IN THE HIGH COURT AT CALCUTTA

Criminal Appellate Jurisdiction

Appellate Side

Present:
The Hon'ble Justice Debangsu Basak
And
The Hon'ble Justice Md. Shabbar Rashidi

DR 3 of 2023
The State of West Bengal
Vs.
Fagun Mandi @ Pui and Another

With

CRA (DB) 176 of 2024
Fagun Mandi @ Pui and Anr.
Vs.
State of West Bengal and Anr.
With
IA No.: CRAN 1 of 2024

For the Appellants	: Mr. Kallol Mondal, Ld. Sr. Adv. Mr. Krishan Ray, Adv. Mr. Souvik Das, Adv. Mr. Anamitra Banerjee, Adv. Mr. Akbar Laskar, Adv.
For the State	: Mr. Debasish Roy, Ld. PP Mr. Partha Pratim Das, Ld. App Mr. Saryati Datta, Adv.
Hearing Concluded on	: July 14, 2025
Judgement on	: July 23, 2025

DEBANGSU BASAK, J.:-

1. Death reference and the connected appeal have been heard analogously as they emanate out of the same impugned judgment of conviction dated June 27, 2023 and the order of sentence dated June 28, 2023 passed by the learned

Additional Sessions Judge, 2nd Court, Jhargram in Sessions Trial No. 03(02) of 2022 arising out of POCSO Case no. 18/21.

2. By the impugned judgment and order, the learned Trial Judge has convicted the appellants under Section 376 DB/302/34/201/34/363/365 of the Indian Penal Code, 1860 and also under Section 6 of the POCSO Act. Learned Single Judge has awarded death penalty to the appellants.

3. Learned senior advocate appearing for the appellants has submitted that, the conviction and the sentence are unsustainable since, they are based on conjectures, inconsistencies, inadmissible evidence, and passed in gross violation of the settled principles governing criminal jurisprudence and capital sentence.

4. Learned senior advocate appearing for the appellants has contended that, the incident, even if proved, cannot be classified as the rarest of rare case warranting imposition of death penalty. He has contended that, the crime and the criminal test have not been correctly applied. According to him, it cannot be said that, awarding of any sentence other than death penalty has been unquestionably foreclosed.

5. Learned senior advocate appearing for the appellants has submitted that, there are material contradictions with

regard to the place and mode of recovery of the dead body. He has referred to the inquest report as also to the deposition of the Executive Magistrate who stated that, the dead body was recovered from a canal on November 7, 2021. He has also referred to the testimonies of prosecution witness (PW) 2, 3, 4 and 6 who have stated that, the dead body was recovered from a paddy field allegedly shown by the appellant No. 1. He has contended that, there are discrepancies as to the place from where, the dead body was recovered and that, the same is fatal to the case of the prosecution.

6. Learned senior advocate appearing for the appellants has contended that, there is every possibility of fabrication in recovery of the seized articles. He has referred to the testimonies of PW 21 and 22 in this regard. He has submitted that, recovery of chocolates, burnt biri stub, bamboo stick and the victim's clothes was allegedly made on November 9, 2021 which is 5 days after the dead body was allegedly recovered on November 4, 2021. He has contended that, it is highly improbable that perishable items like chocolates, burnt biri stub and clothes would remain undamaged in an open paddy field for 5 days. The delay and improbability of such recovery, according to him has cast serious doubts as to its authenticity

and makes the same inadmissible in evidence. He has contended that, the same was planted and concocted evidence.

7. Learned senior advocate appearing for the appellants has contended that, the seizure list witnesses being PW 13 and PW 25 admitted that they were illiterate, unable to read and signed the seizure list without understanding the contents. He has contended that, prosecution failed to prove compliance with mandatory requirements under Section 100 of the Criminal Procedure Code and of the chain of custody of the seized articles. Moreover, the seized articles were not sent for forensic examination. Consequently, according to him, the seized articles are inadmissible in evidence.

8. Learned senior advocate appearing for the appellants has contended that, some of the prosecution witnesses claimed that they recorded statements under Section 164 of the Criminal Procedure Code. However, the Magistrates who had recorded such statements were not examined. In any event, such statements materially contradicted the testimonies made by such prosecution witnesses at the trial. In this regard, he has referred to the testimony of PW 1 and the statement recorded under Section 164 of the Criminal

Procedure Code of such prosecution witnesses. According to him, statements recorded under Section 164 of the Criminal Procedure Code, being inconsistent, uncorroborated and procedurally incorrect cannot form basis of conviction much less a death sentence.

9. Learned senior advocate appearing for the appellants has contended that, the Investigating Officer being PW 28 admitted that, crucial deposition of the key witnesses was not stated during investigation. According to him, the same has discredited the prosecution witnesses and made such prosecution witnesses as tutored and unreliable.

10. Learned senior advocate appearing for the appellants has contended that, the case of the prosecution is based on circumstantial evidence. The chain of circumstance has not been completed. The case of the prosecution is replete with missing link, uncorroborated recovery and suspiciously tailored testimonies which has failed to meet the test required for a conviction**.**

11. Learned senior advocate appearing for the appellants has contended that, the medical evidence introduced at the trial is inconclusive. He has referred to the testimony of the medical officer being PW 26 who has according to him,

admitted that the age of the injuries was not stated in the post mortem report and that cause of death could not be ascertained. He has contended that, in absence of any definite opinion as to the cause and time of death the medical evidence does not support the charge of rape and murder.

12. Learned senior advocate appearing for the appellants has contended that, non-examination of material witnesses such as the Executive Magistrate recording the statement under Section 164 of the Criminal Procedure Code, failure to ensure informed witness participation and inconsistent documentary evidence, violate fair trial standards under Article 21 of the Constitution of India.

13. Learned senior advocate appearing for the appellants has contended that, even assuring through not admitting that the guilt was proved, the mitigating circumstances weigh against the imposition of the death penalty.

14. In such circumstances, learned senior advocate appearing for the appellants has contended that, the conviction and sentence be set aside and, without prejudice to the first contention the death penalty be commuted to life imprisonment.

15. Learned Public Prosecutor has contended that, the prosecution was able to establish the charges beyond reasonable doubt. He has referred to the chain of circumstances proved at the trial. He has contended that, such chain of circumstances unmistakably and unquestionably establishes the guilt of all the three appellants.

16. Learned Public Prosecutor has referred to the testimonies of the prosecution witnesses. He has submitted that the dead body of the victim has been recovered on the leading statement made by the appellants. Moreover, items belonging to the victim were recovered on the leading statements of the appellants and from the possession of such appellants.

17. Father of the victim had lodged a written complaint with the local police stating that, the victim went missing on November 4, 2021 at about 10 am from his house. Despite searches, the victim could not be found. In his written complaint, father of the victim had alleged that the appellant No. 1 had hidden the victim in some secret place.

18. Police had treated such written complaint as a First Information Report. On completion of the investigations, police

had submitted a chargesheet as against the appellants. Learned Trial Judge had framed six charges as against the appellants on February 18, 2022. Appellants had pleaded not guilty to such charges and claimed to be tried. At the trial, prosecution had examined 30 witnesses to prove the charges. Prosecution had also tendered various documentary and material evidence which were marked as Exhibits at the trial.

19. On the conclusion of the evidence of the prosecution, the appellants were examined under Section 313 of the Criminal Procedure Code, where they had claimed to be innocent and falsely implicated. Appellants had declined to adduce any evidence on their behalf.

20. The local shop owner has deposed as PW 1. He has stated that, appellant No. 1 purchased one packet of biri and a chocolate from his shop. Subsequently, the father of the victim had come to his shop and asked him about the victim whereupon, he told the father of the victim that the victim was with the appellant No. 1. He has stated that, he recorded a statement under Section 164 of the Criminal Procedure Code which he tendered in evidence and marked as an Exhibit. He has tendered his signature in the seizure list which was marked as Exhibit 2/1 and identified the seized articles in

Court. He has identified the appellant No. 1 in Court. In cross examination, he has stated that, the biri packet and the chocolate are available in open market.

21. The uncle of the victim has deposed as PW 2. He has stated that, appellant No. 1 had taken the victim towards the paddy field. PW 1 had informed him about the same. Many persons had searched at different places but could not find the victim or the appellant No. 1. He has stated that he was told by PW 5 that the appellant No. 1 took the victim towards the paddy field. He has also stated that, on the appellant No. 1 showing the place, police recovered the victim in dead condition in the paddy field. His claim with regard to the appellants raping and murdering the victim is based on hearsay.

22. Another uncle of the victim has deposed as PW 3. He has stated that, on the date of the incident, one person in the locality died and, therefore, he along with others went to the burning ghat for cremation of such dead body. After completion of cremation, they had returned to their respective houses at about 1 pm. After returning home, they could not find the victim in the house. He had searched for the victim at different places but could not find her. They had come to

know from PW 1 that, appellant No. 1 purchased a biscuit packet and gave it to the victim. Thereafter, appellant No. 1 and the victim had gone to the house of PW 5 and took tobacco therein. The appellant No. 1 and the victim had gone towards the paddy field. Thereafter, the victim did not return to their house. As the victim did not return, they had informed the matter to the police. On the police searching and as shown by the appellant No. 1 police had recovered the victim in a dead condition from the paddy field.

23. PW 3 has witnessed the inquest of the victim. He has tendered his signature on the inquest report in evidence. He has claimed that, appellant No. 1 raped and murdered the victim and that appellant No. 2 accompanied the appellant No. 1. This claim is largely hearsay. He has identified both appellants in Court.

24. Father of the victim has deposed as PW 4. He has identified the date of the incident. He has stated that, on such date, victim went missing. He had searched the victim at different places. He had gone to the shop of PW 1 near his house. He had enquired of PW 1 as to whether the victim came to his shop or not. PW 1 had told him that, the victim along with the appellant No. 1 came to his shop when

appellant No. 1 purchased biscuit. After purchasing the same from his shop he gave the same to the victim and they went away. Thereafter, PW 4 had gone to the house of PW 5 to enquire as to the whereabouts of the victim when, PW 5 told PW 4 that the victim accompanied with the appellant No. 1 came to the house of PW 5 and that, appellant No. 1 took tobacco at his house and thereafter, appellant No. 1 along with the victim went towards the paddy field.

25. PW 4 has stated in his evidence that, he could not find the victim and therefore, he went to the police station and lodged the complaint. He had taken the assistance of a scribe to write down the complaint in accordance with his version. He has stated that, the complaint was read over to him and explained and after understanding the contents of the complaint, he had signed the complaint. He has tendered the written complaint which was marked as Exhibit 5.

26. PW 4 has stated that, after lodging the complaint, police searched for the victim but could not be found. Thereafter, police had brought the appellant No. 1 who identified the place where the dead body of the victim was kept. Then, the police had recovered the dead body of the victim as per identification of appellant No. 1.

27. PW 4 has witnessed the inquest of the victim. He has tendered the inquest report and his signature thereon which were marked as Exhibit 4/2 and Exhibit 6/1. He has stated that, he came to know that the appellants committed murder of the victim after raping her. He has identified the appellants in Court.

28. PW 4 has stated that, in course of investigation, police seized the birth certificate of the victim by preparing a seizure list. He has tendered the seizure list dated November 9, 2021 which was marked as Exhibit 7/1. He has submitted the original birth certificate of the victim along with a photocopy thereof at the trial since, the original was returned to him by the police.

29. PW 4 has been cross-examined at length by the defence. The defence could not elicit anything favourable to them out of such lengthy cross-examination of PW 4.

30. A neighbour at whose house, appellant No. 1 took the victim, has deposed as PW 5. He has stated that, on the fateful day, at around 9:51 AM appellant No. 1 and the victim came to his house when, wife of PW 5 gave some tobacco to the appellant No. 1. He has also given tobacco to the appellant No. 1. Thereafter, appellant No. 1 took the victim towards the

agricultural field. In the evening, father of the victim came to his house and had asked him about the victim. He had told the father of the victim that, he saw the victim along with the appellant No. 1 at his house. He has recorded a statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit 10. She has identified the appellant No. 1 in Court.

31. Aunty of the victim has deposed as PW 6. He has stated that, on the fateful day, since there was a death in the village, she along with others went to the house of such deceased. At that time, the victim was at her house. After attending the house of the deceased person, she had returned to her house. She had seen the victim at her house then. Thereafter, she had searched for the victim at different places. She had come to know that the appellant No. 1 along with the victim went to the shop of PW 1 and appellant No. 1 purchased a biscuit and chocolate from the shop of PW 1 and thereafter, appellant No. 1 along with the victim went to the house of PW 5 and appellant No. 1 obtained tobacco from the PW 5 and thereafter, the appellant No. 1 along with the victim went away towards the agricultural field. She has identified the appellants in Court.

32. Wife of PW 5 has deposed as PW 7. She has stated that, see saw the appellant No. 1 and the victim to be going through the road in front of their house. Appellant No. 1 had come to their house and asked her to give him tobacco. She had entered her house and called PW 5 and told him that, appellant No. 1 is asking for tobacco. She has identified appellant No. 1 in Court. She has tendered her statement recorded under Section 164 of the Criminal Procedure Code in evidence which was marked as Exhibit 11.

33. PW 8 has seen the appellant No. 1 and the victim to be going towards the agricultural field where he was working. He has stated that, after some time, father of the victim came looking for the victim whereupon, he told the father of the victim that, he saw the appellant No. 1 and the victim going towards the paddy field. He has identified the appellant No. 1 in Court. He has recorded a statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit 12.

34. A shop owner has deposed as PW 9. She has stated that she knew the victim and her father. She has stated that, on the date of the incident, while she was sweeping in front of her shop, she found one pair of slippers in front of her shop.

Subsequently, she has come to know that such pair of slippers was of the victim. She has recorded a statement under Section 164 of the Criminal Procedure Code which was tendered in evidence and marked as Exhibit 13.

35. Block development Officer of the area has deposed as PW 10. He has prepared the inquest report which he tendered in evidence and the same was marked as Exhibit 6.

36. A sub- inspector of police who witnessed the seizures made on November 8, 2021 has deposed as PW 11. He has tendered his signature on such seizure list in evidence, at the trial. He has also identified the articles seized.

37. Police personnel has deposed as PW 12. He had accompanied the police party along with the two appellants to the place of the recovery of the dead body of the victim. He has stated that he did the videography of the scene of recovery of the dead body of the victim. He has stated that subsequently, he recorded such videography in a compact disc and handed over the same to the investigating officer. He has taken photographs of the spot and after taking printout of such photographs handed over the same to the investigating officer. He has identified the photographs and his signatures on the reverse of such photographs. He has tendered 5 photographs

of the victim which were marked as Exhibit 15 to 15/4. He has taken photographs of the area from where the dead body of the victim was recovered. Such photographs have been tendered in evidence and marked as Exhibit 16. The compact disc was tendered in evidence and marked as Material Exhibit IV. He has identified the appellants as the persons who were taken to the spot from where the dead body of the victim was recovered.

38. Seizure list witnesses have deposed as PW 13, 14, 15, 17, 18, and 19 at the trial. They have identified their respective signatures on the seizure list and also identified the respective articles seized.

39. The medical officer who examined both the appellants has deposed as PW 16. He has tendered the medical reports in evidence which were marked as Exhibit 20 and 21. He has stated that, he found nothing to suggest that the appellants were incapable of performing sexual intercourse.

40. A police constable has deposed as PW 20. He has stated that he took the dead body for the purpose of post-mortem. He has stated that, after post-mortem examination, wearing apparels of the victim were seized. He has identified his signatures on the seizure list as also the seized articles.

41. A local person who has witnessed the recovery of the dead body as also various articles on the appellants identifying the same, has deposed as PW 21. He has stated that, the appellants showed the wrapper of the chocolate, stub off burnt biri, one torn piece of cloth, one bamboo stick and one empty packet of biri which were seized by the police. He has identified his signature on the seizure list dated November 9, 2021. He has identified the appellants as the persons who showed those articles to the police on that date. He has also identified the seized articles in Court which were tendered in evidence. He has stated that, on the next date that is, November 10, 2021, he along with other persons and the police as also the appellant No. 2 went to the house of the appellant No. 2 where, appellant No. 2 showed one locket with the picture of the victim, one blue colour printed full sleeve torn shirt to the police. Police had seized such articles. He has identified his signature on the seizure list. He has also identified the seized articles.

42. The other seizure list witness of November 19, 2021 has deposed as PW 22. He has corroborated the testimony of PW 21.

43. Another seizure list witness of November 10, 2021 has deposed as PW 23. He has identified his signature on the seizure list as also identified the seized articles. He has corroborated the statement of PW 21.

44. The police personnel who prepared the seizure list of November 11, 2021 has deposed as PW 24. Another police personnel who was present during the seizure on November 9, 2021 has deposed as PW 26.

45. The post-mortem doctor has deposed as PW 26. He has tendered the post-mortem report which was marked as Exhibit 26. He has stated that, the victim was assaulted with a bamboo stick. He has stated that, injury No. 6 and 7 noted in Exhibit 26 may be caused if any person inserted the bamboo stick to the vagina and anus of the victim.

46. The sub- inspector of police who registered the written complaint as first information report has deposed as PW 27. He has narrated how the formal FIR came into place.

47. The investigating officer has deposed as PW 28. He has narrated the course of investigation. He has tendered various documents and articles which were seized during the course of investigations, at the trial. Despite a lengthy cross-

examination, the defence could not elicit anything favourable out of PW 28.

48. The scientific officer who examined the viscera of the victim girl has deposed as PW 29. He has tendered his report which was marked as Exhibit 37 at the trial.

49. The police personnel who collected the forensic science laboratory report has deposed as PW 30. He has submitted a supplementary chargesheet.

50. On completion of the evidence of the prosecution, both the appellants have been examined under Section 313 of the Criminal Procedure Code, individually. In such examination, none of the appellants have offered an explanation as to the claim of the prosecution that they were last seen together with the victim. They have claimed themselves to be innocent and falsely implicated. They have declined to produce any evidence at the trial.

51. Appellants have stood trial for kidnapping, abduction, gang rape, aggravated penetrative sexual assault and murder of a minor along with a charge of destruction of evidence of the crime.

52. Exhibit 26 which is the post-mortem report of the victim along with the deposition of the post-mortem doctor

being PW 26 have established that, the minor was subjected to aggravated penetrative sexual assault and was murdered. Exhibit 26 has enumerated 6 external injuries found on the dead body of the victim. PW 26 has stated that, injuries at serial No. 6 and 7 thereof, could be caused by insertion of a bamboo stick. Injuries described in serial No. 6 and 7 relate to the private parts of the victim. Injuries described in serial No. 6 and 7 of Exhibit 26 together with the testimony of PW 26 have established that, the victim was subjected to aggravated penetrative sexual assault.

53. Exhibit 26 has stated that, the death was homicidal and that, it was caused by strangulation. The Doctor who conducted the post-mortem has deposed as PW 26. Although PW 26 has been cross-examined by the defence, the opinion of PW 26 that, the death was homicidal, and caused by strangulation was not dislodged.

54. Prosecution therefore has been able to establish beyond reasonable doubt that the victim was subjected to aggravated penetrative sexual assault prior to her death by strangulation. Therefore, prosecution has been able to establish that, the victim suffered aggravated penetrative sexual assault and was murdered.

55. Prosecution has relied upon circumstantial evidence to establish the culpability of the appellants in all of the charges levelled against them. Prosecution has relied upon the last seen together theory along with recovery of the dead body as well as articles belonging to the victim, on the showing of the appellants, in order to establish the culpability of the appellants before us.

56. PW 1 has seen the appellant No. 1 and the victim together when, they came to his shop to buy chocolate and biri. Thereafter, PW 5 and 7 has seen the appellant No. 1 and the victim together at their house. Both PW 5 and 7 have stated that, appellant No. 1 and the victim left towards the agricultural field from their house. PW 8 has seen the appellant No. 1 and the victim to go towards the agricultural field from where, ultimately, the body of the victim was recovered. PW 8 is the last prosecution witness who had last seen the appellant No. 1 and the victim together. He has seen them near about the place from where, the dead body of the victim was recovered and at that material point of time, to be proceeding towards such place.

57. Appellant No. 1 during his examination under Section 313 of the Criminal Procedure Code has not been able to

explain his presence with the victim at the material point of time as deposed by PW 1, 5, 7, and 8.

58. In our view, prosecution has been able to establish that, appellant No. 1 was last seen with the victim. Appellant No. 1 has not been able to offer any explanation with regard thereto.

59. A locket with the picture of the victim amongst other articles, has been seized from the house of the appellant No. 2, on the showing of the appellant No. 2. PW 21 and 23 are seizure list witnesses who have established the seizure of such locket from the house of the appellant No. 2 on the showing of the appellant No. 2.

60. Appellant No. 2 has not been able to explain the presence of the locket containing the picture of the victim at his residence, during his examination under Section 313 of the Criminal Procedure Code or otherwise.

61. In course of investigations, police have recovered the dead body of the victim from an agricultural field, after the same was shown by the two appellants. Along with the dead body, a wrapper of a chocolate and a stub of a burnt biri was recovered, amongst others, on the showing of the appellants.

62. PW 2, 4, have stated that, appellant No. 1 showed the place from where, the dead body of the victim was recovered. PW 6, 12 and 21 have stated that, both the appellants showed the place from where, the dead body of the victim was recovered.

63. Recovery of the dead body of the victim had been from an agricultural field. Police had recovered the body of the victim on November 7, 2021. Police had taken both the appellants to the place from where the dead body of the victim was recovered on both the appellants showing the police such place.

64. As against the appellant No. 1, the evidence is one of last seen together as also, recovery of the dead body and certain incriminating articles being seized, on the showing of the appellant No. 1. As against the appellant No. 2, the evidence is that, a locket belonging to the victim bearing the photograph of the victim has been recovered from the house belonging to him, on his showing. Appellant No. 2 has also assisted in the recovery of the dead body of the victim by showing the place at which, the victim was found, along with the appellant No. 1.

65. In our view, prosecution has been able to establish the chain of circumstances against both the appellants to preclude any view as to the innocence of the appellants.

66. Age of the victim has been established by the birth certificate of the victim which was tendered in evidence and marked as Exhibit 9. Defence has not placed any material on record to suggest a different date of birth of the victim than appearing from the birth certificate.

67. Prosecution has established that the date of the incident is November 7, 2021. Taking the date of birth of the victim to be June 12, 2016 as shown in the birth certificate being Exhibit 9, the victim was a minor on the date of the incident. She was slightly over 5 years 4 months on the date of the incident.

68. There is hardly any discrepancy in the evidence placed by the prosecution at the trial as has been contended on behalf of the appellants. The inquest report of PW 10 has stated that the body was recovered from a canal. PW 2, 3, 4 and 6 have stated that, the body was recovered from a paddy field. The place of occurrence in the sketch map prepared to being Exhibit 31 has given the exact location in terms of latitude and longitude. The dead body was found under

shrubs in a canal situated in an agricultural field. The alleged discrepancy of the description of the place where the body of the victim has been found as appearing in the inquest report and in the deposition of the prosecution witnesses are not material. The exact location of the discovery of the dead body has been well documented in Exhibit 31. Prosecution witnesses have referred to such place so also the inquest report.

69. Appellants have questioned the recovery of the seized articles. According to the appellants, the delayed recovery has cast doubt on the credibility thereof. We are unable to subscribe to such a contention, in the facts and circumstances of the present case. Recoveries had been made on the appellants showing the articles including the dead body. Therefore, it cannot be said that, there was a delay in seizing the articles or the same cast any doubt on the credibility of the case of the prosecution.

70. Prosecution witnesses have identified the seized articles at the trial. One of the witnesses of the two seizures made have claimed themselves to be illiterate and unable to read. However, other witnesses to such seizures have tendered the seizure list at the trial. In any event, such witnesses have

also identified the articles seized on the respective dates of seizure. These prosecution witnesses should not be disbelieved merely on the ground of their illiteracy.

71. Defence has not established any material contradiction between the statements recorded by the prosecution witnesses under Section 164 of the Criminal Procedure Code with that of the testimonies at the trial. Testimonies of the prosecution witnesses, at the trial, cannot be classified as improvements over the statements made by them to the investigating officer.

72. Appellant no. 1 had taken the minor from lawful custody of the minor. Appellants had gang raped the victim. They had concealed the dead body of the victim.

73. We are therefore of the view that, the learned trial judge has rightly convicted both the appellants for gang rape, aggravated penetrative sexual assault, murder, kidnapping, abduction of a minor, and destruction of evidence.

74. Learned trial Judge has imposed death penalty on both the appellants. While doing so learned trial Judge has taken into consideration various authorities on the issue of imposition of death penalty. Learned trial judge has noted the aggravating circumstances and the mitigating circumstances. Learned trial Judge has also applied the crime test, criminal

test and the rarest of rare test. Learned trial Judge has held that, the gang rape and murder of the victim was done in a pre-planned and cold-blooded manner. Learned trial Judge has held that, there is no reason to believe that the appellants should be reformed and would not be a menace to the society. In doing so, learned trial Judge has noted that, there appears to be no chance of reformation and rehabilitation since the mitigating factors weighed against a number of other factors pertaining to the way of execution of the offence. Learned trial Judge has also held that, in view of the brutal nature of the crime, rarest of rare test stand satisfied and that, death sentence is the only befitting punishment.

75. Prior to the sentencing, learned trial Judge has also taken into consideration the reports submitted on behalf of the State relating to the conduct of the appellants during their custody and medical condition of the appellants.

76. Learned trial Judge has noted various authorities of the Supreme Court where, death penalty was upheld namely, ***1994 Volume 2 Supreme Court Cases 220 (Dhananjoy Chatterjee vs. State of West Bengal)***, ***2017 Volume 6 Supreme Court Cases 631 (Vasanta Sampat Dupare vs. State of Maharashtra)***, ***2022 Volume 3 Supreme Court***

Cases (Criminal) 596 (Manoj Pratap Singh vs. State of Rajasthan).

77. By an order dated April 28, 2025 we had called upon the State to submit a report with regard to the parameters as delineated in paragraph 250 of ***2023 Volume 2 Supreme Court Cases 353 (Manoj and others versus State of Madhya Pradesh)***. State has submitted a report dated June 9, 2025 with regard to both the appellants.

78. The report dated June 9, 2025 has considered the medical condition of the appellants, their social background and their conduct during custody. State has reported that, appellant No. 1 is a slow learner with severe speech problem. Financial condition of the appellant No. 1 and his family is very poor. Appellant No. 1 and his elder brother had worked under the same fishermen in a fishing trawler at sea. Report has noted that the family of appellant No. 1 is socially backward. Report has stated that is no criminal antecedent so far as appellant No. 1 is concerned. Family members of the appellant No. 1 is sympathetic to appellant No. 1. Report has noted that, the rectification process of the appellant No. 1 is working well at the correctional home.

79. Same report of the State has noted that appellant No. 2 attended primary school but was a slow learner. He had dropped out from the school after attending Class I due to educational dissatisfaction and improper guidance from his parents. Report has noted that the financial condition of the family of the appellant No. 2 is poor and that, his parents worked as labour at a local market. Family of the appellant No. 2 has been noted to be socially backward. Report has stated that, there is no previous criminal antecedent so far as the appellant No. 2 is concerned. Report has also noted that, appellant No. 2 appears to be physically fit and that, he is depressed with ongoing psychiatry treatment with medicine. His family members had reported previous ailment without documentary support. His behaviour at the correctional home has been reported to be good.

80. ***Manoj and others (supra)*** has considered various authorities of the Supreme Court with regard to the award of death penalty. It has observed that, all the authorities of the Supreme Court imposed death penalty only when, the option of life imprisonment is unquestionably foreclosed. It has noted that, there is an option of imposition of proportionate non-remittable sentence of imprisonment available as an

alternative to death penalty. It has further held that, the approach of rigid categorisation of crimes, or aggravating and mitigating circumstances, to determine the imposition of death sentence as adopted in ***1983 Volume 3 Supreme Court Cases 470 (Machhi Singh and others versus State of Punjab) is per incuriam 1980 Volume 2 Supreme Court Cases 684 (Bachan Singh versus State of Punjab)***.

81. Applying the test laid down in ***Manoj and others (supra)*** we find that, the option of life imprisonment coupled with non-remittable sentence is not foreclosed in the facts and circumstances of the present case. Socio economic backwardness, the conduct of the convict post custody as also existence of criminal antecedent if any of the convict should be taken into consideration while determining the quantum of sentence to be awarded. Taking these factors into consideration, so far as both the appellants are concerned, we are not in a position to arrive at the finding that, the mitigating circumstances are nil so far as any of the two appellants are concerned.

82. State has not submitted through its report or otherwise that, there is no possibility of reformation of any of the two appellants. Quite to the contrary, State has stated in

its report dated June 9, 2025 that, rectification of appellant No. 1 is working well at the correctional home and that, conduct of the appellant No. 2 remains good at the correctional home. State has by its report dated June 9, 2025 spoken positively about both the appellants with regard to their reformation.

83. Since, we are not in a position to arrive at a conclusive finding that, possibility of reformation of both the appellants stands foreclosed, we are not minded to confirm the death penalty imposed by the learned trial judge, on the appellants.

84. ***Manoj and others (supra)*** has noted that, a constitutional Court can pass a sentence of imprisonment commuting the death penalty to one for a period which is non-remittable. However, the non-remittable portion of the sentence has to be proportionate.

85. In the facts and circumstances of the present case, a minor of about 5 years of age was subjected to aggravated penetrative sexual assault by the appellants, after being kidnapped and thereafter murdered. Evidence at the trial has established that, the private parts of the victim suffered injuries due to insertion of a bamboo stick therein. The evidence at the trial have also established that, the appellants

strangulated the victim to murder her and then, concealed the dead body of the victim.

86. These conducts of the appellants demonstrate a quality of depravity which shocks the conscience. Balance has to be struck between the gravity of the offence and the quantum of punishment to be imposed.

87. Although, the report of the State has not foreclosed reformation of the two appellants, at the same time, such report also notes that one of the appellants is undergoing psychological treatment.

88. On the basis of the report of the State and the other materials on record we are also not in a position to say that release of any of the appellants on remission would not be a menace to the society.

89. Merely commuting the death penalty to one of life imprisonment simplicitor would not subserve the ends of justice in the facts and circumstances of the present case particularly given the nature of the offence committed by the appellants.

90. In such circumstances, taking into consideration the respective age of the two appellants their socio economic background and mental health conditions as also the nature

of the crime, we deem it appropriate to impose life sentence on both the appellants without the possibility of remission for a period of 60 years from the date of commission of the offence.

91. Accordingly, we commute the death penalty awarded by the learned trial Judge to one of life imprisonment without the possibility of remission for a period of 60 years from the date of commission of the offence.

92. A copy of this judgement and order along with the trial Court records be remitted to the appropriate Court forthwith.

93. In view of the commutation of the death penalty of the appellants, any warrant issued by the appropriate court with regard thereto in respect of the appellants, Stands modified in terms of this judgement and order. Department shall inform the Correctional Home, where the appellants are lodged, as to this judgement and order, forthwith. Such Correctional Home shall record the fact of commutation of death penalty of each of the appellants, to the sentence awarded by this judgement and order, in their records.

94. Period of detention already undergone by the appellants shall be set off against the substantive punishment in terms of the provisions contained in Section 428 Of the Criminal Procedure Code.

95. DR 3 of 2023 along with CRA (DB) 176 of 2024 along with all connected applications stand disposed of.

[DEBANGSU BASAK, J.]

96. I agree.

[MD. SHABBAR RASHIDI, J.]