

**HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR**

D.B. Criminal Death Reference No. 6/2019

State Of Rajasthan, Through P.P.

----Appellant

Versus

Komal Lodha S/o Shri Hiralal Lodha, R/o Mogiyabeh Police Thana
Kamkheda Distt. Jhalawar.

----Respondent

Connected With

D.B. Criminal Appeal (Db) No. 374/2019

Komal Lodha S/o Hiralal Lodha, R/o Mogiyabeh Police Thana
Kamkheda Distt. Jhalawar.

----Appellant

Versus

State Of Rajasthan, Through P.P.

----Respondent

For Accused	:	Mr. Nitin Jain, Pro bono
For State	:	Ms. Rekha Madnani, Addl.G.A.

**HON'BLE MR. JUSTICE PANKAJ BHANDARI
HON'BLE MR. JUSTICE ANOOP KUMAR DHAND**

Judgment

JUDGMENT RESERVED ON :: **26/04/2022**

JUDGMENT PRONOUNCED ON :: **11/05/2022**

PER: PANKAJ BHANDARI, J.

REPORTABLE

1. D.B. Criminal Death Reference No.6/2019 was declined by the High Court and D.B. Criminal Jail Appeal No.374/2019 was partly allowed and while upholding the conviction of the accused under Section 302 IPC, the death sentence awarded with regard to offence under Section 302 IPC, was converted to imprisonment for life. Aggrieved by the said judgment and order, State preferred

Special Leave Petition (Criminal) Nos.5166 and 5167 of 2020 with the prayer to restore the death penalty. The Apex Court vide order dated 6.1.2022 partly allowed the appeal. The judgment and order passed by the High Court converting death penalty into life imprisonment was quashed and set aside and the matter has been remitted to the High Court to consider the question of sentence for the offence under Section 302 IPC, namely, whether death penalty and/or life sentence or any other appropriate sentence, considering the aggravating and/or mitigating circumstances to be pleaded and placed before the High Court. It was made clear by the Apex Court that so far as the conviction is concerned, the same is not upset and the same is confirmed and the matter is remitted only for the purpose of sentence for the offence under Section 302 IPC.

2. We have heard pro bono Mr. Nitin Jain appearing for the accused and Ms. Rekha Madnani, Additional Government Advocate appearing for the State.

3. It is contended by Mr. Nitin Jain, pro bono, that the accused at the time of alleged offence was a minor, his date of birth being 15.6.2001. It is also contended that statement of Deen Dayal (CW-1), who was Principal of a Government School, was recorded by the Court on 26.9.2018, but without giving weightage to the same and relying on the doctor's evidence, who was not even a Radiologist, vide order dated 1.10.2018, the accused was considered as a major. It is further contended that since the appellant was represented by an Amicus Curiae, he had no opportunity to challenge the order dated 1.10.2018 before the High Court. It is contended that in support of the statement, T.C., admission register and school record were produced. There was no

ground to disbelieve the statement of the Principal of a Government School.

4. It is also contended that the case rests on circumstantial evidence. It is argued that from the DNA profile, it is established that DNA obtained from the blood of the accused did not match with the male DNA profile obtained from the leggings and vaginal swab of the deceased.

5. It is also contended that the accused has no criminal antecedents. He has a wife, a five year old son and old parents. There is nothing on record to suggest that the appellant cannot be reformed. It is argued that since the case rests on circumstantial evidence and two male DNA profiles that were obtained from the leggings of the deceased and the DNA profile obtained from vaginal swab did not match with the DNA profile of the appellant, the Courts have erred in convicting the appellant for the alleged offences.

6. It is further contended that there is a flagrant violation of the provision of Section 235(2) Cr.P.C., which provide for real, effective and meaningful opportunity of hearing before passing of any order of sentence. It is submitted that no such opportunity was afforded to the accused and no time was given to the accused to place the material particulars by way of an affidavit on record suggesting mitigating circumstances, which was necessary to be taken into consideration before passing any order of sentence. It is also submitted that on the same date when the judgment of conviction was pronounced, the Court heard on the question of sentence without affording any opportunity to the accused.

7. With regard to death sentence, pro bono Mr. Nitin Jain appearing for the accused has drawn attention of the Court to

Section 354(3) Cr.P.C. It is argued that life imprisonment is the rule and death sentence is an exception. The correct approach should be to apply this policy to the relevant facts of a particular case bearing the question of sentence and to find out if there are any exceptional reasons justifying the imposition of death penalty as a departure from the general rule. Therefore, making the choice of punishment of ascertaining existence of absence of special reasons, due regard must be paid to both the crime and the criminal and great weightage must be given to the mitigating circumstances.

8. Learned Counsel Mr. Nitin Jain has placed reliance on the judgments in *Santa Singh Versus The State of Punjab*: **(1976) 4 SCC 190**, *Bachan Singh Versus State of Punjab*: **(1980) 2 SCC 684**, *Machhi Singh & Ors. Versus State of Punjab*: **(1983) 2 SCC 470**, *Santosh Kumar Satishbhushan Bariyar Versus State of Maharashtra*: **(2009) 6 SCC 498**, *Ajay Pandit @ Jagdish Dayabhai Patel & Anr. Versus State of Maharashtra*: **(2012) 8 SCC 43**, *Shankar Kisanrao Khade Versus State of Maharashtra*: **(2013) 5 SCC 546**, *Sushil Sharma Versus State (NCT of Delhi)*: **(2014) 4 SCC 317**, *Mohd. Mannan @ Abdul Mannan Versus State of Bihar*: **(2019) 16 SCC 584**, *Irappa Siddappa Murgannavar Versus State of Karnataka*: **(2022) 2 SCC 801**, *Lochan Shrivastava Versus State of Chhattisgarh*: **2021 SCC OnLine SC 1249**, *Pappu Versus State of Uttar Pradesh*: **2022 SCC OnLine SC 176**, *Vipul Rasikbhai Koli Jankher Versus State of Gujarat*: **2022 LiveLaw (SC) 288**.

9. Relying on the above judgments, it is argued that rape and murder of a seven year old girl shocks the conscience and it is indeed barbaric, but it is argued that there is no evidence to

support that the accused had committed rape and murder and that the murder was premeditated. Further, the Court below has not considered that the crime is the 'rarest of rare' crime as mandated by the Apex Court in the case of *Bachan Singh* (supra). It was argued that in deciding whether the case falls within the category of rarest of rare case, brutality and/or gruesome and/or heinous nature of the crime is not the sole criterion. It is not just the crime, which the Court has to take into consideration, but also the criminal, the state of his mind, his socio-economic background etc. and that awarding of death sentence is an exception and life imprisonment is the rule.

10. With regard to the mitigating circumstances, it is contended that the accused was a minor at the time of commission of the alleged offence. He was not having any criminal record. He had studied only till Class-V and belongs to a very poor family. The social-economic condition of the family of the accused is very bad. They live in a very remote area of District Jhalawar. He has a wife, a son aged five years, father aged about 67 years, mother aged about 64 years and one unmarried sister. He is a member of the backward class. It is contended that though the accused has three more brothers, but his old aged father, mother and his unmarried sister are living with his wife.

11. It is also contended that reformatory theory has also been given importance in *Bachan Singh* (supra) and it is for the State to prove that reformation would not be possible and it is only when the State puts up a case that the accused cannot be reformed, then only the Court can go to the extent of awarding death penalty. It is further contended that there is no material to establish that the appellant was incapable of being reformed, that

he would remain threat to the society and that the only punishment that would be given with regard to nature of crime is death sentence. It is contended that the conduct of the accused in prison is also satisfactory, which also is a mitigating circumstance. The entire mitigating circumstances are to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before option of death penalty is exercised. It is also contended that before passing death sentence as per the mandate under Section 354(3) Cr.P.C., special reasons are to be recorded.

12. Learned counsel for the State has contended that the aggravating circumstance is the brutal and heinous nature of crime committed by the accused. The victim was subjected to sexual assault. She sustained vaginal and anal injuries and was murdered by throttling. Victim was an innocent seven year old, helpless girl. It was argued that presence of two male DNA profiles on the legging of the victim show that it was a case of gang rape. This fact was in knowledge of the accused and he was the best person, who could have explained as to who was his accomplice. It is also contended that offence was premeditated as the accused followed the victim and took her to his own fields. It is further contended that offence was not committed under any duress or provocation and the accused was a person of criminal mentality. It is contended that the accused was a married man, he was also a father of a young child and in spite of this, he committed an offence with a child, which proves his criminal mentality.

13. Learned Additional Government Advocate appearing on behalf of the State has placed reliance on *Mukesh & Anr. Versus State (NCT of Delhi) & Ors.*: **(2017) 6 SCC 1**. It is argued that

the aggravating circumstances of the case outweigh the mitigating circumstances and bring the case under the category of 'rarest of rare' case. It is also argued that crime against helpless women and young girls of tender age are social crimes, which disrupt the entire social fabric and hence, they call for harsh punishments. Undue sympathy to impose inadequate sentence would do more harm to justice system and will undermine public confidence in efficacy of law. Meagre sentence imposed without considering the nature and gravity of the offence will be counter-productive in long run and against the interest of society. It is argued that the accused has already been sentenced for life imprisonment for rest of his life under Section 6 of the POCSO Act and the intention of the Apex Court in remanding the matter back to this Court was certainly to award a more harsh and stringent punishment, as the present case falls within the purview of 'rarest of rare' case. It is also argued that the accused does not deserve any leniency and death penalty is the only appropriate punishment.

14. Before dealing with the aggravating and mitigating circumstances, it would be appropriate to first refer to the cases cited at bar by the counsel for the parties. In *Santa Singh* (supra), it was held by the Apex Court that the accused has a right of hearing before the award of sentence and hearing implies opportunity to place full and adequate material before the Court and if necessary to lead evidence in support. It was held that the said provision is mandatory and cannot be treated as a mere irregularity curable under Section 465 Cr.P.C. and failure to give opportunity vitiates the award of sentence.

15. In *Bachan Singh* (supra), while upholding the constitutional validity of death penalty provided under Section 302 IPC, the Apex Court laid down certain aggravating circumstances and mitigating circumstances, which have to be weighed before awarding sentence to the accused.

16. Aggravating circumstances were dealt with in Para 202 of the judgment, which is reproduced hereunder:

202. Drawing upon the penal statutes of the States in U.S.A. framed after *Furman v. Georgia*, in general, and Clauses (2)(a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these "aggravating circumstances".

Aggravating circumstances : A Court may, however, in the following cases impose the penalty of death in its discretion :

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed.

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the CrPC, 1973, or who had rendered assistance to a Magistrate or a police officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

17. Mitigating circumstances were dealt with in Para 206, which is reproduced hereunder:

206. Dr. Chitale has suggested these mitigating factors :

Mitigating circumstances: In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances :

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated. The State shall by evidence prove that the accused does not satisfy the conditions 3 and 4 above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person,

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

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. Some of these factors like extreme youth can instead be of compelling importance. In several States of India, there are in force special enactments, according to which a 'child', that is, 'a person who at the date of murder was less than 16 years of age', cannot be tried, convicted and sentenced to death or imprisonment for life for murder, nor dealt with according for the same procedure as an adult. The special Acts provide for a reformatory procedure for such juvenile offenders or children.

18. In *Machhi Singh* (supra), the Apex Court observed certain propositions that emerged from Bachan Singh's case. The same are reproduced hereunder:

37. In this background the guidelines indicated in Bachan Singh's case (supra) will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentences arises. The following propositions emerge from Bachan Singh's case :

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

(ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith 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 for 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 the mitigating circumstances before the option is exercised.

19. In *Santosh Kumar Satishbhushan Bariyar* (supra), the Court while dealing with rarest of rare dictum also dealt with the reformatory theory. Paras 60, 61, 66, 157, 158, 159 and 161 are reproduced hereunder:

60. The *rarest of rare* dictum serves as a guideline in enforcing Section 354(3) and entrenches the policy that life imprisonment is the rule and death punishment is an exception. It is a settled law of interpretation that exceptions are to be construed narrowly. That being the case, the *rarest of rare* dictum places an extraordinary burden on the court, in case it selects death punishment as the favoured penalty, to carry out an objective assessment of facts to satisfy the exceptions ingrained in the *rarest of rare* dictum.

61. The background analysis leading to the conclusion that the case belongs to *rarest of rare* category must conform to highest standards of judicial rigor and thoroughness as the norm under analysis is an exceptionally narrow exception. A conclusion as to

the *rarest of rare* aspect with respect to a matter shall entail identification of aggravating and mitigating circumstances relating both to the crime and the criminal.

66. The *rarest of rare* dictum, as discussed above, hints at this difference between death punishment and the alternative punishment of life imprisonment. The relevant question here would be to determine whether life imprisonment as a punishment will be pointless and completely devoid of reason in the facts and circumstances of the case? As discussed above, life imprisonment can be said to be completely futile, only when the sentencing aim of reformation can be said to be unachievable. Therefore, for satisfying the second exception to the *rarest of rare* doctrine, the court will have to provide clear evidence as to why the convict is not fit for any kind of reformatory and rehabilitation scheme. This analysis can only be done with rigor when the court focuses on the circumstances relating to the criminal, along with other circumstances. This is not an easy conclusion to be deciphered, but Bachan Singh (supra) sets the bar very high by introduction of *Rarest of rare* doctrine.

157. The doctrine of proportionality, which appears to be the premise whereupon the learned trial judge as also the High Court laid its foundation for awarding death penalty on the appellant herein, provides for justifiable reasoning for awarding death penalty. However while imposing any sentence on the accused the court must also keep in mind the doctrine of rehabilitation. This, considering Section 354(3) of the Code, is especially so in the cases where the court is to determine whether the case at hand falls within the *rarest of the rare* case.

158. The reasons assigned by the courts below, in our opinion, do not satisfy Bachan Singh Test. Section 354(3) of the Code provides for an exception. General rule of doctrine of proportionality, therefore, would not apply. We must read the said provision in the light of Article 21 of the Constitution of India. Law laid down by Bachan Singh (supra) and Machhi Singh (supra) interpreting Section 354(3) of the Code should be taken to be a part of our constitutional scheme.

159. Although the Constitutional Bench judgment of the Supreme Court in Bachan Singh (supra) did not lay down any guidelines on determining which cases fall within the '*rarest of rare*' category, yet the mitigating circumstances listed in and endorsed by the judgment gives reform and rehabilitation great importance, even requiring the state to prove that this would not be possible, as a precondition before the court awarded a death sentence. We cannot therefore determine punishment on grounds of proportionality alone.

161. The expression "special reasons" in the context of this provision, obviously means "exceptional reasons" founded on the exceptionally grave circumstances of the particular case relating to the crime as well as the criminal.

20. In *Ajay Pandit @ Jagdish Dayabhai Patel & Anr.* (supra), the Apex Court observed as under:

45. This Court in a recent judgment in **Rajesh Kumar (supra)** examined at length the evaluation of sentencing policy and the concept of mitigating circumstances in India relating to the death penalty. The meaning and content of the expression "hearing the accused" under Section 235(2) and the scope of Sections 354(3) and 465 Code of Criminal Procedure were elaborately considered. The Court held that the object of hearing under Section 235(2) Code of Criminal Procedure being intrinsically and inherently connected with the sentencing procedure, the provisions of Section 354(3) Code of Criminal Procedure which calls for recording of special reason for awarding death sentence, must be read conjointly. The Court held that such special reasons can only be validly recorded if an effective opportunity of hearing as contemplated under Section 235(2) Code of Criminal Procedure is genuinely extended and is allowed to be exercised by the accused who stands convicted and is awaiting the sentence.

46. In our view, the principles laid down in the above cited judgments squarely applies on the question of awarding of sentence and we find from the records that the High Court has only mechanically recorded what the accused has said and no attempt has been made to elicit any information or particulars from the accused or the prosecution which are relevant for awarding a proper sentence. The accused, of course, was informed by the Court of the nature of the show-cause-notice. What was the nature of show cause notice? The nature of the show-cause-notice was whether the life sentence awarded by the trial court be not enhanced to death penalty. No genuine effort has been made by the Court to elicit any information either from the accused or the prosecution as to whether any circumstance exists which might influence the Court to avoid and not to award death sentence.

47. Awarding death sentence is an exception, not the rule, and only in rarest of rare cases, the Court could award death sentence. The state of mind of a person awaiting death sentence and the state of mind of a person who has been awarded life sentence may not be the same mentally and psychologically. The court has

got a duty and obligation to elicit relevant facts even if the accused has kept totally silent in such situations. In the instant case, the High Court has not addressed the issue in the correct perspective bearing in mind those relevant factors, while questioning the accused and, therefore, committed a gross error of procedure in not properly assimilating and understanding the purpose and object behind Section 235(2) Code of Criminal Procedure.

21. In *Shankar Kisanrao Khade* (supra), the Apex Court dealt with the aggravating and mitigating circumstances i.e. crime test and criminal test and observed in Para 52 as under:

52. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R test). R-R Test 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 to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges."

22. The Apex Court also discussed the cases in which death penalty was awarded by the Apex Court and cases in which death penalty was commuted and observed as under:

DEATH PENALTY AWARDED

1. **Nathu Garam v. State of Uttar Pradesh** : (1979) 3 SCC 366)

This Court in that case upheld the death sentence awarded by the trial Court, confirmed by the High Court, for causing death of a 14 year old girl by a person aged 28 years after luring her into the house for committing criminal assault. Judgment was delivered prior to **Bachan Singh** (supra), therefore, the mitigating circumstances concerning the criminal were not seen addressed. Stress was more on "crime test".

2. **Jumman Khan v. State of Uttar Pradesh** : (1991) 1 SCC 752)

This Court, in this case, was hearing a writ petition moved by a convict, not to extend the death sentence. Writ Petition was dismissed after referring to the order passed by this Court in S.L.P. (Criminal) No. 558 of 1986, confirming the death sentence, noticing the degree of criminality and the reprehensive and gruesome manner the crime was committed on a six year old child. "Criminal test" is not *prima facie* seen satisfied, but only the "crime test".

3. **Dhananjoy Chatterjee v. State of West Bengal** : (1994) 2 SCC 220)

This Court dealt with a case of rape and murder of a young girl of about 18 years. The Court opined that a real and abiding concern for the dignity of human life is required to be kept in mind by courts while considering the confirmation of the sentence of death but a cold-blooded and pre-planned murder without any provocation, after committing rape on an innocent and defenseless young girl of 18 years exists in a rarest of rare cases which calls for no punishment other than capital punishment.

Paras 14 and 15 of the judgment would indicate that this Court was more on crime test, not on criminal test, which are extracted below:

14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the victim of crime as also

the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and alter considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.

15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenseless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

Prima facie, it is seen that criminal test has not been satisfied, since there was not much discussion on the mitigating circumstances to satisfy the 'criminal test'.

4. **Laxman Naik v. State of Orissa** : (1994) 3 SCC 381)

This Court again confirmed the death sentence on an accused for the offence of rape followed by murder of 7 year old girl by her own uncle. The Court opined that the accused seems to have acted in a beastly manner. After satisfying his lust, he thought that the victim might expose him for the commission of offence on her to her family members and others, the accused with a view to screen the evidence of the crime, put an end to the life of that innocent girl. The Court noticed how diabolically the accused had conceived his plan and brutally executed it in such a calculated cold blooded and brutal murder of a very tender age girl after committing rape on her which, according to the Court, undoubtedly falls in the rarest of rare case attracting no punishment other than capital punishment.

In this case aggravating circumstances, that is, "crime test" is seen fully satisfied, but on mitigating circumstances (criminal test), this Court held as follows:

26. This brings us to the question of sentence to be imposed upon the Appellant for the offences for which he has been found guilty by the two Courts below as well as by us discussed above. In this connection it may be pointed out that this Court in the case of

Bachan Singh v. State of Punjab: (1980) 2 SCC 684 while discussing the sentencing policy, also laid down norms indicating the area of imposition of death penalty taking into consideration the aggravating and mitigating circumstances of the case and affirmed the view that the sentencing discretion is to be exercised judicially on well recognized principles, after balancing all the aggravating and mitigating circumstances of the crime guided by the Legislative Policy discernible from the provision contained in Sections 253(2) and 354(3) of the Code of Criminal Procedure. In other words, the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty it may be noticed that there are absolutely no mitigating circumstances in the present case. On the contrary the facts of the case disclose only aggravating circumstances against the Appellant which we have to some extent discussed above and at the risk of repetition shall deal with that again briefly.

27. The hard facts of the present case are that the Appellant Laxman is the uncle of the deceased and almost occupied the status and position that of guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the Appellant must have believed in his bona fide also and it was on account of such a faith and belief that she acted upon the command of the Appellant in accompanying him under the impression that she was being taken to her village unmindful of the pre-planned unholy designs of the Appellant. The victim was totally a helpless child there being no one to protect her in the desert where she was taken by the Appellant misusing his confidence to fulfill his just. It appears that the Appellant had pre-planned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act.

Both the tests "crime lest" and "criminal test", it is seen, have been satisfied against the accused for awarding capital punishment.

5. **Kamta Tiwari v. State of M.P.** : (1996) 6 SCC 250)

This Court dealt with a case of rape followed by murder of a 7 year old girl. Evidence disclosed that the accused was close to the family of the father of the deceased and the deceased used to call him "uncle", This Court noticed the closeness to the accused and the accused encouraged her to go to the grocery shop where the girl was kidnapped by him and was subjected to rape and later strangled to death throwing the dead body in a well. This Court described the murder as gruesome and

barbaric and pointed out that a person, who was in a position of a trust, had committed the crime and the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuaded this Court to hold that case as a rarest of rare cases where death sentence was warranted. The Court was following the guidelines laid down in **Machhi Singh** (supra), held as follows:

8. Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances-but found aggravating circumstances aplenty. The evidence on record clearly establishes that the Appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him 'Tiwari uncle'. Obviously her closeness with the Appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The Appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder-as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent hapless girl of 7 years was subjected to such 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 the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a 'rarest of rare' cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's a abhorrence of such crimes.

The Court was giving thrust on crime test rather than criminal test against the accused.

6. ***Molai v. State of M.P.***: (1999) 9 SCC 581)

A three-Judge Bench of this Court justified death sentence in a case where a 16 year old girl, preparing for her Tenth Standard Examination was raped and strangled to death. The Court noticed the gruesome manner in which rape was committed and the way in which she was strangled to death and the dead body was immersed in the septic tank. On sentence, the Court held as follows:

"36. We have very carefully considered the contentions raised on behalf of the parties. We have

also gone through various decisions of this Court relied upon by the parties in the courts below as well as before us and in our opinion the present case squarely falls in the category of one of the rarest of rare cases, and if this be so, the courts below have committed no error in awarding capital punishment to each of the accused. It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangled her by using her under-garment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (Appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

The three-Judge Bench, it is seen, has applied both the tests Crime test as well as the Criminal test and found that the case falls in the category of rarest of rare cases.

7. **Bantu v. State of Uttar Pradesh**: (2008) 11 SCC 113)

This Court confirmed the death sentence in a case where a minor girl of 5 years was raped and murdered. This Court, following the principles laid down in **Bachan Singh**, pointed out that when the victim of the murder is an innocent child or a helpless woman or old or infirm person or a person vis--vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community, it is a vital factor justifying award of capital punishment. In this judgment also, this Court stressed on drawing of a balance sheet of mitigating and aggravating circumstances, following the judgment in **Devender Pal Singh v. Government of NCT of Delhi**: (2002) 5 SCC 234. Court was applying the "balancing test", to award capital sentence.

8. **Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra**: (2008) 15 SCC 269)

This was a case where the accused, a married man having three children, was known to the family of the deceased. The Court noticed the horrendous manner in which the girl aged 9 years was done to death after

ravishing her, The Court awarded capital punishment. The Court, in this case, took the view that mitigating and aggravating circumstances have to be balanced. Here also the test applied was the "balancing test" to award capital punishment.

9. Mohd. Mannan @ Abdul Mannan v. State of Bihar: (2011) 5 SCC 317)

This was a case where a minor girl aged 7 years was kidnapped, raped and murdered. Court noticed how the accused had won the trust of that innocent girl and the gruesome manner in which she was subjected to rape and then strangled her to death. The accused was aged 42-43 years. The Court held that he would be a menace to society and would continue to be so and could not be reformed. The Court awarded death sentence. The Court, in this case, held that a balance sheet is to be prepared while considering the imposition of death sentence. Here also the test applied was "balancing test" to award capital punishment.

10. Rajendra Pralhadrao Wasnik v. State of Maharashtra: (2012) 4 SCC 37

This was a case of rape and murder of a 3 years old child by a married man of 31 years. Court noticed the brutal manner in which the crime was committed and the pain and agony undergone by the minor girl. The Court confirmed the death sentence awarded. The Court elaborately discussed when the aggravating and mitigating circumstances to be taken note of before awarding sentence and what are the principles to be followed, while awarding death sentence. The Court then held as follows:

"37. When the Court draws a balance-sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused.

38. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of 'trust-belief' and 'confidence', in which capacity he took the child from the house of PW2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness.

The Court in this case also applied the "balancing test" to award capital punishment.

CASES IN WHICH DEATH PENALTY COMMUTED

1. Kumudi Lal v. State of U.P.: ((1999) 4 SCC 108)

It was a case where a 14 year girl was raped and killed by strangulation. The Court accepted the brutality of the crime, however commuted death penalty to life imprisonment. The Court noticed that the evidence did not indicate the girl was absolutely unwilling but rather showed that she initially permitted the accused to take some liberties with her but later expressed her unwillingness. Treating the same as a mitigating factor, death sentence was commuted to that of life imprisonment. 'Criminal test' was applied and was found not fully satisfied since some mitigating circumstances were found to be in favour of the accused so as to avoid death sentence.

2. **Raju v. State of Haryana**: (2001) 9 SCC 50)

This Court commuted death sentence to life imprisonment in a case where a girl of 11 years was raped and murdered. Court noticed that the accused had no intention to murder her, but on the spur of the moment, without any premeditation, he gave two brick blows which caused the death. Further, it was also found that the accused had no previous criminal record or would be a threat to the society. 'Criminal test' was applied and found not fully satisfied some mitigating circumstances were found to be in favour of the accused so as to avoid death sentence.

3. **Bantu alias Naresh Giri v. State of M.P.** : (2001) 9 SCC 615)

This Court commuted death sentence to that of life imprisonment in a case where a girl of 6 years was raped and murdered by a boy of less than 22 years. Though, this Court found that the act was heinous and required to be condemned, but it could not be said to be one of the rarest of rare category. The accused did not require to be eliminated from the society. 'Criminal test' was applied and found some circumstances favouring the accused so as to avoid death sentence.

4. **State of Maharashtra v. Suresh** : (2000) 1 SCC 471)

This Court in that case commuted the death sentence to life imprisonment where a girl of 4 years old was raped and murdered. Though this Court felt that the case was perilously near the region of rarest of the rare cases, but refrained from imposing extreme penalty, "Criminal test" was applied and narrowly escaped death sentence.

5. **Amrit Singh v. State of Punjab**: AIR 2007 SC 132)

This Court commuted death sentence to that of life imprisonment in a case, where a 7-8 years old girl was raped and murdered by the accused aged 31 years. The Court noticed the manner in which the deceased was raped, it was brutal, but held it could have been a

momentary lapse on the part of the accused, seeing a lonely girl at a secluded place and there was no pre-meditation for commission of the crime. "Criminal test" it is seen, has been applied in favour of the accused to avoid death sentence.

6. Rameshbhai Chandubhai Rathod v. The State of Gujarat: (2011) 2 SCC 764)

This Court commuted death sentence to life imprisonment of the accused committing rape and murder of a girl of 8 years. It was noticed that the accused at the time of the commission of crime was 27 years and possibility of reformation could not be ruled out. "Criminal test" was applied considering the age of the accused and possibility of reformation saved the accused from death penalty.

7. Surendra Pal Shivbalak Pal v. State of Gujarat: (2005) 3 SCC 127)

This Court commuted death sentence to that of life imprisonment in a case where the accused aged 36 years had committed rape and murder of a minor girl. This Court noticed at the time of occurrence, the accused had no previous criminal record and held would not be a menace to the society in future. "Criminal test" was applied and absence of previous record was considered as a circumstance to avoid death sentence.

8. Amit v. State of Maharashtra: (2003) 8 SCC 93)

This Court commuted death sentence to life imprisonment in a case where the accused aged 28 years had raped and murdered a girl of 11-12 years. This Court noticed that the accused had no previous criminal track record and also there was no evidence that he would be a danger to the society in future. "Criminal test" was applied, absence of previous track record and danger to the society were considered to avoid death sentence."

23. The Apex Court in the above-noted cases broadly analyzed the several reasons, which can be cumulatively taken for converting death penalty to imprisonment for life and observed as under:

Broad analysis:

106. A study of the above cases suggests that there are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include:

(1) the young age of the accused (**Amit v. State of Maharashtra** aged 20 years, **Rahul** aged 24 years, **Santosh Kumar Singh** aged 24 years, **Rameshbhai Chandubhai Rathod (2)** aged 28 years and **Amit v. State of Uttar Pradesh** aged 28 years);

(2) the possibility of reforming and rehabilitating the accused (**Santosh Kumar Singh** and **Amit v. State of Uttar Pradesh** the accused, incidentally, were young when they committed the crime);

(3) the accused had no prior criminal record (**Nirmal Singh, Raju, Bantu, Amit v. State of Maharashtra, Surendra Pal Shivbalakpal, Rahul** and **Amit v. State of Uttar Pradesh**);

(4) the accused was not likely to be a menace or threat or danger to society or the community (**Nirmal Singh, Mohd. Chaman, Raju, Bantu, Surendra Pat Shivbalakpal, Rahul** and **Amit v. State of Uttar Pradesh**),

(5) a few other reasons need to be mentioned such as the accused having been acquitted by one the Courts (**State of Tamil Nadu v. Suresh, State of Maharashtra v. Suresh, Bharat Fakira Dhiwar, Mansingh** and **Santosh Kumar Singh**);

(6) the crime was not premeditated (**Kumudi Lal, Akhtar, Raju** and **Amrit Singh**);

(7) the case was one of circumstantial evidence (**Mansingh** and **Bishnu Prasad Sinha**).

24. In *Shankar Kisanrao Khade* (supra), an eleven year old minor was kidnapped and raped by the accused repeatedly and thereafter, she was strangled to death. The Apex Court applying the guidelines as laid down in *Bachan Singh's* case came to the conclusion that death penalty be converted to life imprisonment.

25. In *Sushil Sharma* (supra), the Apex Court after considering various judgments of the Apex Court observed as under:

"101. We notice from the above judgments that mere brutality of the murder or the number of persons killed or the manner in which the body is disposed of has not always persuaded this Court to impose death penalty. Similarly, at times, in the peculiar factual matrix, this Court has not thought it fit to award death penalty in cases, which rested on circumstantial evidence or solely

on approver's evidence. Where murder, though brutal, is committed driven by extreme emotional disturbance and it does not have enormous proportion, the option of life imprisonment has been exercised in certain cases. Extreme poverty and social status has also been taken into account amongst other circumstances for not awarding death sentence. In few cases, time spent by the accused in death cell has been taken into consideration along with other circumstances, to commute death sentence into life imprisonment. Where the accused had no criminal antecedents; where the State had not led any evidence to show that the accused is beyond reformation and rehabilitation or that he would revert to similar crimes in future, this Court has leaned in favour of life imprisonment. In such cases, doctrine of proportionality and the theory of deterrence have taken a back seat. The theory of reformation and rehabilitation has prevailed over the idea of retribution.

103. In the nature of things, there can be no hard and fast rules which the court can follow while considering whether an accused should be awarded death sentence or not. The core of a criminal case is its facts and, the facts differ from case to case. Therefore, the various factors like the age of the criminal, his social status, his background, whether he is a confirmed criminal or not, whether he had any antecedents, whether there is any possibility of his reformation and rehabilitation or whether it is a case where the reformation is impossible and the accused is likely to revert to such crimes in future and become a threat to the society are factors which the criminal court will have to examine independently in each case. Decision whether to impose death penalty or not must be taken in light of guiding principles laid down in several authoritative pronouncements of this Court in the facts and attendant circumstances of each case."

26. In *Mohd. Mannan @ Abdul Mannan* (supra), the Apex Court observed as under:

72. The proposition of law which emerges from the judgments referred to above is that death sentence cannot be imposed except in the rarest of rare cases, for which special reasons have to be recorded, as mandated in Section 354(3) of the Code of Criminal Procedure. In deciding whether a case falls within the category of the rarest of rare, the brutality, and/or the gruesome and/or heinous nature of the crime is not the sole criterion. It is not just the crime which the Court is to take into consideration, but also the criminal, the state of his mind, his socio-economic background, etc.

Awarding death sentence is an exception, and life imprisonment is the rule.

73. Therefore, before imposing the extreme penalty of death sentence, the Court would have to satisfy itself that death sentence is imperative, as otherwise the convict would be a threat to society, and that there is no possibility of reform or rehabilitation of the convict, after giving the convict an effective, meaningful, real opportunity of hearing on the question of sentence, by producing materials.

79. In this case, an eight year old innocent girl fell prey to the carnal desire and lust of the Petitioner. It is not known whether there was any pre-meditation on the part of the Petitioner to murder the victim. The circumstances in which he murdered the victim are also not known. The conviction is based on circumstantial evidence and extra judicial confession made by the Petitioner to the police in course of investigation. There can be no doubt that the crime is abhorrent, but it is doubtful as to whether the crime committed by the Petitioner can be termed as "rarest of the rare".

27. In *Irappa Siddappa Murgannavar* (supra), a five year old girl was raped and murdered by the accused. The Court after considering the mitigating circumstances converted death penalty to sentence of imprisonment for life with the stipulation that the accused shall not be released before 30 years.

28. In *Lochan Shrivastava* (supra), wherein the case was that a three year old girl was raped and murdered by the accused. The Apex Court considering the young age of the accused with the fact that the accused can be reformed and rehabilitated, the probability that the accused would not commit similar criminal acts, that the accused would not continue to be threat to the society, converted death penalty to life imprisonment.

29. In *Pappu* (supra), the Apex Court was dealing with the case where a seven year old girl was raped and murdered. The Apex Court commuted the death sentence to life imprisonment of 30 years' LI with no premature release/remission and observed as under:

169. The heinous nature of crime like that of present one, in brutal rape and murder of a seven-year-old girl child, definitely discloses aggravating circumstances, particularly when the manner of its commission shows depravity and shocks the conscience. But, at the same time, it is noticeable that the Appellant has no criminal antecedents, comes from a very poor socio-economic background, has a family comprising of wife, children and aged father, and has unblemished jail conduct. When all these factors are added together and it is also visualised that there is nothing on record to Rule out the probability of reformation and rehabilitation of the Appellant, it would be unsafe to treat this case as falling in 'rarest of rare' category. Putting it differently, when the Appellant is not shown to be a person having criminal antecedents and is not a hardened criminal, it cannot be said that there is no probability of him being reformed and rehabilitated. His unblemished jail conduct and having a family of wife, children and aged father would also indicate towards the probability of his reformation.

30. In *Vipul Rasikbhai Koli Jankher* (supra), the Apex Court held that in determining the quantum of sentence, the Court must bear in mind the circumstances pertaining to the offence and all other relevant circumstances including the age of the offender. It was further held that the principles of restorative justice find place within the Indian Constitution and severity of sentence is not the only determinant for doing justice to the victims.

31. Learned Additional Government Advocate has placed reliance on *Mukesh & Anr.* (supra) wherein the Apex Court held that the Court should consider cumulative effect of both factors i.e. aggravating and mitigating circumstances and has to strike a balance between the two to see towards which side scale/balance of justice tilts. The Court held that though there were mitigating circumstances like young age of the accused, dependants and ailing parents, post-crime remorse and good behaviour in jail and absence of criminal antecedents, but the aggravating circumstances outweighed them, warranting confirmation of death

sentence. This case is the Delhi gang rape case, which is popularly known as Nirbhaya's case wherein death penalty was awarded.

32. We have considered the contentions.

33. In the light of the above judgments, we would now deal with aggravating and mitigating circumstances of the present case.

34. The aggravating circumstances are that a seven year old girl was raped, sodomized and murdered. Though the accused has been convicted by the Division Bench of this Court and the judgment of conviction has been upheld by the Apex Court, but while considering the aggravating circumstances, it becomes the duty of this Court to apply the crime test that is to see the circumstances in which the crime was committed.

35. The case rests on circumstantial evidence, the Courts have placed reliance on the DNA report but from the perusal of the same, it is revealed that two male DNA profiles were obtained from the leggings of the deceased and two male DNA profiles were obtained from the underwear of the accused. DNA obtained from the blood sample of the present appellant did not match with the DNA obtained from vaginal swab and also the two male DNA profiles obtained from the leggings of the deceased. The DNA report was not even put to the accused when his statement was recorded under Section 313 Cr.P.C. and he was not given any opportunity to explain the DNA report. The two male DNA profile obtained from the leggings of the deceased did not match with the DNA profile of the blood sample taken from the accused, the only conclusion that can be drawn from the above is that the two criminals who actually committed the crime were not booked by the police. The accused is a member of backward class and belongs to a very poor family. He was not having means even to

engage a lawyer and a lawyer was provided by the Legal Service Authority and a pro bono counsel has argued the case before the High Court.

36. As far as mitigating circumstances are concerned, Deen Dayal (CW-1) the Principal of the Government School was examined as a court witness. Deen Dayal stated before the Court that the date of birth of the accused based on school record (Exhibit-C-1) is 15.6.2001 as per which accused was a minor and at the time of occurrence of the alleged offence his age was only 17 years and 1 month. As per the Juvenile Justice Act, if the date of birth is mentioned in the school first attended the same has to be considered by the Court, there was thus no justification in not relying on the statement of Court Witness and the Admission Register produced by the Court Witness. It is also important to note that the Investigating Officer admitted in his cross-examination that documents pertaining to age of the accused were recovered by him but had no explanation as to why they were not produced. However, the Court relying on the statement of the doctor, who had conducted the medical examination, held the age of the appellant to be between 19 to 21 years. PW-13 the doctor was not a radiologist and he opined on the basis of X-Ray Report that the age of the accused was between 19 to 21 years. As per the Juvenile Justice Act, the age as mentioned in school first attended has to be considered, however, even considering the statement of the doctor, the accused was a very young boy.

37. The other mitigating circumstance is that the accused has no criminal background, yet another mitigating circumstance in favour of the appellant is that his jail conduct was good. He has old parents, a wife and a five year old son. His wife is working as a

labourer to make both ends meet. The State has not come up with any material to show that the accused is a threat to the society or that he cannot be reformed.

38. In the light of the above, even though a seven year old girl was raped, sodomized and murdered, this aggravating circumstance in view of the discussions made herein above cannot be considered to be an aggravating circumstance against the present accused. We are alive of the fact that the conviction of the accused has been upheld by the Apex Court, but it is a cardinal principle of criminal law that let hundred guilty be acquitted but one innocent should not be held guilty.

39. The maxim 'let hundred guilty be acquitted but, one innocent should not be convicted', is based on Blackstone's formulation that it is better that ten guilty persons escape than that one innocent suffers. This statement is the guiding principle behind rules of procedure and evidence guiding our Courts, when any law relating to procedure and evidence requires interpretation, the interpretation given to such provision is usually in favour of the accused upholding the presumption of innocence. The reason for this is to ensure that the police and prosecution do their job right, and to ensure that an overzealous prosecution does not result in an innocent man being convicted of a crime, he did not commit, otherwise people would not have faith and respect for the justice delivery system.

40. Learned Additional Government Advocate has very fairly conceded before the Court that there were two persons, who had committed the heinous offence of rape, sodomy and murder of a seven year old girl. To us also, it appears that two persons committed the horrendous act of rape and sodomy with a seven

year old girl and murdered the girl and thereafter, with the help of the police shifted the crime to the present appellant. The underwear even when it was said to be worn by the accused was seized after seven hours of arrest of the accused. Another thing which shook our conscience is that at the time when the appellant was arrested in the arrest memo (Exhibit-P42), they have mentioned that beneath the penis, there were some abrasion marks. It is indeed surprising that when appellant was arrested, a Police Constable looked beneath the penis of the accused. In the arrest memo, it is mentioned that accused is wearing pant and underwear, there is no mention nor is there any evidence before the Court that he was derobed and his penis was checked and if he was actually derobed then why the underwear was not seized at the same time, which also points to the false implication of the accused. It is also relevant that the witnesses of arrest and recovery of underwear were police personnel and there were no independent witness to the arrest memo and recovery memo. It is evident that the underwear of the person, who in fact committed the offence, was shown as recovered from the present appellant and his semen was planted on the underwear. We would be failing in our duty if those culprits are not booked and justice is not given to the victim.

41. The role of the police and the investigating officer is also dubious for the very reason that the underwear which was got recovered from the present accused was having DNA of some other male and that DNA matched with the DNA of the deceased, which goes to show that to save a culprit, somebody else's underwear was got recovered from the present accused.

42. From the perusal of the judgment of the Apex Court, it is evident that the material facts i.e. age of the accused which according to the school record, was just 17 years and 1 month, the fact that the DNA report was not put to the appellant under Section 313 Cr.P.C., the fact that the leggings of the deceased had two male DNA profiles but none of them was matching with the DNA of the appellant, the DNA obtained from vaginal swab did not match with the DNA obtained from blood of accused, were not brought to the notice of the Apex Court and no assistance was provided to the appellant to prefer appeal before the Apex Court and his conviction was upheld without hearing the side of the appellant on merits. We, therefore, direct the Secretary, Rajasthan State Legal Services Authority to prefer Appeal against the judgment and order dated 24.10.2019 passed by Division Bench of this Court whereby D.B. Criminal Jail Appeal of the accused was partly allowed and Death Reference was declined by the High Court as doctrine laid down by Blackstone contemplates that ten guilty may go unpunished but even one innocent should not be punished.

43. We do not find any aggravating circumstance against the accused rather, all the mitigating circumstances are in favour of the accused. Since we have been directed to confine our judgment only on the question of sentence for offence under Section 302 IPC, we with heavy heart and with hope that justice would be done to the accused, who has been sentenced to imprisonment till death for crime committed by two other persons, commute sentence from death penalty to life imprisonment.

44. In view of the above, while commuting the death penalty to life imprisonment, we direct the concerned Superintendent of

Police, Jhalawar, to reopen the matter and investigate afresh to book the two accused whose DNA's were obtained from the leggings of the deceased for the offence of Murder, Rape, Sodomy and POCSO. Appropriate action be also initiated against those who booked the child belonging to a backward class with no means to defend his case. Superintendent of Police, Jhalawar, should submit report of the action taken by him within two months of the date of this order.

45. Before parting with the case, we would like to appreciate the sincere efforts put in by Mr. Nitin Jain, pro bono, appearing for the accused and the assistance provided to us by the learned Additional Government Advocate, who fairly accepted before the Court that there were two persons, who committed the offence with the victim.

46. The Death Reference is declined and Appeal is accordingly partly allowed.

47. Registrar(Judicial) is directed to send copy of this order to the Secretary, Rajasthan State Legal Service Authority, as well Superintendent of Police, Jhalawar, for necessary compliance. Copy of this order be also sent to the appellant for intimation.

(ANOOP KUMAR DHAND),J

(PANKAJ BHANDARI),J

SUNIL SOLANKI /PS