2024:CGHC:46243-DB

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

CRREF No. 2 of 2021

In Reference of State of Chhattisgarh, through the Police Station Somani, Rajnandgaon District Rajnandgaon Chhattisgarh

---- **Applicant**

versus

Dipak Baghel S/o Late Shri Itwari Baghel, aged about 29 years R/o Gadamod, Police Station Navagarh, District Bemetara Chhattisgarh

---- **Non-applicant**

For Applicant/State : Mr. Shashank Thakur, Dy. Advocate General
For Non-applicant : Mr. Palash Tiwari, Advocate

CRA No. 1365 of 2021

Dipak Baghel S/o Late Itwari Baghel, aged about 29 years R/o Village Gadamod, Thana Nawagarh, District Bemetara (Chhattisgarh)

----**Appellant**

Versus

State of Chhattisgarh, through the Police Station - Somani, District Rajnandgaon (Chhattisgarh)

---- **Respondent**

For Appellant : Mr. Palash Tiwari, Advocate
For Respondent/State : Mr. Shashank Thakur, Dy. Advocate General

---

Hon'ble Shri Ramesh Sinha, Chief Justice
Hon'ble Shri Amitendra Kishore Prasad, Judge

Judgment on Board

Per **Ramesh Sinha, Chief Justice**

26.11.2024

1. The appellant herein namely Dipak Baghel has been awarded death sentence by the learned Additional Sessions Judge (Fast Track Special Court – POCSO), Rajnandgaon in Special Criminal (POCSO) Case No.34/2021 vide judgment dated 08.10.2021 after having found him guilty for offence punishable under Sections 302 of the Indian Penal Code (for short, 'the IPC') read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'the POCSO Act') and also under Section 363, 366 and 201 of the IPC. He has been sentenced to death by hanging under sub-section (5) of Section 354 of the CrPC. Conviction and sentences imposed upon the appellant are as follows:-

Conviction	**Sentence**
U/s 302 of the IPC r/w Section 6 of the POCSO Act	Death sentence (to be hanged till death)
U/s 363 of the IPC (two counts)	Imprisonment for 3-3 years R.I. & fine of Rs. 5,000/- & 5,000/-, in default, additional R.I. for 1 year
U/s 366 of the IPC	Imprisonment for 10 years R.I. & fine of Rs. 5,000/-, in default, additional R.I. for 1 year
U/s 201of the IPC	Imprisonment for 7 years R.I. & fine of Rs. 5,000/-, in default, additional R.I. for 1 year

2. The learned Additional Sessions Judge in exercise of power conferred under Section 366 of the CrPC after passing the sentence of death submitted the proceedings to this Court for its confirmation and this is how this death reference is before us for consideration along with the appeal preferred by the accused / appellant herein being Cr.A.No.1365/2021.

3. The prosecution case and admitted facts are as follows :

A. That on the night of 28.02.2021, the present appellant had enticed away the deceased along with her brother at around 8:30 pm to attend a Jasgeet/Jhanki function wherein the appellant left the brother of the deceased at the function and took the deceased girl near the railways tracks at Somni and committed forceful sexual intercourse rape with the deceased and hit the head of the deceased with a heavy stone causing her death and threw the body of the deceased on the nearby railway tracks due to which the body was mutilated, so as to cause destruction of evidence, thereby committed the above mentioned offences. It is admitted in the case that the age of the deceased is 7 years 4 months and 7 days and age of the brother of the deceased is 5 years. The appellant used to reside in the maternal home of the deceased as he was a close friend of the maternal uncle of the deceased. Appellant also took the ankle bracelet of the deceased along with him.

B. The further case of the prosecution is that on 01.03.2021 in the morning the family of the deceased did not find the deceased at home and were searching for her whereabouts, then around 9 am Dilip Kumar Manikpuri (PW-3) maternal uncle of the deceased received a call from Tomeshwar Dewangan that a picture of a dead body of a girl is being circulated on WhatsApp, upon seeing the said picture Dilip Kumar Manikpuri (PW-3) went to the place of incidence along with Tomeshwar to find the dead body of her niece in mutilated state lying near the railway tracks. At the instance of Dilip Kumar Manikpuri (PW-3), Merg Intimation Ex.P/22 has been recorded on 01.03.2021 at 10:45 am near Nawagaon Khar Up Line 882/2019 by the Investigating Officer Shivendra Rajput (PW-18) and Inquest Report Ex.P/9 was conducted by PW-12 Sewak Ram in presence of witness Dilip Kumar Manikpuri, Sunita aka Triveni, Satish Sen, Ghuman Sahu and Nemdas Manikpuri on the same date 01.03.2021 and identified the dead body of the deceased. Subsequently First Information Report (FIR) was registered at 05.03.2021 at 5:15 pm vide Ex P/30 by Investigating Officer (PW-13) on behalf of the complainant Dilip Kumar Manikpuri (PW-3) against the sole appellant herein for offences under section 363, 366, 376 2F, 376 (2)(1), 302 and 201 of Indian Penal Code and Section 4 of the Protection of Children from Sexual Offences Act, 2012. Further the dead body was sent for Post Mortem and Dr. Nitin Baramate (PW-1) along with Dr. Sohadra Thakur conducted the post

mortem of the deceased vide Ex. P-1. According to the PM Report the deceased died on account of head injuries and internal injuries, deceased was subjected to forceful sexual intercourse due to which injuries were present on the private parts of the deceased. Death was homicidal in nature and death had occurred 12-24 hours prior to time of post mortem. The samples from the organs of the deceased, vaginal slide and swab were seized vide Ex. P-26 in presence of witnesses K Nagarjun and Goverdhan Singh Kunwar. Further during the course of investigation, the certified copy of the dakhil kharij (admissions) register pertaining to the date of birth of the deceased was seized vide Ex P-20 C.

C. Further case of prosecution is that on the basis of the suspicion raised by the complainant Dilip Kumar Manikpuri (PW-3) and the brother of the deceased (PW-9), further investigation was conducted and the appellant was found absconding from his home and was finally caught on 08.03.2021 by the police vide arrest memo Ex. P-42. The appellant was taken into custody and his memorandum statement vide Ex P-15 was recorded under Section 27 of the Indian Evidence Act on 08.03.2021 at 2:05 PM by the Investigating Officer Shivendra Rajput (PW-18) in presence of the memorandum witnesses Harish Deshmukh (PW-7) and Ghuman Sahu (PW-8). At the instance of the accused appellant one silver ankle bracelet of the deceased which the appellant had taken from the body of the

deceased and kept at his residence concealed in his clothes was seized and a bloodstained checked full shirt worn by the appellant during commission of the offence was also seized from the appellant vide seizure memo Ex. P-17, and a blood stained stone used for the commission of the offence which was concealed by the appellant at the place of incidence was also seized vide Ex. P-16, both seizure memorandum in the presence of the seizure witnesses Harish Deshmukh (PW-7) and Ghuman Sahu (PW-8). Further the underwear worn by the appellant during the commission of crime was also seized vide Ex. P-34. Permission was sought from the Additional Sessions Court (FTSC), District Rajnandgaon to conduct DNA test of the appellant vide Ex P-41 and after obtaining the necessary permission and consent of appellant vide Ex P-37, the blood sample was collected from the appellant and seized vide Ex P-33 and the seized blood samples along other seized articles were also sent for DNA examination vide Ex P-38 and the DNA examination report has been received vide Ex P-45. According to the DNA Report(pg 134),

> I. *Allele* of DNA profile from the blood sample of the appellant (Article L) were found in every *allele* of the markers found in the DNA profile of the Article D sample taken from the scalp hair of the deceased, Article E nail clipping of the deceased, Article F vaginal swab and

vaginal slide of the deceased and Article G cervical slide and cervical swab of the deceased.

II. *Allele* of DNA profile from the Article H sample from the sternum bone of the deceased were found in every *allele* of the markers found in the DNA profile of the Article I underwear of the appellant, Article J bloodstained shirt seized from the appellant, Article K bloodstained stone used by the appellant to kill the deceased.

III. Male DNA profile (Y chromosomes) found in the Article F vaginal swab and vaginal slide of the deceased and Article G cervical slide and cervical swab of the deceased are similar to the male DNA profile (Y Chromosomes) found in the Article L blood sample of the appellant.

D. During the course of investigation, statements of the witnesses were recorded under Section 161 and 164 of the Code of Criminal Procedure and charge sheet was filed and charges were framed under section 363-363, 366, 376 AB, 302, 201 and Section 6 of POCSO Act.

4. The prosecution has examined as many as 20 witnesses and exhibited 54 documents Ex's. P-1 to Ex's. P-54.

5. **Defence of the Accused:** The accused/appellant herein entered into defence and abjure his guilt and pleaded innocence and false implication. The accused did not exhibit any statement of defence witness nor adduced any oral or documentary evidence.

6. **Judgment / finding of the Trail Court:** The learned Additional Sessions Judge upon the appreciation of oral and documentary evidence on record convicted the appellant under Section 302, 201, 363-two counts, Section 366 of IPC and Section 6 of POCSO and awarded him death sentence under Section 302 IPC and Section 6 POCSO and further made the present reference before this Hon'ble Court for confirmation of the same.

7. The learned trial Court in order to convict the appellant herein has found proved the following facts: -

1. Age of the deceased was 07 years 04 months and 07 days as proved by Ex.P-7 – dakhil kharij register of Government Primary School, Bachera wherein her date of birth is mentioned as 21.10.2013, which has been duly proved by Alen Kumar Verma (PW-10) Headmaster of the concerned school and age of the other victim (PW-9) brother of the deceased has been stated to be 5 years in this Court statement, which stood unrebutted by the defence. Therefore, the age of the other victim is admitted and established to be 5 years.

2. The appellant had enticed away the deceased along with her brother at around 8:30 pm to attend a Jasgeet/Jhanki function wherein the appellant left the brother of the deceased at the function and took the deceased girl near the railways tracks at Somni and committed forceful sexual intercourse rape with the deceased and hit the head of the

deceased with a heavy stone causing her death and threw the body of the deceased on the nearby railway tracks due to which the body was mutilated, so as to cause destruction of evidence, thereby committed the above mentioned offences.

3. Death of the victim / deceased is homicidal in nature, as cause of death is head injury in view of the medical evidence of Dr. Nitin Baramate (PW-1) who has proved the document Ex.P1 i.e. postmortem report.

4. The theory of last seen together is duly established from the testimonies of mother of the deceased (PW-5), Dipanshu @ Anshu (PW-9), Ku. Dimple Vishwakarma (PW-11) and Ghanshyam Sahu (PW-12).

5. Pursuant to the disclosure statement of the appellant under Section 27 of the Evidence Act, the stone used for killing the deceased, which has been hidden by him near the railway track at the place of incident was recovered by Ex.P-16 and one silver ankle bracelet of the deceased, which the appellant has taken from the body of the deceased and kept at his place of residence concealed in his clothesand a bloodstained checked full shirt worn by the appellant during commission of the offence was also seized from the appellant vide seizure memo Ex. P-17. Both the seizure memorandum was taken in presence of the seizure

witnesses Harish Deshmukh (PW-7) and Ghuman Sahu (PW-8), who have supported the seizure.

6. From DNA Analysis Report (Ex.P45) it is crystal clear that the DNA of the deceased were found on the articles seized from the present appellant and also the DNA of the appellant obtained from the blood samples were matched and found upon the DNA of the samples of organ taken from the deceased, Vaginal Swab and Slide Cervical Swab and Slide and the Nail Clipping of the deceased. It is submitted that the DNA Report not only confirms the commission of crime on the deceased, but also confirms the identity of the present appellant as the author of the said crime.

7. Present is a case of rarest of rare case in which death sentence is the appropriate punishment.

8. Considering the manner in which the offences have been committed brutally and the victim being minor, appropriate penalty is the death sentence.

9. Feeling dissatisfied and aggrieved with the judgment of conviction recorded and sentences awarded, the appellant herein has preferred Cr.A.No.1365/2021 under Section 374(2) of the CrPC challenging his conviction for the aforesaid offences, particularly against the capital punishment awarded to him. However, the learned Additional Sessions Judge in accordance with the provisions contained in Section 366(1) of the CrPC, submitted the

sentence of death to this Court for confirmation and this is how both the cases have been clubbed together, heard together and are being disposed of by this common judgment.

Submissions of parties: -

10. Mr. Palash Tiwari, learned counsel appearing for the accused/appellant, would submit as under: -

    1. The prosecution has failed to bring home the offences charged to and found proved against the appellant herein beyond reasonable doubt and there is no sufficient evidence in shape of direct and indirect evidence to hold him guilty.

    2. Offences punishable under Sections 363 and 366 of the IPC are not proved as the ingredients of the above-stated offences are missing. Once the trial Court has convicted the appellant herein for offence under Section 363 of the IPC which also includes kidnapping, there is no need to convict him and sentence him for offence under Section 366 of the IPC, as such, if court comes to the conclusion that offence under Section 366 of the IPC has been committed, conviction under Section 363 is liable to be set aside. Reliance has been placed in the matter of **Mohammed Yousuff alias Moula and another v. State of Karnataka**[1] in support of his contention.

---

1 2020 SCC OnLine SC 1118

3. Further elaborating his submission, Mr. Tiwari, learned counsel, would further submit that the theory of last seen together, found established by the learned trial Court relying upon the evidence of mother of the deceased (PW-5), Dipanshu @ Anshu (PW-9), Ku. Dimple Vishwakarma (PW-11) and Ghanshyam Sahu (PW-12), is also ill-founded. It has not been clearly established that the accused was last seen along with the victim / deceased and as such, the theory of last seen together is not established.

4. The disclosure statement and pursuant recovery are not proved in accordance with law, therefore, the circumstances proved on the basis of memorandum and seizure are liable to be set aside.

5. In alternative, Mr. Tiwari, learned counsel, would also submit that if the Court found proved that offence against the appellant under Section 302 of the IPC is established, the offence, if any, would be covered by Section 300 Fourthly of the IPC and therefore death sentence can be commuted to life sentence relying upon the decision of the Supreme Court in the matter of **Shatrughna Baban Meshram v. State of Maharashtra**[2] (paragraph 29).

6. Mr. Tiwari, learned counsel for the appellant, would also rely upon the judgments of the Supreme Court in the matters of **Pappu v. State of Uttar Pradesh**[3], **Bhagwani v. State of**

2 (2021) 1 SCC 596

3 2022 SCC OnLine SC 176

Madhya Pradesh[4], **Mofil Khan and another v. State of Jharkhand**[5], **Lochan Shrivas v. State of Chhattisgarh**[6] and **Mohd. Firoz v. State of Madhya Pradesh**[7] to buttress his submission and would submit that in the instant case, the learned Additional Sessions Judge has not given any effective opportunity to adduce evidence on the question of sentence, particularly in respect of rehabilitation and reformation of the accused and the State has also not proved the inability of the accused that he cannot be rehabilitated and reformed and without any enquiry, he has been sentenced to death which is liable to be commuted to life sentence in case, this Court comes to the conclusion and records finding that offence under Section 302 of the IPC is established beyond doubt by the prosecution. As such, the reference be rejected and the appeal be allowed setting aside the judgment of the trial Court convicting the appellant for offence under Section 302 of the IPC and sentencing him with capital punishment as stated above.

7. The age of the appellant was about 29 years at the time of incident, there is every chance of his being reformed and rehabilitated and he has no criminal antecedents, therefore, his death sentence be commuted to life sentence.

---

4 2022 SCC OnLine SC 52

5 2021 SCC OnLine SC 1136

6 2021 SCC OnLine SC 1249

7 2022 SCC OnLine SC 480

8. Case of the appellant is covered by Section 300 Fourthly of the IPC and there was no intention to cause death, therefore, death penalty be converted into life sentence.

11. Mr. Shashank Thakur, learned Deputy Advocate General, opening the argument on behalf of the State, would submit that the ingredients of offences under Sections 363 and 366 of the IPC, both, as well as the evidence for establishing those offences against the appellant herein were available in the present case and the statements of mother of the deceased (PW-5), Dipanshu @ Anshu (PW-9), Ku. Dimple Vishwakarma (PW-11) and Ghanshyam Sahu (PW-12) would clearly establish that the appellant had kidnapped the minor victim / girl aged about 07 years 04 months and 07 days with intent to commit sexual assault covered by Sections 363 and 366 of the IPC and therefore he has rightly been convicted for offence under Sections 363 and 366 of the IPC as well. Elaborating his submission, he would further submit that under Section 363 of the IPC, distinction is based on the age of the minor, whereas under Section 366 of the IPC, it is purpose specific and gender specific. Section 363 of the IPC is an offence of kidnapping as for offence of kidnapping under Section 363, maximum punishment prescribed is seven years and also liable to fine, whereas under Section 366 of the IPC, maximum punishment prescribed is ten years and shall also liable to fine. He would also submit that the offence of kidnapping from lawful guardianship is punishable

under Section 361 of the IPC, as a minor is entitled to enjoy the safe care and custody of parents and parents are also entitled to provide care and custody to their ward who is minor. As such, considering the distinction of offence between Sections 363 and 366 of the IPC, it cannot be held that once a person is convicted for offence under Section 366 of the IPC, he cannot be convicted for offence under Section 363 of the IPC. She would rely upon the decisions of the Supreme Court in **Mohammed Yousuff alias Moula** (supra), **Kavita Chandrakant Lakhani v. State of Maharashtra and another**[8] and **Sannaia Subba Rao and others v. State of Andhra Pradesh**[9] to buttress her submission. He would lastly submit that the manner in which the offence has been committed shocks the conscience of the court and society as well, as such, the trial Court has rightly held that it is the rarest of rare case and rightly proceeded to award death penalty to the accused / appellant which deserves to be maintained by confirming the death sentence awarded to him.

12. Mr. Shashank Thakur, learned Deputy Government Advocate, would submit that the theory of last seen has duly been established by the testimony of mother of the deceased (PW-5), Dipanshu @ Anshu (PW-9), Ku. Dimple Vishwakarma (PW-11) and Ghanshyam Sahu (PW-12) and similarly on the basis of disclosure statement of the appellant under Section 27 of the Evidence Act (Ex.P-15), the stone used for killing the deceased,

8 (2018) 6 SCC 664

9 (2008) 17 SCC 225

which has been hidden by him near the railway track at the place of incident was recovered by Ex.P-16 and one silver ankle bracelet of the deceased, which the appellant has taken from the body of the deceased and kept at his place of residence concealed in his clothesand a bloodstained checked full shirt worn by the appellant during commission of the offence was also seized from the appellant vide seizure memo Ex. P-17. Both the seizure memorandum was taken in presence of the seizure witnesses Harish Deshmukh (PW-7) and Ghuman Sahu (PW-8), who have supported the seizure and thus, incriminating circumstances have been duly established.

13. Similarly, DNA report Ex.P-45 clearly establishes the guilt of the accused and in order to buttress his submission, Mr. Thakur, would rely upon the decision of the Supreme Court in the matter of **Mukesh and another v. State for NCT of Delhi and others**[10] (paragraph 221). He would further submit that the significance of the conduct of an accused post crime, is always material and relevant factor to generate the incriminating circumstances. Lastly, he would submit that it is one of the rarest of rare offence by which the appellant having abducted the minor victim subjected her to sexual intercourse and thereafter, caused her death by crushing her with stone and thereafter, concealed her dead body by throwing it in the railway track which was recovered pursuant by recovery panchnama Ex.P-9, as such, from the FSL report and the DNA profiling, the guilt of the accused is fully

10 AIR 2017 SC 2161

established and therefore it is a case where it would fall within the ambit of rarest of rare case fulfilling the crime test and criminal test as rendered by their Lordships of the Supreme Court in the matters of **Bachan Singh v. State of Punjab**[11] and **Mukesh** (supra) (paragraph 351). It is a case where the collective conscience of the society is shocked because of the crime committed.

14. We have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record of the trial Court thoroughly and extensively. We have also perused the conduct report received from the Jail Superintendent, Central Jail, Raipur, dated 10.07.2022 submitted by the learned State counsel in which conduct of the appellant herein has been found to be normal during the present incarceration in jail.

Challenge of the appellant's conviction under Sections 363 & 366 of the IPC

15. It has vehemently been contended by learned counsel for the appellant that offences under Sections 363 & 366 of the IPC are not proved beyond reasonable doubt, therefore, conviction for the aforesaid offences are liable to be set aside and in alternative, it has also been submitted that if conviction for offence under Section 366 of the IPC is upheld then conviction for offence under Section 363 of the IPC cannot sustain as the ingredients of the

11 AIR 1980 SC 898

offence under Section 366 of the IPC also includes the offence of kidnapping / abduction.

16. Sections 359 and 361 of the IPC provide as under:-

> "**359. Kidnapping**.-Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship.
>
> **361. Kidnapping from lawful guardianship**.- Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

17. In order to address the said submission made on behalf of the appellant, it would be appropriate to notice the definition of kidnapping as defined in Section 359 of the IPC as well as Section 361 of the IPC which provides for kidnapping from lawful guardianship and Section 366 of the IPC which prescribes punishment for kidnapping. Kidnapping is of two kinds: kidnapping from India, and kidnapping from lawful guardianship. Kidnapping from lawful guardianship has been defined in Section 361 of the IPC. The offence under this section may be committed in respect of either a minor under 16 years of age, if a male, or under 18 years of age, if a female, or a person of unsound mind. The object of this section is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and

guardians having the lawful charge or custody of minors or insane persons. Thus, Section 361 of the IPC has four essential ingredients.

(1) Taking or enticing away a minor or a person of unsound mind.

(2) Such minor must be under sixteen years of age, if a male, or under eighteen years of age, if a female.

(3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.

(4) Such taking or enticing must be without the consent of such guardian.

18. The Supreme Court in the matter of **Parkash v. State of Haryana**[12] considering the provisions contained in Section 361 of the IPC has held that the consent of the minor who is taken or enticed is wholly immaterial; it is only the guardian's consent which takes the case out of its purview and further held that it is not necessary that the taking or enticing must be shown to have been by means of force or fraud. It has also been held that persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the provisions contained in Section 361 of the IPC which is punishable under Section 363 of the IPC.

19. In the present case, age of the deceased victim has been proved by Alen Kumar Verma (PW-10) and he has proved the dakhil

12 (2004) 1 SCC 339

kharij register (Ex.P-7) in which date of birth of the deceased is recorded as 21.10.2013 and date of offence is 28.02.2021. As such, the deceased was only 07 years 04 months and 07 days of age on the date of offence and therefore for the purpose of Section 363 of the IPC, she (victim/girl) was minor below 18 years of age on the date of offence.

20. Reverting to the facts of the case, it is quite vivid that the theory of last seen together is duly established from the testimony of mother of the deceased (PW-5), Dipanshu @ Anshu (PW-9), Ku. Dimple Vishwakarma (PW-11) and Ghanshyam Sahu (PW-12). On the basis of appreciation of oral and documentary evidence on record, the trial Court has rightly come to the conclusion that the prosecution has proved the offence under Section 363 of the IPC against the appellant beyond reasonable doubt. We hereby affirm that finding recorded by the trial Court.

21. Now, the appellant has also been convicted for offence under Section 366 of the IPC which states as under: -

> "**366. Kidnapping, abducting or inducing woman to compel her marriage, etc.**—Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation as defined in this Code or of abuse of authority or any other method of compulsion, induces

> any woman to go from any place with intent that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable as aforesaid."

22. In order to constitute offence under Section 366 of the IPC, it is necessary for the prosecution to prove that the accused induced the complainant woman or compelled by force to go from any place, that such inducement was by deceitful means, that such abduction took place with the intent that the complainant may be seduced to illicit intercourse and / or that the accused knew it to be likely that the complainant may be seduced to illicit intercourse as a result of her abduction. Mere abduction does not bring an accused under the ambit of this penal provision. So far as charge under Section 366 of the IPC is concerned, mere finding that a woman was abducted is not enough, it must further be proved that the accused abducted the woman with the intent that she may be compelled, or knowing it to be likely that she will be compelled to marry any person or in order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse.

23. Their Lordships of the Supreme Court in the matter of **Mohammed Yousuff alias Moula and another v. State of Karnataka**[13] pointing out the essential ingredients required to be proved by the prosecution for bringing a case under Section 366 of the IPC, relying upon the decision rendered in the matter of

---

13 2020 SCC OnLine SC 1118

Kavita Chandrakant Lakhani v. State of Maharashtra[14], has clearly held that in order to constitute an offence under Section 366 of the IPC, besides proving the factum of abduction, the prosecution has to prove that the said abduction was for one of the purposes mentioned in Section 366 of the IPC, and observed as under: -

> "8. Chapter XVI of IPC contains offences against the human body. Section 366, which is the pertinent provision, is contained within this Chapter. Kidnapping/abduction simpliciter is defined under Section 359 and maximum punishment for the same extends up to seven years and fine as provided under Section 363. However, if the kidnapping is done with an intent of begging, to murder, for ransom, to induce women to marry, to have illicit intercourse stricter punishments are provided from Section 363A to Section 369.
>
> 9. Section 366 clearly states that whoever kidnaps/ abducts any woman with the intent that she may be compelled or knowing that she will be compelled, to either get her married or forced/seduced to have illicit intercourse they shall be punished with imprisonment of up to ten years and fine. The aforesaid Section requires the prosecution not only to lead evidence to prove kidnapping simpliciter, but also requires them to lead evidence to portray the abovementioned specific intention of the kidnapper. Therefore, in order to constitute an offence under Section 366, besides proving the factum of the abduction, the prosecution has to prove that the said abduction was for one of the purposes mentioned in the section. In this case at hand the prosecution was also required to prove that there was compulsion on the part of the accused persons to get the victim married. [See Kavita Chandrakant Lakhani v. State of Maharashtra, (2018) 6 SCC 664]."

---

14 (2018) 6 SCC 664

24. In the instant case, the appellant taken away the deceased victim with an intent to commit illicit intercourse with her as the offence of sexual assault has been found proved by the prosecution which satisfies the requirement of Section 366 of the IPC. As such, the prosecution has proved the offences under Sections 363 & 366 of the IPC beyond reasonable doubt and the argument that once the appellant has been convicted for offence under Section 363 of the IPC, he cannot be convicted for offence under Section 366 of the IPC is liable to be rejected, as conviction for offence under Section 366 of the IPC would be sustainable as the abduction was for the purpose of subjecting the deceased girl to illicit intercourse which has been found proved by the prosecution and therefore the argument made in this regard is hereby rejected.

25. The appellant has also been convicted for offence under Section 6 of the POCSO Act. Section 3 of the POCSO Act defines penetrative sexual assault and Section 6 of the POCSO Act provides punishment for aggravated penetrative sexual assault which states as under: -

> "**6. Punishment for aggravated penetrative sexual assault.**—(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."

26. Aggravated penetrative sexual assault on a child has been defined in Section 5(m) of the POCSO Act which states as under:-

"**5. Aggravated penetrative sexual assault.—**

(m) whoever commits penetrative sexual assault on a child below twelve years; or"

27. It is the case of the prosecution that the appellant has committed penetrative sexual assault upon the deceased victim as she has suffered 4 injuries on her genital area and total 16 injuries were found on her whole body which has been proved by the statement of Dr. Nitin Barmate (PW-1) and that rape has been committed with the deceased and the same is further corroborated by the DNA report Ex.P-45, which has been proved by Smt. Apolina Ekka (PW-20), Senior Scientific Officer of the State FSL, Raipur, and that has been found proved by the learned trial Court, which has been assailed in this appeal.

28. Dr. Nitin Barmate (PW-1), who has examined the minor victim has found 12 external injuries on the body of the deceased victim and 4 injuries on her private parts which states as under:-

External Injuries :-

1) Lacerated wound present over left fronto-temporal region, 7 cm above left eyebrow of size. 7.8cm x 5.7cm x

cavity deep. Margins blood infiltrated. With e/o underlying skull bone fractured and brain exposed out.

2) Lacerated wound present over right frontal region, 8cm above right eyebrow of size, 2cm x 1cm x muscle deep. Margins blood infiltrated.

3) Lacerated wound present over right zygoma, of size. 3.7cm x 2.5cm x muscle deep. Margins blood infiltrated.

4) Contusion present over right elbow joint, 3 x2.6cm.

5) Postmortem Crush lacerated wound present over chest from right shoulder up to left shoulder, 24cm x 10cm x cavity deep. With traumatic amputation at thoracic 2nd vertebral level.

6) Postmortem Crush lacerated wound present over abdomen and lower chest, 26cm x 12cm x cavity deep. With e/o coils of intestine and visceral organs exposed out.

7) Postmortem Crush lacerated wound present over upper ½ of left thigh, 16cm x 9cm x bone deep. With fracture of left femur bone and traumatic amputation at upper 1/3rd of left femur bone.

8) Postmortem lacerated wound present over right knee joint, 3m x 2cm x bone deep.

9) Postmortem Crush lacerated wound present over right wrist joint and and hand, 8cm x 6cm x bone deep. With

fracture of right radius and ulna bone and exposing right meta carpal bone.

10) Postmortem lacerated wound present over submandibular region, centrally, 1.5m x 0.4cm x subcutaneous tissue deep.

11) Postmortem lacerated wound present over right foot, dorsally.3cm x 1.5cm x muscle deep

12) Postmortem lacerated wound present over left foot, dorsally,2.5cm x 2cm x muscle deep.

Injuries over genital :

1) Tear present over left labia minora of size 1x0.4cm x tissue deep, margins blood infiltrated.

2) Contusion present over left labia minora 0.7 x 0.6 cm, reddish.

3) Contusion present over right labia minora, 1.2 x 0.4 cm, reddish.

4) Tear present over hymen at 7th O'clock position, of 0.6 x 0.3 cm x tissue deep margins blood infiltrated.

29. Dr. Nitin Barmate (PW-1) in paragraph 14 of his statement has clearly stated that the deceased girl was subjected to rape and thereafter, she was murdered, which remains uncontroverted. Not only this, from DNA Analysis Report (Ex.P45) also it is crystal clear that the DNA of the deceased which were found on the articles seized from the present appellant and also the DNA of the

appellant obtained from the blood samples were matched and found upon the DNA of the samples of organ taken from the deceased, Vaginal Swab and Slide Cervical Swab and Slide and the Nail Clipping of the deceased. It is submitted that the DNA Report not only confirms the commission of crime on the deceased, but also confirms the identity of the present appellant as the author of the said crime.

30. It is well settled law that DNA report deserves to be accepted as bona fide evidence unless it is absolutely dented by defence and for non-acceptance of the same, it is to be established that there had been no quality control or quality assurance for the DNA analysis. The Supreme Court in **Mukesh** (supra) reviewing its earlier decision on the point and considering the provisions contained in Section 53A of the Code of Criminal Procedure, 1973, which is a provision for examination of person accused of rape by medical practitioner and which also includes the description of material taken from the person of the accused for DNA profiling and also considering Section 164A of the CrPC which also includes the description of material taken from the person of the woman for DNA profiling, held in paragraph 228 as under: -

> "228. From the aforesaid authorities, it is quite clear that DNA report deserves to be accepted unless it is absolutely dented and for non- acceptance of the same, it is to be established that there had been no quality control or quality assurance. If the sampling is proper and if there is no evidence as to tampering of samples, the DNA test report is to be accepted."

31. Turning to the facts of the case in the light of the aforesaid principles of law laid down by the Supreme Court qua DNA profiling in the matter of **Mukesh** (supra), it is quite vivid that in the present case, Smt. Apolina Ekka (PW-20), who is Senior Scientific Officer of the State FSL, Raipur, has categorically stated before the court that DNA samples as well as report of the DNA profile is prepared with all precautions and with scientific measures and standards and her report is Ex.P-45 in which DNA samples developed through blood samples of the accused have been found matching with the DNA profile developed through the Vaginal Swab and Slide Cervical Swab and Slide and the Nail Clipping of the deceased victim, as such, there is no dispute and it has been fully established. Not only this, the appellant was also found capable of committing sexual intercourse by Dr. Rohit Verma (PW-4) who has examined the accused on 08.03.2021. The aforesaid medical evidence clearly leads to the conclusion that the appellant had committed sexual intercourse with the deceased victim and is guilty of committing penetrative sexual assault with the minor victim. In view of the provisions contained in Section 42 of the POCSO Act, the appellant has been sentenced to death under Section 6 of the said Act.

Conviction of the appellant under Section 302 of the IPC: -

32. The trial Court has convicted the appellant for offence under Section 302 of the IPC too which has been seriously challenged by learned counsel for the appellant. In order to deal with the

submission made in this behalf, it would be appropriate to firstly consider whether death of the deceased was homicidal in nature, as the trial Court has held the death to be homicidal in nature and the appellant was last seen together with the deceased; recovery of dead body of the deceased has been made pursuant to the disclosure statement of the appellant; DNA sample of the accused generated from his blood had matched with Vaginal Swab and Slide Cervical Swab and Slide and the Nail Clipping of the deceased victim. The facts so established are consistent only with the hypothesis of the accused and the chain of circumstances is complete as against the appellant which has seriously been challenged on behalf of the appellant.

33. In order to address the challenge so made, it would be appropriate to notice firstly as to whether the death of the deceased was homicidal in nature which the trial Court has found proved and assailed by the appellant. Dead body of the deceased was recovered on 01.03.2021 from the railway track. Postmortem report Ex.P-1 discloses the cause of death of the deceased to be head injury which has been proved by Dr. Nitin Barmate (PW-1) who conducted postmortem on the body of the deceased. A careful perusal of the statement of Dr. Nitin Barmate (PW-1) extracted herein-above in paragraph 28 would show that as many as 12 external injuries have been found on the body of the victim / deceased and 04 injuries on private part of the deceased was noticed. In paragraph 16, he has opined that

cause of death was head injury caused by heavy stone containing blood stains on it and death was homicidal in nature. No effective cross-examination has been made on behalf of the defence.

34. Their Lordships of the Supreme Court relying upon Modi's Medical Jurisprudence and Toxicology, in the matter of **Subramaniam v. State of Tamil Nadu and another**[15], have elaborated the symptoms / signs of smothering / suffocation which is being highlighted by us herein and held as under: -

> "14. With regard to the post-mortem appearance, it is stated in *Modi*:
>
> "*Post-mortem appearance*
>
> Post-mortem appearances are external and internal
>
> (i) *External Appearance*
>
> The external appearance may be due to the cause producing suffocation, or to asphyxia.
>
> (a) *Appearance due to the Cause Producing Suffocation*.—In homicidal smothering, affected by the forcible application of the hand over the mouth and the nostrils, bruises and abrasions are often found on the lips and on the angles of the mouth, and alongside the nostrils. The inner mucosal surface of the lips may be found lacerated from pressure on the teeth. The nose may be flattened, and its septum may be fractured from pressure of the hand, but these signs are, in Modi's experience, very rare. There may be bruises and abrasions on the cheeks and the molar regions, or on the lower jaw, if there has been a struggle. Rarely, fracture or dislocation of the cervical vertebrae may occur if the neck has been forcibly wrenched in an attempt at smothering with the

15 (2009) 14 SCC 415

hand. No local signs of violence will be found, if a soft cloth or pillow has been used to block the mouth and nostrils.

In compression of the chest, external signs of injury may not be present, but the ribs are usually fractured on both the sides. In homicidal compression of the chest brought about by the hands or knees of a murderer or by some other hard material, bruises and abrasions, symmetrical on both sides, are usually found on the skin together with extravasation of the blood in the subcutaneous tissues. Rarely, along with the ribs the sternum is also fractured. It should, however, be remembered that the traumatic asphyxia produces variable findings. In a fair person, purple suffusion of skin above the point of compression is apparent in severe fixation of the chest by mechanical compression. There may not be any external or internal signs where the pressure is slight or evenly distributed.

(b) *Appearance due to asphyxia*.—The face may be pale or suffused. The eyes are open, the eyeballs are prominent, and the conjunctivae are congested and sometimes there are petechial hemorrhages. The lips are livid, and the tongue sometimes protruded. Bloody froth comes out of the mouth and the nostrils. The skin shows punctiform ecchymoses with lividity of the limbs. Rupture of the tympanum may occur from a violent effort at respiration.

(ii) *Internal appearance*

Rags, mud or any other foreign matter may be found in the mouth, throat, larynx or trachea, when suffocation has been caused by the impaction of a foreign substance in the air-passages. It may also be found in the pharynx or the oesophagus. The mucous membrane of the trachea is usually bright red, covered with bloody froth and congested. The lungs are congested and emphysematous. They may be lacerated or contused even without any fracture of the rib, if death has been caused by pressure on the chest.

> Punctiform subpleural ecchymoses (Tardieu spots) are usually present at the root, base, and the lower margins of the lungs, but they are not characteristic of death by suffocation, as they may also be present in asphyxia death from other causes. They are also found on the thymus, pericardium, and along the roots of the coronary vessels. The lungs may be found quite normal, if death has occurred rapidly. The right side of the heart is often full of dark fluid blood, and the left empty. The blood does not readily coagulate; hence, wound caused after death may bleed. The brain is generally congested, and so are the abdominal organs, especially the liver, spleen and kidneys."
>
> 15. In the author's opinion, to come to a definite conclusion it is very essential to look for evidences of violence in the shape of external marks surrounding the mouth and nostrils or on inside the mucosal surface, or on the chest. According to the learned author, circumstantial evidence should always be taken into consideration to establish the proof of death from suffocation."

35. Going by paragraphs 14 & 15 of the decision rendered in **Subramaniam** (supra) with regard to the postmortem appearance in case of smothering as elaborated by the Supreme Court, in the instant case, there were signs / symptoms of head injury on the body of the deceased which are mentioned as above. As such, it has duly been proved that death of the deceased was homicidal in nature which has also been stated by Dr. Nitin Barmate (PW-1) who has conducted postmortem. Therefore, it has duly been proved that nature of death was homicidal.

36. Now, the question is, whether the trial Court has rightly held that offence has been committed by the appellant herein?

Last seen together: -

37. The theory of last seen together has been found proved by the trial Court which has been vehemently assailed on behalf of appellant before this Court. In a very recent decision rendered on May 13, 2022 in the matter of **Veerendra v. State of Madhya Pradesh**[16], their Lordships of the Supreme Court relying upon the decision in the matter of **Nizam and another v. State of Rajasthan**[17] has held that it would not be prudent to base conviction solely on 'last seen theory'. It was further held that where time gap between 'last seen' and 'time of occurrence' is long it would be unsafe to base the conviction solely on the 'last seen theory' and held that in such circumstances, it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution. It has been held in paragraphs 32.1 to 32.4 of the report as under: -

> "32.1 In the decision in Nizam and Anr. Vs. State of Rajasthan [(2016) 1 SCC 550] this Court held that it would not be prudent to base conviction solely on 'last seen theory'. This Court, obviously, sounded a caution that where time gap between 'last seen' and 'time of occurrence' is long it would be unsafe to base the conviction solely on the 'last seen theory' and held that in such circumstances, it is safer to look for corroboration from other circumstances and evidence adduced by the prosecution.
>
> 32.2 In State of Rajasthan Vs. Kashi Ram reported in (2006) 12 SCC 254, at paragraph 23 this Court held :

16 Criminal Appeal Nos.5 & 6 of 2018

17 (2016) 1 SCC 550

> “23. It is not necessary to multiply with authorities. The principle is well settled. The provisions of Section 106 of the Evidence Act itself are unambiguous and categoric in laying down that when any fact is especially within the knowledge of a person, the burden of proving that fact is upon him. Thus, if a person is last seen with the deceased, he must offer an explanation as to how and when he parted company. He must furnish an explanation which appears to the court to be probable and satisfactory. If he does so he must be held to have discharged his burden. If he fails to offer an explanation on the basis of facts within his special knowledge, he fails to discharge the burden cast upon him by Section 106 of the Evidence Act. In a case resting on circumstantial evidence if the accused fails to offer a reasonable explanation in discharge of the burden placed on him, that itself provides an additional link in the chain of circumstances proved against him. Section 106 does not shift the burden of proof in a criminal trial, which is always upon the prosecution. It lays down the rule that when the accused does not throw any light upon facts which are specially within his knowledge and which could not support any theory or hypothesis compatible with his innocence, the court can consider his failure to adduce any explanation, as an additional link which completes the chain. The principle has been succinctly stated in Naina Mohd., AIR 1960 Mad 218 : 1960 Crl LJ 620.”

32.3 In Arabindra Mukherjee Vs. State of West Bengal [(2011) 14 SCC 352], while dismissing the appeal by the convict who stood sentenced for offences punishable under Section 302, 364, 120B and 201 of IPC, this Court held: “once the appellant was last seen with the deceased, the onus is upon him to show that either he was not involved in the occurrence at all or that he had left the deceased at her home or at any other reasonable place. To rebut the evidence of last seen and its consequence in law, the onus was upon the accused to lead evidence in order to prove his innocence.”

32.4 In Pattu Rajan Vs. State of Tamil Nadu [(2019) 4 SCC 771] this Court held in paragraph 63 thus :-

> 38. "It is needless to observe that it has been established through a catena of judgment of this court that the doctrine of last seen, if proved, shifts the burden of proof on to the accused, placing on him the onus to explain how the incident occurred and what happened to the victim who was last seen with him. Failure on the part of the accused to furnish any explanation in this regard, as in the case on hand, or furnishing false explanation would give rise to strong presumption against him, and in favour of his guilt, and would provide an additional link in the chain of circumstances."
>
> (Emphasis supplied)

39. Similarly, in the matter of **Satpal v. State of Haryana**[18], last seen theory has been held to be a weak piece of evidence by itself to found conviction upon the same singularly, unless it is coupled with other circumstances, and observed as under: -

> "6. We have considered the respective submissions and the evidence on record. There is no eye witness to the occurrence but only circumstances coupled with the fact of the deceased having been last seen with the appellant. Criminal jurisprudence and the plethora of judicial precedents leave little room for reconsideration of the basic principles for invocation of the last seen theory as a facet of circumstantial evidence. Succinctly stated, it may be a weak kind of evidence by itself to found conviction upon the same singularly. But when it is coupled with other circumstances such as the time when the deceased was last seen with the accused, and the recovery of the corpse being in very close proximity of time, the accused owes an explanation under Section 106 of the Evidence Act with regard to the circumstances under which death may have taken place. If the accused offers no explanation, or furnishes a wrong explanation, absconds, motive is established, and there is corroborative evidence

18 (2018) 6 SCC 610

> available inter alia in the form of recovery or otherwise forming a chain of circumstances leading to the only inference for guilt of the accused, incompatible with any possible hypothesis of innocence, conviction can be based on the same. If there be any doubt or break in the link of chain of circumstances, the benefit of doubt must go to the accused. Each case will therefore have to be examined on its own facts for invocation of the doctrine."

40. Coming to the facts of the present case, the deceased victim along with her minor brother (PW-9) were taken away by the appellant around 8:30 pm from the lawful guardianship of her mother (PW-5) to attend a Jasgeet/Jhanki function wherein the appellant left the brother of the deceased at the function and took the deceased girl near the railways tracks at Somni and committed forceful sexual intercourse rape with the deceased and hit the head of the deceased with a heavy stone causing her death and threw the body of the deceased on the nearby railway tracks due to which the body was mutilated, so as to cause destruction of evidence, thereby committed the above mentioned offences, which is duly corroborated from the testimonies of Dipanshu @ Anshu (PW-9), Ku. Dimple Vishwakarma (PW-11) and Ghanshyam Sahu (PW-12). As such, the theory of last seen together is clearly established

41. The law with regard to circumstantial evidence is well settled. In a case where the prosecution relies upon the circumstantial evidence, it must not only prove the circumstances but should link them in such a fashion so as to form an unending chain i.e. the guilt of the accused. But if there is any chance of the accused

being innocent or the crime has been committed by some other person, then the accused has to be given the benefit of doubt and on the basis of circumstantial evidence, he cannot be convicted.

42. The law laid down by their Lordships of the Supreme Court in the matter of **Sharad Birdhichand Sarda v. State of Maharashtra**[19] is that the conditions which must be fulfilled before a case against an accused can be said to be fully established on circumstantial evidence are as under:-

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

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,

(3) the circumstances should be of a conclusive nature and tendency,

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

---

19 (1984) 4 SCC 116

43. In **Sharad Birdhichand Sarda** (supra), the Supreme Court has further held that suspicion, however strong, cannot take the place of legal proof. It has also been held that the well established rule of criminal justice is that "fouler the crime higher the proof" and in case of capital sentence, a very careful, cautious and meticulous approach was necessary to be made. It has been observed in paragraph 180 of the report as under: -

> "180. It must be recalled that the well established rule of criminal justice is that "fouler the crime higher the proof". In the instant case, the life and liberty of a subject was at stake. As the accused was given a capital sentence, a very careful, cautious and meticulous approach was necessary to be made."

44. Reverting to the facts of the case, it is quite evident that it is not the only evidence of last seen together of the appellant with the deceased, apart from that recovery of one silver ankle bracelet of the deceased which the appellant had taken from the body of the deceased and kept at his residence concealed in his clothes was seized and a bloodstained checked full shirt worn by the appellant during commission of the offence from the appellant vide seizure memo Ex. P-17, and a blood stained heavy stone used for the commission of the offence which was concealed by the appellant at the place of incidence was also seized vide Ex. P-16 and same has been found proved by the trial Court and also by us in the foregoing paragraphs. Furthermore, DNA Analysis Report (Ex.P45) also shows that the DNA of the deceased were found on the articles seized from the present appellant and also

the DNA of the appellant obtained from the blood samples were matched and found upon the DNA of the samples of organ taken from the deceased, Vaginal Swab and Slide Cervical Swab and Slide and the Nail Clipping of the deceased. It is submitted that the DNA Report not only confirms the commission of crime on the deceased, but also confirms the identity of the present appellant as the author of the said crime. DNA report Ex.P-45 has been proved by Smt. Apolina Ekka (PW-20). As such, the trial Court has rightly on the basis of last seen together which has duly been established and proved from the testimonies of mother of the deceased (PW-5), Dipanshu @ Anshu (PW-9), Ku. Dimple Vishwakarma (PW-11) and Ghanshyam Sahu (PW-12) and further, on the basis of DNA profiling Ex.P-45, has recorded the aforesaid finding against the appellant.

45. Thus, after appreciating the entire ocular and medical evidence on record, we do not find any illegality in appreciation of oral, medical and circumstantial evidence or arriving at a conclusion as to the guilt of the appellant by the trial Court warranting interference by this Court and we accordingly hereby confirm the conviction of the appellant recorded under Section 302 of the IPC.

46. After hearing learned counsel for the parties and after going through the record, we do not find any perversity or illegality in the finding recorded by the trial Court convicting the appellant herein for offence under Section 201 of the IPC. We hereby

affirm that finding as there is sufficient evidence available on record.

47. Now, the next question would be the question of death sentence awarded by the learned Additional Sessions Judge to the appellant herein directing that he should be hanged to death till his death and it has been sent to us for confirmation in accordance with Section 366 of the CrPC.

Death sentence

48. Now, the only question is, whether this case falls under the category of rarest of rare case justifying capital punishment. Their Lordships of the Supreme Court in umpteen number of judgments have laid down principles for awarding capital punishment for which the balance between aggravating circumstances and mitigating circumstances has to be struck. Seven other factors like, age of the accused, possibility of reformation and lack of intention of murder have also to be gone into the judicial mind.

49. Death penalty or imprisonment for life for the commission of murder under Section 302 of the IPC has been provided. In case of conviction under Section 302 of the IPC or any conviction for an offence punishable with death or in the alternative imprisonment for life, the Court is required to assign special reasons for awarding such penalty and the special reason for awarding death sentence in accordance with sub-section (3) of

Section 354 of the CrPC. Sub-section (3) of Section 354 of the CrPC reads as under:-

> **"S. 354 (3)**: When the conviction is for an offence punishable with death or, in the alternative, with imprisonment for life or imprisonment for a term of years, the judgment shall state the reasons for the sentence awarded, and, in the case of sentence of death, the special reasons for such sentence."

50. The language of Section 354(3) of the CrPC demonstrates the legislative concern and the conditions which need to be satisfied prior to imposition of death penalty. The words, 'in the case of sentence of death, the special reasons for such sentence' unambiguously demonstrate the command of the legislature that such reasons have to be recorded for imposing the punishment of death sentence i.e. the Court is required to hold that it is a case of rarest of rare warranting imposition of only death sentence.

51. Very recently, the Supreme Court in the matter of **Manoj and others v. State of Madhya Pradesh**[20] reviewing the entire case laws on the point beginning from **Bachan Singh** (supra) held in paragraph 204 as under: -

> "204. Mitigating factors in general, rather than excuse or validate the crime committed, seek to explain the surrounding circumstances of the criminal to enable the judge to decide between the death penalty or life imprisonment. An illustrative list of indicators first recognised in Bachan Singh[11] itself:
>
> > "Mitigating circumstances.—In the exercise of its discretion in the above cases, the court shall take into account the following circumstances:

20 Criminal Appeal Nos.248-250 of 2015, decided on 20-5-2022

> (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."

These are hardly exhaustive; subsequently, this court in several judgments has recognised, and considered commutation to life imprisonment, on grounds such as young age[21], socio-economic conditions[22], mental illness[23], criminal antecedents[24], as relevant indicators on the questions of sentence. Many of these factors reflect demonstrable ability or merely the possibility even, of the accused to reform (i.e. (3) and (4) of the Bachan Singh list), which make them important indicators when it comes to sentencing."

Their Lordships further emphasised the need for pre-sentence hearing – opportunity and obligation to provide material on the accused and in paragraphs 211 and 212 held as under: -

---

21 Mahesh Dhanaji Shinde v. State of Maharashtra (2014) 4 SCC 292, Gurvail Singh v. State of Punjab (2013) 2 SCC 713, etc.

22 Mulla and another v. State of U.P. (2010) 3 SCC 508; Kamleshwar Paswan v. U.T. Chandigarh (2011) 11 SCC 564; Sunil Gaikwad v. State of Maharashtra (2014) 1 SCC 129

23 Shatrughan Chauhan v. Union of India (2014) 3 SCC 1

24 Dilip Premnarayan Tiwari v. State of Maharashtra, (2010) 1 SCC 775

> “211. However, this too, is too little, too late and only offers a peek into the circumstances of the accused after conviction. The unfortunate reality is that in the absence of well-documented mitigating circumstances at the trial level, the aggravating circumstances seem far more compelling, or overwhelming, rendering the sentencing court prone to imposing the death penalty, on the basis of an incomplete, and hence, incorrect application of the Bachan Singh test.
>
> 212. The goal of reformation is ideal, and what society must strive towards – there are many references to it peppered in this court’s jurisprudence across the decades – but what is lacking is a concrete framework that can measure and evaluate it. Unfortunately, this is mirrored by the failure to implement prison reforms of a meaningful kind, which has left the process of incarceration and prisons in general, to be a space of limited potential for systemic reformation. The goal of reformative punishment requires systems that actively enable reformation and rehabilitation, as a result of nuanced policy making. As a small step to correct these skewed results and facilitate better evaluation of whether there is a possibility for the accused to be reformed (beyond vague references to conduct, family background, etc.), this court deems it necessary to frame practical guidelines for the courts to adopt and implement, till the legislature and executive, formulate a coherent framework through legislation. These guidelines may also offer guidance or ideas, that such a legislative framework could benefit from, to systematically collect and evaluate information on mitigating circumstances.”

Thereafter, their Lordships issued practical guidelines to collect mitigating circumstances and observed in paragraphs 213 to 217 as under: -

> “213. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.

214. To do this, the trial court must elicit information from the accused and the state, both. The state, must – for an offence carrying capital punishment – at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh*. Even for the other factors of (3) and (4) – an onus placed squarely on the state – conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.

215. Next, the State, must in a time-bound manner, collect additional information pertaining to the accused. An illustrative, but not exhaustive list is as follows:

a) Age

b) Early family background (siblings, protection of parents, any history of violence or neglect)

c) Present family background (surviving family members, whether married, has children, etc.)

d) Type and level of education

e) Socio-economic background (including conditions of poverty or deprivation, if any)

f) Criminal antecedents (details of offence and whether convicted, sentence served, if any)

g) Income and the kind of employment (whether none, or temporary or permanent etc);

h) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any) etc.

This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.

216. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e., probation and welfare officer, superintendent of jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be – a fresh report (rather than the one used by the previous court) from the jail authorities is recommended, for an more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological report which will further evidence the reformative progress, and reveal post-conviction mental illness, if any.

217. It is pertinent to point out that this court, in *Anil v. State of Maharashtra*[25] has in fact directed criminal courts, to call for additional material:

> *"Many a times, while determining the sentence, the courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. The facts, which the courts deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with the offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case."*
>
> (emphasis supplied)

We hereby fully endorse and direct that this should be implemented uniformly, as further elaborated above, for

25 (2014) 4 SCC 69

conviction of offences that carry the possibility of death sentence."

52. Reverting to the facts of the case in the light of the aforesaid practical guidelines issued by the Supreme Court in **Manoj** (supra), it is quite vivid that the trial Court has convicted the appellant and sentenced him to death on the same date. The trial Court has not taken into consideration the probability of the appellant to be reformed and rehabilitated and has only taken into consideration the crime and the manner in which it was committed and has not given effective opportunity of hearing on the question of sentence to the appellant. No evidence was brought on record on behalf of the prosecution to prove to the Court that the appellant cannot be reformed or rehabilitated, by producing material about his conduct in jail and no opportunity of hearing was given to the appellant to produce evidence in that respect. Before this Court a report from jail has been produced in which the behaviour of the appellant has been found to be normal. No jail offence(s) has been said to have been committed by the appellant, though the appellant has committed the offence of kidnapping minor victim girl from the guardianship of her mother and subjecting her to sexual intercourse by which she suffered 12 bodily injuries and 04 additional injuries on her private part which is barbaric, inhuman, heinous and extremely brutal. These are the incriminating circumstances, but there is no evidence on record that the appellant cannot be reformed or rehabilitated as at the time of offence he was aged about 29

years and he is a member of Other Backward Class, thereby he belongs to backward community and his chances of being reformed or rehabilitated cannot be ruled out. Considering his report which is said to be absolutely normal in jail during his incarceration from 08.03.2021 and no criminal antecedents have been shown against him. Though it shocks the conscious of the society at large, but, yet, in the facts and circumstances of the case, considering the young age of the appellant, upon thoughtful consideration, we are of the view that extreme sentence of death penalty is not warranted in the facts and circumstances of the case. We are of the opinion that this is not the rarest of rare case in which major penalty of sentence of death awarded has to be confirmed. In our view, imprisonment for life would be completely adequate and would meet the ends of justice. Accordingly, we direct commutation of death sentence into imprisonment for life. We further direct that the life sentence must extend to the imprisonment for remainder of natural life of the appellant herein – Dipak Baghel.

Conclusion

53. Consequently, Cr.Ref.No.02/2021 made by the Additional Sessions Judge (Fast Track Special Court – POCSO), Rajnandgaon to the extent of confirmation of imposition of death sentence to appellant Dipak Baghel is rejected accordingly.

54. However, Cr.A.No.1365/2021 filed on behalf of appellant - Dipak Baghel is partly allowed. Conviction of the appellant under

Sections 363, 366, 302, 201 of the IPC & Section 6 of the POCSO Act are maintained, but, sentence of death is commuted to life imprisonment by maintaining the fine amount. We further direct that life sentence must extend to the imprisonment for remainder of natural life of the appellant herein – Dipak Baghel.

Compliance

55. The Registrar (Judicial) is directed to send a duly attested copy of this judgment to the concerned Court of Session as mandated under Section 371 of the CrPC for needful. He is also directed to send a copy of this judgment to the concerned Superintendent of Jail, where the appellant is undergoing his jail term, to serve the same on the appellant informing him that he is at liberty to assail the present judgment passed by this Court by preferring an appeal before the Hon'ble Supreme Court with the assistant of High Court Legal Services Committee or the Supreme Court Legal Services Committee.

Sd/-
(Amitendra Kishore Prasad)
Judge

Sd/-
(Ramesh Sinha)
Chief Justice

Chandra

Head Note

The present case does not fall within the category of rarest of rare case wherein death sentence can be awarded in view of the settled principle of law as held in catena of judgments by the Hon'ble Supreme Court.

वर्तमान मामला दुर्लभ से दुर्लभतम मामले की श्रेणी में नहीं आता है, जिसमें माननीय सर्वोच्च न्यायालय के निर्णयों के अनुसार कानून के स्थापित सिद्धांत के मद्देनजर मौत की सजा दी जा सकती है।