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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

ON THE 2ND DAY OF AUGUST, 2019

BEFORE

THE HON'BLE MR. JUSTICE RAVI MALIMATH

AND

THE HON'BLE MR. JUSTICE H.P.SANDESH

CRIMINAL REFERRED CASE NO.1 OF 2018
C/W CRIMINAL APPEAL NO.1067 OF 2018

IN CRIMINAL REFERRED CASE NO.1 OF 2018

BETWEEN:

THE REGISTRAR GENERAL
HIGH COURT OF KARNATAKA
BENGALURU-560 001. ... APPELLANT

(SUO MOTU BY SRI H.S. CHANDRAMOULI, STATE PUBLIC PROSECUTOR)

AND:

SALEEM
SON OF ABDUL KHAYAM
NOW AGED 35 YEARS
NO.70/4, 13TH A CROSS
BESIDES MEMORIAL MASJID
GORIPALYA
BENGALURU-560 026. ... RESPONDENT

(BY SRI. N.R. KRISHNAPPA, ADVOCATE)

THIS CRIMINAL REFERRED CASE IS REGISTERED AS REQUIRED UNDER SECTION 366 (1) CR.P.C. FOR CONFIRMATION OF DEATH SENTENCE AWARDED TO ACCUSED SALEEM BY JUDGMENT DATED 24.01.2018 PASSED IN S.C.NO.147/2012 ONF THE FILE OF III ADDITIONAL DISTRICT AND SESSIONS JUDGE,

RETYPED AND REPLACED VIDE ORDER DATED 23.08.2019

RAMANAGARA FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 376 AND 302 OF INDIAN PENAL CODE.

IN CRIMINAL APPEAL NO.1067 OF 2018

BETWEEN

SALEEM
SON OF ABDUL KHAYAM
NOW AGED 35 YEARS
NO.70/4, 13TH A CROSS
BESIDES MEMORIAL MASJID
GORIPALYA
BENGALURU-560 026. ... APPELLANT

(SRI. N.R. KRISHNAPPA, ADVOCATE)

AND:

THE STATE OF KARNATAKA
TAVAREKERE POLICE STATION
RAMANAGARA DISTRICT.
REPRESENTED BY SPP OF HIGH COURT OF KARNATAKA
HIGH COURT BUILDING
BENGALURU-560 001. ... RESPONDENT

(BY SRI. H.S. CHANDRAMOULI, STATE PUBLIC PROSECUTOR)

THIS CRIMINAL APPEAL IS FILED UNDER SECTION 374 (2) CRIMINAL PROCEDURE CODEPRAYING TO SET ASIDE THE JUDGMENT DATED 23.01.2018 AND ORDER OF SENTENCE DATED 24.01.2018 PASSED BY THE III ADDITIONAL DISTRICT AND SESSIONS JUDGE, RAMANAGARA IN S.C.NO.147/2012 CONVICTING THE APPELLANT-ACCUSED FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 376 AND 302 OF INDIAN PENAL CODE.

THIS CRIMINAL REFERRED CASE AND CRIMINAL APPEAL HAVING BEEN HEARD AND RESERVED FOR

JUDGMENT ON 01.07.2019 COMING ON THIS DAY, H.P. SANDESH J., PRONOUNCED THE FOLLOWING:-

JUDGMENT

This Criminal Referred Case and Criminal Appeal are arising out of the judgment dated 23.01.2018 passed by the 3rd Additional District and Sessions Judge, Ramanagara, whereunder the appellant/accused is convicted for the offence punishable under Section 376 and also for the offence punishable under Section 302 of Indian Penal Code, 1860, and sentenced to death for the offence punishable under Section 302 of the Indian Penal Code and also sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.10,000/- for the offence punishable under Section 376 of the Indian Penal Code and in default of payment of fine, to undergo rigorous imprisonment for six months and substantive sentence was ordered to run concurrently.

2. The case of the prosecution is that on 15.08.2012, the accused came to house of his sister who

has been cited as C.W.9 - Smt.Banu Kausheer situated at Janatha Colony within the jurisdiction of Tavarekere Police Station. On 15.08.2012 at 7.00 p.m., when nobody was there in the house of CW.9, the accused called upon the daughter of CW.1 to bring *beedi*. When the victim brought *beedi*, he called her into the house of C.W.9 and subjected her to sexual act of rape. When she tried to scream, the accused by smothering killed her. The complainant – mother of the deceased lodged complaint in terms of Ex.P.1, which culminated into registering a criminal case against the accused for the above offences. On the same day, the accused was apprehended and interrogated. Accused was also subjected to medical examination and he was in judicial custody. The Investigating Officer has conducted the investigation and after completion of the investigation, he has filed the charge sheet against the accused for the offences punishable under Sections 376 and 302 of the Indian Penal Code. The accused did not plead guilty and he claimed trial. Hence, the prosecution, in order to prove the charges levelled against the accused,

examined witnesses as P.Ws.1 to 14 and got marked documents as per Exs.P.1 to 15 and also got marked material objects as MO Nos.1 to 20.

3. After closure of the evidence of prosecution, the statement of the accused was recorded under Section 313 of the Criminal Procedure Code and put the incriminating evidence against him and he has denied the version of the prosecution case. He did not choose to adduce any defense evidence.

4. The Court below after hearing the arguments of learned Public Prosecutor and also defense counsel, convicted the accused for both the offences and imposed sentence of death and other consequential sentence.

5 Being aggrieved by the judgment of conviction and sentence dated 23.01.2018 and 24.01.2018 respectively, the appellant who is the accused herein has preferred Criminal Appeal No.1067 of 2018 and Criminal Referred Case No.1 of 2018 is registered for confirmation of death sentence awarded to the accused under Section 366(1) of Code of Criminal Procedure in S.C.No.147 of

2012 by the Third Additional District and Sessions Judge, Ramanagara. In the appeal memorandum, it is contended that the Court below has committed an error in convicting the accused. In spite of there being no corroborative evidence to prove the guilt of the accused, the judgment and order of the trial Court is only based on presumptions and same is not well reasoned order. The trial Court has not observed that it is a cooked up case with an ulterior motive. The conviction and sentence is not based on incriminating material evidence and the same not comes under rarest of rare cases. The judgment is only based on the social view not on the incriminating material. Hence, the impugned judgment is liable to be set-aside.

6. The learned counsel appearing for the appellant, Sri. Krishnappa, in his argument, vehemently contended that the Court below did not consider the material contradictions particularly in the evidence of P.Ws.1 to 3. The evidence adduced by the prosecution is not consistent to show that the accused only had committed the offences. The prosecution also did not explain the injuries found on

the accused. It is the duty cast upon the prosecution to explain the injuries sustained by the accused. The very finding of the trial Court is not based on the incriminating evidence and failed to prove that the accused alone has committed the offences. The learned counsel in support of his argument, has relied upon the following judgments:

i) In the case of *RAM SINGH VS. SONIA AND OTHERS* reported in *AIR 2007 SC 1218* to contend that it is not a case of rarest of rare cases, where death penalty should be awarded. Further, he would contend that chain of circumstances is not completed and the evidence of P.Ws.1 to 3 does not inspire the confidence of the Court. Relying upon the said judgment, he would contend that it is a fit case to set-aside the conviction. The appellant is entitled for acquittal and prosecution has failed to prove the offences alleged against the accused beyond reasonable doubt.

ii) In the case of *RAM DEO CHAUHAN AND ANOTHER VS. STATE OF ASSAM* reported in *AIR 2000 SC 2679* to

contend with regard to imposing of death sentence on the accused. Learned counsel referring to this judgment would contend that this case does not come under the rarest of rare cases. By relying upon this judgment, he would also contend that the Apex Court only imposed the death sentence on the ground that the accused caused death of four persons of a family in very cruel, heinous and dastardly manner – Incriminating circumstances leading only to hypothesis of guilt of accused and reasonably exclude every possibility of his innocence – Report of experts of mental hospital not showing that accused was, in any way, deprived off his senses even temporarily at the time of commission of offence. By referring to this judgment, the learned counsel would contend that this is not a case involving cruel, heinous and dastardly acts and the very case is only on presumption that the accused has only committed the offences.

7. Hence, learned counsel for the appellant would contend that it is not a fit case to award the death

sentence and prayed this Court to acquit the accused on the ground that there is no corroborative piece of evidence.

8. On the other hand, the learned State Public Prosecutor, Sri.H.S.Chandramouli, in his argument, would contend that P.W.1 is a rustic villager and illiterate and evidence has to be appreciated keeping in view the illiteracy of witnesses. There are no material contradictions as contended by the defense counsel. The accused did not deny or did not state that somebody committed the murder. The evidence available before the Court i.e., the evidence of P.Ws.1 to 13 particularly P.Ws.7 and 11, Doctor's evidence, corroborates that the accused not only committed rape, but also committed the murder of the victim in a cruel manner and that he had also sustained injuries while committing the offence. The accused did not explain the injuries sustained by him and cause of death is smothering and hence, there is sufficient material on record to confirm the judgment of conviction of the

accused for both the offences. It is a fit case to award death sentence. He would contend that while imposing the death sentence, the Court has to take note of the mitigating circumstances and aggravating circumstances and in the present case, the accused has committed rape on eight years old girl in a cruel manner and injuries found on the deceased go to show that how he was cruel while committing the rape on her and also murdered the said minor girl after committing rape on her. Hence, the Court below has taken note of the circumstances, which warranted to impose the death sentence on the accused. Hence, there are no grounds to acquit the accused and reduce the sentence. In support of his contention, he relied upon the following judgments:

i) In the case of *RAJENDRA PRALHADRAO WASNIK VS. STATE OF MAHARASHTRA* reported in *(2012) 4 SCC 37* to contend that on the pretext of buying her biscuits, the accused had taken the minor child and committed rape on her and the Apex Court confirmed the death sentence;

ii) In the case of *MOHD MANNAN VS. STATE OF BIHAR* reported in *(2011) 5 SCC 317* to contend that the accused was convicted on the basis of circumstantial evidence for kidnapping, raping and killing a minor girl and causing disappearance of evidence of offence and the Apex Court confirmed the death sentence;

iii) In the case of *VASANT SAMPAT DUPARE VS. STATE OF MAHARASHTRA* reported in *(2017) 6 SCC 631* to contend that the victim, a minor girl, aged about four years, was raped and battered to death and the accused allegedly lured the victim by giving her chocolates, kidnapped her and after satisfying his lust, caused crushing injuries and the death sentence was confirmed by the Apex Court;

iv) In the case of *DHANANJOY CHATTERJEE VS. STATE OF WEST BENGAL* reported in *(1994) 2 SCC 220* with reference para Nos.15 and 16 to contend that the appellant – Dhananjoy was one of the security guards deputed to guard the building 'Anand Apartment'. He

visited the apartment of the deceased (18 years oid) when she was all alone, he committed rape and murdered her and the Apex Court considering the circumstances in which murder was committed after committing rape, confirmed the death sentence. The Apex Court also took note of not only the rights of the criminal but also the rights of the victim of crime while imposition of capital punishment;

v) Referring to the case of *NATHU GARFAM VS. STATE OF U.P.* reported in *(1976) 3 SCC 366* learned State Public Prosecutor would submit that in the said case, the deceased was aged about 14 years old, she had taken food to the field and while returning to the village, she did not reach home. On questioning, the accused, ran away and entered the house of the appellant and found the dead body of girl with bleeding injuries. The Apex Court taking note of the circumstances enumerated and the cumulative effect and the appellant who is a bachelor of 28 years living all alone must have lured the girl into his house on some pretext or other and tried to sexually assault her but

because of her resistance his attempt failed and thereafter, he killed her. Hence, the Apex Court confirmed the death sentence;

vi) In the case of *RAM SINGH VS. SONIA AND OTHERS* reported in *AIR 2007 SC 1218* wherein the Apex Court has referred to the Judgment of Machhi Singh vs. State of Punjab and also considered the decision of Bachan Singh and held that in rarest of the rare cases, when collective conscience of the community is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. With these observations, the Apex Court confirmed the death sentence;

vii) In the case of *RAM DEO CHOWHAN @ RAJNATH CHOWHAN VS. STATE OF ASSAM* reported in *AIR 2000 SC 2679* with reference to para No.13 of the said judgment, wherein the Apex Court has observed that in civilized society, a tooth for a tooth, and a nail for a nail or death

for death is not the rule but it is equally true that when a man becomes a beast and a menace to the society, he can be deprived of his life according to the procedure established by law, as the Constitution itself has recognized the death sentence as a permissible punishment and observing the same, held that awarding of lesser sentence only on the ground that the appellant being a youth at the time of occurrence of the incident could not be considered as a mitigating circumstance and confirmed the death sentence.

viii) In the case of *AJITH SINGH HARNAMASINGH GUJARAL VS. STATE OF MAHARASHTRA* reported in *(2011) 14 SCC 401* with reference to the observations made in para 27 of the said judgment, wherein the Apex Court has held that the last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased was found dead is so small that the possibility of any

person other than the accused being the author of the crime becomes impossible.

9. By referring to all the above judgments, the learned State Public Prosecutor would contend that it is a fit case to confirm the death sentence and there are no circumstances warranting the Court to reduce the death sentence and the accused is a menace to the society and the very circumstances of the case disclose that there are aggravating circumstances and that the accused ventured to commit rape on a minor girl, who is aged about eight years and when the girl resisted, he has gone to the extent of smothering and commit the murder, which is heinous and hence, he will become menace to the society. Hence, it is a fit case to confirm the same.

10. Having heard the arguments of learned counsel for appellant and also learned counsel appearing for the State and also reference made by the District Court, the points that arise for our consideration are:

1) *Whether the Criminal Reference No.1 of 2018 requires to be accepted or not?*

2) *Whether the Court below has committed an error in convicting the accused for the offences punishable under Sections 376 and 302 of Indian Penal Code and it requires interference?*

3) *If it does not require any interference, what would be the sentence, whether it has to be confirmed or it has to be modified?*

11. **Point No.2** :- Having heard the arguments of the learned counsel for the appellant and also learned counsel appearing for the State in respect of the offences punishable under Sections 376 and 302 of the Indian Penal Code, this Court has to re-appreciate the evidence available on record. The main contention of the learned counsel for the appellant in his argument is that the evidence of P.Ws.1 to 3 is not consistent and there are material contradictions. The Court below did not consider the evidence in a proper perspective and injuries on the

accused are also not explained by the prosecution and hence, the Court below has committed an error in appreciating the evidence.

12. Per contra, the learned State Public Prosecutor would contend that the witnesses, P.Ws.1 to 3, are rustic villagers and the Court has to evaluate the same keeping in mind that some minor contradictions are bound to occur and witnesses were cross-examined after three years of their examination-in-chief and hence, the minor discrepancies, which do not go to the root of the case, cannot take away the case of the prosecution.

13. Keeping in view the contentions urged by both counsel, this Court has to evaluate the evidence available on record.

14. Now, let us consider the evidence adduced by the prosecution, which mainly relies upon the evidence of PWs.1 to 3 and also the evidence of the Doctor – P.W.11, who conducted the *post mortem* examination of dead body

of the victim and also the F.S.L. Scientific officer, who has been examined as P.W.7.

15. P.W.1 is the mother of the victim. She has stated in her evidence that on the date of the incident at about 6 p.m., she was in the house along with her children. The accused came near her house and called the victim and gave her Rs.10/- and instructed her to bring *beedi*. Accordingly, the victim brought the *beedi* and gave it to the accused. The accused took her daughter to the house of C.W.9, who is the sister of the accused. P.W.1 has further deposed that C.W.2 came and told her that her daughter was in the house of the accused. Herself and other three persons, who resided in the same *galli* went to the house of C.W.9 and knocked the door, but the accused did not open the door immediately and about half an hour thereafter, he opened the door. When she enquired with the accused about her daughter, he told her that her daughter had left the house. She returned to her house. On enquiry, her mother told her that her daughter had not

come back to the house. Again, she went to the house of C.W.9 and knocked the door and at that point of time, accused opened the door. She along with three other persons entered into the house and started searching for her daughter. She found that her daughter was lying underneath the cot. She did not find any cloth on the body of her daughter, but she noticed blood. When she lifted her daughter and started screaming, the accused wore his pant and ran away from the house. She took her daughter to Amma Hospital at Tavarekere and Doctor declared that her daughter had already expired. She went to the Police Station and informed the Police about the incident and gave the complaint in terms of Ex.P1. P.W.1 has also stated that the accused burnt her daughter with *beedi* and caused injury to her private part with knife as a result of which, blood was oozing from the said part. She found swelling in the lower portion of the neck and injuries inflicted to the private part of her daughter. The Police came to the spot and seized the articles by drawing *mahazar.* In the cross-examination of P.W.1, it is elicited

that P.W.2 was staying in the neighbouring house and no others were staying in the vicinity and the house of P.W.2 is situate three houses away from her house and she could not tell as to who were residing in the said three houses. P.W.1 has admitted that the sister of the accused was tenant of P.W.2. She did not know about C.W.9 and she was not aware of quarrel / *galata* that took place between P.W.2 and C.W.9. It was suggested that there was ill will between P.W.2 and C.W.9 and hence, accused had been falsely implicated. The said suggestion has been denied by P.W.1. It is elicited that she came to know about the accused having given Rs.10/- to her daughter to get *beedi* through her neighbours and she could not tell the name of the person, who gave the said information. It was suggested to P.W.1 that the other persons, who were residing in the said lane / *galli* had committed the offence and not the accused and the said suggestion was denied. It is elicited that she orally told the Police about the incident in Urdu language and the same was reduced to

writing in Kannada language and she could not tell as to what was written in the complaint.

16. The other witness is P.W.2. She has stated in her evidence that she had let out her house to C.W.9, the sister of the accused. When C.W.9 had gone out of her house, the accused got *beedi* through the victim and took her to the said house and locked the door. This witness has further stated that she heard some sound in the said house, she went and knocked the door. The accused did not open the door and hence, she called P.W.1. At that time, C.W.3 also came and all of them tried to open the door. The accused wore his pants and ran away from the house. They found the injured, blood was oozing from the injuries on her face and also the injuries on her private part and she was no more. No clothes were found on the body of the victim. She has further stated that herself, P.W.1 and others took the victim to Amma hospital and Doctor declared that she was no more. It was the accused who committed rape and murdered the victim. The victim

lying on the floor of the hall in the house of C.W.9 and no other persons were there in the said house except the accused. This witness was cross-examined and it is elicited that she did not know as to what work P.W.1 was doing as she was not speaking to her frequently. The house was let out to the sister of the accused. It was suggested to this witness that there was a quarrel between the sister of the accused and herself with regard to payment of rent in respect of the said house and the same is denied. It is elicited that until P.W.1 came and enquired about her daughter, she was not aware of the same. It was suggested to P.W.2 that as on the date of the incident, her husband was not keeping well and hence, she was in the hospital. The said suggestion was denied by P.W.2 and she volunteered that she was in the house only. It was further suggested that due to ill will between herself and the sister of the accused, the accused had been falsely implicated in the case even though some other person had committed the offence. P.W.2 denied the said suggestion. It was suggested that she had given false

evidence against the accused due to the ill will between herself and sister of the accused and she denied the same.

17. P.W.3 is another witness. He has stated in his evidence that P.W.1 was living along with her children and mother. The accused was frequently visiting the house of C.W.9. He has stated that he heard screaming sound from the house of C.W.9. He along with his neighbourers went to the said house. P.W.2 knocked the door of C.W.9 and it was locked from inside. He also knocked the door and at that time, the accused wore his pants and ran away from the house and it was about 6 to 6:30 p.m. When himself and P.W.2 went to the house of C.W.9, they saw that the victim was struggling in the hall and he found the cloth only on the upper portion of the body of the victim while there was no cloth on the lower portion of her body and it was half naked, blood was oozing from her private part and blood had spilled on the floor. He has further stated that when he went to the house of C.W.9, P.W.1 had also accompanied him and he did not find any other person

inside the house. In the cross-examination, it is elicited that there was no quarrel (*galata)* between him and P.W.2. He has stated that he did not witness the incident, but when he went inside the house of C.W.9, he saw whatever was found in the house. He heard people talking that the accused had secured the victim on the pretext of getting him *beedi* and the same was informed by him. He gave the statement to the Police. He has further reiterated that there was only one door to the said house. It was suggested to him that the fact that there was nobody in the house when he along with P.W.2 and other neighbourers entered into the house was not informed by him to the Police. He has denied the said suggestion. It was suggested to P.W.3 that the offence was committed by some other three persons and only to file the case against the accused, they conspired with each other and implicated him. He has denied the said suggestion.

18. PWs.4 and 5 are the *mahazar* witnesses. It was suggested to P.W.4 that he was not present at the time of

drawing the *mahazar* in terms of Ex.P2 and the same was denied by him.

19. P.W.5 is also another *mahazar* witness to Ex.P3 and he has identified is signature as per Ex.P3(a). He has stated that the articles were seized in his presence. He was subjected to cross-examination. In the cross-examination of P.W.5, it is elicited that he does not know the contents of Ex.P3 - *panchanama*. It was suggested that he had signed the same in the police station, but he has denied the said suggestion. He claimed that the *mahazar* was drawn in the house and he had signed the same. He has denied the suggestion that he had signed M.O Nos.1(c), 2(c), 3(c) and 4(c) in the station.

20. The other material evidence is P.W.7, who conducted the examination of seized articles which were sent to the laboratory. She has stated in her evidence that she found blood stains on articles bearing Sl. Nos.2, 3, 5, 6, 7, 8, 9, 10, 12, 13 and 17 and she had not found the same in article Nos.1, 4, 11, 15 and 16. The blood stains

found in articles bearing Sl. Nos.2, 5, 9, 12, 13 and 17 was human blood. She has further stated that she could not analyze the blood stains found on articles bearing Sl. Nos.3, 6, 7, 8 and 10 since the same had deteriorated. The blood stains found on articles bearing Sl. Nos.2, 5 and 13 belonged to 'O' blood group. She has identified her signature in terms of Ex.P4(a) and also signatures of Assistant Director and Director as per Exs.P4(b) and P4(c). The witness has also identified her signature in Ex.P5 i.e., with regard to the seized articles and has stated that articles at Sl. Nos.1, 2 and 4 were already exhibited as Mos. Nos.1, 3 and 6 and the remaining articles were exhibited as M.O. Nos.7 to 20. She has further stated that if seminal fluid found in the clothes was not collected in the proper manner immediately after the incident, the same would not be useful for conducting test as it would deteriorate within few hours of its collection. In the cross-examination, it is elicited that she did not bring the records to the Court on that day and age of the person has not been determined while testing blood group. It is elicited

that in order to come to the conclusion that blood belongs to a particular person, D.N.A. test was required to be conducted. The witness has stated that in the report - Ex.P4, she has mentioned as to what tests were conducted by her to conclude that blood belonged to 'O' group. She has admitted that articles with seminal stains had to be collected with due care and caution and then sent for analysis. It is elicited that microscopic test has to be conducted with due care and caution. The witness volunteers that when Police send the articles, they conduct analysis but they do not consider the offence in respect of which the said articles were collected. It is elicited that in respect of articles bearing Sl. Nos.1, 2, 5, 6, 7, 8, 10, 12, 13, 15 and 16, she did not find any seminal stains. It was suggested that at the instance of the Police, she has given false report in terms of Ex.P4. She has denied the said suggestion.

21. P.W.8 is the Assistant Engineer, who prepared the sketch in terms of Ex.P6.

22. P.W.9 is the *grama panchayat* Secretary who gave the house register extract in terms of Exs.P7 and P8.

23. P.W.10 is the Police Inspector. He has stated in his evidence that he has taken over further investigation from the P.S.I., Tavarekere, and continued the investigation. The accused was apprehended by Tavarekere Police Sub-Inspector on 16.08.2012 at 3:30 a.m. and produced before him and in the presence of the accused, the said *mahazar* was conducted from morning 7:30 to 8:30 a.m. in terms of Ex.P3. He also seized the M.Os., at the spot and he identifies M.Os., before the Court i.e., M.O. Nos.1 to 6. He also says he has conducted inquest from morning 9 to 11:30 a.m in terms of Ex.P2. He has stated that during inquest, he noticed injuries on the body of the victim and also blood was oozing from her private part. He sent the seized articles to laboratory and recorded the statement of the witnesses. He has stated that on 24.08.2012, he had requested the Secretary of *Tavarekere* Grama panchayat to send demand register or

its true copy in respect of the house where the incident took place. In his cross-examination, he has admitted that he did not collect any document to show that the house of CW9 belonged to Aslam Pasha. He has admitted that while seizing the articles belonging to the victim, the accused was not there and so also while collecting the blood stained mud.

24. P.W.11 is the Assistant Professor, Forensic Medicine Department, K.R. Hospital, Mysuru. In his evidence, he says that on 16.08.2012, at the request of Police Inspector, he conducted post mortem and found following five injuries on the private part of the victim:

> *"1. Contusion of size 2 cm x 0.5 cm plus sub-utaneous deep over left side of mon-spubis – red color.*
>
> *2. Vulva, lavia majora and labia minora bruised and lacerated – irregular margins – red in color.*

3. *Periurethral, anterior veginial wall is bruised and lacerated – irregular margins – red in color.*

4. *Laceration of posterior veginal wall measuring 4 x 2 cm with muscle deep, fouchette, fossa navicularis torn – irregular margins – red color*

5. *Hymen ruptured completely – red color".*

In his evidence, he also says that he has found the following injuries on the dead body of the victim

"1. Scratch abrasion of size 7 mm x 1 mm obliquely placed at mid of chin – red color.

2. *Abrasion of size 1 x 0.5 cm at right side of chin - red color.*

3. *Contusion of size 1 cm x 1 cm at inner aspect of lower lip with tear of lower lip frenulum – red color.*

4. *Abrasion of size 1 x 0.5 cm at back of right ear – red color.*

5. *Abrasion of size 0.2 x 0.2 cm at the back of left elbow – red color.*

6. *Abrasion of size 1.5 x 0.5 cm at dorsum of right hand – red color.*

7. *Abrasion of size 0.2 x 0.2 cm at dorsum of right foot, medial side – red color.*

8. *3 contusions of size 1cm x 1cm, 2cm x 1 cm and 1.5cm x 1 cm at left upper leg shin – red color. Sub-continuous deep.*

9. *Contusion of size 1.5 x 1.5 x sub-continuous deep at left lower leg above ankie joint – red color.*

10. *Contusion of size 2.5 cm x 2.5 cm sub-continuous deep at left outer aspect of upper thigh – red color."*

25. Further, he also found the following injuries on dissection of dead body of the victim.

"1. Bladder – Anterior wall Hemorrhage present – contused.

2. Genital Organs:

3. Cervix – OS – Bruised – red color"

He has opined that the above injuries would have occurred 24 hours prior to conducting post mortem. He has also opined that the death is on account of "Asphyxia due to smothering with genital injuries". He has also seized the following items of the victim after post mortem and gave the same to the Police for further investigation.

"1. Vaval Swab
2. Urethral Swab
3. Vaginal cervical Swab and Smear
4. Blood for grouping
5. Scalp hairs and
6. Earrings"

This witness also says that he has examined the accused on the same day i.e., on 16.08.2012 at 1.15 p.m. and found the following injuries on the private part of the accused:

1. *Glams penis – Bruised - Red color- ventral aspect of fenulum*
2. *Smegma : on the Glans and Corona Glandis- absent and*

3. Frenulum of the penis – bruised red ventral aspect."

Further, he has also found following external injuries all over the body of the accused:

"1. Abrasion over left arm tenderness placed of size 4 x 0.5 cm - red color.

2. Abrasion over left wrist 6 x 0.5 cm at external aspect - red color.

3. Abrasion 5 x 0.5 cm at back of left elbow - red color.

4. Contusion of size 5 cm x 3 cm at - red color at left shoulder tip.

5. Small abrasion over left shoulder and neck area – red color.

6. Contusion 5 x 4 cm over left later upper chest 10 cm below armpit – red color.

7. Contusion of size 10 x 3 cm at left waist ilac crest – red color.

8. Contusion of size 4 x 4 cm below left scapula at back – red color.

9. *Contusion of size 3 cm x 2 cm at outer aspect of left lower scapula – red color.*

10. *Contusion of size 7 x 3 cm at left upper scapula – red color.*

11. *Contusion over area of 15 x 10 cm over right mid back scapula– red color.*

12. *Abraded contusion of size 8 x 2 cm over right lower back – red color.*

13. *Abrasion size 4 x 1 cm at right lateral chest – red color.*

14. *Contusion of size 8 x 14 cm below right nipple over right chest – red color.*

15. *Abraded contusion 7 x 1 cm over right upper chest below right collar bone – red color.*

16. *Contusion of size 10 x 5 cm over right shoulder – red color.*

17. *Abrasion of size 7 x 3 cm at right armpit posterior – red color.*

18. *Abraded contusion of size 1 x 1 cm over right partial head 7 cm above right ear – red color.*

19. *Multiple small abrasions over dorsum of nose – red color.*

20. *Bilateral periorbital contusion – red color.*

21. *Abrasion of size 1 x 0.3 cm at the back of left ear.*

22. *Abrasion of size 9 x 3 cm over front of right thigh – red color.*

23. *Abrasion 0.5 x 0.5 cm outer aspect of right ankle – red color.*

24. *Abrasion 1 x 0.5 cm at left back of thigh – red color.*

25. *Abrasion 6 x 3 cm at front of left thigh – red color."*

26. He has also collected the following items while examining the accused and gave the same to the Police:

"*1. Brown lining shirt – torned at 3, 5, 6 buttons on the left side, 2nd, 3rd and 4th button missing on the right side.*

2. Bottle green pant stained at places over inner aspect of zip area.

3. Blood stained on the filter paper for grouping.

4. Seminal fluid for medical analysis

5. Urethral swab for chemical analysis.

6. Pubic hairs – cut – for chemical analysis."

27. He identifies the same in his evidence and he has opined that on local examination of the accused, evidence of signs of recent sexual intercourse was present. Further, on examination, he has come to the conclusion that, there is nothing to suggest that, the accused is incapable of performing sexual intercourse. In respect of the same, he gave the report in terms of Ex.P11 that if any adult person commits rape on the girl, who is aged about 8 years, the injuries which are found in Ex.P10 may lead to death. The injuries mentioned other than Ex.P11 appears to be when the people assault the accused that he has committed the rape. He also further opined that the victim is aged about eight years and hence, he has sustained the injuries on account of disproportionate size of female

genital and penis, glama penis-bruised red at ventral aspect of frenulum and frenulum of the penis - bruised red at ventral aspect. Hence, victim also sustained injuries on her private part which has been noted in Ex.P10. This witness was subjected to cross-examination. It is elicited that, he conducted the post mortem after 12 hours of keeping the body in the mortuary and he did not mention in the post mortem report, the place of incident. He admits that while giving the cause of death, he has opined that death was on account of smothering. He admits that normally if hand or kerchief is used to block the mouth and if the same is done at a time, there is a chance of death. It is suggested that if the same has happened, there are chances of sustaining injury in the nose and mouth, for which he has replied that need not necessarily occur. It is suggested that there is no chance of committing a rape on eight year girl and the same was denied. It is suggested that he did not collect any swab, vaginal cervical swab and smear and gave the same to the Police and the same was denied. He admits that he has not specifically mentioned

at what time the death has occurred. He further admits that injury Nos.3 and 4 are the inner wounds which occurs if forcible intercourse is committed. It is suggested that the injury found on the accused which are mentioned in Ex.P11 would occur if she has been assaulted with boot and cane and the said suggestion was denied.

28. P.W.12 is the Police Sub-Inspector, who received the complaint from P.W.1 and registered the case and issued First Information Report in terms of Ex.P12 and also apprehended the accused and produced him before the Investigating Officer. He further says that when he apprehended him, he found the injuries on account of the assault made by the public and the accused himself has admitted that he was assaulted by the public. In the cross-examination, he says that Ex.P1 was written by the general public. It is suggested that P.W.1 has not given the complaint in terms of Ex.P1 and he only got prepared the same and the said suggestion was denied. It is

suggested that the accused was not subjected to assault by the general public and the same was denied.

29. P.W.13 is the Police Constable, who took the seized articles to Forensic Lab on the instructions of the Deputy Superintendent of Police. In the cross-examination, it is suggested that he did not take any seized articles to Forensic Lab and the said suggestion was denied.

30. P.W.14 is the Police Inspector, who conducted further investigation of the case. In his evidence, he says that he collected the post mortem report in terms of Ex.P10 and also obtained permission from the Court for having received the material objects, the sketch and also Forensic Science Laboratory report. Thereafter, on completion of the investigation, he has filed the charge sheet. In the cross-examination, he admits that he did not get corrected the material object numbers which was wrongly mentioned in respect of P.F.Nos.128 of 2012 and 228 of 2012. It is suggested that material objects which were seized were sent to laboratory and the said

suggestion was denied. He admits that in terms of P.F.No.134 of 2012, material objects were seized at the instance of the accused and M.Os.15 to 20 does not contain the signature of the accused. It is suggested that Ex.P4-Forensic Science Laboratory report is obtained to suit the convenience of the case and the said suggestion was denied.

31. Now let us examine the evidence available on record particularly, the evidence of P.Ws.1 to 3, so also the evidence of P.Ws.7 and 11. The evidence of these witnesses is important to connect the accused whether he has committed the offence or not. P.W.1 is the mother of the deceased. P.Ws.2 and 3 are the neighborers. It is their case that P.Ws.1 to 3 went and knocked the door of house of C.W.9, the sister of the accused, wherein the accused was there. No doubt in the cross-examination of P.W.1, some material contradictions are elicited with regard to the accused going and taking the victim to bring beedi from the shop. P.W.1 though in her chief evidence

claims that accused came and took the deceased from her house, but in the cross-examination she admits that she came to know about the same from the neighbours. But, in the cross-examination of P.W.1, nothing is elicited that she did not go to the house of C.W.9 along with P.Ws.2 and 3. It is also elicited from the mouth of P.W.1 that sister of the accused was a tenant in the house of P.W.2. It is suggested to the P.W.1 that there was a galata between P.W.2 and the sister of the accused in connection with letting the house and hence, this accused has been falsely implicated and the said suggestion is denied. It is pertinent to note that, in the cross-examination of P.W.1 also, it is suggested that some other third person could have committed the rape and murder and the same has been specifically denied. On perusal of the records, it is clear that the accused has taken the defence that some other person would have committed the rape and murder. But, P.W.2 categorically says that she went near the house of C.W.9 and knocked the door and when he did not open the door, she called P.W.1 and again when they knocked

the door, the accused opened the door and ran away from the house and found the dead body of the victim inside the house of C.W.9 which belongs to the sister of the accused and except the accused, no other person was there inside the house. In the cross-examination, P.W.2 also admits that when P.W.1 came and enquired, she was not aware of the child. It is suggested that she was not there in the house and the same was categorically denied. It is suggested in the cross examination that some other persons have committed the offence and there was an ill-will between P.W.1 and sister of the accused. Hence, false case has been registered and she has categorically denied the same. In the cross-examination of P.W.2, nothing is elicited that either P.W.1 or P.W.2 did not go to the house of C.W.9 and the accused did not ran away from the place by wearing pant and only suggestions are made that there was a galata between the sister of the accused and P.W.2 and hence, the accused has been falsely implicated. P.W.3, who is also a neighbour, reiterates the evidence of P.W.2 that the accused ran away from the house after

opening the door and when they went inside, the victim was struggling and she was half naked and he categorically says, P.Ws.1 and 2 were also present when they entered the house and no other person was there. In the cross examination of P.W.3, he says that he did not witness the incident but when they went inside, have seen the victim was lying on the floor and he also categorically says that when they went inside the house, except the accused, who ran away, no other person was there.

32. Having considered the evidence of P.Ws.1 to 3, though minor discrepancies are found with regard to the accused going and taking the victim to his house, the fact that all these witnesses went near the house of the accused and knocked the door and the accused opened the door and ran away from the place has remained undisturbed. The evidence of P.Ws.1 to 3 is consistent that accused after opening the door ran away from the place and all these witnesses have witnessed the same and also found the victim in the house of C.W.9 i.e., the house

of sister of the accused. Apart from that, the medical evidence i.e., the evidence of P.W.11-Doctor, is clear that the accused was subjected to medical examination and found the injuries on his private part, which has been specifically spoken to by P.W.11 and he has also spoken with regard to the injuries found on the accused i.e., 25 in number. It is the contention of the learned counsel for the accused that the prosecution has not explained the injuries found on the accused. But, Doctor has categorically stated that he noted the injuries on his private part i.e., penis – bruised - red colour- ventral aspect of fenulum and there is no explanation on the part of the accused with regard to the injury sustained by him to his private part.

33. The main contention of the learned counsel for the accused is that the external injuries found on his body i.e., 25 in number are not explained by the prosecution. The witness, who has been examined before the Court i.e., P.W.12-Investigating Officer, who apprehended the accused categorically says that the public have assaulted

the accused and the accused himself has revealed that he was subjected to assault by the public and as a result, those injuries are sustained. Hence, the contention of the learned counsel for the accused that the prosecution has not explained the injuries found on the accused cannot be accepted. From the evidence of P.W.11, it is clear that the injuries found on the victim that too, particularly on her private part, is on account of sexual act. Further, the evidence of P.W.11 substantiating the fact that the accused also sustained injuries to his private part corresponds with the injuries to the victim which makes it clear that the accused alone has committed the rape on the victim girl. The evidence of P.W.7-Scientific Expert is also clear that the death is on account of asphyxia due to smothering and post mortem report which is marked as Ex.P10 substantiates the evidence of P.W.11-Doctor.

34. Having considered the material on record, particularly the evidence of P.Ws.1 to 3 coupled with the evidence of P.W.11-Doctor and P.W.7-Scientific Expert and

in terms of Ex.P4-Forensic Science Laboratory report, it is clear that the accused alone subjected the victim to rape and thereafter committed the murder. Hence, we do not find any reasons to reverse the findings of the trial Court. The evidence of P.Ws.1 to 3 coupled with evidence of P.Ws.7 and 11 corroborates the case of the prosecution, though there are some minor discrepancies with regard to taking the victim to the house of C.W.9. However, their evidence is consistent with regard to the accused running away from the house of C.W.9 i.e., the house of sister of the accused and the same has not been disturbed in the cross examination of P.Ws.1 to 3. Hence, the very contention of the learned counsel for the appellant that the evidence of P.Ws.1 to 3, is not consistent cannot be accepted.

35. Having considered both oral and documentary evidence available on record, we do not find any reasons to come to any other conclusion than that arrived at by the trial Court in convicting the accused for the offences

punishable under Sections 376 and 302 of Indian Penal Code. Hence, we answer point No.2 as 'negative'.

36. **Point Nos.1 and 3**:- The Sessions Judge has sent reference for confirmation of death sentence in coming to the conclusion that the case is one of the rarest of rare cases.

37. On the other hand, the learned counsel appearing for appellant by referring to the judgments referred supra vehemently contended that it is not a case for imposing death penalty and placing reliance on Ram singh's case (cited supra) and also on Ram Deo Chauhan's case (cited supra) would contend that there is no blood thirsty act and there is no instance of aggravating circumstance wherein the Court has to look into the mitigating circumstances for awarding the appropriate sentence.

38. Per contra, learned State Public Prosecutor placing reliance on the judgments, which are referred

supra, would contend that in similar cases, where minor victim girl was subjected to sexual act and murder was committed, the Apex Court has confirmed the death sentence and there are no grounds to reduce the sentence. Hence, this is a fit case to confirm the death sentence.

39. Having considered the principles laid down in the judgment relied upon by the respective counsel and also the judgments relied upon by the trial Court, this Court has to examine, whether it comes within the purview of rarest of the rare cases. It has to be noted that in order to decide whether it is a rarest of rare cases, the Court has to take note of the mitigating circumstances and also aggravating circumstances. In order to consider the aggravating circumstances, the Court has to take note of the fact as to whether extremely brutal, diabolic and cruel act was committed by the accused and also take note of the age of the victim and whether there was any provocation for commission of such offence and whether injuries were grievous with respect to the sexual assault,

particularly in a case where the victim was minor. All these circumstances are to be taken note of with regard to the aggravating circumstances. This Court also has to take note of the mitigating circumstances i.e., whether the case rests upon the circumstantial evidence and whether there is propensity of the accused committing further crimes and causing continuous threat to the society and also see that there are chances of reformation or rehabilitation. Other punishment options are unquestionably foreclosed and accused is not a professional killer or offender having any criminal antecedents has to be taken note of.

40. No doubt, based on the principles of mitigating circumstances and aggravating circumstances, each case has to be decided on its own facts of the case. The Court has to prepare a balance-sheet of the aggravating and mitigating circumstances. That any changes of reformation or not and also take note of the fact that life imprisonment is the norm and death penalty is the exception. The death

sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment.

41. On perusal of the material on hand, no doubt, the accused has committed rape on a victim girl who is aged about 8 years. He not only committed the rape but also committed an offence of murder by smothering which is evident coupled with the medical evidence. Having considered the material we would like to list out the aggravating circumstances and mitigating circumstances of the case on hand:

Aggravating circumstances:

1. Committed rape on the girl aged about 8 years.
2. Committed murder by smothering.
3. Caused injuries in a cruel manner in spite of the fact that the victim is minor, while committing rape.
4. Committed rape taking advantage that the victim was alone

Mitigating circumstances:

1. Case rests upon the circumstantial evidence

2. There is no material available on record regarding previous criminal antecedents.

3. There is no material to show that he is threat to society.

4. There are no material to the effect that there is no chance of reformation.

42. We would like to refer the decision of Apex Court in the case of *SACHIN KUMAR SINGHRAHA VS. STATE OF MADHYA PRADESH* reported in *AIR 2019 SC 1416* wherein it is observed that the accused had committed a heinous offence in a premeditated manner, as is indicated by the false pretext took the victim girl. He not only abused the faith reposed in him by the elder brother of victim's father, but also exploited the innocence and helplessness of a child. But the Apex Court held that Court was not convinced that probability of reform of the

accused was low, in the absence of prior offending history and keeping in mind his overall conduct. The Apex Court in observing para No.18 of the judgment held that we are not convinced that the probability of reform of the accused is low and also did not place any material of the accused is a habitual offender and in the absence of prior offending history and keeping in mind his overall conduct. The Apex Court held that it is proper to impose a sentence of life imprisonment with a minimum of 25 years' imprisonment without remission.

43. The Hon'ble Apex Court in the recent judgment decided on 17.05.2019 in the case of *AFJAL KHAN AND OTHERS VS STATE OF MADHYA PRADESH AND OTHERS* reported in *MANU/MP/0299/2019* in para No.43 of the judgment has held as under:

> *"43. After perusal of the aforesaid balance-sheet of the aggravating and mitigating circumstances and looking to the facts of this case, where the possibility and options of other punishment are open, while*

upholding the conviction for the offence under Section 302 of the Indian Penal Code, however, in place of death penalty, the appellant is sentenced to undergo life imprisonment with a minimum of 30 years of imprisonment (without remission) and fine of Rs. 20,000/-, in default of payment of fine the appellant has to undergo further RI for six months. The conviction and sentences awarded under Sections 201, 377, 376(2)(F), 376(2)(I) and 376(2)(N) of Indian Penal Code as awarded by the trial Court are just and hence, hereby maintained. The period of sentence already served by the appellant shall be set off."

44. In the case of SACHIN KUMAR SINGHRAHA VS. STATE OF MADHYA PRADESH reported in MANU/SC/0352/2019, the Hon'ble Apex Court with reference to para Nos.17 and 18 has held as under:

"17. However, in our considered opinion, the Courts may not have been justified in imposing the death sentence on the Accused/Appellant.

As has been well settled, iife imprisonment is the Rule to which the death penalty is the exception. The death sentence must be imposed only when life imprisonment appears to be an altogether inappropriate punishment, having regard to the relevant facts and circumstances of the crime. As held by this Court in the case of Santosh Kumar Singh v. State through C.B.I., MANU/SC/0801/2010 : (2010) 9 SCC 747, sentencing is a difficult task and often vexes the mind of the Court, but where the option is between life imprisonment and a death sentence, if the Court itself feels some difficulty in awarding one or the other, it is only appropriate that the lesser punishment be awarded.

18. We have considered the aggravating and mitigating circumstances for the imposition of the death sentence on the Accused/Appellant. He has committed a heinous offence in a premeditated manner, as is indicated by the false pretext given to PW4 to gain custody of the victim. He not only abused the faith reposed in him by the PW4, but also exploited the innocence and

helplessness of a child as young as five years of age. At the same time, we are not convinced that the probability of reform of the Accused/Appellant is low, in the absence of prior offending history and keeping in mind his overall conduct."

45. Considering the aggravating and mitigating circumstances upholding the conviction, modified the sentence, as the accused is sentenced to undergo life imprisonment with a minimum period of 30 years of imprisonment and fine, by taking note of the aggravating circumstances and mitigating circumstances comes to the conclusion that there are chances of reformation and accused is not a professional killer or offender having any criminal antecedent. The accused being a major having family with him, the possibility of reformation cannot be ruled out.

46. In the case on hand, in the light of principles laid down in the judgment referred supra and the facts of the case, the accused taking the advantage of the victim

was alone took the child who is aged about eight years and committed rape and murder. The accused is also aged about 22 years and there is no other criminal antecedents against him. Though the learned State Public Prosecutor tried to convince this Court that there were criminal antecedents, there is no material on record to show that the accused has previous criminal antecedents. While awarding death sentence, the tests we have to apply are crime test and criminal test. Having considered the factual aspects, no doubt, it is a case of extreme brutal and cruel act and subjected eight years old minor girl for his lust. After considering the factual aspects of the case, it is appropriate to award life imprisonment for longer period, upholding the conviction. Award of death sentence would be on the higher side which is disproportionate to the crime committed by the accused. This Court has to examine whether the society abhors such crimes and whether such crime shock the conscience of the society and attract intense and extreme indignation of the community. In the case on hand, he took the advantage

of the victim being alone and committed the heinous offence. Hence, it would not come within the purview of rarest of rare cases. In the absence of any criminal antecedents and also in the absence of chances of not reforming, comparing the aggravating circumstances and also mitigating circumstances, the chances of reformation is not ruled out and there is a possibility of the same.

47. Hence, while keeping in mind the principles as laid down in the aforesaid judgment of the Hon'ble Apex Court and the material on record before us, we do not find it appropriate to confirm the death sentence. We are of the view that the case on hand cannot be considered to be one of the rarest of the rare cases. Therefore, imposition of a sentence of death would not be appropriate. On the other hand, awarding a sentence of life imprisonment would not be adequate. Based on the manner in which the incident took place, a sentence of life imprisonment is not an appropriate sentence.

48. As held by the Hon'ble Supreme Court in the aforesaid judgments, the sentence for a fixed period can be awarded in a case where the Court finds that life imprisonment would be a lower sentence and a death sentence is not warranted. Based on the facts and circumstances involved, we are of the considered view that the imposition of life sentence would not be adequate in as much as imposition of death sentence would be too excessive. Hence, we find it appropriate to sentence the accused to undergo rigorous life imprisonment with a minimum period of 25 years without remission for an offence punishable under Section 302 of IPC and to pay fine of Rs.1,00,000/-, in default to pay the fine amount, accused shall undergo imprisonment for a period of six months. The accused is sentenced to undergo rigorous imprisonment for a period of 10 years for the offence punishable under Section 376 of Indian Penal Code and to pay fine of Rs.10,000/-, in default, to undergo further imprisonment for a period of six months.

49. Hence, we pass the following:

ORDER

(i) Appeal filed by the appellant is partly allowed.

(ii) The judgment of conviction passed by the Court of Third Additional District and Sessions Judge, Ramanagara, dated 23.01.2018 in S.C.No.147 of 2012 is confirmed. The judgment of sentence dated 24.01.2018 is modified.

(iii) The accused is sentenced to undergo rigorous imprisonment for a period of 10 years for the offences punishable under Sections 376 of Indian Penal Code and to pay fine of Rs.10,000/-. In default of payment fine, the accused shall undergo further rigorous imprisonment for a period of six months.

iv) For the offence punishable under Section 302 of Indian Penal Code, in the place of death penalty, the accused is sentenced to undergo rigorous life imprisonment for a period of 25 years without remission and to pay a fine of Rs.1,00,000/-. In default of payment of fine, the accused shall undergo further rigorous imprisonment for a period of one year.

v) The sentences shall run concurrently.

vi) Out of the fine amount of Rs.1,10,000/- an amount of Rs.1,00,000/- shall be paid to PW.1 on proper identification. The balance amount of Rs.10,000/- shall vest with the State.

(vii) The criminal reference is answered accordingly.

(v) Needless to state that if the accused was in custody during the course of trial, he is entitled for the benefit of set off under Section 428 of Cr.P.C.

Sd/-
JUDGE

Sd/-
JUDGE

st/sma/nbm