

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

Death Reference No. 3 of 2018

THE STATE OF WEST BENGAL

...APPELLANT

Vs.

PRANAB ROY

...RESPONDENT

With

C.R.A. 177 of 2018

PRANAB ROY

...APPELLANT

Vs.

THE STATE OF WEST BENGAL

...RESPONDENT

For the Appellant

: Mr. Sekhar Kumar. Basu, Sr. Adv.
Mr. Sujan Chatterjee, Adv.
Mr. Sanat Kumar Das, Adv.

For the State

: Mr. S.G. Mukherjee, ld. PP.
Mr. N. Ahmed, ld. APP.
Mr. P.P. Das, Adv.

Heard on

: 12.12.2022, 20.12.2022,
09.01.2023 and 11.01.2023

Judgment on

: 02.02.2023

Joymalya Bagchi, J.:-

1. This appeal is directed against the judgment and order dated 18.04.2018 and 19.04.2018 passed by learned Additional District & Sessions Judge, 2nd Court, Tamluk, Purba Medinipur in Sessions Trial No. 5(7)15 arising out of Sessions Case no. 434(Nov.)14 convicting the appellant for commission of offences punishable under sections 376A/302 IPC and section 14(1) of Child Labour (Protection) Act [sic]¹ and sentencing him to death subject to the confirmation by this Court.

2. The appeal and the Death reference have been heard analogously and have been disposed of by this judgment and order.

Prosecution case:-

3. Victim was a 12-year old girl. One month prior to the incident she was employed in the house of the appellant as a full time domestic help. On 23.05.2012 at about 1:00 pm her father P.W. 1 got information the victim had been admitted at Tamluk District Hospital. He rushed to the hospital and saw his daughter writhing in pain. She was unable to speak but pointed to her chest. Appellant was present at the spot. He disclosed the victim had consumed poison. He also assured P.W. 1 and his wife that she was stable and if necessary would be shifted to Calcutta for better treatment. Unfortunately, the victim died.

¹ Child Labour (Prohibition and Regulation) Act, 1986 (for short, 'Act of 1986')

4. Appellant sympathized with P.W. 1 and told him that he would arrange for cremation and shradh ceremony and take responsibility of other daughters on condition that P.W. 1 remained silent. Thereafter, with the help of local councilor the body of the victim was released.

5. When police came to the spot P.W. 1 told them there was conspiracy behind the death of his daughter as she had been taken to hospital at 10 AM but he was informed after three hours i.e. around 1:00 PM. During cremation his wife noticed injuries on the private part of their daughter. This raised suspicion in his mind that the victim had not died by consuming poison but due to some indecent behavior. Initially, he was unable to react due to his mental distress.

6. On the next day, appellant and his associates threatened him not to go to police. 7-8 days later he was taken to the residence of one Golam Sarwar. There he was asked to put LTI on a document stating that he would not file any case against the appellant in lieu of money. He refused to do so. Police came to the spot. He was taken to police station where he lodged complaint which was scribed by one Basudeb Das (P.W. 2). Appellant was also brought to the police station and arrested.

7. In the course of investigation his statement was recorded. Post mortem report of the victim showed she had been subjected to rape and throttled to death. Charge-sheet was filed.

8. At the time of consideration of charge defence prayed the viscera report be called for. Viscera report was produced. Upon consideration of the materials on record, charges were framed under section 376A and 302 IPC and under section 14(1) of 'Act of 1986'.

9. Appellant pleaded not guilty and claimed to be tried.

10. In the course of trial, prosecution examined seven witnesses including P.W. 1, father of the victim.

11. In conclusion of trial, the trial Judge vide judgment and order dated 18.04.2018 and 19.04.2018 convicted and sentenced the appellant, to death. Hence, the present appeal and death reference.

Arguments at the Bar:-

12. Mr. Basu, learned Senior Counsel submitted the charges are inconsistent and defective. Dates of occurrence in the heads of charges are not consistent to one another. P.W. 1 is not a reliable witness. He admitted he had not visited the house of the appellant. He is not a competent witness with regard to the victim staying in the house of the appellant as a full time domestic help. His knowledge with regard to the injuries in the private parts of his daughter is derived from his wife who has not been examined. P.W. 1 has criminal antecedents and was arrested in connection with another case. Reason for delay in lodging FIR given by P.W.1 in Court is inconsistent with his statement before Magistrate. It is unclear why he did not take help of his neighbors with whom he had good relations to lodge FIR. None of the doctors who had

examined the victim at the Tamruk District Hospital found signs of sexual assault. P.W. 3 had noted in the injury report 'patient shows sign of poison'. He could not explain when he had struck off the aforesaid statement. P.W. 4 did not find any sign of blood in the private part. P.W. 4 disclosed to police neither the girl nor any other patient party complained of rape. The girl had mentioned the word 'poison' and pointed upstairs. These circumstances militate against the prosecution case. Age of the girl has not been conclusively proved. Opinion of post mortem doctor (P.W. 5) regarding age of the victim on the basis of teeth is not a conclusive one. There is inordinate delay of about three months in making the post mortem report. This unexplained delay casts a shadow and renders it hazardous to rely on the doctor's opinion. There is no evidence where the viscera was kept prior to examination. There are glaring defects or deficiencies in investigation. Vital witnesses, namely, mother of the deceased, doctor at RRB nursing home where the victim was first treated, Satya Kinkar Das (employee of BSNL), Biswajit Manna, Tapan Sarkar, Saroj Kumar Biswas were not examined. Hence, prosecution case has not been proved beyond doubt.

13. In response, learned Public Prosecutor submitted victim was a minor girl coming from economically weak strata of society. She was employed as a full time domestic help in the house of the appellant. Appellant was the lone male member living in the house. P.W. 1, being

the father of the minor girl, was aware of her employment and had consented to it. While staying at the appellant's residence, victim was raped and throttled to death. This is probalised by the fact that the appellant took the victim to hospital. However, to cover his misdeeds he gave a false explanation that the victim had tried to consume poison. P.Ws. 3 and 4, doctors at Tamluk District Hospital relied on the appellant's version and treated the victim perfunctorily. While P.W. 3 did not examine her private parts, P.W. 4 claimed to have done so but over her wearing apparels. Their opinion with regard to the nature of injuries suffered by the victim is of little consequence. Even version of P.W. 4 that the victim did not complain of rape or had uttered the word 'poison' is not supported by other witnesses. P.W. 5 post mortem doctor categorically stated that the minor victim with the noted injuries could not have spoken. P.W. 1 father of the victim also claimed victim was unable to speak. Injuries noted in the post mortem report clearly shows victim had been raped and throttled to death. Viscera report rules out any possibility of poison. Age of the victim is proved through the evidence of her father, P.W. 1. Even the appellant disclosed her age as 12 years when the victim was admitted at Tamluk District Hospital as per Exhibit 2. Appellant gave false explanation with regard to the circumstances in which he had brought the victim as well as the cause of her death. This strengthens the prosecution case and implicates the

appellant in the crime. Hence, appeal is liable to be dismissed and the sentence of death be confirmed.

Defects in institution of proceeding and charge:-

14. It has been argued that the three heads of charges contain various irregularities and refer to different dates of occurrence. While in the head of charge under section 14(1) of the Act of 1986 the legislation is incorrectly described and it is alleged that the victim was employed in the house of the appellant from 12.05.2012 to 23.05.2012, the second head of charge under section 376A IPC alleges she had been subjected to rape 'on or before one month ago' from 02.06.2012 i.e. 02.05.2012 to 02.06.2012. Incident occurred on 23.05.2012 and she was admitted to the hospital on that day. In fact, the third head of charge clarifies the situation and states that the victim was raped and murdered in the morning of 23.05.2012. The variations in dates in the first two heads of charges or other minor errors are inadvertent and when judged in the light of the accusation made in the third head of charge as well as the consistent evidence on record do not give an impression that the appellant had been misled by the aforesaid error to prepare his defence or the same had occasioned failure of justice.

15. It is also argued in view of section 16 of the Act of 1986 no cognizance could have been taken of the offence under the said Act except on a complaint by the appropriate authority. In the instant case

investigation was started on the basis of a FIR alleging offences not only under the Act of 1986 but other graver offences, namely, rape and murder. In conclusion of investigation, a police report was filed for the said graver offences including the offence under section 14(1) of the Act of 1986. Cognizance was taken on the police report filed by the investigating officer who is a police officer entitled to initiate prosecution under section 16 of the said Act. Hence, there is substantial compliance of the aforesaid provision of law.

Is P.W. 1 reliable?

16. Prosecution case essentially hinges on the evidence of the father of the victim girl, P.W. 1. P.W. 1 is also the *de facto* complainant. He deposed one month prior to the incident his daughter was employed as a full time domestic help at the residence of the appellant. Due to poverty he had sent his daughter to work there. Appellant was a teacher and his financial condition was good. He had given consent to his daughter's employment. It is contended he is not a competent witness as he had not visited the house of the appellant. P.W. 1 is the father of the victim girl. Owing to his financial stringency, he had given consent to her employment as a full time domestic help at the residence of the appellant. These circumstances were within the knowledge of P.W. 1 and he was competent to depose in that regard. Merely because he did not go to the residence of the appellant, it cannot be said that he had derived knowledge from his wife and was

not a competent witness. P.W. 1's evidence is further reinforced from the materials on record which shows it was the appellant who had taken the victim to Tamluk District Hospital.

17. In the injury report (Exhibit – 2) at the hospital, it is recorded the appellant had brought the semi-conscious minor. Her name, father's name, age and address were also recorded in the report. P.W. 1 was informed and came to the hospital three hours later. It was none other than the appellant who had furnished the aforesaid personal information to P.W. 3, the doctor who prepared the injury report. This probabalises the prosecution case that the victim was working as a full-time maid at the appellant's residence and such close association gave him knowledge about her personal details. Prosecution case that the victim girl had been residing at the house of the appellant as a full time maid one month prior to the incident is thus clearly established.

18. Evidence of P.W. 1 has also been challenged on the ground that he has criminal antecedents. During cross-examination P.W. 1 admitted he had two wives. He had married his second wife Asha by notary. Asha left with one Purna. This enraged him and he assaulted Purna. He was in custody in that case. Facts of the said case are clearly distinct from the present one. It had nothing to do with the employment of his daughter in the house of the appellant or his relation with the appellant which would prompt him to falsely implicate the latter.

19. There is 7-8 days delay in lodging FIR. Delay in lodging FIR does not improbabilise a prosecution case if the delay is adequately explained. Delay must be assessed in the facts of each case. Nature of the crime, its impact on the victim/complainant and other attending circumstances must be seen.

20. P.W. 1 comes from an economically weaker section of society. He is a rickshaw van puller. Due to financial distress he permitted his daughter to stay and work in the residence of the appellant, a school teacher. Social and economic gradient between the parties are self-evident. On 23.05.2012 around 1:00 PM daughter of P.W. 1 was hospitalized. After three hours, P.W. 1 was informed. He rushed to the hospital and was told she had consumed poison. Soon thereafter she died. Appellant assured him of all economic help and told him not to take the matter to police. P.W. 1 contended during cremation his wife had seen injury marks on the private parts of her daughter. As P.W. 1's wife had not been examined, I would like to discount such fact. However, one cannot lose sight of the fact that P.W. 1, being the unfortunate father, was stunned by the sudden demise of his daughter. Under such circumstances, delay to approach police is understandable. Furthermore, he was discouraged by the appellant through lure of money to set the criminal law into motion. In fact, 7-8 days later he was taken to the house of one Golam Sarwar and was asked to put LTI on a document stating he would not proceed against

the appellant in lieu of money. He refused to do so. Local people assembled and he was brought to the police station. Then he lodged complaint. These circumstances clearly explain the delay in lodging FIR.

21. P.W. 1 was extensively cross-examined. He stoutly withstood the cross-examination and firmly established the foundations of the prosecution. He is a wholly reliable witness and the main plank of the prosecution case. Non-examination of P.W. 1's wife is for reasons peculiar to her and have been elaborated later. Her non-examination does not affect the unfolding of the case. It is the quality and not quantity of evidence which is vital. When P.W. 1 is found to be reliable and truthful, his consistent evidence is sufficient to prove that the victim girl was residing as a full time maid in the house of the appellant.

Cause of death:-

22. P.W. 5, post mortem doctor has proved the cause of death. He deposed on 23.05.2012 he examined the body of the victim. On examination he found the following injuries:-

"Injuries:- (1) One swelling minimally elevated and pushing left ear lobule anteriorly and obliterating the groove behind and 0.5 cm below (also called mastoid groove) lower attachment of left ear lobule measuring approximately 3.5 cm X 3 cm. and gradually subsides into the surrounding tissues. On dissection haematoma and dark scanty blood filled the said groove. Periosteum over mastoid bone tinged with blood permanently. Superior muscle fibres are mopped with blood; on cleansing blood by swabbing upper part of masseter and buccinator having abraded bruise. Anterior surface of lower

part of left auricle and perichondrium faintly tinged with blood-posterior surface not.

1) Vital reaction positive. The right side counter part NAD even on dissention, 2) One thumb impression like bruise over underneath of right side of chin approximately 0.7 cm. below right angle of right side of Jaw bone measuring 1.5cm. X 1 cm. lies obliquely. On dissection faint haematoma over platysma and right greater horn of hyoid cartilage the pericardium of which is blood tinged permanently and no breakage of hyoid. The Supra hyoid muscles in between having bruises. Vital reaction positive.

In column headed "Marks of ligature on neck dissection etc."- No marks of ligature on neck. On dissection no parchmentation, the neck area made bloodless by dissecting brain first. Thyroid and hyoid intact, the right side of hyoid – as stated, left not – feature of partial/ one sided throttling. No nail marks.

In column headed "organs of generation, external and internal"-

Vulva well developed (with subcutaneous fat thickness greater than breast budding on dissection confirmatory). Labia majora apposed and labia minora not seen without make it (labia majora) well apart by index and thumb finger of left hand. Hymen ruptured and fibrosed margin mainly at posterior and postero lateral margin with irregular notches and less than pin head sized knots at margin – features suggestive of repeated intercourse. Fornices firm with features of fibrosis. Vaginal canal provides space for mid finger tip particularly at its deep anterior aspect which is not supposed to be provided in a virgin girl rather features are suggestive of repeated sexual intercourse. All these are features of per vaginal examination – which is done in "copy book fashion". The gloved examining fingers, little –ring and then –mid finger are moistened and slippery without any tinge of blood. Before the said per vaginal examination on inspection under a hand lens show features of wiping the area of vulva, upper thighs and pubic region having streaks of fluid marks like 'geographical map area' at places. No blood marks over the corpse in the said area or in the examining gloved fingers. Vaginal swab is moistened without any tinge of blood. No pubic hair. Uterus shape size:- within normal limits. On dissection potential space nothing abnormal detected and whitish."

23. On examination of the teeth, he opined age was 10/12 years.

He further opined as follows:-

“...– is due to the combined effects of vagus nerve inhibition and from carotid body disturbances, particularly of the left side resulting from the injuries as depicted as well as partial throttling as depicted above ante mortem and homicidal in nature.”

He found no sign of poisoning:-

“Finding of the stomach and Proximal. Intestine does not show any features of poisoning, rather reflects vagal inhibition along with carotid body disturbances reflected in the various organs.”

24. He also deposed injuries mentioned by him in the post mortem report were sufficient to cause death in ordinary course of nature. No poison could be detected. In case of partial one sided throttling there is possibility of froth coming out of the mouth. He further stated viscera was preserved and handed over to the police. He was extensively cross-examined. He clarified that the facial injuries isolatedly were not sufficient to cause death. He denied the suggestion that the thumb impression on the neck was self-inflicting.

25. As the viscera report was not received during investigation, the Court on the prayer of the defence directed the viscera report to be produced at the time of consideration of charge. Viscera report was produced and marked as Exhibit 5. Viscera report shows no poison was found in the stomach of the victim. The post mortem report and viscera report leaves no doubt in one's mind that the minor victim was

subjected to forcible sexual intercourse and throttled to death. It was not a case of ingestion of poison.

26. Defence contended the post mortem report is unreliable in view of the findings of the treating doctors P.Ws. 3 and 4. It was also submitted there was inordinate delay of around 84 days in submission of post mortem report. I have given anxious consideration to the aforesaid submissions. Firstly, with regard to the opinion of the treating doctors, P.Ws. 3 and 4, I am constrained to hold that their examination of the victim was most indifferent and perfunctory. Both the doctors proceeded on the basis the case was one of poisoning.

27. P.W. 3, Dr. Ashok Kumar Paria who treated the victim at the emergency department in Tamluk District Hospital candidly admitted he did not examine the private parts of the victim. He also admitted that he had struck off the words 'patient shows sign of poison' in one portion of the injury report but could not explain why he had done so.

28. P.W. 4, Dr. Hrishikesh Majumdar examined the victim after she was admitted to the pediatric ward. His examination of the patient also appears to be very perfunctory. The doctor admitted he examined the upper and lower abdomen of the victim over her wearing apparels. It is beyond one's imagination how a medical officer could have examined the private parts of a patient without removing her wearing apparels. In fact, P.W. 4 admitted that the examination of total abdomen including private parts must be done after removal of

wearing apparels but for reasons best known to him he did not follow the protocol. Medical examination of the minor at Tamluk District Hospital appears to be wholly perfunctory and contrary to the established medical protocol. Opinion of the doctors who conducted such perfunctory and indifferent examination is of little, if not, of any consequence.

29. P.W. 4 went a step further and deposed he had disclosed to I.O. that neither the girl nor any patient party complained of rape. He also stated he had disclosed to I.O. the girl had uttered the word 'poison' twice and pointed upstairs as the source of poison.

30. P.W. 6 (I.O.) does not corroborate the doctor on this aspect. On the other hand, opinion of post mortem doctor P.W. 5 categorically rules out the possibility of the victim being in a position to speak after having received injuries as noted in the report. P.W. 1 who saw the victim in the hospital also stated his daughter was unable to speak.

31. These circumstances improbabilise the version of P.W. 4 with regard to the victim being able to speak and the claim that she had consumed poison.

32. It has been strenuously argued there is an inordinate delay in submitting the post mortem report. This renders the report vulnerable. It is true the report was submitted after 84 days of post mortem examination. Materials on record show police made prayer to collect post mortem report but was unable to do so. Superintendent of

the hospital wrote letter to the post mortem doctor (P.W. 5) calling upon him to submit the post mortem report in the present case and other cases too. From the letter it appears that the delay in submitting the post mortem report is not unique to the present case. It was a generic delay affecting all cases. Bureaucratic delay of such nature in Government hospitals is not uncommon. They are due to bureaucratic inefficiencies, lack of manpower and other facilities etc. Delay due to bureaucratic red tapism affecting all cases in general including the present one does not create an impression that the report prepared by P.W. 5 was a false one procured through political malice. Suggestion given in this regard was stoutly denied by P.W. 5. Post mortem examination was promptly conducted on 23.05.2012. It is common knowledge while examining the body, a post mortem doctor maintains notes. Formal report is prepared on the basis of such notes. Hence, delayed submission of report due to bureaucratic lethargy when the post mortem examination was, in fact, conducted within 24 hours of death does not affect the credibility of the report.

33. Post mortem doctor deposed that the viscera was collected and handed over to the police. P.W. 7 claimed that the viscera had been sent to the forensic laboratory through a constable, Nirmal Kumar De. On the prayer of the defence, the trial Court directed the viscera to be produced. Pursuant to such direction viscera was produced. In this backdrop, non-examination of the constable who

took the viscera to the forensic laboratory does not snap the live link between the viscera collected and the report produced from FSL laboratory pursuant to the direction of the trial Court.

34. The viscera report (Exhibit- 5) shows no poison was detected in the body of the victim. This renders the defence version that the victim committed suicide by consuming poison untrue. Prosecution case that the victim was raped and throttled to death is established beyond doubt.

Age of victim:-

35. It is contended age of victim has not been established. It is further argued opinion of post mortem doctor that the victim was between 10/12 years based on denture is not conclusive. Father of the victim (P.W. 1) stated in F.I.R. her daughter was 13-years old at the time of incident. Evidence of a parent is the best and direct evidence regarding age of his/her child. More so, appellant who brought the victim to Tamluk District Hospital gave out her age as 12 years which was noted in the injury report, Exhibit- 2 by P.W. 3. These circumstances establish beyond doubt the victim was 12/13 years old at the time of incident.

Non-examination of witnesses:-

36. Defence argued that the prosecution case ought to fail on the ground of non-examination of vital witnesses. Mother of the victim Asha Bhunia had not been examined. Her deposition was necessary for

unfolding of the prosecution case. In addition thereto, neither the medical personnel at RRB Nursing Home (where the victim was first treated) nor the cycle rickshaw puller (who took the victim to hospital) were examined. Other witnesses, namely, Satya Kinkar Das, Biswajit Manna, Tapan Sarkar, Saroj Kumar Biswas were not examined. These witnesses were examined by investigating officer during investigation but were not examined in Court. Their non-examination gives rise to an adverse inference against the prosecution case.

37. During trial the prosecutor submitted a prayer stating he did not wish to examine other witnesses as they had been won over. It is argued mere *ipse dixit* of the prosecutor is not sufficient. It is open to a prosecutor to choose the witnesses he would examine to prove his case. It is not mandatory to examine all witnesses cited in the charge-sheet. More so, when it is contended the said witnesses have been won over. In the present case, appellant comes from a superior socio-economic strata of society and evidence is forthcoming that the father of the victim (P.W. 1) (a poor rickshaw puller) had been subjected to threats and coercion including offers of money to keep silent. In this backdrop, I am prompted to accept the prosecution version that other witnesses had been won over and were not examined.

38. It would be argued non-examination of Asha, mother of the victim was fatal. In ***State of UP and Another vs. Jaggo alias Jagdish and Others***² the Apex Court, inter alia, held as follows:-

“14. ... It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the “unfolding of the narrative” should be called...”

Let me examine whether in the backdrop of the evidence on record non-examination of Asha had impaired the unfolding of the case.

39. Prosecution case that the minor was residing in the house of the appellant as a full time made is proved by P.W. 1. True, Asha (mother of the victim), if examined may have corroborated her husband but her non-examination does not create a void which impacts the unfolding of the case. Even if it is accepted the fact that she noticed injuries in the private parts of her daughter during cremation is not proved due to her non examination, P.W. 5 post mortem doctor has unequivocally proved the presence of injuries in the private parts of the victim and established the prosecution case of rape and murder beyond doubt.

40. Moreover, evidence is forthcoming soon after the incident Asha went missing. She had eloped with one Purna. Over such issue P.W. 1 entered into fracas with Purna. He was jailed. During the hearing of the appeal, this Court made enquiry about the whereabouts of Asha. Report was filed on behalf of the prosecution that Asha was

² (1971) 2 SCC 42

residing with Purna. These circumstances lay bare the reasons why Asha did not find it convenient to come and depose regarding the circumstances leading to the unfortunate death of her daughter born out of P.W. 1. Her affection lay with her paramour and she was an easy victim to be persuaded by the appellant not to depose.

41. Bed head ticket and injury report (Exhibis – 3/3 and 2) respectively of Tamluk District Hospital do not show that the victim had been referred to the hospital from another medical institution, namely, RRB Nursing Home. Appellant may have initially taken the victim to the nursing home but she does not appear to be admitted in the said medical institution. Under such circumstances, non-examination of the medical personnel of the nursing home or the cycle rickshaw puller who took the victim there does not affect the unfolding of the prosecution case.

42. Other local witnesses including Satya Kinkar Das, an employee of BSNL are also of little relevance to the unfolding of the prosecution case. It is the prosecution case that the incident occurred at the residence of the appellant. When the crime is committed within the four walls of a house, examination of local witnesses would hardly throw any light with regard to the circumstances leading to the commission of the crime. On the other hand, it was the defence version that the appellant had found victim lying on the floor of BSNL office. He had taken her to hospital along with local people. Appellant could

have examined the said local people to probabilise such defence which he failed to do. Examination of the local people therefore was not essential for unfolding the prosecution case but may have lent credence to the defence version. Failure of the defence to examine them to probabilise its desperate plea cannot render the prosecution case vulnerable.

Falsity of the defence version:-

43. In the course of his examination under section 313 Cr.P.C. the appellant stated the victim used to take computer lessons in a free coaching center. On the fateful day he saw her lying on the floor of BSNL office and took her to hospital. He was accompanied by local people.

44. Falsity of the defence version is writ large from the materials on record. Victim was a 12/13 year old uneducated girl. Owing to their financial condition, the child had been employed as a whole time domestic help in the household of the appellant. No suggestion was put to P.W. 1 that her daughter was educated and was taking computer lessons. Belatedly during his examination under section 313 Cr.P.C. did the appellant come up with this plea.

45. P.W. 3, the doctor who treated the victim at emergency department in Tamluk District Hospital, deposed the victim had been brought by the appellant. Victim was in semi conscious state. Name of the victim, her age, father's name and address were noted by the said

doctor in the injury report. None other than the appellant who had brought the victim to the hospital could have disclosed these facts to the doctor. Disclosure of the personal details of the victim by the appellant to the treating doctor supports the prosecution case that she was working as a whole time maid in his house and wholly improbabilises the defence version.

46. Appellant also took a false plea that the victim had consumed poison. P.Ws. 3 and 4 appear to have been misled by such plea and the frothing coming out from the mouth of the victim. P.W. 5 post mortem doctor opined such frothing may be caused due to partial throttling and the viscera report clearly rules out a case of poisoning.

47. As discussed earlier, non-examination of the local people were not essential for unfolding the prosecution case but may have probabilised the defence version. Defence did not lay the foundation of its case through cross-examination which may have cast an onus on the prosecution to improbabilise it. Only during his examination under section 313 Cr.P.C. the appellant came out with false explanation that he had seen the child lying on the floor of BSNL office and had taken her to hospital.

48. Falsity of the defence version is an additional incriminating circumstance which points to the guilt of the appellant.

Does conduct of the appellant improbabilise the prosecution case:-

49. It would be argued as the appellant had taken the victim to hospital, the prosecution case that he intended to murder her is demolished.

50. On the first blush the argument is attractive. But a deeper scrutiny would show that the victim who was working as a whole time maid in the house of the appellant had been raped and murdered. He was the sole male member of the household. To cover his misdeed he took a false plea that the victim had consumed poison and admitted her to hospital.

51. His subsequent conduct though ameliorative in assessing the quantum of punishment does not wash away the crime. Appellant had raped the minor girl and in the course of such act had partially throttled her. Appellant had intentionally caused injuries while brutally raping the minor victim. In view of her tender age, he knew the injuries were likely to cause death. Post mortem doctor (P.W. 5) also opined the injuries were cumulatively sufficient in ordinary course of nature to cause death. Act of the appellant would, therefore, fall within clause (2) and (3) of section 300 I.P.C.³ and would constitute murder.

³ 2ndly. – 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

3rdly.- 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.

52. Reliance placed on ***State of Rajasthan vs. Prithviraj***⁴ is inapposite. The case is factually distinguishable. In the cited case the accused had led defence evidence to prove his alibi which improbabilised the dying declaration. In this backdrop, the Court held the accused taking the victim to hospital was an additional circumstance pointing to his innocence. Present case portrays a completely different picture. Post mortem doctor as well as the viscera report establishes beyond doubt the prosecution case of rape and murder. It improbabilises the defence version of poisoning and exposes the desperate plea of poisoning taken by the appellant which misled the treating doctors at the hospital.

Circumstances proved:-

53. Prosecution has therefore been able to establish the following circumstances beyond doubt:-

- a) Victim a 12/13 year old girl was working as a whole time maid in the house of the appellant;*
- b) Appellant was the only male member in the house;*
- c) On the date of incident, he took the victim in a semi conscious condition to the hospital;*
- d) At the time of admission, he gave out the particulars of the victim which probabalises the prosecution case regarding her employment in his household;*

⁴ 1995 Supp (3) SCC 410

e) To cover his misdeeds, he stated that the victim had consumed poison. This misled the treating doctors (P.Ws. 3 and 4) who were prompted to treat her for poisoning and did not medically examine the victim properly as per protocol;

f) Post mortem doctor (P.W. 5) opined that the victim had been raped and partially throttled resulting in her death. He further opined viscera report ruled out any case of poisoning;

g) In the course of examination under section 313 Cr.P.C. appellant came out with a false plea with regard to the manner in which he had found the victim and had taken her to hospital. This is an additional incriminating circumstance militating against his innocence and establishing the prosecution case.

Conclusion:-

54. The aforesaid incriminating circumstances clearly establish the guilt of the appellant. Accordingly, he is convicted for commission of offences under sections 376-A, 302 of I.P.C and 14(1) of the Act of 1986.

Death sentence:-

55. At the outset this Court notes with concern the cavalier manner in which the sentencing was done by the trial Court. Though the appellant was convicted on three counts, trial Court instead of

awarding sentence on each count awarded the sentence of death in a composite manner. Awarding of a composite sentence is not countenanced in law and is patently illegal.

56. While awarding death penalty, the Court merely referred to the aggravating circumstances, namely, the victim was a 12-year old domestic help who was raped and murdered by a school teacher. It did not take into account the mitigating circumstances and held the heinous act deserves death penalty on principle of proportionality.

57. In **Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra**⁵ the Apex Court analyzing the ratio in **Bachan Singh vs. State of Punjab**⁶ held a case would fall within the 'rarest of rare' category only when the alternate option of life sentence is unquestionably foreclosed:-

"64. Another aspect of the rarest of rare doctrine which needs serious consideration is interpretation of latter part of the dictum (SCC p. 751, para 209) — "[t]hat ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed (emphasis supplied)". Bachan Singh [(1980) 2 SCC 684] suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose."

58. To arrive at such conclusion the Court must not only be guided by the brutality of the crime but must make a dispassionate analysis of both the aggravating and mitigating circumstances. The Court must come to a finding that there is no clear evidence why the

⁵ (2009) 6 SCC 498

⁶ (1980) 2 SCC 684

convict is not fit for any kind of reformatory and rehabilitation scheme.

In **Bariyar** (supra) the Bench highlighted the importance of mitigating circumstances in death penology as follows:-

“71. It has been observed, generally and more specifically in the context of death punishment, that sentencing is the biggest casualty in crimes of brutal and heinous nature. Our capital sentencing jurisprudence is thin in the sense that there is very little objective discussion on aggravating and mitigating circumstances. In most such cases, courts have only been considering the brutality of crime index. There may be other factors which may not have been recorded.

72. ...The test which emanates from Bachan Singh [(1980) 2 SCC 684] in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigour and fairness are given primacy over sentiments and emotions.”

59. Ruling out principle of proportionality as the sole parameter to impose death penalty, the Bench further observed:-

“159. Although the Constitutional Bench judgment of the Supreme Court in Bachan Singh [(1980) 2 SCC 684] did not lay down any guidelines on determining which cases fall within the “rarest of rare” category, yet the mitigating circumstances listed in and endorsed by the judgment give reform and rehabilitation great importance, even requiring the State to prove that this would not be possible, as a precondition before the court awarded a death sentence. We cannot therefore determine punishment on grounds of proportionality alone. There is nothing before us that shows that the appellant cannot reform and be rehabilitated.”

(emphasis supplied)

60. In the present case, though the appellant had come out with a false plea of ingestion of poison in the hospital it cannot be denied that his conduct of taking the victim to hospital after the incident

clearly portrays that he is not bereft of the possibility of being reformed and rehabilitated. This was completely lost sight of by the trial Court.

61. In this backdrop, I am of the opinion the imposition of death sentence was completely erroneous and is liable to be set aside.

62. Accordingly, I set aside the sentence of death and award the following sentences:-

(a) Appellant shall suffer rigorous imprisonment of 20 years and to pay a fine of Rs. 25,000/-, in default, to suffer rigorous imprisonment for 2 years more for the offence punishable under section 376A I.P.C.;

(b) He shall suffer rigorous imprisonment for life and to pay a fine of Rs. 20,000/-, in default, to suffer rigorous imprisonment for 2 years more for the offence punishable under section 302 I.P.C.;

(c) He shall suffer rigorous imprisonment for one year and pay a fine of Rs. 10,000/-, in default, to suffer rigorous imprisonment for 2 months more for the offence punishable under section 14(1) of the Act of 1986. All the sentences shall run concurrently.

63. Death Reference No. 3 of 2018 and Criminal Appeal No. 177 of 2018 are, accordingly, disposed of.

64. Period of detention suffered by the appellant during investigation, enquiry and trial shall be set off from the substantive

sentence imposed upon him in terms of Section 428 of the Code of Criminal Procedure.

65. A copy of the judgment along with L.C.R. be sent down to the trial Court at once for necessary action.

66. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of all formalities.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)

PA