Anil @ Anthony Arikswamy Joseph vs State Of Maharashtra on 20 February, 2014

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Bench: Vikramajit Sen, K. S. Radhakrishnan

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL NOS.1419-1420 OF 2012

Anil @ Anthony Arikswamy Joseph .. Appellant

Versus

State of Maharashtra .. Respondent

J U D G M E N T

K. S. RADHAKRISHNAN, J.

1. We are, in this case, concerned with a gruesome murder of a minor boy aged 10 years after subjecting him to carnal intercourse and then strangulating him to death.

2. The accused, Anil @ Anthony Arikswamy Joseph, was charge-sheeted with offences punishable under Sections 302, 377 and 201 of the Indian Penal Code (IPC). The Principal District and Sessions Judge, Nagpur in Sessions Trial No.167 of 2008 convicted the Appellant for the offence punishable under Section 302 IPC and sentenced him to death and also sentenced to pay a fine of Rs.10,000/- and in default to suffer rigorous imprisonment for one year and for the offence punishable under Section 377 IPC, he was sentenced to suffer rigorous imprisonment for 10 years and to pay a fine of Rs.1,000/- and in default to suffer rigorous imprisonment for a period of three months. The Appellant was also convicted for the offence punishable under Section 201 IPC and was sentenced to

suffer rigorous imprisonment for 3 years and to pay a fine of Rs.1,000/- and in default to suffer rigorous imprisonment for a period of three months. Substantive sentences, it was ordered, would run concurrently. Since the accused was sentenced to death, reference was sent to the High Court for confirmation of death sentence. The accused also filed Criminal Appeal No.17 of 2011.

3. The Appeal and the criminal confirmation case then came up for hearing before a Division Bench of Nagpur Bench of the Bombay High Court on 10.08.2011 and the Bench noticed that the DNA profile blood sample and semen sample were not brought before the trial court. Further, it was noticed that PW5, the Assistant Chemical Analyzer of Forensic Science Laboratory, Mumbai, had given detailed evidence in respect of the contents of Ext.35. She stated that she had occasion to compare DNA of blood sample of the accused with Ext.1 (semen stains on half pant) and Ext.5 (anal smear of the deceased) and the DNA samples were matching. PW5 submitted Ext. 38 report. Ext. 38, it was noticed, did not disclose any comparison, as stated by PW5, which was done in FSL at Mumbai. Considering the serious nature of the offence and considering the fact that the whole case against the accused was based on circumstantial evidence, the Court felt that it would be necessary to recall PW5 and record her further examination-in-chief with reference to her report in respect of the DNA profile of the accused, that too with reference to her evidence at paragraph No.3 of her examination–in-chief on 25.09.2009.

4. The Bench, therefore remitted the case to the trial court for production of additional evidence. The operative portion of the order reads as under :

> (i) The prayer for production of copies of Judgments in Sessions Trial No.118 of 1997 and Sessions Trial No.39 of 2002 does not survive as it is not pressed.
>
> (ii) The prosecution shall move the learned Trial Court for production of the additional evidence.
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> (iii) The prosecution shall recall P.W.5 and shall re-examine the said witness further with referenced to the DNA profile of blood sample of the accused and the comparison thereof with Exs.1, 4 and 5 of the report Ex.35.
>
> (iv) The learned Trial Court shall be at liberty to allow the prosecution to produce any other documents connected with the evidence or concerning the collection of samples, carrying the same to F.S.L. and analysis thereof.
>
> (v) The learned Trial Court shall also be at liberty to allow the prosecution to examine any other witness pertaining to or concerning with the collection of samples, carrying the same to F.S.L. and analysis thereof.
>
> (vi) The prosecutions shall recall P.W.10 and P.W.14 and shall examine them further with reference to forwarding samples Exs.1, 4 and 5 of Ex.35 and blood and semen samples of accused-

appellant.

(vii) Needless to state that the accused-appellant shall be given an opportunity to cross-examine the witnesses recalled or fresh witnesses examined following this order.

(viii) It is made clear that the learned trial Court shall be at liberty to pass any incidental order to achieve the purpose of this order, but shall be careful to see that the prosecution does not misuse this opportunity of recording of additional evidence to introduce any other evidence, which is not subject matter of the present order.

(ix) The original record and proceedings be sent back to the learned Sessions Judge, Nagpur.

(x) The learned Sessions Judge shall comply with this order within 30 days from the date of receipt of this order and shall certify the additional evidence to this Court immediately thereof.

Application accordingly stands disposed of."

5. The Sessions Court, after recording the additional evidence and recalling and further examining the witnesses, as ordered, forwarded the same to the High Court. The appeal was then heard by a Division Bench of the High Court on 10.10.2011 along with the confirmation case and the additional evidence recorded. The High Court, after appreciating the oral and documentary evidence and arguments advanced by the counsel on either side, confirmed the death sentence noticing the brutal and grotesque manner in which the crime was committed. The High Court held that the young boy of tender age was subjected to unnatural sex for the satisfaction of the lust of the accused which, according to the High Court, falls under the category of rarest of the rare cases. The High Court, therefore, dismissed the appeal and confirmed the death sentence, against which these appeals have been preferred.

6. Shri P.C. Aggarwala, learned senior counsel appearing for the Appellant, submitted that the prosecution has failed to prove the case beyond reasonable doubt and all the circumstances put together would lead to only one inference that the accused is not guilty of the offences charged against him. Learned senior counsel also submitted that the prosecution has not succeeded in establishing the last seen theory and the evidence adduced by PW2, PW3, PW8 and PW9 would not establish that the victim was last seen with the accused. Learned senior counsel also submitted that the prosecution could not establish that the articles stated to have been recovered from the house of the accused were that of the deceased. The evidence of PW1 and PW6, it was pointed out, was totally unworthy and ought to have been discarded. Learned senior counsel also submitted that the evidence in respect of DNA Profile is completely manufactured to rope in the accused and the evidence of PW10 and PW14 in that respect cannot be believed.

7. Shri Shankar Chillage, learned counsel appearing for the prosecution, on the other hand, submitted that the Courts below have correctly appreciated the evidence of PW2, PW3, PW8 and PW9 and have come to the conclusion that the victim was last seen in the company of the accused and all the principles laid down by this Court to establish the last seen theory have been completely

satisfied, so far as the present case is concerned. Learned counsel also submitted that the evidences of PW1 and PW6 have been correctly appreciated by the Courts below and the prosecution has succeeded in proving that the articles recovered from the possession of the accused were that of the deceased. Learned counsel also submitted that the Courts below have correctly appreciated the evidence of PW5, the Assistant Chemical Analyser, who conducted the DNA test and deposed that she obtained the blood sample of the accused and matched the profile from the blood profile, which was sent as Ex.1 i.e. semen stain cutting from the half pant and submitted the Report Exh.38. Learned counsel submitted that the evidence of PW5 has to be appreciated in the light of the evidence of PW12, PW13, PW15 and PW16, which would clearly indicate that the DNA profile obtained from the anal smear of the deceased matched with the accused. Learned counsel submitted that the DNA profile conclusively indicates that the accused has committed the offence punishable under Section 377 IPC. Learned counsel also submitted that the High Court has rightly held that the case falls under the rarest of the rare category and correctly awarded the death sentence.

8. PW7, Shobha Vaidya, mother of the deceased, a maid servant, was running here and there anxiously for few days to know the whereabouts of her missing son aged 10 years. The boy had gone to the school on 10.1.2008 and normally he used to return in the evening, but on that day he did not return. Since whereabouts of the boy were not known for few days, she lodged a complaint on 15.1.2008 at about 5.00 p.m. before PW10, the Sub- Inspector of Police, attached to Crime Branch, Nagpur, who was posted at Sadar Police Station. Meanwhile, PW2, Mary, a lady, residing near the house of the accused, informed PW10 that the dead body of a boy aged 9-10 years was seen floating in a well at Juna Kabrastan (old cemetery). PW10 then proceeded to the spot and with the assistance of fire brigade took the dead body from the well and sent the same to Mayo Hospital for conducting post-mortem examination. After getting the post-mortem report, PW10 lodged the report and registered the offence under Sections 377, 302 and 201 IPC.

9. PW14, Police Sub-Inspector attached to Sadar Police Station, was entrusted with the investigation. By that time, the accused was arrested on 17.1.2008 and, on his disclosure, various articles belonging to the deceased were recovered from the house of the accused and they were seized in the presence of Panchas. School bag of the deceased, which was black in colour and had pink stripes, concealed in a box was recovered. Bag was opened in the presence of panchas and it was found to contain a Bal Bharati textbook, Mathematics and English books, two note-books, all bore the name of the deceased. Further, a Barmuda pant, belonging to the accused and a jeans belonging to the deceased were recovered on 17.01.2008. The accused was referred for medical examination and the blood sample was taken on 18.01.2008. Samples of blood semen and nail clippings were taken under Ext.17. On the disclosure of the accused, the shirt worn by him, which was concealed near a tree under a stone, was recovered on 22.01.2008. Seized articles were referred to the Chemical Analysis at Nagpur. The reports of the Analyzer are at Exts.91 and 92, while the DNA reports are at Exts.35 and 38. After completing the investigation, the police charge-sheeted the accused for offences punishable under Sections 302, 377 and 201 IPC. On the side of the prosecution, fourteen witnesses were examined and the documentary evidence were brought on record and on the side of the defence, none was examined.

10. PW2, Mary, who runs a tea stall in front of the Income Tax Office, which is near the old cemetery, was examined by the prosecution to prove that the boy was seen in the company of the accused. She stated that she knows the accused who is residing just in front of her house. She has also deposed that on 13.1.2008, the accused had come to her shop and demanded Gutka, which she did not give. Later, a boy of about 11 years was sent from the house of accused, who purchased few items from her shop and returned to the same house. PW3, a neighbour of the accused, is also residing near the old cemetery. She has also deposed that she had seen the boy with the accused on 10.01.2008 and 11.01.2008. PW8, the sister of the accused, who was also residing with the accused in his house, stated that she saw a boy aged about 10 to 12 years in the company of the accused, during the above-mentioned period and on the fateful day, that is, in the mid-night of 12.01.2008 and 13.01.2008, she heard the cries of the boy from the room of the accused. PW9, a neighbour of the accused, also noticed one boy aged 10 years accompanying the accused and that, on the midnight of 12.01.2008, she heard the cries of a small boy emanated from the side of the house of the accused.

11. We have gone through the evidence of PW2, PW3, PW8 and PW9 in its entirety and, in our view, they are trustworthy and reliable. In our view, the prosecution has succeeded in establishing its case beyond reasonable doubt that the deceased was last seen in the company of the accused and that the findings recorded by the trial Court and affirmed by the High Court call for no interference.

12. PW1 and PW6, Panchas of Ex. 13 and Ex.40 respectively, were examined by the prosecution to prove the recovery of the pant as well as school bag of the deceased. School bag was recovered from a box which was placed beneath the cot in the house of the accused. Seizure panchanams vide Exts.15 and 19 give the details of the articles seized at the instance of the accused. The school bag contained books and note books which bore the name of the deceased. The pant and the school bag along with books contained therein would clearly indicate that the boy was in the company of the accused on the fateful day. Consequently, the presence of the deceased in the room of the accused has been clearly established and the finding recorded by the trial Court as well as the High Court on that ground also calls for no interference.

13. PW4 is the doctor who conducted the post-mortem examination of dead body of the deceased. The post-mortem report (Exh.33) indicates the following external and internal injuries on the dead body of the deceased :

> “External Injuries
>
> 1) Anus dilated and appears patalous, perional margin and mucosa appear inflamed, no evidence of tear or foreign body.
>
> 2) Position of Limbus straight.
>
> 3) Multiple contused abrasions (6 in numbers) present over forehead of size varying from 1.5 cm x 1.5 cm to 2 cm x 2 cm.

4) Incised wound present over right lateral forehead oblique of size 1.5 cm x 0.5 cm x bone deep.

5) Contused abrasion at right preauricular area of size 2 cm x 2 cm.

6) Contused abrasion at right face, 1.5 cm below the lower eye lid of size 2 cm x 2.5 cm.

7) Centurion present at chin of size 2 cm x 2.5 cm.

8) Graze abrasion present at right arm, anteri medial aspect, lower 1/3rd of size 3.5 cm x 5 cm directed downward and right laterally.

Internal Injuries (1) Right frontal region of size 4 cm x 5 cm x 0.5 cm.

(2) Right parieto-temporal region of size 5 cm x 4 cm x 0.5 cm. (3) Left occipital region of size 4 cm x 4 cm x 0.5 cm.

Brain, party reddish tinged appearance to the right parieto- temporal region."

14. PW4 has stated that all the internal injuries correspond to external injuries and they were ante-mortem and were ordinarily sufficient to cause death. PW4 has also opined that there was possibility of carnal intercourse with the deceased, though the cause of death was head injury. PW4 also stated that he had seen the DNA report at Exh.35 and stated that the report indicates that anal smear of the deceased gave a mixed DNA profile which matches with semen on half pant and blood of victim. PW4 was also shown another report of DNA, which was in respect of the control sample blood of the accused and stated that DNA profile of blood matches with DNA profile of semen found in the anus of the deceased. Further, he has also stated that injury nos.1, 3, 4 and 5 were possible by hard and blunt object while injury no.2 was caused by sharp cutting edge and injury no.6 was caused by hard and rough object. Facts clearly indicate that the fatal injuries were caused to silence him, after satisfying lust in a barbaric manner. Attempts were made to destroy the evidence which were also proved. PW4 also categorically stated in respect of injury no.1 that it should read as anus dilated and appears patalous, perianal margin anal mucosa appear inflamed, though no evidence of tear or foreign body.

15. PW5, the Assistant Chemical Analyzer, Forensic Science Lab, Kalina, Mumbai stated that she had received the parcels from the Regional Forensic Science Laboratory, Nagpur on 24.1.2008 and she started the analysis on the same day. She stated that Exh.1 is a DNA profile of the accused and Exh.5 anal smear is of the deceased, which gave mixed profile. Further, it is stated that the profile obtained from Exh.1 semen stains matches with the profile obtained from Exh.5 anal smear and also Exh.4 blood stains gauze collected from the deceased. She stated that she conducted two tests, one nuclear Short Tandem Repeats (STR) and Y Short Tandem Repeats (YSTR). PW5, in her report, stated that she obtained blood samples of the accused and matched the profile obtained from that blood with the profile of Exhs.1 and 5 and that the profiles were matching. PW5, as already

indicated, was recalled after the matter was remitted to the trial Court for getting further evidence and she repeated that she had analyzed the blood sample of the accused for DNA profiling and it matched with the sample, which was sent as Exh.1 i.e. semen stain cutting from the half pant. She accordingly issued a report as Exh.38.

16. PW12, the Medical Officer attached to Mayo Hospital, Nagpur was examined to prove that he had received the requisition for taking blood samples, pubic hair, nails and semen of the accused under requisition at Exh.75, which was handed over to the police. PW15 and PW16 were also examined to establish the procedure followed for taking the parcel to the Chemical Analyser for DNA test as well as for collecting blood samples, etc. On going through the evidence of PW4 and PW5 read with evidence of PW12, PW15 and PW16, we are of the view that the DNA test was successfully conducted and that the anal smear matched with the DNA profile of semen stains which were found on the pant of the accused and were matched with the control blood sample of the accused as well as blood sample of the deceased.

17. Deoxyribonucleic acid, or DNA, is a molecule that encodes the genetic information in all living organisms. DNA genotype can be obtained from any biological material such as bone, blood, semen, saliva, hair, skin, etc. Now, for several years, DNA profile has also shown a tremendous impact on forensic investigation. Generally, when DNA profile of a sample found at the scene of crime matches with DNA profile of the suspect, it can generally be concluded that both samples have the same biological origin. DNA profile is valid and reliable, but variance in a particular result depends on the quality control and quality procedure in the laboratory.

18. PW5, Dr. Varsha Rathod, stated that since 1994 she was working as Assistant Chemical Analyzer and has analyzed thousands of samples including DNA test. She has stated that she had conducted two tests, one STR and second YSTR. Both the tests are scientifically proven and the competence of the doctor who conducted the test is also not questioned. Consequently, the DNA test report could be safely accepted, which shows that the deceased boy was subjected to unnatural sex and offence under Section 377 has been clearly made out.

19. Section 377 is mainly confined to act of sodomy, buggery and bestiality, which intends to punish a man when he indulges in a carnal intercourse against the order of nature with a man or, in the same manner, with a woman. Sodomy is termed as Pederasty when the intercourse is between a man and a young boy, that is, when the passive agent is a young boy. Modi's Medical Jurisprudence and Toxicology state that if a passive agent is not accustomed to sodomy, abrasions on the skin near the anus is likely to appear and lesions will be most marked in children while they may be almost absent in adults, when there is no resistance to the anal coitus. Galster's Medical Jurisprudence and Toxicology say that lesions like recent lacerations, bruising, inflammation of the mucous membrane could be noticed in passive agent. Article 377 postulates penetration by the penis into the anus and the merest penetration suffices to establish the offence. PW4 has clearly noticed that "Anus dilated and appears patalous, perional margin and mucosa appear inflamed". DNA test also proved that anal smear matched with the DNA profile of smear stains, which also matched with the control sample of the accused. Consent of a passive agent is not at all a defence, but, in the instant case, though a suggestion was made that the boy had not resisted, being in the company of the accused for

few days, is of no consequence, he being a minor. Prosecution has clearly established that, after subjecting the boy to Pederasty, he was strangulated to death.

20. PW8 has categorically stated that she had heard the cries of the boy during mid-night and she could not sleep till the cries subsided. PW8 is none other than the sister of the accused. She heard the cries of the boy coming from the room of the accused. She is a trustworthy witness and has no axe to grind against the accused. PW9 has also stated that she wanted to go to the direction in which she heard the cries, however, darkness deterred her and others proceeding to the place of occurrence. Cries heard were obviously in loud voice, which indicates that the accused had indulged in such a barbaric act and ultimately killed the boy and later threw the dead body in the well situated near the premises of the old cemetery, a spot which was located behind his house. The Courts below, therefore, concluded that the offence committed by the accused shows extreme depravity of mind and shows extreme perversity and, therefore, calls for extreme punishment i.e. the accused be hanged by neck till death. We are of the opinion that the case under Sections 302, 377 and 201 IPC has been clearly made out. The question is only with regard to the sentence and whether the present case falls under the category of rarest of rare case, warranting capital punishment.

21. In Shankar Kisanrao Khade v. State of Maharashtra (2013) 5 SCC 546, we have dealt with the various principles to be applied while awarding death sentence. In that case, we have referred to the cases wherein death penalty was awarded by this Court for murder of minor boys and girls and cases where death sentence had been commuted in the cases of murder of minor boys and girls. In Shankar Kisanrao Khade (supra), we have also extensively referred to the principles laid down in Bachan Singh v. State of Punjab (1980) 2 SCC 684 and Machhi Singh v. State of Punjab (1983) 3 SCC 470 and the subsequent decisions. Applying the tests laid down in Shankar Kisanrao Khade (supra), we are of the view that in the instant case the crime test and criminal test have been fully satisfied against the accused. Still, we have to apply the RR test and examine whether the society abhors such crimes and whether such crimes shock the conscience of the society and attract intense and extreme indignation of the community.

22. We have no doubt in our mind that such types of crimes preceded by Pederasty are extremely brutal, grotesque diabolical and revolting, which shock the moral fiber of the society, especially when the passive agent is a minor. Recently, this Court in Suresh Kumar Koushal and Another v. Naz Foundation and Others (2014) 1 SCC 1 has also refused to strike down Section 377, even if such acts are indulged in by consenting individuals.

23. Accused is now around 42 years of age and when he committed the crime, he was about 35 years. We have clearly found that there is no mitigating circumstance favouring the accused. Age is not a factor favouring him. By the age of 35, a person attains sufficient maturity and can distinguish what is good or bad, and there is nothing to show that he was under any emotional or mental stress and the offence was committed only to satisfy his lust, in a perverted way. Accused is not the only son of his parents, but the boy was a minor, totally innocent and defenceless, the only son of PW7. The mother, PW7, is a house maid and the son would have looked after her in her old age and also would have been of considerable help to her. Son was snatched in a barbaric gruesome manner only to satisfy the perverted lust of the accused. PW7, the mother had to see the dead body of the son

floating in the well. PW8, the sister of the accused and PW9, the neighbour, both ladies heard the cries of the helpless boy during mid-night but both were helpless. PW8 could not go out of her room since it was locked from outside. PW9, a lady could not go to the house of the accused due to pitched darkness.

24. In Shankar Kisanrao Khade (supra), this Court did not confirm the death sentence, even though the post-mortem spelt out the act of sodomy as the prosecution had failed to chargesheet the accused under Section 377 IPC, which was commented upon by this Court. But, so far as the present case is concerned, the offences under Section 302 and 377 have been fully established and both the crime test and the criminal test have been fully satisfied against the accused. Now, we have to apply the RR Test.

25. We may point out that apart from what has been stated in Bachan Singh's case (supra) and Machhi Singh's case (supra) this Court in various cases like Om Prakash v. State of Haryana (1999) 3 SCC 19, State of U.P. v. Sattan (2009) 4 SCC 736, Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra (2009) 6 SCC 498, held that Court must state special reasons to impose death penalty, hence, the RR Test.

RR Test

26. R-R Test, we have already held in Shankar Kisanrao Khade' case (supra), depends upon the perception of the society that is "society- centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy of certain types of crimes like sexual assault and murder of minor girls, intellectually challenged minor girls, minors suffering from physical disability, old and infirm women, etc. R-R Test is found satisfied in several cases by this Court like in Bantu v. State of U.P. (2008) 11 SCC 113, wherein this Court affirmed the death sentence in a case where minor girl of five years was raped and murdered. This Court noticed that the victim was an innocent child and the murderer was in a dominating position, which the Court found as a vital factor justifying the award of capital punishment. Shivaji v. State of Maharashtra (2008) 15 SCC 269, was a case where a married person having three children, known to the family of the deceased, ravished the life of a girl aged 9 years and strangulated her to death, this Court affirmed the death sentence awarded by the High Court. Mohd. Mannan v. State of Bihar (2011) 5 SCC 317, was a case where a minor girl aged 7 years was kidnapped, raped and murdered by an accused aged between 42-43 years. This Court held that he would be a menace to society and would continue to be so and could not be reformed and hence confirmed the death sentence. Rajendra Pralhadrao Wasnik v. State of Maharashtra (2012) 4 SCC 37 was a case where a 3 year old child was raped and murdered by an accused of 31 years old. This Court noticed the brutal manner in which the crime was committed and the pain and agony undergone by the minor girl. This Court confirmed the death sentence.

27. In Haresh Mohandas Rajput v. State of Maharashtra (2011) 12 SCC 56, this Court opined that the death sentence, in a given case, can be awarded where the victims are innocent children and helpless women, especially when the crime is committed in a most cruel and inhuman manner which is

extremely brutal, grotesque, diabolical and revolting. Reference may also be made to the Judgments of this Court in Rabindra Kumar Pal alias Dara Singh v. Republic of India (2011) 2 SCC 490, Surendra Koli v. State of U.P. and others (2011) 4 SCC 80 and Sudam @ Rahul Kaniram Jadhav v. State of Maharashtra (2011) 7 SCC 125.

28. This Court in Mahesh v. State of Madhya Pradesh (1987) 3 SCC 80 deprecated the practice of taking a lenient view and not imposing the appropriate punishment observing that it will be a mockery of justice to permit the accused to escape the extreme penalty of law when faced with such evidence and cruel acts. This Court further held that to give the lesser punishment for the appellants would be to render the justicing system of this country suspect and the common man will lose faith in courts. In such cases, he understands and appreciates the language of deterrence more than the reformative jargon. In Bantu (supra), this Court placing reliance on the Judgment in Sevaka Perumal v. State of T.N. (1991) 3 SCC 471 observed as follows:

> "Therefore, undue sympathy to impose inadequate sentence would do more harm to the justice system to undermine the public confidence in the efficacy of law, and society could not long endure under such serious threats. It is, therefore, the duty of every court to award proper sentence having regard to the nature of the offence and the manner in which it was executed or committed, etc. Thus, it is evident that criminal law requires strict adherence to the rule of proportionality in providing punishment according to the culpability of each kind of criminal conduct keeping in mind the effect of not awarding just punishment on the society.
>
> The "rarest of the rare case" comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. Where an accused does not act on any spur of the moment provocation and he indulged himself in a deliberately planned crime and meticulously executed it, the death sentence may be the most appropriate punishment for such a ghastly crime."
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> 29. We may indicate, unlike Shankar Kisanrao Khade' case (supra), in this case offence under Section 377 IPC has been fully proved so also the offence under Section 302 IPC. Indian society and also the International society abhor pederasty, an unnatural sex, i.e. carnal intercourse between a man and a minor boy or a girl. When the victim is a minor, consent is not a defence, irrespective of the views expressed at certain quarters on consensual sex between adults.

Reformation and Rehabilitation

30. Learned counsel for the accused submitted that the accused has no previous criminal history and would not be a menace to the society. Further, it was also pointed out that possibility of reformation or rehabilitation of the accused, who is aged 42 years, cannot be ruled out and the State has not discharged its responsibility of proving the impossibility of rehabilitation.

31. In Bachan Singh (supra), this Court has categorically stated, "the probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to the society", is a relevant circumstance, that must be given great weight in the determination of sentence. This was further expressed in Santosh Kumar Satishbhushan Bariyar (supra). Many-a-times, while determining the sentence, the Courts take it for granted, looking into the facts of a particular case, that the accused would be a menace to the society and there is no possibility of reformation and rehabilitation, while it is the duty of the Court to ascertain those factors, and the State is obliged to furnish materials for and against the possibility of reformation and rehabilitation of the accused. Facts, which the Courts, deal with, in a given case, cannot be the foundation for reaching such a conclusion, which, as already stated, calls for additional materials. We, therefore, direct that the criminal courts, while dealing with offences like Section 302 IPC, after conviction, may, in appropriate cases, call for a report to determine, whether the accused could be reformed or rehabilitated, which depends upon the facts and circumstances of each case.

32. Learned counsel also pointed out that the accused had not kidnapped the boy, who voluntarily came and stayed with him. Learned counsel also pointed out that the entire case rests upon circumstantial evidence and generally in the absence of ocular evidence, death sentence is seldom awarded. Reference was made to few judgments of this Court in support of his contention, such as State of Maharashtra v. Mansingh (2005) 3 SCC 131 and Bantu v. State of M.P. (2001) 9 SCC 615. Learned counsel also made reference to few judgments of this Court where death sentences were commuted to life imprisonment, such as Aloke Nath Dutta v. State of West Bengal (2007) 12 SCC 230, Sahdeo v. State of U.P. (2004) 10 SCC 682, Swamy Shraddananda v. State of Karnataka (2007) 12 SCC 288, Shankar Kisanrao Khade (supra), Haresh Mohandas Rajput (supra), Rajesh Kumar v. State (2011) 13 SCC 706, Amit v. State of U.P. (2012) 4 SCC 107, etc.

33. PW8 and PW9 heard the cries of the minor boy during the midnight of 12.01.2008 and after going through their evidence they reverberate in our ears. Injury Nos.1, 3 to 5 were inflicted by hard and blunt object, while injury no.2 was caused by sharp cutting edge and injury no.6 was caused by hard and rash object, over and above, the offence under Section 377 also stood proved. The murder was committed in an extremely brutal, grotesque, diabolical and dastardly manner and the accused was in a dominating position and the victim was an innocent boy, the only son of his mother. Accused was aged 35 years when the crime was committed that is he was a fully matured person. Life of a boy, the only son of PW7, the mother, was taken away in a gruesome and barbaric manner which pricks not only the judicial conscience but also the conscience of the society.

34. Legislative policy is discernible from Section 235(2) read with Section 354(3) of the Cr.P.C., that when culpability assumes the proportions of depravity, the Court has to give special reasons within the meaning of Section 354(3) for imposition of death sentence. Legislative policy is that when special reasons do exist, as in the instant case, the Court has to discharge its constitutional obligations and honour the legislative policy by awarding appropriate sentence, that is the will of the people. We are of the view that incarceration of a further period of thirty years, without remission, in addition to the sentence already undergone, will be an adequate punishment in the facts and circumstances of the case, rather than death sentence. Ordered accordingly.

35. The appeals are, accordingly, disposed of.

eard Hear.....J. (K. S. Radhakrishnan) .....J. (Vikramajit Sen)
New Delhi, February 20, 2014.