HIGH COURT OF MADHYA PRADESH, JABALPUR

DIVISION BENCH: BEFORE HON'BLE SHRI JUSTICE P.K.JAISWAL & HON'BLE SHRI JUSTICE B.K.SHRIVASTAVA

Criminal Reference No.12/2018

In Reference

Vs.

Rabbu alias Sarvesh

&

Criminal Appeal No.6748/2018

Rabbu alias Sarvesh

Vs.

State of Madhya Pradesh

Shri Alok Vagrecha, Advocate and Shri Amit Jain, Advocate for the appellant.
Shri S.K.Rai, Government Advocate for respondent/State.

J U D G M E N T

(17.01.2019)

Per : B.K.Shrivastava, J.

1. Reference No.12/2018 dated 20.08.2018 has been made by First ASJ, Bina, District Sagar, alongwith the proceedings and record for confirmation of death sentence as provided under Section 366(1) of the Code of Criminal Procedure 1973, while the Criminal Appeal No.6748/2018 has been preferred by the accused/appellant Rabbu alias Sarvesh who has been convicted by the judgment dated 20.08.2018 passed by First ASJ, Bina, District Sagar in Special Case No.01/2018 for the offence under Sections 450, 376(2)(i), 376(D), 376(A) of IPC and Section 5(g)/6 of POCSO Act and sentence as under:-

Conviction under Section	Sentence
450 of IPC	10 years R.I with fine of Rs.100/- in default 1 month R.I.
376(D) of IPC	Life Imprisonment with fine of Rs.100/- in default 1 month R.I
376(A) of IPC	Death penalty/capital punishment with fine of Rs.100/- in default 1 month R.I.
302 of IPC	Death penalty/capital punishment with fine of Rs.100/- in default 1 month R.I.

2. In this case, as per prosecution, another co-accused was also involved but who was juvenile, therefore, separate challan has been filed against him before the Juvenile Justice Board. Name of the aforesaid juvenile is not mentioned in this judgment, he will be referred as "juvenile" in this judgment.

3. As per prosecution case on 07.12.2017 at about 08:30 P.M. in the night when the prosecutrix was watching T.V in her residence at village Deval, Police Station Bhangarh, District Sagar (M.P.), appellant with juvenile reached there and asked her for drinking water. Thereafter both entered in the room of the prosecutrix and shown blue film in their mobile to the prosecutrix and both the accused committed rape with the prosecutrix and thereafter when the prosecutrix told them that she will tell the incident to her parents, then the juvenile poured kerosene oil on the prosecutrix and the present appellant set her on fire. Prosecutrix ran away towards outside of her house. Her grand father and other persons any how tried to control the fire. She narrated the entire story to her grand father and witnesses Priti and Sandeep. Thereafter prosecutrix was rushed to the Civil Hospital, Bina. Doctor conducted MLC and also informed the police authority.

4. The Police reached to Bina Hospital and recorded Dehat Nalishi (Ex.P/28) upon the information given by the injured. Naib Tahsildar Sangeeta Mehto also called by Police, who recorded the statement (Ex.P/26) of the injured. For further treatment the injured girl was send to the Bhundelkhand Medical Hospital, Sagar. On 09.12.2017 Judicial Magistrate, Sagar, Smt. Suchita Shrivastava also recorded the statement of injured girl under Section 164 of Cr.P.C (Ex.P/44). During treatment the injured girl expired on 14.12.2017 at about 07:10 A.M. The doctor sent the information to the Police thereafter the police reached on the spot and offence under Section 302 of IPC also enhanced. Police issued the notice (Ex.P/2) to the witnesses, thereafter prepared the inquest Panchnama (Ex.P/3) and sent the dead body for postmortem. Merg No.00/2017 (Ex.P/1) registered at Medical Police Chowki, Sagar and upon the basis of

aforesaid merg original Merg No.41/2017 was registered at Police Station Bhangarh. Police collected the MLC report and documents related to treatment. Police investigated the matter and recorded the statements of several witnesses and arrested the accused persons and sent them for medical examination. The DNA sample also taken by the doctor and the samples were sent for medical examination and FSL examination.

5. After investigation the Police came to the conclusion that the accused and the juvenile both committed the rape upon the prosecutrix and thereafter the juvenile poured kerosene oil upon the girl and present appellant set her ablaze. Therefore, challan No. 259/2017 filed before the JMFC on 29.12.2017, who registered the Criminal Case No.872/2017 and committed the case to the Court of Sessions where special Sessions Trial No.01/2018 registered in Sessions Court Sagar on 12.01.2018 and the case was made over to the ASJ, Bina, who framed the charges against the accused on 09.02.2018 under Sections 449, 293, 376(D) alternatively 376(2)(i), 376(A), 302/34 and 201/34 of IPC and Section 5(g)/6 of POCSO Act. The accused persons denied the charges and demanded for trial. Thereafter prosecution examined 24 witnesses in support of its case. Two witnesses examined by the accused in their defence.

6. After conclusion of the trial the First ASJ, Bina passed the judgment on 20.08.2018 and convicted the accused for the offence punishable under Sections 450, 376(2)(i), 376-D, 376(A) and 302/34 of IPC and 5(g)/6 of POCSO Act. The trial Court acquitted the appellant for the offence under Sections 293 and 201 of IPC. After hearing upon the sentence the trial Court passed the sentence as stated in para-1 of this judgment. The reason for non awarding sentence in some offence has been mentioned in para 56 to 65 in the impugned judgment. Therefore, the appellant has been convicted and sentenced only for the offence under Sections 450, 376-D, 376(A) and 302 of IPC.

7. The trial Court, after passing the judgment referred the case for confirmation of death sentence under Section 366 of Cr.P.C. The accused/appellant also filed the appeal against the judgment impugned. It is submitted by the learned counsel for the appellant that the case was not

proved beyond reasonable doubt against the appellant. The evidence of PW-1, PW-13 and PW-14 was not reliable. The dying declaration recorded by Naib Tahsildar and Judicial Magistrate are suspicious and the said dying declarations are not given by the deceased in fit mental condition. The Dehat Nalishi was not recorded upon the information given by the deceased. Therefore, no any dying declaration was reliable. The accused has been falsely implicated in this case. No independent witnesses have been examined. Therefore, the judgment passed by the trial Court is liable to be set-aside and the appellant is entitled to get acquittal.

8. On the other, side State strongly opposed the appeal. It is submitted by the State that the incident took place on 07.12.2017. The deceased survived upto 14.12.2017. Her mental condition was fit. She herself scribed Dehat Nalishi to the Police and she herself given the statement to Naib Tahsildar as well as Judicial Magistrate. All dying declarations indicate that both the accused committed the rape with the deceased and also committed murder by setting her ablaze. Therefore, this appeal having no force, hence liable to be dismissed.

9. In this case the prosecution relied upon the oral dying declaration given by the deceased to PW-1, PW-2, PW-13 and PW-14. In addition to the aforesaid oral dying declaration the prosecution also relied upon the Dehat Nalishi (Ex.P/28). Dying declaration (Ex.P/26) recorded by Naib Tahsildar and the statement of deceased (Ex.P/44) recorded by the Judicial Magistrate First Class. All three statements shows that both the accused committed rape upon the prosecutrix and also set her ablaze. Due to death of the deceased, all three statements have come in the purview of “dying-declaration” and having weightage in the evidence.

10. First we see the oral dying declarations made by the deceased to PW-1, PW-2, PW-13 and PW-14. Sohan Singh (PW-1) is the grand father of the prosecutrix/deceased, who was undisputedly present in the house at the time of incident on 07.12.2017. This witness said that after taking the meal he was sleeping and the deceased was in her room and watching T.V. The juvenile came and said that he wants some water and knocked the door of the room of the deceased. As per statement of this witness the

accused when set ablaze the prosecutrix then she ran away after opening the door and cried and at that time the witness and other persons put "Kathari" upon the body of the deceased and lay down in the Dehlan. The prosecutrix told the witness and other persons that she was watching T.V in her room, at that time the juvenile and appellant knocked her door for taking the water, when she opened the door the appellant gagged her mouth and juvenile removed the clothes of prosecutrix and committed rape. Thereafter juvenile gagged the mouth of the prosecutrix and the appellant Rabbu committed the rape upon her. Katti of kerosene oil was kept in the courtyard and juvenile poured the kerosene oil upon the deceased and Rabbu set her ablaze by match box. Witness Sohan Singh again said that upon his instigation his nephew Sandeep informed the Police. Thereafter Narayan Singh, Sub Inspector reached there in the night at about 09:00 P.M. and Ambulance also reached. Thereafter they took the prosecutrix to the hospital, Bina from there she was referred to Sagar. In Sagar hospital she was admitted for 7 days and expired on 14.12.2017.

11. Therefore, it appears from the statement of Sohan Singh (PW-1) that just after incident when the prosecutrix came out from the room with burning, at that time she narrated the entire incident to the witness and other persons. Mukund Singh (PW-2) also supported the aforesaid version. He said that he was sleeping in his house and after hearing the crying sound of prosecutrix, he came out from the house and saw that prosecutrix was in burning position and coming out from her house. They all controlled the fire. Thereafter prosecutrix told that juvenile and Rabbu both knocked her door upon the pretext of water and at that time she was watching T.V., when she opened the door Rabbu gagged her mouth and juvenile removed her clothes from her lower part of body and committed rape and after that juvenile gagged her mouth and Rabbu committed rape with her. In para-2 of the statement of witness he said that the deceased also told that when she said the accused persons that she will tell the incident to her family then juvenile poured kerosene oil upon her body and Rabbu set her ablaze by match box. This witness is also resident of same locality.

12. Preeti (PW-13) and Sandeep Singh Rajpoot (PW-14) are aunt and

uncle of the deceased. Both are residents of nearby house of prosecutrix. Preeti said in her statement that resident of the deceased situated just after one house from the house of witness. The witness heard the cry of the deceased at about 8:00 – 8:30 P.M. in the night of 07.12.2018. The witness came out from her house with her husband and saw that the deceased was burning and crying loudly. The witness tried to extinguished the fire by putting blanket, but could not controlled the fire, then Sandeep and Golu poured water upon the deceased, thereafter the fire was controlled. when the witness asked about the fire incident the deceased told her that she was watching T.V in her room, at that time both the accused entered in the house and asked for water and thereafter both committed rape. The same incident has been narrated by the witness as deposed by Sohan Singh (PW-1), Mukund Singh (PW-2). Sandeep Singh Rajpoot (PW-14) also supported the statement of her wife and said the same fact.

13. Therefore, it appears that, all four witnesses are telling the same story. When the deceased came out from the house with burning flame, all four witnesses tried to save her and control the fire. Thereafter deceased narrated the entire story to all four witnesses. As per that story both the accused entered in the room of the prosecutrix and committed rape upon her. Thereafter juvenile poured kerosene oil upon the deceased and Rabbu alias Sarvesh set her ablaze.

14. The aforesaid all four witnesses have been cross examined by the defence. In para-7 of statement of Sohan Singh the defence given the suggestion that the deceased herself poured the kerosene oil because the witness prohibits her from watching the T.V. The witness denied the aforesaid suggestion. No other material omission or contradiction is found in the entire evidence of the aforesaid witness. Mukund Singh (PW-2) admitted in para-5 that the juvenile runs a small shop for selling *ghutkha* etc. near by house of prosecutrix. He denied the suggestion that the juvenile used to come frequently in the house of prosecutrix and both were having any relationship. He also denied the suggestion in para-6 that the prosecutrix did not narrate the incident to her. He denied in para-9 of the statement that the deceased was having illicit relationship with the juvenile and Sohan Singh saw them in objectionable condition. This suggestion has

not been given to Sohan Singh (PW-1). Therefore, this type of suggestion having no meaning. The accused hemself did not produce any evidence regarding illicit relationship between juvenile and deceased.

15. The witness Preeti (PW-13) was also cross examined by defence. She denied the suggestion that she did not put the blanket upon the prosecutrix. She admitted that the appellant is residing in her village Deval and his house is situated near by house of prosecutrix. She also said that there was no previous enmity between the family of the accused persons and deceased. No other suggestion has been given to this witness. The position of cross examination of Sandeep Singh Rajpoot (PW-14) is also same. Any material omission and contradiction is not found in the cross examination of the witness Sandeep Singh Rajpoot.

16. Therefore, it appears that the statements of PW-1, PW-2, PW-13 and PW-14 are found reliable. The only suggestion of the defence is that the juvenile was having relationship with the prosecutrix and PW-1 catched them in objectionable condition, therefore, prosecutrix committed suicide by pouring kerosene oil and set herself ablaze. This suggestion is not supported from the evidence of witnesses. The accused also not produced any evidence for proving the aforesaid suggestion. Therefore, oral dying declaration made by the deceased to the aforesaid four witnesses is found reliable.

17. Now we see the written dying declaration. First dying declaration (Ex.P/26) has been recorded by Naib Tahsildar Sangeeta Mehto on 07.12.2017 between 11:05 to 11:30 P.M at hospital, Bina. Sangeeta Mehto has been examined as PW-11. This witness said that she was posted and working as Executive Magistrate on 07.12.2017 at Tahsil Bina. As per instructions of Tahsildar she reached at Government Hospital, Bina at about 11:00 P.M in the night. She again said that the deceased aged about 14 years was admitted in the hospital. She took the certificate from the duty doctor and thereafter she recorded the dying declaration of the prosecutrix in the question answer form. In para-2 the witness explained the questions and answers given by prosecutrix and prove the statement of Ex.P/26, which is as under:-

मरणासन्न कथन

''नाम– कु. अंजली

पिता–निहालसिंह राजपूत

उम्र– 14 वर्ष

जाति– राजपूत

निवासी– देवल, तहसील बीना

दिनांक– 07.12.2017

समय– 11:00 PM

स्थान– शासकीय चिकित्सालय बीना

कृपया ड्यूटी डॉक्टर यह बताये कि मर्ग बयान देने की स्थिति में है अथवा नहीं ?

मरीज कथन देने योग्य है।

sd. (Dr.)

7/12/2017-11.05 P.M.

Q- *क्या नाम है तुम्हारा ?*

Ans- *अंजली*

Q- *क्या हुआ है अंजली ?*

Ans- *लडको ने छेडछाड की। दो लड़को ने। एक का नाम शिवम और एक का रब्बू सेन*

Q- *क्या किया इन्होंने?*

Ans- *बाथरूम करते है ना वो दिख रहे थे फिर मुंह बंद करके तेल डालकर आग लगा दी।*

Q- *तुम कहां थी?*

Ans- *घर पर देवल में थी।*

Q- *घर पर कौन–कौन था?*

Ans- *दादाजी थे उनको दिखता नहीं है।*

Q- *घर में कौन–कौन है?*

Ans- *मम्मी, दादी, दादा, चाचा, चाची और चार बहनें है सबकी शादी हो गई।*

Q- *तुम पढती हो?*

Ans- *हॉ, आठवी में।*

Q- *तुम्हें पहली बार छेडा या पहले भी?*

Ans- *नहीं पहली बार।*

Q- *तुम्हारे साथ स्कूल पढते है?*

Ans- *एक नहीं पढता, एक 10वीं पढता है।*

Q- *लडको के पिता का नाम क्या है?*

Ans- *शिवम के पिता का नाम रामेश्वर, रब्बू के पिता रामप्रसाद*

सेन है।

Q- उन्होनें तुम्हारे साथ कुछ गलत काम किया है?

Ans- हॉ उन्होंने मेरे साथ गलत काम किया बाथरूम वाली जगह पर जो दिख रहे थे उसे अंदर डाला बहुत दर्द हुआ। मोबाइल पर गंदी–गंदी फिल्म देख रहे थे।

Q- अंजली क्या कहना है? कुछ कहना चाहती हो?

Ans- हॉ उन्हें सजा मिलनी चाहिए, फॉसी की सजा।

Q- मिट्टी का तेल था? कहां से मिला?

Ans- हॉ। घर में रखा था। माचिस भी उनने ढूंढ ली मैं चिल्लाई पर मुंह दबाकर बंद कर दिया था।''

18. In the cross examination she admitted that when she reached for recording the statement at that time the family members of the deceased were present nearby the bed. In para-5 she also said that hands of the deceased were burnt but she was in the position to put her signature. She also denied the suggestion that she did not recorded any statement and prepared the Ex.P/26 upon the basis of the information given by the family members of the deceased. If we see the entire statement of the witness then no reason is found to disbelieve the testimony of aforesaid witness. She is a public servant and was discharging her public duty as Naib Tahsildar/Executive Magistrate. She also took the certificate from the duty doctor thereafter she recorded the statement. The duty doctor Avinash Saxena (PW-9) said in para-3 that the Executive Magistrate reached in the hospital on 07.12.2017 at about 11:00 P.M. and the witness gave the certificate regarding the fit mental condition of the deceased. The witness proved his certificate mentioned in A to A part of Ex.P/26 and said that the statement was started at 11:05 P.M. and completed at 11:35 P.M. The witness also said that after completion of the statement he again certified the condition of deceased and put his signature in the part of C to C upon Ex.P/26. In cross examination of the aforesaid witness, no reason is found to disbelieve the aforesaid statement. Therefore, it appears that the dying declaration (Ex.P/26) recorded by Sangeeta Mehto (PW-11) is reliable, which had been recorded on 07.12.2017 at about 11:05 P.M. after taking the certificate of fit mental condition given by Dr.Avinash Saxena (PW-9). Therefore, the trial Court has not committed any mistake by relying upon the statement Ex.P/26.

19. The second dying declaration is in the shape of Dehat Nalishi (Ex.P/28), which has been recorded by Anjana Parmar (PW-16) at 11:30 P.M. on 07.12.2017. Anjana Parmar (PW-16) is the Sub Inspector posted at Police Station Bina. The witness said that in Civil Hospital, Bina she noted down the report as per information given by the deceased, who was admitted in hospital. In para-2 and 3 she explained the question and the answers given by the deceased. She proved the statement (Ex.P/28) in her para-4 and said that Ex.P/28 was written by her in detail and after writing of the aforesaid report she read over it to the deceased and thereafter she took the signature of the deceased in part B to B. Thereafter she sent the aforesaid report for registration of case at Police Station Bhangarh. She denied the suggestion of defence in para-5 that the aforesaid report was written by her upon the information given by the Aunt of the deceased named Preeti. This suggestion is not given in the statement of Preeti. The witness also explained that hands of the deceased were not excessive burnt and the deceased was in position to hold the pen. She denied the suggestion that the report was not written upon the information given by the deceased. Therefore, no reason is found in the cross examination of this witness to disbelieve the Dehat Nalishi (Ex.P/28) recorded by witness. The entire incident is mentioned in the Dehat Nalishi, which indicates that the accused/appellant committed the rape and also set the deceased ablaze. Ex.P/28 is as under:-

> *"फरियादिया अंजली ने जली हुई अवस्था में बीना में मौखिक रिपोर्ट दर्ज कराई कि मैं ग्राम देवल में रहती हूं कि आज रात्री 08:30 बजे करीबन अपके घर के कमरे में टी. व्ही. देख रही थी। तभी पडौस के रहने वाले शुभम यादव और रब्बू सेन अकेला पाकर पानी मांगने के बहाने कमरे में घुस आये और मुझसे जोर जबरदस्ती करने लगे तो मैने चिहलाया तो रब्बू सेन ने मेरा मुंह दबाकर पलंग पर पटक दिया और एक हाथ से हाथ पकड़ लिया शुभम ने मेरे नीचे के कपडे उतार दिये और मेरे ऊपर चढकर बुरा काम किया फिर रब्बू ने भी मेरे साथ बुरा काम किया तब शुभम यादव ने हाथ–मुंह दबा रखा था जब मैने कहा कि मै घर परिवार गांव वालों को घटना बताऊगी तब शुभम ने मिट्टी के तेल की कुप्पी जो घर*

के बाहर रखी थी जान से मारने की नियत से मेरे ऊपर उडेल दी और रब्बू ने आग लगा दी दोनों बोल रहे थे कि जब तू बचेगी तभी तो बतायेगी कह कर भाग गये मैं जलती हुई अवस्था में बचाव हेतु कमरे के बाहर निकली तो मेरे बाबा ने कथरी उढ़ाई और मेरे चाचा संदीप व चाची प्रीति वा गांव वाले भी आ गये तब 108 से मुझे बीना सरकारी अस्पताल लाये है। मुझे शुभम एवं रब्बू सेन ने बुरा काम करके मिट्टी तेल डालकर जलाया है। रिपोर्ट करती हूं कार्यवाही की जावे।''

20. The third dying declaration is in the shape of statement recorded under Section 164 of Cr.P.C by Smt. Suchita Shrivastava, JMFC, Sagar (PW-23). This statement has been recorded on 09.12.2017 between 08:43 to 09:10 A.M. at Bhundekhand Medical Hospital, Sagar. Smt. Suchita Shrivastava (PW-23) deposed that on 09.12.2017 she was posted as JMFC in District Court, Sagar. Upon the oral instructions of the CJM and the written application of Police Station, Bhangarh she recorded the statement (Ex.P/44) under Section 164 of Cr.P.C. At about 08:43 P.M she reached in the burn ward No.20 of Bhundelkhad Medical Hospital, Sagar. The witness said that after satisfaction regarding the willing of the prosecutrix she recorded her statement (Ex.P/44). The witness said in para-4 that she recorded the verbettam statement of the deceased and also took the signature of the deceased, but she was not able to put her signature in proper way. Therefore, she also took thumb impression of the prosecutrix. The witness said that she also took the opinion (Ex.P/45) from Dr. Bhupendra regarding competency of giving the statement and the doctor gave the certificate about the fit mental condition of the prosecutrix for giving the statement. The witness also proved the order sheet (Ex.P/46) written by her and the written application (Ex.P/43) given by Police Station Bhangarh to CJM in para-5. The witness again said that the statement was recorded during the period of 08:43 to 09:10 P.M.. She denied the suggestion of the defence that at the time of recording the statement, the police personnel were also present there. In para-5 she said that hands of the deceased were burnt, but she was able to hold the pen to write.

21. Dr. Bhupendra (PW-24) also supported the statement of Smt. Suchita Shrivastava. The witness said that on 09.12.2017 he was posted as Junior Resident Surgeon in Bhundelkhand Medical Hospital, Sagar. On the said date at about 09:00 P.M when he was on duty, the deceased was admitted in the hospital and the Magistrate came for recording her statement. Upon the request of the Magistrate he examined the deceased before recording her statement and he also examined the deceased after recording of her statement. In this regard the witness issued the certificate (Ex/P/43).

22. Therefore, it appears that Smt. Suchita Shrivastava, JMFC, Sagar (PW-23) recorded the statement (Ex.P/44) at Bhundelkhand Medical Hospital, Sagar under Section 164 of Cr.P.C and she also obtain the verification regarding fit mental condition of the deceased from Dr. Bhupendra Patel (PW-24). Dr. Bhupendra Patel (PW-24) also supported the aforesaid facts. The statement (Ex.P/44) which has been proved by Smt. Suchita Shrivastava (PW-23) is as under:-

> *"रात के आठ बजे मैं अपने घर पर थी तभी बाहर का ताला तोड़कर शिवम यादव एवं रब्बू खबास घर के अंदर आ गये मेरी दादी और चाचा भोपाल गये थे। मां मामा के घर गयी थी। मेरा दादा को दिखाई सुनाई नहीं देता है। दोनों ने मुझे गंदी–गंदी फिल्म दिखाई। फिर शिवम ने अपनी चड्डी उतारकर मेरी भी चड्डी उतार दी और मेरे ऊपर चढ़कर कुछ करने लगा जिसे मुझे पेशाब की जगह में दर्द होने लगा। मैं चिल्ला भी नहीं पा रही थी। मेरा मुंह मूंद लिया था उसके बाद रब्बू ने भी अपनी चड्डी उतार कर मेरे ऊपर चढ गया मुझे पेशाब में बहुत दर्द हुआ।*
>
> *मैं जैसे तैसे धक्का देकर उठी और चिल्लाई तभी दोनों ने केरोसीन मेरे घर से उठाकर मेरे ऊपर डाल दिया और आग लगा दी और भाग गये में भी घर के बाहर आयीं। मैं पंडित के घर घुस गयी और पंडित के लड़की लड़की और सभी ने मुझे बचाया।*
>
> *कथन मेरे द्वारा BMC अस्पताल में लिये गयें।*
>
> *JMFC SAGAR"*

23. Therefore, it appears that three dying declarations are available in this case. First dying declaration is recorded by Executive Magistrate, second dying declaration in the shape of Dehat Nalishi, recorded by Anjana Parama (PW-16) and third dying declaration is recorded by JMFC. In all three dying declarations, it is mentioned that both the appellant committed rape upon the prosecutrix and set her ablaze. Therefore all three dying declarations are supported the case of prosecution, which also supported by the oral dying declaration made by the deceased to PW-1, PW-2, PW-13 and PW-14.

24. It is not in dispute that the death was homicidal and was a result of burn injuries. The postmortem was conducted by Dr. Saroj Bhuriya (PW-8) and Dr. K.K. Jain, (PW-10). Postmortem report (Ex.P/23) shows that the death was result of extensive burn.

25. As far as rape is concerned the evidence of doctor is also available on the record. Dr. Avinash Saxena (PW-9) is the first doctor who examined the prosecutrix. On 07.12.2017 Dr. Saxena was posted as Medical Officer at Civil Hospital, Bina. On the said date the deceased was brought by dial 100 vehicle. After giving primary treatment he referred the patient to burn ward, District Hospital Sagar. He also said that smell of kerosene was coming from the clothes of the deceased and her clothes were also burnt. She was burnt at about 90%. He also said that burning was within six hours of the examination. He proved his report (Ex.P/25).

26. Dr. Yogmaya (PW-4) is the Medical Officer posted at Government Hospital, Sagar on 08.12.2017. The witness said that prosecutrix was brought by female Constable Gyaneshwari No.43 of Police Station Gopalganj in Bhundelkhand Medical College, Sagar. The witness took the consent of the mother of the prosecutrix, thereafter examined the prosecutrix, upon which sexual assault was made on 07.12.2017. The witness said that after examination she cannot deny the possibility of sexual assault. Therefore, she prepared two vaginal slide and two swab slides, which were handed over to the Constable for confirmation by FSL. She proved her report (Ex.P/14).

27. Ramendra Mishra, (PW-15) is the Incharge Officer of Medical Record posted at Bhundelkhand Medical Hospital, Sagar. He proved the documents (Ex.P/15 to P/20), which are related to the treatment of the deceased.

28. Narayan Singh (PW-19) is the Station House Incharge of Police Station Bhangarh, who investigated the matter. In para-8 the witness said that on 09.12.2017 he produced the accused Rabbu alias Sarvesh before the doctor in Civil Hospital, Bina and the doctor took the sample of blood for the purpose of DNA test. He also said that the aforesaid samples alongwith other relevant articles were sent for chemical examination and DNA examination. In this case DNA report (Ex.P/42) was also proved. As per DNA report, it is reported that:-

> *''आहत अंजली राजपूत के स्रोत (प्रदर्श B एवं प्रदर्श D) से प्राप्त पुरूष मिश्रित Autosomal STR DNA Profile में, आरोपी रब्बू सेन के स्रोत (प्रदर्श G1) एवं अपचारी बालक शुभम यादव के स्रोत (प्रदर्श G2) की DNA Profile भी उपस्थित है।''*

29. Therefore, it appears that in the medical examination of the prosecutrix the possibility of forcible rape was found and as per DNA report (Ex.P/42) the DNA has been matched. Therefore, it is proved beyond reasonable doubt that the accused committed rape with the deceased. Therefore, looking to the aforesaid entire evidence it appears that the oral dying declaration and all three written dying declarations are found reliable and the trial Court did not commit any mistake by relying upon the aforesaid all statements. The accused has rightly held guilty by the trial Court for the offence under Sections 450, 376(D), 376(A) and 302 of IPC.

30. Now the question arises for consideration that in the aforesaid evidence and the circumstances as to whether this is one of rarest of rare case wherein the penalty of death may be confirmed on account of aggravating circumstances or due to having some mitigating circumstances, it may be converted into the imprisonment for life. In this regard, the guidance can be taken from the various judgments of Hon'ble

the Supreme Court.

31. Learned counsel for the appellant submits that the death sentence is not appropriate in the present case. The appellant / accused is a boy aged about 22 years. He has no criminal antecedents. Therefore, he is first offender, hence he is liable to get opportunity of rehabilitation and reformation.

32. On the other hand, learned Government Advocate prays for confirmation of death sentence of the appellant in the light of the crime committed by the appellant.

33. Learned counsel for the appellant submits that the appropriate opportunity of hearing has not been provided to the accused by the trial Court. If, trial Court convicted the accused for the offence under the Section in which death penalty may be awarded, the Court should postpone the hearing upon sentence. But, the trial Court heard upon the sentence on the same day, on which judgment was passed. In this regard, he drawn our attention towards **Rajendra Prasad Vs. State of U.P. (1979) 3 SCC 646**.

34. In cases where an Accused is convicted for offence Under Section 302, Indian Penal Code, minimum sentence that is to be awarded is the life imprisonment. However, in rarest of rare cases, the Sessions Court may award death sentence as well. As per the provisions of Section 235 of the Code of Criminal Procedure, it is mandatory for the sessions court to give a proper hearing to the Accused on the question of sentence as well. The necessity and importance of such a hearing is explained in **Rajesh Kumar v. State Through Government of NCT of Delhi MANU/SC/1130/2011 : (2011) 13 SCC 706** wherein after referring to various earlier judgments, this Court summed up in the following manner:

> *"**44.** In **Santa Singh [MANU/SC/0167/1976 : (1976) 4 SCC 190 : 1976 SCC (Cri.) 546]** this Court noted that in most countries of the world problem of sentencing the criminal offender is receiving increasing attention and it is so in view of rapidly changing attitude towards crime and criminal. In many countries, intensive study of sociology of the crime has shifted the focus from the crime to the criminal, leading to a widening of the objectives of sentencing and*

simultaneously of the range of the sentencing procedures.

***45.** Bhagwati, J. (as His Lordship then was) giving the judgment in **Santa Singh [MANU/SC/0167/1976 : (1976) 4 SCC 190 : 1976 SCC (Cri.) 546]** pointed out and which was later on accepted in **Bachan Singh v. State of Punjab [MANU/SC/0111/1980 : (1980) 2 SCC 684 : 1980 SCC (Cri.) 580]** that proper exercise of sentencing discretion calls for consideration of various factors like the nature of offence, the circumstances—both extenuating or aggravating, the prior criminal record, if any, of the offender, the age of the offender, his background, his education, his personal life, his social adjustment, the emotional and mental condition of the offender, the prospects for the rehabilitation of the offender, the possibility of his rehabilitation in the life of community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by the offender or by others. After referring to all the aforesaid facts, the learned Judge opined as under: (**Santa Singh case [MANU/SC/0167/1976 : (1976) 4 SCC 190 : 1976 SCC (Cri.) 546], SCC p. 195, para 3**)*

> *"**3** . ... These are factors which have to be taken into account by the court in deciding upon the appropriate sentence, and, therefore, the legislature felt that, for this purpose, a separate stage should be provided after conviction when the court can hear the Accused in regard to these factors bearing on sentence and then pass proper sentence on the Accused. Hence the new provision in Section 235(2)".*

***46.** After analysing the aforesaid aspects, the learned Judge in **Santa Singh case [MANU/SC/0167/1976 : (1976) 4 SCC 190 : 1976 SCC (Cri.) 546**] posed the question: What is the meaning and content of expression "hear the Accused"? By referring to various aspects and also the opinion expressed by the Law Commission in its Forty-eighth Report, Bhagwati, J. (as His Lordship then was) opined that the hearing contemplated Under Section 235(2) is not confined merely to oral submissions but it is also intended to give an opportunity to the prosecution and the Accused to place before the court facts and material relating to various factors bearing on the question of sentence. However, there was a note of caution that in the name of such hearing, the court proceedings should not be unduly protracted.*

***47.** This Court held in **Santa Singh [MANU/SC/0167/1976 : (1976) 4 SCC 190 : 1976 SCC (Cri.) 546]** that non-compliance with such hearing is not a mere irregularity curable Under Section 465 of the 1973 Code. This Court speaking through Bhagwati, J. (as His Lordship then was) emphasised that this legal provision under our constitutional values has acquired a new dimension and must reflect "new trends in penology and sentencing procedures" so that penal laws can be used as a tool for reforming and rehabilitating the criminals and smoothening out the uneven texture of the social fabric and not merely as a weapon for protecting the hegemony of one class over the other (see p. 197, para 6 of the Report).*

48.** In **Muniappan v. State of T.N. [MANU/SC/0187/1981 : (1981)

3 SCC 11 :1981 SCC (Cri.) 617] *Chandrachud, C.J. delivering the judgment again had to consider the importance of Section 235(2) and Section 354(3) Code of Criminal Procedure in our sentencing procedure. The learned Chief Justice held that the obligation to hear the Accused on the question of sentence Under Section 235(2) of the 1973 Code is not discharged by putting a formal question to the Accused as to what he has to say on the question of sentence. The learned Chief Justice made it clear that the Judge must make a genuine effort to elicit from the Accused all items of information which will eventually bear on the question of sentence. All such items of information that would furnish a clue to the genesis of the crime and the motivation of the criminal are relevant and the learned Chief Justice emphasized that in such an exercise, it is the bounden duty of the Judge to cast aside the formalities of the court scene and approach the question of sentence from a broad, sociological point of view.*

49. *The learned Chief Justice further said that in the sentencing procedure it is not only the Accused but the entire society is at stake and therefore the questions the Judge puts and the answers the Accused gives may be beyond the narrow constraints of the Evidence Act. In the words of the learned Chief Justice the position of the Court in an exercise Under Section 235(2) is as follows:* ***(Muniappan case [MANU/SC/0187/1981 : (1981) 3 SCC 11 : 1981 SCC (Cri.) 617],*** *SCC pp. 13-14, para 2)*

> *"2 . ... The court, while on the question of sentence, is in an altogether different domain in which facts and factors which operate are of an entirely different order than those which come into play on the question of conviction."*

50. *To the same effect is the judgment of Ahmadi, J. (as His Lordship then was) in* ***Allauddin Mian v. State of Bihar [MANU/SC/0648/1988 : (1989) 3 SCC 5: 1989 SCC (Cri.) 490]****. Explaining the purpose of Section 235(2), this Court in Allauddin Mian [MANU/SC/0648/1988 : (1989) 3 SCC 5 : 1989 SCC (Cri.) 490] held that Section 235(2) satisfies a dual purpose; first of all it satisfies Rules of natural justice by according to the Accused an opportunity of being heard on the question of sentence. Under such sentencing procedure the Accused is given an opportunity to place before the court all relevant materials having a bearing on the question of sentence. The Court opined that it is a salutary principle and must be strictly observed and is not a matter of mere formality. This Court further held that in such hearing exercise the Accused should be given a real and effective opportunity to place his antecedents, social and economic background, etc. before the court, for the court to take a fair decision on sentence as otherwise the sentence would be vulnerable.*

51. *The Court therefore opined:* ***(Allauddin Mian case [MANU/SC/0648/1988 : (1989) 3 SCC 5 : 1989 SCC (Cri.) 490]****, SCC p. 21, para 10)*

> ***10*** *. ... We think as a general Rule the trial courts should after*

recording the conviction adjourn the matter to a future date and call upon both the prosecution as well as the defence to place the relevant material bearing on the question of sentence before it and thereafter pronounce the sentence to be imposed on the offender.

52. *Therefore, it is clear from the purpose of Section 235(2) as explained in the aforesaid cases, that the object of hearing Under Section 235(2) being intrinsically and inherently connected with the sentencing procedure, the provision of Section 354(3) which calls for recording of special reason for awarding death sentence must be read conjointly with Section 235(2) of the 1973 Code. This Court is of the opinion that special reasons can only be validly recorded if an effective opportunity of hearing as contemplated Under Section 235(2) Code of Criminal Procedure is genuinely extended and is allowed to be exercised by the Accused who stands convicted and is awaiting the sentence. These two provisions do not stand in isolation but must be construed as supplementing each other as ensuring the constitutional guarantee of a just, fair and reasonable procedure in the exercise of sentencing discretion by the court.*

53. *These changes in the sentencing structure reflect the "evolving standards of decency" that mark the progress of a maturing democracy and which is in accord with the concept of dignity of the individual--one of the core values in our Preamble to the Constitution. In a way these changes signify a paradigm shift in our jurisprudence with the gradual transition of our legal regime from "the Rule of law" to the "due process of law", to which this Court would advert to in the latter part of the judgment."*

35. In the case of **Vasanta Sampat Dupare v. State of Maharashtra, AIR 2017 S.C.2530** separate date was not fixed for hearing upon the sentence, the Supreme court said in para 15 :-

*"**15**. In a recent judgment rendered by three learned Judges of this Court in **B.A. Umesh v. High Court of Karnataka [10. (2016) 9 Scale 600 : (AIR 2017 SC (Cri) 78).],** the facts were more or less similar, in that no separate date for hearing on sentence was given after recording conviction. Para 8 of that decision of this Court is quoted for ready reference:-*

"8. In addition to above, it is contended on behalf of the petitioner (Review Applicant) that since no separate date for hearing on sentence was given in the present case by the trial court, as such for violation of Section 235(2) Cr.P.C., the sentence of death cannot be affirmed. We have considered the argument of Ms. Suri. It is true that the convict has a right to be heard before sentence. There is no mandate in Section 235(2) Cr.P.C. to fix separate date for hearing on sentence. It depends on the facts and circumstances as to whether a separate date is required for hearing on sentence or parties feel convenient to argue on sentence on the same day. Had any party pressed for separate date for hearing on the

sentence, or both of them wanted to be heard on some other date, situation could have been different. In the present case, the parties were heard on sentence by both the courts below, and finally by this Court, as is apparent from the judgment under review. As such, merely for the reason that no separate date is given for hearing on the sentence, the Review Petition cannot be allowed."

This Court then relied on the principle laid down in ***Dagdu v. State of Maharashtra (AIR 1977 SC 1579)*** *(supra) which was followed subsequently by another Bench of three learned Judges in* ***Tarlok Singh v. State of Punjab[(1977) 3 SCC 218 : (AIR 1977 SC 1747)]****. In the circumstances, merely because no separate date was given for hearing on sentence, we cannot find the entire exercise to be flawed or vitiated. Since we had allowed the petitioner to place the relevant material on record in the light of the principles laid down in Dagdu v. State of Maharashtra (AIR 1977 SC 1579) (supra), we will proceed to consider the material so placed on record and weigh these factors and the aggravating circumstances as found by the Court in the judgment under review."*

36. Therefore per law, there is no mandatory requirement to postpone each and every case for hearing on the sentence. Only it is advisable that when the Court is going to impose death penalty, appropriate opportunity for hearing upon sentence should be provided to the accused. In this, it appears from para-55 of the impugned judgment that when the trial Court held guilty the appellant, then the Court explain to the accused that if he wants to say something about the sentence or he wants to produce any evidence then he can call any witness through the Court. After that the Court postpone the hearing for sometimes. Thereafter at 03:30 P.M. the matter was heard on sentence. The accused was represented by the counsel of his own choice but the accused or his counsel did not requested to the Court for seeking any adjournment for arguments or for submission of any type of evidence. Therefore, it can be said that no prejudice has been caused against the applicant.

37. Learned counsel for the appellant relied upon some judgments in reference to the sentence. It is argued that his case does not comes under

the purview of "rarest of rare". Therefore, death penalty should not be imposed. The purpose of justice may be served by awarding the life imprisonment. In the case of **Mohinder Singh Vs. State of Punjab 2013(3) SCC 294**, the Court relied upon the judgment passed by Constitution Bench passed in **Bachan Singh case (1980) 2 SCC 684** and said that not only circumstance of crime, but also circumstance of criminal have to be considered in applying the "rarest of rare doctrine".

38. In the case of **B. Kumar Vs. Inspector of Police (2015) 2 SCC 346**. It has been said that two fundamental objectives of punishment are – (a) deterrence and (b) reformation. Other factors such as seriousness of crime, criminal history of accused and also propensity of offender to remorselessly commit similar crime in future, must be considered. It is also said that it is not sufficient to given reason pertaining to cruel and heinous act of the accused, but the Court must considered special reasons for awarding death sentence.

39. In the case of **Lalit Kumar Yadav Vs. State of U.P. (2014) 11 SC 129,** Supreme Court said in para 43 that nature, motive, impact of a crime, culpability, quality of evidence, socio-economic circumstances, impossibility of rehabilitation are the factors, which the Court may take into consideration while dealing with such cases as was spell out in **Santosh Kumar Satishbhushan Bariyar Vs. State of Maharastra (2009) 6 SCC 498**.

40. In the case of **Ram Deo Prasad Vs. State of Bihar, (2013) 7 SCC 725** rape and murder was committed by the accused. Victim was a four years old child. The Court observed that there are serious lapses in conduct of investigation and trial. Appellant was represented before trial Court by a lawyer appointed by Court from penal of Advocates. Though facing death penalty, he did not file any appeal before High Court. Only reference was made by trial Court. In Supreme Court, his appeal came through Jail Superintendent. Supreme Court said that it shows that the appellant did not have sufficient resources to engage a lawyer of his own choice and get himself defended upto his satisfaction. Supreme Court set-aside the death sentence and awarded life imprisonment.

41. In the case of **Tattu Lodhi Vs. State of M.P. (2016) 9 SCC 675** the accused kidnapped minor girl, aged about 7 years, attempted to commit rape on her, thereafter murdered her and destroyed the evidence related to crime. After consideration, in the circumstances of the case Supreme Court said that the case do not make out "the rarest of rare", therefore, in place of death penalty Supreme Court awarded life imprisonment with the direction that the accused shall not be released from prison till he complete actual period of 25 years.

42. In the case of **Amar Singh Yadav Vs. State of U.P. (2014) 13 SCC** 44, appellant was a Police Constable, who took his wife and four children in a Maruti Van and set them on fire in Maruti Van itself after pouring petrol on them and locking the doors thereof. Appellant had and extra-marital affair with two women and his wife receiving half salary of accused from the department directly. In the circumstances of case death sentence commuted to life imprisonment for a fixed period of 30 years without any remission by Supreme Court.

43. In the case of **Sandeep Vs. State of U.P. (2012) SCC 107** murder was committed inside Car by hitting her with Car tools (Jack and spanner), cutting her with shaving blades and throwing acid on her. Murder was a pre-plan act. Supreme Court said that brutality though writ large, yet the case was not exceptional enough to warrant death sentence. Death sentence imposed by Court below, commuted by Supreme Court to life imprisonment with the condition that main culprit would serve minimum imprisonment for 30 years without remission.

44. The Full Bench of Hon'ble the Supreme Court in the case of **Machhi Singh & Others Vs. State of Punjab, AIR 1983 SC 957,** relying upon the guidelines drawn by the Apex Court in **Bachan Singh Vs. State of Punjab, AIR 1980 SC 898** laid down the test on the individual facts while pronouncing the sentence. In Paragraph Nos.37,38,39, the Apex Court has observed as under:-

> *"**37**. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culledout and applied to the facts of each individual*

case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case:

"(i) the extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'.
(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

***38**. In order to apply these guidelines inter-alia the following questions may be asked and answered:*

(a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence ?
(b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?
***39**. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed here in above, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so."*

45. In the case of **Mofil Khan Versus State of Jharkhand reported in (2015) 1 SCC 67,** the Hon'ble Apex Court has explained the meaning of "the rarest of rare case". The relevant portion of Paragraph No.64 is reproduced as under:-

"The rarest of the rare case" exits when an

> *accused would be a menace, threat and antithetical to harmony in the society. Especially in cases where an accused does not act on 27 provocation, acting on the spur of the moment but meticulously executes a deliberately planned crime in spite of understanding the probable consequence of his act, the death sentence may be the most appropriate punishment."*

46. In the case of **Haresh Mohandas Rajput Versus State of Maharashtra reported in (2011) 12 SCC 56,** the Apex Court has emphasized the connotation "the rarest of the rare". The relevant portion of Paragraph No.56 is reproduced as under:-

> *"The rarest of the rare case comes when a convict would be menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of "the rarest of the rare case."*

47. In the case of **Anil @ Anthony Arikswamy Joseph Versus State of Maharashtra reported in (2014) 4 SCC 69,** the Apex Court in Paragraph No.27 has clarified the real test of "the rarest of the rare case" which is reproduced as under:-

> *"The rarest of the rare test depends upon the perception of the society that is "societycentric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into the variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc."*

48. In the case of **Santosh Kumar Versus State Through C.B.I reported in (2010) 9 SCC 747,** the Apex Court has explained the philosophy behind "the rarest of the rare case". The relevant portion of in Paragraph No.98 is reproduced as under:-

> *"Undoubtedly, the sentencing part is a difficult one and often exercises the mind of the Court but where the option is between a life sentence and a death sentence, the options are indeed extremely limited and if the Court itself feels some difficulty in awarding one or the other, it is only 29 appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind "the rarest of the rare" principle."*

49. In the case of **Rameshbhai Chandubhai Rathod Vs. State of Gujarat,** reported in the judgment of Hon'ble Supreme Court in the case of **Panchhi & another Vs. State of U.P., (1998) 7 SCC 177,** the Apex Court has held that it is now well settled that as on today the broad principle is that the death sentence is to be awarded only in exceptional cases. The Court deciding the issue has accepted the view whereby in a similar case of rape and murder of a minor girl below the age of 12 years, the Court has given weightage to the fact that the appellant was a young man only 27 years of age. It was obligatory on the Trial Court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of the society in case he was given a change to do so. The Apex Court relying upon the judgment of **Ramraj Versus State of Chhattisgarh reported in (2010) 1 SCC 573 and Mulla & Another Versus State of Uttar Pradesh reported in (2010) 3 SCC 508,** has observed that the term "imprisonment for life" which is found in Section 302 of the I.P.C, would mean "imprisonment for the natural life" of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure, however, converted the capital punishment into the punishment for imprisonment of life. In **Mulla's case (supra),** the Apex Court has said:

> *"We are in complete agreement with the above dictum of this Court. It is open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the length of imprisonment which will suffice the offence committed. Thus, we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence."*

50. Therefore, the Apex Court has given the punishment of life sentence, which may extend to their full life subject to any remission by the Government for good reasons. Thus, relying upon the ratio of **Ramraj (supra) and Mulla (supra),** the Apex Court in the case of **Rameshbhai Chandubhai Rathod (supra)** maintained the same sentence in the similar

terms. Therefore, by the three Judges Bench, the Apex Court recognized that it is obligatory on the Trial Court to have given a finding as to a possible rehabilitation and reformation and the possibility cannot be ruled out that he may be a useful member of the society in case he is given a chance.

51. In the present case it is a horrendous crime when a Girl aged about 15 year 11 months and 6 days on the date of incident i.e. 07.12.2017 (Date of birth 01.01.2002) is violated by a person, who is living in the close vicinity of the family of the child and thus, was known to the child. The Supreme Court in a judgment rendered in ***Shankar Kisanrao Khade v. State of Maharashtra, MANU/SC/0476/2013 : (2013) 5 SCC 546,*** examined the entire case law where the penalty of death sentence was set aside inthe case of an offence under Section 376 of IPC. The Court laid down the aggravating circumstances called "crime test", mitigating circumstances called "criminal test" and "the rarest of rare cases test". The Court noticed that total 7112 cases of child rape were reported in the country during 2011. The State of Madhya Pradesh has reported highest number of cases i.e. 1262. However, the situation has not improved even after more than five years, A report on "Crime in India" in the year 2016 published by National Crime Records Bureau, Government of India, provides information about all the FIRs registered under the Indian Penal Code and Special & Local Laws (SLL) by the police of 36 States/UTs. As per such report, 19765 are the cases of child rape under Section 376 of IPC and Section 4 and 6 of POCSO Act. The highest number of cases in this category was again in State of Madhya Pradesh being 2467. In view of the above, the issue is required to be examined as to whether the imposition of death penalty will deter the prospecting offenders from indulging in horrendous offence of rape and/or murder.

52. In a Judgment ***B.A. Umesh v. Registrar General, High Court of Karnataka reported as MANU/SC/0082/2011 : (2011) 3 SCC 85*** the imposition of death sentence was maintained recording the following findings:

> *"83. On the question of sentence we are satisfied that the extreme depravity with which the offences were committed and the merciless manner in*

> *which death was inflicted on the victim, brings it within the category of the rarest of rare cases which merits the death penalty, as awarded by the Trial Court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in Bachan Singh v. State of Punjab MANU/SC/0111/1980 : (1980) 2 SCC 684 or in Machhi Singh v. State of Punjab, MANU/SC/0211/1983 : (1983) 3 SCC 470 are present in the facts of the instant case. The appellant even made up a story as to his presence in the house on seeing P.W.2 Suresh, who had come there in the meantime. Apart from the above, it is clear from the recoveries made from his house that this was not the first time that he had committed crimes in other premises also, before he was finally caught by the public two days after the present incident, while trying to escape from the house of one Seeba where he made a similar attempt to rob and assault her and in the process causing injuries to her."*

53. Review petition was dismissed by circulation vide order dated 07.09.2011. Subsequently, another review petitions were filed, which were decided vide order dated 3rd October, 2016 in judgment reported as ***MANU/SC/1289/2016 : (2017) 4 SCC 124 (B.A. Umesh v. Registrar General, High Court of Karnataka)***. The Court held as under:-

> *"23. Therefore, on careful comparison of aggravating and mitigating circumstances in the present case, as above, and keeping in view the principle of law laid down by this Court on the point, we are of the firm opinion that the aggravating circumstances are grave and far more serious as against the mitigating circumstances pointed out on behalf of the petitioner. As such, even after open hearing, we are not inclined to allow the review petitions or modify the judgment and order passed by this Court in B.A. Umesh v. High Court of Karnataka MANU/SC/0082/2011 : (2011) 3 SCC 85 dismissed by this Court on 1-2-2011. Accordingly, Review Petitions (Criminal) Nos. 135-36 of 2011 stand dismissed. The criminal miscellaneous petitions stand disposed of."*

54. A three Judge Bench of the Supreme Court in a judgment reported as ***Vasanta Sampat Dupare v. State of Maharashtra MANU/SC/1098/2014 : (2015) 1 SCC 253*** maintained the death sentence when it was held as under (Paras 59 to 62) :-

> *"**58.** Presently, we shall proceed to dwell upon the manner in which the crime was committed. Materials on record clearly reveal that the appellant was well acquainted with the inhabitants of the locality and as is demonstrable he had access to the house of the father of the deceased and the children used to call him "uncle". He had lured the deceased to go with him to have chocolates. It is an act of taking advantage of absolute innocence. He had taken the deceased from place to place by his bicycle and eventually raped her in a brutal manner, as if he had the insatiable and ravenous appetite. The injuries caused on the minor girl are likely to send a chill in the spine of the society and shiver in the marrows of human conscience. He had battered her to death by assaulting her with two heavy stones. The injured minor girl could not have shown any kind of resistance. It is not a case where the accused had a momentary lapse. It is also not a case where the minor child had died because of profuse bleeding due to rape but because of the deliberate cruel assault by the appellant. After the savage act was over, the coolness of the appellant is evident, for he washed the clothes on the tap and took proper care to hide things. As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a menacing effect on the society. It is calamitous.*

59. *In this context, we may fruitfully refer to a passage from* ***Shyam Narain V. State (NCT of Delhi), MANU/SC/0543/2013 : (2013) 7 SCC 77****, wherein it has been observed as follows:*

> *"1. The wanton lust, vicious appetite, depravity of senses, mortgage of mind to the inferior endowments of nature, the servility to the loathsome beast of passion and absolutely unchained carnal desire have driven the appellant to commit a crime which can bring in a "tsunami" of shock in the mind of the collective, send a chill down the spine of the society, destroy the civilised stems of the milieu and comatose the marrows of sensitive polity".*

*In the said case (**Shyam Narain Case**, SCC p.88, para 26), while describing the rape on an eight year old girl, the Court observed :*

> *"**26**. ... Almost for the last three decades, this Court has been expressing its agony and distress pertaining to the increased rate of crimes against women. The eight year old girl, who was supposed to spend time in cheerfulness, was dealt with animal passion and her dignity and purity of physical frame was shattered. The plight of the child and the shock suffered by her can be well visualised. The torment on the child has the potentiality to corrode the poise and equanimity of any civilised society. The age-old wise saying that "child is a gift of the providence" enters into the realm of absurdity. The young girl, with efflux of time, would grow with a traumatic experience, an unforgettable shame. She shall always be haunted by the memory replete with heavy crush of disaster constantly echoing the chill air of the past forcing her to a state of nightmarish melancholia. She may not be able to assert the honour of a woman for no fault of hers."*

60. *In the case at hand, as we find, not only was the rape committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances.*

61. *We are absolutely conscious that mitigating circumstances are to be taken into consideration. Learned counsel for the appellant pointing out the mitigating circumstances would submit that the appellant is in his mid fifties and there is possibility of his reformation. Be it noted, the appellant was aged about forty-seven years at the time of commission of the crime. As is noticeable, there has been no remorse on the part of the appellant. There are cases when this Court has commuted the death sentence to life finding that the accused has expressed remorse or the crime was not premeditated. But the obtaining factual matrix when unfolded stage by stage would show the premeditation, the proclivity and the rapacious desire. Learned counsel would submit that the appellant had no criminal antecedents but we find that he was a history-sheeter and had number of cases pending against him. That alone may not be sufficient. The appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed or rehabilitated. As the circumstances would graphically depict, he would remain a menace to society, for a defenceless child has become his prey. In our considered opinion, there are no*

mitigating circumstances.

> ***62.*** *As we perceive, this case deserves to fall in the category of rarest of the rare cases. It is inconceivable from the perspective of the society that a married man aged about two scores and seven make a four year minor innocent girl child the prey of his lust and deliberately causes her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. In our view, it meets the test of rarest of the rare case and we unhesitatingly so hold."*

55. The review petition against the said order was dismissed on 3rd May, 2017 in a judgment reported as **MANU/SC/0570/2017 : (2017) 6 SCC 631 (Vasanta Sampat Dupare v. State of Maharashtra)**, wherein, the Court observed as under:-

> *"**20**. It is thus well settled, "the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances) and 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 completely ignoring other classes under other heads and it is the primary duty of the Court to balance the two." Further, "it is always preferred not to fetter the judicial discretion by attempting to make excessive enumeration, in one way or another; and that both aspects namely aggravating and mitigating circumstances have to be given their respective weightage and that the Court has to strike the balance between the two and see towards which side the scale/balance of justice tilts." With these principles in mind we now consider the present review petition.*
>
> ***21** . The material placed on record shows that after the Judgment under review, the petitioner has completed Bachelors Preparatory Programme offered by the Indira Gandhi National Open University enabling him to prepare for Bachelor level study and that he has also completed the participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in Bachan Singh v. State of Punjab MANU/SC/0111/1980 : (1980) 2 SCC 684 but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the Judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material*

on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present review petitions."Gandhi Vichar Pariksha and had participated in drawing competition organized sometime in January 2016. It is asserted that the jail record of the petitioner is without any blemish. The matter is not contested as regards Conditions 1, 2, 5, 6 and 7 as stated in paragraph 206 of the decision in Bachan Singh v. State of Punjab MANU/SC/0111/1980 : (1980) 2 SCC 684 but what is now being projected is that there is a possibility of the accused being reformed and rehabilitated. Though these attempts on part of the petitioner are after the Judgment under review, we have considered the material in that behalf to see if those circumstances warrant a different view. We have given anxious consideration to the material on record but find that the aggravating circumstances namely the extreme depravity and the barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of four years clearly outweigh the mitigating circumstances now brought on record. Having taken an overall view of the matter, in our considered view, no case is made out to take a different view in the matter. We, therefore, affirm the view taken in the Judgment under review and dismiss the present review petitions."

56. On 05.05.2017, another three Judge Bench judgment in **Mukesh and another Vs. State (NCT of Delhi) (2017 6 SCC 1,** Supreme court maintained the death sentence on the four accused. The relevant extracts of the said decision (Paras 508 to 510, 515 t0 517, 520 & 521) are reproduced as under :-

"508. *In the same judgment in Shankar Kisanrao Khade v. State of Maharashtra MANU/SC/0476/2013 : (2013) 5 SCC 546, Madan B. Lokur, J. (concurring) while elaborately analysing the question of imposing death penalty in specific facts and circumstances of that particular case, concerning rape and murder of a minor, discussed the sentencing policy of India, with special reference to execution of the sentences imposed by the Judiciary. The Court noted the prima facie difference in the standard of yardsticks adopted by two organs of the government viz. Judiciary and the Executive in treating the life of convicts convicted of an offence punishable with death and recommended consideration of Law Commission of India over this issue. The relevant excerpt from the said judgment, highlighting the inconsistency in the approach of Judiciary and Executive in the matter of sentencing, is as under: (SCC p.614, para 148)*

> *"148. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for*

converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal."

In Shankar Kisanrao's case MANU/SC/0476/2013 : (2013) 5 SCC 546), it was observed by Madan B. Lokur, J. that Dhananjay Chatterjee's case [Dhananjay Chatterjee V. State of W.B. MANU/SC/0626/1994 : (1994) 2 SCC 220] was perhaps the only case where death sentence imposed on the accused, who was convicted for rape was executed.

509. *Another significant development in the sentencing policy of India is the 'victim-centric' approach, clearly recognised in Machhi Singh (Supra) [Machhi Singh v. State of Punjab MANU/SC/0211/1983 : (1983) 3 SCC 470] and reemphasized in a plethora of cases. It has been consistently held that the courts have a duty towards society and that the punishment should be corresponding to the crime and should act as a soothing balm to the suffering of the victim and their family. [Ref: Gurvail Singh @ Gala and Anr. v. State of Punjab MANU/SC/0111/2013 : (2013) 2 SCC 713; Mohfil Khan and Anr. v. State of Jharkhand MANU/SC/0915/2014 : (2015) 1 SCC 67; Purushottam Dashrath Borate and Anr. v. State of Maharashtra MANU/SC/0583/2015 : (2015) 6 SCC 652]. The Courts while considering the issue of sentencing are bound to acknowledge the rights of the victims and their family, apart from the rights of the society and the accused. The agony suffered by the family of the victims cannot be ignored in any case. In Mohfil Khan (supra), this Court specifically observed that 'it would be the paramount duty of the Court to provide justice to the incidental victims of the crime - the family members of the deceased persons.*

510 *. The law laid down above, clearly sets forth the sentencing policy evolved over a period of time. I now proceed to analyse the facts and circumstances of the present case on the anvil of above-stated principles. To be very precise, the nature and the manner of the act committed by the accused, and the effect it cast on the society and on the victim's family, are to be weighed against the mitigating circumstances stated by the accused and the scope of their reform, so as to reach a definite reasoned conclusion as to what would be appropriate punishment in the present case- 'death sentence', life sentence commutable to 14 years' or 'life imprisonment for the rest of the life'.*

*** *** ***

515 *. In Purushottam Dashrath Borate and Anr. v. State of Maharashtra MANU/SC/0583/2015 : (2015) 6 SCC 652, this Court held that age of the accused or family background of the accused or*

lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold and calculated manner in which it was committed by the accused persons.

516 *. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal justice system. As held in Om Prakash v. State of Haryana MANU/SC/0129/1999 : (1999) 3 SCC 19, the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.*

517*. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of "the rarest of rare cases". The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.*

*** *** ***

520 *. The statistics of the National Crime Records Bureau which I have indicated in the beginning of my judgment show that despite the progress made by women in education and in various fields and changes brought in ideas of women's rights, respect for women is on the decline and crimes against women are on the increase. Offences against women are not a women's issue alone but, human rights issue. Increased rate of crime against women is an area of concern for the law-makers and it points out an emergent need to study in depth the root of the problem and remedy the same through a strict law and order regime. There are a number of legislations and numerous penal provisions to punish the offenders of violence against women. However, it becomes important to ensure that gender justice does not remain only on paper.*

521*. We have a responsibility to set good values and guidance for posterity. In the words of great scholar, Swami Vivekananda, "the best thermometer to the progress of a nation is its treatment of its women." Crime against women not only affects women's self esteem and dignity but also degrades the pace of societal development. I hope that this gruesome incident in the capital and death of this young woman will be an eye-opener for a mass movement "to end violence against women" and "respect for women and her dignity" and sensitizing public at large on gender justice. Every individual,*

irrespective of his/her gender must be willing to assume the responsibility in fight for gender justice and also awaken public opinion on gender justice. Public at large, in particular men, are to be sensitized on gender justice. The battle for gender justice can be won only with strict implementation of legislative provisions, sensitization of public, taking other proactive steps at all levels for combating violence against women and ensuring widespread attitudinal changes and comprehensive change in the existing mind set. We hope that this incident will pave the way for the same."

57. The review against the said judgment bearing **Review Petition (Crl.) No. 570 of 2017 (Mukesh v. State of NCT of Delhi)** stand dismissed on 09.07.2018.

58. The Supreme Court in **Purushottam Dashrath Borate and another v. State of Maharashtra reported in MANU/SC/0583/2015 : (2015) 6 SCC 652,** while confirming the death sentence, has held that the age of accused or family background or lack of criminal antecedents cannot be said to be a mitigating circumstance. It cannot also be considered as a mitigating circumstance, particularly taking into consideration the nature of heinous offence, the brutality and the calculated manner in which it was committed by the accused persons.

59. In **Satya Narayan Tiwari Alias Jolly and another v. State of Uttar Pradesh MANU/SC/0910/2010 : (2010) 13 SCC 689** and S**ukhdev Singh and another v. State of Punjab MANU/SC/1331/2010 : (2010) 13 SCC 656**, the Supreme Court has held that crime against women are not ordinary crimes committed in a fit of anger or for property. They are social crimes. They disrupt the entire social fabric and hence they call for harsh punishment.

60. In **Deepak Rai etc. v. State of Bihar, MANU/SC/0965/2013 : (2013) 10 SCC 421**, the Supreme Court held that the young age of the accused is not a mitigating circumstance for commutation to life.

61. The death sentence was also maintained by the Supreme Court in the judgments reported as **MANU/SC/7863/2008 : (2008) 11 SCC 113 (Bantu v. State of Uttar Pradesh)** and **MANU/SC/0700/2009 : (2009) 6 SCC 667 (Ankush Maruti Shinde and others v. State of Maharashtra)**

and **MANU/SC/0649/2015 : (2015) 6 SCC 632 (Shabnam etc. v. State of Uttar Pradesh)**.

62. Within this Court, a Division Bench in ***Criminal Reference No. 05/2015 (in Reference received from the First Addl. Sessions Judge, Maihar v. Sachin Kumar Singhraha***) vide judgment delivered on **03.03.2016** has affirmed the death sentence in case of rape of a victim aged near-about five years. Another Division Bench of this Court in ***CRRFC No. 5/2017 (In Reference Received from District & Sessions Judge, Dindori v. Bhagwani and another) 2018 (2) JLJ 309 = MANU /MP/ 0113/ 2018*** vide judgment delivered on **09.05.2018** has also affirmed the capital punishment awarded to two accused persons by the Trial Court. In the said case also a girl aged about 11 years was victimized and murdered and the Court expressed concern over the alarming increase in the recent incidents of child rapes coupled with the rising anger of the society over rape of minors across the country. Another Division Bench in Cri. Ref. No. 01 of 2018 ***(In Reference Received from Special Judge, Shahdol v. Vinod and another) 2018 (3) Crimes 545 (M.P.) = MANU /MP/ 0357/ 2018*** vide judgment delivered on **08.08.2018** has affirmed the death sentence of appellant who was aged about 22 years, in case of rape of a victim aged near-about four years. The court said :-

> *"66. In the light of the evidence and the judgments referred to hereinabove, we find that there is no mitigating circumstance in favour of the appellant in the present case. The appellant was young* ***unmarried boy aged 22 years*** *at the time of commission of offence but he breached the trust of a* ***girl child of four years*** *when he tempted her by offering biscuit to accompany him to meet her father. He violated her and took her life within 3-4 hours of taking her with him. It is an act of extreme depravity when the appellant prompted a young child whose only fault was that she believed the appellant to be her well-wisher. The crime against the girl child are on rise, therefore, extreme punishment may deter the other criminals indulging in such crime. Such crime sends shock wave in the society when it is committed against a girl child. This Court has the social responsibility to make the citizen of this country know that law cannot come to the rescue of such person on the basis of humanity. The extreme punishment may convey a message to these predators that it is not a soft State where the criminals committing such serious crimes may get reprieve in the guise of humanity. The humanity is more in danger in the hands of the persons like the appellant. Therefore, we find that the capital punishment awarded to the appellant is one of the rarest of rare cases where the extreme capital punishment is warranted."*

63. In the light of the evidence and the judgments referred to herein above, we find that there is no mitigating circumstance in favor of the appellant in the present case. The appellant was young boy aged 22 years at the time of commission of offence but he breached the trust of a girl child of about 16 years when he entered with co-accused in her room by asking water but committed gang rape and set her ablaze. She expired after 7 days from the date of incident. During this period she suffered extreme physical and mental pain which can not be imagine. He violated her and took her life within a short time. It is an act of extreme depravity when the appellant prompted a young girl whose only fault was that she believed the appellant to be her well-wisher. The crime against the girl child are on rise, therefore, extreme punishment may deter the other criminals indulging in such crime. Such crime sends shock wave in the society when it is committed against a girl child. This Court has the social responsibility to make the citizen of this country know that law cannot come to the rescue of such person on the basis of humanity. The extreme punishment may convey a message to these predators that it is not a soft State where the criminals committing such serious crimes may get reprieve in the guise of humanity. The humanity is more in danger in the hands of the persons like the appellant. Therefore, we find that the capital punishment awarded to the appellant is one of the rarest of rare cases where the extreme capital punishment is warranted.

64. Under the facts and circumstances of the case, the only punishment which the accused deserve for having committed the reprehensible and gruesome gang rape and murder of innocent girl to satisfy their lust, is nothing but death. We are immensely appalled by the alarming increase in the recent incidents of child rapes and also being aware of the rising anger of the society over rape of minor across the country, therefore, consider death sentence as a measure of social necessity and also a mean of deterring other potential offenders. In view of the aforestated, in our considered view, the capital punishment to the accused is the only proper punishment and we see no reason to take a different view than the one taken by the trial Court.

65. In view of the foregoing reasons, we affirm the death sentence

awarded to the appellant by the Trial Court while dismissing the Criminal Appeal No. 6748 of 2018 preferred by the accused against his conviction and sentence. We order accordingly.

66. Let a copy of this judgment be retained in the file of the connected Criminal Appeal No. 6748 of 2018.

67. The office is further directed to send a copy of the judgment forthwith to the Trial Court for taking appropriate action in accordance with law.

(P.K.Jaiswal)
Judge

(B.K.Shrivastava)
Judge

Vin**