

(2012) 02 AHC CK 0072
In the Allahabad High Court
Case No : Crl A. (Capital Case) No. 7760 of 2009

Sanjay Kumar

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 08-02-2012

Acts Referred:

Constitution of India, 1950 — Article 161, 72
Criminal Procedure Code, 1973 (CrPC) — Section 164, 235(2), 354(3), 433A
Penal Code, 1860 (IPC) — Section 302, 376

Citation : (2012) 02 AHC CK 0072

Hon'ble Judges : Jayashree Tiwari, J; Amar Saran, J

Bench : Division Bench

Advocate : K.P.S. Yadav and Prem Prakash, for the Appellant; Rupak Chaubey, P.S. Pundir and A.G.A., for the Respondent

Final Decision : Dismissed

Judgement

Amar Saran, J.—is criminal capital appeal has been filed against a judgment and order dated 5.12.2009 passed by the Additional Sessions Judge, Court No. 10. Varanasi in S.T. No. 245 of 2007 convicting and sentencing the appellant Sanjay Kumar u/s 302, I.P.C. to death sentence and a fine of Rs. 10,000 and in default of payment of fine the appellant was directed to undergo four months additional R.I. u/s 376. I.P.C., the appellant was awarded life imprisonment and a fine of Rs. 10,000 and in default of payment of fine, the appellant was directed to further undergo four years additional R.I. reference was also sent by the Additional Sessions Judge to this Court for confirmation of the death sentence. he brief facts of the case are that Kumari Divya Rani, the 18 years old daughter of Shri Tapan Kumar Singh, was staying at the residence of her Phupha, the informant Shyam Ji Sharma at mohalla Tulsi Vihar Colony, P.S. Shivpur, district Varanasi from 6.2.2007 for the purpose of writing her Intermediate Board Examinations. The appellant Sanjay was doing the work of painting in the house for the previous ten days. In order to get some items for painting the house, the informant and his wife Smt. Rajni Sharma had gone to the market on 24.2.2007.

Kumari Divya Rani was present in the house for supervising the work. After buying the items, when the informant returned at about 3.00 p.m. alongwith his wife, he found the door of the house open. Calling for Divya, they entered the north western door of the house. They were shocked to see that the appellant Sanjay, who was well built had committed the murder of Divya and was trying to conceal her body by placing it in a tin trunk after throwing out the clothes from it. There was blood on Divya's face. The informant and his wife tried to catch hold of the appellant, who however, pushed them aside and ran outside the house towards the west. On their alarm, the neighbours arrived and they gave a chase to the appellant, but he could not be apprehended. On the informant's written information, an F.I.R. was registered on 24.2.2007 at about 4.40 p.m. at Crime No. 34 of 2007, u/s 302. I.P.C., at P.S. Shivpur district Varanasi.

2. The police after conducting the inquest, got the post-mortem done on the corpse. After perusal of the post-mortem report. Section 376. I.P.C. was also added and after completion of investigation, the charge-sheet was submitted u/s 302/376, I.P.C. by S.I. S.P. Singh. P.W. 8. The post-mortem was conducted on the body of the deceased by Dr. Arvind Singh. P.W. 5 at about 12 p.m. on 25.2.2007, who found the following ante-mortem injuries on the body of the deceased :

- (1) Nail mark $\frac{1}{2}$ cm. in length 12 cm. below the highest point of the left side iliac crest on the buttock.
- (2) Contusion 3 cm. x 2 cm. on the inner side of the right forearm 2.5 cm. below the elbow joint.
- (3) Abraded contusion $\frac{1}{2}$ cm. x $\frac{3}{4}$ cm. on the left thumb 2 cm. below the nail.
- (4) Abraded contusion $\frac{3}{4}$ cm. x $\frac{3}{4}$ cm. on the left elbow joint posteriorly on the bony prominence.
- (5) Nail mark $\frac{1}{2}$ cm. x $\frac{3}{4}$ cm. on the right side breast 4- $\frac{1}{2}$ cm. below the sternal notch.
- (6) 8 cm. long contusion, elliptical, at points not present on the left side chin (bite mark) upper and lower incisors.
- (7) Upper lip is contused and lower lip is both contused and deeply lacerated more on the left side of the lip and at..... The upper gum is lacerated.
- (8) Ligature mark 29 cm. in length. $\frac{1}{2}$ -1 cm. in thickness at places all around the neck with pressure points pattern 3 cm. below the sternal notch and 3 cm. below both the ears.
- (9) 2 cm. x 1 cm. lacerated wound on the left chin bone.
- (10) 4 nail marks closely placed in an area of 4 cms. 3 cm. below the left eye. Black left eye.
- (11) Contusion 8 cm. x 12 cm. on the apex of the head with a laceration above it

1/2 cm. x 1 cm. on the apex.

There is laceration of the vagina and the vaginal vault and rupture of hymen is seen. Asphyxia as a result of strangulation contributed by and as a result of head injury. The doctor also opined that the victim has been subject to sexual assault against her wishes.

3. Charges under Sections 376 and 302, I.P.C. were framed against the appellant on 6.7.2007 to which the appellant pleaded not guilty and claimed to be tried.

4. Two witnesses of facts, P.W. 1 Shyam Ji Sharma. P.W. 2 Smt. Rajni Sharma, who are the Phupha and Bua of the deceased have been examined. The other witnesses, who have been examined are P.W. 3 Neeraj Singh, P.W. 4 Suresh Kumar Pathak. P.W. 5 Dr. Arvind Singh. P.W. 6, Dr. B.R. Thakur. P.W. 7 S.I. Mohd. Azmi. P.W. 8 S.P. Singh, P.W. 9, Rajnath and P.W. 10 Veni Prasad Srivastava.

5. P.W. 1 Shyam Ji Sharma the informant, has deposed that at the time of incident he was posted as Medical Officer at P.H.C., Cholapur. He has further reiterated his version in the F.I.R. that he was residing in Tulsi Vihar Colony at P.S. Shivpur, district Varanasi. His Sala (brother-in-law) Tapan Kumar's daughter Divya alias Moni, aged about 18 years had come from her home in Bihar to his house to appear in the Intermediate Board Examination. On the date of incident, i.e., 24.2.2007 painting work was being carried out on in his house by the appellant Sanjay. He had gone to the market alongwith his wife and his niece Km. Divya was alone in the house. When they returned after buying some painting items, they entered the north western room calling out for Moni, where they saw Sanjay trying to put the dead body of Moni in a tin box after murdering her and throwing the clothes out of the tin trunk. She had injuries on her face and other parts of the body. Neighbours and nearby shopkeepers arrived on his alarm, but the appellant Sanjay was able to make good his escape. Thereafter, he lodged the report (Ext. Ka-1), which was scribed by Vijay Kumar Mishra on his dictation and then he handed over the same at the police station Shivpur.

6. Thereafter, the police arrived at his residence. They took out the body from the box and carried out the inquest proceeding. He was also made an inquest witness (Ext. Ka-2). After completing the inquest, the Investigating Officer recorded his statement and prepared the site plan.

7. P.W. 2, Smt. Rajni Sharma has deposed that her husband Dr. Shyam Ji Sharma had got a new house built in Tulsi Vihar Colony, where they were residing since 2006. On 6.2.2007 Km. Divya had come to their house for the purpose of appearing in her intermediate examination. Painting work was going on in the house from 10 or 15 days prior to the incident. The appellant, who belongs to Bajar Deeha Khojwa, police station. Bhelupur was carrying out this work. At that time the appellant was residing in village Holapur, police station. Shivpur. On the date of incident, i.e. 24.2.2007, which was a Saturday, her husband had come from the hospital at about 1.00 p.m. She alongwith her husband had gone to the market to bring some items for painting and putai.

When they left home, the appellant was painting the door of the kitchen and her niece Divya alias Moni was alone looking after the house. When he left for the market, apart from Divya and Sanjay, none else was present there. At about 3.00 p.m. when she returned home alongwith her husband after purchasing painting and putai items, they found the door opened. They entered the north western door of the house calling "Moni, Moni", but on reaching the scene they were shocked. They saw the appellant trying to conceal the body of Divya in a tin trunk after having committed her murder, after taking out the clothes from the tin trunk. There was blood on Divya's face. Raising an alarm, they tried to catch hold of Sanjay, but he escaped after pushing them aside and running away towards the West. She fell down and her husband being crippled in one leg, could not apprehend Sanjay on the spot. On their alarm, a large number of neighbours from the mohalla gathered. They also tried to apprehend Sanjay, but they could not apprehend him.

8. Smt. Rajni Sharma further deposed that she could recognize the clothes, which her niece Divya and the appellant were wearing at the time of incident. In one potli (bundle) there were the clothes of accused Sanjay i.e. orange colour shirt and grey colour pant, which the appellant was wearing (Ext. 1) and the other potli contained Km. Divya alias Moni's clothes., i.e., one salwar (Ext. 5). one shameez (Ext. 4), dupatta (Ext. 6) and one underwear (Ext. 7) and one undertape (Ext. 8) for wearing under the shameez.

9. P.W. 3 Neeraj Singh has deposed that he knew Dr. Shyam Ji Sharma, who used to work at Syed Rana hospital. He had met him as Sales Manager Neuton Pharma and since then he used to visit Dr. Sharma's house. On 24.2.2007. Dr. Sharma telephonically informed him that his niece had been murdered. He then came to Dr. Sharma's house where he found that her corpse had been kept outside in a sealed condition. In the presence of this witness, the police recovered a "basull" (Ext. 9). which was bloodstained. It was got sealed and recovery memo was prepared (Ext. Ka-3). There was blood on the pakka cement floor, fard of which was made (Ext. Ka-4).

10. P.W. 4, Suresh Kumar Pathak has deposed that on the date of incident (24.2.2007) he was going from his home towards Nawalpur through Tulsi Vihar Colony. He saw a large crowd outside Dr. Sharma's house. He was told by the crowd that Dr. Sharma's Sala's daughter Divya had been murdered by the painter working in that house named Sanjay. He was told that the doctor had arrived when the appellant was trying to place her body in a tin trunk and he pushed Dr. Sharma aside and ran away. The police took out the dead body from the tin trunk and placed it on the floor. He saw the injuries on the face and body of the deceased. Thereafter, inquest was conducted and he was made an inquest witness. On 28.2.2007 at about 11.00 a.m. when he had gone to Bhojveer, police station Shiv Pur for purchasing vegetables, then he came to know that the police had arrested the appellant. The appellant disclosed his name as Sanjay and he was trembling. He identified Sanjay in Court. When the police inquired from

Sanjay in the presence of the persons present there, then the appellant confessed to his guilt.

11. The appellant disclosed in the presence of this witness that on 24.2.2007, he was doing the work of painting in Dr. Sharma's house. Dr. Sharma and his wife had gone to buy items of painting and in the house only Km. Divya and the appellant were present. Then an evil desire had arisen in his mind and he had asked for water and when Divya came with the water he caught hold of her. On her resistance, he pushed her on the floor and hit her with some hard object because of which she became helpless. After that he committed rape of Divya and strangled her. He was trying to conceal her corpse in a box, but the doctor and his wife had arrived when he was placing the corpse in the box. They began to raise alarms, then he pushed them aside and ran towards Holapur. On reaching home, he took out the clothes, which contained semen and put them in a polythene bag and placed them under a shelf and stated that he was prepared to get them recovered. Then the police officer took the appellant in their vehicle and this witness proceeded on his own vehicle to Holapur village. On reaching Holapur Sanjay got the polythene packet recovered, which contained one grey pant and one orange shirt. On the pant, there was some thick substance, which was surrounded with a pen by the Investigating Officer. On the pant and shirt, there were some signs of paints. The Investigating Officer prepared the fard (Ext. Ka-5) of the polythene bag containing the clothes of the appellant as mentioned above. This witness identified the pant and shirt of the appellant in Court.

12. P.W. 6 Dr. B.R. Thakur has examined the appellant Sanjay at Pandit Deen Dayal Hospital. Varanasi on 1.3.2007 at 10.00 a.m. He found the following injuries on Sanjay :

- (1) Scratched abrasion in an area of 6 cm. x 5 cm. on the left side of face, 1 cm. below the left eye (multiple abrasions), with epithelium grown scab.
- (2) Abrasion (Multiple), (scratched) 1 cm. x 0.5 cm. on the right side of face, 2 cm. below the right ear, epithelium grown scab present.
- (3) Contused swelling 6 cm. x 5 cm. on the dorsum of right hand, black, bluish in colour, advice x-ray.
- (4) Scratched abrasion 2 cm. x 1.5 cm. on the front of right side of leg, 7 cm. below the right patella with epithelium grown scab.
- (5) Abrasion 0.6 cm. x 0.4 cm. at the Junction of prepuce and glans penis, epithelium grown under the scab.

Opinion.- Injury Nos. 1, 2, 3, 4, and 5. Injuries 1, 2, 4 and 5 caused by friction and age about 5 days before. Injury No. 3 caused by hard and blunt object and kept u.o. Advice X-ray and age about 5 days before me.

13. P.W. 7. S.I. Mohammad Azmi conducted the inquest on the corpse of the

deceased Km. Divya between 5.30 p.m. to 6.50 p.m." on 24.2.2007 on the direction of the S.H.O. Sri S.P. Singh. He sent the body for postmortem after giving a letter for that purpose (Ext. Ka-8). He denied that the name of the appellant had riot come to light till the time of inquest.

14. P.W. 8, S.I. S.P. Singh. S.H.O., P.S. Shivpur, district Varanasi proceeded to the spot where he entered the nakal chlk and nakal report in the case diary and prepared the site plan on the pointing out of the informant. He collected the plain and bloodstained earth which contained concrete and prepared its recovery memo (Ext. Ka. 4). He also collected the weapon of assault "basult" from the spot and made the recovery memo (Ext. Ka-3). On 28.2.2007, he arrested the appellant-Sanjay Kumar and recorded his statement. The accused confessed to his guilt and agreed to get the clothes that he was wearing at the time of incident recovered. He was taken by the police and other public witness Suresh Pandey and Jai Prakash to village Holapur where the appellant had hidden his clothes. On 28.2.2007 at about 1.00 p.m. in the presence of the witnesses he took out a grey colour pant, and one T-shirt, which were wrapped in a polythene bag from his hut like residence. There was some sperm mark near the chain portion. After recording the statements of the witnesses, he completed the investigation and after perusing the post-mortem report, which showed that the deceased had been raped and then murdered, he added Section 376. I.P.C. On 15.5.2007, the Investigating Officer submitted the charge-sheet (Ext. Ka. 10). He also sent the weapon of assault and clothes of the accused and the deceased to the Forensic Laboratory. The said clothes were received back from the laboratory, which were sent to the trial court in a sealed condition. He identified the clothes of the deceased and the appellant in the Court.

15. P.W. 9. Constable muharrir Raj Nath prepared the chik F.I.R. on 24.4.2007 (Ext. Ka-11) and also made a G.D. entry (Ext. Ka-12). Vide report No. 32 Section 376, I.P.C. was added on 25.2.2007.

16. P.W. 10 Beni Prasad Srivastava, peshkar of court of Judicial Magistrate-I. Ashish Verma has been examined to prove that Shri Ashish Verma recorded the 164. Cr. P.C. statement of the appellant Sanjay Kumar (Ext. Ka-14). Before recording the statement, the accused-appellant was warned that the confessional statement would be read against him and he was not bound to make the statement.

17. The defence of the accused was that he was not present at the place of incident and that the report had been lodged after consultation. He denied his participation in the incident. He denied having given any confessional statement u/s 164. Cr. P.C. He denied that the spermatozoa and semen that was found in the underwear of the deceased was his. So far as his own injuries (Ext. Ka-7), which were found by P.W. 6 Dr. D.R. Thakur was concerned, it is stated that they were the result of police beating and the police wanted to create evidence against him.

18. Principally Shri Prem Prakash Yadav, learned counsel for the appellant has pleaded that the appellant may not be given the death penalty and that imprisonment for life would meet the ends of Justice.

19. He however further raised the arguments that the F.I.R. was ante-timed and has been seen belatedly by the Magistrate. The confession made by the accused u/s 164. Cr. P.C. was not reliable. As a matter of fact there were no witnesses as the so-called witnesses Shyam Ji Sharma and his wife Smt. Rajni Sharma admitted that they had gone out to make purchases when the incident took place and in case they had arrived at the spot, the accused would have been apprehended. There was no reason for the appellant to have tried to conceal the corpse of the 18 year old girl in a trunk and not making good his escape earlier.

20. Shri P.S. Pundir, learned Additional Government Advocate on the other hand argued that the case against the appellant stood clearly established. There was no reason to suppose that the F.I.R. which was promptly lodged at 4.40 p.m. at the police station which was at a distance of 5 km. on the date of incident, was ante-timed. There was no good reason to doubt the reliability of the judicial confession u/s 164. Cr. P.C. by the appellant confessing to his guilt. All the legal precautions had been taken by the Magistrate while recording the statement u/s 164. Cr. P.C. In the conclusion of the statement itself it was mentioned that the Judicial Magistrate had warned the appellant that he was not forced to make a confessional statement and if he makes a confessional statement, it could be used against him. The Court has also recorded a finding that the confessional statement has been voluntarily given and the said statement could be read against the appellant. Two witnesses Shri Shyam Ji Verma and Smt. Rajni Sharma had given a very natural statement of the incident. There was no reason for them to have falsely implicated the appellant if he was not involved in this crime. There were good reasons for the appellant to remain back and for trying to conceal the body in a trunk.

21. On perusal of the evidence of this case, we are in agreement with the learned A.G.A. that the prosecution has succeeded in establishing its case against the appellant beyond reasonable doubt.

22. There appears no basis for the suggestion that the F.I.R. was ante-timed. The mere fact that the check F.I.R. (Ext. Ka-11) bore the signature of the Magistrate dated 7.3.2007 is not sufficient for holding that the F.I.R. was ante-timed. On 28.2.2007, the CO. had directed that the F.I.R. be sent to the Court. Simply because some papers were signed with delay, it could be due to the negligence of the investigating agency or of some petty officials in placing the file before the Magistrate and could provide no reason for discarding the testimony of the witnesses who had reached the spot when the appellant was trying to escape after trying to conceal the body in a tin trunk. There is no reason also to doubt the reliability of the 164, Cr. P.C. statement of the appellant, which was given after the appellant was warned that it could be read against him. The Magistrate had satisfied himself that the appellant was giving his statement

voluntarily.

23. In the 164. Cr. P.C. statement the appellant had stated that he had been doing the work of painting for the last three years and he used to paint the premises of Dr. Shyam Ji Verma under the contractor Rajnath. For three days, he had been working in that house alone. After describing the manner in which he assaulted the deceased, he mentioned that he had placed the corpse of Divya in the box and he was waiting for the contractor to arrive as the contractor owed him Rs. 2,000 and also the wages of the last three and a half days and the contractor had told him that he would pay him on the date of incident. However, he denied having committed rape on Divya.

24. There was no reason for the two witnesses Dr. Shyam Ji Sharma and Smt. Rajni Sharma to have concocted the story against the appellant. Their not apprehending the appellant in the circumstances is explained. The informant was crippled and the appellant was well built, so the appellant made good his escape after pushing them aside after their sudden return when he was trying to conceal the body in the trunk after committing the crime.

He may have tried to conceal the dead body in the trunk because as he stated in his 164. Cr. P.C. statement he was awaiting the arrival of the contractor for his pending payment of Rs. 2,000 and payment for the last three and a half days work.

25. The most significant feature however, which establishes the complicity of the appellant in this offence are the injuries, i.e., abrasions, contusions and nail and bite marks on the deceased as well as on the appellant, which clearly show that there was a scuffle between the two when the appellant tried to rape the deceased. There was laceration of the vagina and the vaginal vault and the hymen was ruptured and Dr. Arvind Singh. P.W. 5 had recorded a finding that forcible sexual intercourse had been committed on the deceased, which were confirmed by the injuries received by the deceased and the appellant when she may have tried to repulse the assault.

26. The presence of the abrasion 0.6 cm. x 0.4 cm. at the junction of prepuce and glans penis, epithelium grows under the scab of the appellant was clearly the result of forcible rape on an unwilling virgin victim. The said injury on the appellant at that spot could not have been caused by the beating of the police and is a clinching circumstance for showing his complicity in the crime.

27. For all these reasons, we are satisfied that the prosecution has succeeded in establishing its case against the appellant beyond reasonable doubt and the appellant is clearly guilty of the offences punishable under Sections 302 and 376. I.P.C.

28. However, the more important question in this case is whether the sentence of death awarded by the trial court u/s 302/376, I.P.C. should be maintained or should it be substituted with a sentence of imprisonment for life under the said

sections.

29. Learned counsel for the complainant placed reliance on the two Judge Apex Court decision in *B.A. Umesh Vs. Regr. Gen. High Court of Karnataka*, . However, in the said case the appellant when coming out of the house of the deceased Jayashree with a bag carrying the valuables of the house after committing rape and murder of the deceased concocted a story before P.W. 2 Suresh the 7 year old son of the victim whom he met at the door, that his mother was possessed of an evil spirit, hence he had tied her hands and was going to call a doctor. Later the V.C.R. and jewellery and other items such as clock and watch of the deceased were recovered from his possession. The finger prints on the handle of the steel almirah matched with the appellant's finger prints as per the expert report. Two days after this crime of rape, murder and robbery the appellant was caught by the public after attempting to commit a similar assault on a lady Seeba with the intention of robbing her, and thus he was held to be a menace to society who was incapable of being reformed. None of the mitigating circumstances mentioned in *Bachan Singh Vs. State of Punjab*, , or in *Machhi Singh and Others Vs. State of Punjab*, , were available to the appellant in the case before the Apex Court and the case squarely fell in the category of rarest of rare cases where the other option of awarding imprisonment for life was unquestionably foreclosed.

30. In the present case, learned counsel for the appellant has placed reliance on the three Judge decision in *Rameshbhai Chandubhai Rathod Vs. The State of Gujarat*, . In the said case, the appellant who worked as a watchman in a building had carried away a child of tender age studying in class IV and committed her rape and murder. The trial Judge had awarded death sentence and the High Court observing that in the balance sheet of aggravating and mitigating circumstances, the former were predominant, and rejected the reference and dismissed the appeal. In special appeal before the Supreme Court the two Judges Justice Arijit Pasayat and Justice A.K. Ganguly agreed that the conviction must be confirmed, but disagreed on whether the death sentence awarded by the lower Court be affirmed. Justice Pasayat observed that this was the rarest of rare cases as the appellant being a watchman in a position of trust over the little child had committed the diabolical rape and murder. Justice Ganguli however observed that the appellant being a young man of about 27 years, and "as there was some uncertainty with the nature of the circumstantial evidence and that the mitigating circumstance particularly the young age of the appellant and the possibility that he could be rehabilitated and would not commit any offence later on could not be ruled out and that the statutory obligation cast on the trial court u/s 235 (2) read with Section 354 (3) of the Cr. P.C. had been violated inasmuch that the accused had not been given adequate opportunity to plead on the question of sentence" took the view that substituting the sentence of death with a sentence of imprisonment for life would be more appropriate.

31. In view of the difference in opinion of the two Judges the matter was referred

to a three Judge Bench presided over by Justice Harjit Singh Bedi. This Bench agreed with the view taken by Justice Ganguli that the sentence of death awarded to the appellant be substituted with a sentence of imprisonment for life, and observed as follows :

2. As already mentioned above, both Hon"ble Judges have relied on a number of cases which are on almost identical facts in support of their respective points of view. We notice that there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of, individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out. 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. Both Hon"ble Judges have relied extensively on Dhanonjoy Chatterjee's case (supra). In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too was dismissed by this Court leading to the execution of the accused. Ganguli, J., has, however, drawn a distinction on the facts of that case and the present one and held that as 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 society in case he was given a chance to do so. We are therefore, of the opinion that in the light of the findings recorded by Ganguli. J., it would not be proper to maintain the death sentence on the appellant. At the same time the gravity of the offence, the behaviour of the appellant and the fear and concern such incidents generate in ordered society, cannot be ignored. We, therefore, feel that a via-media ought to be adopted in the light of the judgment of this Court in Ramraj @ Nanhoo @ Bihnu Vs. State of Chhattisgarh, and Mulla and Another Vs. State of Uttar Pradesh, . In these two cases, this Court has held 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 u/s 433A of the Code of Criminal Procedure. In Mulla's case (supra), this 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. Here we would like to note that the punishment of life sentence in this case must extend to their full life, subject to any remission by the Government for good reasons.

For the foregoing reasons and taking into account all the aggravating and mitigating circumstances, we confirm the conviction, however, commute the

death sentence into that of life imprisonment. The appeal is disposed of accordingly.

32. On the aforesaid reasoning the Apex Court in Rameshbhai Chandubhai Rathod's case (supra) converted the death sentence to imprisonment for the whole of the natural life of the appellant, observing however that the prisoner would be eligible to any commutation and remissions at the instance of the Government for good and sufficient reasons. However, the Bench observed that the finding in Justice Ganguli's judgment regarding absence of sufficient opportunity to the appellant to plead on the question of sentence, that the statutory obligation cast on the trial court u/s 235 (2) read with Section 354 (3) of the Cr. P.C. appeared to be too broadly stated. It was observed by the Bench : "We are of the opinion that some of the observations made are a little broad based on the facts of the present case and would present insurmountable practical difficulties for a trial court. Even otherwise the facts indicate that the appellant had been given enough time and opportunity for pleading on the question of sentence.

33. We are In agreement with the view taken by Justice Harjit Singh Bedi, speaking for the three Judge Bench in Rameshbhai Chandubhai Rathod's case (supra). This is a case of circumstantial evidence. A submission has also been raised as to why the accused had not been apprehended at the spot if he had stayed back to conceal the corpse in the tin trunk, for which there was no need. Although for the reasons above stated we have rejected this contention as a ground for acquittal, but this circumstance together with the fact that there was no material or finding for showing that there was likelihood of the accused repeating this crime, which he may have committed on the spur of the moment on finding himself alone with the victim after he may have temporarily lost control over his passions, and there was no finding that the appellant could never have been reformed, as the rape and murder did not appear to be a cold-blooded premeditated crime. In somewhat similar circumstances in paragraph 22 in Amrit Singh Vs. State of Punjab, , it has been observed : "Imposition of death penalty in a case of this nature, in our opinion, was thus, improper. Even otherwise, it cannot be said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of appellant, seeing a lonely girl at a secluded place. He had no pre-meditation for commission of the offence. The offence may look a heinous, but under no circumstances. It can be said to be a rarest of rare case.

Four mitigating circumstances mentioned in paragraph 204 by the Constitutional Bench In Bachan Singh Vs. State of Punjab, , are :

- (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
- (2) The age of (he accused. If the accused is young or old he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

34. In the light of the case law cited above and on a consideration of the totality of circumstances we are of the view that the present case does not fall within the category of rarest of rare cases where the other option of awarding a sentence of imprisonment for life is unquestionably foreclosed and in accordance with the via-media suggested by the three Judge Bench headed by Justice Harjit Singh Bedi in Rameshbhai Chandabhai Rathod (supra) we think that in the present case also the ends of justice would be met if the sentence of death awarded to the appellant be substituted with a sentence of imprisonment for the whole of the remaining natural life of the appellant, subject however to the condition that the prisoner would be eligible to any commutation and remissions that may be granted by the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government u/s 433A of the Code of Criminal Procedure for good and sufficient reasons. Subject to the aforesaid observations the appeal is dismissed. The reference for confirming the death sentence is rejected.