
(2018) 05 MP CK 0059

In the Madhya Pradesh High Court

Case No : CRRFC No. 5 OF 2017, Criminal Appeal No. 5446 OF 2017

In Reference

APPELLANT

Vs

Bhagwani

RESPONDENT

Date of Decision : 09-05-2018

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 304, 313
Indian Penal Code — Section 201, 302, 346, 363, 364, 366A, 376A, 376D, 377
Protection of Children from Sexual Offences Act, 2012 — Section 5(m)(g), 6

Citation : (2018) 05 MP CK 0059

Hon'ble Judges : S.K. SETH, J; NANDITA DUBEY, J

Bench : Division Bench

Advocate : Ranjan Banerjee, Shashank Upadhyay, Akshay Namdeo

Final Decision : Dismissed

Judgement

This death reference and connected appeal arise out of the Judgment of conviction passed by the Sessions Judge, Dindori holding the accused persons guilty of the charges levelled against them in the trial.

2. It is undisputed that the deceased and the accused persons are resident of the same village and on 14.04.2017, the family of the deceased as well as

the accused Bhagwani had gone to attend the Chowk ceremony at the house of one Anil Maravi. It is also undisputed that in the early morning of

15.04.2017, both the accused had gone to the house of Jaipal (PW.9) asking for liquor, and when the mother of accused-appellant Bhagwani came

there, they went away. It is also an admitted fact that the deceased had gone to the house of accused Satish to keep blanket and shawl.

3. The prosecution case, in nut shell, is that in the intervening night of 14.04.2017 and 15.04.2017, the accused kidnapped the deceased who was aged

11 years and after committing gang rape on her, throttled her to death. It is alleged that on 14.04.2017 at around 9 PM, the deceased, aged 11 years had gone with her parents to attend the chowk ceremony, from where she went missing . She was last seen going to the house of accused Satish to keep blanket and shawl. Her father Brajlal (PW.2) and mother Kalawati (PW.1) searched for her all through the night, but their efforts were rendered futile. At 5 AM on next morning i.e.15.04.2017 her dead body was ultimately found lying near a hand pump situated near the road. Her slacks were drawn below the knee and there were injuries and scratches on the neck and different parts of body of deceased, her genitals were blood soaked. It was suspected that between 11 PM to 4 AM some unknown person has kidnapped the deceased and committed the heinous offence of rape and after silencing her dumped the body near the hand pump. On the basis of this report, Marg was recorded and FIR was registered against unknown persons at Crime No.39/2017.

4. During the investigation, from the statements of witnesses recorded under Section 161 Cr.P.C, it transpired that the accused persons who were absconding from the village had a verbal altercation with Brajlal, a day prior to the incident. The accused were taken into custody on suspicion of being involved in the horrendous crime. Thereafter, based on their memorandum, button and blood stained soil, packet of kurkure, etc. were seized from the spot vide Ex.P/8. Spot map (Ex.P/13) of the place of occurrence was made.

5. On the memorandum of accused Satish, a shawl and blood stained blanket of the deceased as well as shirt, full pant and dhoti were recovered vide

Ex.P/11. On the disclosure statement of accused Bhagwani, one shirt with some missing button, blood stained vest and jeans were seized vide

Ex.P/12.

6. Pursuant to the investigation, both the accused were charge sheeted and put to trial for the offences punishable under Sections 363,366-

A,364,346,376D, 376A in the alternate under Sections 302/201 of the IPC and Section 5(m)(g) read with Section 6 of the Protection of Children from

Sexual Offences Act,2012.

7. The trial Court, after meticulous consideration of the material on record had concluded that the chain of circumstances has been established beyond

any reasonable doubt and found that the accused committed the heinous offence of gang rape and murder of the deceased.Â The trial Court found

both the accused guilty on each count and sentenced them to various terms of imprisonment, but so far as offence punishable under Section 376 A and

302 of IPC, the trial Court awarded capital punishment, hence this reference for confirmation of death sentence and appeal by accused-appellants

Bhagwani and Satish.Â

8. The case of prosecution entirely hinges on circumstantial evidence. When a case rests on circumstantial evidence, the Court has to be satisfied that

the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established. The circumstances, taken

cumulatively, should also form a chain so complete that there is no escape from the conclusion that within all human probability the crime was

committed by the accused and none else .Â We have, therefore, to see whether the prosecution has been able to establish the chain of circumstances

connecting the accused persons to the crime.

9. Relying on the principles enunciated in Hanumant Vs. State ofÂ M.P. (AIR 1952 SC 343), the supreme Court in the case ofÂ Sharad Birdhichand

Sarda Vs. State of Maharashtra AIR 1984 SC 1622 had laid down five golden principles, which must be fulfilled before a case against an accused can

be said to be fully established, as under :

(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned 'must or should' and not 'may be' established. There is not only a

grammatical but a legal distinction between 'may be proved' and 'must be or should be proved' as was held by this Court in Shivaji Sahabrao Bobade

& Anr. v. State of Maharashtra (1973) 2 SCC 793, where the following observations were made:

Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between

'may be' and 'must be' is long and divides vague conjectures from sure conclusions.

(2) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on

any other hypothesis except that the accused is guilty.

(3) the circumstances should be of a conclusive nature and tendency.

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the

accused and must show that in all human probability the act must have been done by the accused.

10. Similar is the observations made by the Apex Court in the decisions rendered in Raja alias Rajinder vs. State of Haryana (2015) 11 SCC 43 and

in Nizam and another vs. State of Rajasthan (2016) 1 SCC 550.

11. Keeping the aforesaid settled legal principles in mind, we have examined the prosecution evidence adduced in the case in hand. The facts in the

case indicate that the deceased was aged about 11 years on the date of incident. On the age of girl there was some dispute. Parents of

deceased, Kalawati (PW.1) and Brajlal (PW.2) have stated that their daughter was 11 years' old at the time of incident. As per the admission

register (Ex.P/16C), date of birth of the deceased was 06.04.2006 which was duly proved by Surendra Kumar (PW.7), Headmaster of the Primary

School, Gunjhiyari, hence, it is clearly established that on the date of incident the deceased was aged 11 years.

12. Basis of the prosecution case was that both the accused persons were seen at the chowk ceremony, and the deceased was last seen going

to the house of accused Satish. The prosecution has examined five witnesses; viz; Kalawati (PW.1) mother of the deceased, Ashok Kumar (PW.3),

Chainsingh (PW.4), Bhagat Singh (PW.5) and Jaipal (PW.9) in this regard.

13. A careful examination of statements of Kalawati (PW.1), Ashok Kumar (PW.3), Chainsingh (PW.4) and Bhagat Singh (PW.5) show that both the

accused were present at the house of Anil Maravi on the date of incident. Both Kalawati (PW.1) and Bhagat Singh (PW.5) have clearly stated that

the deceased had gone to appellant Satish's house to keep a blanket and shawl. Chainsingh (PW.4) who runs a shop near the house of Anil Maravi,

has stated that the deceased came to his shop for purchase of kurkure carrying a blanket and shawl and thereafter accused Bhagwani came to his

shop asking for Namkeen. Though accused Satish in his 313 Cr.P.C. examination

has denied going to Anil Maravi's house, but in reply to question

no.47 put to him under Section 313 Cr.P.C. examination has admitted that deceased had come to his house to keep the blanket and shawl.Â In view

of this specific admission by accused Satish, it is clearly established that the deceased was last seen in his company. Appellant Bhagwani also

admitted going to the shop of Chainsingh (PW.4) for â??Namkeenâ?? in reply to the Question no. 42.

14. Jaipal (PW.9) had testified that in the morning on 15.04.2017, both the accused came to his house asking forÂ liquor.Â However, when

Bhagwani's mother Munnibai came there, both of them went away. He has clearly stated that at the relevant time eyes of the accused were red and

their hair were disheveled. They sounded very nervous and had stated that big blunder had been committed by them.Â Thereafter, about half an hour

the dead body of deceased was recovered.

15. It is pertinent to note that both the accused have corroborated the statement of Jaipal (PW.9) in their Section 313 Cr.P.C.examination.Â Both of

them have admitted that they had gone to the house of Jaipal and when mother of Bhagwani came there, they went away.Â

16. Accused Bhagwani had also admitted that at that time his eyes were red and hair were disheveled. Both the accused have admitted that they

were together since 9 AM in the morning of 14.04.17 when they had gone to Sudgaon for working, from where they returned in the evening. Accused

Satish had stated that he had gone to his house and accused Bhagwani went to attend the chowk ceremony.Â Accused Bhagwani in his 313

Cr.P.C.examination has admitted that after coming back, both he and Satish had taken liquor with Hemsingh and Moolchand and thereafter Satish

went to his house and he went to the house of Anil Maravi, from where due to his intoxicated condition he was asked to leave. Thereafter, he went to

the shop of Chainsingh (PW.4) from where his mother took him to home and he went toÂ sleep at the house of his neighbour Deepa, which is highly

improbable.

17. The object of Section 313 Cr.P.C.is to empower the Court to examine the accused after evidence of the prosecution has been taken so as to give

an opportunity to the accused to explain the circumstances which may intend to incriminate them.

In the instant case, accused Bhagwani was examined in the Court on 27.09.2017 by the Sessions Judge, Dindori , the relevant portion of which reads

as follows :-

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feyus ds ckn xkao ls Qjkj gks x;s Fks\

mRrj %& eSa pkSd dk;ZÃ?e esa x;k Fkk] fQj dke djus lqM+xkao x;k Fkka

Izk'u 42 %& blh lk{kh dk dguk gS fd dqN nsj ckn $\hat{A}\frac{1}{4}yxHkx$ 15 feuV ckn $\hat{A}\frac{1}{2}$ vki vfHk;qDr Hkxokuh mldh nqdku esa vkdj uedhu ekax jgs Fks\

$\hat{A}$ mRRkj %& lgh gSA

$\hat{A}$ iz'u 45 %& lk{kh Hkxrflag $\hat{A}\frac{1}{4}v0lk05\hat{A}\frac{1}{2}$ dk dFku gS fd jkr yxHkx 10%00 cts vki vfHk;qDr] vfuy ejkoh ds ?kj vk;s Fks\ mRRkj %& xyr gSA eSa

jkr 08&09%00 cts x;k Fkka iz'u 49 %& lk{kh t;iky $\hat{A}$ $\hat{A}\frac{1}{4}v0lk05\hat{A}\frac{1}{2}$ dk dFku gS fd vfuy ejkoh ds ?kj esa pkSd ds dk;ZÃ?e ds nwljs fnu lqcg&lqcg vki

vfHk;qDr mlds ?kj vk;s Fks\

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iz'u 51 %& blh lk{kh dk dFku gS fd vki vfHk;qDr mlls 'kjkC ekax jgs Fks\

$\hat{A}$ mRRkj %& lgh gSA

$\hat{A}$ iz'u 53 %& blh lk{kh dk dFku gS fd mlh le; vki vfHk;qDr Hkxokuh dh ekWa ds vkus ij vki vfHk;qDr ogkWa ls pys x;s Fks\

$\hat{A}$ mRRkj %& lgh gSA

iz'u 76 %& blh lk{kh dk dFku gS fd vki vfHk;qDr Hkxokuh ds ijh{k.k djus ij ck;s da/ks ij mijh fgLLs esa ,d bap dk [kjksap dk fu'kku ck;h rjQ ds da/ks

ds uhps c[[ks ij 0-5 bap vkdkj dk [kjksapnkj fu'kku o ihB ds fupys fgLLs ij vk/kkj bap vkdkj dk [kjksapnkj fu'kku] nk;s c[[ks ij nks bap vkdkj dk

[kjksapnkj fu'kku vkSj 1 xq.kk 1 ls-eh- vkdkj dk xky esa fNyus dk fu'kku] ilyh esa pkj bap vkdkj dk [kjksapnkj fu'kku okyh pksV ik;h Fkh\ mRrj %&

xyr gSA ?kko ds fu'kku FksA iz'u 94 %& blh lk{kh dk dFku gS fd xokgksa ds le{k vki vfHk;qDr lrh'k o Hkxokuh dks vfHk;jk esa ysdj eSeksjsaMe

dFku ys[k fd;k Fkk] tks Ã?e'k% iz-ih- 09 ,oa iz-ih- 10 gS\ mRRkj %& iqfyl us iwNrkn dh Fkha iz'u 115 %& D;k vki vkSj dqN dguk pkgrs gSa\

mRRkj %& eSa lrh'k ds lkFk ?kVuk fnukad dks 09%00 cts dke djus lqMxkao x;k Fkka 'kke 05%00 cts okil vk;k Fkka okil vkrs le; xkaso ls 02 fdeh

igys ¼xqafM;kjh xkao ls½ flaxykSaMh esa gseflag ds lkFk x;s Fks] tgka xkao dk ewypan vk;k Fkk ftlds lkFk eSa] lrh'k us 'kjkC ih Fkh] fQj

ewypan o lrh'k pys x;s Fks vkSj vkSj eSa yxHkx 7 cts cSaM okyksi ds lkFk vfuy ejkoh ds ?kj x;k Fkk] tgka ls eqdn~ne us eq>s Hkxk fn;k Fkka

nqxsZ'ojh dk firk eq>s ?kj NksM+us dk dgk] rks eSaus euk dj fn;k Fkka eSa funksZâ?""k gwWA eS pSuflag dh nqdku pyk x;k Fkk tgka ls esjh eka

eq>s ?kj ysdj xbZ FkhA ekWa eq>s xkyh ns jgh Fkh rks eSa iM+ksl dh nhik ds ?kj esa lks x;k Fkka**

Accused Satish was examined on the same day i.e. on 27.09.2017 by the same learned Judge. The relevant portion of which is thus :-

**iz'u 47 %& blh lk{kh dk dguk gS fd nqxsZ'ojh 'kkWy o dEcy vki vfHk;qDr lrh'k ds ?kj j[kus x;h Fkh\

Â mRrj %& lgh gSA

iz'u 49 %& lk{kh t;iky ¼v0lk09½ dk dFku gS fd vfuy ejkoh ds ?kj esa pkSd ds dk;Z?e esa nwljs fnu lqcg&lqcg vki vfHk;qDr mlds ?kj vk;s Fks\

mRrj %& lgh gSA iz'u 53 %& blh lk{kh dk dFku gS fd vki mlh le; vki vfHk;qDr Hkxokuh dh ekWa ds vkus ij vki vfHk;qDr ogkWa ls pys x;s Fks\

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iz'u 94 %& blh lk{kh dk dFku gS fd xokgksi ds le{k vki vfHk;qDr lrh'k o Hkxokuh dks vfHkj{kk esa ysdj eSeksjsaMe dFku ys[k fd;k Fkk] tks

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mRRkj %& lgh gSA iqfyl us iwNrkn dh FkhA iz'u 115 %& D;k vki vkSj dqN dguk pkgrs gS\ mRrj %& ?kVuk fnukad dks eSa Hkxokuh ds lkFk

lqM+xkao x;k Fkk tgka ls 'kke dks okil eSa vius ?kj vk x;k Fkka eSa vius ?kj vk x;k Fkk vkSj Hkxokuh pkSd okys ?kj pyk x;k Fkka eSa funksZ""k

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18. It is settled law that the answers given by the accused persons under Section 313 Cr.P.C.can be used for proving their guilt as much as the

evidence given by the prosecution witnesses. The Supreme Court in the case of Mohan Singh vs.Â Prem Singh and another (2002) 10 SCC 236 has

held that the statements made in defence by the accused under Section 313 Cr.P.C.can certainly be taken aid of to lend credence to the evidence led

by the prosecution, but only a part of such statement under Section 313

Cr.P.C.cannot be made the sole basis of his conviction.

19. The answers given by accused Bhagwani and Satish to above referred questions, while examining them under Section 313 Cr.P.C., fully

corroborate the evidence of Kalawati (PW.1), Ashok Kumar (PW.3), Chain Singh (PW.4), Bhagat Singh (PW.5) and Jaipal (PW.9) . Though

accused Bhagwani had stated that his mother took him home from shop of Chain Singh (PW.4) and thereafter he went to sleep at this neighbour

Deepa's house, he has not examined her as witness to prove his alibi nor explained at what time he again joined the company of accused Satish to go

to Jaipal's (PW.9) house at early hours of 15.04.2017.

20. Dr. Sajjan Kumar Uike (PW.6) who performed the postmortem found the following injuries : Rigor mortis present in both lower limb and

partially passed in both upper limb. Eye-closed, mouth-closed, first-half open, cornea congested, pupil dilated, face- cyanosed, lip-cyanosed, finger

and hand- cyanosed. Blood mixed froth present over the both nostril. Blood mixed saliva both angle on mouth up to lower margin of mandible. Four

contusion mark over left side of neck, medial aspect of neck. Three contusion mark on left side of neck middle third size of contusion between 1 ½

cm x 1 cm. 1 cm x 1 cm. contusion over both cheek, 1 cm x 1 cm. Infraorbital left side. 1 ½ cm contusion on the left side of xiphisternum. One

infrascapular contusion 1 ½ cm x 1 ½ cm contusion over the left buttock. Clotted blood found over the pink colour aspect dry clotted

blood present over the perineal area lower middle third of both thigh all around anal area. Blood present in the vaginal opening three 3 cm.

anterior to posterior and full thickness of muscle and skin. Dry clotted blood present over the anal opening and inner aspect of anus. Opening is

dilated 2 fingers easily admitted. All injuries are antemortem in nature.

The doctor gave the opinion that cause of death of deceased was due to asphyxia with neurogenic shock due to injuries over the vital organ of the

body neck, vagina and anal area. The injuries caused may be due to throttling and forceful sexual intercourse. The autopsy report, thus, establishes her

death to be homicidal.

21. Accused persons were also examined by Dr. Vijay Pegwar (PW.11) who found the following injuries on their person vide Ex. P/21 and P/22 :-

Injury report of Satish

- (i) Abrasion size 1 cm x 1 cm on right elbow (post).
- (ii) Abrasion size 1 1/2" x 1" on right knee.
- (iii) Abrasion size 1 1/2" x 1 cm on left knee. (iii) Various abrasions size 1 mm x 1 mm to 1 cm x 1 cm on left side of lower elbow.
- (iv) Linear abrasion size 1" over right lower chest, all are caused by hard and rough object, duration within 23 days, heals in 2-3 days, all are simple in nature.

Injury report of Bhagwani

- (i) Abrasion linear 1" on left upper shoulder. (ii) Linear abrasion size 1/2" on left lower scapular region.
- (iii) Linear abrasion size 1/2" on lower lumbar region.
- (iv) Linear abrasion size 1/2" on right scapular region.
- (v) Linear abrasion size 2" on right upper shoulder.
- (vi) Abrasion size 1 cm x 1 cm on right cheek. (vii) Abrasion size 1 cm x 1 cm on right upper parietal region.
- (viii) Abrasion linear 4" each on right lower lateral rib, all are caused by hard and rough object (may be nails), duration within 2-3 days, heals within 2-3 days, all are simple in nature.

22. The clothes found on the body of deceased along with the vaginal slides, rectal slides, sample of dry clotted blood were duly seized. Along

with the blood sample of the accused persons, the seized articles were forwarded to the State Forensic Laboratory for chemical examination and corresponding reports were obtained. The DNA report (Ex.P/25) reads as under :-

All the alleles observed in the male DNA profile of Accused Satish (Article U) were found same with the male DNA profile observed from the source of deceased Durgeshwari, Article Q, R and S.

Same female autosomal STR DNA profile was detected on the source of deceased Durgeshwari (Article R) and Dhoti (Article G), and Underwear Stain2 (Article P).

Same autosomal DNA profile was detected on the source of article T, Article C, article L and article M.

Note: Packet J and E are being referred to physics section for required examination.

23. The DNA profile generated from the slides of deceased matched with DNA profile generated from the blood sample of Satish, blood stained dhoti

, underwear recovered at his behest.Â DNA profile generated from the blood sample and clothes of accused Satish recovered at his behest and

consistent with that of the deceased is an unimpeachable evidence incriminating accused Satish in the occurrence.

24. However, the DNA profile of accused Bhagwani did not match with the DNA profile observed from the source of deceased. But, the admission

by accused Bhagwani that he was together with accused Satish in the evening and had liquor with him, his further admission that he went to the shop

of Chain Singh (PW.4) asking for Namkeen coupled with lack of explanation by accused Bhagwani about scratches on his body and their admission

about being together on 14.04.2017 and his going with accused Satish to Jaipal's house asking for liquor in the early morning of 15.04.2017, in their

Section 313 Cr.P.C.statements, provide a firm link in the chain of circumstances.Â The accused Bhagwani has failed miserably in discharging his

burden of proving that he was not in the company of accused Satish during the commission of crime. Further, theÂ testimony of Chainsingh (PW.4)

and Jaipal (PW.9) firmly establishes the commission of crime by the accused persons.

25. Apart from this, disclosure statements of accused persons before the police relating to recovery of buttons and blood stained soil from the place of

occurrence which was exclusively within the knowledge of the accused and the recovery of shawl and blanket of deceased from the house of

accused Satish, and shirt, jeans, sando baniyan from accused Bhagwani, in pursuant to their memorandum which was duly proved by the seizure

witnesses Ashok Kumar (PW.3) and Bhagat Singh (PW.5), and the DNA report makes the chain of circumstances complete in every respect,

consequently leading to the conclusion that the accused were responsible for sexually assault and murdering the deceased. It is, thus, clear that the

evidence adduced by the prosecution formed a chain so complete that it excluded any hypothesis other than the guilt of the accused persons.Â

26. In view of the aforesaid reasons, we do not see any cogent reason to interfere with the judgment of trial Court regarding conviction of accused

Bhagwani and Satish.

27. The contention of learned counsel that the case be remanded for retrial as the accused belong to lower strata of the society were not given proper

legal assistance and the defence lawyer did not effectively cross-examine the prosecution witnesses, sans merit.Â

28. The Supreme Court in Ashok Debbarma alias Achak Debbarma vs.Â State of Tripura (2014) 4 SCC 747 has observed thus :-

â??36Â Right to get proper and competent assistance is the facet of fair trial. This Court in M. H. Hoskot v. State of Maharashtra (1978) 3 SCC

544, State of Haryana v. Darshana Devi (1979) 2 SCC 236, Hussainara Khatoon (4) v. State of Bihar (1980) 1 SCC 98 and Ranjan Dwivedi v. Union

of India (1983) 3 SCC 307, pointed out that if the accused is unable to engage a counsel, owing to poverty or similar circumstances, trial would be

vitiated unless the State offers free legal aid for his defence to engage a counsel, to whose engagement, the accused does not object. It is a

constitutional guarantee conferred on the accused persons under Article 22(1) of the Constitution. Section 304 CrPC provides for legal assistance to

the accused on State expenditure. Apart from the statutory provisions contained in Article 22(1) and Section 304 CrPC, in Hussainara Khatoon (4)

case (supra), this Court has held that : (SCC p.105, para7)

â??7.....This is a constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons,

such as poverty, indigence or incommunicado situation.....â??

38. Right to get proper legal assistance plays a crucial role in adversarial system, since access to counselâ??s skill and knowledge is necessary to

accord the accused an ample opportunity to meet the case of the prosecution. In Strickland v. Washington, 80 L Ed 2d 674, the US Court held that a

convicted defendant alleging ineffective assistance of counsel must show not only that counsel was not functioning as the counsel guaranteed by the

Sixth Amendment so as to provide reasonable effective assistance, but also that counselâ??s errors were so serious as to deprive the defendant of a

fair trial. Court held that the defiant convict should also show that because of a reasonable probability, but for counselâ??s unprofessional errors, the

results would have been different. The Court also held as follows:

â??.....Judicial scrutiny of counselâ??s performance must be highly deferential, and a fair assessment of attorney performance requires that

every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case.

39. The Court, in determining whether prejudice resulted from a criminal defence counsel's ineffectiveness, must consider the totality of the evidence. When an accused challenges a death sentence on the ground of prejudicially ineffective representation of the counsel, the question is whether there is a reasonable probability that, absent the errors, the Court independently reweighing the evidence, would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death sentence.

29. In the present case, the learned counsel appearing for the accused have not been able to show as to what prejudice has been caused by the counsel defending the accused in the trial Court. On independent re-weighing of the evidence and taking the totality of the circumstances into consideration, it cannot be said that the accused were not given proper legal assistance in the trial Court. As already discussed in detail, there is clinching evidence in the case of the involvement of the accused persons . The evidence tendered by the witnesses do not reflect any discrepancy or inconsistency of fact and, therefore, must be considered as cogent, reliable and incontrovertible evidence.

30. Though, there is clear evidence of carnal intercourse, unfortunately the accused were not charged for that offence under Section 377 of IPC. The postmortem examination report beside showing injury on the neck and vaginal area, shows injuries on the anal area also . The internal examination of the deceased clearly reads thus :-

“Dry clotted blood present over the perineal area lower middle third of both thigh all around anal area. Blood present in the vaginal opening three 3 cm. anterior to posterior and full thickness of muscle and skin. Dry clotted blood present over the anal opening and inner aspect of anus. Opening is dilated 2 fingers easily admitted. All injuries are ante mortem in nature.”

31. In view of the finding recorded in the postmortem examination report of the deceased duly proved by Dr.Sajjan Kumar Uike (PW.6),there was no

justification not to hold the accused persons guilty of offence punishable under Section 377 of IPC. The trial Court has clearly committed an error in

this regard. 32. The Supreme Court in several judgments has awarded capital punishment where rape and murder have been committed on a minor

girl, after striking a balance between the aggravating and mitigating circumstances.Â Several other facts like the young age of the accused, the

possibility of reformation, etc. have also been gone into with judicial mind.

33. With regard to the quantum of sentence, the trial Court in order of sentence, has noticed the well settled principles laid down by the Supreme

Court in Bachan Singh vs.Â State of Punjab (1980) 2 SCC 684, Machhi Singh and others vs.Â State of Punjab (1983) 3 SCC 470, Dhananjay

Chatterjee alias Dhana vs.Â State of West Bengal (1994) 2 SCC 220, Jai Kumar vs.Â State of M.P. (1999) 5 SCC 1, and Mukesh and others vs.Â

State for NCT of Delhi and others (Criminal Appeal No. 609610/2017 judgment dated 05.05.2017). Further, on considering the aggravating and

mitigating circumstances present in the case has observed that the accused have committed heinous offence in a preplanned and meticulous manner

and considering the merciless manner in which the deceased was kidnapped, raped and thereafter done to death found theÂ case to be in the

category of â??rarest of the rareâ?? and awarded death sentence.Â

34. In the case of Dhaanjoy Chatterjee (supra) it has been noticed that the trial Court hasÂ dealt with the case of rape and murder of a young girl

aged about 18 years by the security guard. The Supreme Court opined that a real and abiding concern forÂ the dignity of human life is required to be

kept in mind by the Courts while considering the confirmation of the sentence of death.Â Para 15 of the judgment is reproduced as below :-

â??15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the

defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry

for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence

of the crime. The courts must not only keep in view the rights of the criminal but

also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

35. The Supreme Court in *Purushottam Dashrath Borate and another vs. State of Maharashtra* reported in (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.

36. In *Satya Narayan Tiwari Alias Jolly and another vs. State of Uttar Pradesh* (2010) 13 SCC 689 and *Sukhdev Singh and another vs. State of Punjab* (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.

37. In *Mukesh vs. State (NCT of Delhi)* (2017) 6 SCC 1, the Apex Court for conferring the death penalty reiterated the grounds which weighed with the court in the case of *Shankar Kisanrao Khade vs. State of Maharashtra* (2013) 5 SCC 546 as below :-

â??506 -----

122. The principal reasons for confirming the death penalty in the above cases include:

(1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime *Jumman Khan v. State of U.P.* (1991) 1 SCC 752, *Dhananjay Chatterjee v.*

State of W.B. (1994) 2 SCC 220, *Laxman Naik v. State of Orissa* (1994) 3 SCC 381, *Kamta Tiwari v. State of M.P.* (1996) 6 SCC 250, *Nirmal Singh*

v. State of Haryana (1999) 3 SCC 670, *Jai Kumar v. State of M.P.* (1999) 5 SCC 1, *State of U.P. v. Satish* (2005) 3 SCC 114, *Bantu v. State of U.P.*

(2008) 11 SCC 113, *Ankush Maruti Shinde v. State of Maharashtra* (2009) 6 SCC 667, *B.A. Umesh v. State of Karnataka* (2011) 3 SCC 85, *Mohd.*

Mannan v. State of Bihar (2011) 5 SCC 317 and *Rajendra Pralhadrao Wasnik v. State of Maharashtra* (2012) 4 SCC 37;

(2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (*Dhananjay Chatterjee*

(supra), *Jai Kumar* (supra), *Ankush Maruti Shinde* (supra) and *Mohd. Mannan*

(supra);

(3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (Jai Kumar (supra), B.A. Umesh (supra) and

Mohd. Mannan (supra) ;

(4) the victims were defenceless (Dhananjoy Chatterjee (supra), Laxman Naik (supra), Kamta Tiwari (supra), Ankush Maruti Shinde (supra) , Mohd.

Mannan (supra) and Rajendra Pralhadrao Wasnik (supra);

(5) the crime was either unprovoked or that it was premeditated (Dhananjoy Chatterjee (supra), Laxman Naik (supra), Kamta Tiwari (supra), Nirmal

Singh (supra), Jai Kumar (supra), Ankush Maruti Shinde (supra), B.A. Umesh (supra) and Mohd. Mannan (supra) and in three cases the antecedents

or the prior history of the convict was taken into consideration (Shivu v. High Court of Karnataka (2007) 4 SCC 713, B.A. Umesh (supra) and

Rajendra Pralhadrao Wasnik (supra).â??

Further in para 516 , the Supreme Court has observed :-

â??Societyâ??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 (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.

38. The President of India on 21.04.2018 promulgated an Ordinance titled â?? The Criminal Law (Amendment) Ordinance, 2018, further to amend the

Code of Criminal Procedure, 1973, the Indian Penal Code, 1860, the Indian Evidence Act, 1872 and the Protection of Children from Sexual Offences

Act, 2012. By the Ordinance, new sections 376 AB, 376 DA and 376 DB have been inserted after Section 376A, and Section 376 D of the Indian

Penal Code. Section 376 DB of the IPC reads as follows :-

â??376DB Where a woman under twelve years of age is raped by one or more persons constituting a group or acting in furtherance of a common

intention, each of those persons shall be deemed to have committed the offence of rape and shall be punished with imprisonment for life which shall

mean imprisonment for the remainder of that person's natural life, and with fine or with death :

Provided that such fine shall be just and reasonable to meet the medical expenses and rehabilitation of the victim;

Provided further that any fine imposed under this section shall be paid to the victim.â??

39. In the present factual matrix the deceased, a helpless child of 11 years, who had gone to keepÂ her belongings to the house of accused Satish

was kidnapped and subsequently raped. She was also subjected to carnal intercourse and made to suffer untold pain and agony.Â The accused did

not stop there, but they strangled her, threw her half naked body near the road, in total disregard of the decency and respect for a dead female

body. Considering that the deceased was an innocent child, who could not have provided any excuse, much less any provocation for committing such

heinous act, coupled with the subsequent conduct of throwing the half naked body of the deceased in the open exhibiting their abusive conduct, and

acting normal after commission of the crime, asking for liquor from Jaipal (PW.9) shows lack of any remorse on their part.Â

40. Under the facts and circumstances of the case, the only punishment which the accused persons deserve for having committed the reprehensible

and gruesome murder of innocent child 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.

41. In view of the aforestated, in our considered view, the capital punishment to the accused persons is the only proper punishment and we see no

reason to take a different view than the one taken by the trial Court.Â Hence, we confirm the death sentence awarded by the trial Court to each of

the accused and resultantly dismiss the appeal preferred by the appellants-accused against their conviction and sentence. Reference is answered

accordingly.

42. Let a copy of this judgment be retained in the file of the connected criminal appeal.

43. Office is directed to send a copy of the judgment immediately to the trial Court for taking appropriate action, in accordance with law.

Ordered accordingly.