**IN THE SUPREME COURT OF INDIA**
**CRIMINAL APPELLATE JURISDICTION**

**CRIMINAL APPEAL NOS. 1794-1796 OF 2017**

**Prahlad** **..Appellant**

**Versus**

**State of Rajasthan** **..Respondents**

**O R D E R**

These appeals are presented by the convicted accused/appellant (hereinafter referred to as 'accused') against the judgment dated 1.9.2016 passed by the High Court of Judicature at Rajasthan in D.B. Criminal Murder (Death) Reference No. 01 of

2015, D.B. Criminal Appeal Nos. 970 of 2015 and D.B. Criminal Jail Appeal No. 1011 of 2015. By the impugned judgment, the High Court confirmed the judgment dated 18.9.2015 passed by the District and Sessions Judge, Pratapgarh, imposing capital punishment in Sessions Case No. 149 of 2013 for committing offences punishable under Section 302 IPC, and under Sections 3 and 4 of The Protection of Children from Sexual Offences Act, 2012 (hereinafter referred to as 'the POCSO Act').

2. The case of the prosecution in brief is that the minor daughter (X) of the informant Prabhu Lal, aged about 8 years, was taken at around 4.00 p.m. on 5.7.2013 while she was playing along with other children at the informant's house. She was taken away by the accused on the pretext of giving her chocolates from a shop. However, the minor victim (X) did not come back. The informant, his brother Bhanwar Lal, and other family members were not in the house that evening at the relevant time and they were informed about the incident subsequently by the informant's niece Lali when they came back to their house. They searched for the girl throughout the night, however in the morning to the informant's

dismay, the body of X was found near the house of Nagji, son of Gautam Meena. The first information was lodged at 1.00 p.m. on 6.7.2013 by the father of X, with the allegations of rape and murder against the accused. The Trial Court upon evaluation of the material on record, convicted the accused for the offences punishable under Section 302 IPC, and under Sections 3 and 4 of POCSO Act, vide judgment dated 18.9.2015 and passed the sentence of capital punishment. Consequently, the Trial Court made reference to the High Court under Section 366 of Cr.P.C. for the confirmation of this death sentence. The accused also preferred appeals against the judgment and order of conviction, and sought for acquittal. The reference was allowed, and the appeals filed by the convicted accused came to be dismissed by the High Court.

3. The learned counsel for the accused taking us through the material on record submits that the Trial Court is not justified in convicting the accused for the offences under Section 302 IPC as well as under Section 4 of the POCSO Act. The case rests on circumstantial evidence and these circumstances are not duly proved. He further argues that the chain of circumstances is not

complete and, therefore, the accused is entitled for acquittal. He also submits that, absolutely no evidence is found on record against him for the offences under Sections 3 and 4 of the POCSO Act. Lastly, he submits that the imposition of capital punishment on the accused is illegal, and the case at hand is not a rarest of the rare case.

Per contra, the learned counsel for the State argues in support of the judgments of the courts below.

4. The present case rests on circumstantial evidence. The evidence of PWs 1, 2, 3 and 4 clearly prove that the mother of the deceased was treating the accused as her own brother, and on the eve of Rakhi festival, she even used to tie Rakhi on the hand of the accused. Hence, the child of the informant was treating the accused as a maternal uncle and this fact was also known to all the villagers because the accused used to visit the residence of the informant as one of their relatives. All the family members of the informant trusted the accused. Since the deceased was treating the accused as her uncle, she did not have any reason to disbelieve or doubt the offer made to go with him for getting the chocolates.

5. PW2, Lali @ Lalita has deposed that the accused came to the house of the informant and took his daughter with him. PW4, Chameli also has deposed that, on the date of the incident, the accused took the minor victim on the pretext of giving her chocolates and also deposed that, at the point of time of the incident, the child was 8 years of age. Because of the cordial relationship the accused had with the victim's family, PWs 2 and 4 thought that the accused had taken the child genuinely for getting her chocolates without any ill intentions.

6. From the evidence of PWs 2 and 4 as well as the evidence of the informant PW1, it is clear that the accused was treated as a family member of the informant and that the minor victim believed that the accused is her Mama (uncle) due to the trust her family had upon the accused, because of which, the victim went along with the accused when she was offered the chocolates and toffee. The evidence also supports the case of the prosecution fully in respect of the last seen circumstance.

7. PW5, Sattu is a shopkeeper from whom the accused purchased the chocolates, biscuit and *miraz*. The evidence of PW7, Shyam Lal

also supports the evidence of PW5 relating to the purchase of chocolates and *miraz* from the shop. PW9, Dashrath also supports the evidence of the prosecution, more particularly the evidence of PW1.

8. PW10, Dr. O.P. Dayma, is the member of the Medical Board along with two other doctors who examined the dead body of the victim. They preserved smear from the vagina of the deceased girl, prepared slides and sent it for Forensic Science Laboratory examination. PW10 deposed that, on medical examination, five injuries were found which were on the thighs, right leg, nose and right wrist of the victim. In the post mortem report, PW10 opined that the cause of death was due to hemorrhage shock. PW11, Dr. Neelam Gupta reiterated the proceedings of the post mortem examination as well as the opinion reached.

9. No explanation is forthcoming from the statement of the accused under Section 313 Cr.P.C. as to when he parted the company of the victim. Also, no explanation is there as to what happened after getting the chocolates for the victim. The silence on the part of the accused, in such a matter wherein he is expected to

come out with an explanation, leads to an adverse inference against the accused.

10. We find that there is ample material against the accused to convict him for the offence under Section 302 IPC. All the circumstances relied upon by the prosecution stand proved so as to complete the chain of circumstances in respect of the offence under Section 302 of the IPC. The Trial Court and the High Court are, on facts, justified in convicting the accused for the offence under Section 302 of the IPC. However, we are unable to find reliable material against the accused for the offences under Section 3 and 4 of the POCSO Act.

11. The post-mortem report reveals the following injuries on the body of the victim:

1. 3x1 cm on left thigh on anterior knee.
2. 6x1 cm on right leg.
3. 2x1 cm abrasion on right thigh.
4. 1x1.5 cm on nose.
5. 1x1 cm on right wrist.

In the Examination-in-Chief itself, the doctor PW10 who conducted the post-mortem examination has deposed that the genital organs of the victim were normal. The doctor further opined that the death of the deceased was caused due to acute hemorrhage. Post-mortem report is at Ex. P15. In the cross-examination, the doctor has admitted that all the aforementioned five injuries are simple in nature and they are likely to be caused by falling. Fracture on the left rib nos. 10 and 11 mentioned in the post-mortem report can be caused by falling on a stone. PW10 further stated that the genital organs of the deceased were healthy and no marks of any injury were present on the private parts of the deceased. Signs of sperm ejaculation were also not found on the external skin near the genital organs of the deceased. No injury was present on the head of the deceased. The doctor further deposed that when forcible sexual intercourse is committed upon a tender girl, there is a possibility of her vagina getting ruptured and bleeding from her genitals. There is no such mention in the post-mortem report. The FSL report regarding vaginal swab which was sent for examination is not helpful for the prosecution to prove the

offence under Sections 3 and 4 of the POCSO Act. Prosecution, practically relies upon the doctor's evidence only for proving the offence under Section 4 of the POCSO Act. No other material is placed on record by the prosecution to prove the offence under Section 4 of the POCSO Act. However, the evidence relating to penetration into the vagina, mouth, urethra or anus of a child etc. or any part of the body is not found. The Trial Court as well as the High Court have not gone into the depth of the evidence relating to offence of penetrative sexual assault, in detail. Certain casual observations are made which are not supported by the evidence led by the prosecution. In light of the aforementioned evidence of PW10 doctor, and in view of the fact that no other reliable evidence exists to prove the charge of penetrative sexual assault, i.e. any of the acts as detailed in Section 3 of the POCSO Act, it is our considered opinion that the Trial Court and the High Court are not justified in convicting the accused for the offence under Section 4 of the POCSO Act. We find from the judgment of the High Court that absolutely no reason, much less any valid reasons were assigned for convicting the accused for the offence punishable under the POCSO

Act. Since no reliable material is available against the accused for the aforementioned offence of the POCSO Act, the benefit of doubt would go in the favour of the accused. After scanning through the entire materials on record in order to satisfy the conscience, and having regard to the seriousness of the charge, we conclude that the accused needs to be given the benefit of doubt in so far as the offence punishable under Section 4 of the POCSO Act is concerned.

12. Since the accused is to be acquitted for offence under Section 4 of the POCSO Act, in our considered opinion, this is not a fit case to impose the death penalty on him, inasmuch as the appellant does not have any criminal background, nor is he a habitual offender. Motive for the offence of murder is not clear and of course it is generally hidden, known to the accused only. Under such circumstances, the court will have to see as to whether the case at hand falls under the 'rarest of the rare' case category. The accused was also young during the relevant point of time. The duty is on the State to show that there is no possibility of reform or rehabilitation of the accused. When the offence is not gruesome, not cold-blooded murder, nor is committed in a diabolical manner, the court will

impose life imprisonment. In the case at hand, the mitigating factors outweigh the aggravating factors. The only aggravating factor in the matter is that the accused took advantage of his position in the victim's family for committing the murder of the minor girl inasmuch as the minor girl was treating the accused as her Mama (uncle).

13. We do not find that the murder has been committed with extreme brutality or that the same involves exceptional depravity. On the other hand, as mentioned supra, the accused was young and the probability that he would commit criminal acts of violence in the future is not available on record. There is every probability that the accused can be reformed and rehabilitated. In this context, the observations made by this Court in the case of *Bachan Singh v. State of Punjab*[1], is reproduced as follows:

> "209. There are numerous other circumstances justifying the passing of the lighter sentence; as there are countervailing circumstances of aggravation. "We cannot obviously feed into a judicial computer all such situations since they are astrological imponderables in an imperfect and undulating society." Nonetheless, it cannot

1 (1980) 2 SCC 684.

> be over-emphasised that the scope and concept of mitigating factors in the area of death penalty must receive a liberal and expansive construction by the courts in accord with the sentencing policy writ large in section 354 (3). Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency- a fact which attests to the caution and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter. It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guidelines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354 (3), viz., that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of the human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

14. Be that as it may, since the offence of rape is not proved and as the offence of murder is proved beyond reasonable doubt, the accused is liable to be convicted for the offence under Section 302 IPC. In view of the aforementioned reasons, the judgment of the

Trial Court as well as the High Court convicting the accused for the offences under Sections 3 and 4 of the POCSO Act and imposing capital punishment on him stands set aside. However, for the offence under Section 302 IPC, the accused is sentenced to undergo imprisonment for life. Appeals are partly allowed in the aforesaid terms.

**.....J.**
**(N. V. RAMANA)**

**.....J.**
**(MOHAN M. SHANTANAGOUDAR)**

**.....J.**
**(MUKESHKUMAR RASIKBHAI SHAH)**

**New Delhi;**
**November 14, 2018.**