
(2016) 01 BOM CK 0122

In the Bombay High Court

Case No : Confirmation Case No. 1 of 2015 in Sessions Case No. 127 of 2012
and Criminal Appeal No. 783 of 2015

The State of Maharashtra

APPELLANT

Vs

Ravi

RESPONDENT

Date of Decision : 20-01-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 235(2), Section 313, Section 354(3)
Evidence Act, 1872 — Section 106
Penal Code, 1860 (IPC) — Section 302, Section 363, Section 376, Section 377

Citation : (2016) 1 AIRBomRCri 876 : (2016) ALLMRCri 3703 : (2016) 2
BomCR(Cri) 346 : (2016) MCR 490 : (2016) 5 MhLJCrI 88

Hon'ble Judges : Anand Vasant Nirgude and I.K. Jain, JJ.

Bench : Division Bench

Advocate : A.B. Girase, P.P., S.J. Salgare and S.P. Deshmukh, A.P.Ps., for the
Appellant; Naseem R. Shaikh, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

I.K. Jain, J.—1. Confirmation Case No. 1 of 2015 arises out of the Reference made by the learned Additional Sessions Judge, Jalna in Sessions Case No. 127 of 2012 for confirmation of death sentence awarded to appellant/accused Ravi S/o. Ashok Ghumare. By the judgment and order dated 16.9.2015 the learned Additional Sessions Judge convicted the accused for the offence punishable under Section 302 of the Indian Penal Code (for short IPC) and sentenced him to capital punishment of death. By the very same judgment and order accused was also convicted for the offences punishable under Sections 363, 376 and 377 of the Indian Penal Code and sentenced as under--

2. Accused being aggrieved by the said judgment and order preferred Criminal Appeal No. 783 of 2015. As the Confirmation Case and the Appeal are directed against the same judgment and order both were heard and are being decided together.

3. The facts in the present case unfold an inhuman act of aggression and an intrusion into the privacy of a two year old innocent child in the utter disregard of her right to be respected, protected and cared as well as of the freedom of life. When a child is born thought of creative intelligence comes into action. When a child sees the mother earth it is a grace to the human race but unfortunately in the case on hand life span of a girl child was guillotined before it could blossom because of unimaginable carnal desire of the Accused. The gruesome nature of the crime and the diabolical manner in which it is executed poses a question whether the author of such crime can ever be reformed and if death penalty is given in such a case whether it would be justified irrespective of the fact whether it acts as deterrent or not.

4. Prosecution case briefly stated is as under:-

(i) The first informant PW 9 Iliyas Mohinuddin Pathan is dealing in business of sale of fruits. He is resident of Jalna. He had a two year old daughter Zoya. On 6.3.2012 when he was busy in his business activities he was informed by his wife that Zoya was missing. He rushed home. They tried to search whereabouts of missing girl.

(ii) During search complainant was informed by PW 2-Shaikh Azhar that accused had consumed alcohol and was distributing chocolates to the small children in the lane. Informant went to his house. Accused was residing in the same lane. It was noticed that house of the accused was locked. As whereabouts of the daughter could not be known complainant lodged missing report to police. He also informed police about the information received from PW-2 Shaikh Azhar.

(iii) Police then came to the house of accused. The house had two doors. One was found locked and another was closed from inside. Police broke open the door and entered the house along with informant, his brother and others. They saw accused in the house. Victim was lying under the bed in a necked and unconscious condition. Blood was oozing from her private part. She received multiple injuries on the body. Victim was removed to the hospital where she was declared dead. Inquest panchanama was recorded. The body was sent for postmortem. The panel of doctors including PW-7 Dr. Survase and PW-8 Dr. Bedarkar performed postmortem. They found multiple injuries on the person of victim and opined cause of death as asphyxia due to throttling.

(iv) On 7.3.2012 at 00.30 hours PW 9 Iliyas Pathan lodged report. Crime No. 56 of 2012 was registered against the accused. Investigation was handed over to PW 12 P.I. Rajendrasing Gaur. Accused was arrested at 1.00 a.m. on the same day. The clothes on the person of accused were seized. Seizure panchanama was drawn in the presence of panch witnesses Shaikh Irshad and Shaikh Naim.

(v) The father of victim produced clothes on the person of victim. They came to be seized in the presence of PW 1 Syed Mujid and Mohd. Akbarkhan. Scene of offence panchanama was drawn. Articles found on the spot were seized at the time of recording spot panchanama. Accused was referred for medical

examination to Ghati Hospital, Aurangabad.

(vi) On 11.3.2012 blood sample of the accused was taken. Seized muddemal and blood samples were sent to Mumbai for DNA examination. On the instructions of the office of expert again blood sample of Accused was taken on 13.3.2012 and the same was sent for the test.

(vii) On completion of investigation charge sheet was submitted to the learned Chief Judicial Magistrate, Jalna who in turn committed the case for trial to the Court of Sessions.

5. Charge came to be framed against the accused under Sections 363, 376 and 302 of the Indian Penal Code vide Exh. 4. Accused pleaded not guilty to the charge and claimed to be tried. During trial Prosecution moved an application (Exh. 61) to frame additional charge under Section 377 of the Indian Penal Code. The said application was allowed and accordingly additional charge under Section 377 of the Indian Penal Code was framed. It was explained to the accused. Accused pleaded not guilty and claimed to be tried. The defence of accused was of total denial and false implication.

6. Prosecution examined in all 12 witnesses during trial. After going through the evidence adduced in the case, the learned Additional Sessions Judge convicted and sentenced the accused as stated in para 1 above.

7. We have heard the learned counsel for appellant/accused and the learned Public Prosecutor for the State. After giving our anxious consideration to the facts and circumstances of the case, arguments advanced by the learned advocates for the parties, judgment and order delivered by the learned Additional Sessions Judge and the evidence on record, for the reasons stated below we are of the opinion that Appellant/Accused has committed offences punishable under Sections 302, 376, 377 and 363 of the Indian Penal Code.

8. Needless to state that in a case of murder exclusive burden lies on the Prosecution to establish that death of a human being is caused. Prosecution has to overrule the possibility of natural, accidental or suicidal death by adducing reliable and convincing evidence clearly indicating the mode of death as homicidal. In the present case to prove homicidal death Prosecution has placed strong reliance on medical and circumstantial evidence.

9. So far as medical evidence is concerned, PW 7 Dr. B.L. Survase and PW 8 Dr. R.N. Bedarkar are the witnesses who throw light on the factum of homicidal death. PW 7 Dr. Survase was attached to Civil Hospital, Jalna as medical officer. He stated that on 7.3.2012 dead body of Zoya was brought by police and postmortem was conducted by panel of doctors on the request of police. The panel consisted of Dr. Kanade, PW 8 Dr. Bedarkar, Dr. Jadhawar, Dr. Badale, Dr. Palla and Dr. Survase himself. According to Dr. Survase at the time of performing postmortem he noticed dry blood stains over genitals up to thigh and pelvic region of the death body. On external examination they found the following

injuries.

- (i) Linear abrasion on right side of chest 2 cm, oblique, reddish in colour
- (ii) Abrasion over left zygomatic area, 5 x 2 c.ms.
- (iii) Linear abrasion, left side of neck, above clavicle reddish, about 1 cm in length and 2 in number
- (iv) Linear abrasion, left scapular region, two in number, one below other 2 1/2 c.m. reddish in colour
- (v) Abrasion, 5 in number, at the centre over lower back, 1/2 x 1 c.m. each in size
- (vi) Contusion over vault 1/2 x 1/2 c.m.
- (vii) Abrasion over right sub mandibular region, 1 cm reddish
- (viii) Abrasion, right supra clavicular region, 2 in number, 1/2 cm each, over above other

10. During internal examination doctor noticed neck dissection under the skin, contusion to muscle and subcutaneous tissues corresponding to abrasions on skin. Right and left lungs congested. Heart was found congested. Right side of heart was full of blood and left side was empty. Tongue was inside the mouth between the teeth. Stomach was congested and was containing semi digested food.

11. On vaginal examination evidence of tear at posterior vaginal wall and triangular shape tear 2 x 1 x 1/2 c.m. could be noticed and hymen was found ruptured.

12. It is stated by PW 7 Dr. Survase that external injuries were corresponding to the internal injuries and were sufficient in the ordinary course of nature to cause death. All the injuries were ante mortem. The cause of death opined by the medical doctor was due to throttling. Postmortem report is duly proved by PW 7 Dr. Survase at Exh. 59. In the cross-examination of PW 7 Dr. Survase nothing substantial could be elicited to disbelieve his testimony. PW 8 Dr. Bedarkar another member of the panel fully supported the evidence of PW 7 Dr. Survase. The evidence of Dr. Bedarkar is consistent to the postmortem report and his testimony could not be shaken in cross-examination.

13. In addition to medical evidence, Prosecution has relied upon uncontroverted inquest panchanama (Exh. 20). The genuineness of inquest panchanama is not disputed. From the unshaken testimony of PW 7 Dr. Survase, PW-8 Dr. Bedarkar, postmortem report (Exh. 59) and unchallenged inquest panchanama (Exh. 20) an irresistible conclusion must follow that death of victim girl was homicidal in nature.

14. Now, in order to ascertain whether accused is responsible for rape and

causing death of victim girl we have to evaluate the evidence of Prosecution witnesses.

15. There is no direct evidence in the matter. Prosecution case exclusively rests on circumstantial evidence. It may be stated that for a crime to be proved, it is not necessary that the crime must be seen to have been committed and must, in all circumstances, be proved by direct or ocular evidence by examining before the Court those persons who had seen its commission. The offence can be proved by circumstantial evidence also. The principal fact or "factum probandum" may be proved indirectly by means of certain inferences drawn from "factum probans" i.e. evidentiary facts. To put it differently, circumstantial evidence is not direct to the point in issue but consists of evidence on various other facts in issue that taken together forms a chain of circumstances from which the existence of a principal fact can be legally inferred or presumed.

16. It has been consistently laid down by the Hon''ble Apex Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. A legal trend would further show that for a conviction in murder case on circumstantial evidence, following conditions must be fulfilled:

- i) The circumstances from which the conclusion of guilt is to be drawn should be fully established.
- ii) The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is, they should not be explainable on any other hypothesis except that the accused is guilty.
- iii) The circumstances should be of a conclusive nature and tendency.
- iv) They should exclude every possible hypothesis except the one to be proved.
- v) 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 it must show that in all human probability, the act must have been done by the accused and the accused alone.

17. Keeping in view the ratio laid down by the Hon''ble Supreme Court, we shall examine the circumstantial evidence on which reliance is placed by the prosecution.

18. In the present case, prosecution has relied upon the following incriminating circumstances which according to prosecution prove the guilt of Accused beyond reasonable doubt.

- A) Accused was found with victim girl in a house one door of which was locked from outside and another door closed from inside,
- B) Multiple injuries found on the person of victim,

- C) Medical evidence showing that the girl was forcibly raped and done to death,
- D) Recovery of blood stained jeans pant and full bush shirt (torn) from the Accused,
- E) Motive,
- F) Failure of Accused to offer plausible explanation to the incriminating circumstances against him.

19. (A) ACCUSED WAS FOUND WITH VICTIM GIRL IN A HOUSE ONE DOOR OF WHICH WAS LOCKED FROM OUTSIDE AND ANOTHER DOOR CLOSED FROM INSIDE:-

i. PW-3 API Dilip Pralhadrao Tejan, PW-4 Police Constable Sanjay Tukaram Katake, PW-5 Sk. Aslam Sk. Ahmed and PW-9 informant Iliyas Mohinoddin Pathan are the star witnesses who found Accused with the deceased in a house which was locked.

ii. PW-9 informant Iliyas is father of victim Zoya. He stated that on 6th March, 2012, he was busy in selling fruits at Nutan Vasahat area Jalna. At about 05:00 pm in the evening he was informed by his wife Ayesha on phone that since 04:00 pm Zoya was missing. He went home. His father, brother and he himself went in search of Zoya in adjoining locality. During search PW-2 Sk. Azhar Sk. Usman informed PW-9 Iliyas that Accused was under influence of liquor and was giving chocolates to the children. This evidence is corroborated by PW-2 Sk. Azhar. On receiving such information PW-9 Iliyas went to the house of Accused. He found the house locked from outside. He then went to police station and lodged missing report between 08:00 pm and 08:30 pm. Complainant also disclosed to police about the information received from PW-2 Sk. Azhar.

iii. After some time police came to the spot. PW-9 Iliyas, PW-5 Sk. Aslam maternal uncle of victim, PW-3 API Dilip, PW-4 PC Sanjay and other police staff then went to the house of Accused. They noticed another door to the house. Police broke open the door. PW-9 Iliyas and others entered the house. PW-9 Iliyas further states that Accused was found under the bed. Victim Zoya was lying naked. They noticed injuries on her person. Blood was oozing from her private part. Police covered the victim with clothes and took her to Hospital at Jalna. Doctor declared Zoya as dead. PW-9 Iliyas then lodged report against the Accused. The said report is at Exhibit 67.

20. The evidence of PW-9 informant Iliyas receives corroboration from the testimony of PW-5 Sk. Aslam. He is the maternal uncle of victim. It is stated by PW-5 Sk. Aslam that Accused was residing near the house of his sister. The evidence of PW-5 Sk. Aslam shows that incident occurred on 6th March, 2012. PW-9 Iliyas informed him on phone that Zoya was missing. PW-9 Iliyas also asked PW-5 Sk. Aslam to bring her photo in the police station. So Sk. Aslam carried photo of Zoya to police station. PW-9 Iliyas lodged missing report. Then they went in search of Zoya in Ambad Chouphuli, railway station and Motibag

area. Sk. Aslam was telephonically informed by one Hussain Pathan that whereabouts of Zoya could be traced. He accordingly went to the house of Accused Ravi. It is stated by Sk. Aslam that he noticed that Ravi Ghumare was under the bed and Zoya was on the bed. There were no clothes on the person of Zoya. She was wrapped in a blanket. They took her to Deepak Hospital, Jalna and then to Civil Hospital where doctor declared her dead.

21. The next important witness who saw Accused with victim is PW-3 API Dilip Pralhadrao Tejan. PW-3 Tejan was attached to Kadim Jalna Police Station at the relevant time as PSI. He states that on 6th March, 2012 Iliyas lodged missing report of his two year old daughter Zoya. PSI Thombre recorded the missing report and entrusted inquiry to PW-3 Tejan.

22. PSI Tejan conducted inquiry in Missing Report No. 15 of 2012. He alongwith police personnel Katake, Jawale, Rathod and Chavan had been to Indira Nagar area Jalna. They had received information that Accused Ravi was giving chocolate, ice-cream and food to minor children. They had been to the house of Accused on the same day between 09:30 and 09:45 pm. They saw through a gap of another door one cloth around the bed. They called in the name of Ravi. No one responded. Then they broke open the door and entered the house. PW-3 Tejan further stated that kid was found naked and blood was oozing from her private part. Accused was also found naked. The kid was covered with blanket and taken for medical treatment. Several persons gathered there. They were insisting the police to give Accused in their custody. Police rescued the Accused and took him to police station.

23. Another star witness for the prosecution is PW-4 Police Constable Sanjay. He fully supports the prosecution witness PW-3 PSI Tejan, PW-5 Sk. Aslam and PW-9 informant Iliyas. It is stated by PW-4 PC Sanjay that on 6th March, 2012, after missing report of Zoya was lodged to the police station, he alongwith other police persons namely Choudhary, Jawale, Chavan, Rathod accompanied Mr. Tejan for inquiry into the missing report. They went to Indira Nagar area Jalna. They were informed by people in the vicinity that Accused Ravi used to give ice-cream and chocolate to the children. The evidence of PW-4 PC Sanjay further shows that they went to the house of Accused. They saw two doors to the house. One door was locked from outside and another door was closed from inside. They called in the name of Ravi. Through the gap in the door, they saw one bed and one cloth around it. They had a doubt that somebody was under the bed. They broke open the door and entered the house. Mr. Tejan removed cloth around the bed. They noticed Accused and kid Zoya under the bed in naked condition. Mr. Tejan took that kid on the bed. Blood was oozing from her private part. She was covered with a blanket and then sent to hospital through her maternal uncle. PW-4 PC Sanjay further states that 4-5 persons who entered the house were asking police to give Accused in their custody. That time around 150 to 200 persons had gathered on the spot. Police refused to give the custody of Accused to mob. Mob became aggressive and started pelting stones on police vehicles which were in

the lane and also on policemen. Those persons also caused damage to the house of Accused. PW-4 PC Sanjay lodged report in that regard to the Police Station. The said report is proved by him at Exhibit 45. A summary report was submitted in that crime.

24. On going through the cross-examination of these important witnesses we did not notice any material omission or contradiction in their testimonies. PW-3 Tejan and PW-4 Sanjay were the police witnesses. They had no reason to grind an axe against the Accused. They never knew the Accused before incident. No animosity or grudge is attributed to the police witnesses PW-3 and PW-4 by Accused. Their evidence is most natural, consistent, believable and trustworthy.

25. The evidence of PW-9 informant Iliyas and PW-5 Sk. Aslam has been assailed on behalf of the Accused on the ground that one is father and another is uncle of the victim. It is alleged that they are highly interested witnesses. Another ground raised by Accused is that Complainant had a previous dispute regarding purchase of premises where Iliyas resides and in view of the dispute he lodged false complaint. PW-9 Iliyas has denied such dispute between him and Accused. There is no evidence to show that Complainant had any reason to falsely implicate Accused in such a case. On close scrutiny of the evidence of PW-9 Iliyas and PW-5 Sk. Aslam we found that they fully support the prosecution and there is no reason to even slightly doubt their testimonies.

26. From the evidence of PW-3 Tejan, PW-4 Sanjay, PW-5 Sk. Aslam and PW-9 Iliyas it is clear that Accused was found with the deceased in a house one door of which was locked from outside and another door was closed from inside. It is also established from their evidence that victim was found naked. The blood was oozing from her private part. Both the police witnesses had seen the Accused in naked condition. Multiple injuries were found on the person of victim including on private part. No one else than Accused was present in the house.

27. In such a case provisions of Section 106 of the Indian Evidence Act would be attracted. Section 106 of the Indian Evidence Act provides that when any fact is specially within the knowledge of any person, the burden of proving that fact is upon him. In a case based on circumstantial evidence, if Accused fails to offer reasonable explanation in discharge of burden placed on him that itself provides an additional link in the chain of circumstances proved against him.

28. True, burden of proof is always on the prosecution and Section 106 of the Indian Evidence Act does not shift the burden of proof in criminal trial. It lays down the rule that when the Accused does not throw any light upon the facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the Court can consider his failure to offer an explanation as an additional link which completes the chain of circumstances.

29. In the present case Accused had not offered any explanation in his statement under Section 313 of the Code of Criminal Procedure for the clinching

circumstances in which he was found with a kid of two year old. The silence on the part of Accused is a very strong circumstance against him as the victim girl was found dead in his custody.

30. In view of the evidence discussed above we find that the prosecution has proved this incriminating and clinching circumstance against the Accused.

31. (B) MULTIPLE INJURIES FOUND ON THE PERSON OF VICTIM,

(C) MEDICAL EVIDENCE SHOWING THAT THE GIRL WAS FORCIBLY RAPED AND DONE TO DEATH,

(D) RECOVERY OF BLOOD STAINED JEANS PANT AND FULL BUSH SHIRT (TORN) FROM THE ACCUSED:-

According to PW-12 PI Rajendrasingh Prabhusingh Gaur after arrest Accused was referred to Ghati Hospital, Aurangabad for medical examination. Blood sample of Accused was taken on 11th March, 2012. On the same day he sent the seized Muddemal and blood samples to Mumbai for DNA examination. It can be seen from investigation that father of victim had produced her nicker, frock, blanket in which she was wrapped, blue bangle, painjam etc. on the next day. Those articles were seized under panchanama Exhibit 32. Clothes of Accused were also seized. As stated by Medical Officer PW-7 Dr. Survase blood sample of deceased was collected at the time of postmortem examination. All these articles were sent to PW-11 Mr. Lade for DNA examination.

32. PW-11 Mr. Shrikant Hanumant Lade was attached to Forensic Science Laboratory, Mumbai as Assistant Director. It is stated by PW-11 Mr. Lade that he examined anal swab, blood and semen samples and jeans pant of Accused and swab of victim. On examination Mr. Lade opined that Accused had committed unnatural intercourse with the victim. The evidence of Medical Officers PW-7 Dr. Survase and PW-8 Dr. Bedarkar if considered alongwith the evidence of PW-11 Mr. Lade and DNA findings that lead us to irresistible conclusion that Accused committed rape, carnal intercourse against the order of nature with the victim, caused multiple injuries to her and done her to death. Considering the evidence of witnesses named above we have no reason to disbelieve these strong clinching circumstances duly proved against the Accused.

33. (E) Motive:-

Another circumstance relied upon by prosecution is motive to commit crime. In a case based on circumstantial evidence, motive assumes pertinent significance as existence of motive is an enlightening factor in a process of presumptive reasoning in such a case. The absence of motive however, puts the court on its guard to scrutinize the circumstances more carefully to ensure that surmises and conjectures do not take place of legal proof.

34. From the incriminating circumstances discussed here-in-above motive of the accused in the present case has been established i.e. to satisfy the unbridled lust

of the accused and then to cause death of victim girl so that his acts can be simply buried forever. As motive is apparent, prosecution does safely cross this hurdle too.

35. (F) FAILURE OF ACCUSED TO OFFER PLAUSIBLE EXPLANATION TO THE INCRIMINATING CIRCUMSTANCES AGAINST HIM:-

The last circumstance against the Accused is his failure to offer plausible explanation to the incriminating circumstances against him. We have already stated that in his statement under Section 313 of the Code of Criminal Procedure Accused has not given any explanation whatsoever for any of the clinching circumstances brought on record by the prosecution against him. We consider the silence of Accused as an additional link to complete the chain in the circumstantial evidence and on the close and critical examination of the evidence on record we hold that all the circumstances proved by the prosecution clearly indicate that accused and accused alone is responsible for the acts attributed to him.

36. To sum up we reiterate the incriminating circumstances proved against the accused as under--

- (i) Accused was found with the victim in a house one door of which was locked from outside and another door was closed from inside,
- (ii) Accused and deceased both were found naked,
- (iii) Multiple injuries were found on the person of victim. The blood was oozing from her private part,
- (iv) Before the incident Accused was seen distributing chocolate to children,
- (v) The clothes of Accused were found stained with blood,
- (vi) Medical evidence and DNA findings unhesitatingly show that girl was forcibly raped, carnal intercourse against the order of nature was committed and then she was done to death,
- (vii) Motive to gratify the lust,
- (viii) Failure of Accused to offer plausible explanation of incriminating circumstances established against him.

37. All these circumstances conclusively prove that all links in the chain are so complete that they do not leave any reasonable ground for a conclusion consistent with the hypothesis of the innocence of the accused. On the contrary, the same are of exclusive nature consistent only with the hypothesis of the guilt of the accused and conclusively lead to an irresistible conclusion that it is the accused who took away the victim girl to a house, sexually assaulted her, committed carnal intercourse with her and caused her death. These acts are squarely covered under Sections 302, 376, 377 and 363 of the Indian Penal Code.

38. This takes us to the quantum of sentence. Learned counsel for Accused Ravi Ghumare is heard on the point of sentence. Learned counsel submits that Accused is 25 year old young boy. He has family responsibilities of parents, younger brothers and sisters. On behalf of Appellant Mr. Shaikh submitted that it is not a rarest of rare case and capital punishment ought not to have been awarded in this case. On the mitigating circumstances Mr. Shaikh placed reliance on the following authorities:

a) Shankar Kisanrao Khade Vs. State of Maharashtra , AIR 2013 SC (Supp) 947

b) Amit Vs. State of U.P. , AIR 2012 SUPREME COURT 1433

c) State Vs. Suresh , 1999 CRI. L.J. 2491 (Allahabad)

39. In the case of Shankar Kisanrao Khade Vs. State of Maharashtra (supra) the Hon"ble Supreme Court held that while awarding death sentence Court has to apply "crime test", "criminal test" and "R-R Test" and not "balancing test". In paragraph Nos. 27 and 28 Their Lordships observed thus--

"27. In Sangeeta's case this Bench has held that there is no question of balancing the above mentioned circumstances to determine the question whether the case falls into the rarest of rare cases category because the consideration for both are distinct and unrelated. In other words the "balancing test" is not the correct test in deciding whether capital punishment be awarded or not.

28. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test.

(R-R Test). R-R Test depends upon the perception of the society that is "society centric" 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 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, suffering from physical disability, old and infirm women with those disabilities etc... Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges."

40. In this connection learned counsel for Appellant vehemently contended that in the present case young age of accused, possibility of reformation, no previous criminal record are the mitigating circumstances to avoid capital punishment and since there is no material on record to show that crime test, criminal test and R-R test have been complied, there is no question of application of rarest of rare test in the present case.

41. In the case of Amit Vs. State of U.P. (supra) the Hon'ble Apex Court held that accused was a young person of 28 year and a neighbourer. No previous record of commission of offences of kidnapping, rape or murder was available. Possibility of reformation was not ruled out and in such a circumstance death sentence was held as unwarranted.

42. State Vs. Suresh referred above was the case before the Allahabad High Court in which deceased died of asphyxia during commission of rape on her by accused. The victim was 10 year old. In the facts and circumstances it was observed that extreme penalty of death is not called for as it could not be said to be a murder of brutal, grotesque, diabolical, revolting or dastardly nature.

43. In response to the submissions made on behalf of Appellant, learned PP strenuously submitted that considering the nature of offence, manner in which it was committed and its impact on the society at large, no leniency be shown to Appellant/Accused. According to Mr. A.B. Girase it is a rarest of rare case and Trial Court has rightly awarded capital punishment. On the point of death sentence, learned PP relied upon the following authorities--

- a) Bachan Singh Vs. State of Punjab , (1980) 2 Supreme Court Cases 684.
- b) Macchi Singh and Others Vs. State of Punjab , (1983) 3 Supreme Court Cases 470.
- c) Dhananjay Chatterjee alias Dhana Vs. State of W.B. , (1994) 2 Supreme Court Cases 220.
- d) Laxman Naik Vs. State of Orissa , (1994) 3 Supreme Court Cases 381.
- e) Bantu Vs. State of Uttar Pradesh , (2008) 11 Supreme Court Cases 113.
- f) Shivaji alias Dadya Shankar Alhat Vs. State of Maharashtra , (2008) 15 Supreme Court Cases 269.
- g) Rajendra Pralhadrao Wasnik Vs. State of Maharashtra , AIR 2012 SUPREME COURT 1377.
- h) Vasanta Sampat Dupare Vs. State of Maharashtra 2014 AIR SCW 6952.
- i) State of Maharashtra Anr. Vs. Rakesh Manohar Kamble @ Niraj Ramesh Wakekar Anr. , 2014 (2) Bom. C.R. (Cri.) 664 (NAGPUR BENCH)
- j) Purushottam Dashrath Borate and Anr. Vs. State of Maharashtra CRIMINAL APPEAL No. 1439 OF 2013 (SUPREME COURT OF INDIA)

k) The State of Maharashtra Vs. Viran Gyanlal Rajput CRIMINAL CONFIRMATION CASE No. 03 OF 2014 (HIGH COURT, BOMBAY)

l) State of Maharashtra Vs. Shatrughna Baban Meshram CRIMINAL CONFIRMATION CASE No. 01 OF 2015 (NAGPUR BENCH)

44. In Macchi Singh's case (supra), the Hon'ble Supreme Court justified capital sentence in rarest of rare cases. It was observed that death sentence can be awarded when the collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. In paragraphs 32, 34, 35, 36 and 37 of the judgment various circumstances were stated where the community may entertain such sentiments. They are:

(i) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community.

(ii) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(iii) When murder of member of a Scheduled Caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath; or in cases of "bride burning" or "dowry deaths" or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(iv) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community or locality, are committed.

(v) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

45. In this case, Their Lordships have observed that guidelines indicated in Bachan Singh Vs. State of Punjab (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing the death sentence arises. The following positions emerge from Bachan Singh case (supra):

(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.

46. Before the new Code of Criminal Procedure both alternative sentences provided in Section 302 of the Indian Penal Code were normal sentences but position is now modified by Section 354(3) of the Code of Criminal Procedure which mandates the Courts convicting a person for an offence punishable with death or in the alternative with imprisonment for life or any other term of imprisonment not to impose sentence of death on that person unless there are "special reasons" to be recorded by the Court for such sentence. The expression "special reasons" in Section 354(3) means "exceptional reasons" founded on exceptional grave circumstances of the crime as well as the criminal as held in Bachan Singh's case. In this connection, it is necessary here to refer the relevant paragraph from the judgment in Bachan Singh's case (supra):

"As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of "special reasons" in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends on the facts and circumstances of the particular case. More often than not, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. This is so because style is the man. In many cases, the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator. That is why, it is not desirable to consider the circumstances of the crime and the circumstances of the criminal in two separate water tight compartments. In a sense, to kill is to be cruel and therefore all murders are cruel. But such cruelty may vary in its degree of culpability. And it is only when the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

47. In the case of Dhananjay Chatterjee (supra), accused committed rape and murder of a young girl of about 18 years in the society where he was working as a security guard. The Hon'ble Supreme Court observed that the measure of punishment in a given case must depend upon the atrocity of the crime, conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the Courts respond

to the society's cry for justice against the criminals. Justice demands that Courts should impose punishment befitting the crime so that the Courts reflect public abhorrence of the crime. The Hon'ble Supreme Court further observed that the Courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

48. In *Laxman Naik Vs. State of Orissa* referred above seven year old girl was sexually assaulted by her own uncle who done her to death. The death sentence was imposed by Trial Court and confirmed by the High Court. The Hon'ble Supreme Court observed that on facts and circumstances death sentence was justified.

49. In the case of *Bantu Vs. State of Uttar Pradesh (supra)* a five year old minor girl was raped and murdered. Appellant was awarded death sentence by Trial Court which was affirmed by the High Court. The Hon'ble Supreme Court reiterated the principles stated in *Bachan Singh Vs. State of Punjab (supra)*, *Macchi Singh and Others Vs. State of Punjab (supra)* and held that the case fell in the category of rarest of rare case in which the capital punishment was warranted.

50. In the decision in *Shivaji (supra)*, rape and murder of a small child of 9 years was committed. The case was exclusively based on circumstantial evidence. Plea that in case of circumstantial evidence, death penalty should not be awarded was held without logic. The Hon'ble Supreme Court held that circumstances proved establish the depraved acts of the accused and they call for only one sentence that is the death sentence.

51. In the case of *Rajendra Wasnik* referred above, the accused aged 31 years committed rape on a 3 year old minor girl and thereafter committed her murder. In the said case, death sentence was confirmed. The Hon'ble Supreme Court, after considering earlier decisions relating to sentencing policy in cases of death sentence, observed that the Court then would draw a balance-sheet of aggravating and mitigating circumstances. Both aspects have to be given their respective weightage. The Court has to strike a balance between the two and see towards which side the scale/balance of justice tilts.

52. In the recent decision of *Vasanta Dupare Vs. State of Maharashtra* referred above, accused was found guilty of kidnapping, rape and murder of 4 year old girl. Confirming the death sentence, the Hon'ble Supreme Court observed--

"As is manifest, he even did not think for a moment the trauma and torture that was caused to the deceased. The gullibility and vulnerability of the four year girl, who could not have nurtured any idea about the maladroitly designed biological desires of this nature, went with the uncle who extinguished her life spark. The barbaric act of the appellant does not remotely show any concern for the precious life of a young minor child who had really not seen life. The criminality of the conduct of the appellant is not only depraved and debased, but can have a

menacing effect on the society. It is calamitous. Not only the rape was committed in a brutal manner but murder was also committed in a barbaric manner. The rape of a minor girl child is nothing but a monstrous burial of her dignity in the darkness. It is a crime against the holy body of a girl child and the soul of the society and such a crime is aggravated by the manner in which it has been committed. The nature of the crime and the manner in which it has been committed speaks about its uncommonness. The crime speaks of depravity, degradation and uncommonality. It is diabolical and barbaric. The crime was committed in an inhuman manner. Indubitably, these go a long way to establish the aggravating circumstances. Further the appalling cruelty shown by him to the minor girl child is extremely shocking and it gets accentuated, when his age is taken into consideration. It was not committed by accused under any mental stress or emotional disturbance and it is difficult to comprehend that he would not commit such acts and would be reformed and rehabilitated. As the circumstances would graphically depict, he would remain a menace to the society, for, a defenceless child has become his prey. Thus, there are no mitigating circumstances. It is inconceivable from the perspective of the society that a married man aged about two scores and seven make a four year minor innocent girl child a prey of his lust and deliberately cause her death. A helpless and defenceless child gets raped and murdered because of the acquaintance of the appellant with the people of the society. This is not only betrayal of an individual trust but destruction and devastation of social trust. It is perversity in its enormity. It irrefragably invites the extreme abhorrence and indignation of the collective. It is an anathema to the social balance. It meets the test of rarest of rare case and therefore, death sentence is affirmed."

53. In *Purushottam Dashrath Borate and Anr. Vs. State of Maharashtra* (supra) deceased was serving as an Associate in the branch of Wipro Company at Pune. The Company had arranged for transport and hired a private cab service for its employees from their residence to the workplace. Appellant/Purushottam was driver of private cab. Appellants hatched a conspiracy to abduct the deceased and take her to a secluded spot under the guise of taking her to workplace in the night. Accordingly, they abducted the deceased, committed gang rape and murdered her by strangulation. On the facts and circumstances of the case the Hon"ble Apex Court confirmed the death sentence awarded to the Appellants.

54. We have heard the learned counsel for parties in extenso on the question of sentence. We have given our anxious consideration to the submissions made by learned counsel for Appellant and learned PP for the State. Keeping in view the proposition of law and guidelines laid down by the Constitution Bench of the Hon"ble Supreme Court time and again it appears to us that for deciding just and appropriate sentence to be awarded for an offence aggravating and mitigating factors and circumstances in which crime has been committed are to be delicately balanced in a dispassionate manner. We now propose to deal with aggravating and mitigating circumstances in the present case.

55. AGGRAVATING CIRCUMSTANCES:

- a) The offence committed by Accused had not been committed on the spur of moment. It was preplanned. Accused took away the victim girl to the house one door of which was locked from outside and another door was closed from inside to get rid of any suspicion or doubt.
- b) Accused committed the offence in order to satisfy his lust. He forcibly raped two year old defenceless child and eliminated her life even before she could really see the world. We consider this grisly and a gory episode as an ultimate insult to the humanity in general and womanhood in particular.
- c) The crime is committed in beastly, brutal and barbaric manner.
- d) Subsequent conduct of accused indicates that he had felt no remorse.
- e) Neither the victim nor her family members had any animosity with the accused.
- f) The modus-operandi to commit the crime by resorting to diabolical method exhibits depravity, degradation and uncommonality of the crime which had shocked the collective conscience of the community.

56. MITIGATING CIRCUMSTANCES:

- a) Accused was 25 year old at the relevant time.
- b) He has family responsibilities of his parents, younger brothers and sisters.

57. The hard facts of the present case are that Accused took away the helpless and innocent child in a house, locked the door from outside and closed another door from inside, brutally and sexually assaulted her and then mercilessly caused her murder. It has come on record that Accused used to distribute chocolates to children in the lane. Accused took this opportunity and kidnapped the victim girl child, committed rape and done her to death. The modus-operandi of Accused clearly shows that he would be a menace to the society and there is no possibility of the Accused being reformed.

58. Considering the nature of offence, manner in which it was committed and upon evaluating the aggravating and mitigating circumstances, according to us, this is a case which falls in the category of rarest of rare case.

59. In our view, the reasons and findings recorded by the learned Additional Sessions Judge are based upon due appreciation of evidence and are consistent with the evidence on record as well as the settled legal principles. We have, therefore, no hesitation in confirming the sentence of death awarded by the Trial Court.

60. Before we part with the judgment, we record our appreciation for the efforts of Mr. Naseem R. Shaikh, learned counsel appointed on behalf of Appellant and Mr. A.B. Girase, learned PP in arguing this confirmation case as well as the

criminal appeal.

61. In the above premise and in the totality of the facts and circumstances, we proceed to pass the following order--

ORDER

I. The conviction and sentence of death imposed under Section 302 of the Indian Penal Code on Accused Ravi Ashok Ghumare is confirmed.

II. The conviction and sentence under Sections 376, 377 and 363 of the Indian Penal Code is maintained.

III. The reference is answered accordingly.

IV. Criminal Appeal No. 783 of 2015 is dismissed.

V. Office to furnish copy of the judgment and order free of cost to the Appellant/ Accused who is in jail through concerned prison authorities.

VI. The fees of appointed Advocate Mr. N.R. Shaikh, is quantified at Rs. 5,000/-.