
(2016) 04 MP CK 0004

In the Madhya Pradesh High Court

Case No : Criminal Reference No. 10/2015 and Criminal Appeal No. 3133/2015

Received from I Additional Sessions Judge, Maihar and Others **APPELLANT**
Vs

Suraj Vishwakarma and Others **RESPONDENT**

Date of Decision : 04-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 174, Section 313, Section 363
Evidence Act, 1872 — Section 27
Penal Code, 1860 (IPC) — Section 201, Section 302, Section 354(3), Section 363,
Section 376, Section 376-A
Protection

Citation : (2016) 04 MP CK 0004

Hon'ble Judges : Rajendra Menon and S.K. Palo, J.

Bench : Division Bench

Advocate : Ajay Shukla, Govt. Advocate, for the Appellant; D.P. Patel, Advocate, for the Respondent

Final Decision : Disposed off

Judgement

S.K. Palo, J.—1. By this common judgment, we propose to dispose of the Criminal Reference No. 10/2015 as well as Criminal Appeal No. 3133/2015.

2. The death reference and the criminal appeal has arisen out of the judgment and sentence awarded by learned I Additional Sessions Judge, Maihar, District Satna in Special Sessions Trial No. 67/2015 whereby the learned trial Judge has convicted the accused-appellant, Suraj Vishwakarma [hereinafter called "the appellant"] in respect of the offence punishable under sections 363, 376-A, 302 and 201 of the Indian Penal Code [for brevity "the IPC"] and under Section 5(i)(1)(m) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 [for short "the Act 2012"] and sentenced the appellant rigorous imprisonment for 7 years with fine of Rs. 5000/- under section 363 of the IPC; death sentence under Section 376-A of the IPC; imprisonment for life with fine of Rs. 10,000/- under section 5(i)(1)(m) read with Section 6 of the Act 2012; death sentence with fine of Rs. 10,000/- under Section 302 of the IPC; and rigorous

imprisonment for 7 years with fine of Rs. 5000/- under section 201 of the IPC. In default, to undergo further rigorous imprisonment of 3 months and 6 months respectively, with the further stipulation, substantive sentence to run concurrently.

3. The learned I Additional Sessions Judge made this death reference under Section 363 of the Code of Criminal Procedure, 1973 [for brevity "the CrPC"] to this Court for confirmation.

4. The appellant has challenged the judgment of conviction and order of sentence by filing this criminal appeal.

5. In the present case, a 7 year old minor girl had gone to sell flowers and did not return home till evening of 17-5-2015, hardly knowing that it was her last visit and final journey from this planet. Her father Kamlesh (PW-1) lodged a missing report at Police Outpost - Devi Ji Sharda Dham, Maihar in the morning of 18-5-2015. When he was searching his daughter, he found her dead-body floating in "Lilji Bandh" within jurisdiction of Police Station, Maihar.

6. Genesis of the prosecution case is abduction; rape; commission of sexual assault with penetration with a minor girl; murder; and causing disappearance of evidence.

7. Merg No. 04/2015 was lodged at Police Outpost - Devi Ji Sharda Dham, Maihar (Ex. P/1). On intimation received by the Police Merg No. 50/2015 was registered at the Police Station, Maihar, District Satna under Section 174 of the CrPC, vide Ex. P/22. Merg Panchnama (Ex. P/3) was drawn after issuing notice (Ex. P/2) to the Panch witnesses. Sample of water of the "Lilji Bandh" was seized, vide Ex. P/7 and requisition (Ex. P/14) was sent for postmortem of the dead-body. In the same format postmortem report (Ex. P/14) was prepared in which the Medical Officer, who conducted autopsy opined that sexual intercourse was committed with the deceased before she was strangled to death. Therefore, Crime No. 398/2015 in respect of offences punishable under sections 363, 376, 302 and 201 of the IPC read with Section 3/4 of the Act 2012 was instituted against unknown persons, vide Ex. P/23.

8. During investigation on 20-5-15 the appellant was arrested in presence of Rampyare (PW-5) and Ram Kishore Kushwaha (PW-6). Arrest memo (Ex. P/8) was drawn by K.K. Tiwari, Sub-Inspector of Police (PW-16) on the basis of which spot map (Ex. P/5) was drawn. Earth stained with blood and plain earth were seized. Under garment of the deceased stained with blood and a polythene bag containing some coins were seized. Besides, on the memorandum of the accused-appellant his old T-shirt and pant which were stained with blood were also seized from his house, vide seizure memo Ex. P/10. Spot map of the house of the appellant was also prepared and he was taken into custody by the Police, vide arrest memo (Ex. P/12). Father of the accused Pramod was intimated about arrest vide notice (Ex. P/26). Blood stained soil etc. and the garments of the deceased and the accused-appellant with semen slide of the accused, viscera and

vaginal slide of the deceased were sent to the Forensic Science Laboratory, Sagar with requisition (Ex. P/27). A piece of femur bone and sample of water seized from the spot were also sent for forensic examination to the Medico Legal Institute, Gandhi Medical College, Bhopal, vide requisition (Ex. P/28).

9. With permission of the Court blood sample of the accused-appellant was taken for the purpose of conducting DNA test. The sample was sent to the DNA Fingerprint Unit, Sagar, vide Ex. P/33 along with identification form (Ex. P/17). FSL reports of Sagar (Ex. P/29) and (Ex. P/30) and medical report received from the Medico Legal Institute, Bhopal (Ex. P/31), DNA test report (Ex. P/34). DNA profile of the accused was tallied with DNA profile of the blood sample found in the under garments of the deceased (Ex. P/29). There was semen in the inner garment of the deceased and semen slide of the accused was found therein.

10. On filing charge-sheet, the same was committed to the Court of Sessions. Learned trial Court framed charges and explained the same to the accused-appellant.

11. The accused-appellant abjured the guilt. In his examination under Section 313 of the CrPC, he denied having committed any offence and pleaded false implication. However, he has not adduced any evidence in support of his defence.

12. As the case hinges on circumstantial evidence the circumstances of this case ought to be analysed and discussed on the principles laid down by the Hon''ble Supreme Court in *Sharad Birdhichand Sarda vs. State of Maharashtra*, , AIR 1984 SC 1622 in which the Hon''ble apex Court has issued the guidelines that the following conditions must be fulfilled before a case against the accused based on circumstantial evidence can be said to be fully established:

"(1) The circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned "must or should" and not "may be" established.

(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."

13. In the light of the above principles the material available in the present case is analysed.

14. The deceased was aged about 7 years as per her father Kamlesh (PW-1) and mother Kusumbai (PW-2). No cross-examination has been made in this regard and no suggestion has been placed to these witnesses contending that the deceased was a major at the time of incident.

15. In the "Naksha Panchayatnama" (Ex. P/3) dated 18-5-15 also, age of the deceased has been written as 7 years. No challenge has been made in this regard in the cross-examination of the Panch witnesses specially, Ravindra Kumar (PW-3) and K.K. Tiwari (PW-16). Besides, postmortem report (Ex. P/14) also shows the age of the deceased as 7 years. Dr. V.K. Goutam (PW-7), Medical Officer has estimated age of the deceased as 7 years. In this regard also, no suggestion has been made to the Medical Officer. Sushila (PW-8), who is aged about 11 years and is a friend of the deceased. If the deceased is taken to be one or two years senior to Sushila (PW-8) for the sake of arguments, she could be 12-13 years at the time of the incident. By no stretch of imagination, she could be more than 18 years on the date of the incident. Otherwise also, we have no reason to doubt the entry made by the Medical Officer, when there is no suggestion made to him in his cross-examination about the age of the deceased.

16. Kamlesh Kushwaha (PW-1) has narrated that on 17-5-2015 his daughter (the prosecutrix) had gone to sell out flower garlands along with her friend Sushila (PW-8) but she did not return till 11-12 noon. They searched for her and when they did not find her, he lodged a missing report at Police Outpost Arkandi Devi. Smt. Kusumbai (PW-2), the mother of the deceased, has stated that around 2 1/2 months ago her daughter (the prosecutrix) had gone to sell out flower garland with her friend Sushila (PW-8) but did not return. They started searching her but she was not traceable. On being asked Sushila (PW-8) stated her that the prosecutrix had gone with her, but she did not return with her.

17. Sushila (PW-8) is hardly an eleven year old girl and she is the real sister of the accused-appellant. Statement of Sushila (PW-8) is very relevant and significant in the present case. She had gone to sell out flower garlands along with prosecutrix, which she often used to do. At about 10-10:15 AM they used to come back after selling out garlands. Sushila (PW-8) has been declared hostile for she did not support the prosecution case. It is but natural that she is a minor girl of 11 years and had gone to the Court with her parents to depose and is not expected to speak anything truth against her brother. In her examination-in-chief she has clearly mentioned that the deceased-prosecutrix had gone to sell garlands with her. On their way back, her brother, the appellant herein, met them. After she was declared hostile and on being asked leading questions she has agreed that the accused had met them on their way to village. She has denied the suggestions that the appellant asked her to leave and took the prosecutrix towards the upper portion of the dam.

18. She tried to come up with a story that she and the prosecutrix were taking bath in the dam, where the prosecutrix got drowned. This part of her statement is not reliable for the simple reason, that had that been so, she could have

narrated the incident of drowning immediately to someone or atleast to the parents of the deceased, when they had asked her about the missing girl. Her police statement (Ex. P/18) does not contain any such narration of drowning of the deceased. One thing is clear from her statement that the deceased was accompanying her and she had gone to sell out flower garlands. The appellant met them when they were returning home. This portion of the statement of Sushila (PW-8) can be relied upon. Because she is declared hostile, the whole statement cannot be disbelieved.

19. In the case of *Khujji alias Surendra Tiwari vs. State of M.P.*, AIR 1991 SC 1853, a Full Bench has propounded that while appreciating the evidence, only because a witness has become hostile, his whole testimony cannot be treated as washed out.

20. On the following day the dead-body of the deceased was discovered in the Lilji Dam. Kamlesh Kushwaha (PW-1) has stated that on the next day when he was going to the Arkandi Devi Ji Temple, he saw a gathering near the Dam. Upon his asking, it was informed that a dead-body was found floating in the Dam. When he went near the dam he found that the dead-body was that of his daughter. She was found dead unclothed. He then lodged a report at the Police Outpost Arkandi Devi Ji within the jurisdiction of the Police Station, Maihar. Police reached at the spot, took out the dead-body and after issuing notice to Panch witnesses drew spot map "panchayatnama". It is worth mentioning here that Kamlesh (PW-1) also perceived injuries on private part of the deceased. After the dead-body was recovered the same was sent for postmortem to the Civil Hospital, Maihar.

21. Dr. V.K. Goutam (PW-7) got the dead-body medically examined and drew the postmortem report (Ex. P/14). He has observed that the deceased died due to antemortem strangulation leading to asphyxia and cardio-respiratory failure owing to injuries antermortem in nature. There was indication of sexual assault. V-shaped swelling 12" x 8" was found on the neck; swelling of 6" x 3" was also found on the upper portion of the chest; swelling on the lower side of stomach 5" x 1" was seen. Blood was oozing out from vagina and there was swelling. A lacerated wound was seen on the left side of the hymen 1 1/2" x 1/2" x 1/2" in size.

22. Evidence of the Medical Officer clearly and unambiguously indicates that the prosecutrix was subjected to sexual assault and she was later strangulated to death, for all the injuries inflicted on her were antermotem in nature. The Medical Officer denied the suggestion that the injuries might have caused to the deceased while falling into the dam from a height. Evidence of the Medical Officer does withstand the test of cross-examination and, therefore, cannot be disbelieved. This according to us reveals that the deceased died due to strangulation.

23. Vimal Singh Lodhi (PW-4) is another incidental and chance witness. He is a resident of the same Village and, therefore, he was known to accused the

prosecutrix as well as Sushila (PW-8). According to him on 17-5-2015 at about 11:30 AM he was going from the Village Udaipur towards his shop through the dam road. He saw the accused Suraj with his sister Sushila (PW-8) and the prosecutrix standing near the Dam. The prosecutrix was in her school uniform. He did not give importance to this, thinking that they were village children going somewhere. On the following day, when he came to know about the dead-body of the prosecutrix he told this incident of seeing the accused with the deceased and Sushila (PW-8) to Incharge of the Police Station concerned. This statement of Vimal Singh Lodhi (PW-4) also inspires confidence corroborating with the prosecution story to a great extent.

24. Ram Pyare (PW-5) another villager came to know about the dead-body having found in the Lilji Dam, Arkandi. He has stated that the policeman took out the dead body from the Dam which was unclothed. After recovery of the dead body notice (Ex. P/2) was given to him by the police to remain personally present at the time of Panchayatnama. In his presence Panchayatnama (Ex. P/3) was prepared. Rampyare (PW-5) and Ramkishore (PW-6) are the witnesses in whose presence memorandum (Ex. P/8) of the accused was drawn by the police, wherein the accused has narrated that under garments of the prosecutrix with a blue coloured skirt were kept at the bank of the Lilji Dam and at his instance police has recovered the articles, vide Ex. P/9. Police arrested the accused in presence of Rampyare (PW-5) and Ramkishore (PW-6), vide arrest memo (Ex. P/12). Both the witnesses have also corroborated that besides this police have also seized ordinary and blood stained earth from the spot.

25. These independent witnesses have further gone to state that the police prepared the spot map (Ex. P/11) and subsequently seized pant and T-shirt of the accused-appellant which are marked with blood, vide seizure-memo (Ex. P/10). Spot map (Ex. P/13) was also prepared by the police.

26. These articles recovered at the instance of the accused were sent to the Forensic Science Laboratory, Sagar for analysis by the Investigating Officer, K.K. Tiwari (PW-16) vide letter dated 3-6-2015 (Ex. P/27). With permission of the Court blood sample was taken from the accused-appellant on 3-7-2015 and the same was sent for DNA test, vide Ex. P/33. DNA Fingerprint Unit of the Forensic Science Laboratory Sagar submitted the report (Ex. P/34) that undergarments of the prosecutrix-deceased contained the same source of DNA profile. It was similar to that of the blood sample (Article "M") obtained from the accused. This indicates that the under undergarment of the deceased contained some DNA of the source obtained from the accused. The vaginal slide (Article "I") does not contain any trace of semen as per report (Ex. P/29). This is, but natural, when the dead body was lying naked in the water for more than 18 hours, traces of semen could have washed out. But the traces found in the undergarment of the deceased recovered at the instance of the appellant, is a reliable evidence to indicate that the prosecutrix was subjected to sexual intercourse before she was strangled to death by the accused-appellant.

27. It would be appropriate to mention here that Dr. V.K. Goutam (PW-7) who examined the accused on 30-5-15, vide Ex. P/16 has opined that no abnormality was detected on the basis of which it can be inferred that the accused was unable to perform sexual intercourse. Two semen slides were prepared and were handed over to the police constable who brought the accused-appellant for medical examination.

28. In *Patangi Balarama Venkata Ganesh vs. State of Andhra Pradesh*, (2009) 14 SCC 607 the apex Court has held that identification of the accused from blood sample can be based on DNA test. If the DNA fingerprint of a person matches with that of a sample, it means that the sample has come from that person only.

In the present case also there is nothing to show that precaution was not taken in conducting the DNA test. Therefore, reliability and authenticity of the DNA test report cannot be questioned.

29. On behalf of the appellant reliance has been placed on the decision rendered in the case of *Raj Kumar Singh alias Raju alias Batya vs. State of Rajasthan*, 2013 CrLJ 3276 in which it is held as under:

"Murder, rape and causing disappearance of evidence - circumstantial evidence, victim, a 4 years old girl found lying dead in a lonely house, medical evidence showing that victim was first subjected to monstrous sexual assault and was then mercilessly killed by inflicting injuries on her head. Evidence of constable that in arrest memo there was no mention about blood on body of victim by grandmother is suspicious owing to fact that she is unable to go to roof of a vacant building in wee hours in morning. No explanation furnished by prosecution with respect to injuries on person of accused, major contradictions/improvements/embellishment in deposition of witnesses. Chain of links connecting accused with crime appears inconclusive. Guilt of accused not proved beyond reasonable doubt. Conviction and sentence passed against accused, therefore, set aside."

30. In the present case there is ample evidence about the chain of circumstances which proves that the accused was with the prosecutrix and dead body of the prosecutrix was found on the following day in the Dam. Whereas at the instance of the accused-appellant under garments of the prosecutrix were seized which contained blood stains. These blood stains have been proved by the DNA test to be that of the DNA profile of the blood sample obtained from the accused. Therefore, in the facts and circumstances of the present case, the benefit of the citation *Raj Kumar Singh alias Raju alias Batya* (supra) is not available to the accused-appellant.

31. In *Mahesh Chandra vs. State of Madhya Pradesh*, 2005 CrLJ 2480 a Division Bench of this Court in a similar circumstance has held as under:

"Rape and murder of minor girl aged 7 years, cases based on circumstantial evidence, garments etc. of deceased recovered from possession of accused just

after murder, blood stained bed sheet and mattress from house of accused also recovered just after crime. Accused calling minor girls in his house with ulterior motive proved. Accused making attempt to run away, body of deceased found near house of accused and false denial of such fact by accused - Medical evidence indicative of commission of offence of rape and murder - Conviction held proper."

32. In the case *Samir Bhowmik vs. State of Tripura*, , 2010 CrLJ 3018, the Gauhati High Court has held as under:

"Rape, murder and causing disappearance of evidence, circumstantial evidence, accused alleged to have committed rape on victim girl, seven years of age at his studio, killed her by smothering and disposed of her dead-body in carton, the carton in which dead-body was found has been procured by accused from shop of witness. Bangles belonging to deceased recovered from studio of accused. Medical evidence showing that death was caused due to combined effect of asphyxia due to smothering and shock as a result of penetrating injury. Non forensic examination of wearing garments of deceased not fatal to prosecution. No evidence of showing that after deceased was seen with accused, she was found with any other person. Circumstances form a complete chain pointing to guilt of accused to the exclusion of any other hypothesis. Conviction of accused proper."

33. As regards circumstantial evidence of a similar facts Hon"ble Supreme Court in the case of *Purna Chandra Kusal vs. State of Orissa*, , 2012 CrLJ 615 has expressed the opinion as under:

"Murder and rape - evidence of last seen - alleged that accused raped minor girl and murdered her by asphyxiation - as per evidence of mother and brother of deceased, accused was last seen in company of deceased - further on statement made by accused u/s. 27 of the Evidence Act clothes of deceased which he had hidden after her rape and murder were recovered - Similarly on his disclosure clothes he had been wearing too were recovered - both clothes were found to be stained with human blood - Therefore, last seen evidence finds full corroboration from recoveries made by investigating agency - Conviction proper, but death sentence commuted into one for life."

34. Though learned counsel for the appellant has strenuously argued and invited our attention to the statements of prosecution witnesses that the appellant was not last seen with the deceased, therefore, chain of circumstances is not complete. We hasten to add that, recovery of clothes of the deceased at the instance of the appellant is a ground in itself incriminating against the accused-appellant. Moreso, when the blood stains have been found similar to the blood profile of the accused in the DNA test, it gives no chance of any suspicion but a definite and conclusive proof. That being so, after considering all aspects and the circumstances prevailed in the case in hand, we deem it fit to hold that the learned trial Judge has not committed any error in holding the accused-appellant

guilty for the offence mentioned hereinabove.

35. We now proceed to consider about the death sentence imposed by the learned trial Judge under Section 376-A and 302 of the IPC.

36. In *Gurbaksh Singh Sibbia Vs. State of Punjab*, (1980) 2 SCC 565, the Apex Court has stated broad guidelines relating to the mitigating circumstances, in which it is held that:

"Judges should never be blood thirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, Courts have inflicted the extreme penalty with extreme infrequency-a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that Courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an 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 the alternative option is unquestionably foreclosed."

37. In the case of *Bachan Singh Vs. State of Punjab*, (1980) 2 SCC 684, the Hon"ble Apex Court has culled out the following propositions:

"(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 along with 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 have 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 *Santosh Kumar Singh vs. State through CBI*, (2010) 9 SCC 747 the Hon"ble apex Court has opined as under:

"Death sentence or life imprisonment - choice between Priyadarshini Mattoo rape and murder case - held where Court feels some difficulty in making choice, appropriate course is to award lesser sentence. This flows from the "rarest of rare" principle aggravating and mitigating circumstances while choosing between two punishments. Appellant committing rape and murder of a hapless junior college student for having rebuffed his amorous overtures and after causing long harassment and stalking her, while appellant was a young man of 24 years. Before murdering her, appellant himself sustained injuries while mercilessly beating the deceased with his helmet and causing 19 injuries including three fractured ribs, to her person. He got married after his acquittal by trial Court. There was no indication that appellant was not capable of reform. These facts considered as mitigating circumstances. On the other hand, misuse of power and pelf which appellant enjoyed by virtue of his father's high position, considered as aggravating circumstance. Balancing the two factors, held, appropriate sentence was life imprisonment. Death sentence awarded by High Court therefore, commuted to life imprisonment. Penology - Reformation - Criminal Trial - Sentence - Death sentence - commutation to life imprisonment when warranted."

39. In Samir Bhowmik (supra) the Gauhati High Court has held as under:

"Rape and murder - Aggravating circumstances and mitigating factors manner in which deceased was raped and killed by accused was undoubtedly brutal. But, there is nothing on record to shown that he had any pre-meditated plan to commit offence of rape. Death of deceased was result of accused desire to meet his sexual urge. Case does not fall within the category of "rarest of the rare cases". Not a case where extreme penalty of death should be imposed. Imposition of punishment of rigorous imprisonment for life would be sufficient to meet the ends of justice."

40. In the present case aggravating circumstances are:

- (I) The victim was a hapless female child aged about 7 years.
- (II) She was a friend of the sister of the accused and had no knowledge about the ill intention of the accused.
- (III) The child was raped, causing injuries to her private part and strangulation.
- (IV) The accused exhibited complete absence of human feelings, while deciding to commit rape on a seven years old minor, resulting into her death.
- (V) After committing the offence in cool mind, he tried to remove and destroy the evidence by disposing of the dead body after throwing it into the dam.
- (VI) Despite committing the ghastly acts on the helpless child, the accused suffered from no instinctive remorse.
- (VII) The manner in which the innocent helpless minor girl was raped and immediately killed was inhuman, barbaric and dastardly.

(VIII) The act of committing rape, followed by murder and disposal of the dead body, were done in cold blood.

(IX) Nature of offence committed by the accused were not only horrifying but also shocking to the society.

41. Mitigating circumstances in the present case are:

(i) The accused was a young boy of about 21 years.

(ii) He did not procure the victim girl but took her from the path.

(iii) The accused while committing rape on the victim caused death of the deceased. Either to destroy the evidence of such crime committed by him or to stop her from raising alarm during the rape or from reporting the matter to others and accordingly to save himself.

(iv) As a result of the aforesaid rape on a seven year old minor girl injuries were caused to her private part. Certainly the minor must have suffered tremendous pain compelling her to cry and in order to stop her from raising alarm, the accused probably smothered her causing her death.

(v) The medical evidence also indicates that the death was the result/consequence of the combined effect of the injuries and smothering.

(vi) In order to save himself from being caught in connection with the said offences, the accused disposed of the dead body by throwing the same into the dam.

(vii) There is nothing on record to show that there was any previous plan or design to commit the said offences.

(viii) There is nothing on record to find that the accused was a menace or threat to the society or that his joining the society would be injurious to the society.

(ix) The accused has no criminal antecedents.

42. On careful consideration of the above aggravating circumstances appearing against the appellant as well as mitigating factors which speak in his favour, we find that after giving full consideration to the mitigating circumstances that the accused wanted to fulfil his sexual desire, as a result of which death of the minor deceased was caused. The accused-appellant after committing the death of the deceased might have tried to dispose of the dead body throwing the same into the dam, with a view to cause disappearance of evidence.

43. There is no previous complaint of any criminal activity of the accused. Therefore, it can safely be held that in all probabilities the idea of committing the rape came to his mind immediately after he found the deceased-prosecutrix on the way, took her to a nearby place to commit the crime. There was no previous intention or design to commit the offence hence, it can be concluded that the offence of rape was committed on a spur of the moment, as a result of

momentary loss of reasons humanly considerations. The accused-appellant aged about 21 years failed to apply his prudent mind and reasons and got prompted to fulfil his desire by using the said minor, who was not fit to have sex. It was a case of failure of human mind to apply reasoning and good conscience.

44. The manner in which the deceased was raped by the appellant, was undoubtedly brutal. But there is nothing on record to show that he had any pre-meditated plan to commit the offence of rape. The death of the deceased was result of the appellant's desire to meet his sexual urge. Therefore, though the offences look heinous, it cannot, in the circumstances, as discussed above, said to be a "rarest of rare case".

45. In the light of the above discussion, we feel inclined to conclude that this case does not fall within the category of "rarest of the rare case". Therefore, in our view it is not a case where extreme penalty of death should be imposed.

46. We have no hesitation in holding that imposition of punishment of imprisonment of life would be sufficient to meet the ends of justice. Accordingly, the death penalty for offence under sections 376-A and 302 of the IPC is commuted to imprisonment for life. The appellant, therefore, instead of awarding the death penalty, is hereby sentenced to undergo imprisonment for life under sections 376-A and 302 of the IPC and fine of Rs. 10,000/- as awarded by the learned trial Court. However, part of the sentences imposed by the learned Sessions Judge for offence under sections 363 and 201 of the IPC and under Section 5(i)(1)(m)/6 of the Act 2012, are maintained.

47. With the above modification in sentence, the appeal stands partly allowed. The offence shall run concurrently.

48. In the result and for the reasons discussed above, we decline to confirm the sentence of death imposed against the accused-appellant by the learned trial Judge.

49. Accordingly, the criminal death reference and the criminal appeal stand disposed of. Record of the trial Court be sent back for necessary action.