

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1024 of 2017

Arising Out of PS. Case No.-19 Year-2016 Thana- MAHILA PS District- Aurangabad

Azhar @ Md. Azhar, S/o Late Jilani, resident of Raja Nagar Road, P.S. -
Rafiganj, District - Aurangabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 843 of 2017

Arising Out of PS. Case No.-19 Year-2016 Thana- MAHILA PS District- Aurangabad

1. Jalaluddin @ Jalalu @ Jamalu, S/o Late Md. Hussain;
2. Kamaluddin @ Kamalu, S/o Late Md. Hussain;
3. Jaibun Khatoon, W/o Md. Mokhtar;
4. Baby Khatoon, W/o Md. Zilani Marhum.

All are residents of Mohalla - Raja Nagar, P.S. - Rafiganj, District -
Aurangabad.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In both the Appeals)

For the Appellant/s : Ms. Meena Singh, Adv.

For the State : Mr. Abhimanyu Sharma, APP



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CORAM: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR
and
HONOURABLE MR. JUSTICE JITENDRA KUMAR
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE ASHUTOSH KUMAR)
Date : 20-06-2024

Both the appeals have been taken up together
and are being disposed off by this common judgment.

2. We have heard Ms. Meena Singh, the
learned Advocate for the appellants in both the appeals,
namely, Azhar @ Md. Azhar [*Cr. Appeal (DB) No. 1024
of 2017*] and Jalaluddin @ Jalalu @ Jamalu; Kamaluddin
@ Kamalu; Jaibun Khatoon & Baby Khatoon [*Cr. Appeal
(DB) No. 843 of 2017*].

3. The State has been represented by Mr.
Abhimanyu Sharma, the learned APP.

4. Appellant/Azhar @ Md. Azhar [*Cr. Appeal
(DB) No. 1024 of 2017*] has been convicted under
Sections 448, 354A, 326A, 307 and 302 of the I.P.C.
and Section 8 of the Protection of Children from Sexual
Offences Act, 2012 (*hereinafter referred to as the*



POCSO Act, 2012) *vide* judgment dated 23.06.2017 passed by the learned Additional Sessions Judge-I, Aurangabad. By order dated 29.06.2017, he has been sentenced to undergo imprisonment for the remainder of his life for the offence under Section 302 of the I.P.C. and to pay a fine of Rs. 25,000/- with no default clause. However, no separate sentence has been imposed on him for the offences under Sections 448, 354A, 326A and 307 of the I.P.C. as also Section 8 of the POCSO Act, 2012.

5. The other appellants in Cr. Appeal (DB) No. 843 of 2017 *vide* judgment and order dated 23.06.2017 have been convicted under Sections 341, 323 and 504 of the I.P.C. and have been sentenced to undergo S.I. for one month, to pay a fine of Rs. 5,00/- each and in default of payment of fine, to further suffer imprisonment for five days for the offence under Section 341 of the I.P.C.; to undergo S.I. for one year, to pay a fine of Rs. 1,000/- each and in default of payment of



fine, to further undergo S.I. for one month for the offence under Section 323 of the I.P.C. and to undergo S.I. for a period of two years, to pay a fine of Rs. 1,000/- each and in default of payment of fine, to further suffer S.I. for one month for the offence under Section 504 of the I.P.C.

6. The sentences have been ordered to run concurrently.

7. The victim/deceased died after 83 days of the occurrence in Apollo Burns Hospital at Delhi. She was 15 years of age at that time and because of the unrequited advances towards her by appellant/Azhar @ Md. Azhar, he threw acid on her, leading to 40% burn injuries and later complications, leading to septicemia and her ultimate death. While rescuing her, the mother of the deceased also received 40% scalding injuries. One of her sisters also received minor injuries on her cheeks.

8. The deceased (name has purposefully been



withheld) lodged the *fardbeyan* on 24.06.2016 at Anugrah Narayan Magadh Medical College & Hospital, Gaya in the Intensive Care Unit (I.C.U.), alleging that appellant/Azhar, who resided in front of her house, had been stalking her for the last several days. She had complained about this to her mother, who chastised appellant/Azhar. Later, appellant/Azhar openly misbehaved with the victim/deceased and caught her hands on the public road while she was coming back home from tuition. The deceased extricated herself from appellant/Azhar's stranglehold and came back home and narrated about the incident to her mother, who communicated such fact to her father. Her father went to the house of appellant/Azhar, but he too was ill-treated by the mother of appellant/Azhar, namely, Baby Khatoon and uncles of appellant/Azhar, namely, Kamaluddin @ Kamalu and Jalaluddin @ Jalalu. With the intervention of local residents, the accused persons were pacified.



9. On 24.06.2016 at about 12 O'clock, while the deceased was sitting in her house, appellant/Azhar suddenly appeared and told her that he would not let her live peacefully and threw acid on her face. Before she could understand, her clothes started burning. One of the sisters of the deceased threw water on her face and her mother tried to douse the fire by wiping her face. Within few seconds, she had blisters all over her body. She had given such statement in presence of her mother/Madina Parveen (P.W. 3).

10. On the basis of the afore-noted *fardbeyan* statement of the victim/deceased, a case *vide* Aurangabad (*Mahila*) P.S. Case No. 19 of 2016, dated 25.06.2016, was registered for the offences under Sections 341, 323, 504, 354A, 307, 326A and 34 of the I.P.C. and Section 8 of the POCSO Act, 2012. Later, Section 302 I.P.C. was added *vide* order dated 22.02.2017, after the death of the victim.

11. All the appellants were *charge-sheeted*



and they faced Trial.

12. The Trial Court, after examining nine witnesses on behalf of the prosecution and one on behalf of the defense, convicted and sentenced the appellants as aforesaid.

13. Out of the nine witnesses examined at the Trial, P.Ws. 1, 2 and 9, namely, Roushni Parveen, Jeba Parveen and Jasmin, are own sisters of the deceased, whereas P.Ws. 3 and 4 (Madina Parveen and Kaushar Kadiri) are the parents of the deceased. Shakuntala Kumari and Ram Swaroop Rai (P.Ws. 5 and 7 respectively) are the two Investigating Officers. The victim, while she was alive, was treated by Dr. Ajeet Kumar Singh, who has been examined as P.W. 6. The *post-mortem* examination on the dead-body of the deceased was conducted by Dr. Shyam Kishore (P.W. 8).

14. The deceased was first examined on 24.06.2016 at Primary Health Centre, Rafiganj,



Aurangabad and Dr. Ajeet Kumar Singh (P.W. 6) found that her full face had been burnt; eyes were closed and there were burns on abdomen, both the thighs and sexual organs as well. The nature of injuries was found to be dangerous to life caused by chemical reaction.

15. For the gravity of the injuries suffered by the victim/deceased, she was first referred to Anugrah Narayan Magadh Medical College & Hospital, Gaya and from there to Apollo Burns Hospital, Delhi.

16. On the same day, the mother of the deceased (P.W. 3) was also examined by P.W. 6. She had also suffered injuries between 30 to 40%, apparently caused by chemical reaction of acid. However, the nature of the injury on her was found to be simple.

17. The deceased died on 15.09.2016.

18. The *post-mortem* was conducted on 17.09.2016. Approximately 12 *ante-mortem*, but partially healed burn wounds were found on her body.



There were multiple confluencing wounds of various sizes present over the forehead. The margins of such wounds were healthy, but the base was found to be of reddish colour and there were also presence of granulation tissues. On examination of the brain meninges and the cerebral vessels, it was found that *pus* had spread all over the surface of the brains. There were no particular injuries found on the abdomen and spinal cord. The death was opined to have been caused because of shock due to septicemia, which could be possible in the alleged circumstances.

19. The *post-mortem* report by the AIIMS, Delhi has been marked as Exhibit-10.

20. The three sisters, *viz.*, P.Ws. 1, 2 and 9 have supported the prosecution case as being witnesses to the occurrence. Similarly, the mother of the deceased (P.W. 3) is also a witness to the occurrence.

21. Roushni Parveen (P.W. 1) had seen the appellant/Azhar @ Md. Azhar pouring acid on the body



of the deceased. She has also recounted before the Trial Court that a day before the occurrence, appellant/Azhar had tried to tease the deceased and when the parents of the deceased made a complaint to the parents of appellant/Azhar, they were ill-treated, abused and assaulted. A *Panchayati* also had been convened. She had given her 164 Cr.P.C. statement also, which is quite in tandem with what she had stated before the Trial Court. She has further confirmed that the victim/deceased was taken to Rafiganj Hospital, Aurangabad and, thereafter, she was referred to Gaya and then to Delhi, where she died on 15.09.2016 in Apollo Burns Hospital.

22. The suggestion given to her that the deceased was madly in love with appellant/Azhar @ Md. Azhar and when she was prevented from meeting him, she harmed herself by pouring kerosene oil on her, was denied.

23. Similar statements have been made by



Jeba Parveen and Jasmin (P.Ws. 2 and 9 respectively).

24. Madina Parveen (P.W. 3), the mother of the deceased, has given some extra information regarding the manner in which the victim was taken to local hospital with the help of neighbours, viz., Rizwan and Imran, both of whom have not been examined and her treatment at Gaya and Delhi thereafter. Same suggestion was given to her also, i.e., of the deceased harming herself because of the displeasure of her family on her being in affair with appellant/Azhar, but the same was vehemently denied.

25. The father of the deceased (P.W. 4) fairly stated before the Trial Court that he was not present and his house when appellant/Azhar had come and poured acid on the deceased, but he knew about the background facts and the later developments.

26. The first Investigator (P.W. 5), a lady Police Officer, confirmed that the house of the appellants is situated very near to the house of the deceased. She,



while inspecting the house where the occurrence had taken place, made some seizures of incriminating articles and she also recorded the statement of most of the witnesses. The statement of the victim was recorded in the I.C.U. of Anugrah Narayan Magadh Medical College & Hospital, Gaya.

27. From a perusal of the evidence on record, what comes to the fore is that appellant/Azhar, being the neighbour of the deceased, had been making advances to her, which was not returned by the deceased. The deceased had made a complaint to her parents about an incident which had taken place a day before the occurrence. The parents of the deceased, in turn, had accosted the family members of appellant/Azhar, but they were manhandled. Convening of *Panchayati* to settle the issue locally also did not bear any fruit. While all this had happened, appellant/Azhar, with a sense of revenge, went to the house of the deceased; poured acid on her and ran away.



28. The question is whether he intended to cause the death of the deceased?

29. There does not appear to be any evidence of the appellant/Azhar harbouring intention to harm or end the life of the deceased. However, he ought to have known that his action of throwing acid on her body and that also in quite a measure, would have proved fatal. This definitely brings him within the mischief of Section 300 thirdly of the I.P.C., making him liable for her death; regardless of the fact that the death took place about 82 days of the occurrence at Delhi.

30. Septicemia was the direct cause of the injuries suffered by the deceased and inflicted at the hands of the appellant/Azhar. The Septicemia had occurred because of *pus* cells having spread all over the brain area. There was no other reason for septicemia except excessive burn injuries of more than 40%.

31. We have also given our anxious consideration to the admissibility of the *fardbeyan* given



by the deceased while she was alive. The deceased had received 40% burn injuries and was in great pain. She had blisters all over her body. Her eyes were also closed.

32. However, since we have not found any injury on her neck or internal portion of esophagus or vocal cords, it cannot be doubted that she was in a position to speak. She may not have anticipated that she would die because of the injuries, but yet her statement so recorded would be admissible under Section 32(1) of the Indian Evidence Act, 1872, which reads as hereunder:

32 (1) When it relates to cause of death.- *When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.*

Such statements are relevant



whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

33. Clause (1) of Section 32 of the Indian Evidence Act, 1872 provides that statements made by a person as to the cause of his death, or as to any of the circumstance of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question, are themselves relevant facts.

34. In the present case, the cause of death of the deceased was a question to be decided and the statements made by the witnesses as also the deceased are clear circumstances of the transaction which resulted in her death. Thus, bringing such statement of the victim/deceased within the meaning of Section 32(1) of the Indian Evidence Act, 1872.

35. There is a clear distinction between



principles governing the evaluation of a dying declaration under the English Law and the Indian Law. Under the English Law, credence and relevancy of a dying declaration is only when the person making such statement is in hopeless condition and expecting an eminent death. So under the English Law for its admissibility, the declaration should have been made when in actual danger of death and the declarant should have had full apprehension that his death would ensue. However, under the Indian Law, the dying declaration is relevant, whether the person who makes it was or was not under expectation of death at the time of such declaration.

36. In ***Pakala Narayana Swami Vs. King Emperor; AIR 1939 PC 47***, Lord Atkin had held that circumstances of the transaction which resulted in the death of the declarant will be admissible if such circumstances have some proximate relation to the actual occurrence. The test laid down by Lord Atkin has



been quoted in ***Sharad Birdhichand Sarda Vs. State of Maharashtra; (1984) 4 SCC 116*** and it was held that Section 32 of the Evidence Act is an exception to the rule of hearsay evidence and in view of peculiar conditions in the Indian Society, it has widened the sphere to avoid injustice.

37. The difference in the English Law and the Indian Law has been reiterated in ***Rattan Singh Vs. State of H.P.; (1997) 4 SCC 161***, where it has been held that even if the deceased was nowhere near expectation of death, still her statement would become admissible under Section 32(1) of the Evidence Act, though not as a dying declaration as such, provided it satisfies one of the two conditions set forth in this section.

38. In ***Khushal Rao Vs. State of Bombay; AIR 1958 SC 22***, the Supreme Court had examined the principles governing the acceptance of dying declaration. After examining the relevant provisions of the Evidence



Act and various judicial pronouncements, the Supreme Court laid down the following conclusions :-

(i) it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;

(ii) each case must be determined on its own facts, keeping in view the circumstances in which the dying declaration was made;

(iii) it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

(iv) a dying declaration stands on the same footing as another piece of evidence. It has to be judged in the light of surrounding circumstances and with reference to the principles governing weighing of evidence;

(v) a dying declaration which has been recorded by a competent



Magistrate in the proper manner stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character;

(vi) in order to test the reliability of a dying declaration, the court has to keep in view various circumstances including the condition of the person concerned to make such a statement; that it has been made at the earliest opportunity and was not the result of tutoring by interested parties.

39. It would also be relevant to refer to ***Paniben Vs. State of Gujarat; (1992) 2 SCC 474,*** where the law with respect to dying declaration have been summed up as follows:-

'(i) There is neither rule of law nor of prudence that dying declaration cannot be acted upon without corroboration. (See Munnu Raja v. State of M.P. [(1976) 3 SCC



104 : 1976 SCC (Cri) 376]).

(ii) If the court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration. (See State of U.P. v. Ram Sagar Yadav [(1985) 1 SCC 552 : 1985 SCC (Cri) 127] and Ramawati Devi v. State of Bihar [(1983) 1 SCC 211 : 1983 SCC (Cri) 169]).

(iii) The court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had an opportunity to observe and identify the assailants and was in a fit state to make the declaration. (See K. Ramachandra Reddy v. Public Prosecutor [(1976) 3 SCC 618 : 1976 SCC (Cri) 473]).

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence. (See Rasheed Beg v. State of M.P. [(1974) 4 SCC 264 : 1974 SCC



(Cri) 426]]).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected. (See Kake Singh v. State of M.P. [1981 Supp SCC 25 : 1981 SCC (Cri) 645]).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction. (See Ram Manorath v. State of U.P. [(1981) 2 SCC 654 : 1981 SCC (Cri) 581]).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected. (See State of Maharashtra v. Krishnamurti Laxmipati Naidu [1980 Supp SCC 455 : 1981 SCC (Cri) 364]).

(viii) Equally, merely because it is a brief statement, it is not to be discarded. On the contrary, the shortness of the statement itself guarantees truth. (See Surajdeo Ojha v. State of Bihar [1980 Supp



SCC 769 : 1979 SCC (Cri) 519J).

(ix) Normally the court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eyewitness said that the deceased was in a fit and conscious state to make the dying declaration, the medical opinion cannot prevail. (See Nanhau Ram v. State of M.P. [1988 Supp SCC 152 : 1988 SCC (Cri) 342J).

(x) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon. (See State of U.P. v. Madan Mohan [(1989) 3 SCC 390 : 1989 SCC (Cri) 585J).

(xi) Where there are more than one statement in the nature of dying declaration, one first in point of time must be preferred. Of course, if the plurality of dying declaration could be held to be trustworthy and



reliable, it has to be accepted. (See Mohanlal Gangaram Gehani v. State of Maharashtra [(1982) 1 SCC 700 : 1982 SCC (Cri) 334]).'

40. We have no doubt in our mind that the victim was in a position to make such statement for the reason of the statement being complete in itself, without any embellishment and without there being such injuries on her body which would have prevented her to make a detailed statement. This is also obvious from the fact that she survived for 82 days, though under great pain and agony.

41. Thus for all practical purposes, the *fardbeyan* of the deceased can be accepted without any demur.

42. Similarly, we have found that four of the family members of the deceased (three sisters and the mother) have given absolutely truthful account of what had happened. The truthfulness of their versions clearly come to the fore as even the mother of the deceased



(P.W. 3) was hurt by chemical reaction of acid when the deceased, in agony, caught her mother. One of her sisters also, while throwing water on the face of the deceased, suffered injuries on her cheeks by acid. This clearly demonstrates that the intention of appellant/Azhar was to damage and cause harm to the deceased to the maximum possible extent.

43. From the injuries suffered by the deceased as also P.W. 3, it further appears that in good measure and quantity, the acid was thrown on the body of the deceased.

44. However, we have not found anything in the entire records which would justify the conviction of appellant/Azhar @ Md. Azhar under Section 8 of the POCSO Act, 2012, which is a penal provision for a sexual act with a child.

45. After having said that, we are also of the view that the appellant/Azhar should also have been charged under Section 326A of the IPC.



46. We have also given our anxious consideration to the application of Section 11 of the POCSO Act, 2012 in which the charge has not been framed, which provides for punishment for sexual harassment.

47. So far as the rest of the appellants [*Cr. Appeal (DB) No. 843 of 2017*] are concerned, they may be morally wrong in not restraining appellant/Azhar from continuing to stalk the deceased. They were not in know of the fact that the appellant/Azhar had gone to the house of the deceased and had poured acid on her body. The allegation of misbehaviour with the father of the deceased at the hands of the other appellants also appears to be a one time affair. It is quite possible that if the complaint by the father of the deceased was not believed by the family members of appellant/Azhar, there would have been some retaliation and under such circumstances, fisticuffs and minor push would not constitute any offence for the other appellants to be held



guilty. It would, in our estimation, be the likened to *de minimis non curat lex*.

48. Thus, on going through the evidence on record, we find that the conviction of the appellant/Azhar @ Md. Azhar under Sections 448, 354A, 326A, 307 and 302 of the I.P.C. is justified. The facts of the case do not warrant any conviction under Section 8 of the POCSO Act, 2012.

49. We, but in the present fact scenario, do not approve of the conviction of appellants/Jalaluddin @ Jalalu @ Jamalu, Kamaluddin @ Kamalu, Jaibun Khatoon and Baby Khatoon under any one of the sections of the I.P.C.

50. Appellants/Jalaluddin @ Jalalu @ Jamalu; Kamaluddin @ Kamalu; Jaibun Khatoon and Baby Khatoon [Cr. Appeal (DB) No. 843 of 2017] are, therefore, acquitted of the charges levelled against them.

51. We have strong reservations about the



sentence imposed upon the appellant/Azhar @ Md. Azhar [Cr. Appeal (DB) No. 1024 of 2017] for the offence under Section 302 of the I.P.C. It appears that the maximum sentence of imprisonment for remainder of life has been awarded to him for the offence under Section 302 of the I.P.C. This is not permissible.

52. In ***Bachan Singh Vs. Union of India; 1980 (2) SCC 684***, while upholding the capital sentence to the appellant, the Supreme Court had specified that the death sentence ought to be given in "rarest of the rare" cases.

53. Three years later, the Supreme Court in ***Machhi Singh Vs. State of Punjab; 1983 (3) SCC 470*** talked about the requirement of making a balance-sheet of "aggravating and mitigating circumstances" and that the mitigating circumstances also be accorded full weightage. A balance is required to be struck between the "aggravating and mitigating" circumstances before imposing the punishment. The Supreme Court drew out a two-pronged approach for the Trial Courts to follow, viz.,



the Trial Court ought to consider whether there is anything uncommon about the crime in question which has rendered the sentence of imprisonment of life inadequate and that death sentence ought to be awarded and whether according to the circumstances of the crime and the case and giving maximum weightage to the mitigating circumstances in favour of the accused, nothing less than death sentence would be appropriate.

54. There have been but many departures in the past from the said principle in sentencing the offenders.

55. However, in ***Santosh Kumar Satishbhushan Bariyar Vs. State of Maharashtra; (2009) 6 SCC 498***, the Supreme Court again clarified and propounded the two-step process to decide whether a convict deserved the death sentence. For death sentence to be given, the case had to fall in the "rarest of the rare category" and secondly, the alternative of life imprisonment to be held to be inappropriate against the gravity of the offence. While deciding the case to be of



“rarest of the rare” category, the court would be required to identify the aggravating and mitigating circumstances, giving both the conditions equal weightage and would also have to take a call that life imprisonment is not the appropriate sentence but this could be done only when it is found that the reformation of the offender was not possible/feasible. The State, therefore, in such circumstances, would be under an obligation to provide materials in order to support the suggestion that death sentence only would be appropriate in that case.

56. About five years later, the Supreme Court in ***Shankar Kishanrao Khade Vs. State of Maharashtra; 2013 (5) SCC 546*** further cautioned the Trial Courts that both, the crime and the criminal have to be taken into account before taking decision with respect to sentencing. What was emphasized by the Supreme court in this instance was that without considering the mitigating circumstances and referring to materials on the possibility of reformation of the convict, sentence should not be awarded off the hat.



57. It would be relevant here to state that in ***Swamy Shraddananda @ Murali Manohar Mishra Vs. State of Karnataka; (2008) 13 SCC 767***, the Supreme Court after consideration of earlier judgments in ***Gopal Vinayak Godse Vs. State of Maharashtra; (1961) 3 SCR 440***, ***Dalbir Singh Vs. State of Punjab; (1979) 3 SCC 745***, ***Subash Chander Vs. Krishan Lal; (2001) 4 SCC 458***, ***Shri Bhagwan Vs. State of Rajasthan; (2001) 6 SCC 29***, ***State of Madhya Pradesh Vs. Ratan Singh; (1976) 3 SCC 470*** and host of other cases, held that depending upon the gravity of the offence and the manner in which the crime was executed, it would be appropriate and within the parameters of law to sentence the offender for the remainder of his life or for any fixed term without remissions. In a case reflecting depravity of mind, a sentence for life which for all intents and purposes would not be more than 14 years, would be highly unjust to the victim. This recourse, namely, directing for imprisonment for remainder of life or for a fixed term beyond 14 years and without remissions, but could be



taken only if the other alternative punishment of a sentence of 14 years of imprisonment would mean no punishment at all.

58. This proposition was questioned in the ***Union of India Vs. V. Sriharan @ Murugan & Ors.; (2016) 7 SCC 1***, in which the Constitution Bench upheld the ratio in ***Swamy Shraddananda*** (supra) that a special category of sentence, instead of death, for a term exceeding 14 years and putting of such category of sentence to be beyond the application of remission. While doing so, the view expressed by the Supreme Court in ***Sangeet & Anr Vs. State of Haryana; 2013 (2) SCC 452*** that the deprivation of remission power of the appropriate Government by awarding sentences of 20 or 25 years or without any remission is not permissible and in consonance with law, was specifically overruled.

59. However, the Supreme Court retained to itself and the High Courts the power to exercise the option of imposing special or fixed term sentences and not the Trial Courts.



60. In ***Vikash Chaudhary Vs. The State of Delhi; (2023) SCC Online SC 472***, the Supreme Court again analyzed all the judgments in seriatim and found that the concept of special or fixed term sentences which could be awarded by the Supreme Court and the High Courts as Constitutional Courts served many purposes, which are as follows :-

"(a) As a feasible alternative in capital cases where the Court was of the opinion that death sentence is inappropriate, and:

(b) That the Court was of the opinion that there were elements in the crime and or the conduct of the criminal which warranted imposition of a mandatory sentence beyond a minimum of 14 years prescribed by the Code of Criminal Procedure.

(c) Where the court felt, independently, that the serious nature of the crime and the manner of its commission warranted a special sentence, whereby the state's discretion in releasing the



offender, should be curtailed so that the convict is not let out before undergoing a specified number of years, of incarceration."

61. The Trial Courts thus are absolutely prohibited from imposing any modified or specific term of sentence or life imprisonment for the remainder of the convict's life as an alternative to the death penalty. The Trial Courts thus have only two option viz. to award a life sentence with all remissions or death sentence. For death sentence to be awarded, the Courts shall have to consider the mitigating circumstances as also the aggravating circumstances, for which, materials would be provided by the State for the Courts to undertake the balancing test. The State is under an obligation to show, in case it proposes death sentence, that there is complete absence of mitigating circumstances and that there are no chances of reformation of the accused.

62. In **Vikash Chaudhary** (supra), the Supreme Court after taking into account the judgments in



Manoj Vs. State of Madhya Pradesh; (2023) 2 SCC 353, Rajendra Prahladrao Wasnik Vs. State of Maharashtra; (2019) 12 SCC 460, Channulal Verma Vs. State of Chhatisgarh; (2019) 12 SCC 438 further held that it is imperative to conduct evaluation of mitigating circumstances at the trial stage "to avoid slipping into a retributive response to the brutality of the crime" by eliciting information both from the State and the accused.

63. That not having been done, we are of the view that the sentence imposed upon the appellant/Azhar @ Md. Azhar [Cr. Appeal (DB) No. 1024 of 2017] requires to be modified.

64. We, thus, convert his sentence under Section 302 I.P.C. to life imprisonment, which would mean that appellant/Azhar @ Md. Azhar would be entitled to the remissions legally available to him. We say so also for the reason that at the time of the occurrence, appellant/Azhar was in his teens and no prior case of similar kind was reported against him.



While imposing the sentence, the Trial Court has not looked into the nominal roll of appellant/Azhar to know whether he was on the road to reformation in jail.

65. Thus, we set-aside the judgment of conviction and order of sentence dated 23.06.2017 recorded against the appellants, viz., appellants/Jalaluddin @ Jalalu @ Jamalu; Kamaluddin @ Kamalu; Jaibun Khatoon and Baby Khatoon, in Cr. Appeal (DB) No. 843 of 2017.

66. The Cr. Appeal (DB) No. 843 of 2017 is, accordingly, allowed.

67. The appellants in Cr. Appeal (DB) No. 843 of 2017, above-named, are acquitted of the charges levelled against them. Since all of them are on bail, they are discharged of their liabilities from the bail bonds.

68. The judgment in Cr. Appeal (DB) No. 1024 of 2017 (*Azhar @ Md. Azhar Vs. The State of Bihar*) is dismissed with modification in the sentence and



the sentence of imprisonment for remainder of life has been converted into imprisonment for life with all remissions.

69. Both the appeals stand disposed off.

70. Let a copy of this judgment be dispatched to the Superintendent of the concerned Jail/s forthwith for compliance and record.

71. The records of the cases be returned to the Trial Court forthwith.

72. Interlocutory application/s, if any, also stand disposed off accordingly in both the appeals.

(Ashutosh Kumar, J)

(Jitendra Kumar, J)

Praveen-II/Saurav

AFR/NAFR	AFR
CAV DATE	N/A
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