2019 INSC 851

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

Criminal Appeal Nos. 1174-1175 of 2019
[Arising out of SLP (Criminal) Nos.7581-7582 of 2014)

Manoharan …Appellant

Versus

State by Inspector of Police,
Variety Hall Police Station, Coimbatore …Respondent

J U D G M E N T

R.F. NARIMAN, J.

1. Leave granted.

2. The present appeals raise the spectre of a ghastly rape and murder. The brief facts necessary for appreciation in these appeals are as follows.

3. One Mohanakrishnan (at 7.50 a.m. on 29.10.2010) who had borrowed a vehicle from PW.7 its owner, picked up two children, a girl aged 10 years old and her brother aged 7 years old from outside a

Hindu Temple as the children were preparing to go to school. This Mohanakrishnan was seen by PW.3, the priest of the particular Vinayakar Temple and by PW.9, the grandmother of the two children, taking the children away in the aforesaid vehicle. Mohanakrishnan then drove the children to a petrol pump at around 8.15 a.m. on the same day, and at 9.30 a.m. picked up the Appellant from his house in Angalakuruchi. The children were then taken to a remote area called the Gopalsamy Temple Hills at roughly 10.45 a.m. at which point rape was allegedly committed on the girl whose hands were tied by both Mohanakrishnan and the Appellant. Thereafter, considering that the girl had been brutally raped (her anus having ruptured), the two accused bought what is called cow dung powder which is nothing but a poisonous substance which is added to cow dung to keep insects away. This substance together with milk that was also purchased by the Appellant herein was allegedly administered by both Mohanakrishnan as well as the Appellant to the two children in an attempt to do away with both of them. Both children ingested only a small portion of the cow dung powder mixed with the milk and did not die. Mohanakrishnan and the Appellant thereafter to do away with

both the children threw them in Parambikulam-Axhiyar Project canal (**“PAP Canal”**) and it was alleged by the prosecution that the girl was tied up and pushed into the canal by the Appellant herein whereas the boy was pushed into the canal by Mohanakrishnan. At 5.00 p.m., PW.24 saw the school bags of the two children floating in the canal, which were then given to PW.22. Later on the same evening, PW.22 informed PW.10 the principal of the school who then informed the police between 6.15 p.m. and 6.30 p.m. the same evening. At 9.00 p.m. on the same day, Mohanakrishnan went to the house of PW.7 one Anbu @ Gandhiraj, who informed the police, as a result of which Mohanakrishnan was arrested at 9.45 p.m. on the same night at PW.7’s house. At 9.30 a.m. on the next day, the girl’s body was recovered from the canal. On 31.10.2010, the present Appellant was arrested at 7.15 a.m. and on the same day, the boy’s body was also recovered from the canal. To complete the narrative, Mohanakrishnan was shot dead by the police on 9.11.2010 in an encounter. That left only the Appellant to be tried as an accused. A confession was recorded before the Magistrate in a statement made under Section 164 of the Code of Criminal Procedure by the

Appellant on 20.11.2010 which was partially retracted only by a letter dated 25.7.2012, which the Appellant asked the trial court to treat as a statement under Section 313 of the Code of Criminal Procedure.

4. The prosecution examined a large number of witnesses - 49 in all. The trial court in a detailed judgment ultimately held the Appellant guilty under Section 120-B, Section 364-A, Section 376, Section 302, Section 302 read with Section 34 and Section 201 of the Indian Penal Code. Under Section 376 IPC, the Appellant was awarded life sentence, and for the offence under Section 302 IPC, he was given the death sentence.

5. The High Court of Madras, in the impugned judgment dated 24.3.2014, set aside the Appellant's conviction under Section 120-B and 364-A of the Penal Code, but confirmed the sentences under Sections 376, 302, Section 302 read with Section 34, and Section 201. After considering aggravating and mitigating circumstances, ultimately the death sentence imposed by the trial court was confirmed by the High Court.

6. In order to make out the offence of kidnapping the two children for ransom, a number of witnesses were examined. Though the Appellant was acquitted for this offence, yet the High Court found that the last seen theory was made out in the facts of the present case after closely scrutinizing the evidence of the following witnesses:

1. Sundararajan – PW.3, who was the temple priest who saw Mohanakrishnan picking up the two children around 8.00 a.m. on 29.10.2010.

2. Senthil Kumar – PW.20, a tailor, who saw both the accused with the children at 10.00 a.m. on that day.

3. N. Mani - PW.25, owner of a brick kiln in the foot hills of Gopalasamy Hills, who saw both the accused with the children at roughly 10.45 a.m. as they were coming down from the Gopalasamy Hillock.

4. Saravanakumar - PW.23, owner of a bakery who sold the milk at 1.00 p.m. on the same day to the Appellant, who saw the two children with Mohanakrishnan and the Appellant; and

5. R. Soundararajan – PW. 24 who saw both the accused with the children in a Maruti van around 3.00 p.m. on the same day.

On the basis of this evidence, the Court held:-

> "38. After closely scrutinizing the evidences of (a)Sundararajan [P.W.3], the temple Priest, who saw Mohanakrishnan picking up the two children around 8.00 a.m. on 29.10.2010; (b)K.Senthil Kumar [Tailor, P.W.20], who saw both the accused with the children at 10.00 a.m. on 29.10.2010; (c) N.Mani [P.W.25] owner of the Brick kiln at the foothills of Gopalsamy Hills, who saw both the accused with the children at 10.45 a.m. on 29.10.2010, while they were coming down from the hills; (d) Saravanakumar [P.W.23] owner of "Winner Bakery", who sold milk at 1.00 p.m. on 29.10.2010 to the accused and who saw the two children with them and (e) R.Soundararajan [P.W.24] who saw both the accused with the children in the Maruthi van around 3.00 p.m. on that day, we have no hesitation in our mind that the prosecution has proved beyond reasonable doubt that Mohanakrishnan picked up the two children and later Manoharan joined him and together both the accused were last seen with the two children and thus, the prosecution has proved the kidnapping and last seen theory without any iota of doubt."

So far as rape of the girl by the Appellant is concerned, the High Court concluded as follows:-

> "44. To sum up, we hold that the panties M.O.1 was recovered with hairs on 29.10.2010 in the Maruthi van with the help of Saravanan, P.W.43, the expert of

Forensic Sciences Laboratory and the same was sent to the Court without delay and thereafter, the Court had sent it to the Forensic Sciences Department, where, after DNA comparison, the experts have opined that the DNA profiles in the pubic hairs tally with the DNA profile extracted from the blood of Manoharan.

45. Since we have left incomplete the discussion in Para No.9 supra about “Evidence Relating to Rape of 'X'”, we are now concluding it after answering to the points raised by Mr.A.Raghunathan relating to the seizure of the panties (M.O.1).

46. From (a) the final opinion of Dr.Jeyasingh that 'X' was subjected to sexual assault; (b) injury on the penis of Manoharan; (c) the absence of panties in the dead body of 'X'; (d)the presence of panties (M.O.1) in the Maruthi van; (e)identification of the panties (M.O.1) by 'X''s father; (f)presence of hairs on it at the time of recovery and (g)matching of DNA profile extracted from the hair with that of Manoharan, we hold that Manoharan has subjected 'X' to sexual assault. To come to this finding also, we have still not used the judicial confession given by Manoharan.”

The High Court devoted a few pages to the confession made by the Appellant to the Magistrate. The High Court held:

“47. Confession of Manoharan:

L.Sathyamoorthy, P.W.28, Judicial Magistrate No.1, Coimbatore examined Manoharan on 19.11.2010 and extensively questioned him and made a roving enquiry in order to find out if he was voluntarily giving confession statement. The questions were asked in Tamil and the answers were also recorded in Tamil by the learned Judicial Magistrate. 17 questions were put to him on 19.11.2010. Thereafter, he was sent back to

> the jail for reflection and was directed to be produced the next day again i.e. on 20.11.2010. On 20.11.2010, the learned Judicial Magistrate has put nine questions to him. He has even told Manoharan that he need not have to give any confession. We also went through the preliminary examination done by the Judicial Magistrate on 19.11.2010 and 20.11.2010 and we find that the Judicial Magistrate has not mechanically acted, but has sincerely endeavoured to make the accused be aware of his rights and also the fallout of giving a confession. Sufficient reflection time was also given by the learned Judicial Magistrate and thereafter, he has proceeded to record his confession."

It then set out some of the relevant questions that were asked by the said Magistrate to the Appellant as follows:-

> "49. We gave our anxious consideration to the arguments advanced by the learned senior counsel and therefore, we scrutinized carefully the questions put by the Judicial Magistrate on 19.11.2010 and 20.11.2010.
>
> The learned Judicial Magistrate has put 17 questions on 19.11.2010. Some relevant questions run thus (English Translation):
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> > Question No.5 : Do you know that I am a Judicial Magistrate No.1, Coimbatore?
> >
> > Ans :Yes. I know that this is Judicial Magistrate Court, but only from you, I know the number.
> >
> > Question No.9 :Do you know as to why you have come here?

Ans : I want to give a true statement to the Judicial Magistrate. That is why I have come here.

Question No.10 :Did police torture to give statement in any manner?

Ans :No. Nothing like that has happened.

Question No.11 :Did the Police or anyone tell you that if you give confession statement, it will be beneficial to you and if you do not give confession statement, they will do something to you?

Ans :No one has said like that to me.

Question No.12 : Are you aware that you have no duty to give confession?

Ans :I have understood it from what you told now.

Question No.15 :I am asking you once again this question, Has anybody tortured you or induced you to give confession?

Ans :No. Nobody has tortured me.

50. Again on 20.11.2012, some questions were asked to Manoharan in order to find out whether he was voluntarily willing to give confession. Only thereafter, the learned Judicial Magistrate has recorded the confession."

Since the confession was later partially retracted, the High Court dealt with this aspect of the matter as follows:-

"61. In this case confession was recorded on 20.11.2010 and it was retracted only on 13.08.2012 during the cross examination of Mr. L.S.

Sathiyamoorthy (P.W.28). When Manoharan was put the following question under Section 313 Cr.P.C. viz. "That P.W.28 Mr.L.S. Sathiamoorthy in his evidence has stated that he was Judicial Magistrate in Coimbatore and that he examined Manoharan on 19.11.2010 in the Court for the purpose of recording the confession statement and for that he had taken appropriate steps and had also given 24 hours time to reflect and that on 20.11.2010, he recorded the confession statement running to 17 pages in the appropriate manner. That confession statement is Ex.P.18. What do you say?" The answer given by Manoharan is, "Correct". This singular answer of Manoharan demolishes the defence argument that the Magistrate had not followed the proper procedure for ascertaining whether the confession was voluntary.

62. xxx xxx xxx

63. We have already extracted the statement of Manoharan under Section 313 Cr.P.C. with regard to the evidence of Mr. L.S. Sathiamoorthy P.W.28. This statement under Section 313 Cr.P.C. was recorded on 04.09.2012, after the evidence, whereas Mr. L.S. Sathiamoorthy was crossexamined on 13.08.2012. In other words on 13.08.2012, when P.W.28 was cross examined by the counsel, the confession was retracted. But in the 313 examination recorded subsequently on 04.09.2012, Manoharan had admitted that the confession was properly recorded. Manoharan was examined by us u/s 313 Cr.P.C. on 27.02.2014 with regard to the inculpatory portion in his confession statements. At that time he stated that Police forced him to give the confession.

64. We may now mention about the letter dated 25.07.2012 written by Manoharan from jail addressed to the Sessions Judge which he wanted to be treated as his statement under Section 313 Cr.P.C.'73. In that

> letter he has stated that Police made him to confess to the crime and had it videographed in the Police Station. Thereafter they played the videograph to the Magistrate and the Magistrate merely wrote down the confession statement by seeing the videograph. In other words, the Magistrate did not record any statement from him directly but copied a statement from the videograph. This is given as a reason for retraction. Such a suggestion was not even put to Mr.Sathiamurthi, the Magistrate when he was cross examined. Applying the test in Subramania Goundan's case cited above, we cannot but simply reject the very retraction."

The High Court then held that the confessional statement given by the Appellant was voluntarily made and the retraction was clearly an afterthought.

The confessional statement given by the Appellant was set out verbatim by the High Court as follows:-

> "66. The English translation of the confession statement given by Manoharan that was given in Tamil is given below:
>
> "I used to go for flower business along with my mother Amavasai Selvi on Fridays. I do not remember the date. About two weeks ago, on a Friday, I finished my flower business and had my breakfast at 9.15 in the morning. Afterwards, when I was about to attend to tractor work of my owner Thambu, my friend Mohanakrishnan, who studied with me till 7th standard in the same school at Angalakurichi, came to my home at 9.30 A.M. in the morning in a Maruti Omni Van. He

knew my house. He called me to Azhiyaru dam. He asked for some rope, which was lying near my house, took that rope and kept it in the omni van. He asked me to get into the van and I sat next to the driver seat in the omni van. A boy and a girl in School uniform were seated at the back seat. When I asked about them, he told me that they had come to see Azhiyaru, and that a school bus had already gone ahead. When we went to the house of Mohanakrishnan, which was located near the Tank-mound, which was in Azhiyaru road, there was a tailor. He asked that tailor for two covers and obtained them. There was no possibility for the tailor to look at the persons, who were seated in the omni van. The vehicle was parked on the road. In the meantime, a telephone call came. When I asked, Mohanakrishnan he said that it was his mother, who spoke over the phone. Again, we went to my house in the vehicle. He told me to get fifty rupees. I got it from my mother. He asked me to buy two packets of cow dung powder for mopping up his house. I got two packets for Rs.12/- Rs.6/- each from Nayakam's shop, which is next to my house. I kept them in the omni van and we went straight to the hill of Gopalsamy temple. We parked the vehicle at the foothill and walked up the hill. Mohanakrishnan asked the children to climb up the hill so that they could see tiger, lion and deer. Both of them ie., the girl and the boy walked some distance and stopped. They sternly said that they would not come up. They started crying stating that they wanted to go to school. Immediately, Mohanakrishnan took the mobile phone and made a fake call, as if, he was talking to the Principal Sir, saying that they would come then, that the vehicle broke down and that they would come to the school immediately. He asked for apology from the Principal for being late to the school and made the children believe his words. But the small boy asked his elder sister in their language, not to go. Then both of them started crying. Hence, all of us

came back without going up the hill. Immediately, we started from the Gopalsamy foothill and crossed Manjanaickanur, Kambalampatti, crossed the bridge and went to a place adjacent to the canal. That place looked like a big forest with groves all around. I do not know the name correctly. We parked the vehicle under the tree and I said I needed to answer nature's call urgently. So saying, I went by the side of the canal. The boy, who was in the vehicle was tied with a rope near the side of the driver seat, so that he could not go out. He put that female child alone in the back seat and tied her hands behind. When I asked him, he said that I was not aware that he and her father had a deal. Then Mohan stripped all his garments, removed the pant of the said girl, and laid himself upon her. When I asked him, he told me he would make the girl a prostitute. He had sex with that girl and raped her. I thought if the small boy was present there at that time, it would be embarassing and I slowly took him out. Later on, after some time, I returned with that small boy. Then I asked Mohan as to how he felt. He said that his male organ could not properly penetrate. I asked him to give me a chance. Immediately he asked me to have sexual intercourse with that girl. Mohan sat in the front seat and watched. I went and saw the said girl who did not wear the pant and who was in the back seat. When I placed my penis in the front, the girl cried stating that she felt pain She was also adamant. Then, I had intercourse with her on her back side, through her rectum. That also did not suit me. Immediately, I masturbated and ejected the seminal fluid ([tpe;J jz;zpia). Having thought that if the matter became public and revealed out, it would become a big problem for us, all the 4 of us went near our house by the vehicle. There, I bought milk in a plastic bag for ten rupees. Mohan asked me to buy milk saying that it was required for the children. Then in order to let the children believe that, we transferred the milk into a

water bottle and mixed it with cow dung powder. When we made the children drink that, the girl and the boy swallowed half and spat out the remaining half on the seat. When I bought the said milk, I bought two disposable plastic tumblers. I asked them to drink only through that. She swallowed only half of that and spat the remaining milk. After giving the cow dung powder, we drove the omni vehicle again to Manjanayakanur. It would be noon time, when we went to Deepalipatti. We did not know the time exactly. He told me that in such a situation, one should always pass through the place, which is not frequented by people. He went near the canal, pushed the girl and returned. Then he was sweating a lot. Thereafter, I pushed the boy and he was washed away by the flow of the water in the canal, in which water had been flowing fully. Then, after travelling some distance Mohan halted the vehicle, and when he saw me, it looked that he would push me too. But, we took the school bag and threw it in the canal. Then he dropped me at Angalakurichi tollgate. Then, he told me that he had thought that he would get Rupees Twenty lakhs, and that the event had resulted in that manner. He told that he would abscond thereafter. He told me that he would sport " "Lion-moustache" and asked me not to disclose to anyone and to come with him. Since, Mohan told me that he would buy an autorickshaw for me, I went with Mohan and it happened like this. Then, the same day, at 7.30 p.m. Mohan called me up in my mobile number 9790299953 from his mobile number and talked to me. I don't know the number. He threatened me asking not to disclose the matter to anyone. This only had happened I don't wish to say anything else."

MAGISTRATE'S NOTE [ENGLISH VERSION]

"I recorded the statement given by Manoharan, the person who was charged as above, in my own

handwriting as stated by him. After recording completely, it was read over to him clearly. I asked him to read it and after he had acknowledged it as correct, his signature was obtained in my presence. Till the completion of the recording of the statement, the doors of the court were bolted, closed and the entire proceedings were held in camera. Then, no one else other than me, my court assistant Thiru.T.Raja and Office Assistant M.M.Vijayakumar were present."

This being done, then the High Court in paragraph 70 in tabular form set out in a table the facts that are admitted in the confessional statement; what continues to be admitted and what is retracted by the letter dated 25.7.2012; and the other evidence on record which otherwise corroborates the confessional statement. This aspect of the case is important and is set out hereinbelow:-

> “70. Now we are giving a tabular column to corroborate the confession statement:

Sl. No	**Confession Statement Ex. P.18**	**Written Statement Dated 25.07.2012**	**Evidence on record**
1.	He knows Mohanakrishnan	He admits this fact	--

2.	Mohanakrishnan picked him up around 9.30 a.m. in the Maruthi Omni Van saying that they are going to Aliyar Dam	He admits this fact	--
3.	Mohanakrishnan took the two children in School uniform in the Maruthi Omni Van	He admits this fact	--
4.	Mohanakrishnan went to meet the Tailor	He admits this fact	Evidence of the Tailor P.W.20 Senthilkumar, who saw both of them with the children at 10.00 a.m.
5.	Mohanakrishnan and Manoharan went to purchase cow dung powder from the shop of Nayagam [P.W.35]	He admits this fact	P.W.35 Nayagam corroborate this fact.
6.	Both of them went to Gopalsamy hills with the two children and climbed the hill by walk	He admits this fact	Both of them were seen with two children at Gopalsamy Hills by N.Mani, P.W.25.

7.	Both of them proceeded to a secluded place besides the canal	He admits this fact	--
8.	Both of them parked the vehicle and Manoharan goes to attend nature's call	He admits this fact	--
9.	On Manoharan returning, he finds Mohanakrishnan raping 'X' after tying her with a rope	He admits this fact	--
10.	After Mohanakrishnan, Manoharan raped 'X'	He does not admit this fact	--
11.	Manoharan attempts vaginal coitus, the child cried, he does anal coitus	He does not admit this fact	The postmortem shows 'X' had injuries on vagina and anus. Manoharan had injury in the penis.
12.	Thereafter they went to winner bakery and purchased milk for Rs.10/-	He admits this fact	Saravana Kumar, P.W.23, owner of Winner Bakery corroborates.
13.	The Children are given cow dung	Giving Milk	Viscera shows

	powder mixed in milk	alone is admitted	the presence of auramine poison in the stomach and small intestine of both the children (Ex.P.50 and 53)
14.	The children drank some of the milk mixed with auramine and spit the rest in the van	He does not admit this fact	Stains were found in the floor mat of the van
15.	Both the accused take the children to Deepalapatti area of the canal	He does not admit this fact	Both of them are seen by Sundarrajan, P.W.24.
16.	Mohanakrishnan pushed 'X' in the canal and Manoharan pushed 'Y' in the canal	He does not admit the fact	Body of 'X' and 'Y' are recovered from the canal and the postmortem report shows that they died of drowning and they had auramine poison in the stomach

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Based on this, the High Court, therefore, concluded:-

> “71. Therefore we have no hesitation in holding that the confession statement Ex.P.18 has been corroborated in all aspects and the same is true. If one reads the letter dated 25.07.2012, which Manoharan wanted to treat as a written statement under Section 313 Cr.P.C., the exculpatory portions are absolutely incredible. He says that it was Mohanakrishnan, who raped 'X', but he was simply sitting and watching. Then, he says that he got down from the van at a distance and after that he was picked up by Mohanakrishnan again and at the time, the two children were missing. What is baffling us is, Manoharan was aged about 23 years at that time and he did nothing to prevent Mohanakrishnan from committing a horrendous crime of raping a child and pushing the two children into the running canal. We find that the explanation given by Manoharan in his written statement is patently false and the Hon'ble Supreme Court has stated that a false explanation will provide the missing link in a case based on circumstantial evidence.”
>
> “78. To sum up, we hold that the prosecution has proved all the circumstances beyond reasonable doubt and if we apply the golden rule laid down by the Supreme Court in Sharad Birdhichand Sarda vs. State of Maharashtra [1984 (4) SCC 116] the inescapable inference we come to is, that Manoharan had joined Mohanakrishnan who had already kidnapped the two children; that Manoharan raped 'X' and also had sodomica luxuria (anal coitus); that Manoharan shared the common intention with Mohanakrishnan in the murder of 'X', by pushing her in the canal; and Manoharan murdered 'Y' by pushing him in the canal; the murder was committed in order to cover up the offence of kidnapping and rape.”

When it came to confirming the death sentence, the High Court held:-

“82. In this case, the aggravating circumstances are:

(i) The offence is one of rape of a minor and murder of two children;

(ii) The hands of 'X' were tied behind and one after the other they have raped her;

(iii) After committing rape, cow dung powder which contains auramine and which is normally used for committing suicide was purchased from a shop and milk was purchased from another shop.

(iv) Thereafter, they mixed the cow dung powder and milk and filled it in a water bottle and gave it to the children. Both the children drank a little bit of it and spit the balance in the car. Then the accused realised that since the children had spit the milk mixed with poison, they may not die. They wanted to make sure that the children die and so they took the children to Deepalapatti, a secluded place in the outskirts of Coimbatore District, where the P.A.P. canal flows with gusto.

(v) They pushed one child after the other and the body of the children were recovered several kilometres away in the canal. Manoharan pushed 'Y'

and the body was recovered 12 km away from Deepalapatti two days later. Here both the victims were innocent, helpless and defenceless children.

83. MITIGATING CIRCUMSTANCES: There is nothing to suggest that Manoharan suffered from any emotional or mental imbalance or disturbance or was under any external provocation while committing this offence. As regards the chances of him not indulging in commission of such a crime again, we find that even in his letter addressed to the learned Sessions Judge, he was trying to fix the responsibility on Mohanakrishnan

and was attempting to absolve himself completely of the offence. He went to the extent of even charging that the Magistrate had colluded with the police in recording the confession by seeing the videograph. There does not seem to be any remorse shown by Manoharan.

84. CRIME TEST: The victim in this case were 10 and 7 years old and they were defenceless. The victim 'X' was first raped by Mohanakrishnan; Manoharan committed rape and since she cried, he committed sodomy. Since that also did not satisfy him, he masturbated in order to release his excitement in the presence of the children. They were administered poison and then to be doubly sure that they die, they were pushed into the running waters.

85. CRIMINAL TEST: Manoharan is an able bodied person and is aged about 23 years. As stated earlier, he does not seem to show any inkling of reformation. Therefore, we hold that the criminal test is also satisfied.

86. RR TEST:

This is society centric test and not judge centric test, i.e. whether the society will approve the awarding of death sentence to certain types of crime or not. In Sevaka Perumal v. State of Tamil Nadu [1991 (3) SCC 471] the Supreme Court has said :
"The "rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Where an accused does not act or any spur of the moment provocation and he indulged himself in a deliberately planned crime and meticulously executed it, the death sentence may be the most appropriate punishment for such a ghastly crime."

> In this case also, the accused will be a menace to the society as could be inferred in the manner in which he raped a 10-year old child and pushed a 7-year old boy in the canal. Hence, the R.R. test is also satisfied."

7. Shri P. Vinay Kumar, learned counsel appearing on behalf of the Appellant, assailed the High Court judgment by stating that he adopted the arguments of Shri A. Raghunathan where Shri Raghunathan assailed the allegation that the Appellant had raped the 10 years old girl. In paragraph 41 of the judgment, the High Court had held regarding the evidence relating to rape as follows:-

> "41. Evidence relating to Rape of 'X':
>
> There is no direct evidence to prove this fact. The prosecution is relying upon the following pieces of evidence for inferring rape.
>
> (a) Dr.Jeyasingh [P.W.46], who conducted the autopsy on the body of 'X', has stated that he found "(4) Contusion 2x1 cm x 0.5 cm depth noted over in the posterior fouchette and lateral wall of vagina. Hymen Intact. (5)On examination of anus:- Anus found roomy measuring 3 cm in diameter and mucosal tear 1 x 0.5cm x mucosal deep noted over left lateral aspect of the anus at the level of muco-cutaneous junction. On dissection of Thorax and Abdomen: Contusion 4x2 cm noted over anterior aspect of lower end of uterus." In his final opinion, Ex.P.50, he has stated, "The deceased would appear to have died of DROWNING. Injuries noted on the vagina and anus due to forcible sexual assault. The deceased has consumed

auramine poison prior to death (detected in stomach & small intestine)".

(b) Dr.Jeyasingh, examined Manoharan on the orders of the Magistrate on 04.11.2010 and observed the following injury on his penis in his report Ex.P.56.

"A dark colour contusion noted over proximal part of glands penis around urethral orifice."

(c)The Police had recovered the panties [M.O.1] of 'X' with some hair strand from the Maruthi van as early as on 29.10.2010 and had sent the same to the Tamil Nadu Forensic Sciences Laboratory through the Court for D.N.A. Analysis. The blood samples and saliva that were collected from Mohanakrishnan and Manoharan by Dr.Bhuvana [P.W.44] were also sent to the Tamil Nadu Forensic Sciences Laboratory. The D.N.A. analysis was done by Mrs.Lakshmi Balasubramaniam [P.W.49]. She was examined by us in this Court, the reason for which we have already given in the earlier part of the judgment. In her evidence, she stated that she extracted D.N.A. from the blood samples of Mohanakrishnan and Manoharan and amplified them for amelogenin and for 15 Short Tandem Repeat markers using PCR amplified STR technique. The hair strands that were received by the Forensic Sciences Department from the Court with the panties [M.O.1] was also subjected to amplification for amelogenin. The DNA typing results of the blood samples of Mohanakrishnan and Manoharan were compared with the DNA profile of the hair in the panties [M.O.1]. On comparison, P.W.49 found that the DNA profile of the hair did not match with that of Mohanakrishnan, but, matched with that of Manoharan. Her report was marked as Ex.P48(A). The defence counsel did not seriously challenge the final opinion of the expert, but Mr.A.Raghunathan, learned Senior Counsel for the accused attacked the very seizure of the hair and

> contended that Manoharan was made to pluck 5 strands of his pubic hair on 04.11.2010, when he was examined by Dr.Jeyasingh [P.W.46] and this was substituted in the cover that was sent to the Forensic Sciences Department. Mr.A.Raghunathan, learned Senior Counsel, who cross examined Dr.Jeyasingh [P.W.46], Mrs.Radhika Balachandran [P.W.48] and the Investigating Officer [P.W.47] before us, shaped this defence and presented the following arguments attacking the seizure of the panties [M.O.1] and the pubic hairs from the Maruthi van on 29.10.2010."

8. Shri Raghunathan's arguments against the pubic hair of the Appellant being found on the panty of the dead girl was then dealt with in great detail after which the High Court then summed up the matter as follows:-

> "45. Since we have left incomplete the discussion in Para No.9 supra about "Evidence Relating to Rape of 'X'", we are now concluding it after answering to the points raised by Mr.A.Raghunathan relating to the seizure of the panties (M.O.1).
>
> 46. From (a) the final opinion of Dr.Jeyasingh that 'X' was subjected to sexual assault; (b) injury on the penis of Manoharan; (c) the absence of panties in the dead body of 'X'; (d)the presence of panties (M.O.1) in the Maruthi van; (e)identification of the panties (M.O.1) by 'X''s father; (f)presence of hairs on it at the time of recovery and (g)matching of DNA profile extracted from the hair with that of Manoharan, we hold that Manoharan has subjected 'X' to sexual assault. To

> come to this finding also, we have still not used the judicial confession given by Manoharan."

9. Having gone through the exhaustive analysis of the High Court on this aspect, we feel no reasonable ground has been made out by learned counsel for the Appellant to assail the same and, therefore, confirm the findings that the Appellant had subjected the girl to sexual assault.

10. Learned counsel for the Appellant, then argued that the Learned Magistrate should have refused to record the confessional statement made on 20.11.2010 given the fact that Appellant had been beaten by the police. The High Court has dealt with this aspect of the case by stating that the Ld. Magistrate asked the Appellant repeatedly as to whether the statement that is being given by him is voluntary or because of torture or beatings. The Appellant repeatedly stated that the statement being given was voluntary. Further, the High Court has also adverted in paragraph 60 of its judgment, to the fact that police custody ended after the first 15 days of arrest that is on 14.11.2010. The accused was produced before the Ld. Judicial Magistrate only on 19.11.2010 after which statement was recorded on 20.11.2010. It

was clear therefore that on this date there was no possibility of handing back the Appellant to police custody. Further, the retraction that was made from the confessional statement was made one year and nine months after it was made and as can be the seen from the table set out in paragraph 70 of the impugned judgment, the retraction statement confirms the original confessional statement in every detail except that the Appellant retracts the part played by him in the rape and murder of the ten year old girl and the girl & boy respectively. For all these reasons, therefore we reject the arguments of the Ld. Counsel for the Appellant in this behalf.

11. The Appellant's counsel then argued that PW.24 who is a very material witness as to the last seen theory cannot possibly be believed, because in his evidence he states that he saw the children after the girl was raped standing on the road next to Mohanakrishnan and the Appellant, and found nothing untoward with the children, who did not utter a word or show in any manner that they have just gone through the most gruesome ordeal. According to him, PW.24's version is, therefore inherently not believable and cannot be relied upon. Even if we were to accept learned counsel's argument on this

aspect, we must not forget that for the last seen theory a number of other persons were relied upon by the High Court. PW.20, PW.25 and PW.23 all saw the two accused together with the children at different times on 29.10.2010. Indeed, even if one were to read the confessional statement of the Appellant together with the retraction thereof, the fact that he purchased milk at 1.00 p.m. from PW.23 is clearly made out and the fact that Mohanakrishnan went to meet the tailor, was also admitted by him in both the original confessional statement as well as the retraction. It is clear therefore that the evidence of PW.20 and 23 are corroborated by the confessional statement and the retraction made by the Appellant and therefore the factum of the two accused being with the two children in the vehicle is clearly made out and thus the High Court's conclusion that the last seen theory can be relied upon cannot possibly be assailed.

12. Learned counsel for the Appellant then argued that having raped a girl in the morning hours, it is highly improbable that the victim would be paraded around and taken to so many places including the shop selling milk and cow dung powder, and that the entire story is so inherently improbable that it should be rejected. We

are afraid that this kind of argument flies in the face of the confessional statement made even when read with the retraction thereof. All the facts as to Mohanakrishnan abducting the children, raping the girl and murdering the children are contained in both the statement as well as the retraction of the Appellant. It is only in the retraction that the Appellant seeks to exculpate himself completely from rape and murder, which, as has rightly been held by the High Court, cannot be given any credence. This is also for the added reason that once it is accepted that the DNA sample from the pubic hairs of the Appellant are found in the panty of the dead girl, rape gets established beyond reasonable doubt.

13. The argument of the learned counsel for the Appellant that no semen or blood was found on the body of the dead girl pales into insignificance in view of the DNA evidence. In any case, the body of the dead girl was found in a canal, which had fast flowing water in it, several kilometers away, after one day of the commission of the crime. It is obvious that with this passage of time whatever semen and blood that may have been on the dead body when the girl was

thrown into the canal has been effaced by the fast flowing water in which the body was immersed for a day after it was recovered.

14. Learned counsel then tried to argue that the allegation of tying up of the children has no evidence to support it. We are afraid that this is also not correct inasmuch as in both the confessional statement as well as the retraction thereof it is clear that Mohanakrishnan at least tied the girl with a rope and then raped her.

15. The Appellant then argued that the panty was found later in the car thereby rendering its being found in the car suspect, and that the panty which is stated to be torn was never so stated in the earlier statements made to the police. What is clear from the forensic examination is that the panty was found in the car only after the car was searched at 2.00 a.m. on the night after the rape and the murder as is clear from a reading of exhibit P.5 marked on the side of the prosecution.

16. Learned counsel for the Appellant then argued that it is wholly improbable that the lunch bag of the murdered boy would be taken home by the accused Appellant and would be found by the police at

his house two days thereafter. Obviously therefore the aforesaid bag has been planted by the police. Even if this is so, this does not take the Appellant anywhere. What is clear from a narration of the facts above is that it is clear that the children were initially abducted by Mohanakrishnan after which the Appellant joined them. The fact that the Appellant brutally raped the 10 year old girl is corroborated not only by his confessional statement but also by the DNA test which found the Appellant's pubic hair on the panty of the girl. It is clear that once this heinous act was committed, the next important step would be for both the accused to do away with the children so that they would not be able to give evidence as to the kidnapping and rape committed on the girl. Towards this end, it is admitted that the Appellant purchased "cow dung" powder, that is poison, and milk, and stated in his confessional statement that the two were then mixed and administered to both children by both the accused. Since the poison did not work, the only other way of doing away with the children would be to find some other method, and the method found by the two accused was to take the children to the canal in question and throw them into the canal so that they would be dead by drowning.

The entire chain of events has been made out and despite this being a case of circumstantial evidence, the prosecution has clearly proved its case beyond reasonable doubt. The courts below are right in convicting the Appellant of rape and murder.

17. The question that now arises is whether the death sentence should be confirmed by this Court. The Appellant has pleaded that the mitigating circumstances in the present case are that the accused belongs to a rural area and he is only 23 years old and has no other previous conviction, and if let out will not be a menace to society. On the other hand, the counsel for the respondent has argued that this is an extremely heinous crime committed ruthlessly and cold bloodedly and that the aggravating circumstances made out by the High Court clearly outweigh the alleged mitigating circumstances and therefore this is a clear case for the death penalty to be imposed.

18. In **Machhi Singh v. State of Punjab, (1983) 3 SCC 470**, this Court laid down the circumstances in which a death sentence may be imposed for the crime of murder as follows:-

> **"32.** The reasons why the community as a whole does not endorse the humanistic approach reflected in

“death sentence-in-no-case” doctrine are not far to seek. In the first place, the very humanistic edifice is constructed on the foundation of “reverence for life” principle. When a member of the community violates this very principle by killing another member, the society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realized that every member of the community is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of the rule of law enforced by it. The very existence of the rule of law and the fear of being brought to book operates as a deterrent for those who have no scruples in killing others if it suits their ends. Every member of the community owes a debt to the community for this protection. When ingratitude is shown instead of gratitude by “killing” a member of the community which protects the murderer himself from being killed, or when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so “in rarest of rare cases” when its collective conscience 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. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:

I. *Manner of commission of murder*

33. 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. For instance,

(*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.

(*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.

(*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

II. *Motive for commission of murder*

34. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-a-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is committed in the course for betrayal of the motherland.

III. *Anti-social or socially abhorrent nature of the crime*

35. (*a*) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of “bride burning” and what are known as “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. *Magnitude of crime*

36. 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. *Personality of victim of murder*

37. When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (b) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-a-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

38. In this background the guidelines indicated in *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh case* [(1980) 2 SCC 684 : 1980 SCC (Cri) 580 : AIR 1980 SC 898 : 1980 Cri LJ 636] :

"(*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.

39. In order to apply these guidelines inter alia the following questions may be asked and answered:

(*a*) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death sentence?

(*b*) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender?"

In so far as Kashmir Singh, that is one of the appellants before the Court, in this case was concerned, this Court, applying paragraph 37 (a), upheld the conviction as follows:-

"44. Insofar as appellant Kashmir Singh s/o Arjan Singh is concerned death sentence has been imposed

> on him by the Sessions Court and confirmed by the High Court for the following reasons:
>
> Similarly, Kashmir Singh appellant caused the death of a child Balbir Singh aged six years while asleep, a poor defenceless life put off by a depraved mind reflecting grave propensity to commit murder."

It will thus be seen that the fact that the victim of the murder was a defenceless 6 year old child, was found sufficient to make Kashmir Singh's case a rarest of rare case, shocking the Court's conscience.

19. In **Mukesh v. State (NCT of Delhi),** (2017) 6 SCC 1, this Court speaking through Dipak Misra, J. and R. Banumathi, J. had occasion to deal with a large number of judgments, in which, after considering aggravating and mitigating circumstances, this Court has either awarded the death sentence in the case of violent crimes or life imprisonment. From paragraph 322 of Dipak Misra, J.'s judgment, all these judgments are set out in great detail and, therefore, need not be repeated by us. It may only be noted that in paragraph 349, **Dhananjoy Chatterjee v. State of West Bengal** (1994) 2 SCC 220, was referred to, in which rape and murder of an 18 year old girl resulted in affirmation of the death sentence by this Court. Equally, in

paras 350 and 351, **Laxman Naik v. State of Orissa** (1994) 3 SCC 381, was referred to where a 7 year old girl was raped by her uncle and then murdered, also resulted in confirmation of the death sentence by this Court. Similar is the case in **Bantu v. State of U.P.** (2008) 11 SCC 113 and **Rajendra Pralhadrao Wasnik v. State of Maharashtra** (2012) 4 SCC 37, referred to in paragraphs 353 and 354 of the said judgment.

20. However, in **Akhtar v. State of U.P.** (1999) 6 SCC 60, referred to in paragraph 356, in a similar case of rape and murder of a young girl, this Court awarded life imprisonment because the evidence of witnesses showed that the murder was not committed intentionally and with any premeditation as the girl had been picked up for committing rape. Similarly, in **State of Maharashtra v. Bharat Fakira Dhiwar** (2002) 1 SCC 622, referred to in paragraph 357, in the case of a 3 year old girl who was raped and murdered, this Court held that as the accused had been earlier acquitted by the High Court, this Court refrained from imposing the death penalty in spite of the fact that “this case is perilously near the region of ‘the rarest of rare cases’.….”.

21. Paragraphs 358 to 362 deal with **Vasanta Sampat Dupare v. State of Maharashtra** (2017) 6 SCC 631, in which a minor girl child was raped and murdered. The death penalty was confirmed by this Court. After a review petition was then heard in open Court, the death penalty was reconfirmed despite the fact that the accused had, after the judgment under review, completed Bachelors Preparatory Program and had a jail record without any blemish. What was projected was that there is a possibility of the accused being reformed and rehabilitated and, therefore, the death sentence should not be imposed. This Court turned down this argument stating that the extreme depravity and barbaric manner in which the crime was committed and the fact that the victim was a helpless girl of 4 years clearly outweigh the mitigating circumstances resulting in a dismissal of the review petition. The Court then went on to confirm the death sentence on the facts of that case as follows:

> **"363.** Now, we shall focus on the nature of the crime and manner in which it has been committed. The submission of Mr Luthra, learned Senior Counsel, is that the present case amounts to devastation of social trust and completely destroys the collective balance and invites the indignation of the society. It is submitted by him that a crime of this nature creates a

fear psychosis and definitely falls in the category of the rarest of rare cases.

364. It is necessary to state here that in the instant case, the brutal, barbaric and diabolic nature of the crime is evincible from the acts committed by the accused persons viz. the assault on the informant, PW 1 with iron rod and tearing off his clothes; assaulting the informant and the deceased with hands, kicks and iron rod and robbing them of their personal belongings like debit cards, ring, informant's shoes, etc.; attacking the deceased by forcibly disrobing her and committing violent sexual assault by all the appellants; their brutish behaviour in having anal sex with the deceased and forcing her to perform oral sex; injuries on the body of the deceased by way of bite marks (10 in number); and insertion of rod in her private parts that, inter alia, caused perforation of her intestine which caused sepsis and, ultimately, led to her death. The medical history of the prosecutrix (as proved in the record in Ext. PW-50/A and Ext. PW-50) demonstrates that the entire intestine of the prosecutrix was perforated and splayed open due to the repeated insertion of the rod and hands; and the appellants had pulled out the internal organs of the prosecutrix in the most savage and inhuman manner that caused grave injuries which ultimately annihilated her life. As has been established, the prosecutrix sustained various bite marks which were observed on her face, lips, jaws, near ear, on the right and left breast, left upper arm, right lower limb, right inner groin, right lower thigh, left thigh lateral, left lower anterior and genitals. These acts itself demonstrate the mental perversion and inconceivable brutality as caused by the appellants. As further proven, they threw the informant and the deceased victim on the road in a cold winter night. After throwing the informant and the deceased victim, the convicts tried to run the bus over them so

that there would be no evidence against them. They made all possible efforts in destroying the evidence by, inter alia, washing the bus and burning the clothes of the deceased and after performing the gruesome act, they divided the loot among themselves.

365. As we have narrated the incident that has been corroborated by the medical evidence, oral testimony and the dying declarations, it is absolutely obvious that the accused persons had found an object for enjoyment in her and, as is evident, they were obsessed with the singular purpose sans any feeling to ravish her as they liked, treat her as they felt and, if we allow ourselves to say, the gross sadistic and beastly instinctual pleasures came to the forefront when they, after ravishing her, thought it to be just a matter of routine to throw her along with her friend out of the bus and crush them. The casual manner with which she was treated and the devilish manner in which they played with her identity and dignity is humanly inconceivable. It sounds like a story from a different world where humanity has been treated with irreverence. The appetite for sex, the hunger for violence, the position of the empowered and the attitude of perversity, to say the least, are bound to shock the collective conscience which knows not what to do. It is manifest that the wanton lust, the servility to absolutely unchained carnal desire and slavery to the loathsome bestiality of passion ruled the mindset of the appellants to commit a crime which can summon with immediacy a “tsunami” of shock in the mind of the collective and destroy the civilised marrows of the milieu in entirety.”

xxx xxx xxx

“**512.** We are here concerned with the award of an appropriate sentence in case of brutal gang rape and

murder of a young lady, involving most gruesome and barbaric act of inserting iron rods in the private parts of the victim. The act was committed in connivance and collusion of six who were on a notorious spree running a bus, showcasing as a public transport, with the intent of attracting passengers and committing crime with them. The victim and her friend were picked up from the Munirka Bus-stand with the mala fide intent of ravishing and torturing her. The accused not only abducted the victim, but gang-raped her, committed unnatural offence by compelling her for oral sex, bit her lips, cheeks, breast and caused horrifying injuries to her private parts by inserting iron rod which ruptured the vaginal rectum, jejunum and rectum. The diabolical manner in which crime was committed leaves one startled as to the pervert mental state of the inflictor. On top of it, after having failed to kill her on the spot, by running the bus over her, the victim was thrown half-naked in the wintery night, with grievous injuries.

513. If we look at the aggravating circumstances in the present case, following factors would emerge:

(i) Diabolic nature of the crime and the manner of committing crime, as reflected in committing gang rape with the victim; forcing her to perform oral sex, injuries on the body of the deceased by way of bite marks; insertion of iron rod in her private parts and causing fatal injuries to her private parts and other internal injuries; pulling out her internal organs which caused sepsis and ultimately led to her death; throwing the victim and the complainant (PW 1) naked in the cold wintery night and trying to run the bus over them.

(ii) The brazenness and coldness with which the acts were committed in the evening hours by picking up the deceased and the victim from a public space, reflects the threat to which the society would be posed to, in case the accused are not appropriately punished. More so, it reflects that there is no scope of reform.

(iii) The horrific acts reflecting the inhuman extent to which the accused could go to satisfy their lust, being completely oblivious, not only to the norms of the society, but also to the norms of humanity.

(iv) The acts committed so shook the conscience of the society.

514. As noted earlier, on the aspect of sentencing, seeking reduction of death sentence to life imprisonment, three of the convicts/appellants, namely, A-3 Akshay, A-4 Vinay and A-5 Pawan placed on record, through their individual affidavits dated 23-3-2017, following mitigating circumstances:

(a) Family circumstances such as poverty and rural background,

(b) Young age,

(c) Current family situation including age of parents, ill-health of family members and their responsibilities towards their parents and other family members,

(d) Absence of criminal antecedents,

(e) Conduct in jail, and

(f) Likelihood of reformation.

In his affidavit, accused Mukesh reiterated his innocence and only pleaded that he is falsely implicated in the case.

515. In Purushottam Dashrath Borate v. State of Maharashtra [Purushottam Dashrath Borate v. State of Maharashtra, (2015) 6 SCC 652 : (2015) 3 SCC (Cri) 326] , this Court held that age of the accused or family background of the accused or lack of criminal antecedents cannot be said to be the mitigating circumstance. It cannot also be considered as mitigating circumstance, particularly taking into consideration, the nature of heinous offence and cold

and calculated manner in which it was committed by the accused persons.

516. Society's reasonable expectation is that deterrent punishment commensurate with the gravity of the offence be awarded. When the crime is brutal, shocking the collective conscience of the community, sympathy in any form would be misplaced and it would shake the confidence of public in the administration of criminal-justice system. As held in Om Prakash v. State of Haryana [Om Prakash v. State of Haryana, (1999) 3 SCC 19 : 1999 SCC (Cri) 334] , the Court must respond to the cry of the society and to settle what would be a deterrent punishment for what was an apparently abominable crime.

517. Bearing in mind the above principles governing the sentencing policy, I have considered all the aggravating and mitigating circumstances in the present case. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the crime. Justice demands that the courts should impose punishments befitting the crime so that it reflects public abhorrence of the crime. Crimes like the one before us cannot be looked with magnanimity. Factors like young age of the accused and poor background cannot be said to be mitigating circumstances. Likewise, post-crime remorse and post-crime good conduct of the accused, the statement of the accused as to their background and family circumstances, age, absence of criminal antecedents and their good conduct in prison, in my view, cannot be taken as mitigating circumstances to take the case out of the category of “the rarest of rare cases”. The circumstances stated by the accused in their affidavits are too slender to be treated as mitigating circumstances.

> **518.** In the present case, there is not even a hint of hesitation in my mind with respect to the aggravating circumstances outweighing the mitigating circumstances and I do not find any justification to convert the death sentence imposed by the courts below to "life imprisonment for the rest of the life". The gruesome offences were committed with highest viciousness. Human lust was allowed to take such a demonic form. The accused may not be hardened criminals; but the cruel manner in which the gang rape was committed in the moving bus; iron rods were inserted in the private parts of the victim; and the coldness with which both the victims were thrown naked in cold wintery night of December, shocks the collective conscience of the society. The present case clearly comes within the category of "the rarest of rare cases" where the question of any other punishment is "unquestionably foreclosed". If at all there is a case warranting award of death sentence, it is the present case. If the dreadfulness displayed by the accused in committing the gang rape, unnatural sex, insertion of iron rod in the private parts of the victim does not fall in the "rarest of rare category", then one may wonder what else would fall in that category. On these reasonings recorded by me, I concur with the majority in affirming the death sentence awarded to the accused persons."

22. In **Khushwinder Singh v. State of Punjab**, (2019) 4 SCC 415, this Court affirmed the death sentence of the accused in which the accused had killed six innocent persons, out of which two were minors, by kidnapping three persons, drugging them with sleeping tablets, and then pushing them into a canal. Thereafter, three other

members of the same family were done away with. This Court upheld the award of capital punishment as follows:-

> "**14.** Now, so far as the capital punishment imposed by the learned Sessions Court and confirmed by the High Court is concerned, at the outset, it is required to be noted that, as such, the learned counsel appearing on behalf of the accused is not in a position to point out any mitigating circumstance which warrants commutation of death sentence to the life imprisonment. In the present case, the accused has killed six innocent persons, out of which two were minors — below 10 years of age. Almost, all the family members of PW 5 were done to death in a diabolical and dastardly manner. Fortunately, or unfortunately, only one person of the family of PW 5 could survive. In the present case, the accused has killed six innocent persons in a pre-planned manner. The convict meticulously planned the time. He first kidnapped three persons by way of deception and took them to the canal and after drugging them with sleeping tablets, pushed them in the canal at midnight to ensure that the crime is not detected. That, thereafter he killed another three persons in the second stage/instalment. Therefore, considering the law laid down by this Court in *Mukesh* v. *State (NCT of Delhi)*[*Mukesh* v. *State (NCT of Delhi)*, (2017) 6 SCC 1 : (2017) 2 SCC (Cri) 673] , the case would fall in the category of the "rarest of rare case" warranting death sentence/capital punishment. The aggravating circumstances are in favour of the prosecution and against the accused. Therefore, striking a balance between the aggravating and mitigating circumstances, we are of the opinion that the aggravating circumstance would tilt the balance in favour of capital punishment. In the facts and circumstances of the case, we are of the opinion that there is no alternative punishment suitable, except

> the death sentence. The crime is committed with extremist brutality and the collective conscience of the society would be shocked. Therefore, we are of the opinion that the capital punishment/death sentence imposed by the learned Sessions Court and confirmed by the High Court does not warrant any interference by this Court. Therefore, we confirm the death sentence of the accused imposed by the learned Sessions Court and confirmed by the High Court while convicting the appellant for the offence punishable under Section 302 IPC."

The present case consists of a crime even more shocking than that in **Khushwinder's** case (supra), in as much as a young 10 year old girl has first been horribly gangraped after which she and her brother aged 7 years were done away with while they were conscious by throwing them into a canal which caused their death by drowning.

23. Just as this judgment is being dictated, we notice that a significant amendment has been made to The Protection of Children from Sexual Offences Act, 2012, *vide* "The Protection of Children from Sexual Offences (Amendment) Bill, 2019" (hereinafter, "Amendment") which was passed on 24.07.2019 by the Rajya Sabha. In the original Act, aggravated penetrative sexual assault is defined in Section 5 as follows:-

"5. Aggravated penetrative sexual assault.-

g. whoever commits gang penetrative sexual assault on a child.

Explanation.- When a child is subjected to sexual assault by one or more persons of a group in furtherance of their common intention, each of such persons shall be deemed to have committed gang penetrative sexual assault within the meaning of this clause and each of such person shall be liable for that act in the same manner as if it were done by him alone;"

"l. whoever commits penetrative sexual assault on the child more than once or repeatedly;

m. whoever commits penetrative sexual assault on a child below twelve years;"

xxx….xxxx…xxx

"r. whoever commits penetrative sexual assault on a child and attempts to murder the child;"

Originally, the punishment for aggravated penetrative sexual assault was as follows:-

"6. Punishment for aggravated penetrative sexual assault.-

Whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but

> which may extend to imprisonment for life and shall also be liable to fine.”

Post the Amendment, Section 6 has been substituted as follows:-

> "6. (1) Whoever commits aggravated penetrative sexual assault shall be punished with rigorous imprisonment for a term which shall not be less than twenty years, but which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person, and shall also be liable to fine, or with death.
>
> (2) The fine imposed under sub-section (1) shall be just and reasonable and paid to the victim to meet the medical expenses and rehabilitation of such victim."

It will be noticed that the minimum sentence has gone up from 10 years to 20 years, and imprisonment for life has now been expressly stated to be imprisonment for the remainder of the natural life of the person. What is more significant is that the death penalty has also been introduced.

24. On the facts of the present case there is no doubt that aggravated penetrative sexual assault was committed on the 10 year old girl by more than one person. The 10 year old girl child (who was below 12 years of age) would fall within Section 5 (m) of the POCSO

Act. There can be no doubt that today's judgment is in keeping with the legislature's realisation that such crimes are on the rise and must be dealt with severely. In fact, the Statement of Objects and Reasons of the Amendment are important and state as follows:-

> "3. However, in the recent past incidences of child sexual abuse cases demonstrating the inhumane mind-set of the abusers, who have been barbaric in their approach towards young victims, is rising in the country. Children are becoming easy prey because of their tender age, physical vulnerabilities and inexperience of life and society. The unequal balance of power leading to the gruesome act may also detriment the mind of the child to believe that might is right and reported studies establish that children who have been victims of sexual violence in their childhood become more abusive later in their life. The report of the National Crime Records Bureau for the year 2016 indicate increase in the number of cases registered under the said Act from 44.7 per cent. in 2013 over 2012 and 178.6 per cent. in 2014 over 2013 and no decline in the number of cases thereafter.
>
> 4. The Supreme Court, in the matter of Machhi Singh vs. State of Punjab [1983 (3) SCC 470], held that when the community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning the death penalty. But the community will not do so in every case. It may do so in rarest of rare cases when its collective conscience 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. The same analogy has been reiterated by the Supreme Court in the matter of Devender Pal Singh vs. State (NCT of Delhi) [AIR 2002 SC 1661] wherein it was held that when the collective conscience of the community is so shocked, the court must award death sentence.
>
> 5. In the above backdrop, as there is a strong need to take stringent measures to deter the rising trend of child sex abuse in the country, the proposed amendments to the said Act make provisions for enhancement of punishments for various offences so as to deter the perpetrators and ensure safety, security and dignified childhood for a child. It also empowers the Central Government to make rules for the manner of deleting or destroying or reporting about pornographic material in any form involving a child to the designated authority"

25. In the circumstances, we have no doubt that the trial court and High Court have correctly applied and balanced aggravating circumstances with mitigating circumstances to find that the crime committed was cold blooded and involves the rape of a minor girl and murder of two children in the most heinous fashion possible. No remorse has been shown by the Appellant at all and given the nature of the crime as stated in paragraph 84 of the High Court's judgment it

is unlikely that the Appellant, if set free, would not be capable of committing such a crime yet again. The fact that the Appellant made a confessional statement would not, on the facts of this case, mean that he showed remorse for committing such a heinous crime. He did not stand by this confessional statement, but falsely retracted only those parts of the statement which implicated him of both the rape of the young girl and the murder of both her and her little brother. Consequently, we confirm the death sentence and dismiss the appeals.

……..J.
(R.F. NARIMAN)

New Delhi; **…… J.**
August 01, 2019. **(SURYA KANT)**

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO(s). 1174-1175 OF 2019
(ARISING OUT OF SPECIAL LEAVE PETITION (CRIMINAL) NO(S). 7581-7582 OF 2014)

MANOHARAN ….. APPELLANT(S)

VERSUS

STATE BY INSPECTOR OF POLICE,
VARIETY HALL POLICE STATION,
COIMBATORE. ….. RESPONDENT(S)

J U D G M E N T

SANJIV KHANNA, J.

There is so much in the comprehensive judgment of my esteemed brother Justice Rohinton Fali Nariman, with which I entirely agree. I would uphold the appellant's conviction under Sections 302, 376 (2) (f) and (g) and 201 of the Indian Penal Code,1898 ("IPC" for short). However, for reasons stated below, I do not think this is a case wherein the appellant should be given death penalty and would commute it to imprisonment for life i.e. till

his natural life with a stipulation that the appellant would not be entitled to remission under Sections 432 and 433 of the Code of Criminal Procedure, 1973 ("Cr.P.C" for short).

2. In ***Bachan Singh*** v. ***State of Punjab***[1], this Court, while upholding constitutionality of death penalty for murder under Section 302 of the IPC and the procedure for sentencing laid down in Section 354(3) of the Cr.P.C., had held:

> "209… 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 in the rarest of rare cases when the alternative option is unquestionably foreclosed."

Thus, ***Bachan Singh*** (supra), while accepting validity of the death penalty, had settled as a ratio that imprisonment for life is the normal and preferred punishment for the offences under Section 302 of the IPC, and that death penalty, which deprives the accused of his life, is an exception to be imposed only in the *'rarest of rare'* cases, when the first option of imposing imprisonment for life is foreclosed and for which special reasons must be recorded.

1 (1980) 2 SCC 684

3. Recognising that the legislative policy underlying the provisions of Sections 302 IPC and 354 (3) Cr.P.C. requires exercise of the court's discretion on the award of punishment, ***Bachan Singh*** (supra) had laid down that 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 for the judicial discretion to be exercised. The expression 'special reasons' in the context, it was observed, means 'exceptional reasons' founded on exceptionally grave circumstances of the particular case relating to the crime and the criminal.

4. On the aspect of mitigating circumstances in general and on the factual matrix of the case, in ***Bachan Singh*** (supra) it was observed:

> "206. Dr. Chitaley has suggested these mitigating factors:

> Mitigating circumstances: - In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:
>
> (1) That the offence was committed under the influence of extreme mental or emotional disturbance.
>
> (2) The age of the 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.
>
> (5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.
>
> (6) That the accused acted under the duress or domination of another person.
>
> (7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct."

Bachan Singh (supra) in the aforesaid paragraph highlights the aspect of probability of reform and rehabilitation, and also probability that the accused would not commit criminal acts as to

constitute a continuing threat to society and that the State must by evidence adduced establish that conditions 3 and 4 are not satisfied.

5. In ***Machhi Singh*** v. ***State of Punjab***[2], this Court elucidated that from the tussle between the protagonists of "an eye for an eye" philosophy who demand "death for death" on one hand and the "humanists" who press for "death in no case", a synthesis had emerged for imposing a death sentence only in the *'rarest of rare'* cases. Judgment referred to the collective conscience of the community which is so shocked from the crime that had occurred that it will expect the holders of judicial office to inflict death penalty irrespective of their personal opinion on the desirability or otherwise of retaining death penalty. The community it was observed may entertain these sentiments in the following circumstances: -

(1). 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.

2 (1983) 3 SCC 470

(2). 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 a cold-blooded murder for gains of a person vis-à-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.

(3). When murder of a 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.

(4). 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.

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

If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions posed by way of the test for the '*rarest of rare'* cases, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

6. ***Machhi Singh*** (supra) analysing the principles in ***Bachan Singh*** (supra) observed that they postulate a twin question test which is required to be answered by the Court when they exercise discretion to determine the *'rarest of rare'* cases. The questions that must be put and answered are:

(a) Whether there was something uncommon about the crime, which renders the sentence of imprisonment for life inadequate and calls for death sentence?

(b) Whether there were other circumstances concerning the crime, i.e. aggravating circumstances, because of which there is no alternative but to impose the death sentence after having accorded maximum

weightage to all mitigating circumstances which speak in favour of the offender?

7. The circumstances elucidated in ***Machhi Singh*** (supra), if carefully analysed, relate to the first question to be posed and answered. But this is not the only question that the court must answer, for the second question has to be also answered in order to direct or uphold the death penalty. Second question can be answered with reference to the grounds quoted from ***Bachan Singh*** (supra) in paragraph 3 above. These grounds relating to mitigating factors are however not exhaustive.

8. In ***Rajesh Kumar*** v. ***State through the Government of NCT of Delhi***[3], this Court had traced out case laws for evaluation of the sentencing structure with reference to the aggravating and mitigating circumstances in the Indian context. Elucidating that the question of sentence is not to be determined only with reference to the volume, nature or character of the evidence produced by the prosecution in order

3 (2011) 13 SCC 706

to secure a conviction, but also with regard to the facts of a particular case and the existence of extenuating circumstances that can mitigate the enormity of the crime, reference was made to ***Vadivelu Thevar and Anr.*** v. ***State of Madras***[4]***,*** a judgment delivered in 1955 under the Code of Criminal Procedure, 1898. Volume and character of the evidence would refer to the first question, while the extenuating circumstances in current trends in penology and sentencing procedures would refer to the second question. It is also obvious that not only the statutory provisions have undergone a substantive change, there has been an evolution in the law of sentencing and the judicial interpretation on the principles applicable for award of the death penalty. ***Rajesh Kumar*** (supra) clearly rejects the theory that while inflicting the punishment of death penalty, only the nature and gravity of the crime to the exclusion of the characteristics of the criminal are germane for consideration and imposition of an appropriate punishment. Thus, while awarding the sentence, the Court should not confine its consideration “principally or merely” to the circumstances of a

4 AIR 1957 SC 614

particular crime, but also give due consideration and regard to the circumstances and attributes of the criminal. An earlier judgment of this Court in ***Ravji alias Ram Chandra*** v. ***State of Rajasthan***[5]***,*** which was followed by at least six other decisions of this Court, holding that it is the nature of the crime but not the criminal that are germane for consideration of appropriate punishment was commented upon and held to be *per incurium*. Referring to the mitigating circumstances and the aggravating circumstances, the Court held that the brutality and cruelty in the manner of committing a crime and the subsequent conduct of the criminal may be a relevant factor, but is not the sole criteria for awarding death sentence and must not seminally influence the court. Alluding to the mitigating circumstances stated in '3 and 4' of 'paragraph 206' of the judgment in ***Bachan Singh*** (supra) quoted above, on the probability of the accused being reformed and rehabilitated and of not committing criminal acts of violence so as to constitute a continuing threat to the society, were held, must be given due weightage in determining the appropriate sentence. There

5 (1996) 2 SCC 175

should be some disapprobatory evidence and material to show that the accused is incapable of being reformed or rehabilitated in the society. The dictum was expressed in the following words:

> "74. It is clear from the aforesaid finding of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in society and the High Court has considered the same as a neutral circumstance. In our view the High Court was clearly in error. The very fact that the accused can be rehabilitated in society and is capable of being reformed, since the State has not given any evidence to the contrary, is certainly a mitigating circumstance and which the High Court has failed to take into consideration. The High Court has also failed to take into consideration that the appellant is not a continuing threat to society in the absence of any evidence to the contrary. Therefore, in paragraph 78 of the impugned judgment, the High Court, with respect, has taken a very narrow and a myopic view of the mitigating circumstances about the appellant. The High Court has only considered that the appellant is a first-time offender and he has a family to look after. We are, therefore, constrained to observe that the High Court's view of mitigating circumstance has been very truncated and narrow in so far as the appellant is concerned."

9. In an earlier decision in ***Santosh Kumar Satishbhushan Bariyar*** v. ***State of Maharashtra***[6], it was observed that the

6 (2009) 6 SCC 498

'rarest of rare' dictum breathes life into the 'special reasons' which are mandated to be recorded under Section 354(3) of the Cr.P.C. In this regard, referring to ***Bachan Singh*** (supra), the Court had emphasised the aforesaid principles rest on a real and abiding concern for the dignity of human life which postulates resistance to the taking away of a life through the instrumentality of laws, and that death ought not to be awarded save in the *'rarest of rare'* cases and when the alternative option is incontrovertibly foreclosed.

10. The expression *'rarest of rare'* literally means rarest even in the rare, i.e. a rarest case of an extreme nature. The expression and the choice of words, means that punishment by death is an extremely narrow and confined rare exception. The normal, if not an unexceptional rule, is punishment for life, which rule can be trimmed and upended only when the award of sentence for life is unquestionably foreclosed. Thus, capital punishment is awarded and invoked only if the facts and material produced by the prosecution disdainfully and fully establish that the option of imprisonment for life will not be

suffice and is wholly disproportionate and therefore the case belongs to the *'rarest of rare'* category.

11. On the question of deterrent effect of punishment, in ***Santosh Kumar*** (supra) reference was made to ***Swamy Shraddananda*** @ ***Murali Manohar Mishra*** v. ***State of Karnataka***[7] (***Swamy Shraddananda-I***) and some other studies to observe that:

> "164. The issue of deterrence has also been discussed in the judgment of Swamy Shraddananda - I (supra), thus:
>
> "68. It is noteworthy to mention here the Law Commission in its Report of 1967 took the view that capital punishment acted as a deterrent to crime. While it conceded that statistics did not prove these so-called deterrent effects, it also said that figures did not disprove them either."
>
> Most research on this issue shows that the relationship between deterrence and severity of punishment is complicated. It is not obvious how deterrence relates to severity and certainty. Furthermore criminal policy must be evidence-led rather than based on intuitions, which research around the world has shown too often to be wrong. In the absence of any significant empirical attention to this question by Indian criminologists, we cannot assume that severity of punishment correlates to deterrence to an extent which justifies the restriction of the most fundamental

7 (2007) 12 SCC 288

> human right through the imposition of the death penalty. The goal of crime reduction can be achieved by better police and prosecution service to the same or at least to a great extent than by the imposition of the death penalty."

It was also observed that:

> "72. We must also point out, in this context, that there is no consensus in the Court on the use of "social necessity" as a sole justification in death punishment matters. The test which emanates from *Bachan Singh* (supra) in clear terms is that the courts must engage in an analysis of aggravating and mitigating circumstances with an open mind, relating both to crime and the criminal, irrespective of the gravity or nature of crime under consideration. A dispassionate analysis, on the aforementioned counts, is a must. The courts while adjudging on life and death must ensure that rigor and fairness are given primacy over sentiments and emotions."

12. In ***Santosh Kumar*** (supra) reference was made to ***Panchhi and others*** v. ***State of Uttar Pradesh***[8] and ***Vashram Narshibhai Rajpara*** v. ***State of Gujarat***[9] to state that the brutality of the manner in which the crime was committed may not be the sole ground for judging whether the case is one of the *'rarest of rare'*. Every murder is perceived brutal and for murder to be treated as the *'rarest of rare'* case, additional

8 (1998) 7 SCC 177
9 (2002) 9 SCC 168

factors required to be considered are the mitigating and aggravating circumstances featuring around the murder, which would include the intensity of bitterness that had prevailed and the escalation of simmering thoughts into a thirst for revenge or retaliation. Reference was made to ***Om Prakash*** v. ***State of Haryana***[10] , to hold:

> "76. In Om Prakash v. State of Haryana, K.T. Thomas, J. deliberated on the apparent tension between responding to "cry of the society" and meeting the *Bachan Singh* dictum of balancing the "mitigating and aggravating circumstances". The court was of the view that the sentencing court is bound by *Bachan Singh* and not in specific terms to the incoherent and fluid responses of society:
>
> 7. It is true that court must respond to the cry of the society and to settle what would be a deterrent punishment for an abominable crime. It is equally true that a large number of criminals go unpunished thereby increasing criminals in the society and law losing its deterrent effect. It is also a truism as observed in the case of *State of M.P. v. Shyamsunder Trivedi* that the exaggerated adherence to and insistence upon the establishment of proof beyond every reasonable doubt, by the prosecution, ignoring the ground realities, the fact situation and the peculiar circumstances of a given case often results in miscarriage of justice and makes the justice delivery system a suspect; in the ultimate analysis, the society suffers and a criminal gets encouraged. Sometimes it is stated that only rights of the criminals are kept in mind, the victims are

10 (1999) 3 SCC 19

> forgotten. Despite this it should be kept in mind that while imposing the *rarest of rare* punishment, i.e., death penalty, the court must balance the mitigating and aggravating circumstances of the crime and it would depend upon particular and peculiar facts and circumstances of each case."

13. Constitutional Bench in ***Union of India*** v. ***V. Sriharan alias Murugan and Others***[11] had examined several questions/issues. On interpreting Sections 53 and 45 IPC it was held that the imprisonment of life means imprisonment till the end of life of the convict. However, appropriate government in exercise of power under Sections 432 and 433 Cr.P.C. can grant remission in the form of commutation. Life convict can be also validly granted remission etc. by the President and the Governor of the State as provided under Articles 72 and 161 of the Constitution. The majority judgment authored by Mohd. Ibrahim Kalifulla, J. answered in affirmative the question "whether a special category of sentence can be considered in substitute to death penalty for imposing sentence for life, i.e. 'entirety of life'," which can be the full life term or a specified term exceeding 14 years without remission under Sections 432

11 (2016) 7 SCC 191

and 433 Cr.P.C., observing that the earlier decision in ***Swamy Shraddananda (2)*** v. ***State of Karnataka***[12] ***[Swamy Shraddananda (2)]*****,** accepting the said view was a well thought out one. The majority in ***V. Sriharan*** (supra) observed:

> "68. If one were to judge the case of the said appellant in the above background of details from the standpoint of the victim's side, it can be said without any hesitation that one would have unhesitatingly imposed the death sentence. That may be called as the human reaction of anyone who is affected by the conduct of the convict of such a ghastly crime. That may even be called as the reaction or reflection in the common man's point of view. But in an organised society where the Rule of Law prevails, for every conduct of a human being, right or wrong, there is a well-set methodology followed based on time tested, well-thought out principles of law either to reward or punish anyone, which were crystallised from time immemorial by taking into account very many factors, such as the person concerned, his or her past conduct, the background in which one was brought up, the educational and knowledge base, the surroundings in which one was brought up, the societal background, the wherewithal, the circumstances that prevailed at the time when any act was committed or carried out whether there was any pre-plan prevalent, whether it was an individual action or personal action or happened at the instance of anybody else or such action happened to occur unknowingly, so on so forth. It is for this reason, we find that the criminal law jurisprudence was developed by setting forth very many ingredients while describing the various crimes, and by providing different kinds of

12 (2008) 13 SCC 767

> punishment and even relating to such punishment different degrees, in order to ensure that the crimes alleged are befitting the nature and extent of commission of such crimes and the punishments to be imposed meets with the requirement or the gravity of the crime committed.
>
> 69. Keeping the above perception of the Rule of Law and the settled principle of criminal law jurisprudence, this Court expressed its concern as to in what manner even while let loose of the said appellant of the capital punishment of death also felt that any scope of the appellant being let out after 14 years of imprisonment by applying the concept of remission being granted would not meet the ends of justice. With that view, this Court expressed its well-thought out reasoning for adopting a course whereby such heartless, hardened, money-minded, lecherous, paid assassins though are not meted out with the death penalty are in any case allowed to live their life but at the same time the common man and the vulnerable lot are protected from their evil designs and treacherous behaviour.…"

14. Judgment in ***Santosh Kumar*** (supra) under the heading 'Equal Protection Clause' refers to ***Swamy Shraddananda (2)*** (supra) in which the Court had noted and recorded with extraordinary candour the "arbitrariness prevailing in the capital sentencing process" in the following words:

> "48. .... Coupled with the deficiency of the criminal justice system is the lack of consistency in the sentencing process even by this Court. It is noted above that *Bachan Singh* laid down the principle of the rarest of rare cases. *Machhi Singh*,

for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the *Machhi Singh* categories were followed uniformly and consistently.

In *Aloke Nath Dutta* v. *State of W.B.* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] Sinha, J. gave some very good illustrations from a number of recent decisions in which on similar facts this Court took contrary views on giving death penalty to the convict (see SCC pp. 279-87, paras 151-78 : Scale pp. 504-10, paras 154-82). He finally observed (SCC para 158) that "courts in the matter of sentencing act differently although the fact situation may appear to be somewhat similar" and further "it is evident that different Benches had taken different view in the matter" (SCC para 168). Katju, J. in his order passed in this appeal said that he did not agree with the decision in *Aloke Nath Dutta* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] in that it held that death sentence was not to be awarded in a case of circumstantial evidence. Katju, J. may be right that there cannot be an absolute rule excluding death sentence in all cases of circumstantial evidence (though in *Aloke Nath Dutta* [(2007) 12 SCC 230 : (2008) 2 SCC (Cri) 264 : (2006) 13 Scale 467] it is said "normally" and not as an absolute rule). But there is no denying the illustrations cited by Sinha, J. which are a matter of fact.

50. The same point is made in far greater detail in a report called "*Lethal Lottery, The Death Penalty in India*" compiled jointly by Amnesty International India and People's Union for Civil Liberties, Tamil Nadu & Puducherry. The report is

based on the study of the Supreme Court judgments in death penalty cases from 1950 to 2006. One of the main points made in the report (see Chapters 2 to 4) is about the Court's lack of uniformity and consistency in awarding death sentence.

51. The truth of the matter is that the question of death penalty is not free from the subjective element and the confirmation of death sentence or its commutation by this Court depends a good deal on the personal predilection of the judges constituting the bench.

52. The inability of the Criminal Justice System to deal with all major crimes equally effectively and the want of uniformity in the sentencing process by the Court lead to a marked imbalance in the end results. On the one hand there appears a small band of cases in which the murder convict is sent to the gallows on confirmation of his death penalty by this Court and on the other hand there is a much wider area of cases in which the offender committing murder of a similar or a far more revolting kind is spared his life due to lack of consistency by the Court in giving punishments or worse the offender is allowed to slip away unpunished on account of the deficiencies in the Criminal Justice System. Thus the overall larger picture gets asymmetric and lop-sided and presents a poor reflection of the system of criminal administration of justice. This situation is matter of concern for this Court and needs to be remedied.

53. These are some of the larger issues that make us feel reluctant in confirming the death sentence of the appellant."

15. In ***V. Sriharan*** (supra), the majority judgment referring to the above criticism, while fully endorsing the anguish, had observed that the situation on the lack of uniformity and inconsistency in awarding death sentence and its ill effects is of serious concern. Thereafter it was noted that this Court in several cases had imposed imprisonment till life or for a fixed term exceeding 14 years without remission as a middle path where life sentence means a person's life span in incarceration, rather than get nudged into endorsing the death penalty. The Court would not violate the law by giving the aforesaid direction by imposing life imprisonment with the stipulation by restraint or limit to grant of remission by way of statutory executive action.

16. Thus, the majority judgment approved the ratio in ***Swamy Shraddananda (2)*** (supra) that there can be special category of sentence where the Court could specify that the life sentence would exceed 14 years and would be beyond application for remission. Earlier judgment of this Court in ***Sangeet and Another*** v. ***State of Haryana***[13] that the Court cannot proscribe

13 (2013) 2 SCC 452

power of remission of the appropriate Government by awarding sentences of 20-25 years, was over-ruled. The majority, however clarified, that such directions in the judgment would not in any manner restrict the right to claim remission, commutation, clemency etc. as provided under Article 72 and Article 161 of the Constitution.

17. A three judges bench in their decision dated 14th February 2019 in Review Petition (Criminal) No. 308/2011 in Criminal Appeal No. 379/2009 in ***M.D. Mannan*** @ ***Abdul Mannan*** v***. State of Bihar***, while allowing the Review Petition, commuted the death sentence with the direction that considering the heinous nature of the crime committed, the petitioner therein must undergo imprisonment for life, that is till his natural death and no remission of sentence would be granted. In ***Md. Mannan*** (supra) after referring to several cases including ***Dagdu and Others*** v. ***State of Maharashtra[14] and Mohinder Singh*** v. ***State of Punjab[15],*** on the doctrine of *'rarest of rare'* and its application, it was held:

14 (1977) 3 SCC 68
15 (2013) 3 SCC 294

> "22. The doctrine of 'rarest of rare' confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of 'rarest of rare' and secondly, when the alternative option is unquestionably foreclosed. Bachan Singh suggested selection of death punishment as the penalty of last resort when, alternative punishment of life imprisonment will be futile and serves no purpose."

18. In ***Santosh Kumar*** (supra), reference was made to the 48th Report of the Law Commission and the importance of information relating to the characteristics and socio-economic background of the offender which should be collected and brought to the notice of the Court.

19. In ***Mulla*** v. ***State of Uttar Pradesh***[16], it was held that the socio-economic factors relating to the crime and the criminal should be taken into consideration, in the following words:

> "80. Another factor which unfortunately has been left out in much judicial decision-making in sentencing is the social-economic factors leading to crime. We at no stage suggest that economic depravity justify moral depravity, but we certainly recognize that in the real world, such factors may lead a person to crime. The 48th Report of the Law Commission also reflected this concern. Therefore, we believe, socio-economic factors

16 (2010) 3 SCC 508

> might not dilute guilt, but they may amount to mitigating factor i.e. the ability of the guilty to reform. It may not be misplaced to note that a criminal who commits crimes due to his economic backwardness is most likely to reform. This Court on many previous occasions has held that his ability to reform amounts to a mitigating factor in cases of death penalty.
>
> 81. In the present case, the convicts belong to an extremely poor background. With lack of knowledge, on the background of the appellants, we may not be certain as to their past, but one thing which is clear to us is that they have committed these heinous crimes for want of money. Though we are shocked by their deeds, we find no reason why they cannot be reformed over a period of time."

The socio-economic characteristics of the criminal assume relevancy in light of administration of criminal justice and particularly of capital punishment, with regard to which the Law Commission, in its 262nd Report, had made the following observations:

> “7.1.6 Numerous committees reports as well as judgments of the Supreme Court have recognized that the administration of criminal justice in the country is in deep crisis. Lack of resources, outdated modes of investigation, over-stretched police force, ineffective prosecution, and poor legal aid are some of the problems besetting the system. Death penalty operates within this context

> and therefore suffers from the same structural and systemic impediments. The administration of capital punishment thus remains fallible and vulnerable to misapplication. The vagaries of the system also operate disproportionately against the socially and economically marginalized who may lack the resources to effectively advocate their rights within an adversarial criminal justice system."

20. When we come to the facts of the present case, one has to but agree that the offence or the crime was brutal, ruthless and cruel as two innocent children aged 7 to 10 lost their lives, and there is substantial medical and other evidence to show that the young girl was mercilessly sexually abused and raped by the appellant and Mohanakrishnan (since deceased). Thereafter the children were administered poison and thrown into a canal to die. The pain and trauma suffered by the small children who were not at fault and the agony of the parents and grandmother are immense, incalculable and would remain forever. The punishment must be severe. Yet to award death penalty we must examine and answer the second question, i.e. balance out the aggravating circumstances by giving weightage to the mitigating circumstances and decide whether

punishment of life imprisonment is foreclosed. Then and then alone the case would fall under the *'rarest of rare'* category. While doing so, we should account for the majority dictum in ***V. Sriharan*** (supra) that where life imprisonment is considered to be disproportionate or inadequate, then the Court may direct sentence for life imprisonment, without any right to remission i.e. imprisonment for the entire course of life with no recourse to remission, subject to the power that may be exercised under Article 72 and 161 of the Constitution.

21. In ***Md. Mannan*** @ ***Abdul Mannan*** (supra) there is a detailed reference to case law on whether death penalty should be awarded in cases where prosecution had succeeded in proving the guilt beyond a reasonable doubt by leading circumstantial evidence. Reference was made to the judgment of this Court in ***Ram Deo Prasad*** v. ***State of Bihar***[17] which had made reference to earlier judgments in ***Santosh Kumar*** (supra) and ***Ramesh and Others*** (supra) to observe that quality of evidence was also a relevant factor in considering the

17 (2013) 7 SCC 725

question of death sentence. Judgment under challenge before us has quoted from ***The Collector of Customs, Madras and Others*** v. ***D. Bhoormall***[18] to following effect: -

> "30. ……. One of them is that the prosecution or the Department is not required to prove its case with mathematical precision to a demonstrable degree; for, in all human affairs absolute certainty is a myth, and-as Prof. Brett felicitously puts it "all exactness is a fake". El Dorado of absolute proof being unattainable, the law accepts for it probability as a working substitute in this work-a-day world. The law does not require the prosecution to prove the impossible. All that it requires is the establishment of such a degree of probability that a prudent man may, on its basis, believe in the existence of the fact in issue. Thus, legal proof is not necessarily perfect proof; often it is nothing more than a prudent man's estimate as to the probabilities of the case."

22. In the present case the principle applicable to cases based on circumstantial evidence is not required to be examined and answered, but I would like to make some comments on the evidence that should be excluded. This would reveal the true importance and significance of the voluntary confession made by the appellant.

18 (1974) 2 SCC 544

23. On the factual matrix of the present case, the High Court had discarded and did not rely upon the testimonies of Kamala Bai (PW-9), Vijayranganathan (PW-12), C. Manikandan (PW-13), Jayakumar (PW-14) and Afsal (PW-16) (I have some reservation on the High Court disregarding and not taking into consideration the testimony of Kamala Bai (PW-9), grandmother of the victims. However, for the purpose of the present judgment I need not go into the said aspect as her deposition would not directly implicate the appellant before us – Manoharan). We have also not accepted R. Sounderrajan's (PW-24) version that he had seen Appellant-Manoharan and Mohanakrishnan (since deceased) with the two children at about 3 p.m. on 29.10.2010. The testimony of R. Sounderrajan (PW-24) to this extent as a chance witness is debatable and questionable. R. Sounderrajan (PW-24) also claims, and to this extent we have no doubt, that R. Sounderrajan (PW-24) had seen a school bag floating in the nearby canal (and another bag in the vicinity) which he took out and thereafter had handed over the bags to Chinnaswamy (PW-22) who had then

telephoned the school principal Anthony Raj (PW-16). Anthony Raj (PW-16) had then informed Chinnaswamy (PW-22) that the two children, to whom the school bags belonged, were missing. R. Sounderrajan (PW-24) did not tell Chinnaswamy (PW-22) and neither was Anthony Raj (PW-16) informed and told about the chance meeting between R. Sounderrajan (PW-24) and Appellant-Manoharan and Mohanakrishnan (since deceased) at about 3:00 p.m. on 29.10.2010 and the conversation amongst the three, in which the appellant and Mohanakrishnan (since deceased) had stated that they were taking the children for a picnic to Gurumurthi Hill._

24. I have some reservation on whether the hair was found attached or inside the pink underwear (Exhibit M.O-1) found in the van by Saravanan (PW-43), Assistant Director of the Mobile Unit of the Tamil Nadu Forensic Science Department. The Mahazar (Exhibit P-5) prepared by him and the Investigating Officer Kanagasabapathy (PW-47) does not specifically state that the hair found was stuck on the underwear. On the other

hand, it refers to “hair gathered” as is apparent from column 5 and 7 of the Mahazar (Exhibit P-5) which reads: -

> “From whom was it seized
> Produced from the Maruti Van TN37 BF-2796 after search by Forensic Science Expert, which car was used by Accused Mohanakrishnan to kidnap Muskan and Rithik”
>
> “Details of property seized
> With words SBT Kida Wear 75cms” printed pink Jatti with stains and hair gathered and entrusted after keeping inside Angel Form Brassieres card board box.”

25. However, in the report (Exhibit P-38) prepared by PW-43 which was then sent to the Investigating Officer (PW-47), for subsequent forensic examination, the underwear was found stuck with hair. Exhibit P-38 records: -

> “a) A Pink coloured panty printed letters “SBT Kids wear” “75cms” with pale brownish starchy like stains with small hair pieces on its inner surface was found beneath the back seat of the vehicle was identified, collected. The place where the hair pieces were seen were marked and pasted with cellphone tape in order to safety transport the vital cue materials for comprehensive Forensic analysis.”

26. Radhika Balachandran (PW-48) Deputy Director, Regional Forensic Science Laboratory, Coimbatore has

deposed that 5 strands of hair were sent for forensic examination. However, only two strands of hair were sent by PW-48 for DNA comparison to Lakshmi Balasubramanian (PW-49), Deputy Director, DNA Division, Forensic Science Department, Chennai. These two hairs strands, as per the DNA report were of the Appellant-Manoharan.

27. Radhika Balachandran (PW-48) in her report (Exhibit-P 48) has opined that the hair strands were human pubic hair. However, in her cross-examination before the High Court (this witness was not examined in the trial court and the report was taken on record under Section 293 of the Cr.P.C.) in response to Court Question, PW-48 had stated:

> "Court Question: What did you observe in the five strands of hair found in item [8]?
> A: They all were dark brown in colour, medullated four were with shrunken root of which only two had thin layer of tissue and the ends of the strands were found tapering.
>
> Court Question: Can pubic hairs fall of with root during rubbing?
> A: Pubic hairs can fall of on rubbing if they are in the stag being shrunk and falling of naturally.
>
> Court Question: Pubic hairs can also plucked with roots?

A: Yes.”

28. Modi’s Textbook of Medical Jurisprudence and Toxicology 26th Edition at page 427 in table 13 has referred to characteristics of human hair from various body parts. Pubic hair is between 1-5 cm often curly and kinky, large by variation along length, round or frayed relatively broad and irregular. Hair in the Axilla region is also 1-5 cm broad, round and frayed and is often circular. Further scalp hair have tampered tips, whereas pubic hair have round or frayed tips. As per PW-48, the ends of the strands were found tampered.

29. I would accept the prosecution case that hair belonging to Appellant-Manoharan was found in the van but the forensic report that this was the pubic hair of the Appellant-Manoharan would be debatable. It would be also debatable whether the hair was found stuck/attached on the underwear (M.O. -1) which belonged to the deceased girl. Inspite of the aforesaid reservation, I have no hesitation in accepting that the prosecution case has been proved beyond doubt and for this

would also rely on the confessional statement made by the appellant before the Magistrate under Section 164 Cr.P.C. The contention that the confession should not be relied upon has been rightly rejected. In the avowal recorded on 20th November 2010, twenty days after the arrest of the appellant on 30th October 2010, the appellant was candid and forthcoming in accepting his friendship with Mohanakrishnan (since deceased), and that the girl was subjected to sexual assault and was raped by Mohanakrishnan (since deceased) on the rear seat of the van by tying her hands. The appellant, realising that the boy would be unnerved and fret, had taken him away. On return, the appellant too had sexually assaulted the helpless girl and committed rape. Subsequently, he had bought milk from the bakery and the two children were given milk mixed with the cow dung powder that had poison. Concerned that they would be exposed and caught, the appellant and Mohanakrishnan (since deceased) had thrown the children in the canal, where they got drowned and died.

30. Confession of an accused as to the offence made on oath before the Magistrate under Section 164 Cr.P.C. is uncommon and 'rare'. Both the trial court and the High Court have referred to the confession, but have not considered its implication and effect on the question of punishment as a mitigating factor.

31. The trial court in its judgment, on the question of sentence, has recorded as under:

> "With regard to question of sentence as it required section 235(2) Cr.P.C the accused simply stated that nothing is to say about the sentence to be awarded. Even after asking the accused repeatedly by explaining that there is a possibility for awarding maximum punishment prescribed in law unless the court convinced with adequate reasons. Then also the accused did not respond. However the learned counsel appearing for the accused advanced her argument by stating how for the rulings relied by prosecution is not applicable to the case on our hand and further invites this court that the accused Manoharan is aged about 25 hears, having aged parents and a family and he is the 1st offender prayed for leniency."

The trial court also observed that, when the appellant was produced before the court on 29th October, 2012 and had been told about the charge proved against him and on being asked

whether he had understood the consequences, the appellant had stated that he had nothing to say.

32. Judgment in ***Md. Mannan*** @ ***Abdul Mannan*** (supra) highlights the importance of Section 235(2) of Cr.P.C., which postulates that if the accused is convicted, the court must proceed in accordance with the provisions of Section 360 to hear the accused on the question of sentence and then pass the sentence on the accused in accordance with law. This provision was earlier examined in ***Santa Singh*** v. ***State of Punjab***[19] wherein it was observed that hearing on the question of sentence should not be rendered an idle formality by confining the hearing merely to earlier submissions without giving an opportunity to the parties, the State and the accused, to produce material with regard to various factors on the question of sentence.

33. In the present case, confession was not made at the behest of the police/authorities or on inducement by the prosecution to enable the prosecution to prove the case against the appellant. Rather, we have already rejected the contention

19 (1976) 4 SCC 190

that the confession was extracted under compulsion, inducement, threat or promise and therefore inadmissible. Confession by the appellant was given voluntarily and after due deliberation on 20th November, 2010, as the appellant was given a day's time to think and ponder when he had appeared before the Magistrate on 19th November, 2010.

34. Confession of guilt is an acceptance of one's sin. Though psychologists are not clear as to how precisely guilt operates to produce confession, one possibility is that it tends to cure self-hostility. Pangs of conscience following the committal of an offence would normally have a role to play when the person confesses, for if a person does not feel the guilt, he would normally not confess to an act which is regarded as evil. By confessing, as an act of penance, a person may seek and beg for forgiveness. However, to make a confession can be a degrading and humiliating experience, yet the psychoanalytic models suggest that this is the first step back into society. (See *'The Value of Confession and Forgiveness'*, Carl Jung).

35. In this case, it could be argued that the appellant was driven by the hope that an earlier admission of guilt may lead to a lighter sentence and that was one of the factors that had prompted him to make the confession. However, to confess to such acts of crime and misdeeds before all and everyone, including the Magistrate could only mean that the appellant had felt shame, remorse and alienation from the society. It is probable, among other reasons, that the appellant had confessed his guilt in order to seek forgiveness. Otherwise, I do not see any cause for him to appear before the Magistrate and on oath, disclose in detail and accept his direct involvement in the crime. In ***Bishnu Prasad Sinha*** (supra), this Court referred to the confession made by the appellant before the Judicial Magistrate and also before Sessions Judge in a statement under Section 313 Cr.P.C. and observed that this would show repentance.

36. Confession of crime has been treated as a mitigating circumstance by this Court in ***Gurdeep Singh alias Deep*** v.

State (Delhi Admn.)[20]***,*** a case under the Terrorist and Disruptive Activities (Prevention) Act, 1987 to observe: -

> "25. Before concluding we would like to record our conscientious feeling for the consideration by the legislature, if it deems fit and proper. Punishment to an accused in criminal jurisprudence is not merely to punish the wrongdoer but also to strike a warning to those who are in the same sphere of crime or to those intending to join in such crime. This punishment is also to reform such wrongdoers not to commit such offence in future. The long procedure and the arduous journey of the prosecution to find the whole truth is achieved sometimes by turning on the accused as approvers. This is by giving incentive to an accused to speak the truth without fear of conviction. Now turning to the confessional statement, since it comes from the core of the heart through repentance, where such accused is even ready to undertake the consequential punishment under the law, it is this area which needs some encouragement to such an accused through some respite may be by reducing the period of punishment, such incentive would transform more such incoming accused to confess and speak the truth. This may help to transform an accused, to reach the truth and bring to an end successfully the prosecution of the case."

The above paragraph was quoted in ***Mohd. Maqbool Tantray*** v. ***State of Jammu and Kashmir***[21], which too was a case under the Terrorist and Disruptive Activities (Prevention)

20 (2000) 1 SCC 498
21 (2010) 12 SCC 421

Act, 1987 wherein the sentence was reduced from 14 years to the period already undergone on consideration of the confession.

37. It is correct that the appellant after nearly two years had written the letter dated 25th July 2012 to the Additional Sessions Judge to be read as his statement under Section 313 Cr.P.C., retracting the last part of his confession as to his involvement in sexual assault, rape and throwing the children in the canal. This letter does, however, substantially reiterate and accept the first portion of the confession, including his presence in the van, but states that the appellant had not raped the girl and had remained standing. It was stated that thereafter the appellant was dropped by Mohanakrishnan (since deceased) near a bridge, who had driven off in the van with the children. Further, the appellant's statement under Section 164 Cr.P.C., as recorded by the Magistrate, was incorrect and the police had shown and played a video recording to the Magistrate.

38. Appellant's partial retraction has been rightly disbelieved for good reasons, including the statement of the appellant under Section 313 Cr.P.C. in the Court accepting and admitting that his confession was recorded by the Magistrate. The retraction by itself, I would observe, should not be treated as absence of remorse or repentance, *albeit* an afterthought or on advice propelled by fear that the appellant in view of his admission may face the gallows, and that the earlier confession made seeking forgiveness would be the cause of his death. A thought of doubt and attempt to retract had surfaced on account of belief that the sense of remorse, repentance and forgiveness would not be appreciated and given due regard, cannot be ruled out. Benefit in this regard must go to the appellant.

39. The other mitigating factors in favour of the appellant are his young age, he was 23 years of age at the time of occurrence and he belongs to a poor family. He has aged parents and is a first-time offender as recorded in the

judgment/order of the trial court. Further, the appellant Manoharan was not initially involved in the abduction and kidnapping of the children. He was not the mastermind. Mohanakrishnan (since deceased) had thought, conceived and had single-handedly executed the plan to abduct the children. Appellant did join him thereafter and was with Mohanakrishnan (since deceased). Subsequently the devil in Mohanakrishnan (since deceased) took over and he sexually assaulted and raped the small girl, while the appellant kept quiet. Later the appellant too sexually assaulted and committed rape. Thereupon, poison was administered to the children before throwing them into the canal. The offence committed was heinous and deplorable.

40. I would, therefore, uphold and maintain conviction of the appellant under Sections 302, 376(2)(f) and (g) and 201 IPC and the sentences awarded under Sections 376(2)(f) and (g) and 201 IPC. To this extent the appeal is dismissed. In view of the aforesaid discussion and on balancing aggravating and mitigating circumstances, in my opinion, the present case does

not fall under the category of '*rarest of rare'* case i.e. there is no alternative but to impose death sentence. It would fall within the special category of cases, where the appellant should be directed to suffer sentence for life i.e. till his natural death, without remission/commutation under Sections 432 and 433 Cr.P.C. To this extent I would allow the appeal.

NEW DELHI; **.....J.**
AUGUST 01, 2019. **(SANJIV KHANNA)**