

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 1 of 2020

State of West Bengal

Vs.

Sri Gourab Mondal @ Shanu & Anr.

with

CRA 167 of 2020

Sri Gourab Mondal @ Shanu & Anr.

Vs.

State of West Bengal

For the Appellants	: Md. Asraf Ali, Adv. Mr. S. S. Arefin, Adv. Mr. Kaniz Kusum, Adv.
Amicus Curiae	: Mr. Sekhar Kumar Basu, Ld. Sr. Adv. Mr. Soubhik Mitter, Adv.
For the De facto Complainant	: Mr. Arnab Sinha, Adv. Mr. Arka Ranjan Bhattacharya, Adv. Mr. Amartya Basu, Adv.
For the State	: Mr. Sanjoy Bardhan, Adv. Ms. Amita Gour, Adv.

Hearing Concluded on	: January 11, 2023
Judgement on	: January 31, 2023

DEBANGSU BASAK, J.:-

1. The appellants have assailed the judgement of conviction dated January 22, 2022 and the order of sentence

dated January 27, 2022 passed by the learned additional Sessions Judge, 2nd Court, Chinsurah, Hooghly.

2. By the impugned judgement of conviction and the order of sentence, the learned trial judge has convicted the appellants for commission of offences punishable under sections 363/34/364A/34/376 (2) (i)/302/34/201 of the Indian Penal Code, 1860 and under section 6 of the Protection of Children from Sexual Offences Act, 2012.

3. Each of the appellants had been sentenced to suffer rigorous imprisonment for a period of 5 years and to pay a fine of Rs. 10,000 in default to suffer rigorous imprisonment for a period of another 20 days for commission of offence punishable under sections 363/34 of the Indian Penal Code, 1860; to suffer life imprisonment for commission of the offences punishable under section 376 (2) (i)/364A/34 of the Indian Penal Code, 1860 which shall mean imprisonment for the remainder of the persons natural life; to suffer rigorous imprisonment for a period of 20 years to pay a fine of Rs. 50,000 in default to suffer rigorous imprisonment for the period of another 60 days for the commission of offence punishable under section 6 of the Protection of Children from Sexual Offences Act, 2012; to suffer rigorous imprisonment for

a period of 5 years for the commission of the offence punishable under section 201 of the Indian Penal Code, 1860; with the direction that the sentences imposed will run concurrently; to be hanged to death for the commission of the offence punishable under section 302 of the Indian Penal Code, 1860, subject to the confirmation of the Hon'ble High Court at Calcutta.

4. By reason of the appellants having been awarded the death sentence, a death reference was made to this Hon'ble Court. The death reference and the appeal emanating from the same judgement of conviction and the order of sentence, have been heard analogously.

5. The appellants having remained unrepresented over a period of time in the death reference as well as in the appeal filed by them, the court appointed amicus curiae.

6. Learned amicus curiae has drawn the attention of the court to the chain of circumstances that led to the conviction of the appellants. He has submitted that, PW 23 (Medical Officer who examined the accused persons) stated that on examining the 1st appellant he found bite mark on his left palm. Moreover, the 1st appellant had informed him that those bite marks were of the victim. The medical examination

report of the 1st appellant conducted by PW 23 had been tendered in evidence and marked as Exhibit 35. Exhibit 35 had mentioned that there were bite marks found on the left palm of the 1st appellant and that the 1st appellant stated before PW 23 that the 1st appellant received the bite mark from the victim on December 12, 2014 at 8:10 PM. According to him, this indicated that the victim had come in physical contact with the 1st appellant and that some kind of physical struggle occurred between them.

7. Learned amicus curiae have pointed out that, the dead body of the victim had been recovered pursuant to the statements of the appellants. Such statements had been adduced as Exhibit 62 and Exhibit 63. The fact that the dead body of the victim had been found pursuant to the statement of the appellants instilled credibility in the information carried by the appellants with respect to the victim's dead body in view of section 27 of the Evidence Act.

8. Pursuant to the leading statement made by the 2nd appellant, the spade which had been used to chop the legs of the victim was recovered.

9. Learned amicus curiae has submitted that, the oral testimony of the autopsy surgeon (PW 26) and the Post

Mortem Report of the victim established that the victim was sexually assaulted, in fact raped. Learned amicus curiae has submitted that, the prosecution also ran a case of demand of ransom of Rs. 3 lakh and Rs. 30 lakh from PW 9 and PW 19. The claim of PW 9 had been corroborated by PW 1. The conversations between PW 9 and the kidnapper have been recorded by PW 10 in his phone. The ransom demand of Rs. 30 lakh from PW 19 had been recorded by PW 11.

10. Learned amicus curiae has submitted that, the bicycle of the victim has been recovered and seized pursuant to the statement of the appellants. In this regard, he has referred to the testimony of PW 14, 16 and 25. He has submitted that, PW 25 claimed that the appellants confessed about murdering the victim, and the disposal of the bicycle in the canal. The slippers of the victim had also been recovered and seized pursuant to the statement made by the appellants.

11. Learned amicus curiae has submitted that, call details record for the demand of ransom had been produced at the trial with certificate under Section 65 B (4) of the Indian Evidence Act, 1872.

12. Learned amicus curiae has submitted that, although, the dead body of the victim had been recovered on the

statement made by the appellants, no explanation had been furnished by the appellants as to how they could disclose the place where the dead body of the victim and her belongings were buried.

13. Learned amicus curiae has submitted that, there were missing links in the chain of circumstances. According to him, if any of the circumstances proved are consistent with the innocence of the accused or the chain of continuity of the circumstances is broken or the circumstances of some of them can be explained by any of the reasonable hypothesis, then the accused must have the benefit of that hypothesis and they are entitled to benefit of doubt. In this regard he had submitted that, the autopsy surgeon being PW 26 opined that the injuries found on the legs of the victims were probably post-mortem and that he could not ascertain if penetration injury on the private parts of the victim occurred ante mortem or post mortem.

14. Moreover, according to the learned amicus curiae, the prosecution could not produce any witness to establish how the dead body of the victim had been carried. He has referred to PW 6 and PW 12.

15. Learned amicus curiae has submitted that, the confession of the juvenile co-accused was inadmissible in evidence. PW 2 who was the aunty of the juvenile had claimed that the juvenile confessed before her that the juvenile was involved in the kidnapping of the victim. PW 3 who was the uncle of the juvenile had claimed that PW 2 told him about the involvement of the juvenile. PW 3 had claimed that the juvenile confessed that the juvenile was in the market when the accused persons called him near the nursery. PW 4 and 5 had stated that the juvenile confessed before them on December 12, 2014 that the appellant picked up the juvenile on his motorcycle. The juvenile had recorded statement under Section 164 of the Criminal Procedure Code before the learned Magistrate. The juvenile had been referred to the Juvenile Justice Board for trial. Since the juvenile was not tried together with the other co-accused persons, the confessional statement of the juvenile against the present appellants made before the prosecution witnesses and before the learned Magistrate could not be used to convict the appellants. He has referred to Section 30 of the Indian Evidence Act, 1872 and submitted that the same would not apply to the instant case.

In support of his contentions, he has relied upon **(2022) 6 SCC 576 (Gadadhar Chandra Vs. State of West Bengal)**.

16. Learned amicus curiae has submitted that, the evidence of PW 2 and 3 are inadmissible in evidence because both of them are hearsay witnesses.

17. Referring to the quantum of punishment imposed upon the appellants, learned amicus curiae has submitted that, while awarding a death sentence the mitigating circumstances must outweigh the aggravating circumstances.

He has relied upon **2022 Volume 10 Supreme Court Cases 321 (Pappu Vs. State of Maharashtra), (2021) 11 SCC 1 (Arvind Singh Vs. State of Maharashtra), (2013) 5 SCC 546 (Shankar Kisanrao Khade Vs. State of Maharashtra)**.

18. Relying upon the **(2021) 11 SCC 1 (Arvind Singh Vs. The State of Maharashtra)** it has been submitted that, there, the accused had been found guilty of kidnapping, demanding ransom and murdering a minor. However, the death sentence had been commuted to one of life sentence.

19. Learned amicus curiae has submitted that, the appellant No. 1 was aged about 22 years and the appellant No. 2 was aged about 19 years on the date of the commission of the alleged offences. According to him, it would be

inconceivable that there was no scope for reforming and rehabilitating both the accused persons. Prosecution has not led any evidence to show that the appellants were beyond reformation and rehabilitation. According to him, prosecution has not placed any material to indicate that if the appellants were allowed to live within the precincts of the correctional home they would still be a menace to the society. According to him, it cannot be said that, imposition of an alternative punishment that is, life imprisonment was foreclosed.

20. Learned amicus curiae has submitted that, the report in respect of the appellants with regard to their conduct post their arrest has shown that they were capable of reformation. The appellants have no criminal antecedents. The appellants have hailed from very humble background and therefore they must be given an opportunity to reform and rehabilitate themselves.

21. In such circumstances, learned amicus curiae has submitted that, the death penalty awarded in favour of the appellants be commuted to one of life imprisonment.

22. Learned advocate appearing for the appellants have adopted the contentions advanced by the amicus curiae. He

has submitted that, he has nothing further to add in favour of the appellants.

23. Learned advocate appearing for the State has submitted that, considering the heinous nature of the crime committed by the appellants, the punishment awarded by the learned Trial Judge was just and proper. He has submitted that, none of the appellants committed the acts under any mental stress or emotional disturbance or on spur of the moment or on provocation. According to him it was difficult to comprehend that the appellants would not commit such acts in the future and would be reformed or would be rehabilitated.

24. Learned advocate appearing for the State has referred to the nature of the crime committed by the appellants. He has submitted that, the appellants had kidnapped a minor girl aged about 11 years, demanded ransom for her release, committed murder of the victim and also committed rape on her. According to him, the nature of crime that the appellants had committed were heinous, unnatural, diabolic, barbaric and inhuman. He has submitted that, the appellants had committed the crime on a helpless and resistanceless 11 year old minor victim girl. Acts of the appellants had been pre planned, pre meditated, meticulous and deliberate coupled

with sheer brutality and apathy for human life. The conducts and acts of the appellants have revealed that they would be a menace to the society with very little chance of reformation or rehabilitation.

25. Learned advocate appearing for the State has submitted that, given the nature of the crime collective conscience of the community was shocked and that imposition of alternative sentence of life imprisonment upon any of other appellants would not meet the ends of justice rather it would tempt other offenders to commit such crime and getaway with the lesser punishment of life imprisonment.

26. Learned advocate appearing for the State has submitted that, the nature of the crime was such that it was rarest of the rare case. The aggravating circumstances outweighed the mitigating circumstances overwhelmingly. Therefore, the death sentence awarded should be confirmed.

27. In support of his contention, learned advocate appearing for the State has relied upon ***(2021) 11 SCC 1 (Arvind Singh Vs. The State of Maharashtra), 2022 SCC Online SC 677 (Monoj and Others Vs. State of Madhya Pradesh), (2022) 7 SCC 443 (Mohd Firoz Vs. State of Madhya Pradesh), 2019 Volume 2 Supreme Court Cases***

311 (Vivan Gyanlal Rajput vs. State of Maharashtra), 2020 SCC Online Cal 1519 (State of West Bengal Vs. Ustab Ali), (2015) 1 Supreme Court Cases 253 (Vasanta Sampat Dupare Vs. State of Maharashtra), (2015) 6 Supreme Court Cases 652 (Purushottam Dashrath Borate and Another Vs. State of Maharashtra), 2011 Volume 14 Supreme Court Cases 401 (Ajit Singh Haruamisingh Gujral Vs. State of Maharashtra), (1988) 1 Supreme Court Cases 633 (Ranjeet Singh and Another vs. State of Rajasthan) and 2003 Volume 8 Supreme Court Cases 224 (State of Rajasthan Vs. Kheraj Ram).

28. The father of the victim had deposed as PW 1. He had stated that, at the time of her death, the victim was 11 years of age, and studying in Class VI. On December 12, 2014 at about 5 P.M the victim had gone for tuition and thereafter the dead body of the victim was recovered by the police at the bank of the river on December 14, 2014. He had stated that, the victim usually reached the house of her tutor by 5 P.M and used to return home at about 8 P.M. The travelling time was more or less 10 minutes. The victim used to inform her family on reaching the tutor by mobile phone. She had a mobile phone with dual SIM card. PW 1 had given the mobile

phone number of the victim. He had stated that, on December 12, 2014, after the victim reached the house of her tutor, she informed such fact to his wife. At about 8 P.M the victim had informed the wife of PW 1 that is the mother of the victim that her study was over. The victim did not return home 15/20 minutes thereafter. Accordingly, PW 1 had gone to the house of the tutor by cycle in search of the victim. On reaching the house of the tutor and asking her as to the whereabouts of the victim, the tutor had told him that, the victim left her house after completion of the tuition. Accordingly, PW 1 had informed the matter to his wife, by mobile phone and reached near a particular shop where he found some of his friends. He had requested such friends to search for the victim. Amongst such friends, PW 9 had instructed him to keep the bicycle and ride on the motorcycle of PW 9. Accordingly, PW 1 rode on the motorcycle of PW 9 and had gone to search for the victim. Other friends who were sitting there, had also gone to search for his daughter. Thereafter, they could not find the victim. PW 9 had left PW 1 near the house of PW 1 and went away. PW 1 and his wife went for search of their daughter by riding a motorcycle at about 9.30 P.M. PW 9 informed PW 1 by mobile phone that the victim had been traced. PW 9 had been

trying to contact the victim over mobile phone. PW 9 had contacted the mobile phone of the victim when one male voice responded stating that they kidnapped the victim and demanded Rs. 3 lakhs for her release. Such conversation had been recorded by PW 4. Such voice recording was played before PW 1 and his wife.

29. PW 1 had stated that, being afraid of the kidnappers he did not go to the police station. However, on December 13, 2014 at about 4 A.M, he went to the police station and had informed the police about the victim going missing. The First Information Report had been lodged. He had identified his signature on the written complaint. He had stated about the wearing apparels of the victim when she went for the tuition. He had identified the articles produced in Court which were tendered in evidence and marked as Material Exhibit I. He had stated that the victim used to go for tuition by riding a bicycle which he identified in Court and which was tendered in evidence and marked as Material Exhibit II.

30. PW 1 had stated that, on December 18, 2014, in the evening, the police came to his house at about 6.30 P.M and seized the birth certificate along with other things. The police

had prepared a seizure list. He had identified the seizure list which was tendered and marked as Exhibit II.

31. PW 1 had stated that, on December 14, 2014, the police arrested the two appellants along with a juvenile. Pursuant to the statements made by the accused, police had recovered the dead body of the victim buried in the bank of the river.

32. PW 1 had also stated that, pursuant to the demand for ransom, he collected a sum amount of Rs. 3 lakhs as claimed by the kidnappers from his relatives. On December 13, 2014 at about 3 P.M, the kidnappers had switched on the mobile phone of the victim. They had contacted the father-in-law of PW 1 who requested the kidnappers to collect less than Rs. 3 lakhs and release the victim. Then the kidnappers had refused such amount and demanded Rs. 30 lakhs. He had identified the two appellants in Court. He had stated that, the juvenile was facing trial in another Court. PW 1 had been cross-examined at length by the accused. No material favouring the case of the accused had been extracted from such cross-examination of PW 1.

33. Aunty of the juvenile had deposed as PW 2. She had stated that, the juvenile came to her house and told her that

he wanted to make a confessional statement regarding the kidnapping of the victim. She had asked the juvenile as to whether he was involved when he replied in the affirmative. The juvenile had stated that, the appellants called him. The appellants had caught hold of the victim beside a nursery shop when the juvenile fled away being afraid. Thereafter, PW 2 had informed such fact to her husband over mobile phone when her husband came to the house. She had identified the statement recorded by her under Section 164 of the Criminal Procedure Code which was marked as Exhibit IV. She had also identified the appellants in Court. She had been cross-examined at length by the defence.

34. The husband of PW 2 had deposed as PW 3. He had corroborated the oral testimony of PW 2 regarding the juvenile making extra judicial confession to PW 2. He had been cross-examined by the defence.

35. An acquaintance of the father of the victim had deposed as PW 4. He had stated that, on December 13, 2014 at the evening, PW 3 had informed him over phone that the juvenile was acquainted with the persons involved with the kidnapping of the victim. Accordingly, he had attended the house of PW 3 and went to the house of the juvenile. He had

asked the juvenile about the incident when the juvenile replied that on December 12, 2014 the victim was kidnapped. The juvenile had claimed that the appellants killed the victim. They had threatened the juvenile not to disclose such fact to anybody.

36. PW 4 had stated that after hearing the incident from the juvenile, he had informed PW 5. Thereafter, PW 5 had informed the police. Police had come and taken the juvenile into their custody.

37. PW 4 had narrated about his participation in the seizure of articles. He had identified his signature on the seizure list. He had tendered his statement recorded under Section 164 of the Criminal Procedure Code as an Exhibit. He had also identified the motorcycle which was seized. He had been examined at great length on behalf of the defence.

38. PW 5 had deposed as a prosecution witness before, whom, the juvenile had made the confessional statement in presence of PW 4. He had also narrated about the seizure made by the police which he was a witness. He had also been cross-examined at great length by the defence.

39. PW 6 had seen the appellants and the juvenile at about 7/7.30 P.M on December 12, 2014 to be sitting on a

motorcycle. The appellants and the juvenile had been seen near a primary school. He had identified one of the appellants in Court. He had stated that, the place where he found the appellants and the juvenile standing with the motorcycle was about 4/5 minutes walking distance from the house of the tutor of the victim. He had tendered his statement recorded under Section 164 of the Criminal Procedure code. He had been cross-examined by the defence.

40. Scribe of the written complaint had deposed as PW 7. He had stated that, he wrote the complaint as per the dictation of the de facto complainant. He had gone to the place where the dead body was recovered on December 14, 2014. He had described the injuries he found on the dead body of the victim. He had identified the appellants in Court. He had been cross-examined on behalf of the defence.

41. The tutor of the victim had deposed as PW 8. She had stated that on December 12, 2014, the victim came to her house at 5 P.M and after studies the victim was released at about 8 P.M. She had identified the bicycle and wearing apparels that the victim was wearing on the fateful day. She had also identified the mobile phone used by the victim. She had been cross-examined by the defence.

42. The friend of the father of the victim who contacted one of the mobile phone numbers used by the victim on December 12, 2014 had deposed as PW 9. He had stated that, at about 9.26 P.M a male person received his call on the mobile phone of the victim and informed him that they kidnapped the victim and demanded a sum of Rs. 3 lakhs. Such male voice had claimed that if the kidnaping was reported and the demand for ransom was not paid the victim would be murdered.

43. PW 10 is a person who was present when he had recorded the entire conversation relating to the demand for ransom in his mobile phone as PW 9 had put his mobile on speaker mode. He had informed the father of the victim and also other friends with regard to the demand for ransom.

44. PW 10 had stated that on January 9, 2015 the Investigation Officer seized the chip of his mobile phone. He had identified his signature in the seizure list. He had stated that, the SD Card from another person was seized by the Investigation Officer in his presence. He had identified the signatures that he put on the seizure list. He had been cross examined at length on behalf of the defence.

45. PW 11 had recorded the conversation between the kidnappers and the grandfather of the victim when the

kidnappers demanded a sum of Rs. 30 lakhs from the grandmother of the victim. He had stated that, the police seized the memory card of his mobile. He had identified his signature on the seizure list. He had identified the memory card of another person. He had been cross-examined at great length on behalf of the defence.

46. PW 12 had seen the first appellant to be riding a red colour motor bike at around 12 midnight on December 12, 2014. He had identified the first appellant in Court. He had identified his signatures on the seizure list. He had been cross-examined at great length on behalf of the defence.

47. Seizure list witness with regard to the seizure made on December 21, 2014 had deposed as PW 13. He had identified his signature on the seizure list. He had identified the spade which was recovered. Such spade had been marked as Material Exhibit VII.

48. Another seizure list witness with regard to three seizures made on December 21, 2014 had deposed as PW 14. He had identified his signature on the seizure list. He had also identified several Material Exhibits which were seized. He had been examined at great length on behalf of the prosecution.

49. The Judicial Officer before whom the juvenile recorded the statement under Section 164 of the Criminal Procedure Code had deposed as PW 15. The confessional statement of the juvenile was tendered in evidence and marked as Exhibit 29. He had stated that, on December 31, 2014, four more statements under Section 164 of the Criminal Procedure Code were recorded.

50. Witness to the three seizure list made on December 21, 2014 had deposed as PW 16. He had stated how, the accused persons had also put their signatures on the seizure list.

51. PW 17 had stated that, three persons came to their hotel to have dinner at 9 P.M. He had identified the appellants as to the two persons out of the three who had come for dinner.

52. A Police Constable who had taken the dead body of the victim to the hostel for conducting post mortem had deposed as PW 18. He had identified his signature on the dead body challan and on the seizure list dated December 14, 2014. He had identified the wearing apparels of the victim.

53. The mother of the victim had deposed as PW 19. She had corroborated the oral testimony of her husband. She had

identified her signatures on the seizure list. She had been cross-examined at great length on behalf of the defence.

54. A grocery shop and telephone booth owner had deposed as PW 20. He had identified the second appellant in Court as the person who purchased a mobile recharge card from his shop in the middle of the month of December 2014.

55. A Police Constable who had witnessed the seizure made on December 14, 2014 deposed as PW 21. He had identified his signature on the seizure list. He had also identified his signature on the seizure list dated December 16, 2014.

56. An employee of the Block Development Officer had deposed as PW 22. He had done the videography. He had stated that, in terms of the instructions of the Investigating Officer on December 14, 2014 as shown by the accused, the dead body of the victim had been recovered from the canal of the river. That one pair of hawai chappals, a mobile phone kept in a polythine bag, one jeans, one ladies bicycle and one motorbike had also been seized by the Investigating Officer as shown by the accused. He had made a videography of such recoveries. After about two months, he had handed over the DVD of the recorded videography to the Investigating Officer.

He had identified his signature on the seizure list dated February 13, 2015. He had identified the DVD in Court which was tendered in evidence and marked as Material Exhibit XII.

57. The doctor who had medically examined the first appellant on December 16, 2014 had deposed as PW 23. He had stated that, on examination, he found the first appellant was well built and that there was 1.5/1 Cm bite mark over his left palm. The first appellant told him that the victim caused such bite mark. The incident had happened on December 14, 2014 at about 8.10 P.M. He had collected the semen of the first appellant and opined that the first appellant was capable of sexual function. He had tendered the Medical Examination Report of the first appellant which was marked as Exhibit 35. He had stated that if someone closes the mouth of the victim girl with his palm then, the type of bite mark that was appearing on the left palm of the first appellant would be inflicted. He had been cross-examined on behalf of the defence.

58. The then Officer-in-Charge of the local police Station had deposed as PW 24. He had stated that, he received a written complaint at 6.15 hours from PW 1. After receiving the same, he had initiated a police case inter alia under Section

363/364 A of the Indian Penal Code, 1860. He had endorsed such case to the Sub-Inspector for investigation. He had identified the formal First Information Report which was tendered in evidence and marked as Exhibit 39.

59. The police officer who had taken part in the raid leading to the recovery of the dead body and articles belonging to the victim had deposed as PW 25. He had stated that, as per the statements of the two appellants, the police went to the bank of the river and from the canal there, they recovered the dead body as well as the articles and bicycles belonging to the victim. He had narrated about how the other articles had been seized. He had been cross-examined at great length on behalf of the defence.

60. The doctor who had conducted the post mortem on the victim had deposed as PW 26. He had stated that, there were a number of injuries on the body of the victim. He had opined that the death of the victim was due to asphyxia, ante mortem, homicidal due to compression of neck and fracture of hyoid bone. He had stated that, the injuries on the legs were probably post mortem caused by heavy sharp cutting instruments. He tendered the Post Mortem Report which was marked as Exhibit 40. On being shown the spade which was

marked as Exhibit he had stated that the injuries he observed on the legs of the victim might be caused by Mat. Exhibit VII. He had stated that, the probable time of death was 40 hours from the time of the post mortem. With regard to sexual assault, he has stated that, the injuries on the body of the victim had been caused by forceful sexual intercourse. He had explained the injuries on the dead body of the victim. He could not say whether the penetration into the vagina of the victim had taken place ante mortem or post mortem but it had occurred definitely before rigor motis set in. He had explained the absence of semen in the vagina of the victim. According to him, if a dead body is buried under muddy soil then the semen may be washed away from the vagina. Police personnel who witnessed seizure made on September 4, 2015 had deposed as PW 27. An officer from the State Forensic Science Laboratory had deposed as PW 28. He had identified his signatures on the report. He had tendered the reports which were marked as Exhibit 43 and 44.

61. An official of Bharti Airtel Limited had deposed as PW 29. He had identified the call details recording and CAF and certificate under Section 65 (B) of the Indian Evidence Act, 1872 in respect of three mobile phone numbers which were

tendered in evidence and marked as Exhibit 46 to 49. He had also identified and tendered in evidence call details recording, SDR and certificate under Section 65 (B) of the Indian Evidence Act, 1872 in respect of another mobile phone number which was tendered and marked as Exhibit 50 and 51.

62. The Block Development Officer at that material point had deposed as PW 30. He had conducted the inquest report. He had narrated about the same in his evidence. He had spoken about the seizures of articles belonging to the victim in his presence.

63. An official of Reliance Commission Limited has deposed as PW 31. He had tendered in evidence the articles received by his company as also the forwarding letter along with the certificate under Section 65 B of the Indian Evidence Act which was marked as Exhibit 53.

64. Another official of the State Forensic Science Laboratory had deposed as PW 32. He had tendered Exhibits 54 and 55 in evidence.

65. The Sub-Inspector of police who had conducted the investigation had deposed as PW 33. He had spoken about the manner in which the investigations was conducted and the

evidences that were collected. He was cross-examined at great length on behalf of the defence.

66. On completion of the evidence of the prosecution, the appellants had been examined under Section 313 of the Criminal Procedure Code where, the appellants claimed to be innocent and not guilty. The appellants had declined to adduce any evidence at the trial.

67. The dead body of the victim had been recovered on December 14, 2014 from the bank of a river. Post mortem of the dead body of the victim had been conducted by PW 26. The Post Mortem Report had been marked as Exhibit 40.

68. The oral testimony of PW 26 and the contents of Exhibit 40 read together have established that, the victim was raped and murdered. The nature of injuries that had been found on the dead body of the victim are as follows :-

“.....eleven sharp cut injuries on left leg from knee to mid shaft shin varying sizes to 2 inch to 4 inch long with femur cut around knee joint and both bones cut above lateral malleolus and 3 inch above lateral malleolus with compound fracture. Three false joint created due to the injuries till left dorsum of foot. Eight sharp cut injuries on right leg from above knee joint mid leg femur cut in two pieces above left knee joint also.

Neck and Head – Clear four finger imprint on left cheek and one on right cheek with swollen

upper lips and haematoma inside lips Contusion on both sides of neck below angle of mandible 1 inch x $\frac{3}{4}$ inch size. Hyoid bone fracture, nail marks on left side of neck 3 in number.

Genital Organs – Big contusion on left thigh 4 inch x 6 inch near femoral triangle. Introitus is gaping. Both labia minora and majora separated by about 2 centimeter. Hymen ruptured. Some liquid seen coming out of vagina. Linear abrasion over symphysis pubis 3 inch long $\frac{1}{2}$ inch wide. Scratch mark over left labia majora.”

69. PW 26 had opined that the death of the victim was due to Asphyxia, ante mortem in nature, homicidal due to compression of neck and fracture of hyoid bone. The post mortem doctor had been cross-examined at great length. This opinion of the post mortem doctor had not been established to be incorrect.

70. PW 26 had also opined that the injuries on the neck of the victim were probably post mortem caused by heavy sharp cutting instruments. He had also opined that the injuries on the leg of the deceased might have been caused by Material Exhibit VII which was a spade.

71. Material Exhibit VII had been recovered on the leading statement made by the appellants.

72. PW 26 had deposed that, the probable time of death of the victim was 40 hours from the time of post mortem

examination. He had stated that, he started performing the autopsy at 2:20 P.M on December 14, 2014.

73. The victim had been reported to be missing from 8 P.M on December 12, 2014. The time of death spoken of by PW 26 placed the time of death of the victim after the victim had gone missing from tuition. The tutor of the victim, being PW 8 had stated in her deposition that the victim left her premises after completion of her tuition at about 8 P.M on December 12, 2014.

74. PW 6 had stated in his deposition that, he had seen the appellants and the juvenile at about 7/7:30 P.M on December 12, 2014 to be sitting on a motorcycle near a primary school. The place where PW 6 had seen the appellants and the juvenile to be sitting on the motorcycle was about 4/5 minutes walking distance from the house of the tutor of the victim.

75. Therefore, the appellants had been placed near the victim prior to her death on December 12, 2014 at about the time when she went missing.

76. The body of the victim was recovered pursuant to the leading statement made by the appellants being Exhibit 62 and 63. In their examinations under Section 313 of the

Criminal Procedure Code, the appellants did not offer any explanation as to how they became aware of the location of the dead body of the victim.

77. It has come out from the evidence led by the prosecution at the trial that, the dead body of the victim was buried on the banks of a river. Therefore, without the appellants being complicit in the incident with regard to the victim, they would not, in the normal course of events be able to identify the location of the dead body of the victim. Therefore, the fact that the dead body of the victim had been discovered pursuant to the leading statement made by the appellants, instilled credibility in the information given by the appellants in terms of Section 27 of the Indian Evidence Act.

78. Articles belonging to the appellants had been seized pursuant to the leading statement made by the appellants. Again, the appellants did not explain how they became aware of the location of such articles belonging to the victim in their statements recorded under Section 313 of the Criminal Procedure Code. The appellants had been arrested on December 14, 2014 at about 2:05 A.M and 2.07 A.M respectively. They had recorded statements under Section 161 of the Criminal Procedure Code. PW 33 who was the

Investigation Officer had claimed that, the appellants had confessed before him that they murdered the victim and hid the dead body. They had also confessed as to how they carried the dead body. They had stated to PW 33 that they would assist the police to recover the personal belongings of the victim as well as the dead body of the victim.

79. On December 14, 2014, at about 5:15 A.M, PW 33 along with the appellants went to the spot where they hid the dead body of the victim. PW 33 had informed the matter to the then officer-in-charge of the police station for arranging a Executive Magistrate. Accordingly, the Block Development Officer had reached there. In presence of the Block Development Officer, the dead body of the victim had been recovered as shown by the appellants.

80. On December 21, 2014, PW 33, the Investigating Officer, had seized one pink coloured hawai chappal of the victim as identified by the appellant. One maroon colour BSA Diana Classic Ladies cycle, as had been identified by the appellant. He had also seized the motorcycle identified by the appellant and also the wearing apparels of the second appellant. He had seized the mobile set and the SIM Card

belonging to the victim on December 21, 2014. He had made those seizures after they had been identified by the appellant.

81. PW 26 had stated that, the victim was sexually violated. He had however opined that, he was not sure as to whether the penetration into the vagina of the victim took place ante mortem or post mortem but it occurred definitely before rigor motis set in.

82. From the evidence led by the prosecution, it has been established that, the victim was kidnapped. The appellants had demanded ransom subsequent to the victim being kidnapped. After being kidnapped the victim had been raped, and murdered. The nature of injuries that the victim had suffered established that, the rape and murder were diabolic and grotesque.

83. The appellants had demanded ransom subsequent to kidnapping the victim. PW 1 had stated that, PW 9 told him that when PW 9 tried to contact the mobile phone numbers belonging to the victim subsequent to her being kidnapped, all of a sudden at around 9:26 PM a male person received his call and informed him that they kidnapped the victim and demanded a sum of Rs. 3 lakhs for her release and that, if the amount was not paid, they would murder the victim. PW 10

was also present when such conversation took place and had recorded the entire conversation in his mobile as PW 9 had put the mobile on speaker mode. PW 10 in his deposition had corroborated the statements made by PW 9. Both PW 9 and PW 10 had informed the father of the victim about such demand for ransom and the threat of murder. The investigating officer had seized the chip of the mobile phone of PW 10 by seizure list being Exhibit 10.

84. The appellants had demanded ransom for the 2nd time when the grandfather of the victim had called one of the family members of the victim. The conversation between the appellants and the grandfather of the victim had been recorded by PW 11. The appellants had called the grandfather of the victim on December 13, 2014 at about 4:51 PM. The appellants had demanded a sum of Rs. 30 lakhs from him. The police had seized the memory card of PW 11 by the seizure list marked Exhibit 19.

85. The fact that calls had been made by PW 9 and the grandfather of the victim to the mobile phone of the victim had been established by the certificates issued by the telecom service providers being Exhibit 46 to 50 and 53.

86. The appellants had therefore, kidnapped the victim on December 12, 2014, demanded ransom on that date itself at about 9:26 PM and made a further demand for ransom on December 13, 2014 at about 4:51 PM. They had sexually assaulted victim. They had murdered the victim. They had broken the legs of the victim subsequent to murdering her. They had buried the dead body of the victim in order to conceal the evidence of the crime. They had also thrown away the personal belongings of the victim and the tool used for the purpose of breaking the legs of the victim and buried the victim, again in order to conceal the evidence of the crime.

87. That the victim was a minor had been established by the prosecution through the birth certificate of the victim being Mat Exhibit III. The foundational facts of the offences alleged against the appellants had been established by the prosecution. Therefore, the victim being a minor, the presumption contemplated under section 29 of the Protection of Children from Sexual Offences Act, 2012 had come into operation. The appellants had failed to discharge the burden placed upon them by such provisions of law. The appellants having failed to discharge their burden enshrined in section

29 of the Protection of Children from Sexual Offences Act, 2012, statutory presumption operates against the appellants.

88. A juvenile had been involved with the appellants in the crime. He had been tried separately as he was a juvenile. He had made a confessional statement. In ***Gadadhar Chandra (supra)*** the Supreme Court has held that, a confessional statement made by a co accused who was tried separately cannot be used at the trial of the other accused in view of Section 30 of the Evidence Act.

89. In the facts of the present case, independent of the confessional statement of the juvenile, the prosecution has placed sufficient materials on record to arrive at a conclusive finding of guilt of the appellants.

90. The learned trial judge has awarded death penalty to the appellants. The death penalty awarded by the learned trial Judge has to be evaluated on the basis of the ratio laid down by the Supreme Court with regard to award of death penalty.

91. In ***Shankar Kisanrao Khade (supra)*** Supreme Court has observed that, the tests that have to be applied while awarding the death sentence are “crime test”, “criminal test” and the “R-R test” and not the “balancing test”. It has observed that, for a death sentence, the “crime test” has to be

satisfied fully and nothing should be found in the “criminal test” that is the mitigating circumstances. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, accused not being a menace to society, no previous criminal record, et cetera the “criminal test” may favour the accused to avoid the capital punishment. Even if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still the rarest of rare test has to be finally applied.

92. In *Pappu (supra)* the Supreme Court has commuted the death penalty to one of imprisonment for life, with the stipulation that the appellant shall not be entitled to premature release or remission before undergoing actual imprisonment for a period of 30 years, in a case where the appellant had been held guilty of committing brutal rape, murder of a 7 year old girl and dumping the dead body, after dragging the dead body over a distance. The appellant has been found having no criminal antecedent, coming from a very poor social economic background with family comprising of wife, children and aged father, his jail conduct being

unblemished and no material to rule out the probability of reformation and rehabilitation. Therefore, it has been held that, the case of the appellant did not fall in the rarest of rare category.

93. In ***Ranjeet Singh (supra)*** the Supreme Court has upheld the sentence of death in the facts and circumstances of that case. It has been observed that, the manner in which the entire family was eliminated indicated that the offence was deliberate, diabolical, premeditated, cold-blooded, devilish and dastardly. The accused was the brother of the deceased and he had murdered the deceased along with his entire family namely his wife, son and 5 daughters when they were fast asleep in the night.

94. In ***Khemraj Ram (supra)*** the Supreme Court has held that the death sentence was justified. In the facts of that case, there were gruesome murders, deliberately planned and meticulously executed. The accused had killed his 2 innocent children, wife and brother-in-law when they were sleeping at night. He had acted in a cruel and inhuman manner. He did not show any remorse for such gruesome act. On the contrary he was satisfied with what he had done.

95. In ***Ajit Singh Haruamisingh (supra)*** the Supreme Court has upheld the death penalty. In the facts of that case, the accused had set his wife, his son and 2 daughters on fire. It has observed that, the expression “rarest of rare cases” cannot be defined with complete exactitude. It has observed that an accused deserve death penalty where the murder was grotesque, diabolical, revolting or of a dastardly manner so as to arouse intense and extreme indignation of the community, and when the collective conscience of the community is petrified or outraged. It also has to be seen whether the accused is a menace to society and continues to be so, threatening its peaceful and harmonious existence. Court has to further enquire and believe that the accused cannot be reformed or rehabilitated and shall continue with his criminal acts.

96. In ***Purushottam Dashrath Borate (supra)*** the Supreme Court has affirmed the death sentence to the accused. The Supreme Court has noticed that, the accused committed and executed the heinous offences of kidnapping, demanding ransom, gang rape and murder of the victim in a preplanned and meticulous manner. It has noticed that, the extreme depravity with which the offences were committed

and the merciless manner in which the victim was gang raped and murdered coupled with the position of trust held by one of the accused and the lack of remorse or repentance for any of their actions.

97. In ***Vasanta Sampat Dupare (supra)*** the Supreme Court has affirmed the death penalty. It has noticed that, accused had taken advantage of his acquaintance with the girl, her family and neighbours, lured the victim, a 4 year old girl, for giving her chocolate, took her on his cycle, raped her and crushed her with stones. He had thereafter shown no remorse for his diabolic, barbaric, inhuman, savage and uncommon act. He had washed the blood stained clothes taking proper care to hide things. He did not commit the crime under any mental stress or emotional disturbance. It was difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. He was found to remain a menace to the society. The age of the accused had also been taken into consideration.

98. In ***Viran Gyanlal Rajput (supra)*** the Supreme Court has commuted the death sentence to one of life imprisonment for a fixed term in a case of kidnapping, rape, murder of minor and causing disappearance of evidence. The court has taken

into consideration the lack of criminal antecedents prior to the commission of the crime and his post incarceration conduct which according to the court did not suggest impossibility of reform of the accused.

99. In ***Mohd Firoz (supra)*** the Supreme Court has commuted the death penalty in respect of a crime of rape and murder of a minor after abduction.

100. In ***Manoj and others (supra)*** the Supreme Court has upheld the death penalty of the accused noticing that, the accused after committing the murder was guilty of murdering another person during his custody.

101. In the facts of the present case, the appellants have been found guilty of two offences which prescribe capital punishment. The appellants have been held guilty of offences committed under Section 364 A as well as 302 of the Indian Penal Code, 1860 both of which carry death penalty.

102. The Supreme Court in ***2021 SCC Online SC 1136 (Mofil Khan and Another Vs. State of Jharkhand)*** has held that, it was the responsibility of the prosecution to prove that the accused cannot be reformed and is beyond the scope of rehabilitation.

103. In the facts and circumstances of the present case, the State has submitted a report pursuant to the order dated December 21, 2022. The state has not placed any materials to establish that, the appellants cannot be reformed or that they were beyond the scope of rehabilitation. The appellants do not have previous criminal antecedents. The State has not submitted any adverse report with regard to the conduct of any of the appellants subsequent to their arrest.

104. In the facts and circumstances of the present case, therefore, it cannot be said that, the mitigating circumstances are zero so far as the appellants are concerned. However, the aggravating circumstances are many. The appellants had kidnapped a minor, demanded ransom for her release, sexually assaulted the minor, and murdered the minor. After committing the murder, the appellants had broken the legs of the victim, and tried to remove the evidence of the crime. The appellants had acted in a brutal and diabolic manner.

105. In view of the State having failed to place any material to establish that the appellants cannot be reformed and are beyond scope of rehabilitation, the award of death penalty is commuted to one of life imprisonment. Keeping in view the brutality of the offence committed, it would be appropriate

that, the appellants be sentenced to life imprisonment without the possibility of remission till the end of their natural life.

106. DR 1 of 2020 along with CRA 167 of 2020 are disposed of accordingly.

107. 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 appellants stands modified in terms of this judgement and order. Department will inform the Correctional Home where the appellants are 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 appellants, in their records.

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

[DEBANGSU BASAK, J.]

109. I agree.

[MD. SHABBAR RASHIDI, J.]