section 313 of the Criminal Procedure Code. In such examination, the appellant had claimed to be innocent. He had declined to adduce any defence witness.

5. Learned senior advocate appearing for the appellant has contended that, the prosecution failed to prove the case beyond reasonable doubt. He has referred to the evidence of PW 2, particularly the cross examination thereof and submitted that, PW 2 is not a reliable witness. Conviction

should not be based on such unreliable oral testimony of PW 2. He has drawn the attention of the court to the evidence of PW 13 and submitted that, he was declared hostile. Therefore, the so-called corroboration of the evidence of PW 2 by PW 13 is suspect.

6. Referring to the evidence of PW 9, learned senior advocate appearing for the appellant has submitted that, in his examination in chief, such witness stated that, the police compelled him to state what the police tutored him. He has submitted that, PW 9 has not been declared hostile by the prosecution. Therefore, the evidence of the prosecution which was not declared hostile by the prosecution, is binding upon the prosecution. Therefore, since PW 9 had stated that, he was tutored by the police, no reliance should be placed on his evidence or at least, such evidence should not support the prosecution. If at all, the evidence of PW 9 should be taken to support the case of the defence.

7. Learned senior advocate appearing for the appellant has submitted that, there is no evidence as to how and when the victim reached the abandoned building. The version of the appellant of forcefully taking the victim to the abandoned building has not been established by any evidence. It is

unlikely that, any person would have committed forceful aggravated penetrative sexual assault on a girl at a place which is located in a busy area and near a public thoroughfare without any member of the public intervening.

8. Learned senior advocate appearing for the appellant has submitted that, no injury was found on and around the mouth of the victim. In the event, the victim was indeed raped, she would have tried to raise an alarm and in that case, there would be injury marks on her mouth since the appellant, in normal course of things, would have tried to stop the appellant from shouting. There is no evidence that the victim had raised an alarm. A male protection had been seized from the place of occurrence. It is highly unlikely that, the appellant would have used a male protection if he was to commit the brutal rape as contended on behalf of the prosecution.

9. Learned senior advocate appearing for the appellant has submitted that, PW 8 stated that, the appellant and the victim were having an affair. Therefore, the prosecution had failed to establish that, the victim was forcefully taken away and raped.

10. Learned senior advocate appearing for the appellant has submitted that, there are discrepancies regarding the time of the incident. Moreover, if the victim had voluntarily gone to the abandoned quarter, and if they had engaged themselves in consensual sexual escapades then, Section 376A of the Indian Penal Code, 1860 is not attracted.

11. Relying upon **2020 volume 2 Supreme Court Cases (Criminal) 382 (Md. Mannan Alias Abdul Mannan vs. State of Bihar)**, **2015 volume 3 AICLR 927 (Supreme Court) (Kalu Khan vs. State of Rajasthan)**, **2016 volume 3 CCrLR (Supreme Court) 108 (Laloo Tiwari & Ors. vs. State of Bihar)**, **2013 volume 3 Supreme Court Cases (Criminal) 402 (Shankar Kishanrao Khade vs. State of Maharashtra)**, **2014 volume 1 Supreme 528 (Birju vs. State of Madhya Pradesh)**, **2019 volume 20 Supreme Court Cases 102 (CBI vs. Mahagu Binjewar & Ors.)**, **2012 volume 1 CCrLR (Supreme Court) 285 (Rajesh vs. State (Govt. of NCT))** and **2012 volume 8 Supreme Court Cases 43 (Ajay Pandit alias Jadgish Dayabhai Patel & Anr. vs. State of Maharashtra)**, **All India Reporter 1980 Supreme Court 898 (Bachan Singh vs. State of Punjab)**, **2003 Supreme Court Cases (Criminal) 1595 (Ram Pal vs. State of Uttar**

Pradesh), 2005 Supreme Court Cases (Criminal) 653 (Surendra Pal Shiv Balapal vs. State of Gujarat), 2005 Supreme Court Cases (Criminal) 657 (State of Maharashtra vs. Man Singh), 2005 Supreme Court Cases (Criminal) 674 (CBI & Ors. vs. Paltan Mallah & Ors.), 2007 volume 12 Supreme Court Cases 230 (Aloke Nath Dutta & Ors.) and 2008 Volume 3 Supreme Court Cases (Criminal) 262 (Des Raj vs. State of Punjab), 2014 Volume 20 Supreme Court Cases (Criminal) 626 (Dharam Deo Yadav v. State of Uttar Pradesh), 2014 Volume 2 Supreme Court Cases (criminal) 417 (Ashok Debbarma @ Achak Debbarma v. State of Tribura), 2014 Volume 2 Supreme Court Cases (criminal) 266 (Anil vs. State of Maharashtra), 2015 Volume 4 Supreme Court Cases 467 (State of Uttar Pradesh vs. Om Prakash), learned senior advocate appearing for the appellant has submitted that, the sentence of death is an exception. The facts and circumstances of the present case do not demonstrate that the crime complained of is of the rarest of rare category. Therefore, according to him, death penalty should not be awarded, in the event, the appellant is not acquitted.

12. Learned advocate appearing for the State has referred to the facts of the present case. He has submitted that, on April 12, 2018, the victim went to the rural hospital for treatment. The appellant used to tease and irritate the victim for a long time, had followed her to the hospital and in a planned manner managed to get her at one abandoned place and committed forceful sexual intercourse resulting in the death of the victim. He has submitted that, the appellant and the parents of the appellant had been proceeded against. The parents of the appellant had been acquitted from the charge under Section 506 of the Indian Penal Code, 1860 by the learned trial judge.

13. Learned advocate appearing for the State has submitted that, the post-mortem report being Exhibit 9, the inquest report being Exhibit 13, and the deposition of PW 14, PW 16 and the seizure list dated April 19, 2018 being Exhibit 2 by which the innerwear of the appellant was seized from the house of the appellant have proved beyond reasonable doubt that the appellant raped the victim using force resulting in her death. The innerwear of the appellant seized by Exhibit 2 had bloodstains. He has referred to the deposition of the PW 2, PW 8, PW 9 and PW 13. He has submitted that, PW 2 had

corroborated the statements recorded under Section 164 of the criminal procedure code. He has relied upon **2012 volume 2 Supreme Court Cases (criminal) 440 (Bhajju @ Karan Singh vs. The State of Madhya Pradesh)** and **2014 volume 6 Supreme Court Cases 59 (Periyasami vs. The State)** in support of his contentions.

14. Relying upon **2013 volume 1 Supreme Court Cases 205 (C. K. Jaffer Sharief vs. State through CBI)** learned advocate for the State has submitted that, an individual's criminal culpability would be attached if such individual broke the law. In the facts of the present case, the prosecution had proved beyond reasonable doubt the culpability of the appellant in raping and murdering the victim.

15. Learned advocate for the State has supported the quantum of punishment awarded. He has contended that, the brutal nature of the crime in the instant case is shocking and is definitely coming under the bracket of rarest of rare case where a minor was murdered by forceful sexual intercourse.

16. The father of the victim had lodged the police complaint. He had deposed as PW 1. He had claimed that the age of the victim was 17 years 10 months at the time of the incident. The incident had happened on April 12, 2018. He

had stated that the appellant previously used to taunt the victim and heckled her in different ways. He had seen the same with his own eyes. He had complained about the same to the parents of the appellant when they threatened to kill him and his family. He had stated that the victim went to the hospital on that date to visit a doctor. She had been suffering from ear pain. He had identified the seizure list by which the School certificate of the victim was seized by the police.

17. In cross examination, PW 1 had stated that, PW 2, who was a civic police, told him that the appellant took the victim to the hospital and fled away leaving the victim. He had also stated in cross examination that, the victim used to complain that the appellant was disturbing and teasing her. The victim had complained about the same many a times and reported the same to him for about 14/15 times. He had reported the matter to the parents of the appellant.

18. The civic volunteer who was present at the relevant point of time had deposed as PW 2. He had stated that, on April 12, 2018, he was performing his duties at the subject hospital. It was about 11/11:30 A.M when three persons had called him to an abandoned house situated on the backside of the quarters. He had gone there and found the appellant was

sitting on the last step of the staircase with the victim lying on his lap. The victim was bleeding in the lower portion and eyes were open and fixed. He had identified the appellant in court. He had stated that, the victim was taken inside the hospital immediately. Appellant had accompanied the victim to the hospital and thereafter fled. He had been examined by the police and his statement was recorded under Section 164 of the criminal procedure code before the learned Magistrate He had identified such statement and tendered it as Exhibit 1.

19. One of the witnesses to the seizure list dated April 19, 2018 being Exhibit 2 had deposed as PW 3. One witness to the seizure list dated April 12, 2018 which was marked as Exhibit 3 had deposed as PW 4. The police constable, who bought the dead body of the victim for post-mortem examination had deposed as PW 5. He had identified the dead body before the autopsy surgeon. The wearing apparel of the deceased had been seized by a seizure list which was marked as Exhibit 5. The sub- inspector of police who witnessed the Seizure on April 13, 2018 which was marked as Exhibit 5 had deposed as PW 6. Another police personnel who had witnessed the Seizure on April 13, 2018 being Exhibit 5 had deposed as PW 7. A minor had been examined as PW 8. He had stated

that the police tutored him to make a statement before the court. He had been declared hostile. He has not added any substance to the case of either the prosecution or the defence.

20. The ambulance driver had deposed as PW 9. He had stated that the police tutored him before making the statement under Section 164 of the criminal procedure code. He had however stated that, he found the appellant coming out of the hospital. He had identified the appellant in court. He had also stated that he came to know the name of the appellant on the date of the incident itself.

21. A relative of the victim had deposed as PW 10. She has stated that, the mother of the victim once told her that the appellant was creating disturbance to the victim. She had advised that such facts should be brought to the knowledge of the parents of the appellant. She had gone to the house of the appellant and told his parents and requested them to control the appellant and not to disturb the victim. The parents of the appellant did not pay any heed to her by saying that their son could do anything. She had visited the hospital upon receiving the news of the death of the victim.

22. The brother-in-law of the victim had deposed as PW 11. He had stated that, the appellant used to disturb the

victim. He had talked to the appellant and requested him not to disturb the victim but the same was in vain. Such talk was held about 3 to 4 days before the death of the victim. He had also told the father of the appellant about the disturbance created by the appellant to the victim when he replied that, the appellant could do whatever he liked. On receiving the news of the death of the victim, he had rushed to the hospital.

23. The mother of the victim had deposed as PW 12. She had stated that, the appellant used to tease the victim. The victim had reported the same to her. She has said that, on Monday, she went to the parents of the appellant and reported the matter. They had told her that their son will do whatever he likes. They had also threatened her with murder. On the date of the incident, on receiving the information, she had rushed to the hospital. She had found the lower part of the victim to be stained with blood. She had heard from PW 2 that the appellant committed rape and then killed the victim. She had identified the appellant and his parents in court.

24. PW 13 had called the civic police after seeing an incident. He had found the victim lying at the abandoned hospital. The civic police had come and took the victim to the hospital. There, the doctor had declared the victim as brought

dead. He had been declared hostile by the prosecution and was cross-examined. He had denied in his cross-examination by the prosecution that, he told the police that, the appellant sought his help and that, he told the appellant to wait and thereafter called the civic police.

25. The doctor who had conducted the post-mortem of the victim had deposed as PW 14. He had stated that, he found five injuries on the body of the victim. He had stated that, in his opinion, the death was due to effects of urogenital injuries as noted in the post-mortem report and that the injuries were ante mortem in nature. He had also stated that, there was evidence of using forceful sexual intercourse. According to him, there was evidence of bleeding and that led to the death of the victim. He tendered his post-mortem report which was marked as Exhibit 9. In his cross-examination, he had stated that, there was no other cause of death except urogenital injuries. He had stated that, due to forceful sexual copulation, the injuries noted on the body of the victim were caused.

26. The police constable who had witnessed the seizure prepared by the seizure list marked as Exhibit 10, had deposed as PW 15. The doctor who had examined the victim when she was brought that to the hospital on April 12, 2018

had deposed as PW 16. In his examination in chief, he had stated that, he examined the victim at about two 11:40 AM. He had prepared a report and informed the same to the jurisdictional police station. He had tendered such a report which was marked as Exhibit 11.

27. In his cross-examination, PW 16 had stated that, he came to know about the appellant from the local people. He did not obtain any signature of the appellant as the victim was brought by the appellant. He found that the appellant had left the place just after keeping the dead body of the victim. He had seen the appellant. He had asked the local people to bring the appellant in front of him but, the appellant had fled away. Prior to that interaction, he had stated that, he was not acquainted with the appellant. He had recorded the incident in the register. In response to a query of the court as to whether, he could say whether the appellant was present in the courtroom or not, he had stated that, he cannot say.

28. The person who had written the formal complaint had deposed as PW 17. He had identified his handwriting. He had stated that, he had written the complainant as per the dictation of the father of the victim who deposed as PW 1. The written complaint was tendered and marked as Exhibit 12.

29. The sub- inspector of police who had held the inquest over the dead body of the victim and who witnessed the seizure which was marked as an Exhibit 5 had deposed as PW 18. The inquest report had been tendered and marked as Exhibit 13.

30. The second investigating officer had deposed as PW 19. He had submitted the charge sheet. The first investigating officer had deposed as PW 20. He had stated about the conduct of the investigations. He had identified the accused persons in court. The defence in cross-examination could not elicit anything favourable to them.

31. The appellant had been examined under Section 313 of the Criminal Procedure Code. He had claimed innocence and stated that the incident was absolutely fabricated. The investigation was not proper. He had declined to adduce any defence witness.

32. Since a charge had been framed under Section 6 of the Act of 2012 the age of the victim is required to be determined. Although, a seizure list claimed that, the admission certificate of the victim to the school had been seized, such certificate was not produced at the trial. Birth certificate of the victim had not been tendered in evidence at the trial. The father of

the victim had claimed that, the victim was seventeen years ten months old at the time of the incident.

33. In the absence of cogent evidence with regard to the age of the victim being established conclusively at the trial, it would be improper to hold that the victim was a minor at the date of the incident. The learned Trial Judge, therefore had correctly held that, since the age of the victim was not established conclusively, the victim need not be treated as a minor. Moreover, even going by the statement of the father of the victim, the age of the victim was near about a time where the victim can be said to be an adult.

34. Two plausible views can be taken with regard to the issue of the age of the victim on the basis of the evidence that the prosecution had led at the trial. One plausible view is that, the age of the victim has not been conclusively established at the trial. The other plausible view is that, the age of the victim was seventeen years ten months on the basis of the oral testimony of the father of the victim being PW 1. The learned Trial Judge had taken the view that, the prosecution had failed to establish the age of the victim conclusively. The view of the learned Trial Judge with regard to the age of the victim not being established conclusively by the prosecution at the

trial, being a plausible view and since we do not have sufficient material on record to arrive at the finding that, such view returned by the learned Trial Judge is vitiated by perversity. We deem it appropriate to accept the view of the learned Trial Judge with regard to the age of the victim.

35. The post-mortem report of the victim being Exhibit 9 and the deposition of the post-mortem doctor being PW 14 had established that, the victim suffered five several injuries. The injuries that have been noted in the post mortem report being Exhibit 9 are as follows: –

“1) Laceration of anterior and posterior vaginal wall with abrasions and contusion at the corresponding site with evidence of bleeding.

2) Evidence of tear of hymen at 5 and 7 O’ Clock, torned margins are red, sharp and bleed on touch.

3) Redding of labia majora and Labia Minora.

4) Anal orifice dilated, lax with abression and contusion of anal mucosa with mucosal tear at places.

5) Bruise 1.8 inch / 1.2 inch diffusely involving right side of neck at the soft tissue level over hyoid region.”

36. The victim had been subjected to forceful sexual intercourse. The death was due to the effects of urogenital injuries as noted in the post-mortem report being Exhibit 9, ante mortem in nature. Exhibit 9 and the deposition of PW 14

had established that, the victim died out of the injuries suffered due to the brutal manner in which she was raped.

37. The appellant had been seen with the victim after the incident with the victim on his lap by PW 2. The presence of PW 2 and the factum of PW 2 seeing the appellant with the victim on his lap stands corroborated by the evidence of PW 13. PW 13 had been declared hostile by the prosecution. Before PW 13 had been declared as hostile, he stated that, he called PW 2 from the hospital because there was some incident with 6/7 person standing there. He had stated that PW 2 came there and took the victim to the hospital. PW 13 was not cross-examined on the issue of him calling PW 2 to the spot.

38. PW 16 who as the doctor posted at the hospital had attended on the victim when she was brought to the hospital stated that, the appellant brought the victim to the hospital. He had filed a report on April 12, 2018 being Exhibit 11 with the Police when he stated that the appellant brought the victim to the hospital.

39. Therefore, on the evidence of PW 2, PW 13 and PW 16, it can be said that, the appellant had brought the victim to the hospital. The victim had been brought dead.

40. The appellant had been last seen with the victim. The appellant had brought the victim to the hospital where the victim was declared brought dead by PW 16. The appellant had a history of teasing and disturbing the victim as transpiring from the evidence of PW 1, PW 10, PW 11 and PW 12.

41. An inner wear of the appellant had been seized by the seizure list being Exhibit 2. The inner wear of the appellant had blood stains. One male protection had been seized from the place of occurrence by the seizure list being Exhibit 3. The seized items along with the conduct of the appellant prior to the incident and his post incident conducts have established that, the appellant was involved in raping the victim.

42. The nature of injuries that the victim had suffered at the hands of the appellant, the brutal penetrative sexual assault on her, and her death due to the injuries suffered justifies award of punishment under Section 376 A/302 of the Indian Penal Code, 1860. However, the quantum of sentence has to be evaluated in the facts and circumstances of the present case.

43. The Trial Judge had awarded death penalty to the appellant considering the brutality of the offence and the

involvement of the appellant therein. The learned Trial Judge had taken into consideration various authorities of the Hon'ble Supreme Court in awarding death penalty to the appellant. However, the learned Trial Judge did not embark upon an exercise in evaluating the mitigating circumstances and aggravating circumstances. The learned Trial Judge did not return a finding that the appellant was beyond reformation.

44. The issue as to whether, death penalty faults the basic structure of the Constitution has been answered in **1980 Volume 2 Supreme Court Cases 684 (Bachan Singh v. State of Punjab)**. *Bachan Singh (supra)* has also observed that Section 354 (3) of the Criminal Procedure Code gave a wide discretion in the arena of sentencing. However, such wide discretion in sentencing cannot be said to be untrammelled and unguided. It has to be exercised judiciously and in accordance with well-established principles crystallized by judicial decision and directed along the broad contours of legislative policy. It has laid down that, degrees of palpability and all aggravating and mitigating circumstances should be taken into consideration at the time of sentencing. **1983 Volume 3 Supreme Court Cases 470 (Machhi Singh vs.**

State of Punjab) has considered **Bacchan Singh (supra)**

and held as follows :-

“38. In this background the guidelines indicated in Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] :

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

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

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

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck

between the aggravating and the mitigating circumstances before the option is exercised.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

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

(b) 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 favour of the offender?"

45. The doctrine of proportionality in awarding death penalty has been noticed in **2003 Volume 8 Supreme Court Cases 224 (State of Rajasthan vs. Kheraj Ram)** and **2009 Volume 6 Supreme Court Cases 498 (Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra).**

46. In **2012 Volume 4 Supreme Court Cases 257 (Ramnaresh vs. State of Chattisgarh)** the Supreme Court has held as follows :-

"72. The above judgments provide us with the dicta of the Court relating to imposition of death penalty. Merely because a crime is heinous per se may not be a sufficient reason for the imposition of death penalty without reference to the other factors and attendant circumstances.

73. Most of the heinous crimes under the IPC are punishable by death penalty or life imprisonment. That by itself does not suggest that in all such

offences, penalty of death should be awarded. We must notice, even at the cost of repetition, that in such cases awarding of life imprisonment would be a rule, while 'death' would be the exception. The term 'rarest of rare' case which is the consistent determinative rule declared by this Court, itself suggests that it has to be an exceptional case.

74. The life of a particular individual cannot be taken away except according to the procedure established by law and that is the constitutional mandate. The law contemplates recording of special reasons and, therefore, the expression 'special' has to be given a definite meaning and connotation. 'Special reasons' in contradistinction to 'reasons' simpliciter conveys the legislative mandate of putting a restriction on exercise of judicial discretion by placing the requirement of special reasons.

75. Since, the later judgments of this Court have added to the principles stated by this Court in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] , it will be useful to re-state the stated principles while also bringing them in consonance, with the recent judgments.

76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh [Bachan Singh v. State of Punjab, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] and thereafter, in Machhi Singh [Machhi Singh v. State of Punjab, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] . The aforesaid judgments, primarily dissect these principles into two different compartments—one being the 'aggravating

circumstances’ while the other being the ‘mitigating circumstances’. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating circumstances

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

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

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

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

(5) Hired killings.

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

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

(8) *The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 CrPC.*

(9) *When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.*

(10) *When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.*

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

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

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

Mitigating circumstances

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

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

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

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

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

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

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

77. *While determining the questions relatable to sentencing policy, the court has to follow certain principles and those principles are the loadstar besides the above considerations in imposition or otherwise of the death sentence.*

Principles

(1) *The court has to apply the test to determine, if it was the 'rarest of rare' case for imposition of a death sentence.*

(2) In the opinion of the court, imposition of any other punishment i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant circumstances.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime.

78. Stated broadly, these are the accepted indicators for the exercise of judicial discretion but it is always preferred not to fetter the judicial discretion by attempting to make the excessive enumeration, in one way or another. In other words, these are the considerations which may collectively or otherwise weigh in the mind of the court, while exercising its jurisdiction. It is difficult to state it as an absolute rule. Every case has to be decided on its own merits. The judicial pronouncements, can only state the precepts that may govern the exercise of judicial discretion to a limited extent. Justice may be done on the facts of each case. These are the factors which the court may consider in its endeavour to do complete justice between the parties.

79. The court then would draw a balance sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The court has to strike a balance between the two

and see towards which side the scale/balance of justice tilts. The principle of proportion between the crime and the punishment is the principle of 'just deserts' that serves as the foundation of every criminal sentence that is justifiable. In other words, the 'doctrine of proportionality' has a valuable application to the sentencing policy under the Indian criminal jurisprudence. Thus, the court will not only have to examine what is just but also as to what the accused deserves keeping in view the impact on the society at large.

80. Every punishment imposed is bound to have its effect not only on the accused alone, but also on the society as a whole. Thus, the courts should consider retributive and deterrent aspect of punishment while imposing the extreme punishment of death.

81. Wherever, the offence which is committed, manner in which it is committed, its attendant circumstances and the motive and status of the victim, undoubtedly brings the case within the ambit of 'rarest of rare' cases and the court finds that the imposition of life imprisonment would be inflicting of inadequate punishment, the court may award death penalty. Wherever, the case falls in any of the exceptions to 'rarest of rare' cases, the court may exercise its judicial discretion while imposing life imprisonment in place of death sentence."

47. So far as aggravating circumstances are concerned, the appellant has committed a crime of rape leading to the death of the victim due to rape. The offence had been committed outrageously for lust while involving inhuman

treatment to the victim. So far as mitigating circumstances are concerned, the appellant had committed the crime when he was approximately thirty eight years of age. The age of the appellant has not been conclusively established at the trial. Even in his statement recorded under Section 313 of the Criminal Procedure Code, the appellant had claimed that his age was about forty while saying that he was not sure about his exact age. The State has not placed on record any material to suggest that there is no probability of the appellant being reformed and rehabilitated. The appellant had brought the victim to the hospital. This act of the appellant in bringing the victim to the hospital has to be treated as a mitigating circumstance in favour of the appellant. The evidence that had been led by the prosecution allows a view to be taken that the death resulted due to injuries suffered in the course of commission of rape. There is an arena of doubt as to whether the appellant had acted with the primary objective of murdering the victim.

48. In the conspectus of the aggravating and mitigating circumstances and in view of the fact that, life imprisonment is the rule and death sentence is an exception, the death sentence awarded by the learned Trial Judge to the appellant,

has to be reconsidered. We have noted, there are mitigating circumstances in favour of the appellant namely, his age, the absence of positive material to establish that he is beyond reformation or rehabilitation and his action of bringing the victim to the hospital.

49. At the same time it has to held that the appellant is guilty of rape and murder.

50. In such circumstances, we commute the death sentence awarded by the learned Trial Judge as against the appellant to life imprisonment.

51. A copy of this judgement along with the trial Court records be remitted to the appropriate Court forthwith. In view of the commutation of the death penalty, any warrant issued by the appropriate Court with regard thereto in respect of the appellant stands modified in terms of this judgement and order. Department will inform the Correctional Home where the appellant is lodged as to this judgement and order. The Correctional Home will record the fact of commutation of death penalty to the sentence awarded by this judgement and order in respect of the appellant, in their records.

52. DR 03 of 2021 along with CRA 146 of 2021 is disposed of accordingly.

53. Urgent Photostat certified copy of this order, if applied for, be supplied expeditiously after complying with all necessary legal formalities.

[DEBANGSU BASAK, J.]

54. I agree.

[MD. SHABBAR RASHIDI, J]