HIGH COURT OF ORISSA: CUTTACK.

DSREF No.3 of 2019 & CRLA No.680 of 2019

Reference under Section 366 of Cr.P.C. for confirmation of death sentence and appeal U/s.374 of Cr.P.C. against the judgment of conviction and sentence dtd.10.09.2019 of learned Addl. Sessions Judge-cum-Special Judge, (POCSO), Jagatsinghpur passed in Special G.R. (POCSO) No.32 of 2018.

DSREF No.3 of 2019

State of Odisha ..... Appellant.

- Versus-

Laba @ Kalia Manna ..... Respondent.

Counsel for Appellant :Mrs. Saswata Patnaik, Addl. Government Advocate.

Counsel for Respondent :M/s. G. N. Mishra and S. C. Sahoo.

Counsel for Informant :M/s. Durga Prasad Pattanaik and T. K. Mishra. M/s. Debasnan Das, S. S. Pattanaik, N. Behuria and D. Biswal.

CRLA No.680 of 2019

Laba @ Kalia Manna ..... Appellant.

- Versus-

State of Odisha ..... Respondent.

Counsel for Appellant :Mr. Karunakar Gaya, P. K. Maharaj, S. P. Dash, S. B. Das.

Counsel for Respondent :Mrs. Saswata Patnaik, Addl. Government Advocate

Counsel for Informant :M/s. Debasnan Das, S. S. Pattanaik, N. Behuria and D. Biswal.

PRESENT:

THE HONOURABLE SRI JUSTICE S. K. MISHRA.
&
THE HONOURABLE DR. JUSTICE A. K. MISHRA.

Date of hearing : 20.02.2020 :: Date of judgment : 02.11.2020

Dr. A. K. Mishra, J. Submission for confirmation of death sentence, a reference U/s.366 of the Code of Criminal Procedure (in short 'Cr.P.C.') is to be addressed in this judgment along with appeal filed by the condemned prisoner who has been convicted U/s.302, 376(2)(i), and 376-A of the Indian Penal Code (in short 'I.P.C.') and U/s.6 of the Protection of Children from Sexual Offences Act, 2012 (in short 'POCSO') by the learned Addl. Sessions Judge-cum-Special Judge, Jagatsinghpur in Special G.R. (POCSO) No.32 of 2018 on 10.09.2019. The Special Court while awarding death sentence for offence U/s.302 I.P.C. has not passed any separate sentence for other offences.

2. The deceased shall be referred to hereinafter as victim in order to avoid the disclosure of identity as observed in the case of **Bhupinder Sharma vrs. State of Himachal Pradesh, (2003) 8 SCC 551**, that the mandate of not disclosing identities of the victims of sexual offences under Section 228-A of I.P.C. ought to be observed in spirit.

3. Prosecution Case:

The victim, a 9 years old girl, was found missing on 20.03.2018 at 3 P.M. in village Godaharishpur. The family members including her father, P.W.3 searched but could not trace her. On 21.03.2018 at 6:30 A.M., a co-villager Kabita Gayan (P.W.20) while going to attend call of nature in the nearby cashew nut field, found the dead body of the victim. She immediately informed Satyaranjan Jena (P.W.5), her brother, who in turn, informed to Sarpanch (P.W.4). The father of the victim was informed. They all approached the spot and saw the dead body of the victim in naked condition. Injuries were found on her body including private part.

The father (P.W.3) lodged F.I.R. (Ext.1/1) against unknown culprit, scribed by P.W.5. The said F.I.R. was registered as Ersama P.S. Case No.42 of 2018. The investigation was undertaken by the I.I.C. (P.W.22) who swung into action to gather evidence. The spot was visited by the Executive Magistrate and members of the scientific team. The sniffer dog was deployed who led into the house of accused. The accused was not present then. The photographs of the victim at spot were taken, inquest over the dead body was made vide Ext.2. The cadaver was despatched for post mortem by issuing dead body challan (Ext.20).

In the meantime P.W.10 and P.W.18 found accused leaving the village hurriedly having attire stained with dust and blood. The

accused was apprehended on 21.3.2018 at 11 P.M. at Badambadi bus stand by the police in presence of witnesses. He made confessional statement under Ext.11 and gave recovery of one gray colour chaddi stained with semen which was concealed under leaves at a distance from the spot. The same was seized under Exdt.12 at 10 A.M. The statement of two witnesses, P.W.6 and P.W.7 who had seen accused taking the victim last time on the occurrence day at about 3 to 4 P.M., were recorded U/s.164 Cr.P.C. vide Ext.3 and Ext.4 respectively. The accused was examined by the doctor P.W.24. He was found sexually potent vide Ext.30. The post mortem of the victim was conducted by P.W.21 on 22.3.2018 vide Ext.15 who found the death homicidal in nature. The wearing apparel of the deceased and accused, biological sample and the seized chaddi were sent for chemical examination. The said report was received vide Ext.28 confirming that the seized gray colour chaddi had semen stain. After completion of investigation charge sheet was submitted. Learned Special Judge took cognizance for offence U/s.302, 376(2)(i) and 376 of I.P.C. and U/s.6 of the POCSO Act.

4. Defence:-

Accused pleaded not guilty to the charge of the said offences and faced trial. Denial was his plea simpliciter.

5. Evidence:-

In order to bring home charge, prosecution examined twenty five witnesses while defence examined two. Thirty documents are

exhibited by the prosecution while nothing is marked from the side of defence. Twenty three material objects are marked.

Keeping the nature of oral evidence, the witnesses are bracketed in the following compartments

P.W.3 is the father of the victim-cum-informant. P.Ws.1, 4 and 5 have stated about the missing of victim on 20.03.2018 at about 3 P.M. P.Ws.6 and 7 are witnesses to the last seen theory. P.Ws.4, 8 and 9 are the witnesses to inquest. P.W.9 and P.W.19 are witnesses to the ownership of the spot cashew nut field vide Ext.5, seizure list and zimanama (Ext.14). P.Ws.11 and 14, the school teachers, are witnesses to prove the age of the victim by admission register (Ext.6 and Ext.10). P.W.15 is an independent witness to the statement and seizure U/s.27 of the Evidence Act. P.W.23 proved the photographs taken at spot of the victim under Ext.13. P.W.25 is the doctor who examined the accused while P.W.21, conducted autopsy of the victim. P.W.22 is the investigating officer who proved inter alia the chemical examination report (Ext.28). Other witnesses are formal in nature. P.W.4, 15 and I.O. are witnesses to sniffer dog barking.

D.W.1 is the co-villager while D.W.2 is the brother of the accused who are pressed into service to prove that on 21.3.2018, on the next day of occurrence, the accused went Cuttack to go Chennai to join in his job.

6. Findings of the Trial Court:-

(i) The date of birth of the victim was 22.06.2008 as per School Admission Register (Ext.6) and oral testimonies of headmaster P.W.14 and Asst. Teacher P.W.11 and that she was reading in Class-IV and by the time of incident she was 9 years 9 months old.

(ii) Accepting the evidence of doctor P.W.21 and post mortem report Ext.15, the death of deceased on 20.03.2018 has been held homicidal in nature due to asphyxia as a result of strangulation.

(iii) Blood stain is found on the body of the accused.

(iv) The accused had taken victim while she was playing towards cashew nut jungle on 20.3.2018 at about 3 to 4 P.M. Thereafter the deceased was found dead.

(v) The accused gave recovery of his Chaddi (inner garment) having semen stain which is relevant U/s.27 of the Indian Evidence Act.

All the circumstances taken together establish that the accused has raped and murdered the victim.

Consequently, the accused has been convicted and sentenced supra.

7. Contention:

Learned counsel for the appellant Mr. G. N. Mishra would submit that

(i) The circumstances considered by the trial Court are neither singularly proved beyond reasonable doubt nor point out the guilt of the accused taken together.

(ii) The leading to discovery statement U/s.27 of the Evidence Act has no evidentiary value as the same does not find any corroboration from the chemical examination report, particularly when the said underwear is not produced before the trial court.

(iii) The extra judicial confession is not proved as the witness P.W.18 is declared hostile.

(iv) Sans blood grouping and DNA profiling as mandated U/s.53-A of Cr.P.C., the connecting link between the accused and the incident is found missing.

(v) The evidence through sniffer dog is not admissible. The testimonies of P.Ws.6 and 7 with regard to last seen theory being discrepant are not reliable. The evidence of doctor P.W.25 who examined the accused having found no injury on the body of the accused, the complicity of the accused with any sexual assault on victim is not established.

(vi) The accused being married has two children and having no criminal antecedent, should not have been awarded with death sentence as it is not covered under rarest in rare cases. He relied

upon a decision of Hon'ble Supreme Court in the case of **Dileep Banker Vrs. State of Madhya Pradesh**, (Crl. Appeal No.1059 of 2019) decided on 10.07.2019.

8. Mrs. Saswata Pattnaik, learned Addl. Government Advocate, supported the judgment of conviction and sentence on the factum found and reasoning assigned in the judgment. She further added that when victim was lastly spotted with the accused who called her to cashew nut field at 4 P.M. and her dead body was detected on the next day morning, the accused having not given any explanation, adverse inference is to be drawn and false explanation, denial, is to be considered to fortify the finding of guilt. According to her, this is a classic case of split personality for which death sentence should be confirmed. She also submitted that the injuries on the private parts prove that accused, none else, had sole intention to commit rape and murder.

9. Analysis:-

There is no direct evidence and the case is based on circumstantial evidence. The circumstances on which an inference is sought to be drawn must be cogently and firmly established and in order to sustain conviction, must be complete and must be incapable of explanation of any other hypothesis than that of guilt of the accused.

The evidence adduced in the backdrop of incident which rocked the locality, it is incumbent to ascertain first the age of the

victim, the nature of death, and if any sexual assault is committed. Followed to that, the evidence which lacks either credibility or weight is to be culled out. The process will culminate in circumscribing the circumstances to arrive at a conclusion.

9-A. Age of the victim:-

The school admission register (Ext.6), evidence of Asst. Teacher and Headmaster of Gadaharishpur School, P.Ws.14 and 11 respectively ,getting corroboration from the father and brother of victim unequivocally proves that the date of birth of victim, who was reading in class-IV, was 22.6.2008 and by the time of incident on 20.03.2018, she was 9 years and 9 months old. We approbate the finding of learned Trial Court on this point.

9-B. Doctor, P.W.21 conducted post mortem over the cadaver of the victim on 22.3.2018. He found the followings which are reflected in his report (Ext.15); -

"External Injuries:-

(i) Abraded contusion of size 1 cm. X 1 Cm placed 3 cm below the right mastoid tip of the neck.

(ii) A patch of confluent reddish brown looking abrasion of size 3 X 1.5 cm placed 4.5 cm below right angle of mandible on the neck.

(iii) Red looking abraded contusion of size 3 X 3 cm on left side neck 5 cm below left angle of mandible.

(iv) An irregular shaped abraded contusion of size 4 X 4 cm in the left anterior lateral neck touching the left angle of mandible and extending downwards.

(v) Crescentic abrasion of size 0.75 cm length placed 3 cm below chin and over the similar triangular abrasion of size 0.75 X 0.5 cm placed 2 cm right to this.

(vi) On wiping the perineum, the majora are appeared on the anterior part and gapping on the posterior part with discharge of reddish brown colour blood pinked thick fluid. On further examination blood tinged fluid was found before to the majora and there were irregular ragged stretched and turned soft tissue in the adjoining perineum.

Internal injuries:-

On dissection, soft tissues corresponding to the injuries detailed in the neck are found bluish with collection of haematoma. There was haematoma collection in the left supra clavicular fossa. The hyoid bone and tracheal rings were intact. Stomach was containing about 200 grams of partly digested rice particles. Internal organs of the generation were intact.

Opinion:-

The injuries detected are ante mortem in nature. The injuries on the neck 1 to 5 are caused by hard and blunt pressure and compression and crushed with strangulation. The genital injuries in the perineum might have been due to introduction of some hard blunt foreign body. The manner appeared homicidal in nature and the injuries are fresh in duration. Death is due to asphyxia as a result of strangulation."

In cross examination doctor has admitted that he has not seen any spermatozoa in the dissection table and that type of injury is not possible if a person falls from a tree and contacted with branches. The chemical examination report (Ext.26) reveals that no blood or semen stain was found either on the panty or on the frock of the victim. No semen was found from any biological sample collected from vagina.

From the above, what is proved beyond reasonable doubt is that the five injuries found on the neck of the victim are caused by hard and blunt pressure and compression twist with strangulation and that the death of victim is homicidal in nature and it is due to strangulation.

9-C. As far as discharge of reddish brown colour blood pink thick fluid found before to the majora and irregular ragged, stretched and turned soft tissue to the adjoining perineum, is concerned, it is stated to be due to introduction of hard blunt foreign body. The nature of hard-blunt foreign body is not stated by the doctor. The oral evidence of

witnesses who saw the dead body and found blood stain on the private part of the deceased without corroboration from any scientific evidence, cannot be the basis to hold that hard and blunt foreign body was introduced to commit rape. It would be an act of paving way to their guesswork which has no place in criminal trial. We are alive of the law that rape is now defined U/s.375 of I.P.C. *inter alia* that insertion of any object to any extent into the vagina of a woman is rape. As per doctor injury nos.(i) to (v) found on the neck are the cause of death and the genital injuries are not the cause of such death. The accused, who is examined by doctor after two days of the occurrence, is found to have sustained no injury on his person including the private parts. In such a situation, it would be a prosecutorial overreach to draw an inference that rape has been committed particularly when Chemical examination report does not show any sign of spermatozoa to establish sexual assault. Suspicion however grave may be cannot take the place of proof. Because of this, what is revealed from the evidence of doctor and chemical examination report is that the death of deceased is homicidal in nature but there is no proof beyond reasonable doubt that victim has been subjected to sexual assault .

9-D. Snitch testimony:-

Investigating officer, P.W.22, has testified to have requisitioned detective dog who reached the spot at 2:20 P.M. on 21-03-2018 and the service of sniffer dog was obtained by making the dog

namely Phynix to smell the inner garment of victim who proceeded towards Manisha Devi temple to beetle shop of Ashalata Gudia and then to the house of accused. P.W.4 corroborated the same stating that sniffer dog barked in-front of the house of accused and accused was not in his house. So also P.W.15. Law is no more res Integra. The evidence of dog barking is not a circumstance which would exclude the possibility of guilt of any person. This view gets support from the decision reported in **AIR 1993 SC 1723, Surinderpal Jain Vrs. Delhi Administration**. The Hon'ble Supreme Court in the decision reported in **2001 Crl. L.J. 3317, Gade Lakshmi Mangraju @ Ramesh Vrs. State of Andhra Pradesh** has reiterated the Law in the following words-

> *"We are of the view that criminal courts need not bother much about the evidence based on sniffer dogs due to the inherent frailties adumbrated above, although we cannot disapprove the investigating agency employing such sniffer dogs for helping the investigation to track down criminals. Investigating exercises can afford to make attempts or forays with the help of canine faculties but judicial exercise can ill afford them."*

The dog barking evidence is not a circumstance and to that extent, the ocular testimonies are snitch-testimonies.

10. The perpetrator of murder of victim is attributed to the accused on the following circumstances:-

(i) The last seen theory;

(ii) Accused gave discovery of facts U/s.27 of the Evidence Act;

(iii) Extra judicial confession; and

(iv) Conduct of the accused.

10-A. The last seen theory:-

The father and sister have stated that the victim left house to play with her friends Sumitra and Minaxi at about 3 P.M. The sister of victim P.W.1 stated that the family members retired after lunch and at about 3 P.M. they awoke to find that the victim was not in their house and she and others searched. P.Ws.6 and 7 have testified that while they were playing with victim on 20.3.2018 at village danda, accused came there and took the victim with him towards the cashew nut field of Tapana Gaya. P.W.7 is the classmate of the victim. Her statement was recorded U/s.164 Cr.P.C. vide Ext.4. She has stated that 5 children were playing "Kitikiti" and on the next day she came to know that victim was murdered. This evidence is urged to be not reliable because she has admitted in her cross-examination that for the first time she saw the accused in the court. We do not subscribe that view. A statement having many meanings, cannot undercut the substratum of the truth. It is noteworthy that victim, the witnesses and accused are co-villagers. P.W.6, a child witness, who is found competent, has testified that accused had taken victim towards cashew jungle on 20.3.2018 at about 3 to 4 P.M. by holding her hand while they were playing. Her statement was recorded U/s.164 Cr.P.C. vide Ext.3. In further cross-examination she has admitted that she has disclosed such fact before her parents on

that night. Both the witnesses P.Ws.6 and 7 have no axe to grind against the accused who is their co-villager. They were playing which indicate their innocence. When they depose later minor discrepancies are bound to occur. Such discrepancies being not cognate to the substratum is not potential to corrode the credibility.

Having carefully gone through the testimonies of P.Ws.6 and 7 situationally, we find both of them as wholly reliable witnesses and from their evidence, it is proved that accused had taken victim on 20.3.2018 at about 4 P.M. towards cashew jungle and on next day, the dead body of the victim was found. This last seen factum is proved beyond reasonable doubt by cogent and clear evidence. The accused has not given any explanation in this regard. It is needless to observe 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 occur and what happened to the victim who was lastly seen with him.

In the decision reported in **(2018) 16 SCC 161, Navaneethakrishnan Vrs. The state by Inspector of Police,** their Lordships of Hon'ble Supreme Court have held that "it is settled legal position that the law presumes that it is the person, who was last seen with the deceased, would have killed the deceased and the burden to rebut the same lies on the accused to prove that they had departed. Undoubtedly, the last seen theory is an important event in the chain of

circumstances that would completely establish and / or could point to the guilt of the accused with some certainty. However, this evidence alone can't discharge the burden of establishing the guilt of accused beyond reasonable doubt and requires corroboration."

In the decision reported in **AIR 2019 SC 1674, Pattu Rajan Vrs. State of Tamil Nadu** it is held that failure on the part of accused to furnish any explanation or furnishing false explanation would provide an addition link in the chain of circumstances.

In the decision reported in **(2019) 8 SCC 333, Sudru Vrs. State of Chattisgarh** the Hon'ble Supreme Court has stated that the false explanation can always be taken into consideration to fortify the finding of guilt already recorded on the basis of other circumstances.

10-B. Discovery of fact U/s.27 of the evidence Act:-

In this connection the evidence of investigating officer P.W.22 and independent witness P.W.15 are pressed into service.

P.W.22 has testified that on 21.3.2018 he searched the accused and on getting information that he is available at Badambadi bus stand he, accompanied by P.W.15 and another, went to Cuttack. At about 11:30 P.M. they apprehended the accused and returned to Ersama. On the next day at 9 A.M. he arrested the accused. During interrogation, accused confessed and gave statement that he had

concealed his inner garment – chaddi at a distance of 50 meters near the spot. He recorded his statement vide Ext.11. Thereafter he along with others took accused to the spot where he gave recovery of gray colour jockey sports chaddi and this was seized under Ext.12. He has further stated that the chaddi was kept under a cashew nut tree covered by cashew nut leaves. P.W.15 corroborated the same by admitting his signature on the seizure list and statement. The timing recorded in the seizure list corroborate the oral testimonies. This witness has admitted that the chaddi was not visible to others. The evidence of P.W.15 and P.W.22 on this score is not rattled in the cross-examination.

The accused knew that his semen stained chaddi was concealed near the spot under the leaves which was not known to others and such fact is the confirmation of the knowledge of the accused that chaddi was thrown after commission of murder. This circumstance is proved beyond reasonable doubt and admissible U/s.27 of the Evidence Act. Section 27 permits the derivative use of custodial statement. The custodial statement directly leads to the subsequent discovery of semen stained chaddi which could not be discovered by otherwise through independent means. It is a good link in the chain of evidence. The relevancy is limited as relates distinctly to the facts thereby discovered.

In the case at hand, prosecution has successfully brought home this circumstance beyond reasonable doubt.

10-C. Extra judicial confession:-

On the point of extra judicial confession, the evidence of P.W.18 is projected. He is a co-villager of accused. He has stated that on 20.3.2018, while he was going on a motor cycle, accused asked him for a lift till Goda bus stand and he dropped him there and went away. In his cross-examination he has stated that accused confessed to his wrong when they were nearing to Goda bus stand and he had not disclosed about the confession to the outsiders there. Despite being declared hostile, his statement in the cross-examination remains unchallenged and that part of evidence which is not impeached in any manner is acceptable. It is also to be seen that P.W.18 has described the attire of the accused which was smeared with patches of sand, dirt and blood. Accused has not specifically admitted his guilt about murder of the victim. It is not an admission of guilt with regard to murder of victim. This circumstance does not unerringly point out the guilt of the accused. In our considered opinion it is the conduct of the accused which is relevant U/s.8 of the Evidence Act, but not the confession.

10-D. Conduct:-

The victim was found to have been taken by accused on 20.3.2018 at about 4 P.M. to cashew nut field. On the next day morning

her dead body was found. P.W.5 stated that Kashinath Pradhan (P.W.18) has told him that accused had requested him (P.W.18) to leave accused on his motor cycle and accused reaching at Goda chowk went by Janaki bus. The evidence of P.W.18 is already analysed in the preceding para. P.W.10 has stated that while he was standing at Mayurlanji chowk on 20.3.2018 at about 4 to 4:15 P.M., found accused going towards Garia having stained with dust and blood in his wearing apparel. When he asked him as to where he was going, accused replied in perplexed mind that he was going towards Garia. He has given description of his wearing apparel stating that the colour of pant was blue while the shirt was green colour check. He is categorical to state that accused was running towards southern side to western side. P.W.5 gets corroboration from P.Ws.10 and 18. The chemical examination report corroborates that human blood was found on the pant and shirt of the accused. The accused has no explanation for this except a denial.

Accused is a co-villager of the victim, he was found with blood stain on his pant and shirt and was leaving village without exhibiting normal behaviour to his co-villager. Such finding of blood on his wearing apparel is a circumstance which is cogently and firmly established and leads towards the guilt of the accused.

11. After culling out the circumstances which have lost its value either legally or factually, but considered by the trial court, we have now

come to the conclusion that the following three circumstances, i.e, (i) last seen theory, (ii) discovery of fact U/s.27 of the Evidence Act and (iii) conduct of accused as well as availability of blood stains in his wearing apparels, are established beyond reasonable doubt and unerringly point towards the guilt of the accused. The last seen theory gets corroboration from other two circumstances, i.e. recovery of facts and the conduct of accused having blood stained apparels. Taking cumulatively, all the above circumstances form a chain so complete that there is no escape from the conclusion that the murder of victim on 20.3.2018 was committed by the accused and none else. The guilt of the accused is proved beyond reasonable doubt.

The decision of **Dileep Banker** (supra) cited by learned counsel for the appellant is in no way helpful to the facts rest upon circumstantial evidence. Rather it is a case where death sentence has been commuted to life imprisonment extending to 25 years of imprisonment.

The plea of defence is denial. The evidence through D.Ws.1 and 2 does not appear probable, rather being a false to the last seen theory, is an additional link to the guilt already established by the circumstances.

In the aforesaid **Pattu Rajan** case (supra) their Lordships have given an approach to prove beyond reasonable doubt in the following words:-

> *"It is worth recalling that while it is necessary that proof beyond reasonable doubt should be adduced in all criminal cases, it is not necessary that such proof should be perfect, and someone who is guilty cannot get away with impunity only because the truth may develop some infirmity when projected through human processes. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Justice cannot be made sterile by exaggerated adherence to the rule of proof, inasmuch as the benefit of doubt must always be reasonable and not fanciful. (See* ***Inder Singh v. State (Delhi Administration), (1978) 4 SCC 161; State of H.P. v. Lekh Raj & Anr., (2000) 1 SCC 247; Takhaji Hiraji v. Thakore Kubersingh Chamansing & Ors., (2001) 6 SCC 145; Chaman & Anr. V. State of Uttarakhand, (2016) 12 SCC 76****).*"

12. Evidence is scanned independently as appellate court is obliged. Regards being had to the materials on record and the circumstances established, prosecution is found to have proved offence U/s.302 I.P.C. beyond reasonable doubt against the sole accused, condemned prisoner. The offences U/s.376(2)(i) and 376-A I.P.C. and U/s.6 of POCSO Act are not proved beyond reasonable doubt and accused is to be acquitted therefrom.

Resultant thereupon, the condemned prisoner is held guilty of the charge U/s.302 I.P.C. and his conviction by the Special Court on this count is up held. The accused is held not guilty U/s.376(2)(i) and 376-A I.P.C. and U/s.6 of POCSO Act and the conviction to that extent is hereby annulled and he is acquitted therefrom.

13. Sentence:-

Duelling over the life and death, the conviction has now descended into murder U/s.302 I.P.C. simpliciter. In view of the submission for confirmation of the death sentence, the question remains to be answered as to whether the death sentence should be confirmed.

13-A. Learned counsel for the condemned prisoner has submitted that for a murder simpliciter based on circumstantial evidence, the young age of accused, his family consisting of wife and two children and that he belongs to labour class having no criminal antecedent, should be considered as mitigating circumstances.

13-B. Learned Addl. Government Advocate urges to confirm the death sentence in view of rising trend of the murder of girl child betraying trust for lust and to consider the brutality perpetrated by strangulation by the accused.

14. The guidelines of Constitution Bench Judgment in **Bachan Singh Vrs. State of Punjab, AIR 1980 SC 898** are to be applied which *inter alia* states that Life imprisonment is the rule and death sentence is an exception and a balance sheet of aggravating and mitigating circumstances has to be drawn up. In **Machhi Singh Vrs. State of Punjab, (1983) 3 SCC 470**, the principles of rarest in rare case is reiterated.

In the **Dileep Banker** case (supra), for the rape and murder of a 5 years girl, the sentence of total 25 years of imprisonment is awarded in setting aside death sentence. In **Akhtar Vrs. State of U.P., (1999) 6 SCC 60**, the Hon'ble Supreme Court has awarded life imprisonment because the evidence of witnesses showed that the murder was not committed intentionally and with any premeditation as the girl was picked up for committing rape.

15. In the case in hand, the offence of lust is lost raising residual doubt upon the act by sexual assault. Having regards to the aggravating and mitigating circumstances, we are of the opinion that, the mitigating circumstances outweigh the aggravating factors. Conscience is shocked but there is an alternative available to the death sentence. The assumption of power to take one's breath away, in the facts proved would be stretching the direction "in rarest in rare cases" beyond the limit of limitation so far prescribed by the precedents.

The sentence 'Imprisonment for Life' will be just and proper. The death sentence awarded by the learned Trial Court is not to be confirmed. Instead it is to be modified to Imprisonment for Life for offence U/s.302 of I.P.C.

16. In the result, the conviction of the condemned prisoner U/s.302 of Indian Penal Code is upheld and he is sentenced to undergo Imprisonment for Life. The death sentence awarded by the learned Trial Court is hereby set aside.

The conviction of the appellant U/s.376(2)(i) and 376-A of I.P.C. and U/s.6 of POCSO Act is set aside.

Accordingly the CRLA No.680 of 2019 is allowed in part. The DSREF is answered in negative.

Send back the L.C.Rs. forthwith.

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Dr. A.K.Mishra, J.

S. K. Mishra, J ***(****Concurring)* - Having carefully gone through the judgment rendered by learned brother Dr. Justice A.K. Mishra, I concur with the findings given by him, but would like to add few lines on the question of sentencing. In the reported case of **Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614**, the Hon'ble Supreme Court held that in a case of murder,

imposition of death sentence is the rule and imposition of alternative sentence of imprisonment for life is the exception. However, that view has undergone a change over the time, which is manifest from the later judgments of the Hon'ble Supreme Court.

17. For the first time, the constitutional validity of death sentence was considered by the Constitution Bench of the Hon'ble Supreme Court in the case of **Bachan Singh vs. State of Punjab,** AIR 1980 SC 898. The Constitution Bench of the Hon'ble Supreme Court taking note of the reported case of **Jagmohan Singh vs. State of U.P.,** (1973) 1 SCC 20 held that the impossibility of laying down standard is at very core of the criminal law as administered in India, which invests the judge with a very wide discretion in the matter of fixing of punishment. Further, it was held that discretion in the matter of sentence is, as already pointed out, liable to be corrected by superior court. The exercise of judicial discretion of well-recognised principles is, in the final analysis, the safest possible safeguard for the accused. Holding that the provision of inflicting death penalty is not ultra virus of the constitution, the Hon'ble Supreme Court held that the authority and efficacy of the proposition laid down by the Apex Court in Jagamohan case (supra) considering the effect of the legislative changes are as follows:-

" **160**. xxx

(i) The general legislative policy that underlies the structure of our criminal law, principally contained in the Indian Penal Code and the Criminal Procedure Code, is to define an offence with sufficient clarity and to prescribe only the maximum punishment therefore, and to allow a very wide discretion to the Judge in the matter of fixing the degree of punishment.

With the solitary exception of Section 303, the same policy permeates Section 302 and some other sections of the Penal Code, where the maximum punishment is the death penalty. *(However, the Hon'ble Supreme Court in the case of* ***Machhi Singh and others vs. State of Punjab.,*** *(1983) 3 SCC 470, has struck down the provision of Section 303 of the Indian Penal Code as unconstitutional*) (italic portion added by us)

(ii) (a) No exhaustive enumeration of aggravating or mitigating circumstances which should be considered when sentencing an offender, is possible. "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler plate' or a statement of the obvious that no Jury (Judge) would need." (Referred to Mc Gantha v. California, (1971) 402 US 183)

(b) The impossibility of laying down standards is at the very core of the criminal law as administered in India which invests the Judges with a very wide discretion in the matter of fixing the degree of punishment.

(iii) The view taken by the plurality in Furman v. Georgia, 33 L Ed 2d 346 : 408 US 238 (1972) decided by the Supreme Court of the United States, to the effect, that a law which gives uncontrolled and un-guided discretion to the Jury (or the Judge) to choose arbitrarily between a sentence of death and imprisonment for a capital offence, violates the Eighth Amendment, is not applicable in India. We do not have in out Constitution any provision like the Eighth Amendment, nor are we at liberty to apply the test of reasonableness with the freedom with which the Judges of the Supreme Court of America are accustomed to apply "the due process" clause. There are grave doubts about the expediency of transplanting western experience in our country. Social conditions are different and so also the general intellectual level. Arguments which would be valid in respect of one area of the world may not hold good in respect of another area.

(iv) (a) This discretion in the matter of sentence is to be exercised by the Judge judicially, after balancing all the aggravating and mitigating circumstances of the crime.

(b) The discretion is liable to be corrected by superior courts. The exercise of judicial discretion on well-recognised principles is, in the final analysis, the safest possible safeguard for the accused.

In view of the above, it will be impossible to say that there would be at all any discrimination, since crime as crime may appear to be superficially the same but the facts and circumstances of a crime are widely different Thus considered, the provision in Section 302, Penal Code is not violative of Article 14 of the Constitution on the ground that it confers on the Judges an un-guided and uncontrolled discretion in the matter of awarding capital punishment or imprisonment for life.

(v) (a) Relevant facto and circumstances Impinging on the nature and circumstances of the crime can be brought before the Court at the pre-conviction stage, notwithstanding the fact that no formal procedure for producing evidence regarding such facto and circumstances had been specifically provided. When counsel addresses the Court with regard to the character and standing of the accused, they are duly considered by the Court unless there is something in the evidence itself which belies him or the Public Prosecutor challenges the facts.

(b) It is to be emphasised that in exercising its discretion to choose either of the two alternative sentences provided in Section 302, Penal Code, "the Court is principally concerned with the facts and circumstances whether aggravating or mitigating, which are connected with the particular crime under inquiry. All such facts and circumstances are capable of being proved in accordance With the provisions of the Indian Evidence Act in a trial regulated by the Cr. P. C. The trial does not come to an end until all the relevant facts are proved and the counsel on both sides have an opportunity to address the Court. The only thing that remains is for the Judge to decide on the guilt and punishment and that is what Sections 306(2) and 309(2), Cr. P. C. purport to provide for. These provisions are part of the procedure established by law and unless it is shown that they are invalid for any other reasons they must be regarded as valid. No reasons are offered to show that they are constitutionally invalid and hence the death sentence imposed after trial in accordance with the procedure

established by law is not tin-constitutional under Article 21. (emphasis added).

161. A study of the propositions set out above, will show that, in substance, the authority of none of them has been affected by the legislative changes since the decision in Jagmohan's case, (1973) 2 SCR 541: (1973) 1 SCC 20: 1973 SCC (Cri) 169. Of course, two of them require to be adjusted and attuned to the shift in the legislative policy. The first of those propositions is No. (iv) (a) which postulates, that according to the then extant Cr.P.C. both the alternative sentences provided in Section 302, Penal Code are normal sentences, and the Court can, therefore, after weighing the aggravating and mitigating circumstances of the particular case, in its discretion, impose either of those sentences. This postulate has now been modified by Section 354(3) which mandates the Court convicting a person for an offence punishable with death or, in the alternative with imprisonment for life or imprisonment for a term of years, not to ins-pose the sentence of death on that person unless there are "special reasons" - to be recorded - for such sentence. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal. Thus, the legislative policy now writ large and clear on the face of Section 354(3) is that on conviction for murder and other capital offences punishable in the alternative with death under the Penal Code, the extreme penalty should be imposed only hi extreme cases.

162. In this view we are in accord with the dictum of this Court in Balwant Singh v. State of Punjab, AIR 1976 SC 230 : (1976) 2 SCR 684 (1976) 1 SCC 425 : 1976 SCC (Cri) 43 , wherein the interpretation of Section 354(3) first came up for consideration. After surveying the legislative background, one of us (Untwalia, J.) speaking for the Court, summed up the scope and implications of Section 354(3), thus: (SCC p.427, para 4)

Under this provision the Court is required to state the reasons for the sentence awarded and in the case of sentence of death, special reasons are required to be stated. It would thus be noticed that awarding of the sentence other than the sentence of death is the general rule now and only special reasons, that is to say, special facts and circumstances in a given case, will warrant the passing of the death sentence. It is unnecessary nor is it possible to make a catalogue of the special

reasons which may justify the passing of the death sentence in a case.

While applying proposition (iv) (a), therefore, the Court has to bear in mind this fundamental principle of policy embodied in Section 354(3).

163. Another proposition, the application of which, to an extent, is affected by the legislative changes, is No. (v). In portion (a) of that proposition, it is said that circumstances impinging on the nature and circumstances of the crime can be brought on record before the pre-conviction stage. In portion (b), it is emphasised that while making choice of the sentence under Section 302, Penal Code, the Court is principally concerned with the circumstances connected with the particular crime under inquiry. Now, Section 235(2) provides for a bifurcated trial and specifically gives the accused person a right of pre-sentence hearing, at which stage, he can bring on record material or evidence, which may not be strictly relevant to or connected with the particular crime under inquiry, but nevertheless, have, consistently with the policy underlined in Section 354(3) a bearing on the choice of sentence. The present legislative policy discernible from Section 235(2) read with Section 354(3) is that in fixing the degree of punishment or making the choice of sentence for various offences, including one under Section 302, Penal Code, the Court should not confine its consideration "principally" or merely to the circumstances connected with particular crime, but also give due consideration to the circumstances of the criminal.

164. Attuned to the legislative policy delineated in Sections 354(3) and 235(2), propositions (iv) (a) and (v) (b) in Jagmohan, (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 shall have to be recast and may be stated as below:

(a) The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence,

(b) While considering the question of sentence to be imposed for the offence of murder under Section 302 Penal Code; the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and

heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence.

165. The soundness or application of the other propositions in Jagmohan (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 and the premises on which they rest, are not affected in any way by the legislative changes since effected. On the contrary, these changes reinforce the reasons given in Jagmohan (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169, for holding that the impugned provisions of the Penal Code and the Criminal Procedure Code do not offend Articles 14 and 21 of the Constitution. Now, Parliament has in Section 354(3) given a broad and clear guideline which is to serve the purpose of lodestar to the court in the exercise of its sentencing discretion. Parliament has advisedly not restricted this sentencing discretion further, as, in its legislative judgment, it is neither possible nor desirable to do so. Parliament could not but be aware that since the Amending Act 26 of 1955, death penalty has been imposed by courts on an extremely small percentage of persons convicted of murder - a fact which demonstrates that courts have generally exercised their discretion in inflicting this extreme penalty with great circumspection, caution and restraint. Cognizant of the past experience of the administration of death penalty in India, Parliament, in its wisdom thought it best and safe to leave the imposition of this gravest punishment in gravest cases of murder, to the judicial discretion of the courts which are manned by persons of reason, experience and standing in the profession. The exercise of this sentencing discretion cannot be said to be untrammelled and unguided. It is exercised judicially in accordance with well-recognised principles crystallised by judicial decisions, directed along the broad contours of legislative policy towards the signposts enacted in Section 354(3).

166. The new Section 235(2) adds to the number of several other safeguards which were embodied in the Criminal Procedure Code of 1898 and have been re-enacted in the Code of 1973. Then, the errors in the exercise of this guided judicial discretion are liable to be corrected by the superior courts. The procedure provided in Criminal Procedure Code for imposing capital punishment for murder and some other capital crimes under the Penal Code cannot, by any reckoning, be said to be unfair, unreasonable and unjust. Nor can it be said that this sentencing discretion, with which the courts are invested, amounts to delegation of its power of legislation by

> Parliament. The argument to that effect is entirely misconceived. We would, therefore, re-affirm the view taken by this Court in Jagmohan, (1973) 2 SCR 541 : (1973) 1 SCC 20 : 1973 SCC (Cri) 169 and hold that the impugned provisions do not violate Articles 14, 19 and 21 of the Constitution."

18. The ratio decided in the aforesaid case was considered by the Hon'ble Supreme Court in the case of **Machhi Singh and others vs. State of Punjab,** (1983) 3 Supreme Court Cases 470. The Hon'ble Supreme Court in the aforesaid case held that the guidelines which emerge from the case of **Bachan Singh** (supra) would have to be applied to the facts of each individual case, where the question of imposition of death sentence arise:

(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. 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 has 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.

Thus, following the aforesaid principle, the Hon'ble Supreme Court in **Machhi Singh** case (supra) held that the following questions may be asked and answered as a test to determine the 'rarest of rare' case in which death sentence can be inflicted.

"(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?"

19. This Court, while considering the propriety of imposing death sentence in the case of **State of Orissa vs. Ardhu Chendreya,** (2010) 47 OCR 953, in which one of us, namely S.K. Mishra, J. was a party, has also taken into consideration the fact that, in the case of **Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka,** AIR 2007 SC 2531, the concept of irrevocability of the death sentence and whether it should be awarded in a case base entirely on circumstantial evidence was considered. In the case of **Vadivelu Thevar**

(supra), the Hon'ble Supreme Court has held that while considering the quantum of sentence, the nature of proof available in the case is not relevant or important as the question of appreciation of evidence, nature of evidence, i.e. the prosecution case which alleges against the accused beyond all reasonable doubt falls within realm of the findings relating guilt or otherwise of the accused. It has nothing to do it with the question of sentencing. In the case of **Md. Mannan @ Abdul Mannan vs. State of Bihar,** decided on 20.04.2011, a three Judge Bench of the Hon'ble Supreme Court, in Criminal Appeal No.379 of 2009, the Hon'ble Apex Court has upheld the maximum sentence of death penalty, solely based on circumstantial evidence, which was brought home, the offences under Sections 366, 376, 302 and 201 of the Indian Penal Code, 1860.

In the case of **Swamy Shraddananda** (supra), the Hon'ble Supreme Court has held as follows:-

> "89. It has been a fundamental point in numerous studies in the field of Death Penalty jurisprudence that cases where the sole basis of conviction is circumstantial evidence, have far greater chances of turning out to be wrongful convictions, later on, in comparison to ones which are based on fitter sources of proof. Convictions based on seemingly conclusive circumstantial evidence should not be presumed as full proof incidences and the fact that the same are circumstantial evidence based must be a definite factor at the sentencing stage deliberations, considering that capital punishment is unique in its total irrevocability. Any characteristic of trial, such as conviction solely resting on circumstantial evidence, which contributes to the uncertainty in the culpability

calculus, must attract negative attention while deciding maximum penalty for murder.

90. One of the older cases in this league dates back to 1874, Merritt v. State, 52 Ga. 82, 85 (1874) where the Supreme Court of Georgia described the applicable law in Georgia as follows:-

"By the penal code of this state the punishment of murder shall be death, except when the conviction is founded solely on circumstantial testimony. When the conviction is had solely on circumstantial testimony, then it is discretionary with the presiding judge to impose the death penalty or to sentence the defendant to imprisonment in the penitentiary for life, unless the jury . . . shall recommend that the defendant be imprisoned in the penitentiary for life; in that case the presiding judge has no discretion, but is bound to commute the punishment from death to imprisonment for life in the penitentiary."

91. Later case of Jackson v. State, 74 Ala. 26, 29-30 (1883) followed the aforementioned case. [Also see S.M. Phillipps, Famous Cases of Circumstantial Evidence with an Introduction on the Theory of Presumptive Proof 50-52 (1875)]

92. In United States v. Quinones, 205 F. Supp. 2d 256, 267 (S.D.N.Y. 2002) the court remarked:-

"Many states that allow the death penalty permit a conviction based solely on circumstantial evidence only if such evidence excludes to a moral certainty every other reasonable inference except guilt."

93. In the instant case, confession before police was taken as a gospel truth. It seems that the judicial mind has a role to play in that behalf in imposition of sentence.

94. Another aspect which needs to be considered as according to the Bachan Singh Rule (that sentencing should involve analysis about the nature of crime as well as the accused) which require consideration, is the effect of two pointers relating to the nature of crime. Firstly, the case does not seem to be an instance of what is called a diabolical murder. We come across cases of murdering wife by burning for non-fulfillment of dowry, preceded by continuous torture. Simon and Ors. v. State of Karnataka [(2004) 2 SCC 694] noting the "all murders are cruel" observation in Bachan Singh (supra) puts the law on death penalty in perspective as:

> "The Constitution Bench said that though all murders are cruel but cruelty may vary in its degree of culpability and it is only then the culpability assumes the proportion of extreme depravity that "special reasons" can legitimately be said to exist."

20. In view of the dissenting judgments in **Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka** (1) (supra), the matter was taken up by the Hon'ble Supreme Court in a Bench having a coram of three Hon'ble judges of the Court. The judgment has been rendered by Hon'ble Justice Aftab Alam, as His Lordship the then, in the reported case of **Swamy Shraddananda @ Murali Manohar Mishra vs. State of Karnataka,** AIR 2008 SC 3040.

21. In this case, applying the principle as laid down in the case of **Machhi Singh** (supra), we found that the condemned prisoner is a 28 years old man belonging to low status of the society and a villager, who could not afford to engage a defence counsel on his own and was provided the assistance of a learned Advocate as State defence counsel. In this case, as already observed by my learned brother Dr. Justice A.K. Mishra, the offences under Sections 376 (2)(i) and 376-A of the IPC and Section 6 of the POCSO Act have not been established by the prosecution. There also appears to be nothing uncommon about the crime, which would render the sentence of imposition for life inadequate and calls for a death sentence. Applying the 2nd test, we are of the opinion that this is not a case where there is no alternative but to impose death sentence even after according maximum weightage to the

mitigating circumstances in favour of the offender. The offender does not have any criminal track record. So, there is neither any material on record to show that he has been charge-sheeted by the police for committing any other offences in the past nor he has been found guilty by any court of competent jurisdiction. He is a semi-literate rustic villager earning his livelihood as a labourer, who can barely write his name as signature on the accused statement. Moreover, the accused is only 28 years old at the time of trial. So, there is every chance of his being reformed by the correctional treatments meted out by the authorities in charge of penitentiary.

Hence, I concur with the view taken by my learned brother and hold that this is not a case which falls in the category of rarest of rare cases, where all other options, but the sentence of death, is foreclosed. Hence, the appeal is allowed in-part as concluded by the learned judge in Paragraphs 15 and 16 of the judgment and the death reference is answered accordingly.

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S.K. Mishra, J.

Orissa High Court, Cuttack,
Dated the 2nd November, 2020/MKP / PCD