



**IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR
BEFORE**

**HON'BLE SHRI JUSTICE VIVEK AGARWAL
&
HON'BLE SHRI JUSTICE DEVNARAYAN MISHRA
CRIMINAL REFERENCE NO.10 OF 2019**

IN REFERENCE

Versus

VISHNU BHAMORE

Appearance:

Shri Aditya Narayan Gupta – Public Prosecutor for the reference-petitioner.

Shri Uma Kant Sharma – Senior Advocate assisted by Shri P.N. Tiwari – Advocate for the respondent.

CRIMINAL APPEAL NO.6422 OF 2019

VISHNU BHAMORE

Versus

STATE OF MADHYA PRADESH

Appearance:



Shri Uma Kant Sharma – Senior Advocate assisted by Shri P.N. Tiwari – Advocate for the appellant.

Shri Aditya Narayan Gupta – Public Prosecutor for the respondent-State.

Reserved on : 23.10.2024

Pronounced on : 14.11.2024

J U D G M E N T

Per: Justice Vivek Agarwal

These cases originate from the impugned judgment dated 10.07.2019 passed by the learned 18th Additional Sessions Judge, Bhopal in S.T. No. 560/2019 (*State of Madhya Pradesh through SHO, Police Station Kamla Nagar Vs. Vishnu Bhamore S/o Tarachand Bhamore*), whereby the appellant-accused has been convicted by the learned trial Court under Section 377 of IPC with life imprisonment and fine of Rs.1,000/- with the default stipulation of 6 months rigorous imprisonment. He is also convicted under Section 201, IPC and sentenced to 7 years rigorous imprisonment and fine of Rs.1,000/- with default stipulation of 6 months rigorous imprisonment. Conviction is also recorded under Section 363 of IPC and sentenced to 3 years rigorous imprisonment with fine of Rs.1,000/- with default stipulation of 6 months



rigorous imprisonment. He is also convicted under Section 366 of IPC and sentenced to 7 years rigorous imprisonment with fine of Rs.1,000/- with default stipulation of 6 months rigorous imprisonment. Appellant is also convicted under Section 302 and 376(a)(b) of IPC and sentenced to death penalty.

2. Sentence including death penalty being inflicted, therefore, the matter has been sent to this Court in reference by the learned trial Court as per the requirements of Section 366, Cr.P.C. and Rule 43 of Chapter-XIII of High Court Rules. Convicted accused has also preferred an appeal before this Court under Section 374(2) of the Code of Criminal Procedure, 1973 (for brevity “Cr.P.C.”) challenging the conviction and penalty on the ground that his case is based upon circumstantial evidence, but there is no witness/evidence that the prosecutrix was last seen with the accused-appellant. There being no concrete proof/evidence to establish the fact that the hut where the alleged offence was committed belongs to the appellant-accused and there being no other independent witness except the family members of the prosecutrix, the conviction of the appellant, is not called for.

3. Shri Umakant Sharma, learned Senior counsel submits that present case does not fall under “rarest of rare” cases, therefore, imposing extreme penalty of death sentence, is not called for. Learned trial Court has erred in convicting



the appellant for the alleged offence. Conviction and sentence are bad on both counts i.e. in law and on facts, as prosecution has failed to prove its case beyond reasonable doubt.

4. It is submitted that PW-2 is the mother of the victim, whereas PW-1 is the father of the victim. Merg intimation (Ex.P-1), was lodged on 09.06.2019 at Police Station Kamla Nagar, Bhopal. It is submitted that the accused-appellant was out of station and has been falsely implicated.

5. Prior to lodging the merg intimation, missing person report (Ex.P-2) was lodged on 09.06.2019 at about 00:38 hours saying that prosecutrix had left her home on 08.06.2019 at about at about 8:00 PM in the name of buying certain goods from a colony shop, but she did not return. Her height was about four feet and she was a minor. Accordingly, missing person report No.51/19 was recorded at Police Station Kamla Nagar, Bhopal.

6. It is submitted that for the aforesaid reason, since appellant was not present at the place of the incident and he was out of station, therefore, the learned trial Court erred in not relying on the alibi of the appellant and arbitrarily recorded conviction. It is further submitted that even if plea of alibi is discarded, as has been done by the learned trial Court, then present being not a “rarest of rare” case, death penalty is required to be converted into one of life imprisonment.



7. Reliance is placed on the judgment of the Supreme Court in **Mohinder Singh Vs. State of Punjab, AIR 2013 SC 3622**, wherein it is held that the High Court has to first satisfy itself that conviction is right and then consider what sentence should be awarded independent of view expressed by Sessions Judge. It is further pointed out that confirmation of death sentence is not to be based only on precedents or aggravating facts of any other case, but High Court has to come to an independent conclusion after considering proceedings in all aspects. The Courts are required to keep in mind that death penalty should be sustained only when Court is of the opinion that sentencing aim of reformation through award of life imprisonment, is unachievable.

8. Reliance is also placed on the judgment of the Madhya Pradesh High Court in case of **In Ref: Vs. Ramesh, ILR 2016 MP 1523**, wherein it is held that if charge was framed for a lesser offence and without alteration of charge, accused has been convicted for a greater offence against the mandate of Sub-section (7) of Section 211 of the Cr.P.C., then it can be said that the appellant was deprived of a fair opportunity of defence and grave prejudice is caused to the accused. It is also pointed out that in case of child witnesses, evidence of child witnesses has to be scrutinized carefully and substantial corroboration is necessary.



9. Reliance is also placed on the judgment of the Supreme Court in **Pappu Vs. State of Uttar Pradesh, AIR 2022 SC (Supp) 897**, wherein it is held that principles of penology have evolved to balance the other obligations of the society, i.e. of preserving the human life, be it of accused, unless termination thereof is inevitable and is to serve the other societal causes and collective conscience of society, which has led to the evolution of ‘rarest of rare test’ and then, its appropriate operation with reference to ‘crime test’ and ‘criminal test’ is to be applied. Judicial process is expected to maintain a delicate balance, particularly when dealing with crimes of heinous nature. It is also pointed out that the delicate balance expected of the judicial process has also led to another mid-way approach, in curtailing the rights of remission or premature release while awarding imprisonment for life, particularly when dealing with crimes of heinous nature like the present one.

10. Reliance is also placed on the judgment of Supreme Court in **Sundar @ Sundarrajan Vs. State by Inspector General of Police, AIR 2023 SC (Supp.) 1177**, wherein in a case of kidnapping and murder coupled with circumstantial evidence i.e. evidence of last seen, the Supreme Court held that sex of the child cannot be considered as aggravating circumstance by itself. The murder of a young child is unquestionably a grievous crime. Young age of the victim as well as the trauma that it causes for the entire family is



undoubtedly an aggravating circumstance. It should not matter for court if the young child was a male child or a female child. Courts should not indulge in notion that only a male child furthers family lineage or is able to assist the parents in old age. Dealing with the ‘Lingering Doubt Theory’, Supreme Court held that where conviction is based on circumstantial evidence as a ‘lingering doubt’ regarding guilt persists, Court already applied the relevant standard to confirm the guilt of the accused on the basis of circumstantial evidence. It would not be appropriate for the Court to once again venture into an assessment of the evidence in the review jurisdiction in view of its limited scope.

11. It is submitted that in **Mohd. Arif @ Ashfaq Vs. The Registrar, Supreme Court of India and others, (2014) 9 SCC 737**, Supreme Court took note of the irretrievable nature of the death penalty and of the possibility of two judicial minds reaching on different conclusions on the question of a case being appropriate for the award of the death penalty. It noted that death sentence cases are a distinct category of cases altogether. Supreme Court in all death sentence cases and apart from death sentence being granted only in the rarest of rare cases, two factors have impressed upon. The first is the irreversibility of a death penalty. And the second is the fact that different judicially trained minds can arrive at conclusions which, on the same facts, can



be diametrically opposed to each other. Thus, it is submitted that death penalty being a rarest of rare, it may not be taken recourse to in the normal course.

12. Reliance is also placed on the judgment of Supreme Court in **Munna Pandey Vs. State of Bihar, AIR 2023 SC 5709** to submit that non-procurement of FSL report was a serious flaw on the part of Investigating officer that too in such a serious matter. In rape or murder case, failure to conduct medical examination of accused and produce evidence, despite there being no obstacle from the accused or anyone, could create a gaping hole in the case of the prosecution and give rise to serious doubts on the case of the prosecution. It also dealt with duties of the High Court in confirmation of death penalties and referring to the judgment of Supreme Court in **Bhupendra Singh Vs. State of Punjab, AIR 1968 SC 1438**, it is held that the Court must examine the appeal record for itself, arrive at a view whether a further enquiry or taking of additional evidence is desirable or not, and then come to its own conclusion on the entire material on record whether conviction of the condemned prisoner is justified and the sentence of death should be confirmed or not?

13. Shri Aditya Narayan Gupta, learned Public Prosecutor, in his turn, submits that there is prompt FIR. Conduct of the accused is required to be taken into consideration. He initially searched the victim along with her



parents and residents of the locality and then absconded. PW-2 Shabana, mother of the victim in para 4 of her examination-in-chief, categorically stated that her daughter had gone to buy a gutka. She was wearing cream colour leggings, a pink colour kurta with ballooned sleeves. She had bangles in her hands and earrings besides ring in her finger. When she was found, she was not wearing bangles in her hands and Vishnu was also not present in his house. It is pointed out that in the FIR Ex. P-2, it is mentioned that she was wearing a green colour salwar with sleepers in her feet.

14. It is further submitted that date of birth of the victim is proved beyond reasonable doubt to be 14.06.2010 as is mentioned in Ex.P-22C, which is copy of school register, duly proved by PW-13 Ajit Singh, Principal of Jai Hind Convent school, Kotra, Bhopal. Thus, there is no iota of doubt that the victim was less than 12 years of age.

15. It is submitted that PW-3 Dr. Avinash Thakur, who was working as Assistant Professor in Gandhi Medical College, Bhopal in the Forensic Medicine Department, had noted that when he had medically examined the accused, then found that there were 3 to 4 contusions of reddish blue colour on the glans penis measuring 0.2 X 0.3 cms to 0.4 X 0.8 cms. Rugosities were present on the scrotum. It is pointed out that in the opinion of PW-3 Dr. Avinash Thakur that contusions found on the glans penis of the accused could



have been caused if forceful intercourse is committed on a minor child as size of genitals of a minor child and an adult male do not match. Thus, pointing out from the evidence of PW-3 Dr. Avinash Thakur, it is submitted that guilt of the appellant is proved beyond reasonable doubt.

16. PW-10 Dr. Atul Gaur was examined as he had collected evidence as a Scientific Officer of District Scene of Crime Mobile Unit, Jahangirabad, Bhopal. In Para 3 of his examination-in-chief, he stated that there were abrasions on the private parts of the deceased besides abrasions on her left thigh. Deceased was wearing a yellow colour pajami and some hairs were found on it. Those hairs were preserved separately. Thus, it is pointed out that evidence of PW-3 Dr. Avinash Thakur and PW-10 Dr. Atul Gaur, is vital.

17. Reading from the evidence of PW-5 Dr. Ashok Sharma, who had conducted autopsy on the body of the victim, it is pointed out that there was blood on the leggings as well as on the private parts of the victim. Stitches of the leggings were open to the extent of 4 cms. There was darkness on her face and it was cyanosed.

18. After hearing learned counsel for the parties and going through the record, prosecution case in short is that, on 08.06.2019 the victim had gone to purchase a 'vimal gutka' for her father from a colony shop. When she did not return, her parents searched for her and lodged a missing person report at



Police Station Kamla Nagar, Bhopal, which is available on record as Ex.P-2. This report lodged at the instance of PW-2 Shabana, mother of the victim, was recorded by ASI Shri Devkishan Vishwakarma (PW-11), registering missing person report No.51/19. Then parents of the victim searched for the girl along with colony-mates for the whole night. In the morning at 5-6 AM, PW-1 Azad Khan, father of the victim, found her daughter's dead body on a chamber over a nala. Then, he had given intimation to the police station, on the basis of which PW-23 Head Constable Chandrahas Choubey lodged merg intimation No.30/19 (Ex.P-1) under Section 174 of the Cr.P.C. Deceased was taken to J.P. hospital, where she was declared dead. From there she was taken to Hamidia hospital. PW-11 ASI Shri Devkishan Vishwakarma had given an application (Ex.P-9) for postmortem and Naksha Panchyatnama (Ex.P-21) was prepared.

19. PW-10 Dr. Atul Gaur, Scientific Officer, District Scene of Crime Mobile Unit, Jahangirabad, Bhopal had inspected the scene of crime and found that close to nala, over a latrine chamber, dead body was found over two farsi stones. Pieces of red colour bangles were found. Distance between the nala and the latrine chamber was about 4 feet and the distance of house of the deceased and that of the latrine chamber was 36 feet. Thereafter, he had gone to Hamidia hospital to inspect the dead body.



20. PW-5 Ashok Sharma along with Dr. Neelam Shrivastava conducted autopsy on 09.06.2019 and found that the legging is smudged with blood at perineal region and torn for a length of 4 cm from the seam. Face was dark and cyanosed with bruises on right and left side of the face. There was tear measuring 0.5 cm long and another tear measuring 0.6 cm and third tear measuring 1.0 cm were found on the anal region along with another tear measuring 0.5 cms long. There were bruises on the vaginal part of the victim. Vide Ex.P-11 opinion was given that cause of death was due to asphyxia as a result of throttling and smothering. Death was homicidal in nature. Evidence of sexual violation per vagina and per anus were present. Hence, vaginal smear and anal smear slides were prepared and their swabs were preserved for further examination and analysis. Viscera was preserved for chemical analysis. Both hands finger nails clippings were taken separately and clothings were preserved and handed over to the concerned police. Duration of death was shown to be within 24 hours since postmortem examination. Photographs were taken and videography was done by Vikash Shukla, SI, Police Control Room, Bhopal.

21. PW-17 Head Constable Bistrati had presented the seized materials to the police station, where PW-8 Head Constable Vineet Kumar Dwivedi seized them and prepared seizure memo Ex.P-12.



22. PW-1 Azad Khan, PW-2 Shabana, PW-4 Dwarka Bai, PW-9 Md. Shahid and PW-14 Shahzad expressed doubt over the present appellant. During investigation, PW-15 Alok Shrivastava, SHO, Police Station Kamla Nagar carried out search in the Jhuggi of accused and seized 4 golden colour bangles and their pieces (Article A-1), pouch of 'vimal pan masala' (Article A-4), 2 empty wrappers of diamond namkeen (Article A-2 and A-3), white black and maroon stripped clothes, two in number, laced with a substance looking like semen, sealed in Packet-B (Article A-25). Spotted bed-sheet pieces containing blood stains, sealed in Packet-C (Article A-26), male underwear, sealed in Packet-E (Article A-28), a double bed multi-colour bed-sheet containing some spots, sealed in Packet-D (Article A-27) and blood collected from just outside the main gate, sealed in Packet-F (Article-29) and similarly, stains of semen and blood as seized from the bathroom were recovered on a cotton swab in Packet-G (Article A-30) vide seizure memo Ex.P-23. Blood recovered from the latrine chamber where dead body was dumped, was preserved in Packet-A (Article A-24) vide seizure memo Ex.P-14.

23. Investigating officer had collected tower location of the appellant's Mobile No.9098513508. Its location on the date of the incident was narrated by the Nodal officer of Jio company Shri Amandeep Gupta to be near mobile



tower Bhadbhada road, Bhopal and phone number was certified to be in the name of the appellant.

24. On 10.06.2019, appellant was arrested at Omkareshwar, District Khandwa from where he was brought to Hamidia hospital police chowki where appellant's memorandum (Ex.P-15) was recorded. Then his rail ticket and mobile phone were seized vide Ex.P-16 and he was arrested vide arrest memo (Ex.P-17).

25. PW-3 Dr. Avinash Thakur found appellant to be capable of performing intercourse and noted contusions over glans penis. He had taken blood sample of the appellant in EDTA vial vide Ex.P-8 and handed over to ASI Bhagwan Singh Verma (PW-21) in a thermocol box, who handed it over to ASI Upendra Singh (PW-18). PW-18 Upendra Singh in turn had handed over this material to PW-8 Head Constable Vineet Kumar, who had prepared seizure memo (Ex.P-13).

26. Broken pieces of bangles recovered from the hutment of the accused were subjected to identification in the hands of mother of the victim by Naib Tehsildar Ms. Anjushree Gupta (PW-12) vide identification panchnama (Ex.P-5).

27. PW-15 Alok Shrivastava through Superintendent of Police, South Bhopal, had sent collected samples to the Regional Forensic Science



Laboratory, Bhopal vide Draft (Ex.P-30) on 10.06.2019. Report of the FSL laboratory is Ex.P-32 in which it is mentioned that positive results were found on the following articles on which human sperms were also found, namely, B₁ (piece of cloth recovered from the house of the accused-appellant), C₁ (clippings of mattress), D (bed-sheet), E (underwear of the appellant), F (cotton swab collected near the gate), H₁ (kurti of the victim), H₂ (leggings of the victim), I (anal slide of victim), L (vaginal swab of victim), M (vaginal slide of deceased), N (anal swab of victim), O₂ (T-shirt of appellant), P (underwear of appellant), S (penis slide) and T₁ (glans penis swab).

28. It has also come on record that Articles A (cotton swab collected from the place where dead body was found), C₁ (clippings of mattress), D (bed-sheet), G (cotton swab collected from the bathroom of appellant's house), H₁ (kurti of victim), H₂ (leggings of victim), H₃ (dupatta of victim), O₂ (T-shirt of appellant), P (underwear of appellant), T₁ (glans penis swab), T₂ (testicles swab of appellant) and T₃ (pubic region swab of appellant), contains 'B' group of human blood. Copy of this report is Ex.P-32, proved by PW-15 Alok Shrivastava, SHO, Police Station Kamla Nagar, District Bhopal.

29. DNA report is Ex.P-37 in which it is mentioned that similar male DNA profile is detected on the source of article B (piece of cloth recovered from the house of accused), C (piece of bed-sheet recovered from the house of accused),



D (double bed-sheet recovered from the house of accused), E (underwear of the accused), F (blood/semen collected on cotton near the door of accused), H (clothes of deceased), I (slide of deceased), J (right hand nails of deceased), K (left hand nails of deceased), L (vaginal swab of deceased), M (vaginal slide of deceased), N (anal swab of deceased), O (clothes of accused) and U (blood sample of accused). Similar female DNA profile detected on the source of article A (blood stains collected on cotton from the spot), B (piece of cloth recovered from the house of accused), C (piece of bed-sheet recovered from the house of accused), G (blood stains collected on cotton from the bathroom of accused), I (slide of deceased), J (right hand nails of deceased), K (left hand nails of deceased), O (clothes of accused), T (penis and pubic area swab of accused) and on the source of article H (female fraction) (clothes of deceased). Presence of accused Vishnu's (article U) body fluid (semen) is detected on the source of article D (double bed-sheet recovered from the house of accused), F (blood/semen collected on cotton near the door of accused), H (male fraction) (clothes of deceased), L (vaginal swab of deceased), M (vaginal slide of deceased), N (anal swab of deceased), P (underwear of accused) and S (penis slide of accused). Presence of deceased's body fluid (article H (clothes of deceased)-female fraction) is detected on article T (Penile swab). Opinion



given by Dr. Pankaj Shrivastava in DNA report (Ex.P-37) is reproduced below:-

“Following conclusive results were obtained on DNA profiling and upon conduct of examination of the exhibits, which are as follows:-

- Similar male DNA profile is detected on the source of article B, C, D, E, F, H, I, J, K, L, M, N, O and accused Vishnu (article U).
- Similar female DNA profile detected on the source of article A, B, C, G, I, J, K, O, T and on the source of article H (female fraction).
- Presence of accused Vishnu's (article U) body fluid (semen) is detected on the source of article D, F, H (male fraction), L, M, N, P and S.
- Presence of deceased's body fluid (article H -female fraction) is detected on article T (Penile swab)”

30. Evidence of PW-1 Azad Khan, PW-2 Shabana, PW-4 Dwarka Bai, PW-5 Dr. Ashok Sharma, PW-9 Mohd. Shahid, PW-14 Shahzad and PW-16 Dr. Pankaj Shrivastava, is material. PW-1 Azad Khan stated that he had sent his daughter at about 8:00 PM to bring a ‘vimal gutka’ from the shop of Vishal. For 10-15 minutes, when his daughter did not return, he had gone to the shop of Vishal, who informed him that 5 minutes back, victim had taken the pouch. PW-1 Azad Khan went back to his home, inquiring for his daughter, but when



it was informed that she did not return, then she was searched in the house of her friends. They continued to look for her upto 12:00-1:00 AM and then, recorded missing person report. Thereafter, police personnel had come and they also started searching for the girl. At about 4:30 AM, PW-1 Azad Khan went towards the nala when the dawn had begun he saw his daughter lying dead on a chamber near nala. PW-1 Azad Khan raised alarm. There were blood marks on the body of the victim and her body had turned black. Several people gathered. He had fallen unconscious. Later on, it was revealed that his daughter was subjected to rape and, thereafter, throttling was resorted to, to put an end to her life. He stated that Vishnu raped her and put her to death. There is a detailed cross-examination on this witness. In para 10 of his cross-examination, he stated that he cannot say that as to who first informed him that Vishnu is the culprit of raping and murdering his daughter, but on his own said that he was informed that police personnel had come with dog squad when dog had gone upto Bhadbhada and then in the house of Vishnu.

31. PW-2 Shabana, mother of the victim corroborated a fact that when the victim was recovered, there were no bangles in her hands. She stated that while searching for the girl in early hours of morning at about 5 AM, they had gone to family of her niece for having a cup of tea and then again started looking for their daughter. Thereafter, her husband reached close to the nala and when he



shouted, they saw that their daughter was lying there, bleeding from lower part of the body. She too had fallen unconscious. When they gained consciousness, they took their daughter to the hospital at 1250 Quarters, Bhopal, where she was declared dead, then she was taken to Hamidia hospital. When their daughter was recovered, she was not wearing bangles in her hands and they returned to their home. Vishnu was not available. Detailed cross-examination was conducted, but except for discrepancies in colours of bangles and clothings, no major infirmity was found.

32. PW-3 Dr. Avinash Thakur found injuries on the penis of the appellant and he stated that there were contusions on the glans penis mentioned above. There were rugosities on the scrotum of the appellant. Testes were present. In the opinion, PW-3 Dr. Avinash Thakur stated that contusions on glans penis were on account of forceful intercourse with a minor girl as the size of the genitals of a minor girl and an adult male do not match.

33. PW-4 Dwarka Bai stated that accused is brother of her daughter-in-law. He is residing in the next gali in a Jhopadi. On the date of the incident, his mother Komal Bai had gone to some relative's house. Appellant Vishnu was alone on that day. She stated that they all were searching for the victim along with the parents of the victim upto 3:00 AM. Thereafter, she had come back to her house. When she got up at 6:00 AM, she saw Vishnu on the roadside going



somewhere. She asked Vishnu as to where he is going, but he did not reply. Later on, she came to know that dead body of the victim was found by the side of the house of Vishnu over a nala. Residents of Mohalla were saying that some wrong act was done with the victim and she was lying dead. She further stated that Komal Bai returned back to her hutment on the next morning. She did not ask her anything, but PW-4 Dwarka Bai had informed her that her son Vishnu was going somewhere and had not informed as to where he was going. Police had gone to Vishnu's house, where they had found broken bangles, some torn clothes stained with blood, pouch of 'vimal gutka' and some pouches of eatables. These items were seized in front of this witness and Komal Bai on which she had put her thumb impression. In cross-examination, this witness admitted that she was not literate, but denied this suggestion given in para 12 of her cross-examination that she had put her signatures at the police station. She on her own stated that she had put her thumb impression at the house of Vishnu. She further stated that police personnel before obtaining her thumb impression, had read over the seizure memo and had kept the seized material in polythene.

34. PW-5 Dr. Ashok Sharma stated that he had conducted postmortem along with Dr. Neelam Shrivastava. There were blood stains on the leggings and the private parts of the victim. He stated that there were blunt injuries on the



frontal part of labia majora and internal parts of labia majora, which was reddish in colour. There were blunt injuries on labia minora also. These injuries were of dark red colour. Vagina was also having excessive blunt injuries which were in the form of 3 o'clock to 9 o'clock. There were lacerated wounds on the walls of the vagina till the depth of mucosa. Hymen was also torn at a 6 o'clock position. These injuries were up to the depth of muscles measuring 1 cm. There was ecchymosis on this spot. There were blunt injuries between the vagina and the anal part. Blood was oozing out per vagina. Vaginal smear was prepared on the basis of which vaginal slide and swab were preserved.

35. As far as anus is concerned, there were blunt injuries on the anal entrance and around. There was ecchymosis. Joint of skin and mucosa had severe blunt injuries which were in the shape of 9 o'clock of a watch to 3 o'clock in excessive quantity. There was a lacerated wound in the form of 2 o'clock of the watch, 4 o'clock, 6 o'clock and 9 o'clock measuring respectively 0.4 cms, 0.6 cms, 1 cm and 0.5 cms. They all were mucosa to muscle deep. Anus was extruding blood mixed fickle material. Anal smear and anal swab were taken and kept. On the internal examination, other body parts were excessively red. Brain was red and in the edematous state. Both the lungs were in the edematous state with redness and on dissection asphyxiated fourth



aid. Blood substance oozed out. Intestines contained 300 cc of half digested food. Cause of death was shown as throttling and smothering. Nature of death was homicidal.

36. In cross-examination, Shri Mukesh Pawar, learned counsel for the accused gave a suggestion to this witness as to the age of the victim, but in view of availability of Ex.P-22C, school register duly proved by PW-13 Ajit Singh, Principal, age of the victim is not disputed. In para 11 of the cross-examination, it has come on record that there were injury marks on the left wrist of the victim. Process of rigor mortis has started. PW-5 Dr. Ashok Sharma on his own stated that the injuries which were found on the throat, trachea and nose, could not have been caused accidentally or on own. Fracture of right-hand side thyroid cartilage and injury on the higher bone reveals that on one side excessive hand pressure was exerted.

37. PW-6 Vishal Nand Maher is the person from whose shop the victim had gone to purchase 'vimal gutka' pouch. This witness stated that he had collected Rs.5/- from the victim. She had left his shop. After 1½ hour, sister of the victim, her mother and maternal grandmother had come to his shop asking for the victim. He had informed them that she had taken 'vimal gutka' and left his shop 1½ hours prior to inquiry. Then, all of them started searching for the victim.



38. PW-9 Akram is the landlord who has rented his jhuggi to Komal Bai, mother of the accused. After 20 days of renting it out, accused had joined his mother. This witness is a hearsay witness. He had not seen the accused.

39. PW-8 Head Constable Vineet Kumar Dwivedi had prepared seizure memo (Ex.P-12) containing clothes of the victim, her slides, her left hand nails in one plastic bottle and right hand nails in another plastic bottle, her vaginal swab, vaginal slide, anal swab, stomach content, liver of the victim and saline solution in front of witnesses Sunita and Priti Yadav.

40. PW-9 Mohd. Shahid is a witness in whose presence seizure memo (Ex.P-14) was prepared. Memorandum of the accused (Ex.P-15) was taken. His mobile phone, ticket from Habibganj to Indore and aadhar card were seized vide Ex.P-16 and then he was arrested vide arrest memo Ex.P-17. In para 5, this witness has categorically denied that he had signed on blank papers. However, he admitted that memorandum (Ex.P-15) was not read over to him, but on his own stated that he does not know how to read. He denied a suggestion that seizure memo and arrest memo were signed in blank state.

41. PW-10 Dr. Atul Gaur, Scientific officer of District Scene of Crime Mobile Unit, found injuries on the private parts of the body of the victim.

42. PW-11 Devkishan Vishwakarma is the author of missing person report bearing No.51/19 (Ex.P-2) and also author of FIR No.474/2019 recorded under



Section 363, IPC (Ex.P-3). He also prepared spot map (Ex.P-4). He sent the body for postmortem vide Ex.P-9. He had also prepared notice for merger intimation (Ex.P-20) and naksha panchayatnama (Ex.P-21).

43. PW-12 Ms. Anjushree Gupta is the Executive Magistrate in front of whom seized pieces of bangles were identified by PW-2 Shabana vide identification memo (Ex.P-5).

44. PW-13 Ajit Singh, Principal of Jai Hind Convent School, Kotra, Bhopal proved the date of birth of the victim to be 14.06.2010 vide Ex.P-22C.

45. PW-14 Shahzad is the resident of the same mohalla, where the incident took place. This witness stated in para 2 that accused had said that they should go towards Bhadbhada as the child was towards Bhadbhada and on his directions, they had gone towards Bhadbhada, but could not find the child and started searching for her again in their locality. By the time body of victim was recovered, Vishnu absconded. At about 11:00 AM, police had come with a dog squad. They had taken the dog to the place where the dead body was lying. Police had picked some blood in a cotton swab and had made certain formalities there vide seizure memo Ex.P-14. Vishnu was arrested on 10.06.2019. His memorandum statements (Ex.P-15) were recorded in front of this witness and also in front of Bablu. Aadhar card of appellant, railway ticket and mobile were seized vide Ex.P-16 and he was arrested vide arrest memo



Ex.P-17. In cross-examination, this witness remained consistent to his earlier stand.

46. PW-15 Alok Shrivastava, SHO, Police Station Kamla Nagar, in para 2 stated that prior to his reaching the scene of crime, somebody had given intimation to senior officials that Dwarka Bai had seen Vishnu running in the morning when his mobile number was traced and his location was obtained. He further stated that people had informed him that in the night, even appellant-Vishnu was searching the girl along with other persons and had stated that girl was seen going towards Bhadbhada. He had prepared seizure memo (Ex.P-23). In para 7, this witness stated that on 10.06.2019, he had received intimation that a team of police personnel brought suspect Vishnu from Omkareshwar. With a view to maintain law and order situation, senior officials had directed to not to bring Vishnu to Kamla Nagar police station and therefore, as per their directions, Vishnu was kept at Koh-e-fiza police station as there was lot of anger and several organizations were making protest.

47. This witness had taken memorandum of the accused in front of PW-14 Shahzad and PW-9 Mohd. Shahid which is available on record as Ex.P-15. This witness had reconstructed the scene of crime as per the statements of Vishnu given under Section 27 of the Evidence Act and had seized the physical evidence from the spot. He had prepared spot inspection memo (Ex.P-



26) in presence of witnesses Santosh Mishra and Radhe Singh. After obtaining viscera from medico legal institute in sealed condition, he had forwarded it to the forensic science laboratory for which draft is Ex.P-27, receipt is Ex.P-28 and viscera report is Ex.P-29. After postmortem, he had sent 20 sealed items to Forensic Science Laboratory, Bhopal for reporting vide Ex.P-30, receipt of which is Ex.P-31 and the report is Ex.P-32. He was also responsible for forwarding other materials vide Ex.P-33, Ex.P-34, Ex.P-35 and Ex.P-36 for which report Ex.P-37 was given. Ex.P-37 since found the DNA report to be positive, therefore, further steps were taken.

48. PW-16 Dr. Pankaj Shrivastava is the Scientific officer of the State Forensic Science Laboratory, Sagar. He is the author of DNA report (Ex.P-37). In para 11 of his cross-examination, this witness stated that on the basis of the report Ex.P-37, it was not getting proved that female DNA profile was that of the deceased-victim, therefore, they carried out separate tests on seized articles concerning the deceased and obtained different female and male mixed DNA profiles from different articles, therefore, they had carried out separate tests on all the articles of the deceased and the profile so generated, confirmed that the female DNA profile was that of the victim-deceased only. This witness has proved presence of male DNA profile of the appellant on Article B (clothes recovered from the house of the appellant), Article C (clipping of the mattress),



Article D (bed-sheet), Article E (underwear of the accused), Article F (cotton swab taken from the sample close to the door, Article H (kurti of the deceased), Article I (anal slide of the deceased), Article J (nails of right hand of the deceased), Article K (nails of left hand of the deceased), Article L (vaginal swab), Article M (vaginal slide), Article N (anal swab) and Article O (clothes of accused).

49. Similarly, female DNA profile was detected on the source of Article A (cotton swab recovered from the place where dead body was recovered), Article G (cotton swab recovered from the bathroom of the accused) and Article T (glans penis swab, testicles swab and pubic region swab). This DNA report coupled with Ex.P-39, where male mixed DNA profile was detected on the source of Articles D, H and F.

50. PW-17 Bisarti is the Head-constable, who is witness of seizure Ex.P-12. PW-18 Upendra Singh is ASI who stated that all the articles which were sent for forensic science examination were preserved in a thermocol box. PW-19 Kripashankar Singh, S.I., is a witness of Ex.P-25, Ex.P-42 and Ex.P-45. PW-20 Vikash Shukla, S.I., is a witness of videography and he produced 13 photos (Article A-10 to A-22) and DVD of video recording (Article A-23) for which he had given certificate (Ex.P-44). PW-21 B.S. Verma is the person who had received blood sample of the accused in a thermocol box in a sealed condition.



PW-22 Ritesh Pandey is the officer from Jio Infocom Ltd., who had given tower location at Bhadbhada vide Ex.P-47 in regard to Mobile No.9098513508 on 08.06.2019 from 19:26 to 19:32 hours. It was signed by Amandeep Gupta. That location was of an incoming SMS. That mobile is in the name of Vishnu Mohare S/o Tarachand Mohare, R/o Khandwa city, Aadhar No.4076 9313 4036 containing photograph of Vishnu vide Ex.P-47. He stated that Amandeep Gupta had issued a certificate under Section 65-B of the Evidence Act i.e. Ex.P-48.

51. Under Section 313, Cr.P.C. examination, accused had taken a plea that he is innocent. He was outside Bhopal in the search of work.

52. The issues which emerge for consideration are that admittedly there are no eye-witnesses, but whether circumstances prove towards the guilt of the appellant and no other conclusion can be drawn or in the alternative, benefit of doubt should accrue in favour of the appellant? Another issue is that when in terms of the evidence of PW-22, Ritesh Pandey, Nodal officer, Reliance Jio Infocomm Ltd., as per Ex.P-46 on 08.06.2019 when the victim had gone missing, appellant's mobile tower location was at Bhadbhada road, Bhopal from 19:26 to 19:32 PM, then whether the plea of alibi that he was outstation in search of work, can be accepted? Thirdly, it is to be determined that whether



the capital punishment inflicted on the appellant is required to be maintained or it calls for interference?

53. As regard the first issue, the circumstance which exists and as has been stated by PW-1 Azad Khan and PW-2 Shabana corroborated by PW-4 Dwarka Bai, PW-9 Mohd. Shahid and PW-14 Mohd. Shahzad, are that daughter of PW-1 and PW-2, aged about 9 years was sent to procure a 'vimal gutka' from a colony shop by PW-1 Azad Khan. She had left her house at about 8:00 PM. She did not return, therefore, her parents had gone to look for her when owner of the shop PW-6 Vishal Nand Maher informed that victim had visited him 1½ hours back and she had taken 'vimal gutka'.

54. Another fact corroborated by this set of witnesses is that they started searching for the girl, but when she could not be traced till 12:00 AM, then missing person report (Ex.P-2) was recorded.

55. It has also come on record and as stated by PW-14 Mohd. Shahzad that appellant was also moving with them in search of the girl along with other persons of the locality. Appellant had said that they should go towards Bhadbhada in search of the girl as girl is at Bhadbhada. At his instance, they had gone towards Bhadbhada in search of the girl, but when they could not recover the girl, then they came back and started searching for her in the colony itself. Thus, according to the evidence of this witness, appellant Vishnu



was present in the team which was looking for the missing girl. He misled the team by saying that girl was seen going towards Bhadbhada and asked the team to go towards Bhadbhada and at his instance, they had gone towards Bhadbhada in search of the girl. When they did not find the girl towards Bhadbhada, they came back and started looking for the girl. Early morning at 5:00-5:30 AM, PW-1 Azad Khan found her body lying over a chamber close to the house of the accused and also close to nala.

56. PW-22 Ritesh Pandey stated that on the date when victim gone missing for which missing person report was lodged vide Ex.P-2 on 09.08.2019 at 00:38 hours informing that the victim went missing on 08.06.2019 at 20:00 hours, approximately in the same time range, appellant's mobile location was found to be in the vicinity of mobile tower at Bhadbhada as deposed by PW-22 Ritesh Pandey. He stated that from 19:26 to 19:32 hours, tower location of mobile number of accused on 08.06.2019 was at Bhadbhada road. When this fact is corroborated with the evidence of PW-4 Dwarka Bai who had seen the accused leaving his home in the morning at about 6:00 AM and did not answer her question as to where he was going and when taken into consideration with the evidence of PW-14 Mohd. Shahzad that accused was part of the search party, looking for the missing girl and had misdirected them to go and look for the girl towards Bhadbhada, completes the chain of events that at the time of



girl going missing, appellant was present in the vicinity of the place of incident. He was present in the vicinity till morning of 09.06.2019 when PW-4 Dwarka Bai saw him going on a roadside. Recovery of railway ticket from Habibganj to Indore vide Ex.P-16 bearing No.ULB-68793128 dated 09.06.2019 again proves that till 09.06.2019, appellant was at Bhopal, inasmuch as, Habibganj railway station is a suburb railway station of Bhopal city only. PW-9 Mohd. Shahid is the witness of this seizure.

57. Recovery of golden bangles of 2 inches size, 5 pieces of golden bangles, one filled pouch of 'vimal pan masala', 2 empty wrappers of Rs.5/- each of Yellow Diamond namkeen, 2 pieces of white black and maroon lined clothes, containing sperms like substance, clippings of the bed-sheet containing blood stains, a male underwear with a chit of ESSA measuring 90 cms, a double bed multi colour bed-sheet containing chit of Metropolis and stains, then blood stains/semen marks collected from the outer side of the main gate and blood stains collected from the bathroom of the house of the accused in a cotton swab, were seized vide Ex.P-23. They all were subjected to DNA examination vide Ex.P-37 and Ex.P-39 and the DNA report is positive, inasmuch as, it is mentioned that accused Vishnu's body fluid is detected on the source of Article B (clothes recovered from the house of the appellant), Article C (clipping of the mattress), Article D (bed-sheet), Article E (underwear of the



accused), Article F (cotton swab taken from the sample close to the door, Article H (kurta of the deceased), Article I (anal slide of the deceased), Article J (nails of right hand of the deceased), Article K (nails of left hand of the deceased), Article L (vaginal swab), Article M (vaginal slide), Article N (anal swab) and Article O (clothes of accused). Articles D, F were recovered from the house of the appellant, whereas H are the clothings of the deceased. L is the vaginal swab of the victim, M is the vaginal slide, N is the anal swab, P is the underwear of the appellant and S is the penis slide of the appellant. It has also come on record that deceased's body fluid (Article H-Female faction) was detected on Article T i.e. the penial swab. Thus, scientific evidence has been able to prove violation of privacy of the victim in the hands of the appellant.

58. Thus, two circumstances, presence of the victim contrary to his plea of alibi, is proved from the locality where the girl had gone missing. Violation of privacy of the victim in the hands of the appellant is also proved beyond doubt through the medico legal evidence which has come on record, especially, Ex.P-37 and Ex.P-39.

59. It is also true that plea of alibi of his absence from the city in search of job, as was taken by the appellant, is not proved. Law in this behalf is settled as held by Guwahati High Court in **Amir Hussain Vs. State 1998 Cr.L.J. 4315 Gau**, that the burden of proving the plea of alibi is on the accused person.



His evidence in this case was contradictory and also not supported by any reasoning. The order rejecting the plea of alibi was held to be proper. This judgment is in the context of Section 103 of the Evidence Act which says that the burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

60. In case of **Vijay Singh Vs. State of Uttar Pradesh, AIR 1990 SC 1459**, it is held by the Supreme Court that circumstances leading to alibi are within the knowledge of the accused and as provided in Section 106 of the Evidence Act, he has to establish the same satisfactorily. The burden of proving alibi rests on the accused.

61. Thus, appellant having taken a plea of alibi of his absence from the city, having failed to substantiate it and there being both oral and documentary evidence, as demonstrated by PW-4 Dwarka Bai and PW-14 Mohd. Shahzad, so also evident from seizure memo Ex.P-16, plea of alibi could not withstand. The material like bed-sheet, clippings of the mattress, etc. recovered from the house of the appellant including the cotton swab (Article F) and cotton swab (Article G), recovered respectively from the gate and bathroom of the appellant's house, proves it beyond reasonable doubt that victim was taken to the appellant's house, her privacy was violated and in view of medico legal



opinion of PW-5 Dr. Ashok Sharma, she was ravished and this fact being corroborated by DNA report, there is no iota of doubt that involvement of the appellant in violating the privacy of the victim is complete.

62. PW-3 Dr. Avinash Thakur corroborated contusions on glans penis of the appellant and clearly stated that if forceful intercourse is performed on a minor, then on account of difference in the size of the genitals of a minor girl and an adult, such contusions can be contacted, corroborates the theory of violation of the privacy of the victim in the hands of the appellant alone.

63. As far as death of the victim is concerned, PW-5 Dr. Ashok Sharma, Incharge Director of Medico Legal Research Institute Gandhi Medical College, Bhopal is important. In para 11 of his cross-examination, after having denied the fact that injuries caused to the deceased on her neck and nose, could not have been accidental or self inflicted, but stated that the fracture found on the right thyroid cartilage indicates that excessive pressure was applied on one side with the help of the hand. PW-5 Dr. Ashok Sharma also found that there were injuries on the wrist of the victim.

64. We are of the opinion that in view of the aforesaid discussion, appreciation of facts and analysis of the evidence, conviction of the appellant under Sections 302, 376(ab), 377, 201, 363, 366 IPC, cannot be faulted with.



65. Now what is to be decided is that whether under the facts and circumstances of the case, death penalty is appropriate or not? Supreme Court in **Mohinder Singh** (supra) held that High Court has to first satisfy itself that conviction is right and then consider that what sentence should be awarded independent of the view expressed by the Sessions Judge.

66. Now, coming to the issue of sentence, the Supreme Court in **Mohinder Singh** (supra) has held that the doctrine of “rarest of rare” confines two aspects and when both the aspects are satisfied only then the death penalty can be imposed. Firstly, the case must clearly fall within the ambit of “rarest of rare” and secondly, when the alternative option of life imprisonment is unquestionably foreclosed. In life sentence, there is a possibility of achieving deterrence, rehabilitation and retribution in different degrees. But the same does not hold true for the death penalty. It is unique in its absolute rejection of the potential of convict to rehabilitate and reform. It extinguishes life and thereby terminates the being, therefore, puts an end anything to do with the life. This is the big difference between two punishments. Thus, before imposing death penalty, it is imperative to consider the same. It is further held that for satisfying the second aspect of “rarest of rare” doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. Then, it went on to say that life



imprisonment duration will not be 14 years or 20 years or 30 years, but it is for the whole life.

67. In view of said decision, we find that there is no criminal history of the appellant. Learned trial Court has not taken this aspect into consideration. It has only said that since such offences are on rise against minor daughters, which are indicative of perverted mind, then with a view to save the dreams of minor children, conclusive punishment is required to be given to such convicts.

68. In para 110, it has considered the mitigating circumstance of aged parents of the appellant, but merely saying that they never appeared in the Court, then noting a fact that as per the report of the Superintendent of the jail, conduct of the appellant was normal. It went on to say that in view of the law down in **Afzal Vs. State of Madhya Pradesh** in criminal appeal No.438/2019 and criminal reference No.02/2019, decided on 17.05.2019, refuse to show any indulgence. However, we are of the considered opinion that these three mitigating circumstances, namely, there is possibility of reform as besides old parents, appellant has a wife too, as stated by PW-4 Dwarka Bai and as held by the Supreme Court in **Pappu** (supra) in para 41, which reads as under:-

“41. It could readily be seen that while this Court has found it justified to have capital punishment on the statute to serve as deterrent as also in due response to the society’s call for appropriate



punishment in appropriate cases but at the same time, the principles of penology have evolved to balance the other obligations of the society, i.e., of preserving the human life, be it of accused, unless termination thereof is inevitable and is to serve the other societal causes and collective conscience of society. This has led to the evolution of ‘rarest of rare test’ and then, its appropriate operation with reference to ‘crime test’ and ‘criminal test’. The delicate balance expected of the judicial process has also led to another mid-way approach, in curtailing the rights of remission or premature release while awarding imprisonment for life, particularly when dealing with crimes of heinous nature like the present one.”

69. In the present case, though appellant has tried to submit that since there was no motive to kill the minor and throttling was accidental, resulting in incidental death of the minor, but that is not the aspect to be taken into consideration, especially when it is apparent that deceased was a child of less than 12 years of age. Her privacy was brutally violated and then she being known to the appellant, her life was terminated, then means of termination becomes secondary and will not be of any consequence. However, taking into consideration the judgment of the Supreme Court in **Pappu** (supra), when a mid-way approach is adopted, then we have no hesitation in maintaining his sentence under Sections 302, 376(ab), 377, 201, 363, 366 of the IPC, but societal interest can be balanced by holding that appellant shall remain in custody for the remaining period of his life rather than for 14, 20 or 30 years as offence under Section 5(m) of the Protection of Children from Sexual Offences Act, 2012, is made out for which the punishment is not less than 20 years, but



which may extend to imprisonment for life, which shall mean imprisonment for the remainder of natural life of that person.

70. Facts of the case of **Munna Pandey** (supra) are different. In that case, FSL report, etc. was not procured.

71. In case of **Ajitsingh Harnamsingh Gujral v. State of Maharashtra, (2011) 14 SCC 401**, the Supreme Court noted that life imprisonment is now rule and death sentence is an exception. It noted that the new code, amended in 1973, Section 354(3) reads as under:-

“51. The Code of the Criminal Procedure was further amended in 1973, making life imprisonment the normal rule. Section 354 (3) of the new Code provides:

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

52. Thus in the new Code, the discretion of the judge to impose death sentence has been narrowed, for the court has now to provide special reasons for imposing a sentence of death. It has now made imprisonment for life the rule and death sentence an exception, in the matter of awarding punishment for murder.”

72. This view finds further support from the judgment of Constitutional Bench decision of Supreme Court in **Bachan Singh vs State of Punjab, AIR 1980 SC 898**. Therefore, we are of the considered opinion that circumstances of the case do not call for confirmation of death penalty. It only requires



maintaining of the conviction, but alteration of sentence from one of death penalty to life imprisonment for remainder of the life of the appellant.

73. Accordingly, criminal appeal filed by the appellant is allowed in part and the criminal reference is answered in the following manner: -

- (i) The conviction of the appellant of offences under Sections 302, 376(ab), 377, 201, 363, 366 IPC is upheld and the sentences awarded to him are confirmed except the death sentence for the offence under Section 302 and 376(ab) IPC.
- (ii) The death sentence awarded to the appellant for the offence under Section 302 and 376(ab) IPC is commuted into that of imprisonment for life for the remainder of his natural life.
- (iii) The other terms of sentences awarded to the appellant, including the amount of fine and default stipulations, are also confirmed.

74. In above terms, criminal appeal is allowed in part and the criminal reference is answered accordingly.

(VIVEK AGARWAL)
JUDGE

(DEVNARAYAN MISHRA)
JUDGE