

Rabbu @ Sarvesh

v.

The State of Madhya Pradesh

(Criminal Appeal No(s). 449-450 of 2019)

12 September 2024

**[B.R. Gavai,* Prashant Kumar Mishra and
K.V. Viswanathan, JJ.]**

Issue for Consideration

The appellant was convicted for offences punishable u/ss. 450, 376(2)(i), 376D, 376A and 302 r/w. s.34 of IPC and s.5(g)/6 of the Protection of Children from Sexual Offences Act, 2012 (POCSO) awarding death penalty u/ss. 376A and 302 IPC and life imprisonment u/s. 376D of the IPC and rigorous imprisonment for 10 years u/s. 450 of the IPC.

Headnotes[†]

Penal Code, 1860 – ss.450, 376(2)(i), 376D, 376A and 302 r/w. s. 34 – Protection of Children from Sexual Offences Act, 2012 – s.5(g)/6 – Appellant contended that the instant case rested on the three dying declarations and a DNA report – The Dying declarations were inconsistent and DNA report pointed presence of a third person – It was also contended that it was not ‘rarest of the rare’ case:

Held: On perusal of the materials on record, it is found that the dying declaration recorded by the Executive Magistrate (Naib Tehsildar), PW-11, which was endorsed by PW-9- doctor is reliable and trustworthy – The dying declaration recorded by PW-11 is in question-answer form – In the said dying declaration, the deceased clearly implicates the present appellant – The Medical Officer, PW-9, before the commencement of the dying declaration has given an endorsement regarding fit mental status of the deceased to make a declaration and at the end of the dying declaration again he has endorsed that the deceased was in a fit state of mind – The written dying declaration is corroborated by the oral dying declaration as has come on record in the evidence of her grand-father (PW-1), her grand-father’s brother (PW-2), her aunt (PW-13) and her uncle (PW-14) – In the said dying declaration, all the witnesses have clearly stated that the deceased after coming

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out from the room in flames has narrated the incident about the appellant committing the crime – The statement of the deceased recorded u/s.164 of Cr.P.C. also supports the prosecution case – There is no error in the conviction of the appellant – As far as the question whether the present case falls under the category of ‘rarest of rare case’ is concerned, in the present case, it is to be noted that the appellant comes from a socio-economic backward stratum of the society – He lost his mother and brother at the tender age – The appellant and his family members do not have any criminal background – The appellant was of a tender age of 22 years when the aforesaid incident occurred – It cannot be said that the appellant is a hardened criminal, who cannot be reformed – The possibility of the appellant, if given the chance of being reformed, cannot be ruled out – In view of the matter, the confirmation of the death penalty would not be justified – In facts and circumstances of the case, the death penalty needs to be commuted to fixed imprisonment without remission for a period of 20 years. [Paras 7, 8, 15, 16, 18]

Case Law Cited

Shivu and Another v. Registrar General, High Court of Karnataka and Another [\[2007\] 2 SCR 555](#) : (2007) 4 SCC 713 : (2007) INSC 136; *Purushottam Dashrath Borate and Another v. State of Maharashtra* [\[2015\] 5 SCR 1112](#) : (2015) 6 SCC 652 : (2015) INSC 392; *Deepak Rai v. State of Bihar* [\[2013\] 14 SCR 297](#) : (2013) 10 SCC 421 : (2013) INSC 638; *Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka* [\[2008\] 11 SCR 93](#) : (2008) 13 SCC 767 : (2008) INSC 853; *Shankar Kisanrao Khade v. State of Maharashtra* [\[2013\] 6 SCR 949](#) : (2013) 5 SCC 546 : (2013) INSC 281; *Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka* [\[2017\] 2 SCR 62](#) : (2017) 5 SCC 415; *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* [\[2001\] Supp. 5 SCR 612](#) : (2002) 2 SCC 35 : 2001 INSC 606; *Mohinder Singh v. State of Punjab* [\[2013\] 3 SCR 90](#) : (2013) 3 SCC 294 : (2013) INSC 61; *Madan v. State of Uttar Pradesh* [\[2023\] 16 SCR 765](#) : (2023) SCC OnLine SC 1473; *Navas @ Mulanavas v. State of Kerala* [\[2024\] 3 SCR 913](#) : (2024) SCC OnLine SC 315 : 2024 INSC 215 – referred to.

List of Acts

Penal Code, 1860; Protection of Children from Sexual Offences Act, 2012.

Rabbu @ Sarvesh v. The State of Madhya Pradesh**List of Keywords**

Section 450 of IPC; Section 376(2)(i) of IPC; Section 376D of IPC; Section 376A of IPC; Section 5(g)/6 of POCSO; Dying declarations; Rarest of rare case; Death Penalty; Socio-economic stratum backward; Remission.

Case Arising From

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 449-450 of 2019

From the Judgment and Order dated 17.01.2019 of the High Court of M.P. Principal Seat at Jabalpur in CRLR No.12 of 2018 and CRLA No. 6748 of 2018

Appearances for Parties

N. Hariharan, Sr. Adv., Ms. Shreya Rastogi, Bhavesh Seth, M.A. Niyazi, Ms. Zehra Khan, Ms. Anauntta Shankar, Sharian Mukherji, Ms. Sana Singh, Ms. Punya Rekha Angara, Advs. for the Appellant.

Bhupendra Pratap Singh, D.A.G., Ms. Mrinal Gopal Elker, Abhimanyu Singh, Abhinav Shrivastava, Advs. for the Respondent.

Judgment / Order of the Supreme Court**Judgment****B.R. Gavai, J.**

1. Heard Shri N. Hariharan, learned Senior Counsel for the appellant and Shri Bhupendra Pratap Singh, learned Deputy Advocate General appearing on behalf of the State of Madhya Pradesh.
2. These appeals arise out of the judgment and order dated 17.01.2019 passed by the Division Bench of the High Court of Madhya Pradesh at Jabalpur, dismissing the appeal of the appellant and confirming the judgment and order dated 20.08.2018 passed by the First Additional Sessions Judge, Bina, District Sagar (hereinafter referred to as the "Trial Judge"), thereby convicting the appellant for offences punishable under Sections 450, 376(2)(i), 376D, 376A and 302 read with 34 of the Indian Penal Code, 1860 (for short, 'IPC') and Section 5(g)/6 of the Protection of Children from Sexual Offences Act, 2012 (for short, 'POCSO') awarding death penalty under Sections 376A and 302 IPC and life imprisonment under Section 376D of the IPC and rigorous imprisonment for 10 years under Section 450 of the IPC.

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3. Shri Hariharan submits that the present case basically rests on the three dying declarations and the DNA report. He submits that the dying declarations are inconsistent. He further submits that as the time progressed there were improvements in the dying declaration. He therefore submits that in the present case the truthfulness of the dying declarations itself is doubtful and therefore the conviction could not be based on the said dying declarations. He further submits that the DNA report also points out towards the presence of a third person. In such an eventuality, the learned Senior Counsel submits that the order of conviction could not be sustained.
4. Shri Hariharan, in the alternative, submits that the present case is not a 'rarest of the rare' case, which would justify awarding death penalty. He further submits that, in the present case, the order convicting the appellant and imposing death penalty were done simultaneously. He submits that the learned Trial Judge also does not consider the balance between the mitigating circumstances and aggravating circumstances while awarding the death penalty. Learned Senior Counsel therefore submits that in the event this Court is not inclined to interfere with the finding of the conviction, in the facts and circumstances of this case and particularly taking into consideration the fact that the appellant lost his mother and brother at a tender age, the socio-economic background of the appellant and the age of the appellant at the time of commission of crime so also his conduct and behaviour in the prison entitle him for commutation of sentence.
5. Shri Bhupendra Pratap Singh, learned Deputy Advocate General (DAG), on the contrary, submits that the learned Trial Judge as well as the High Court, upon appreciation of the evidence, have correctly come to a finding that the present appellant is guilty for the offences committed. He therefore submits that no interference is warranted in the present appeals.
6. Insofar as the prayer made by the learned Senior Counsel for the appellant regarding commutation is concerned, the learned DAG for the respondent-State relies on the following judgments of this Court in the cases of Shivu and Another v. Registrar General, High Court of Karnataka and Another,¹ Purushottam Dashrath

1 [2007] 2 SCR 555 : (2007) 4 SCC 713 : 2007 INSC 136

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Borate and Another v. State of Maharashtra,² and *Deepak Rai v. State of Bihar*,³ in order to contend that merely the age of the appellant cannot be taken into consideration. He further submits that the appellant taking advantage of the circumstances that the deceased was alone in the house has committed the heinous crime and therefore the present case would squarely fit in the category of 'rarest of the rare' cases. He submits that the psychological report would also show that there is no remorse expressed by the appellant. He therefore submits that taking into consideration all these aspects, the death penalty needs to be confirmed.

7. We have perused the material on record and find that the dying declaration recorded by the Executive Magistrate (Naib Tehsildar), PW-11, which was endorsed by Dr. Avinash Saxena, PW-9 is reliable and trustworthy. The dying declaration recorded by PW-11 is in question-answer form. In the said dying declaration, the deceased clearly implicates the present appellant. The Medical Officer, PW-9, before the commencement of the dying declaration has given an endorsement regarding fit mental status of the deceased to make a declaration and at the end of the dying declaration again he has endorsed that the deceased was in a fit state of mind. The written dying declaration is corroborated by the oral dying declaration as has come on record in the evidence of her grand-father Sohan Singh (PW-1), her grand-father's brother Mukund Singh (PW-2), her aunt Preeti (PW-13) and her uncle Sandeep Singh Rajpoot (PW-14).
8. In the said dying declaration, all the witnesses have clearly stated that the deceased after coming out from the room in flames has narrated the incident about the appellant committing the crime. Not only this, but DW-1-Golu Chaubey who was examined on behalf of the defence has also clearly stated that when the deceased came out of the house, she was shouting that the accused person(s) had committed rape on her and set her on fire. The statement of the deceased recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short, Cr.P.C.) by Smt. Suchita Srivastava, Judicial Magistrate First Class, Sagar (PW-23) also supports the

2 [\[2015\] 5 SCR 1112](#) : (2015) 6 SCC 652 : 2015 INSC 392

3 [\[2013\] 14 SCR 297](#) : (2013) 10 SCC 421 : 2013 INSC 638

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prosecution case. The *Dehat Nalishi* (Ex. P/28) recorded by Sub Inspector, Anjana Parmaar (PW-16) also narrates the same factual position.

9. In that view of the matter, we do not find that there is any error in the concurrent orders of the Trial Judge and the High Court convicting the appellant for the offences punishable under Sections 450, 376(2) (i), 376D, 376A and 302 read with 34 of the IPC and Section 5(g)/6 of the POCSO.
10. The question that now requires to be considered is as to whether the present case would fall in the category of 'rarest of rare case' so as to confirm the death penalty or the sentence could be commuted.
11. We have perused the psychological assessment of the present appellant as conducted by the Department of Psychiatry, NSCB Medical College, Jabalpur, Madhya Pradesh so also the report of the Senior Probation and Welfare Officer, Central Jail, Bhopal, Madhya Pradesh dated 12.06.2023 and the report of the Divisional Officer, Western Division/Assistant Jail Superintendent, Central Jail Jabalpur dated 10.06.2023.
12. In the said reports, it has been found that there is nothing against the behaviour of the appellant herein in the prison. His conduct in the prison has been found to be satisfactory. The reports further reveal that though not allotted any work, the appellant is engaging himself in plantation of trees, cleaning the temple and surrounding area.
13. While considering as to whether the death penalty needs to be confirmed or not, we would be required to take into consideration various factors.
14. It is not in dispute that the appellant lost his mother at the tender age of 8 years and his elder brother at the age of 10 years. The appellant was brought up by his father as a single parent. The appellant has close family ties with his father, his sister, who is married and his grand-mother. Though, Shri Singh is right that the age of the appellant at the time of commission of crime solely cannot be taken into consideration, however the age of the appellant/accused at the time of commission of crime along with other factors can certainly be taken into consideration as to whether the death penalty needs to be commuted or not.

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15. In the present case, it is to be noted that the appellant comes from a socio-economic backward stratum of the society. As already discussed hereinabove, he lost his mother and brother at the tender age. The appellant and his family members do not have any criminal background. The appellant was of a tender age of 22 years when the aforesaid incident occurred.
16. It cannot be said that the appellant is a hardened criminal, who cannot be reformed. The possibility of the appellant, if given the chance of being reformed, cannot be ruled out.
17. In that view of the matter, we find that in the present case the confirmation of death penalty would not be justified. However, at the same time we also find that the ordinary sentence of life i.e. 14 years imprisonment with remission would not meet the ends of justice. In our considered view, the present case would fall in the middle path, as laid down by this Court in a catena of judgments, which are as follows:-
 - i. Swamy Shraddananda (2) alias Murali Manohar Mishra v. State of Karnataka;⁴
 - ii. Shankar Kisanrao Khade v. State of Maharashtra;⁵
 - iii. Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka;⁶
 - iv. Prakash Dhawal Khairnar (Patil) v. State of Maharashtra;⁷
 - v. Mohinder Singh v. State of Punjab;⁸
 - vi. Madan v. State of Uttar Pradesh;⁹
 - vii. Navas @ Mulanavas v. State of Kerala¹⁰
18. We, therefore, find that in the facts and circumstances of the present case, the death penalty needs to be commuted to fixed imprisonment without remission for a period of 20 years.

4 [\[2008\] 11 SCR 93](#) : (2008) 13 SCC 767 : 2008 INSC 853

5 [\[2013\] 6 SCR 949](#) : (2013) 5 SCC 546 : 2013 INSC 281

6 [\[2017\] 2 SCR 62](#) : (2017) 5 SCC 415

7 [\[2001\] Supp. 5 SCR 612](#) : (2002) 2 SCC 35 : 2001 INSC 606

8 [\[2013\] 3 SCR 90](#) : (2013) 3 SCC 294 : 2013 INSC 61

9 [\[2023\] 16 SCR 765](#) : 2023 SCC OnLine SC 1473

10 [\[2024\] 3 SCR 913](#) : 2024 SCC OnLine SC 315 : 2024 INSC 215

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19. The order of conviction is maintained however the death penalty awarded under Sections 376A and 302 IPC is commuted to rigorous imprisonment for 20 years.
20. The appeals are allowed to the extent indicated above.
21. Pending application(s), if any, shall stand disposed of.

Result of the Case: Appeals allowed.

[†]Headnotes prepared by: Ankit Gyan