

(2018) 10 MP CK 0009
In the Madhya Pradesh High Court
Case No : Criminal Appeal No. 5786 Of 2018

Raj Kumar Kol

APPELLANT

Vs

State of Madhya Pradesh

RESPONDENT

Date of Decision : 26-10-2018

Acts Referred:

Constitution of India, 1950 — Article 72, 161
Code of Criminal Procedure, 1973 — Section 161, 354(3), 366(1), 433A
Evidence Act, 1872 — Section 8, 27, 157
Indian Penal Code, 1860 — Section 302, 323, 375, 376, 376(b), 376(c), 376(AB), 376(2)(I)
Protection of Children from Sexual Offences Act, 2012 — Section 3, 4, 5E, 6

Citation : (2018) 10 MP CK 0009

Hon'ble Judges : Hemant Gupta, CJ;Vijay Kumar Shukla, J

Bench : Division Bench

Advocate : Narendra Nikhare, Vishal Dhagat

Final Decision : Disposed Off

Judgement

V.K. Shukla, J

The reference has been made for confirmation of order of capital punishment of death awarded in Special Session Trial No.55/2018, passed by 6th Additional Sessions Judge/Special Judge, Katni, whereby the accused has been convicted under Section 376(AB) amended by Act No. 22/2018) and 376(2)(I) and 323 of IPC and under section 3/4 and 5(E)/6 of the Protection of Children from Sexual Offences Act, 2012 and sentenced to death by hanging till he dies subject to confirmation by the High Court.

2. The convict has filed Criminal Appeal No.5786/2018 against the said judgment, therefore, both the reference and appeal are taken up for hearing together and are being disposed of by common order.

3. Prosecution story in short is that on 06-07-2018 in the night of 23.10 hours, a written complaint (Ex.P-1) was submitted before the Police Station Katni by

Suman Panjwani (Badi Maa of the prosecutrix) alleging that the prosecutrix is daughter of his sister-in-law (wife of husband's elder brother) and she is aged about 5 years old and is studying in KG-1 in Bardsle English Medium School. The accused, who is an auto driver of Auto No.MP-21R/0145 was engaged to pick up and drop the girl from school. It is alleged that on the date of incident when the prosecutrix went for urination, she made a complaint about the pain on her private part and started crying. When the mother of the prosecutrix checked up her private part, she found that there was redness and abrasion near private part. She enquired about the same, then the prosecutrix disclosed that the accused had taken her to an unknown place while going to school and kissed her and thereafter he had removed her undergarments and inserted finger on her private part. He had beaten her and also threatened not to disclose the incident to anyone. The mother disclosed the incident to her husband Ramesh and thereafter her Badi Mammi and the other family members went to the police station and submitted written complaint. On the said complaint, Crime No. 518/2018 was registered for commission of offence under Section 376(2)(I) and 323 of IPC and Section 3/ 4 of the Protection of Children from Sexual Offences Act, 2012.

4. After registration, the investigation started and with the consent of elder mother (Badi Mammi) Suman (PW-2), the prosecutrix was sent for medical examination. The said form is Ex.P-9 which was prepared by Sub Inspector Manju Sharma (PW-14). She was examined by Dr. Sunita Verma (PW-5) and her report is Ex.P-10. The prosecutrix was further referred to the Medical College, Jabalpur where she was examined by Dr.Najrin Siddiqui (PW-8) and her report is Ex.P-13.

5. Investigating Officer Shailesh Mishra(PW-9) prepared site plan (Ex.P-7) on 07-07-2018 and spot map Ex.P-8 was prepared by patwari Raj Kumar Gautam(PW-15). The statements of prosecutrix PW-1 and her Badi Maa Suman Panchwani were recorded by the Judicial Magistrate First Class, Katni, which is Ex.P-5.

6. The prosecutrix was interrogated by PW-14 Sub Inspector Manju Sharma and thereafter the FIR (Ex.P-2) was written. The prosecutrix was taken for medical examination vide Ex.P-19 by PW-12 Anamika Tiwari. The statements of the prosecutrix, her Badi Maa (PW-2) Suman Panjwani and other prosecution witnesses under section 161 CrPC. were recorded by PW-9 Shailesh Mishra.

7. On 07-07 2018, Auto was seized from the accused vide Ex.P-15 and the seizure witnesses are PW-11 Ramraj Gupta and constable Bhole Shankar. The accused was arrested by constable Ravindra Dubey (PW-16) in the presence of witnesses Narendra Kanojiya (PW-18). The arrest memo is Ex.P-12.

8. On the memorandum of the accused under Section 27 of the Indian Evidence Act (Ex.P-14), his garments were seized in the presence of seizure witness (PW-11) Ramraj Gupta and Constable No.482 Bhole Shankar (PW-10). The

accused was sent for medical examination. He was examined by Dr. Dr. Paritosh Soni. His seized underwear and semen slide were sent for the chemical examination.

9. The Investigating Officer Shailesh Mishra (PW-9) seized the birth certificate and admission register of Bardsle School Katni and the true copies of these documents were exhibited P-11-C and Ex.P-13. The same was compared by PW-16 Ravindra Dubey and P-18 Narendra Kanojiya.

10. After the investigation, the charge sheet was filed before the court of Special Sessions Court (POSCO Act) Katni. The charges were framed as mentioned in the earlier paragraphs. The accused abjured his guilt and pleaded that he is innocent and has been falsely implicated.

11. Learned counsel for the appellant/accused argued that in the present case, there is no allegation of sexual intercourse or penetration and it is a case of fingering only, therefore, the conviction for rape and sentence of death punishment are not sustainable.

12. Per contra, learned counsel for the State supported the impugned order and submitted that as per the amended definition of Section 375, the fingering would amount to the intercourse and would fall within the definition of rape under section 375 of IPC and the accused has rightly been convicted and sentenced to death as per amended provision of Section 376(AB) of Act No.22/2018.

The provisions of Section 375 & 376 (AB) are reproduced as under:

"375. Rape.-A man is said to commit "rape" if he-

(a) Penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or

(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or

(c) manipulates any part of the body of a woman so as to cause penetration into the vagina; the urethra or anus of a woman or makes her to do so with him or any other person; or

(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person,

Under the circumstances falling under any of the following seven descriptions:-

First- Against her will.

Secondly - Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

{[375. Rape.-A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following de-scriptions:-

First - Against her will.

Secondly -Without her consent.

Thirdly- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

Fifthly - With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly - With or without her consent, when she is under sixteen years of age.

Explanation- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Sixthly- With or without her consent, when she is under eighteen years of age.

Seventhly- When she is unable to communicate consent.

Explanation 1.- For the purposes of this section. " vagina" shall also include labia majora.

Explanation 2.- Consent means an unequivocal voluntary agreement when the woman by words, gestures or any form of verbal or non-verbal communication, communicates willingness to participate in the specific sexual act;

Provided that a woman who does not physically resist to the act of penetration shall not by the reason only of that fact, be regarded as consenting to the sexual activity.

Exception 1.- A medical procedure or intervention shall not constitute rape.

Explanation 2- Sexual intercourse or sexual acts by a man with his own wife, the wife not being under fifteen years of age, is not rape."

376AB. Whoever, commits rape on a woman under twelve years of age shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of that person's natural life, and with fine or with death:

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

13. Regarding the age of the prosecutrix, the prosecutrix herself stated that she is aged about 5 years and is studying in Bardsle School Katni in KG-1. Her mother PW-3 Sanjna Panjwani and father Rakesh Panjwani (PW-17), Badi Papa (PW-4) Ramesh Panjwani stated in their statements that her date of birth is 14-01-2014. The birth certificate was also produced in which her date of birth is recorded as 14-01-2014. In addition to that, the prosecution also produced her school admission register as Ex.P-11-C. In the said register, her name is at serial No.5406 and date of admission is mentioned 19-02-2018 and the date of birth is recorded as 14-01-2014. The attendance register was exhibited as Ex.P-13. Principal of the school Atul Abraham (PW-7) was examined, who proved the admission register and also the attendance register. Thus, all the witnesses and the documentary evidence proved the date of birth of the prosecutrix as 14-01-2014 and according to the said date of birth, she was aged about 5 years and being less than 12 years of age, she is a child within the definition of child under the POSCO Act, 2012.

14. The next argument that the prosecution could not prove its case and therefore, conviction is not sustainable. It is condign to consider testimony of witnesses and other evidence. The prosecutrix was examined as PW-1. Before recording her statement, the court made queries and found that the child witness was able to understand the queries and oath, thereafter, recorded her statement. She stated that she is studying in Bardsle School. She goes to school by auto and the accused was auto driver. On the date of incident, auto vala after dropping of other children, had taken her to forest and had removed her undergarments and thereafter inserted his finger into her private part. He had threatened her not to disclose the incident to anyone, thereafter, she was dropped at home. In her statement under section 164 of Code of Criminal Procedure also, she had narrated the same incident and the accused was addressed by her as 'Gande Bhaiya' because of his bad act with her.

15. Sanjna Panjwani (PW-3) is mother of the prosecutrix. She stated that on 04-07-2018 after returning from the school she was continuously crying and was complaining pain on her private part. She disclosed the incident to her Badi Maa PW-2 Suman Panjwani who had seen the redness and swelling on private part.

PW-2 Suman Panjwani (Badi Maa) stated that accused Rajkumar is a person who used to pick up and drop the prosecutrix from the school. On 04-07-2018 in the morning the accused had taken her to the School at 7 A.M. in his auto. She came back around 12.45 PM and was crying and complaining the pain. When she enquired, she narrated the incident that she was taken by the accused to the forest, where he had removed her undergarments and had kissed her and also inserted his finger in to her private part. She had seen her private part, there was redness and swelling. Thereafter, they went to the police station alongwith the prosecutrix and her father PW-4 Ramesh Panjwani and written complaint (Ex.P-1) was submitted to Sub Inspector Manju Sharma (Ex.P-14). The report was registered as Ex.P-2 and the prosecutrix was sent for medical examination to the District Hospital Hospital Katni after taking her written consent in Ex.P-3. She was examined by Dr. Sunita Verma (PW-5) at Katni and her report is Ex.P-10. She had found redness and swelling on the private part of the prosecutrix and she had referred the prosecutrix for further examination to Medical College, Jabalpur. She was examined at Jabalpur by Dr. Najreen Siddiqui (PW-8). His report is Ex.P-13. She also found redness near the private part though there was no external injury. There was sign of penetration. However the consent was not given for examination under anesthesia by her parents.

16. Thus, the Doctor has proved that there was redness and abrasion on the private of the prosecutrix. There was sign of penetration but there was no other external injury. The report is Ex.P-10 and the same has also been affirmed by Jabalpur Medical College. The finding has been proved by medical report.

17. PW-1(victim) who is aged about 5 years, has supported the allegation of fingering in her deposition. PW-2, Suman Panjwani (Badi Mamma of the prosecutrix) who is informant of FIR supported the prosecution case and her deposition is also relevant under section 157 and Section 8 of the Indian Evidence Act. PW-3 Sanjana Panjwani (mother of the prosecutrix) also supported the prosecution case. PW-4 Ramesh Panjwani is Badi Papa of the victim stated that spot map Ex.P-7 was prepared on his instruction by PW-9 Shailesh Mishra, Station House Officer as disclosed by victim to him. PW-17 Rakesh Panjwani is father of the prosecutrix. He is also hearsay witness who has supported the statement of the prosecutrix and the statements of other witnesses. Apart from PW-6 Gaurishankar stated that he is owner of auto and used to let it to accused to a sum of Rs.200/- per day. On 04-07-2018, auto was given to the accused. PW-9 Shailesh Mishra is Investigating Officer, stated that he prepared the spot map and also made seizure of the cloths. PW-14 Manju Sharma recorded the FIR and PW-15 Rajkumar Gautam stated that he is Patwari and prepared the spot map. PW-16 Ravindra Dubey is police constable and witness to the seizure of semen slide of the accused Ex.P-18, seizure of document Ex.P-12 and spot map Ex.P-8. The accused was sent for examination to Dr. Paritosh Soni but he was not examined because there was only allegation of fingering. Semen slide of the accused was prepared and seized vide seizure memo Ex.P-18.

18. On consideration of the aforesaid evidence the prosecution has proved its case that the prosecutrix was violated by the accused and his act comes within the definition of rape.

19. Now the question arises for consideration in the facts, evidence and circumstances of the present case as discussed as to whether this is one of the 'rarest and 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 not less than 20 years or with fine.

20. Newly inserted Section 376-AB in the Penal Code provides that in the case of rape with a woman under 12 years of age, minimum rigorous imprisonment has been provided not less than twenty years which may extend to imprisonment for life which shall mean natural life and with fine. Thus, the test for awarding the death sentence in the case of woman under 12 years of age shall be still the same which has been laid down in the various judgments prior to the amendment i.e. 'rarest of rare case'.

21. On the other hand learned counsel appearing for the accused argued that in the facts of the present case, the conviction of death sentence awarded to the accused is not sustainable. He submitted that the manner in which the alleged offence is committed is not barbaric and brutal, therefore, present case does not fall within 'rarest of rare case' to award death sentence. He relied on the various judgments of the Hon'ble Supreme Court in the cases of Bachan Singh Versus State of Punjab reported in AIR 1980 SC 898, Machhi Singh & Others Versus State of Punjab reported in AIR 1983 SC 957. He has also placed reliance on the judgment of Hon'ble the Supreme Court in the case of Amit Versus State of Uttar Pradesh reported in AIR 2012 SC 1433 to contend that in absence of having any evidence that the accused may repeat a similar crime in future, the possibility of his reform cannot be ruled out in the coming years looking to the age and under such circumstances, the Hon'ble Supreme Court in the said case relying upon the judgment of Rameshbhai Chandubhai Rathod Versus State of Gujarat reported in AIR 2011 SC 803 converted the death penalty into the imprisonment for life for the remaining term. He has further placed reliance on the 6 judgment of Hon'ble the Supreme Court in the case of Panchhi & Another Versus State of U.P reported in (1998) 7 SCC 177 to explain the circumstance as to when the death penalty is not justified.

22. In the case of Bachan Singh (supra) the Apex Court by the majority view has declined to interfere into the matter but drawn the guidelines on the "aggravating circumstances" and "mitigating circumstances" and directed that the Court has to decide each case in their own facts looking to those circumstances. It is laid down that aggravating and mitigating circumstances should be considered. Those are shown as follows.

[i] Aggravating circumstances (para 202):

- (a) Preplanned murder with extreme brutality.
- (b) Exception depravity
- (c) Murder of Military Officer or Police Officer or any public Officer on duty. In consequence of anything done during discharge of duty.
- (d) Murder of a person who had rendered assistance to the Magistrate or a Police in discharging their duties.

[ii] Mitigating Circumstances (para 206):

- (a) Commission of offence under the influence of extreme mental or emotional disturbance.
- (b) If the accused is young or old, he shall not be sentenced to death.
- (c) Probability of the accused not committing criminal act of violence as would constitute a continuing threat to the society.
- (d) Probability of reformation or rehabilitation of the accused.
- (e) Murder committed in fact showing that accused believed that he was morally justified in committing the offence.
- (f) Murder under duress or domination of another person.
- (g) Mentally defective condition of the accused impairing capacity to appreciate criminality of his conduct.

[iii] In para 207, extreme youth has been recognized as a strong ground for leniency.

In the case of Bachan Singh (supra), the Apex Court referring both "aggravating circumstances" and "mitigating circumstances" has further observed that these are undoubtedly relevant circumstances must be given great weight in determination of the sentence but there may be numerous other circumstances justifying the passing of the lighter sentence as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrologically imponderables in an imperfect and undulating society. The scope and concept mitigating factors in the area of death penalty must receive a liberal and expensive construction by the Court in accord with sentencing policy. The Judges should never be bloodthirsty. Hanging of the murderers has never been too good for them. It is imperative of voice the concerned that the Courts aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with ever more scrupulous care and humane concern directed along the highroad of legislative policy outlined in Section 354(3) of the Cr.P.C. For a person convicted of murder, life imprisonment is rule and the death sentence is exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when

alternative option is unquestionably foreclosed".

23. The Supreme Court in the case of Machhi Singh (supra), relying upon the guidelines drawn by the Apex Court in Bachan Singh (supra) 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 culled out 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.

24. 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 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."

25. 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."

26. 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."

27. 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 appropriate that the lesser sentence should be awarded. This is the underlying philosophy behind "the rarest of the rare" principle."

28. In the case of Rameshbhai Chandubhai Rathod citation, 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 by one of the Judge 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." 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.

29. In a judgment reported as (2017) 6 SCC 631 (Vasanta Sampat Dupare vs. State of Maharashtra), wherein, the Court observed that the Court would consider the cumulative effect of both the aspects (namely aggravating factors as well as mitigating circumstances). Another three judges Bench in Mukesh and another Vs. State (NCT of Delhi) and others (2017) 6 SCC 1 maintained the death sentence on the 4 accused persons. The review against the said judgment bearing Review Petition (Cri.) No.570/2017 (Mukesh Vs. State of NCT of Delhi) was dismissed on 09-07-2018. In the cases of rape coupled with murder, the death sentence was maintained by the Apex Court in several judgments reported in (2008) 11 SCC 113 (Bantu Vs. State of Uttar Pradesh), (2009) 6 SCC 667 (Ankush Maruti Shinde Vs. State of Maharashtra) and (2015) 6 SCC 632 (Shabnam etc. Vs. State of Uttar Pradesh).

30. It is a horrendous crime when a child of four years 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. He prompted the child to come with him so as to take her to her father and then violated and killed her. The Supreme Court in a judgment rendered in Shankar Kisanrao Khade vs. State of Maharashtra, (2013) 5 SCC 546, examined the entire case law where the penalty of death sentence was set aside in the 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". It was held that the nature, motive, impact of crime, culpability, quality of evidence, socioeconomic circumstances, impossibility of rehabilitation are some of the factors, the Court may take into consideration while commuting the death sentence into imprisonment for life.

31. In the following cases, the death penalty was commuted to the imprisonment for life where a minor girl was raped and murdered by applying aforesaid principles.

(i) In the case of *Kumudi Lal Vs. State of U.P.* (1999)4 SCC 108, death penalty was commuted into imprisonment. It was a case where 14 years girl was raped and killed by strangulation.

(ii) In *Raju Vs. State of Haryana* (2001)9 SCC 50, the Court commuted death sentence to life imprisonment in case where a girl of 11 years was raped and murdered. The Court noticed that the accused had no intention to murder her, but on the spur of the moment, without any premeditation, he gave two brick blows which caused the death. It was further noticed that the accused had no previous record or would be a threat to the society.

(iii) In the case of *Bantu Vs. State of M.P.* (2001)9 SCC 615, in a case where a girl of 6 years who was raped and murdered by a boy who less than 22 years, the death sentenced was commuted to that of life imprisonment.

(iv) In the case of *State of Maharashtra Vs. Suresh* (2000)1 SCC 471, a girl of 4 years was raped and murdered.

(v) In the case of *Amrit Singh Vs. State of Punjab* (2006) 12 SCC 79 where a 7-8 years old girl was raped and murdered by the accused of 31 years.

(vi) In the case of *Rameshbhai Chandubhai Rathod (2) Vs. State of Gujrat* (2011)2 SCC 764, the age of the prosecutrix was 8 years. She was raped and murdered.

(vii) In the case of *Surendra Pal Shivbalakpal Vs. State of Gujrat* (2005) 3 SCC 127, an accused of 36 years old had committed rape and murder of minor girl.

(viii) In the case of *Amit Vs. State of Maharashtra* (2003)8 SCC 93, an accused aged about 20 years had raped and murdered a girl of 11-12 years. In the aforesaid cases mentioned above, where the death sentence was commuted to imprisonment for life.

32. Fingering into the vagina would be a rape within the definition of rape under Section 375 of IPC as substituted by Act No.13 of 2013 w.e.f. 03-02-2013. Relevant clause substituted under Section 376(b) (c) have already been reproduced in the earlier paragraphs, which provides that a man is said to commit a "rape" if he inserts , to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other persons or manipulates any part of the body

of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person.

33. Even before the amendment in the various judgments, the Apex Court held that to constitute offence under section 375 of IPC complete penetration is not essential. In the case of *State of U.P. Vs. Babul Nath* (1994)6 SCC 29, it was held that as per explanation contained in Section 375 of IPC, complete penetration is not essential even partial or slightest penetration with or without emission of semen and rupture of hymen or even an attempt of penetration into the private part of the victim would be sufficient for the purpose of sections 375 and 376 of IPC. The same view was reiterated in the case of *Koppula Venkat Rao Vs. State of A.P.*(2004)3 SCC 602 and *Aman Kumar and another Vs. State of Haryana* (2004)4 SCC 379.

34. In the present case a child of 5 to 6 years old was taken by the accused in his auto to an isolated place and it is alleged that he kissed her and inserted his finger into her vagina and thereafter threatened her not to disclose the same. In her medical report Ex.P-10 redness and abrasion was found on her private part. There was no other external injury on her person. In another examination by Doctor in Medical College in its report Ex.P-13, redness was found present but no external or internal injury was found on the private part of the prosecutrix. Thus, the act of the accused inserting finger into the private part of the prosecutrix amounts to rape under the definition of Section 375 of IPC but the manner in which the offence is committed is not barbaric and brutal. We have given our anxious consideration to the material on record and find that though the offence is condemnable, reprehensible, vicious and a deplorable act of violence but the same does not fall within the aggravating circumstances namely extreme depravity and the barbaric manner in which the crime was committed. Taking into consideration the totality of the facts, nature, motive and the manner of the offence and further that nothing has been brought on record by the prosecution that the accused was having any criminal antecedent and the possibility of being rehabilitation and reformation has also not been ruled out. Nothing is available on record to suggest that he cannot be useful for the society. In our considered opinion, it is not a case in which the alternative punishment would not be sufficient to the facts of the case.

35. Accordingly the Criminal Reference No. 07/2018 made by the 6th Additional Sessions Judge/Special Judge, POCSO Act, Katni under Section 366(1) of the Cr.P.C. for confirmation of the death penalty of the accused is answered but the capital punishment for the offence under Section 376(AB) is commuted to the rigorous imprisonment for a period of 20 years and fine of Rs. 10,000/-, in default payment of fine, the accused will undergo further R.I. for 2 months. The conviction and sentence under Section 366 of IPC is maintained. The Criminal Appeal No. 5786/2018 filed by the accused stands disposed of in the manner as delineated above.

36. Let a copy of this judgment be retained in the record of Criminal Appeal No.

5786/2018.

37. Office is directed to send a copy of this Judgment immediately to the trial Court concerned to take appropriate steps as per law.