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IN THE HIGH COURT OF KARNATAKA
DHARWAD BENCH

DATED THIS THE 6TH DAY OF MARCH, 2017

PRESENT

THE HONOURABLE MR.JUSTICE ANAND BYRAREDDY

AND

THE HONOURABLE MR.JUSTICE K.SOMASHEKAR

CRIMINAL APPEAL No.2802 OF 2013

CONNECTED WITH

CRIMINAL REFERRED CASE NO.32 OF 2013

IN CRL.A.2802/2013:

Between:

Irappa Shiddappa Murgannavar,
Aged 25 years,
Occupation: Driver,
Resident of Khanapur,
Taluk: Nargund.

... APPELLANT.

(By Smt. Seema Shiva Naik, Advocate)

And:

The State of Karnataka,
By Nargund Police Station,
Represented by Public Prosecutor.

... RESPONDENT.

(By Shri V.M. Banakar, Additional State Public Prosecutor)

This criminal appeal is filed under Section 374(2) of the Code of Criminal Procedure, 1973, seeking to allow this criminal appeal by setting aside the judgment and order of conviction and sentence recorded by the District & Sessions Judge, Gadag, in S.C.No.33/2011 dated 8.3.2012 and consequently to acquit the appellant.

IN CRL.RC.32/2013:

Between:

The State of Karnataka,
By Nargund Police Station,
Represented by Public Prosecutor.

... APPELLANT.

(By Shri V.M. Banakar, Additional State Public Prosecutor)

And:

Irappa Shiddappa Murgannavar,
Aged 25 years,
Occupation: Driver,
Resident of Khanapur,
Taluk: Nargund.

... RESPONDENT.

(By Smt. Seema Shiva Naik, Advocate)

This Criminal referred case is registered as required under Section 366 of the Code of Criminal Procedure, 1973 for confirmation of the death sentence awarded to the accused Irappa, S/o. Siddappa Muragannavar, Resident of Khanapur, Taluk: Nargund, District: Gadag, by the District and Sessions Judge, Gadag, vide judgment of conviction dated 8.3.2012 in S.C.No.33/2011

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Crl.A.2802/2013 along with Crl.RC 32/2013 having been heard and reserved on 14.02.2017, this day, ANAND BYRAREDDY J., delivered the following:

J U D G M E N T

Heard the learned counsel for the appellant and the learned State Public Prosecutor.

2. The criminal appeal is preferred by the accused against the conviction and sentence imposing sentence of death for an offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC', for brevity), while also imposing lesser punishments for offences punishable under Sections 364, 366A, 201 and Section 376 of the IPC. The reference by the State is to seek confirmation of the death sentence imposed against the appellant.

2. The facts of the case as stated by the prosecution, are as follows:

Sanganabasappa, the complainant had a daughter Rakshitha aged about 5. He had left her in his father-in-law's house in Khanapur of Nargund Taluk, since he and his wife

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were working as coolies in Mangalore City. It transpires that on 29.12.2010, he was informed by his father-in-law, telephonically, that his daughter Rakshitha was missing. On receiving such news, he and his wife are said to have rushed to Khanapur and joined others in a search for their daughter. But she could not be traced. However, one Hanamanthappa Bheemappa and some others had informed him that they had last seen the accused – appellant herein carrying his daughter. It is later that the police acting on such information, had managed to trace the dead body of the child on information provided by the accused. She had been murdered and put into a gunny bag with two stones and was immersed in the Bennihalla water body near Khanapur. The complainant had identified the dead body and he had learnt that the accused had committed rape on the child and thereafter had killed her and had sought to conceal the evidence by immersing the dead body in the water. He also learnt that the accused had taken his daughter from the house of one Venkavva, where his daughter was said to have been watching television along with other children. It is in this

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background that the accused was charge-sheeted for offences punishable under Sections 302, 201, 376, 366-A and 364 IPC.

It was the specific charge against the accused that on 28.12.2010 at about 6.30 p.m., the accused with an intention to commit rape upon the minor, had kidnapped her from the house of Venkavva Patil and had taken her to the land of one Sangappa Hadaada and had committed rape on her and had throttled her to death and thereafter had immersed her in the water body of Bennihalla in order to cause disappearance of evidence. The appellant had pleaded not guilty and claimed to be tried. The prosecution had examined 25 witnesses and had got marked Exhibits P1 to P23 and material objects MOs 1 to 5. The court below had framed the following points for consideration:

“1. Whether the prosecution proves beyond all reasonable doubt that on 28/12/2010 at 6.30 p.m. in the house of C.W.12 Yenkovva situated at Khanapur village, Nargund taluk, the accused kidnapped the minor girl Kum. Rakshitha aged about 5 years 2 months by assuring her to give

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biscuits and thereby committed an offence punishable under Section 364 IPC?

2. Whether the prosecution proves beyond all reasonable doubt on the said date, the accused, after kidnapping the minor girl by name Kum. Rakshitha committed rape twice upon her in the land of 20 Sangappa Hadapad and thereby committed an offence punishable under Section 376 IPC?

3. Whether the prosecution proves beyond all reasonable doubt that on the said date, time and place, the accused assured the minor girl to give biscuits with an intention that the said girl may be forced to illicit intercourse and thereby committed an offence punishable under Section 366-A IPC?

4. Whether the prosecution proves beyond all reasonable doubt that on the said date, the accused, after committing rape twice upon the minor girl Kum. Rakshitha committed murder by throttling and thereby committed an offence punishable under Section 302 IPC?

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5. Whether the prosecution proves beyond all reasonable doubt that after committing the murder of minor girl Kum. Rakshitha, the accused put the dead body and stone in a gunny bag and thrown the said gunny bag in Bennihalla with an intention to cause disappearance of evidence by screening himself from legal punishment and thereby committed an offence punishable under Section 201 IPC?

6. What order?"

The court below has answered all the above points in the affirmative and has convicted the accused as aforesaid. It is that which is under challenge in the appeal.

3. The learned counsel for the appellant – accused contends that the entire case of the prosecution is based on circumstantial evidence and on the voluntary statement of the accused - appellant and in the absence of direct evidence, it would be a travesty of justice to punish the accused with the extreme punishment as imposed, when the guilt of the accused has not been established beyond all reasonable doubt. It is

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sought to be pointed out by the learned counsel that the very complaint cannot be readily accepted, as admittedly, the complainant was in Mangalore when he was said to have been informed about his daughter missing from 28.12.2010. The complainant and his wife had received information about their daughter missing on 29.12.2010 at 3.00 p.m. and it is admitted that the complainant had come to Nargund on 30.12.2010. The complaint is lodged on 1.1.2011 and if the tenor of the complaint is seen, it is as if the complainant knew the minutest details of the alleged sequence of events in the accused having kidnapped his daughter and thereafter having traced his movements till he committed the crime and sought to get rid of the dead body in the manner aforesaid. These particulars could have been furnished only if the complaint was lodged after the accused allegedly disclosed the manner in which the crime had been committed in his alleged voluntary statement to the police. For otherwise, the complainant would have only mentioned that his daughter was missing and was not traceable. Therefore, this

glaring circumstance has been completely overlooked by the Trial Court.

Yet another circumstance that is highlighted by the learned counsel for the appellant is that PW-2 had not supported the case of the prosecution, in as much as he had failed to identify the boundary of the land and this was odd and would indicate that he was not at all present at the time of the mahazar and he has also admitted that the Bennihalla river was flowing from North to South and if the dead body tied in a gunny bag was thrown in the flowing water, it would have naturally moved with the flow of the water. But, it was curious that the dead body was recovered at the instance of the accused from the very spot where it had been dumped, even after a lapse of four days. PW-4, one of the eye-witnesses who had claimed that he had seen the accused carrying Rakshitha from the house of Venkavva Patil, had admitted that he had not personally seen the appellant carrying the child. Venkavva Patil from whose house the child was allegedly kidnapped by the accused, was noticed by the court below as being hard of hearing and the fact

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that Venkavva had identified the gunny bag in which the dead body was tied and dumped in the water by the initial that was written on it, is also doubtful and further, her statement that when she along with Rakshitha and other children were watching television, the accused had come there and had enticed Rakshitha by telling her that he would purchase biscuits for her, is not readily acceptable when admittedly the witness was partially deaf. And she has also denied that she had made any statement to the police that others had told her that the accused was seen carrying Rakshitha on his shoulder and she has also stated that she came to know about the said fact only through the police. Therefore, her evidence would not support the case of the prosecution in view of the inconsistencies.

Similarly, it is pointed out by the learned counsel that PW-7 was a partially blind witness who has stated that the accused was carrying a gunny bag on one shoulder and the child on the other shoulder. But he has admitted that he has not given any statement to the police of this fact. This witness in his cross-examination, has added that he has not informed

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Venkavva about the girl being carried by the accused. Therefore, the court could not have placed much significance on the testimony of this witness.

Insofar as PW-8 is concerned, it is evident that he was doubtful and he has in so many words, stated that he could not say whether the accused had covered the child with a sack or whether the appellant had placed the sack which he was carrying on one shoulder and was carrying the child on the other. Therefore, there is ambiguity and inconsistency in the evidence of these witnesses.

One other witness PW-9 who is said to be an eye-witness to the fact of the accused carrying the child on his shoulder, who has stated that he was carrying a sack on his right shoulder over which the child was also being carried. Therefore, the evidence of PW-7, 8 and 9 would not corroborate each other. The inconsistency in their assertions could not have been reconciled by the court below.

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PW-10 has been inconsistent even about his own age. He has stated that he was 35 in the initial stage of his testimony and has later corrected it as 60 years, which itself would cast doubts on the credibility of the statements of the witnesses. PW-11 and 12 who are said to have recovered the gunny bag from the bottom of the river have both stated that the water level was upto their midriff and hence, was clearly visible from the surface and there was no need for them to search under water and hence, their evidence also is of doubtful veracity.

It is further contended that the evidence of the Medical Practitioner would not also be relied upon, as admittedly, the dead body of the child was in a decomposed state and therefore, the manner in which she had been put to death could not have been detected under those circumstances. The learned counsel for the appellant has even found fault with the observations of the Trial Court that the mother of the victim was unable to tender evidence, as she could not stop crying and sobbing. The Trial court having moved by the said circumstance, was completely biased against the accused and that this is evident

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from extreme expressions such as the appellant being extremely brutal, grotesque and diabolical, which would indicate that the court below was unnecessarily influenced by the display of emotions by the mother of the child and therefore has led to the appellant being convicted in the face of inconsistencies and infirmities that are replete and which are highlighted hereinabove.

4. While the learned State Public Prosecutor seeks to address each of the contentions raised as grounds in the appeal while seeking that the facts and circumstances of the case would certainly attract the extreme punishment of death penalty and seeks that the same be confirmed by this court and seeks dismissal of the appeal filed by the accused.

5. On a consideration of these rival contentions and on a close examination of the record, the point urged that the father of the victim could not have stated the manner in which his daughter had been murdered even before the body was discovered and the case was pieced together on the basis of

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statements of witnesses and the voluntary statement of the accused is concerned, the complaint has been prompted by strong suspicion that has arisen by the several witnesses apparently having informed him of having seen the accused carrying his daughter just before she disappeared. The same having been confirmed on investigation by the police, cannot therefore be termed as a concocted complaint and one which has been filed much after the discovery of the dead body. Therefore, in the face of the homicidal death of the child not being in doubt, it would not be prudent to acquit the accused on this ground alone.

The further contention that PW-2 had not supported the case of the prosecution as he had failed to identify the boundary of the land and therefore, his presence being doubtful as a mahazar witness, would not also advance the case of the appellant. The further admission by the said witness that the bennihalla river flows North to South and that the dead body if immersed in the water, would have moved along with the water and would not have remained in the same position when it was

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recovered, is also a contention that cannot be accepted, for the reason that there is evidence on record that the dead body which was placed in the gunny bag was weighed down with stones with exactly the intention to prevent the body from floating to the surface and the weight was sufficient to keep it stationary at the spot where it was dumped, as it would have settled down on the soft bottom of the river.

The further contention that Venkavva – PW-5 was partially deaf and therefore, she could not have heard the accused enticing the victim to go with him on the pretext that he would buy her biscuits and that she was also not capable of recognizing the gunny bag in which the body was dumped and which had been taken from her house, is also not a significant ground on which the evidence of the prosecution could be held to be unreliable.

The so-called contradictions are sought to be highlighted in the statement of Venkavva to the effect that she was not clear about whether she had made a statement to the police of other

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witnesses having told her of the accused carrying the victim on his shoulder.

This so-called inconsistency also would not have the effect of diluting or rendering the testimony of Venkavva as being unreliable. The further attempt to contend that the evidence of PW-7, 8 and 9 are inconsistent in not having accurately stated as to on which shoulder the accused was carrying the victim, is also not significant. The fact remains that these witnesses have consistently stated that they saw the accused with the victim. The further contention that the evidence of PW-11 and 12 who had entered the bennihalla river to retrieve the gunny bag in which the dead body was kept as being unbelievable, since the water was not very deep and hence that the gunny bag could be seen from the surface, is a surmise and it need not necessarily be presumed that it was visible from the surface. Therefore, their testimony could not be discredited on that assumption.

The contention that the evidence of the Medical Practitioner PW-20 could not be accepted as admittedly, the

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dead body was decomposing rapidly and therefore, he could not have found the cause of death and the manner in which the child had been killed, is also an assumption and it cannot be said that a post-mortem examination would not have revealed the manner in which death had occurred. There is no reason to disbelieve the evidence of the Medical Practitioner.

The suggestion that the Trial court was moved by the mother of the victim having broken down in court and not having been able to tender evidence on account of her grief in remembering the incident and the loss of her daughter, had unduly prejudiced the mind of the court, is also an unfair suggestion and is not a welcome assertion by the learned counsel for the appellant.

6. Therefore, viewed from any angle, it is clear that the circumstantial evidence adduced by the prosecution is very strong and the fact that the accused had led the police to the place where he had dumped the dead body, would clinch the issue and therefore, the prosecution has certainly established its case beyond all reasonable doubt. There is no warrant for

interference by this court insofar as the conviction of the appellant for the offences punishable under Sections 364, 366A, 201 and 376 IPC are concerned.

Insofar as the punishment in the appellant having been sentenced to death for the offence punishable under Section 302 IPC is concerned, and in considering whether the same should be confirmed by this court, it is useful to refer to a number of cases decided by the Apex court, where it was called upon to provide guidelines as to when it would be appropriate to award a death penalty and in what circumstances it would be appropriate to dilute the punishment to imprisonment for life, and the observations made therein are extracted hereinunder:

In *Gulab Sonba vs. State of Maharashtra, 1971(3) SCC 931*, a three judge bench of the apex court has held as follows:-

"We do not think it necessary to lay down any law on the subject of awarding of death penalty and imprisonment for life. All that we can say is that both the

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sentences are legal and the courts have a fair discretion in the matter in the light of the circumstances existing in each case. We therefore proceed to decide the case on its own facts without laying down any law for future guidance."

Again in *Raghubir Singh vs. State of Uttar Pradesh*, (1972)3 SCC 79, the Apex Court has observed thus:-

"This takes us to the question of sentence. It may in this connection be pointed out that after the amendment of Section 367(5), Cr.P.C., by Act 26 of 1955, the discretion of the Court in deciding whether to impose the sentence of death or of imprisonment for life has become wider. The High Court, when considering the question of sentence while disposing of the murder reference and the appeal, does not seem to have paid proper attention to this aspect. In view of the peculiar facts and circumstances of this case we consider that the sentence of imprisonment for life would seem to meet the ends of justice and we accordingly reduce the sentence. The appeal thus succeeds in part."

In *Ediga Anama vs. State of Andhra Pradesh*, (1974)4 SCC 443, the Apex Court has expressed its opinion and has provided the guidelines thus:

“ 23. *The final position, as we see it, is neither with the absolute abolitionist nor with the Mosaic retributions. It is relativist, and humanist, conditioned by the sense of justice and prevailing situation of the given society. In England, men once believed it to be just that a thief should lose his life (as some Arab Chieftains do to-day) but the British have gone abolitionist now without regrets. In contemporary India, the via media of legal deprivation of life being the exception and long deprivation of liberty the rule fits the social mood and realities and the direction of the penal and processual laws.*

24. *While deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime, to espouse a monolithic theory of its deterrent efficacy is unscientific and so we think it right to shift the emphasis, to accept*

composite factors of penal strategy and not to put all the punitive eggs in the 'hanging' basket but hopefully to try the humane mix.

25. We assume that a better world is one without legal knifing of life, given propitious social changes. Even so, to sublimate savagery in individual or society is a long experiment in spiritual chemistry where moral values, socioeconomic conditions and legislative judgment have a role. Judicial activism can only be a signpost, a weather vane, no more. We think the penal direction in this jurisprudential journey points to life prison normally, as against guillotine, gas chamber, electric chair, firing squad or hangmen's rope. 'Thou shalt not kill' is a slow commandment in law as in life, addressed to citizens as well as to States, in peace as in war. We make this survey to justify your general preference where s.302 keeps two options open and the question is of great moment.

26. Let us crystallise the positive indicators against death sentence under Indian Law currently. Where the murderer

is too young or too old, the clemency of penal justice helps him. Where the offender suffers from socioeconomic, psychic or penal compulsions insufficient to attract a legal exception or to downgrade the crime into a lesser one, judicial commutation is permissible. Other general social pressures, warranting judicial notice, with an extenuating impact may, in special cases, induce the lesser penalty. Extraordinary features in the judicial process, such as that the death sentence has hung over the head of the culprit excruciatingly long, may persuade the court to be compassionate. Likewise, if others involved in the crime and similarly situated have received the benefit of life imprisonment or if the offence is only constructive, being under Section 302 read with Section 149, or again the accused has acted suddenly under another's instigation, without premeditation, perhaps the court may humanely opt for life, even like where a just cause or real suspicion of wifely infidelity pushed the criminal into the crime. On the other hand, the weapons used and the manner of their use, the horrendous features of the crime and hapless, helpless

state of the victim, and the like, steal the heart of the law for a sterner sentence.

We cannot obviously feed into a judicial computer all such situations since they are astro-logical imponderable in an imperfect and undulating society. A legal policy on life or death cannot be left for ad hoc mood or individual predilection and so we have sought to objectify to the extent possible, abandoning retributive ruthlessness, amending the deterrent creed and accenting the trend against the extreme and irrevocable penalty of putting out life.

27. Here, the criminal's social and personal factors are less harsh, her femininity and youth, her unbalanced sex and expulsion from the conjugal home and being the mother of a young boy-these individually inconclusive and cumulatively marginal facts and circumstances tend towards award of life imprisonment.

We realise the speculative nature of the correlation between crime and punishment in this case, as in many others, and conscious of fallibility dilute the death

penalty. The larger thought that quick punishment, though only a life term, is more deterrent than leisurely judicial death award with liberal interposition of executive clemency, and that stricter checking on illicit weapons by the police deters better as social defense against murderous violence than an instant death sentence, is not an extraneous component in a court verdict on form of punishment."

In *Jai Kumar vs. State of M.P.*, (1999)5 SCC 1, it has again expressed thus:

"13. Justice is supreme and justice ought to be beneficial for the society so that the society is placed in a better off situation. Law courts exist for the society and ought to rise up to the occasion to do the needful in the matter, and as such ought to act in a manner so as to sub-serve the basic requirement of the society. It is a requirement of the society and the law must respond to its need. The greatest virtue of law is its flexibility and its adaptability, it must change from time to time so that it answers the cry of the people, the need of

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the hour and the order of the day. In the present day society, crime is now considered a social problem and by reason therefore a tremendous change even conceptually is being seen in the legal horizon so far as the punishment is concerned.

14. One school of thought on this score propagates the function of the law court is that of a social reformer and as such in its endeavour to act as such, the question of deterring punishment would not arise since the society would otherwise be further prone to such violent acts or activities by reason of the fact that with the advancement of the age the mental frame of boys of tender age also go on changing and in the event of any arrogance being developed or a sense of revenge creeps the society, the society would perish to the detriment of its people.

15. The other school, however, expressly recorded and rather emphatically that unless severest of the severe punishments are inflicted on an offender (obviously depending upon the nature of the

crime) the society would perish. The other school professes that since one has taken the life of another that does not mean that his life shall have to be taken but during the trial if it transpires the method and manner or the nature of the activities which has resulted in the elimination of a human being from this world, there should not be any laxity on the part of the law courts, otherwise people will and in turn the society will be engulfed in false sense of security of life in the event of there being most heinous crime of the earth.

16. The law courts as a matter of fact have been rather consistent in the approach that a reasonable proportion has to be maintained between the seriousness of the crime and the punishment. While it is true that a sentence disproportionately severe, ought not to be passed but that does not even clothe the law courts with an option to award the sentence which would be manifestly inadequate having due regard to the nature of the offence since an inadequate sentence would fail to produce a deterrent effect on the society at large.

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Punishments are awarded not because of the fact that it has to be an eye for an eye or a tooth for tooth, rather having its due impact on the society: while undue harshness is not required but inadequate punishment may lead to sufferance of the community at large."

In *Bachan Singh vs. State*, (1980)2 SCC 684, decided by a constitution bench, the majority view did not agree with the approach adopted by a three-judge bench in *Rajendra Prasad vs. State of UP*, (1979)3 SCC 646, that focussed on special reasons. But that apart, the majority view in *Bachan Singh*, is as follows:-

"As we read Sections 354(3) and 235(2) and other related provisions of the Code of 1973, it is quite clear to us that for making the choice of punishment or for ascertaining the existence or absence of 'special reasons' in that context, the court must pay due regard both to the crime and the criminal. What is the relative weight to be given to the aggravating and mitigating factors, depends

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on the facts and circumstances of the particular case."

Their Lordships accepted the board contours of the circumstances cited before them by one of the learned counsel as having mitigating impact. The Constitution Bench has observed, on the aforesaid submission of the counsel, as follows: (SCC p. 750, para 207)

" 207. We will do no more than to say that these are undoubtedly relevant circumstances and must be given great weight in the determination of sentence."

Three such circumstances which the court was told about were the following:-

- 1. The age of the accused - if the accused is young or old the sentence of death should be avoided*
- 2. The probability that the accused would not commit criminal acts of violence as would constitute continuing threat to society.*
- 3. That the accused acted under duress or domination of another person.*

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After having referred to *Bachan Singh*, supra, the Supreme Court in *State Vs. Nalini*, (1999)5 SCC 253, has held thus:

"347. Bearing the above principles in mind we have now to determine whether the death sentence passed by the trial court should be confirmed or not in respect of the 7 accused whose conviction of the offence under Section 302 read with Section 120-B we have confirmed. There can be no two opinions that looking at the crime conspectus of what was perpetrated at Sriperumbudur it was most dastardly to the superlative degree. Those who machinated to bring about such a horrendous crime cannot normally escape the extreme penalty of law. As the law enjoins that we have to look at the criminals also we are duty-bound to look at it from that perspective also.

348. The conspirators in the Rajiv Gandhi assassination case can be vivisected into four broad categories:

First, those who formed the hard-core nucleus which took the decision to assassinate Rajiv Gandhi.

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Second, those who induced others to join the ring and played active as well as supervisory roles in the conspiracy.

Third, those who joined the conspiracy by inducement whether through indoctrination or otherwise,

Fourth, those among the conspirators who participated in the actual commission of murder.

In *Sushil Murmu vs. State of Jharkhand*, (2004) 2 SCC 338, while stating that the death sentence is ordinarily ruled out and could only be imposed for special reasons as provided in Section 354(2) of the Code of Criminal Procedure, 1973, the Apex Court has expressed its opinion thus:-

"6. Section 302 IPC prescribes death or life imprisonment as the penalty for murder. While doing so, the Code instructs the court as to its application. The changes which the Code has undergone in the last three decades clearly indicate that Parliament is taking note of contemporary criminological thought and

movement. It is not difficult to discern that in the Code, there is a definite swing towards life imprisonment. Death sentence is ordinarily ruled out and can only be imposed for "special reasons", as provided in Section 354(3). There is another provision in the Code which also uses the significant expression "special reason". It is Section 361. Section 360 of the Code re-enacts, in substance, Section 562 of the Criminal Procedure Code, 1898 (in short "the old Code"). Section 361 which is a new provision in the Code makes it mandatory for the court to record "special reasons" for not applying the provisions of Section 360. Section 361 thus casts a duty upon the court to apply the provisions of Section 360 wherever it is possible to do so and to state "special reasons" if it does not do so. In the context of Section 360, the "special reasons" contemplated by Section 361 must be such as to compel the court to hold that it is impossible to reform and rehabilitate the offender after examining the matter with due regard to the age, character and antecedents of the offender and the circumstances in which the offence

was committed. This is some indication by the legislature that reformation and rehabilitation of offenders and not mere deterrence, are now among the foremost objects of the administration of criminal justice in our country. Section 361 and Section 354(3) have both entered the statute book at the same time and they are part of the emerging picture of acceptance by the legislature of the new trends in criminology. It would not, therefore, be wrong to assume that the personality of the offender as revealed by his age, character, antecedents and other circumstances and the tractability of the offender to reform must necessarily play the most prominent role in determining the sentence to be awarded. Special reasons must have some relation to these factors, Criminal justice deals with complex human problems and diverse human beings. A Judge has to balance the personality of the offender with the circumstances, situations and the reactions and choose the appropriate sentence to be imposed.

7. It should be borne in mind that before the amendment of Section 367(5) of

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the old Code, by the Criminal Procedure Code (Amendment) Act, 1955 (26 of 1955) which came into force on 1.1.1956, on a conviction for an offence punishable with death, if the court sentenced the accused to any punishment other than death, the reason why sentence of death was not passed had to be stated in the judgment. After the amendment of Section 367(5) of the old Code by Act 26 of 1955, position is clear that the normal penalty is imprisonment for life. It can be awarded in the presence of extenuating circumstances which reduce the gravity of the offence. The matter is left, after the amendment, to the discretion of the court. The court must, however, take into account all the circumstances, and state its reasons for whichever of the two sentences it imposes in its discretion. Therefore, the former rule that the normal punishment for murder is death is no longer operative and it is now within the discretion of the court to pass either of the two sentences prescribed in this section; but whichever of the two sentences he passes, the Judge must give his reasons for imposing a particular

sentence. The amendment of Section 367(5) of the old Code does not affect the law regulating punishment under IPC. This amendment relates to procedure and now courts are no longer required to elaborate the reasons for not awarding the death penalty; but they cannot depart from sound judicial considerations preferring the lesser punishment.

8. Section 354(3) of the Code marks a significant shift in the legislative policy underlying the old Code as in force immediately before 1.4.1974, according to which both the alternative sentences of death or imprisonment for life provided for murder were normal sentences. Now, under Section 354(3) of the Code the normal punishment for murder is imprisonment for life and death penalty is an exception. The court is required to state the reasons for the sentence awarded and in the case of death sentence "special reasons" are required to be stated, that is to say, only special facts and circumstances will warrant the passing of the death sentence. It is in the light of

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these successive legislative changes in the Code that the judicial decisions prior to the amendment made by Act 26 of 1955 and again Act 2 of 1974 have to be understood."

In dealing with the principle of proportion between crime and punishment, the Supreme Court in the case of *State of UP vs. Satish*, (2005)3 SCC 114, has held thus:-

"28. The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable. As a principle of criminal justice it is hardly less familiar or less important than the principle that only the guilty ought to be punished. Indeed, the requirement that punishment not be disproportionately great, which is a corollary of just desert, is dictated by the same principle that does not allow punishment of the innocent, for any punishment in excess of what is deserved for the criminal conduct is punishment without guilt.

29. *The criminal law adheres in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Judges in essence affirm that punishment ought always to fit the crime; yet in practice sentences are determined largely by other considerations. Sometimes it is the correctional needs of the perpetrator that are offered to justify a sentence. Sometimes the desirability of keeping him out of circulation, and sometimes even the tragic results of his crime. Inevitably these considerations cause a departure from just desert as the basis of punishment and create cases of apparent injustice that are serious and widespread.*

30. *Proportion between crime and punishment is a goal respected in principle, and in spite of errant notions, it remains a strong influence in the determination of*

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sentences. Anything less than a penalty of greatest severity for any serious crime is thought to be a measure of toleration that is unwarranted and unwise. But in fact quite apart from those considerations that make punishment unjustifiable when it is out of proportion to the crime, uniformly disproportionate punishment has some very undesirable practical consequences."

In *Swamy Shraddananda vs. State of Karnataka*, (2007) 12 SCC 288, it is expressed that cases where death penalty is upheld are those where murder was committed of a large number of persons or by more than one person in a brutal or systematic manner (Para 79).

In the case of *Des Raj vs. State of Punjab*, (2007) 12 SCC 494, the Supreme Court has indicated as to why in that particular case, the death sentence was not warranted and how mitigating circumstances have been given their due importance, thus:-

"12. Applying the above principles, there can be no doubt that this is not a case which

calls for imposition of death sentence. This is not a murder to satisfy any greed or lust. This is not a case involving cruelty to or torture of the victim. This is not a case where the act is brutal, diabolic, or revolting. The accused has no bad antecedents nor is a hardcore criminal nor an anti-social nor an anti-national element. The action was impulsive and without pre-meditation arising out of a sudden quarrel between the appellant's wife and Chand Singh's wife. Each of the victims was shot at only once. The repeated firing by the appellant is an overreaction of an inebriated brain to a petty issue. We hasten to add that drunkenness cannot be an excuse for any brutal or diabolic acts. The entire incident occurred in the span of a few minutes. The repeated loading and firing in utter disregard for life, in the circumstances is not an indication of extreme depravity or brutality, but of a drunken rage. The trial court and the High Court have persuaded themselves to award the death penalty by considering only the aggravating circumstances and to an extent carried away by the fact that three died and four (two

directly and two indirectly) were injured. The mitigating circumstances have not been given their due importance. On a careful balancing of the aggravating and mitigating circumstances, we find that in spite of the gravity of the crime involving triple murder, the aggravating circumstances noticed and enumerated by the High Court do not outweigh, much less overwhelmingly, the mitigating circumstances. This is not that the rarest of rare cases, which invites death penalty."

In *Swamy Shraddananda (2) vs. State of Karnataka*, (2008)13 SCC 767, the apex court has lamented the lack of uniformity and consistency in according the death sentence in the following words:-

"46. More important are the cases of murder of the worst kind, and their number is by no means small, in which the culprits, though identifiable, manage to escape any punishment or are let off very lightly. Those cases never come up for comparison with the cases this Court might be dealing with for confirmation of death sentence. To say this is

because our Criminal justice System, of which the court is only a part, does not work with a hundred percent efficiency or anywhere near it, is not to say something remarkably new or original. But the point is, this Court, being the highest court of the Land, presiding over a Criminal Justice System that allows culprits of the most dangerous and revolting kinds of murders to slip away should be extremely wary in dealing with death sentence and should resort to it, in the words of Bachan Singh, only when the other alternative is unquestionably foreclosed.

47. We are not unconscious of the simple logic that in case five crimes go undetected and unpunished that is no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence.

48. That is not the end of the matter. Coupled with the deficiency of the Criminal

Justice System is the lack of consistency in the sentencing process even by this Court. It is noted above that Bachan Singh laid down the principle of the rarest of rare cases. Machhi Singh, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the Machhi Singh categories were followed uniformly and consistently."

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

In Rabindra Kumar Pal @ Dara Singh vs. Republic of India, (2011)2 SCC 490, it is reiterated that where a case falls within rarest of rare cases or not has to

be examined with reference to the facts and circumstances of each case thus:-

"90. Though the trial Court awarded death sentence for Dara Singh, the High Court after considering entire materials and finding that it is not a rarest of rare case, commuted the death sentence into life imprisonment. The principles with regard to awarding punishment of death have been well settled by judgments of this Court in Bachan Singh vs. State of Punjab AIR 1980 SC 898, Machhi Singh vs. State of Punjab (1983) 3 SCC 470, Kehar Singh vs. State (Delhi Administration) (1988) 3 SCC 609. It is clear from the above decisions that on conviction under Section 302 IPC, the normal rule is to award punishment of life imprisonment and the punishment of death should be resorted to only for the rarest of rare cases.

91. Whether a case falls within the rarest of rare case or not, has to be examined with reference to the facts and circumstances of each case and the Court has to take note of the aggravating as well as mitigating circumstances and conclude whether there was something uncommon about the crime which renders the sentence of imprisonment for life

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inadequate and calls for death sentence. However, more than 12 years have elapsed since the act was committed, we are of the opinion that the life sentence awarded by the High Court need not be enhanced in view of the factual position discussed in the earlier paras."

In *Sangeet and another vs. State of Haryana*, (2013)2 SCC 452, it was again pointed out that there is no uniformity in the application of the approach adopted in *Bachan Singh's* case (1980)2 SCC 684), thus:

"49. Despite Bachan Singh, the "particular crime" continues to play a more important role than the "crime and criminal" as is apparent from some of the cases mentioned above. Standardization and categorization of crimes was attempted in Machhi Singh for the practical application of the rarest of rare cases principle. This was discussed in Swamy Shraddananda. It was pointed out in paragraph 33 of the Report that the Constitution Bench in Jagmohan Singh and Bachan Singh "had firmly declined to be drawn into making any standardization or categorization of cases for awarding death

penalty". In fact, in Bachan Singh the Constitution Bench gave over half a dozen reasons against the argument for standardization or categorization of cases. Swamy Shraddananda observed that Machhi Singh overlooked the fact that the Constitution Bench in Jagmohan Singh and Bachan Singh had "resolutely refrained" from such an attempt. Accordingly, it was held that even though the five categories of crime (manner of commission of murder, motive for commission of murder, anti-social or socially abhorrent nature of the crime, magnitude of crime and personality of victim of murder) delineated in Machhi Singh provide very useful guidelines, nonetheless they could not be taken as inflexible, absolute or immutable.

50. *Indeed, in Swamy Shraddananda this Court went so far as to note in paragraph 48 of the Report that in attempting to standardize and categorize crimes, Machhi Singh "considerably enlarged the scope for imposing death penalty" that was greatly restricted by Bachan Singh.*

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51. It appears to us that the standardization and categorization of crimes in Machhi Singh has not received further importance from this Court, although it is referred to from time to time. This only demonstrates that though Phase II in the development of a sound sentencing policy is still alive, it is a little unsteady in its application, despite Bachan Singh."

In Mahesh Dhanaji Shinde vs. State of Maharashtra, (2014) 4 SCC 292, the Apex Court has expressed that though the principles of sentencing have been identified, the difficulty lies in the application thereof in the following words:-

"35. In a recent pronouncement in Sunil Dutt Sharma vs. State (Govt. of NCT of Delhi) it has been observed by this Court that the principles of sentencing in our country are fairly well settled – the difficulty is not in identifying such principles but lies in the application thereof. Such application, we may respectfully add, is a matter of judicial expertise and experience where judicial wisdom must search for an answer to the vexed question

—whether the option of life sentence is unquestionably foreclosed? The unbiased and trained judicial mind free from all prejudices and notions is the only asset which would guide the judge to reach the 'truth'.”.

The case in *Kamta Tiwari vs. State of M.P. (1996) 6 SCC 250*, was very similar to the present case on hand. The child involved was about 7 and the accused was acquainted with her and she used to call him “uncle”. She having been killed after being raped in a similar fashion, the Apex Court, after considering the decision in *Bachan Singh vs. State of Punjab (1980) 2 SCC 684*, wherein the guidelines to be followed for imposing the extreme penalty of death was discussed and a later judgment in *Machhi Singh vs. State of Punjab (1983) 3 SCC 470*, has reiterated the following propositions which were formulated and were to be applied when the question of awarding death sentence arises.

“(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;

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(ii) *Before opting for the death penalty the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime;*

(iii) *Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment or life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances;*

(iv) *A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances has to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised,"*

Therefore, in the light of the above case law and the guidelines aforesaid by the Apex Court and on an overall view of the facts and circumstances of the instant case, we are of the

firm opinion that the sentence of death should be maintained. There are no mitigating circumstances to be found, but the aggravating circumstances are many. The evidence on record clearly establishes that the appellant was known to the deceased and she apparently had complete trust and faith in him as an adult and which is why she had willingly allowed him to carry her away, but the child was not aware that she was being kidnapped and was to be brutally raped and murdered in the most gruesome fashion, as the injuries on her body testify and the finale was the dumping of her body weighed down by stones in a gunny bag and immersed in the river which was later recovered and when an innocent and helpless girl of 5 was subject to such a barbaric treatment by a person who was in a position of her trust, his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of an ordinary person. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime and the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable

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not only to deter others from committing such atrocious crimes, but also to give emphatic expression to society's abhorrence of such crimes.

Accordingly, the appeal filed by the accused in Crl.A.2802/2013 is dismissed and the reference filed by the State in Crl.R.C.32/2013 is allowed. The sentence of death pronounced by the Trial Court is hereby confirmed. The appellant in Crl.A.2802/2013 shall be hung by the neck, till dead.

Sd/-
JUDGE

Sd/-
JUDGE

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