* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Decided on: 18th May, 2022

\+ **CRL.A. 135/2022**

JAMAHIR ALIAS JAWAHAR ..... Appellant
Represented by: Ms. Rajdipa Behura, Adv. DHCLSC.

versus

THE STATE GOVT OF NCT OF DELHI ..... Respondent
Represented by: Mr. Tarang Srivastava, APP for State with SI Manish, PS Kirti Nagar.

\+ **CRL.A. 183/2021**

RAJ KUMAR ..... Appellant
Represented by: Mr. Anwesh Madhukar, Adv. DHCLSC through VC

versus

STATE OF NCT OF DELHI ..... Respondent
Represented by: Mr. Tarang Srivastava, APP for State with SI Manish, PS Kirti Nagar.

\+ **CRL.A. 228/2021**

BIRBAL ..... Appellant
Represented by: Mr. Sumit Choudhary, Adv. DHCLSC through VC

versus

STATE GOVT. OF NCT OF DELHI ..... Respondent
Represented by: Mr. Tarang Srivastava, APP for State with SI Manish, PS Kirti Nagar.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA
HON'BLE MS. JUSTICE MINI PUSHKARNA

MUKTA GUPTA, J. (ORAL)

1. By these three appeals, the appellants impugn the judgment dated 16th October, 2020 whereby they have been convicted for offences punishable under Sections 376(2) (g), 377, 302 and 201 IPC and the order on sentence dated 21st January, 2021 awarded by the learned Special Judge, POCSO directing them to undergo imprisonment for the rest of their lives for offences punishable under Sections 302 and 376(2) (g) IPC, simple imprisonment for 10 years for offence punishable under Section 377 IPC, simple imprisonment for 5 years for offence punishable under Section 201 IPC and accused Jamahir has been awarded sentence of imprisonment for 5 years for offence punishable under Section 363 IPC.

2. Assailing the conviction, learned counsel for the appellant Jamahir contends that there is delay in registration of FIR. Despite the fact that the case of the parents of the victim was that she went missing in the evening of 5th January, 2012 no missing report was lodged and the FIR was lodged only on 7th January, 2012 after the post-mortem report was received by the Police. It is further contended that the so-called eye-witness Ramjanam is a planted witness and not reliable. There are material contradictions in his testimony including contradictions in the time stated by him as to when he went to the Police Station, which is contradicted by the father of the deceased/PW-2. Learned counsel further states that no rough site plan of the place of incident was prepared; though one rough site plan of Nala was prepared and in the absence of rough site plan of the place of occurrence, the

FSL report claiming that the soil from the place of occurrence matched with the soil found from the body of the deceased is meaningless. She further states that no independent witness has also seen the place of occurrence. Besides challenging the manner in which based on the DNA analysis the appellants Jamahir has been convicted, learned counsel for the appellant further challenges the quantum of sentence awarded to the appellant claiming that the learned Trial Court could not have awarded sentence of imprisonment for the remainder of the life as held by the Hon'ble Supreme Court in the decision reported as (2021) 3 SCC 380 *Gauri Shankar Vs. State of Punjab*.

3. Learned counsel appearing on behalf of appellant Raj Kumar states that the conduct of the appellant was unbecoming of an accused as he was arrested on the disclosure statement of Jamahir outside the Police Station. He further contends that the MLC of all the appellants was conducted twice and the DNA analysis which could have been conducted based on the blood samples and would have proved the prosecution case without any ambiguity, was not adhered to; rather the Police collected semen samples of all the three appellants thus creating a doubt of planting the semen on the vaginal swabs collected as the samples were in the custody of the Police. He states that the tampering of the samples cannot be ruled out and thus the appellants are entitled to the benefit of doubt.

4. Learned counsel for the appellant Birbal adopts the arguments addressed by learned counsels for Jamahir and Raj Kumar.

5. The prosecution case commences from an information received at the Police Station Kirti Nagar at 7.45 AM on 6th January, 2012 recorded vide DD No. 11A informing that a dead body of girl aged about 3-4 years was

found in front of house No.03/17, Ramesh Nagar. The body was identified to be of one 'R' aged 3 years by her father who appeared in the witness box as PW-2. The said dead body was found by Suresh (PW-10) who was the sweeper of MCD cleaning the Nala and who with the help of Shamsher Singh (PW-11) took out the body from the Nala and informed the Police.

6. The post-mortem of the dead body was conducted at 1.15 PM on 6th January, 2012 itself and the following injuries were found:

> *"EXTERNAL EXAMINATION: External Injuries:-*
> *1. Abraded bruise of size 1.5cm x 0.5cm present on the left side of forehead with reddish brown in colour.*
> *2. Abraded bruise of size 2.5cm x 2cm present on the right side of face just medial to right ear with reddish brown in colour.*
> *3. Inner aspect of both upper and lower lip found bruised at middle part with associated abrasions on outer aspect and having colour of reddish brown.*
> *4. 3 to 4 crescentric shaped abrasions of size 5mm (circumferential length) appearing like nail marks present on the left side of face and neck with reddish brown in colour.*
> *5. Abraded bruise of size 20cm x 8cm present on the lower half part of back with scattered peeling of skin on the injured part (could be caused by rubbing of back on hard and rough surface during act of sexual assault).*
> *6. Apartly placed pressure abrasion placed on semi circular manner with 6-7 in numbers present on the anterior aspect on mid of left thigh. Each of pressure marks presented with variable in dimension (2mm x 1mm to 3mm x 2mm) appearing like human bite / love bite during act of sexual assault.*
> *7. The inner aspect of labia majora, whole part of labia minora, vaginal introitus severely bruised along with relatively directed vaginal opening, lacerated hymen and vaginal mucosa with collection of clotted blood into vaginal canal.*
> *8. Perianal area bruised with dilated and lacerated anal mucosa up to anal sphincter along with collection of clotted blood into anal canal with dark red in colour."*

INTERNAL EXAMINATION.

1. Hyoid Bone / Thyroid Cartilage / Cricoid Cartilage / Tracheal Rings & Mucosa / Any Foreign Body in Trachea: All cartilages and hyoid bone of neck found intact. The tracheal mucosa found highly congested with collection of frothy secretion into lumen of it."

7. The post-mortem Doctors opined that:

"1. The cause of death is due to asphyxia caused by manual smothering.

2. All Injuries are ante mortem in nature and of same duration.

3. The manner of death is homicide.

4. The possibility of sexual assault (vaginal and anal coitus) can not be ruled out.

5. Time since death of deceased is approx 16 - 18 hours prior, to post-mortem examination."

8. The post-mortem thus clearly showed that an offence of rape with murder of the minor child aged 3 years was committed. The post-mortem Doctors preserved the vaginal swabs, anal swabs, few hair strands recovered from the body and clothes of the deceased for DNA profile as also the soil on the body for establishing the place of occurrence. All these exhibits were duly sealed and preserved with the seal of DFMT, DDU Hospital and handed-over to the Police.

9. Subsequently, the prosecution recorded the statement of Ramjanam. The Trial Court examined two witnesses including Ramjanam as PW-4 and thus for the sake of convenience we will note Ramjanam as PW-4A. According to Ramjanam on 5th January, 2012 he had gone to the market Veer Bazar, Ramesh Nagar to purchase household articles. At about 8.00

PM he reached near Gol Chakkar in front of Pakora Corner and saw one girl aged 3–5 years weeping and the said girl was accompanied by a boy aged 25–30 years having a small beard, who was holding her hand. The girl was wearing an orange colour and white colour T-Shirt (jacket type). When he enquired from the said boy as to why the said girl was weeping, he said that he was searching for the parents of the girl as she has been missing from her parents. Thereafter, he went home and later when he came to know that dead body of a girl was found, he went to the Police Station Ramesh Nagar on 7th January, 2012 and requested to show the photo of the girl. He identified the girl to be the same which he had seen with the boy in Veer Bazar. He gave the height of the boy as 5/ 5 ½ feet and stated that he could identify the boy if he was shown to him.

10. As per the investigation thereafter accused Jamahir was apprehended who was then identified by Ramjanam at DDU Hospital after Jamahir refused his TIP. It is on the disclosure of Jamahir that the two other accused Raj Kumar and Birbal were also apprehended. On the arrest of these three accused, their blood samples and semen samples were collected and sent to the FSL for DNA examination. The FSL result qua DNA examination was reported as:-

> *"RESULTS OF EXAMINATION*
> *1. The alleles from the source of exhibit 'll' (Blood sample of accused Jawahar @ Jamahir), exhibit '20' (Blood sample of accused Birbal), exhibit '23'(Blood sample of accused Raj Kumar), exhibit '25'(Blood sample of accused Raj Kumar), exhibit '26'(Blood sample of accused Jawahar @ Jamahir) & exhibit '27'(Blood. sample of accused Birbal) are accounted in the mixed alleles from the source of exhibit '2a' (top), exhibit '2b' (T- shirt), exhibit '3a'(cotton wool swab), exhibit '3b' (cotton wool swab), exhibit '4a' (cotton wool swab), exhibit '4b'*

(cotton wool swab),.and exhibit '15' (Underwear of deceased). However Alleles from the source of exhibit "23" and "25" (Blood sample of accused Rajkumar) is accounted in the alleles from the source of exhibit "17" (Cloth piece).The alleles from the source of exhibit '11' (Blood sample of accused Jawahar @ Jamahir) & exhibit '26' (Blood sample of accused Jawahar @ Jamahir) are accounted in the alleles from the source of exhibit '10' (Hair recovered from the body and clothes of deceased)

CONCLUSION
1. The DNA profiling (STR analysis) performed on the exhibits are sufficient to conclude that the mixed DNA Profile from the source of exhibit '2a'- (top), exhibit '2b' (T- shirt), exhibit '3a' (cotton wool swab), exhibit '3b' (cotton wool swab), exhibit '4a' (cotton wool swab), exhibit '4b' (cotton wool swab), , exhibit '15' (Underwear of deceased) are matching with DNA Profile from the source of exhibit '11' (Blood sample of accused Jawahar @ Jathahir), exhibit '20' (Blood sample of accused Birbal), exhibit '23'('Blood sample of accused Raj Kumar), exhibit '25'(Blood sample of accused Raj Kumar), exhibit '26'(Blood sample of accused .Jawahar @ Jamahir) & exhibit '27'(Blood sample of accused Birbal).

2. The DNA profile of the source of exhibits "23" and "25" (Blood sample of accused Rajkumar) is matching with the source of exhibit "17" (Cloth piece).

3. The DNA profile of the source of exhibit '11' (Blood sample of accused Ja\yahar @ Jamahir) 85 exhibit '26' (Blood sample of accused Jawahar @ jamahir) is matching with the source of exhibit '10' (Hair recovered from the body and clothes of deceased).”

11. Contention of learned counsel for the appellant Jamahir that there is delay in registration of FIR does not affect the case of the prosecution for the reason according to the mother of the deceased she went to lodge the missing report in the evening of 5th January, 2012, however no missing

report was lodged. Be that as it may, the dead body was found at around 7.00 AM on 6th January, 2012 and the body along with the inquest papers was received for post-mortem at around 1.00 PM on 6th January, 2012. Till then neither the statements of eye-witnesses were recorded nor were the appellants arrested. The FIR does not name the assailants but only gives the description as to when the victim went missing and as to how her dead body was found.

12. Further contention that Ramjanam is a planted witness and not reliable also deserves to be rejected as Ramjanam gave the description of appellant Jamahir and it is on his description that Jamahir was arrested and when Jamahir failed to participate in the Test Identification Parade he was duly identified by Ramjanam. Version of Ramjanam is further corroborated by the fact that from the vaginal and anal swabs of the deceased collected, preserved and sealed at around 1.00 PM on 6th January, 2012, the alleles matched with the DNA samples of Jamahir, as also the two other accused. Further, there was no eye-witness to the place of incident and hence no rough site plan thereof was prepared. While conducting the post-mortem the soil on the body was collected and the FSL report in this regard shows that the soil on the body matches to the constitution of the soil from the place of occurrence which was pointed out by the accused.

13. Merely because Raj Kumar did not run away and was arrested outside Police Station at the pointing out of Jamahir cannot be a ground to come to the conclusion that Raj Kumar is innocent, particularly in view of the FSL report showing his semen in the body of the minor child. The vaginal swabs and anal swabs from the deceased were collected, preserved and sealed on the afternoon of 6th January, 2012 and the accused were arrested much later

i.e. Jamahir on 11th January 2012 and Raj Kumar and Birbal on 15th January 2012 and when the samples reached the FSL they were found to be sealed with the seal of Hospital with no tampering therein, ruling out the possibility of any manipulation or planting of the semen of the appellants on the samples collected.

14. The post-mortem examination of the victim aged 3 years shows the diabolic and brutal manner in which she was ravished causing tear and laceration in the hymen and vagina as also perianal area followed by killing her by smothering. It is in the light of these facts that the learned Trial Court awarded the sentence of life imprisonment for the remainder of the natural life to the three appellants.

15. In the decision reported as (2016) 7 SCC 1 *Union of India Vs. V. Sriharan @ Murugan & Ors*. Constitution Bench of the Hon'ble Supreme Court held that the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty can be exercised only by the High Court and the Supreme Court and not by any other inferior Court. Even in *Gauri Shankar (supra)*, Hon'ble Supreme Court took the same view following the Constitution Bench decision in *V.Sriharan* (supra).

16. In view of the law laid down by the Constitution Bench in *V.Sriharan* (supra), the impugned order on sentence to the extent it awards sentence for imprisonment of the remainder of the life to the appellants herein for offences punishable under Sections 376(2) and 302/34 IPC cannot be sustained.

17. Thus the issue that arises before this Court is whether only in a case where the Trial Court awards death sentence and instead of confirming the

death sentence can the High Court modify the sentence to life imprisonment to the remainder of life or a definite term or even in a case where life imprisonment has been awarded by the Trial Court, the High Court in exercise of its appellate jurisdiction can direct that the life imprisonment would be for the remainder of the life or a definite term.

18. Section 45 of the Indian Penal Code defines 'life' as 'the life of a human being, unless the contrary appears from the context'. Therefore, imprisonment for life means the natural life of a human being. The power of the appropriate government to remit a sentence of imprisonment of life as conferred by clause (b) of Section 433 read with Section 433-A CrPC, cannot mean that the life imprisonment awarded by a Court of competent jurisdiction is not the natural life. (See also 2018 SCC Online Del 9304 *Sanjay Kumar Valmimi Vs. State*, para 88).

19. Constitution Bench in *V.Sriharan* (supra) upholding the views expressed in (2008) 13 SCC 767 *Swamy Shraddananda (2) Vs. State of Karnataka* held that by the Court prescribing a definite term of 20 years, 25 years, 30 years or the remainder of life as an alternate to life imprisonment, it cannot be held that the Court has carved out a new punishment. What the Court seeks is to declare by stating that within the prescribed limit of punishment of life imprisonment, having regard to the nature of offence committed, life imprisonment for a specific period is imposed, which is proportionate to the crime as well as the interest of the victim. Hon'ble Supreme Court held: -

> *"76. Keeping the above hard reality in mind, when we examine the issue, the question is "whether as held in Shraddananda (2) [Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] , a*

special category of sentence; instead of death; for a term exceeding 14 years and putting that category beyond application of remission is good in law? When we analyse the issue in the light of the principles laid down in very many judgments starting from Godse [Gopal Vinayak Godse v. State of Maharashtra, AIR 1961 SC 600 : (1961) 1 Cri LJ 736 : (1961) 3 SCR 440] , Maru Ram [Maru Ram v. Union of India, (1981) 1 SCC 107 : 1981 SCC (Cri) 112 : (1981) 1 SCR 1196] , Sambha Ji Krishan Ji [Sambha Ji Krishan Ji v. State of Maharashtra, (1974) 1 SCC 196 : 1974 SCC (Cri) 102 : AIR 1974 SC 147] , Ratan Singh [State of M.P. v. Ratan Singh, (1976) 3 SCC 470 : 1976 SCC (Cri) 428] , it has now come to stay that when in exceptional cases, death penalty is altered as life sentence, that would only mean rest of one's lifespan.

XXX XXX XXX

78. Though we are not attempting to belittle the scope and ambit of executive action of the State in exercise of its power of statutory remission, when it comes to the question of equation with a judicial pronouncement, it must be held that such executive action should give due weight and respect to the latter in order to achieve the goals set in the Constitution. It is not to be said that such distinctive role to be played by the Executive of the State would be in the nature of a subordinate role to the judiciary. In this context, it can be said without any scope of controversy that when by way of a judicial decision, after a detailed analysis, having regard to the proportionality of the crime committed, it is decided that the offender deserves to be punished with the sentence of life imprisonment i.e. for the end of his life or for a specific period of 20 years, or 30 years or 40 years, such a conclusion should survive without any interruption. Therefore, in order to ensure that such punishment imposed, which is legally provided for in the Penal Code, 1860 read along with the Criminal Procedure Code to operate without any interruption, the inherent power of the court concerned should empower the court in public interest as well as in the interest of the society at large to make it certain that such punishment imposed will operate as imposed by stating that no remission or

other such liberal approach should not come into effect to nullify such imposition.

XXX XXX XXX

83. Keeping the above principles in mind, when we make a study of the vexed question, we find that the lawmakers have restricted the power to impose death sentence to only 12 sections in the Penal Code, namely, Sections 120-B(1), 121, 132, 194, 195-A, 302, 305, 307 (Second Part), 376-A, 376-E, 396 and 364-A. Apart from the Penal Code such punishments of death are provided in certain other draconian laws like TADA, Mcoca, etc. Therefore, it was held by this Court in umpteen numbers of judgments that death sentence is an exception rather than a rule. That apart, even after applying such great precautionary prescription when the trial courts reach a conclusion to impose the maximum punishment of death, further safeguards are provided under the Criminal Procedure Code and the special Acts to make a still more concretised effort by the higher courts to ensure that no stone is left unturned for the imposition of such capital punishments.

XXX XXX XXX

85. Again keeping in mind the above statutory prescriptions relating to imposition of capital punishment or the alternate punishment of life imprisonment, meaning thereby till the end of the convict's life, we wish to analyse the scope and extent to which such alternate punishment can be directed to be imposed. In the first place, it must be noted that the lawmakers themselves have bestowed great care and caution when they decided to prescribe the capital punishment of death and its alternate to life imprisonment, restricted the scope for such imposition to the least minimum of 12 instances alone. As has been noted by us earlier, by way of interpretation process, this Court has laid down that such imposition of capital punishment can only be in the rarest of rare cases. In the later decisions, as the law developed, this Court laid down and quoted very many circumstances which can be said to be coming within the four corners of the said rarest of rare principle, though such instances are not exhaustive.

XXX XXX XXX

"90. In such context when we consider the views expressed in Shraddananda (2) in paras 91 and 92, the same are fully justified and need to be upheld. By stating so, we do not find any violation of the statutory provisions prescribing the extent of punishment provided in the Penal Code. It cannot also be said that by stating so, the Court has carved out a new punishment. What all it seeks to declare by stating so was that within the prescribed limit of the punishment of life imprisonment, having regard to the nature of offence committed by imposing the life imprisonment for a specified period would be proportionate to the crime as well as the interest of the victim, whose interest is also to be taken care of by the Court, when considering the nature of punishment to be imposed.

XXX XXX XXX

98. While that be so, it cannot also be lost sight of that it will be next to impossible for even the lawmakers to think of or prescribe in exactitude all kinds of such criminal conduct to fit into any appropriate pigeonhole for structured punishments to run in between the minimum and maximum period of imprisonment. Therefore, the lawmakers thought it fit to prescribe the minimum and the maximum sentence to be imposed for such diabolic nature of crimes and leave it for the adjudication authorities, namely, the Institution of Judiciary which is fully and appropriately equipped with the necessary knowledge of law, experience, talent and infrastructure to study the detailed parts of each such case based on the legally acceptable material evidence, apply the legal principles and the law on the subject, apart from the guidance it gets from the jurists and judicial pronouncements revealed earlier, to determine from the nature of such grave offences found proved and depending upon the facts noted, what kind of punishment within the prescribed limits under the relevant provision would appropriately fit in. In other words, while the maximum extent of punishment of either death or life imprisonment is provided for under the relevant provisions noted above, it will be for the

courts to decide if in its conclusion, the imposition of death may not be warranted, what should be the number of years of imprisonment that would be judiciously and judicially more appropriate to keep the person under incarceration, by taking into account, apart from the crime itself, from the angle of the commission of such crime or crimes, the interest of the society at large or all other relevant factors which cannot be put in any straitjacket formulae.

XXX XXX XXX

100. That apart, as has been noted by us earlier, while the description of the offences and the prescription of punishments are provided for in the Penal Code which can be imposed only through the courts of law, under Chapter XXVIII of the Criminal Procedure Code, at least in regard to the confirmation of the capital punishment of death penalty, the whole procedure has been mandatorily prescribed to ensure that such punishment gets the consideration by a Division Bench consisting of two Hon'ble Judges of the High Court for its approval. As noted earlier, the said Chapter XXVIII can be said to be a separate Code by itself providing for a detailed consideration to be made by the Division Bench of the High Court, which can do and undo the whole trial held or even order for retrial on the same set of charges or of different charges and also impose appropriate punishment befitting the nature of offence found proved.

101. Such prescription contained in the Criminal Procedure Code, though procedural, the substantive part rests in the Penal Code for the ultimate confirmation or modification or alteration or amendment or amendment of the punishment. Therefore, what is apparent is that the imposition of death penalty or life imprisonment is substantively provided for in the Penal Code, procedural part of it is prescribed in the Criminal Procedure Code and significantly one does not conflict with the other. Having regard to such a dichotomy being set out in the Penal

Code and the Criminal Procedure Code, which in many respects to be operated upon in the adjudication of a criminal case, the result of such thoroughly defined distinctive features have to be clearly understood while operating the definite provisions, in particular, the provisions in the Penal Code providing for capital punishment and in the alternate the life imprisonment.

XXX	*XXX*	*XXX*
XXX	*XXX*	*XXX*

104. That apart, in most of such cases where death penalty or life imprisonment is the punishment imposed by the trial court and confirmed by the Division Bench of the High Court, the convict concerned will get an opportunity to get such verdict tested by filing further appeal by way of special leave to this Court. By way of abundant caution and as per the prescribed law of the Code and the criminal jurisprudence, we can assert that after the initial finding of guilt of such specified grave offences and the imposition of penalty either death or life imprisonment, when comes under the scrutiny of the Division Bench of the High Court, it is only the High Court which derives the power under the Penal Code, which prescribes the capital and alternate punishment, to alter the said punishment with one either for the entirety of the convict's life or for any specific period of more than 14 years, say 20, 30 or so on depending upon the gravity of the crime committed and the exercise of judicial conscience befitting such offence found proved to have been committed.

105. We, therefore, reiterate that the power derived from the Penal Code for any modified punishment within the punishment provided for in the Penal Code for such specified offences can only be exercised by the High Court and in the event of further appeal only by the Supreme Court and not by any other court in this country. To put it differently, the power to impose a modified punishment providing for any specific term of incarceration or till the end of the convict's life as an alternate to death penalty,

can be exercised only by the High Court and the Supreme Court and not by any other inferior court".

20. In *Swamy Shraddananda (2)*, Hon'ble Supreme Court further held that it is equally well settled that Section 57 of the IPC does not, in any way, limit the punishment of imprisonment for life to a term of twenty years. Section 57 of the IPC is only for calculating fractions of term of imprisonment and provides that imprisonment for life shall be reckoned as equivalent to imprisonment for 20 years. It was further held on the facts of a case, a death sentence awarded by Trial Court may be excessive and unduly harsh whereas a life imprisonment which subject to remission normally works out to be a term of 14 years, would be grossly disproportionate and inadequate. Thus, it is within these two categories that a specific category has been carved out wherein the Courts can award a particular period of the natural life as the sentence. Hon'ble Supreme Court held:

"92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be

disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.

93. Further, the formalisation of a special category of sentence, though for an extremely few number of cases, shall have the great advantage of having the death penalty on the statute book but to actually use it as little as possible, really in the rarest of rare cases. This would only be a reassertion of the Constitution Bench decision in Bachan Singh [(1980) 2 SCC 684: 1980 SCC (Cri) 580: AIR 1980 SC 898] besides being in accord with the modern trends in penology."

21. As noted above, though the learned Trial Court could not have qualified the imprisonment of life awarded by it to the remainder of the natural life of the appellants as held by the Constitution Bench in *V.Sriharan* (supra) as also in *Gauri Shankar* (supra), this Court though setting aside the said order in exercise of its appellate jurisdiction, can award the same sentence on consideration of the facts of the case. In the present case, the three appellants have been convicted for the gang rape and murder of a minor aged 3 years, thereby brutally mutilating her private parts and smothering her. In the present case death sentence has not been awarded by the learned Trial Court. However, the sentence of life which would ordinarily be upto fourteen years after remissions would be highly inadequate, unjust and unfair to the victim. Further sentence of life being a sentence for the natural life reserving the right of the executive to grant remissions, this Court in view of the law laid down in *V.Sriharan* (supra) and *Swamy Shraddananda (2)* (supra) would be competent to award the

sentence for remainder of the life to the appellants. Hence, imprisonment of life for the remainder of life to the appellants would be an appropriate sentence in the facts of the case.

22. Consequently, upholding the conviction of the appellants for the offences punishable under Sections 376(2)(g) IPC, 302 IPC, 377 IPC and 201 IPC, and of appellant Jamahir for offence punishable under Section 363 IPC, though the order on sentence to the extent it directs the appellants to undergo imprisonment for the remainder of life as passed by the learned Trial Court is set aside for offences punishable under Sections 376(2) and 302 IPC, however, in exercise of its appellate jurisdiction and in view of diabolic and brutal manner in which rape with murder of a three year old child was committed, this Court deems it fit to award the same sentence i.e. remainder of the life for offences punishable under Sections 376(2) and 302 IPC. The sentence of simple imprisonment for 10 years for offence punishable under Section 377 IPC to all the appellants and imprisonment for 5 years to the appellant Jamahir for offence punishable under Section 363 IPC along with the fine imposed and the default sentences is upheld.

23. Appeals are accordingly disposed of.

24. Copy of the order be uploaded on the website of this Court, as also communicated to the Superintendent Tihar Jail for updation of records and for intimation to the appellants.

(MUKTA GUPTA)
JUDGE

(MINI PUSHKARNA)
JUDGE

MAY 18, 2022/'ga'