

IN THE HIGH COURT AT CALCUTTA
Criminal Miscellaneous Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Debangsu Basak

And

The Hon'ble Justice Md. Shabbar Rashidi

CRA (DB) 130 of 2022

With

D.R. 1 of 2022

Jahangir Chowdhury

Vs.

The State of West Bengal

For the Appellant : Mr. Sekhar Kumar Basu, Sr. Adv.
 Mr. Soubhik Mitter, Adv.
 Ms. Rajnandini Das
 Mr. Karan Bapuli, Adv.

For the State : Mr. Ranabir Roychowdhury, Adv.
 Mr. Sandip Chakraborty, Adv.
 Mr. Mainak Gupta, Adv.

Hearing Concluded on : January 2, 2022
 Judgement on : January 11, 2023

DEBANGSU BASAK, J.:-

1. A 5 year old female minor was kidnapped, raped, and murdered. There was an attempt to destroy the evidence with regard to the crime. The appellant was tried with regard to such offences. He was convicted by the impugned judgement of conviction dated June 20, 2022 and the impugned order of sentence dated June 24, 2022.

2. By the impugned order of sentence dated June 24, 2022, the appellant was awarded death penalty. The appellant

preferred an appeal from the impugned order of conviction and the impugned order of sentence. A death reference was made to this Hon'ble Court in view of the award of death penalty. Both the appeal and the death reference were heard analogously.

3. At the trial, the case of the prosecution was that, the appellant on February 14, 2018 at about 6:30 PM in the evening, entered the house of the de facto complainant who was the mother of the victim. The appellant took the victim from her house on the plea that the appellant would purchase chanachur (loosely translated as fried Indian snack). When the victim did not return, a search was started for the victim whereupon, she could not be found. On February 15, 2018, at about 11 AM in the morning, the de facto complainant came to learn from the local people that a girl was lying on the bank of a pond. De facto complainant went there, and identified the body as that of her daughter. Police started an unnatural death case. The mother of the victim, as de facto complainant, lodged a written complaint on the basis of which, a First Information Report was registered. The First Information Report was investigated into and a charge sheet was submitted on conclusion of the investigation for offences under Sections 363/365/302/201/376 of the Indian Penal

Code, 1860 and Sections 4/6/8 of the Protection of Children from Sexual Offences Act, 2012 vide charge sheet No. 115/18 dated May 11, 2018 against the appellant.

4. Charges against the appellant were framed under Sections 363/302/201/376 (2) (i) of the Indian Penal Code, 1860 and under Section 6 of the Protection of Children from Sexual Offences Act, 2012. The appellant pleaded not guilty in respect of the charges and claimed to be tried.

5. At the trial, the prosecution examined 16 witnesses. The prosecution relied upon various documentary and material exhibits to bring home the charges as against the appellant. On conclusion of the evidence of the prosecution, the appellant was examined under Section 313 of the Criminal Procedure Code. The appellant during such examination claimed to be innocent. He declined to adduce any defence witness.

6. The de facto complainant, who was the mother of the victim, deposed as PW 1. She stated that, in the evening at about 6/6:30 PM when the victim was sitting by the side of her sister-in-law who was preparing bread at her house, the appellant came to the house. The victim expressed a desire to accompany the appellant to a grocery shop. Appellant took the victim on his lap and proceeded towards the grocery shop of

PW 7. After half-an-hour, she asked her sister-in-law about the whereabouts of the victim when her sister-in-law told her that, the appellant took the victim to the shop of PW 7. She then went to the shop of PW 7 to search for the victim when she was told by PW 7 that the appellant came to the shop alone.

7. The victim went missing since then. The next morning, the dead body of the victim was detected in the mud water of the pond of the village. The dead body was lifted. The appellant fled away from the place when the dead body of the victim was lifted. The maternal cousin brother intimated the police and thereafter, the police came and started the investigation. The police apprehended the appellant and interrogated him. During interrogation, the appellant admitted that he took the victim and murdered her by strangulation after committing rape.

8. PW 1 stated that the age of the victim was about five and half years at the time of the incident. She tendered her statement recorded under Section 164 of the Criminal Procedure Code in evidence, which was marked as X for identification. She identified the appellant in Court. She was cross-examined in detail on behalf of the defence. She accepted the fact that, on the fateful evening, when the victim

was missing, they did not intimate the police station about her disappearance.

9. The grandfather of the victim deposed as PW 2. He stated that the appellant took the victim with him on the pretext of giving her fried Indian snack from the shop of PW 7. When the appellant came back alone, he was asked about the victim when the appellant replied that, he dropped the victim at the door of her house. Thereafter, a search was commenced when there was a failure to trace the victim in the night. On the next morning at about 11/11:30 A.M they were intimated that, the appellant was searching something in the pond with the help of torchlight in the night of the incident. The pond was searched when the dead body of the victim was recovered. He described the wearing apparels of the victim when she went with the appellant. He also described the necklace that the victim was wearing at that point of time. He stated that, at the time of recovery of the body of the victim, the necklace was missing from the body of the victim. He identified the wearing apparels of the victim and the necklace in Court which were tendered in evidence and marked as material exhibits. He identified the appellant in Court. He was cross-examined in great detail. The defence could not elicit anything favourable from him.

10. A seizure list witness deposed as PW 3. He identified the wearing apparels which were seized from the appellant, in Court. He identified the signature on the seizure list. The wearing apparels of the appellant were marked as material exhibits.

11. The lady in whose presence, the appellant took the victim on the fateful evening, deposed as PW 4. She stated that, she was cooking in her house and that at around 6/6:30 PM, appellant came to the house and asked the victim to go with him. The appellant told her that, he would buy and give fried Indian snack to the victim from the shop of PW 7. Thereafter, the appellant took the victim with him and came back alone after 30 minutes. The appellant was asked about the whereabouts of the victim when he replied that he kept the victim at the main door of the house. She could not see the victim there and asked the appellant again about the victim when the appellant said that he was talking on his mobile while walking and he fell down on the ground and thereafter, the victim fled away from the place leaving the hand of the appellant. He identified the appellant in Court.

12. PW 4 stated that, at the time when the appellant took the victim from her, the appellant was wearing blue T-shirt and blue jeans full pant. She identified the wearing apparels

of the appellant in Court. She stated that after the appellant returned without the victim, a search was commenced. First they went to the shop of PW 7 when PW 7 stated that, the appellant came alone and that the dress of the appellant was mud stained. She described the wearing apparels of the victim at the time when she went with the appellant. She stated that, the victim was wearing an orange coloured chain made of plastic material which she identified in Court. She identified her statement recorded under Section 164 of the Criminal Procedure Code and tendered the same in evidence. She was cross-examined at great length. The defence could not elicit anything favourable from her.

13. The younger brother of the person running the grocery shop deposed as PW 5. He stated that, he was on the veranda of the grocery shop on the fateful evening. The appellant came running to the shop in the evening alone. The wearing apparels of the appellant were mud stained. He asked the appellant about the same when, the appellant answered that the appellant fell down on the ground when the appellant was attending to nature's call. Thereafter, the appellant purchased fried Indian snack from the shop and left the shop. After the departure of the appellant, PW 1 and his maternal uncle came to the shop asking about the whereabouts of the victim as

they suspected that the appellant brought the victim to the shop keeping the victim in his lap. He told them that, the appellant did not come to the shop with the victim. He witnessed the seizure of the blood stained mud and ordinary mud from the place of occurrence. He identified his signature on the seizure list which was tendered in evidence. He identified the appellant in Court. PW 5 was cross-examined in extenso. However, nothing favourable was elicited from PW 5 by the defence.

14. The grandmother of the victim deposed as PW 6. She stated that, the victim was with PW 4 when the appellant entered the house, took the victim on his lap by saying that he will purchase fried Indian snack for the victim. She identified the appellant in Court. The appellant did not bring the victim back to the house when he came back. On being asked the appellant said that, he left the victim in the road while he was returning. PW 6 was cross-examined in extenso and nothing favourable was elicited from her by the defence.

15. The grocery shop owner from where, the appellant bought the fried Indian snack deposed as PW 7. He stated that, the appellant came to his shop and asked for 50 grams of fried Indian snack. He stated that his brother being PW 5 was sitting outside the shop. The appellant came alone. He

identified the appellant in Court. He stated that, the appellant was wearing a blue colour jeans pant and a blue colour shirt. Both the pant and shirt were wet at that time. After purchasing fried Indian snack the appellant left the shop. One hour after the departure of the appellant, PW 1 and 2 came to his shop and asked for the whereabouts of the victim. On the next morning the dead body of the victim was recovered from the shallow pond.

16. A juvenile deposed as PW 8. He stated that, he saw the appellant on the fateful day at about 6:30/7 P.M when the appellant was trembling/shivering. He identified his signature on the statement made by him and recorded under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit 3.

17. A seizure list witness deposed as PW 9. He identified the plastic ball made chain. He identified his signature in seizure list dated February 22, 2018 being Exhibit 4.

18. Another seizure list witness deposed as PW 10. He identified the chain which was seized on February 22, 2018 as well as his left thumb impression on the seizure list.

19. The doctor who examined the appellant deposed as PW 11. He tendered the Medical Examination Report prepared which was marked as Exhibit 5. He stated that, there was

nothing to suspect about the potency of the appellant. There was no injury mark detected on the private part of the appellant.

20. The police personnel who wrote the complaint and registered the First Information Report deposed as PW 12. The formal First Information Report was tendered in evidence and marked as Exhibit 7.

21. The post mortem doctor deposed as PW 13. He described the injuries he found on the body of the victim. He stated that, in his opinion, cause of death was due to effects of manual strangulation, ante-mortem and homicidal in nature associated with forceful penetration of vagina and anus. He was cross-examined at great length on behalf of the defence. The defence could not elicit anything favourable to them by such cross-examination.

22. The Investigating Officer deposed as PW 14. He stated about the manner of the investigations. He stated that, on February 22, 2018, he interrogated the appellant in custody and recorded a statement under Section 27 of the Evidence Act. As per the statement of the appellant, seizures were made by the seizure list dated February 22, 2018 which was marked as Exhibit 4.

23. Judicial Magistrate before whom, PW 1 and 4 recorded their statements under Section 164 of the Criminal Procedure Code deposed as PW 15.

24. The scribe of the written complaint deposed as PW 16. He stated that, he wrote the complaint as per the direction and instructions of PW 1. Thereafter, he read over and explained the contents of the written complaint to PW 1. PW 1 then put her left thumb impression on such written complaint in his presence. Written complaint was tendered and marked as Exhibit 6.

25. The appellant was examined under Section 313 of the Criminal Procedure Code. He claimed to be innocent. He did not venture to adduce any defence witness.

26. Learned senior advocate appearing for the appellant submitted that, there was a delay in lodging the First Information Report. The victim went missing on February 14, 2018 at about 6:30 PM. The victim did not return to her residence in the evening. The family members of the victim did not lodge the First Information Report till about the evening of February 15, 2018 when PW 1 lodged the written complaint. He contended that, there was a possibility that the delay was due to the family of the victim attempting to shift the blame on

the appellant on account of the personal enmity as would appear from the evidence of PW 8.

27. Learned senior advocate appearing for the appellant submitted that, the dead body of the victim was found around 11 AM on February 15, 2018. An unnatural death case was started about 4:15 PM on February 15, 2018 and thereafter the First Information Report was lodged at about 5:45 PM. The First Information Report was lodged 4 hours after the recovery of the dead body. The police was informed and reached the spot from where the dead body was recovered and investigational actions commenced prior to the lodging of the First Information Report. The exact nature of the information that was supplied to the police at the first instance prior to the lodging of the First Information Report remained unanswered and unexplained at the trial.

28. Apart from the delay in the lodgement of the First Information Report, there was delay in recording the statements of witnesses, under Section 164 of the Criminal Procedure Code. The owner of the grocery shop from where the fried Indian snack was purchased, being PW 7, recorded a statement under Section 164 of the Criminal Procedure Code on February 26, 2018 which was 10 days after the lodging of the complaint. PW 4 recorded a statement under Section 164

of the Criminal Procedure Code on March 14, 2018 that is about a month after the lodging of the complaint. The statement of the mother of the victim who deposed as PW 1 was recorded on April 30, 2018, that is, more than two months after the lodging of the complaint. The prosecution did not explain the delay in recording such statements.

29. Learned senior advocate appearing for the appellant submitted that there were discrepancies between the complaint lodged by the PW 1 and her deposition at trial. He also highlighted the discrepancies between the complaint lodged and the deposition of PW 2.

30. Referring to the inquest report, learned senior advocate appearing for the appellant submitted that, such report does not contain any allegation of sexual assault or murder against the appellant. He submitted that, failure to disclose the details of the incident at the first available opportunity was visited with serious consequences. In support of such contention, he relied upon **2011 SCC Online Cal 190 (Mobarak Sk. @ Mobark Hossain and Others vs. State of West Bengal)**.

31. Learned senior advocate appearing for the appellant contended that, there were discrepancies in the deposition of the witnesses. He drew the attention of the Court to the discrepancies between the deposition of PW 1 and 9. He

highlighted the time difference stated by the various prosecution witnesses with regard to the chain of events.

32. Learned Senior advocate appearing for the appellant contended that, the chain of circumstances did not point to the guilt of the appellant. There were missing links in the chain. The evidence led did not provide any direct indication whereby irrefutable conclusion can be drawn with regard to the nexus between the crime and the criminal.

33. Learned senior advocate appearing for the appellant submitted that, the prosecution failed to establish the allegation of penetration beyond reasonable doubt. Official report indicated that although blood was detected in the vaginal swab taken of the victim, no semen was detected in such swab. Serology report indicated that blood group could not be determined as blood sample was not sufficient for the test and the bloodstains were disintegrated.

34. Learned senior advocate appearing for the appellant contended that, the last seen together with the victim was not proved beyond reasonable doubt. The situs of the offence was also not proved. Past enmity between the father of the victim and the father of the appellant was also not proved. Important witnesses were not examined. The father of the victim who

signed the inquest report did not come as a witness. Various other persons were also not brought as prosecution witnesses.

35. Learned senior advocate appearing for the appellant contended that, some of the prosecution witnesses made certain claims for the first time. He drew the attention of the Court to the deposition of PW 2 and PW 14 in this regard.

36. With regard to the necklace, learned senior advocate appearing for the appellant submitted that, the leading statement of the appellant which led to the recovery was not marked as an exhibit at the trial. The investigating officer admitted in his cross-examination that he did not record any confessional statement of the appellant. Moreover, the prosecution did not establish that the necklace was worn by the victim during the commission of the offence.

37. Learned senior advocate appearing for the appellant contended that, if a victim of around 5 to 6 years of age slips from the top of an embankment of a pond, such victim would sustain multiple injuries. Such victim can also sustain injuries on the private parts depending upon the nature of apparel the victim was wearing at the time of the accident. If a body is sunk in the water for the whole night, there was a possibility of the body receiving bloodstains.

38. Learned senior advocate appearing for the appellant contended that, the investigation was not conducted in right earnest. He contended that, since the prosecution failed to prove the case beyond reasonable doubt, the presumption under Section 29 of the Prevention of Children Against Sexual Offences Act did not shift.

39. Referring to the death sentence awarded by the learned trial judge, learned senior advocate appearing for the appellant submitted that, that sentence cannot be imposed except in the rarest of rare cases, for which special reasons are required to be recorded. The impugned judgement of conviction and the order of sentence did not indicate the factors that weighed with the learned Judge on the basis of which, death penalty was awarded to the appellant. Life imprisonment is the rule and death penalty is an exception. In support of such contention, he relied upon **2019 Volume 16 SCC 584 (Mohammad Mannan vs. State of Bihar)** and **2016 Volume 15 Supreme Court Cases 448 (Bimla Devi vs. Rajesh Singh & Anr).**

40. Referring to **All India Reporter 1980 Supreme Court 898 (Bachan Singh v. State of Punjab)** and **All India Reporter 1983 Supreme Court 957 (Macchi Singh & Ors. v. State of Punjab)**, learned senior advocate appearing for the

appellant submitted that, once a balance sheet of the aggravating and mitigating circumstances is taken, then, in the facts and circumstances of the present case, death penalty cannot be awarded.

41. Learned senior advocate appearing for the appellant submitted that, death sentence cannot be imposed except in the rarest of rare cases for which special reasons are required to be recorded as mandated in Section 354 (3) of the Criminal Procedure Code. In support of such contention, he relied upon **2019 Volume 16 Supreme Court Cases 584 (Md. Mannan @ Abdul Mannan versus State of Bihar).**

42. Learned senior advocate appearing for the appellant submitted that, the state did not produce any material at the trial or in the appeal that the appellant was incapable of being reformed. He relied upon **2019 Volume 20 Supreme Court Cases 102 (CBI versus Sakru Mahagu Bunjewar).**

43. Moreover, according to the learned senior advocate appearing for the appellant, there was non-compliance with the provisions of Section 235 (2) of the Criminal Procedure Code at the time of sentencing. He relied upon **2012 Volume 8 Supreme Court Cases 43 (Ajay Pandit alias Jagadish Dayabhai Patel & Ors. Versus State of Maharashtra).**

44. Learned advocate appearing for the state submitted that, the prosecution established the charges beyond all reasonable doubt. He submitted that, the orange colour chain made of beads worn by the victim was recovered from the appellant. Such recovery was made on the leading statement made by the appellant. He referred to exhibit 4 in support of his contention.

45. Referring to the testimonies of PW 4, 7 and 8 learned advocate for the state submitted that, the appellant took the victim on the plea of buying her fried Indian snack from the shop of PW 7. The appellant was last seen together with the victim. The appellant did not return the victim to her parents or to PW 4. When he was asked about the victim, he did not give any satisfactory answer. He did not explain how the victim was not with him. Consequently, he submitted that, the prosecution was able to establish the chain of events with the appellant and the victim being last seen together. He highlighted the fact that, the appellant went to the shop of PW 7 and bought a packet of fried Indian snack, alone. The victim was not with him at that point of time. PW 7 stated that, the clothes worn by the appellant were wet. There were corroborating evidences of the prosecution witnesses as to the conduct of the appellant, his wearing apparels and that the

wearing apparels of the appellant being wet and mud stained. He submitted the impugned judgement of conviction and the order of sentence should not be interfered with.

46. The dead body of the victim was discovered on February 15, 2018 at about 11 A.M in the morning. The dead body of the victim was sent for Post Mortem Examination. PW 13 conducted the post mortem on the dead body of the victim. The Post Mortem Report of the victim was tendered in evidence and marked as Exhibit 8. The victim carried the following injuries on her body as will appear from Exhibit 8 and the testimony of PW 13 :-

“ 1) One abraded bruise 0.5 inch x 0.4 inch, diffused over chin 0.4 inch right from midline.

2) One creasent nail seratch abrasion 0.4 inch x 0.2 inch over right angle of mandible.

3) Multiple small bruise with creasent shaped nail scratches on outer margin of bruises over right side of neck four in number arranged more or less obliquely above downwards of size 0.2 inch x 0.1 inch to 0.5 x 0.1 inch over an area 3 inches x 2 inches. The upper most scratch abrasion is situated 3.5 inch right from midline and 1.5 inch between tip of right mastoid process, lower most scratch abrasion is situated 2.8 inch right from midline and 4.5 inch below tip of right mastoid process with convexity directed backwards,

4) Multiple small bruise with creasent shaped nail scratches over right side of neck four in number of size 0.1 inch x 0.1 inch to 0.4 inch x 0.1 inch over an area 2 inch x 1.5 inch. Uppermost scratch abrasion 2.4 inch

from midline, 1.5 inch below right angle of mandible, lower most scratch abrasion is situated 2.8 inch from midline and 3.5 inch below right angle of mandible.

5) Abrasion 0.3 inch x 0.1 inch over outer aspect of left forearm.

6) Mucosal tear with contusion over inner aspect of lip (upper and right) with contusion over gum at the corresponding level.

7) Evidence of scalp haematoma 6.5 inch x 5 inch diffused over head involving left parieto – occipital region of scalp.

8) Bruise over neck more on right side at the soft tissue level involving sternomastoid muscle, thyroid gland.

9) Avulsion of thyro hyoid membrane with sub laxation of right great horn of hyoid with extra vassation of blood at the corresponding side.

10) Evidence of fracture (sub laxation) of right horn of thyroid cartilage with extra vassation of blood at corresponding side.

11) Engorgement of pharynx, base of tongue, upper part of larynx with evidence of bleeding on to this part.

12) Bruise 2.6 inch x 1.5 inch diffusely involving right chest wall over right sub clavicular region.

13) Evidence of blood stain over vulva with bruise and swelling.

14) Tear of posterior commissure with evidence of bleeding.

15) Contusion with tearing of vaginal mucosa.

16) Rupture of hymen with evidence of bleeding from torn margins.

17) Anus appeared swollen with contusion and tear of posterior mucocutaneous region.”

47. In his oral testimony, PW 13, the doctor conducting the post mortem on the dead body of the victim stated that,

cause of death was due to effects of manual strangulation as noted, ante-mortem and homicidal in nature associated with forceful penetration of the vagina and anus.

48. Exhibit 8 and the testimony of PW 13 established that, the victim was raped and murdered. She was subjected to penetrative sexual assault at her vagina and anus. She was strangled to death. She suffered a number of nail scratches over various portions of her body.

49. Age of the victim was not disputed at the trial. The age of the victim was stated to be 5 years by the doctor conducting the post mortem on the body of the victim being PW 13. The parents of the victim also stated in their oral testimony that, the victim was about five and half years at the time of the incident. That the victim was a minor cannot be disputed.

50. The appellant was last seen together with the victim by PW 4. The appellant went into the house of PW 4 at around 6/6:30 P.M and asked the victim to go out with him on the pretext of giving her fried Indian snack from the shop of PW 7. Appellant took the victim with him and came back alone after 30 minutes when PW 4 asked the appellant about the whereabouts of the victim. The appellant replied that he kept the victim at the last door of the house. PW 4 could not see the victim there and asked the appellant again about the

victim when the appellant said that he was talking on his mobile while walking and he fell on the ground. The victim fled away on that point of time.

51. The appellant went to the shop of PW 7 alone. PW 5 and 7 in their testimonies established that the appellant came to the shop of PW 7 alone and bought fried Indian snack. The testimonies of PW 5 and PW 7 established that the appellant went alone to the shop of PW 7 about 30 minutes after he took the victim in presence of PW 4.

52. PW 4 identified the apparels that the appellant was wearing at the material point of time being a blue T-shirt and blue jeans full pant. PW 5 and PW 7 corroborated PW 4 as to the wearing apparels of the appellant. The appellant went to the shop of PW 7 wearing the same apparels but alone. PW 7 stated that, the wearing apparels of the appellant were wet at that point of time. The body of the victim was found on the bank of a pond.

53. The appellant in his statement recorded under Section 313 of the Criminal Procedure Code did not explain how the victim went missing from his custody after he took the victim from PW 4.

54. The victim went missing on February 14, 2018 at about 6:30 P.M. and was found dead on the following day that

is February 15, 2018 at about 11 A.M. with the victim suffering penetrative sexual assault. The appellant was last seen together with the victim on February 14, 2018.

55. On the basis of the victim being last seen together with the appellant it can be held that the prosecution established beyond reasonable doubt that the appellant was the murderer. The appellant was seen immediately after taking the victim to be without the victim when he went to buy the fried Indian snack from the shop of PW 7. PW 4 asked the appellant about the victim when the appellant returned without the victim.

56. Post Mortem Report of the victim and the testimony of the doctor conducting the post mortem on the body of the victim being PW 13 established that, the victim suffered penetrative sexual assault. PW 11 examining the appellant stated that there was nothing to suspect the potency of the appellant. On the basis of the last seen together with the victim circumstance and the testimony of PW 11 and Exhibit 5 it can be safely said that the appellant was guilty of inflicting penetrative sexual assault on the minor victim.

57. The contention of the appellant that, there was a delay in lodging the First Information Report cannot be accepted in the facts and circumstances of the present case. The victim

went missing on February 14, 2018 at about 6:30 P.M. The dead body was discovered at around 11 A.M on February 15, 2018. The unnatural death case was started at around 4.15 P.M with the mother of the victim lodging the complaint at around 5.45 P.M on February 15, 2018. The conduct of the parents of the victim and particularly the mother of the victim who was the de facto complainant is required to be understood in the context of the present case. A minor daughter went missing from the previous evening. The parents organised a search party to find the victim. The search party was unsuccessful till the discovery of the body at about 11 A.M. of February 15, 2018. The economic condition of the family of the victim as appearing from the oral testimonies suggests that, the family was of an economically backward class. The socio-economic situation of the country where, people from the lower strata of income are hesitant to approach law enforcement agencies needs to be taken into consideration. The delay is not so large so as to raise or permit benefit of doubt being granted to the appellant.

58. Statements of witnesses under Section 164 of the Criminal Procedure Code were recorded from time to time. Statement of PW 7 was recorded on February 26, 2018 while PW 4 was recorded on March 14, 2018 and of PW 1 on April

30, 2018. The appellant could not draw the attention of the Court to any discrepancies between the statements of such prosecution witnesses recorded under Section 164 of the Criminal Procedure Code and their oral testimonies in Court.

59. It was contended on behalf of the appellant that, there were discrepancies between the complaint lodged by PW 1 and her statement in Court. In the written complaint being Exhibit 6, PW 1 stated that, the appellant took her daughter, the victim to the shop of PW 7 for buying fried Indian snack. She stated that, after going to the shop, the victim bought the fried Indian snack but after that, when the victim did not return for a long time, the family started a search for the victim. In the oral testimony, PW 1 stated that, the victim was sitting by the side of PW 2 when she was preparing food. The appellant came to the house when, PW 2 started to leave. At that time, the victim expressed desire to accompany the appellant to go to the shop of PW 7. The appellant took the victim on his lap towards the shop of PW 7.

60. The essential fact that the appellant took the victim towards the shop of PW 7 was stated both in the written complaint as well as in the deposition of PW 1. The oral testimony of PW 1 stood corroborated by the testimonies of PW 2 and 4. The entire evidence led at the trial is required to

be evaluated as a whole rather than picking out minor discrepancies and phrases out of the cross examination. The evidence taken as a whole is convincing and trustworthy.

61. It was contended on behalf of the appellant that there were discrepancies between the deposition of PW 1 and 9. PW 9 was a seizure list witness who identified Material Exhibit I and his signature being Exhibit 4. The seizure list was prepared on February 22, 2018. This contention of the appellant was of no substance, with the deepest respect.

62. In *Mobarak Sk. (supra)* there was delay in sending the First Information Report to the Court of 11 days after the occurrence. No explanation was forthcoming from the investigating officer of the case to explain such unusual and inordinate delay. There were apparent discrepancies about the time of the lodging of the First Information Report. The recovery of the weapon of assault was not proved as the seizure list witnesses disowned the factum of seizure in their presence. In such circumstances, the order of conviction and sentence were set aside. Such facts and circumstances do not obtain in the present case.

63. The post-mortem report together with the deposition of the post-mortem doctor established beyond all reasonable doubt that there was penetrative sexual assault on the victim.

Therefore, the contention on behalf of the appellant that the allegation of penetration was not proved beyond reasonable doubt cannot be accepted. The situs of the recovery of the dead body was proved. Material witnesses were produced at the trial and their testimonies were trustworthy and convincing.

64. Bacchan Singh (supra) and Macchi Singh (supra) were considered by the Supreme Court in **2012 Volume 4 Supreme Court Cases 257 (Ramnaresh versus State of Chhattisgarh)** where in paragraphs 76 and 77 thereof, it was observed as follows: –

“76. The law enunciated by this Court in its recent judgments, as already noticed, adds and elaborates the principles that were stated in Bachan Singh [(1980) 2 SCC 684 : 1980 SCC (Cri) 580] and thereafter, in Machhi Singh [(1983) 3 SCC 470 : 1983 SCC (Cri) 681]. The aforesaid judgments, primarily dissect these principles into two different compartments—one being the “aggravating circumstances” while the other being the “mitigating circumstances”. The court would consider the cumulative effect of both these aspects and normally, it may not be very appropriate for the court to decide the most significant aspect of sentencing policy with reference to one of the classes under any of the following heads while completely ignoring other classes under other heads. To balance the two is the primary duty of the court. It will be appropriate for the court to come to a final conclusion upon balancing the exercise that would help to administer the criminal justice

system better and provide an effective and meaningful reasoning by the court as contemplated under Section 354(3) CrPC.

Aggravating circumstances

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

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

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

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

(5) Hired killings.

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

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

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

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

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

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

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

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

Mitigating circumstances

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

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

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

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

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

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

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

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

Principles

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

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

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

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

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

65. The learned trial judge imposed death penalty upon the appellant under Section 6 of the Protection of Children from Sexual Offences Act and under Section 302 Of the Indian

Penal Code, 1860. The incident of rape and murder was of February 14, 2018. Death penalty for an offence under Section 6 of the Protection of Children from Sexual Offences Act was introduced by way of an amendment with effect from August 16, 2019. Prior to the amendment, Section 6 of the Protection of Children from Sexual Offences Act, 2012, did not contemplate a death penalty. The maximum punishment was one of imprisonment for life.

66. In the facts of the present case, the incident occurred on February 14, 2018 prior to the amended Section 6 of the Protection of Children from Sexual Offences Act, 2012, coming into effect. Therefore, in our view, the learned trial judge erred in awarding death penalty in respect of the offence under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

67. However, penetrative sexual assault on the victim was established at the trial. Keeping in mind the nature of the crime, the age of the victim and the position of trust that the appellant enjoyed in respect of the victim, with such trust he misused, a punishment of life imprisonment upon the appellant was required to be awarded. The appellant is therefore sentenced to imprisonment for life in respect of the

offence committed under Section 6 of the Protection of Children from Sexual Offences Act, 2012.

68. The learned judge also awarded death penalty in respect of the offence committed under Section 302 of the Indian Penal Code, 1860. Although, the learned trial judge took into account **Bacchan Singh (supra)** and **Macchi Singh (supra)** he did not return a finding that, the appellant was beyond reformation. In fact, no material was placed either before the learned trial judge or before us to suggest, let alone establish that, the appellant was beyond reformation. The report called for by the order dated August 31, 2022 did not contain anything adverse to the appellant.

69. The appellant committed heinous crime of rape and murder. The victim was a minor. The crime of rape and murder was committed brutally. Those were the aggravating circumstances as against the appellant. So far as the mitigating circumstances were concerned, the appellant was 24 years of age when the statement under Section 313 of the Criminal Procedure Code was recorded. The appellant was about 20 years of age at the time of the incident. There was no adverse report as against the appellant with regard to his conduct subsequent to his arrest.

70. In the facts and circumstances of the Court, we are not in a position to return a finding that, imposition of any other punishment, that is, life imprisonment would be completely inadequate and would not meet the ends of justice. We take into account the dictum that life imprisonment is the rule and death sentence is an exception.

71. In **2016 Volume 7 Supreme Court Cases 1 (Union of India versus Sriharan @ Murugan & Others)** the Supreme Court held that, the constitutional Courts can award life sentence without remission if the facts and circumstances of the case demands the same.

72. In **Md. Mannan (supra)** the Supreme Court in a case of kidnapping, rape and murder of a minor girl and causing disappearance of evidence of offence, commuted the death sentence to an imprisonment for life till the natural death of the accused with no remission of sentence to be granted to him.

73. In **Sakru Mahagu Binjewar (supra)** the Supreme Court observed that, the judicial discretion conferred upon the court in the matter of awarding sentence was an onerous duty which was to be exercised keeping in view the settled and binding precedents including the doctrine of proportionality

for assigning justifiable reasons to award death penalty and also keeping in mind the doctrine of reform and rehabilitation.

74. In *Ajay Pandit (supra)* the Supreme Court considered the provisions of Section 235 (2) of the Criminal Procedure Code and various authorities on such subject. It observed that, the object of hearing under Section 235 (2) of the Criminal Procedure Code was intrinsically and inherently connected with the sentencing procedure, the provisions of Section 354 (3) of the Criminal Procedure Code which call for recording a special reason for awarding death sentence and that the provisions should be read together conjointly. Special reasons could only be validly recorded if an effective opportunity of hearing as contemplated under Section 235 (2) of the Criminal Procedure Code was genuinely extended and was allowed to be exercised by the accused.

75. The learned trial judge passed the judgement of conviction on June 23, 2022. While passing the judgement of conviction, the learned Judge recorded that, he informed the appellant that the punishment for the offence committed under Section 302 of the Indian penal Code, 1860 would be death or imprisonment for life and shall also be liable to fine. He also informed the appellant that for the offence committed under Section 6 of the Protection of Children from Sexual

Offences Act, 2012 would be punishment for life or with death and shall also be liable for fine. He fixed June 24, 2022 for hearing on the point of sentence.

76. As noted above, Section 6 of the Protection of Children from Sexual Offences Act, 2012 did not provide for a death penalty and that the same was introduced with effect from August 16, 2019.

77. On June 24, 2022, the case was taken up at 3:15 PM and by order number 80, the learned trial judge recorded that, the appellant was heard on the point of sentence. He recorded that, the appellant on being asked stated that he was innocent and falsely implicated due to political rivalry. He heard the learned public prosecutor and the learned defence lawyer. Learned public prosecutor submitted that the offence was serious in nature and maximum punishment may be awarded. Learned defence lawyer was also heard when he submitted that since he already argued the matter there was nothing more to add for the defence. The learned trial judge thereafter directed that the convict be produced at 3:30 PM.

78. At 3:30 PM on June 24, 2022 the appellant was produced from lock-up. The learned Judge considered the submission made by the convict, learned public prosecutor

and learned defence lawyer. He proceeded to award death penalty as noted above.

79. In the facts of the present case, it cannot be said that there was non-compliance of the provisions of Section 235 (2) of the Criminal Procedure Code in sentencing the convict.

80. In the facts and circumstances of the present case, a female minor of five years of age was sexually assaulted and murdered. The injuries suffered by the victim depict unsavoury barbarism at the behest of the appellant. The victim suffered penetrative sexual assault on her vagina and anus. Her life was ended in a brutal manner. Therefore, while commuting the death penalty of the appellant, we should keep in mind the brutality of the crime in deciding on the proportionality of the punishment.

81. In view of the discussions above, we commute the death penalty of the appellant to one of rigorous imprisonment for life without the possibility of remission for a period of 50 years from the date of his arrest.

82. We affirm the conviction of the appellant under Sections 302/201/376 (2) (i) of the Indian Penal Code, 1860 and under Section 6 of the Protection of Children from Sexual Offences Act, 2012. We commute the death penalty sentenced under Section 302 of the Indian Penal Code, 1860. We also

commute the death penalty awarded under Section 6 of the Protection of Children from Sexual Offences Act, 2012 to one of rigorous life imprisonment without remission for a period of 50 years from the date of the arrest of the appellant. We affirm the sentences of punishment under the other charges in respect of which the appellant was found guilty by the learned trial judge.

83. All the sentences will run concurrently. The period of detention undergone by the convict during investigation, enquiry or trial is set of under Section 428 of the Criminal Procedure Code.

84. D. R. 1 of 2022 and CRA (DB) 130 of 2022 are disposed of accordingly. All pending applications are also disposed of.

85. Trial court records along with a copy of this judgement and order be sent down at once to the appropriate court for necessary action. The correctional home where the appellant is lodged will make necessary corrections in the records in relation to the death penalty awarded by the learned trial judge in light of the present judgement in order. Appropriate court will also note the commutation of the death penalty to one of life imprisonment without remission for a period of 50 years from the date of the arrest of the appellant.

86. Photostat certified copy of this judgement and order, if applied for, be given to the parties on priority basis on compliance of all formalities.

[DEBANGSU BASAK, J.]

87. I agree.

[MD. SHABBAR RASHIDI, J]