IRAPPA SIDDAPPA MURGANNAVAR

v.

STATE OF KARNATAKA

(Criminal Appeal Nos. 1473-1474 of 2017)

NOVEMBER 08, 2021

[L. NAGESWARA RAO, SANJIV KHANNA AND B. R. GAVAI, JJ.]

Penal Code, 1860: ss. 302, 376, 364, 366A and 201 – Rape and murder – Prosecution case that accused raped and murdered a five year old girl, and then disposed of her body, tied in a gunny bag, into the stream – Conviction and sentence for commission of offence u/s. 302, 376, 364, 366A and 201 – Upheld by the High Court – On appeal, held: On overall view of the evidence and witness statements adduced by the prosecution, the chain of circumstances affirmatively establishes the guilt of the appellant – Contradictions and inconsistencies highlighted in the prosecution's case, do not create a reasonable doubt – Circumstances relied upon are fully established – They are conclusive in nature and tendency – Chain of evidence is so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the appellant – Facts established consistent only with the hypothesis of the guilt of the accused and exclude every hypothesis except the one proved – Thus, the order of the courts below convicting the appellant for offences u/s. 302, 376, 364, 366A and 201 upheld.

Sentence/Sentencing: Death sentence – Imposition of – Commission of rape and murder of 5 year old – Conviction and sentence of the appellant for the offences u/ss. 302, 376, 364, 366A and 201 – Commutation of sentence of death imposed – Held: There is hope for reformation and rehabilitation – There are sufficient mitigating factors to commute the sentence of death imposed by the courts below into imprisonment for life – Young age of the appellant at the time of commission of the offence (23/25 years), his weak socio-economic background, absence of any criminal antecedents, non pre-meditated nature of the crime, and that the accused has spent nearly 10 years 10 months in prison are other extenuating factors – No doubt the appellant has committed an abhorrent crime,

A *incarceration for life would serve as sufficient punishment and penitence for his actions – Thus, death sentence commuted to imprisonment for life – However, the appellant not entitled to premature release/remission for the offence u/s. 302 until he has undergone actual imprisonment for at least thirty years.*

B *Code of Criminal Procedure, 1973: s. 235(2) – Infraction of – Plea of appellant-accused that by passing a common order on conviction and sentencing, the High Court contravened by not hearing the petitioner separately on sentencing – Held: Adequate and sufficient opportunity has been afforded to the appellant to place all the relevant materials on record.*

C

Disposing of the appeals, the Court

HELD: 1.1 On an overall view of the evidence and witness statements adduced by the prosecution, the chain of circumstances affirmatively establishes the guilt of the appellant. Though the

D **counsel for the appellant has painstakingly sought to highlight contradictions and inconsistencies in the prosecution's case, it is believed that the same do not create a reasonable doubt in the mind of this Court. The five-fold test prescribed in *Sharad Birdhichand Sarda's* case are satisfied as the circumstances relied upon are fully established; they are conclusive in nature and**

E **tendency; the chain of evidence is so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the appellant; the facts established are consistent only with the hypothesis of the guilt of the accused and exclude every hypothesis except the one proved. The decision of the**

F **High Court as well as the District and Sessions Court convicting the appellant for rape and murder of R etc., thus, is upheld. [Para 21][67-G-H; 68-A-B]**

Sharad Birdhichand Sarda v. State of Maharashtra **(1984) 4 SCC 116 : [1985] 1 SCR 88 – relied on.**

G **1.2 The defence is entitled to rely upon contradictions in ocular evidence furnished by the eye-witnesses and highlight any incongruity between their versions and the prosecution's case. It is not a universally affirmed position that the witnesses must be confronted by the defence to seek advantage of the**

H **contradictions. [Para 12][64-D]**

1.3 On the aspect that PW-7, PW-8, PW-9 and PW-10 are planted witnesses, at first the site map is taken note of which indicates the place/location where PW-7 resides and also the pathway from the village to the stream, which is about a kilometre long. PW-15 has deposed that there being waste shrubs next to his field on the banks of the stream, it was difficult to go to the stream through the shrubs. Next to his land, lie the fields belonging to others, beyond which there was a graveyard where people did not usually visit at odd hours. Secondly, there are good and sound reasons to believe that the date 30th December 2010 deposed to by PW- 8, PW-9 and PW-10 is on account of failure to recollect the exact date when they had seen the appellant with a gunny bag and the girl on his shoulder, and not on account of false deposition on the factum that the appellant was seen carrying the child at about 8:30 p.m. The witnesses are village residents and as their evidence was recorded nearly a year after the occurrence, they may not have possibly remembered the date of sighting, for the reason that dates, especially those in the Gregorian calendar, may not be of much relevance or consequence in the rural areas. [Para 13, 14][64-E-H; 65-A-B]

1.4 On 29th December 2010, PW-4 had filed a missing person report at about 5:00 p.m. On 30th December 2010, the parents of R, PW-1 and PW-19 had also reached the village. In case PW-8, PW-9 and PW-10 had seen the appellant carrying the girl child on his shoulder on 30th December 2010, they would have immediately accosted him and questioned him about the girl, for by then the disappearance of R had become common knowledge for all villagers. Therefore, the date on which PW-8, PW-9 and PW-10 saw the appellant with the small girl on his shoulder was not 30th December 2010. Rather, 30th December 2010 was the date on which these witnesses had informed other villagers that they had seen the appellant carrying a small girl on his shoulder about two days earlier. On a careful scrutiny of the statements made by PW-8, PW-9 and PW-10, it becomes apparent that they had met PW-1 on 30th December 2010 and informed him about their sighting. The inconsistency of dates, thus, can be explained as inadvertence or strained memory due to passage of time, not resulting in displacing the case against the appellant that the prosecution has made out. [Para 15][65-B-F]

1.5 There is no room left for doubt that recovery of the dead body of R was based on the appellant's statement. The dead body was concealed in a gunny bag with two stones and immersed in the stream which had about midriff-high water. The fact that PW-9 and PW-10 had deposed on almost identical lines does not, in any way, reflect a discrepancy, but rather a possible lapse on the part of the court recording their evidence. [Para 16][65-G-H; 66-A]

2.1 The impugned judgment reveals extensive study of case-law on part of the High Court in considering the death sentence imposed by the trial court. On an overall view of the facts and circumstances of the matter, the High Court was of the opinion that the sentence of death should be confirmed, that there were no mitigating circumstances to be found, and that there were many aggravating circumstances as the appellant was known to R, who reposed complete trust and faith in him and willingly allowed him to take her along, but she was raped and murdered in the most gruesome manner and her body was dumped into the stream. The motivation of the appellant, the vulnerability of the deceased R, the enormity of the crime and the execution thereof, the Court considered the case as falling in the "rarest of the rare" category, and warranting the sentence of death to deter others from committing atrocious crimes, and to give emphatic expression to society's abhorrence of such crimes. [Para 23][68-D-G]

2.2 The statement of objection filed by the respondent State seeks to draw force from the observations of the High Court. In addition, the respondent State has defended the death sentence on the grounds that the actions of the appellant constitute a grave and uncommon crime endangering the moral fabric of the society. The submission is that the matter falls in the category of 'rarest of the rare' cases as the appellant, under the pretext of giving biscuits, committed rape and murder of a five-year old girl, and threw her dead body into the stream. The deceased R could not have provided resistance, much less provocation for the crime. Relying on the data compiled by the National Crime Records Bureau which shows that an average of 77 acts of rape were committed daily in India in the year 2020, the counsel has sought a deterrent penalty for the actions of the appellant. [Para 25][70-C-E]

2.3 As regards the plea that there has been violation of s. 235(2) of the Code of Criminal Procedure, which mandates that the accused must be heard, in light of the principle laid down in *Dagdu's* case, adequate and sufficient opportunity has been afforded to the appellant to place all the relevant materials on record. [Para 26][70-F-G; 71-D]

2.4 The trial court recorded that the death sentence was awarded on the ground that "the crime was committed in an extremely diabolical manner and that it was cruel, barbaric and revolting." It has been rightly pointed out that the trial court merely noticed that the appellant was of young age (23 / 25 years) belonging to a very poor family, but did not consider these as mitigating factors. The High Court noted that there are no mitigating circumstances at all. This observation is incorrect. To begin with, it is clear that the appellant had no criminal antecedents, nor was any evidence presented to prove that the commission of the offence was pre- planned. There is no material shown by the State to indicate that the appellant cannot be reformed and is a continuing threat to the society. On the contrary, it can be seen from the Death Sentence Prisoner Nominal Roll issued by the Chief Superintendent, Central Prison, that the conduct of the appellant in jail has been 'satisfactory'. The appellant's conduct in prison would be considered as expiation for his past deeds, also reflecting his desire to reform and take a humane turn. Furthermore, the young age of the appellant at the time of commission of the offence (23/25 years), his weak socio-economic background, absence of any criminal antecedents, non pre-meditated nature of the crime, and the fact that he has spent nearly 10 years 10 months in prison have weighed with as other extenuating factors, which add up against imposition of death penalty which is to be inflicted only in rarest of the rare cases. The respondent State has not shown anything to prove the likelihood that the appellant would commit acts of violence as a continuing threat to society; per contra, his conduct in the prison has been described as satisfactory. There is no doubt that the appellant has committed an abhorrent crime, and for this it is believed that incarceration for life will serve as sufficient punishment and penitence for his actions, in the absence of any material to believe that if allowed to live he poses a grave and

serious threat to the society, and the imprisonment for life would also ward off any such threat. It is believed that there is hope for reformation, rehabilitation, and thus the option of imprisonment for life is certainly not foreclosed and therefore acceptable. [Para 28][72-D-G; 73-A-D]

2.5 There are sufficient mitigating factors to commute the sentence of death imposed by the Sessions Court and confirmed by the High Court into imprisonment for life, with the direction that the appellant would not be entitled to premature release/ remission for the offence under Section 302 of the Penal Code until he has undergone actual imprisonment for at least thirty (30) years. While maintaining other sentences, it is directed that the sentences shall run concurrently and not consecutively, as the appellant has been sentenced to imprisonment for life for the offence under section 376 of the Code, which sentence is also imposed for the offence under section 302 of the Code. [Para 29] [73-D-F]

2.6 The conviction of the appellant for the offences under Sections 302, 376, 364, 366A and 201 of the Code and the sentences awarded for the offences under Sections 376, 364, 366A and 201 of the Code is upheld. The death sentence is commuted to that of life imprisonment with the stipulation that the appellant would not be entitled to premature release/remission before undergoing actual imprisonment of 30 years for the offence under Section 302 of the Code and further the sentences awarded would run concurrently and not consecutively. [Para 30][73-F-G; 74-A]

Shanti Devi v. State of Rajasthan **(2012) 12 SCC 158 : [2012] 9 SCR 226;** *Ranjit Kumar Haldar v. State of Sikkim* **(2019) 7 SCC 684 : [2019] 9 SCR 754;** *Santa Singh v. State of Punjab* **(1976) 4 SCC 190 : [1977] 1 SCR 229;** *Dagdu and Others v. State of Maharashtra* **(1977) 3 SCC 68 : [1977] 3 SCR 636;** *Shatrughna Baban Meshram v. State of Maharashtra* **(2021) 1 SCC 596;** *Bantu alias Naresh Giri v. State of Madhya Pradesh* **(2001) 9 SCC 615 : [2001] 4 Suppl. SCR 298;** *Purushottam Dashrath Borate v. State of Maharashtra*, **(2015) 6 SCC 652 : [2015] 5 SCR 1112;** *Mulla v. State*

of U.P. **(2010) 3 SCC 508 : [2010] 2 SCR 633;** *Mohan v. State of T.N.* **(1998) 5 SCC 336 : [1998] 3 SCR 317;** *Akhtar v. State of UP* **(1999) 6 SCC 60;** *Union of India v. V. Sriharan alias Murugan and Others* **(2016) 7 SCC 1 : [2015] 14 SCR 613.**

Modi's Textbook of Medical Jurisprudence and Toxicology, 25th edition (2016), Chapter XV – *'Post Mortem Changes and Time of Death'.* **pg 352 – referred to.**

Case Law Reference

[2012] 9 SCR 226	**referred to**	**Para 16**
[2019] 9 SCR 754	**referred to**	**Para 16**
[1985] 1 SCR 88	**relied on**	**Para 21**
[1977] 1 SCR 229	**referred to**	**Para 26**
[1977] 3 SCR 636	**referred to**	**Para 26**
(2021) 1 SCC 596	**referred to**	**Para 26**
[2001] 4 Suppl. SCR 298	**referred to**	**Para 27**
[2015] 5 SCR 1112	**referred to**	**Para 28**
[2010] 2 SCR 633	**referred to**	**Para 28**
[1998] 3 SCR 317	**referred to**	**Para 28**
(1999) 6 SCC 60	**referred to**	**Para 28**
[2015] 14 SCR 613	**referred to**	**Para 30**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 1473-1474 of 2017.

From the Judgment and Order dated 06.03.2017 of the High Court of Karnataka, Dharwad Bench, in Criminal Appeal No.2082 of 2013 and Criminal Referred Case No. 32 of 2013.

Gaurav Agrawal, Adv. for the Appellant.

Nikhil Goel, AAG, V. N. Raghupathy, Vinay Mathew, Advs. for the Respondent.

A The Judgment of the Court was delivered by

SANJIV KHANNA, J.

1. The judgment under challenge, passed by the High Court of Karnataka at Dharwad on 6th March 2017, affirms the conviction of the appellant – Irappa Siddappa Murgannavar – under Sections 302, 376, B 364, 366A, and 201 of the Indian Penal Code, 1860 (for short, 'the Code'); and confirms the sentence of death for the offence under Section 302, rigorous imprisonment for life for the offence under Section 376, rigorous imprisonment for six years and a fine of Rs.10,000/- with default stipulation for the offences under Sections 364 and 366A each, and rigorous C imprisonment for two years and a fine of Rs.2,000/- with default stipulation for the offence under Section 201 of the Code. The sentences under Sections 376, 364, 366A, and 201 of the Code are directed to run consecutively.

2. The case of the prosecution is that the appellant subjected the D deceased R to rape, killed her by strangulation, and then disposed of her body, tied in a gunny bag, into the stream named *Bennihalla*. As there are no eye witnesses to the commission of the offences, in order to prove these postulations, the prosecution has relied on three-fold circumstances: (i) that the appellant took away R from a neighbour's house on 28th December 2010; (ii) that the appellant was last seen by E certain witnesses carrying R and a gunny bag towards the *Bennihalla* stream; and (iii) that based on the disclosure statement of the appellant on 1st January 2011, the dead body of R was recovered in a gunny bag from *Bennihalla*.

3. R, a girl aged 5 years and 2 months, was living with her maternal F grandfather Rangappa in village Khanapur, Taluka Nargund, District Gadag, Karnataka while her parents worked in Mangalore, Karanataka. Rangappa's neighbours Venkavva Patil (PW-5) and her nephew Ajit Patil (PW-6) have testified that on 28th December 2010 at about 6:30 pm, R had come to their house to watch TV. At about 6:30 pm the G appellant had also come to their house. He was talking to R and took her with him on the pretext of buying her biscuits. Hanamappa (PW-4), who is the brother of Rangappa, testified that R did not return that night, and in spite of frantic efforts, she could not be traced. The next day, he enquired at Venkavva Patil's (PW-5) house about R's whereabouts, where he was informed that the appellant had taken R with him. Hanamappa H

(PW-4) lodged a missing person report re R at Nargund Police Station on 29th December 2010 (Exhibit P-6). This complaint states that on 28th December 2010, at 9 pm, he was informed by Mallanagowda Kagadal (PW-14) that R was missing, following which he went to his brother Rangappa's house and learnt from his brother's daughter, Yallavva Mangalore (PW-23), that R had gone to Venkavva Patil's (PW-5) house at 6:30 pm to watch TV, and that he, along with other people, tried locating R but were unsuccessful. The complaint does not mention the involvement of the appellant, a fact counted on by the counsel for the appellant that will be addressed subsequently. Similarly, Yallavva Mangalore (PW-23) has testified that R had gone to her neighbour's house at about 6:30 p.m. on 28th December 2010 to watch TV. As R did not return home, they had made enquiries with their neighbour Venkavva Patil (PW-5) who had confirmed R's visit to her house for watching TV and that she may have gone out. Yallavva Mangalore (PW-23) had looked for R and, on being unsuccessful, informed her father and uncles. R could not be located on the said date or on 29th December 2010.

4. Upon learning from Hanamappa (PW-4) and Yallavva Mangalore (PW-23) that R was missing, her father Sanganabasappa (PW-1) and mother Shivaleela (PW-19) returned to Khanapur on 30th December 2010. Thereupon, extensive search for R was undertaken, but she could not be found. Sanganabasappa (PW-1) has stated that he was told by Bhimappa Talawar (PW-8), Hanamappa Talawar (PW-10) and others that they had seen the appellant carrying his daughter somewhere. He had then made a complaint at the Nargund Police Station on 1st January 2011 at 12:30 a.m. (Exhibit P-1), which we would subsequently refer to. Hanamappa (PW-4) has similarly testified that he had learnt from village residents Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (P-10) that they had seen the appellant carrying R on his shoulder and going towards the *Bennihalla* stream. Thereafter, he went to the police station and informed the police about the possible involvement of the appellant. On similar lines, Venkavva Patil (PW-5) has deposed that she learnt from the police that Yallappagouda Kagadal (PW- 7), Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (P-10) had seen the appellant carrying a gunny bag and the deceased R, walking towards the stream. These evidences, further elaborated below, have been adduced by the prosecution to establish that the appellant was seen carrying R and a gunny bag and walking towards the stream.

A 5. Yallappagouda Kagadal (PW-7), in his sworn statement, confirms the prosecution version that on 28th December 2010 at about 8:30 p.m. while he was standing near his house, he saw the appellant carrying a child (who was wearing a frock) and a gunny bag, going through the bus stand road. He thought that the appellant was taking the said girl to her house. Subsequently he had informed others and learnt B from Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10) that they too had seen the appellant carrying a girl child with him at about 8:30 p.m. on 28th December 2010. Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10), in their depositions, have corroborated that they had C seen the appellant carrying a girl on his shoulder and a gunny bag at 8:30 p.m. However, they have stated that the sighting was on 30th December 2010. We shall examine this inconsistency and variance of the date subsequently.

6. Ajit Patil (PW-6), in his testimony, has stated that they had D searched for the appellant but he had left the village. This had also been a factor, along with others, contributing to the suspicion that the appellant had kidnapped R with an intention to rape and kill her.

7. The investigating officer B. Vijaykumar (PW-24) has stated that he had taken charge of the investigation from PSI S.S. Kamathagi E (PW-25) on 1st January 2011. He searched for the appellant and subsequently arrested him on the same day in front of one Goudappagouda Hanamantagouda Kagadal. The date and time of arrest as shown in the chargesheet are 1st January 2011 at 4:30 am. B. Vijaykumar (PW-24) has testified that the appellant, upon arrest, had made a disclosure statement (Exhibit P-17), wherein he has stated, *inter alia*, that he F inserted the body of R into a bag with two stones, tied the mouth of the bag and threw it into the waters of *Bennihalla*. Based on the disclosure statement, the appellant was taken to *Bennihalla* near the field of one Shrinivasreddi Ramanagouda Hosamani (PW-15) where he showed the place where he had thrown the dead body of R. On similar lines, Rajesab G Nadaf (PW-11) and Shankrappa Tadasi (PW-12), in almost identical testimonies, have deposed that the appellant had shown the spot in *Bennihalla* where he had submersed the body of R tied in a gunny bag along with two stones. On directions of the police, they dived into the water and discovered a gunny bag, which contained the dead body of R, along with two stones. The stones were identified by Rajesab Nadaf H

(PW-11) and Shankarappa Tadasi (PW-12) and marked MO.1 and MO.2 while the gunny bag was marked MO.3 and the frock worn by R was marked as MO.4. The version asserted by Rajesab Nadaf (PW-11) and Shankarappa Tadasi (PW-12) is affirmed by the *panch* witnesses. It is also avowed by Shrinivasreddi Ramanagouda Hosamani (PW-15) that the police had asked two persons to enter the water, who found a sack near the pipe connected to his pump set. The sack was opened to find the dead body of R along with two stones. The prosecution has laid reliance on these depositions to evidence that the dead body of R was recovered from the stream based on the disclosure statement made by the appellant.

8. Having noted the witness statements and evidence relied upon by the prosecution to prove the circumstances of commission of the offences, we would examine the implication of the discrepancies in the statements of witnesses and the prosecution case, which the counsel for the appellant submits, establish that the prosecution has failed to prove the case against the appellant beyond reasonable doubt.

9. The first discrepancy alleged is predicated on the testimony of Hanamappa (PW-4) and Yallava Mangalore (PW-23) vis-à-vis the testimony of Venkavva Patil (PW-5) and Ajit Patil (PW-6) regarding the presence of the appellant in the house of Venkavva Patil (PW-5) on 28th December 2010 at 6:30 p.m. Counsel for the appellant submits that the assertion that appellant took R with him on the pretext of getting her biscuits is an afterthought and contrived evidence. In this regard, he places reliance upon Exhibit P-6, i.e. the complaint filed by Hanamappa (PW-4) on 29th December 2010 at 5:00 p.m., which makes no mention of the presence of the appellant at the residence of Venkavva Patil (PW- 5) and Ajit Patil (PW-6) or that he had taken R with him, in spite of averments in witness statements that the factum of the appellant taking R with him had been communicated to Hanamappa (PW-4) before filing of the complaint. Reliance is also placed on the testimony of PSI S.S. Kamathagi (PW-25) who claims that he had visited the village after recording the complaint (Exhibit P-6) and made efforts without success to trace R. Our attention was drawn to the FIR (Exhibit P-22) recorded on the basis of statement made by Sanganabasappa (PW-1) in the intervening night of 31st December 2010 and 1st January 2011. The FIR mentions that Venkavva Patil (PW-5) and Ajit Patil (PW-6) had informed Sanganabasappa (PW-1) that the appellant had taken R with him, and

A that Sanganabasappa (PW-1) came to know of this fact only on 30th December 2010. The counsel for the appellant has argued that Venkavva Patil (PW-5) and Ajit Patil (PW-6) did not name the appellant though R was missing from 6:30 p.m. onwards on 28th December 2010, and the first mention of the appellant's involvement surfaces only in the FIR dated 1st January 2011. Therefore, the evidence of 'last seen' propounded and based on depositions by Venkavva Patil (PW-5) and Ajit Patil (PW-6) is shaky and doubtful.

10. Khanapur is a small village, secluded and away from urban areas or other habitations, which is apparent from the fact that the closest police station is located about nineteen kilometres away. Hanamappa (PW-4) who had made the police complaint (Exhibit P-6) on 29th December 2010, and his neighbours Venkavva Patil (PW-5) and Ajit Patil (PW-6) are village dwellers and simple people. Village communities are close-knit, and given the camaraderie, faith and trust amongst the known villagers, Hanamappa (PW-4), Venkavva Patil (PW-5) and Ajit Patil (PW-6) may not have initially suspected the appellant's foul play in disappearance of R. The complaint (Exhibit P-6) is short and brief; while mentioning that R was missing, it does not record that she may have been raped and killed by someone. This is also evident from Hanamappa's (PW-4) cross-examination wherein he has stated that at the time of filing of the complaint, he did not know whether the appellant had committed an offence. Noticeably, the implication as to the involvement of the appellant was made shortly thereafter, that is on 31st December 2010. By then the entire village was in a state of alarm and wary that a terrible crime had been committed by someone from the village. Yallappagouda Kagadal (PW-7), Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9), and Hanamappa Talawar (PW-10) had come forward and stated that they saw the appellant carry a child towards *Bennihalla*. The appellant, a driver by profession, had gone missing according to Ajit Patil's (PW-6) testimony. Therefore, mere non-inclination to straight-away accuse the appellant who was apparently close to Venkavva Patil (PW-5) and Ajit Patil (PW- 6) and had come to their house to watch television, should not be a ground to thrust aside Hanamappa's (PW-4) version as he had not named the appellant, or depositions of Venkavva Patil (PW-5) and Ajit Patil (PW-6) that R had left with the appellant. One could accept that there could be some exaggeration in the statements of Venkavva Patil (PW-5) and Ajit Patil (PW-6) to the extent that they had heard the appellant conversing with

R and that he had taken her away on the pretext of giving her a biscuit, but this would not in any manner affect the factum that the appellant and the victim R were present in the house of Venkavva Patil (PW-5) and Ajit Patil (PW-6) at 6:30 p.m. on 28th December 2010 where they had gone to watch TV. It would be rather imprudent to hold that the appellant had not visited the house of Venkavva Patil (PW-5) and Ajit Patil (PW-6) on 28th December 2010 at 6.30 p.m., when R was also present, and that the appellant had left taking R with him.

11. It would be apposite to pay minute attention to the testimonies of Yallappagouda Kagadal (PW-7), Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10). These villagers again had no reason to suspect that the appellant, who was carrying a child on his shoulder, was guilty of a criminal act of rape and murder or that he was carrying a gunny bag on his shoulder for the purpose of dumping the victim's body in the stream. This is understandable from the statement of Yallappagouda Kagadal (PW-7) according to which he assumed that the appellant was taking the girl to her home. The situation changed rapidly thereafter, as is duly reflected in the statement made by Sanganabasappa (PW-1) on the intervening night of 31st December 2010 and 1st January 2011 wherein he has cast suspicion on the appellant. The statement reflects the anger of people in a rural environment as faith had given way to disbelief. By that time, villagers had not been able to locate R who was last seen with the appellant, who in turn had been spotted carrying a child and a gunny bag, and therefore, they suspected that R had been raped and killed. There appeared no other reason for R to have vanished and disappeared, she being a girl aged only about five years who had gone to a neighbour's house to watch TV in the evening. The statement of PSI S.S. Kamathagi (PW-25) has not in any way contradicted the prosecution version or the testimonies of Sanganabasappa (PW-1), Hanamappa (PW-4), Venkavva Patil (PW-5), Ajit Patil (PW-6), Yallappagouda Kagadal (PW-7), Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9), Hanamappa Talawar (PW-10), and Yallava Mangalore (PW-23).

12. We would now examine the date discrepancy in the court testimonies of Yallapagouda Kagadal (PW-7), Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10), and consider the contention of the counsel for the appellant that Yallapagouda Kagadal (PW-7), Bhimappa Talawar (PW-8), Gadigeppa

A Talawar (PW-9) and Hanamappa Talawar (PW-10) are planted witnesses. Yallappagouda Kagadal (PW-7) in his testimony has clearly stated that he had seen the appellant carrying a girl on his shoulder at about 8:30 p.m. on 28th December 2010. Contrary to Yallapagouda's (PW-7) statement relating to the date of sighting, Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9), and Hanamappa Talawar (PW-10), have deposed that they had seen the appellant with a gunny bag and a girl child on his shoulder on 30th December 2010 at about 8:30 p.m. This date – 30th December 2010 – has been repeatedly mentioned by Bhimappa Talawar (PW-8) and Hanamappa Talawar (PW-10) and once by Gadigeppa Talawar (PW-9). The counsel for the appellant has harped on the inconsistency of these dates. On the other hand, the State has contended that this contradiction should have been put to the witnesses in question in their cross-examination by the defence. We would have to reject the contention raised by the State as untenable and fallacious. It is an accepted position that the defence is entitled to rely upon contradictions in ocular evidence furnished by the eye-witnesses and highlight any incongruity between their versions and the prosecution's case. It is not a universally affirmed position that the witnesses must be confronted by the defence to seek advantage of the contradictions.

13. On the aspect that Yallapagouda Kagadal (PW-7), Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10) are planted witnesses, at first we take note of the site map (Exhibit P-8) which indicates the place/location where Yallappagouda Kagadal (PW-7) resides and also the pathway from the village to the stream, which is about a kilometre long. Shrinivasreddi Ramanagouda Hosamani (PW-15) has deposed that there being waste shrubs next to his field on the banks of *Bennihalla*, it was difficult to go to the stream through the shrubs. Next to his land, lie the fields belonging to others, beyond which there was a graveyard where people did not usually visit at odd hours.

14. Secondly, we see good and sound reasons to believe that the date 30th December 2010 deposed to by Bhimappa Talawar (PW- 8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10) is on account of failure to recollect the exact date when they had seen the appellant with a gunny bag and the girl on his shoulder, and not on account of false deposition on the factum that the appellant was seen carrying

the child at about 8:30 p.m. The witnesses are village residents and as their evidence was recorded nearly a year after the occurrence, they may not have possibly remembered the date of sighting, for the reason that dates, especially those in the Gregorian calendar, may not be of much relevance or consequence in the rural areas.

15. Furthermore, what has weighed with us is the undisputed fact that on 29th December 2010, Hanamappa (PW-4) had filed a missing person report (Exhibit P-6) at about 5:00 p.m. On 30th December 2010, the parents of R, Sanganabasappa (PW-1) and Shivaleela (PW-19) had also reached the village. In case Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10) had seen the appellant carrying the girl child on his shoulder on 30th December 2010, they would have immediately accosted him and questioned him about the girl, for by then the disappearance of R had become common knowledge for all villagers. Therefore, the date on which Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10) saw the appellant with the small girl on his shoulder was not 30th December 2010. Rather, 30th December 2010 was the date on which these witnesses had informed other villagers that they had seen the appellant carrying a small girl on his shoulder about two days earlier. On a careful scrutiny of the statements made by Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10), it becomes apparent that they had met Sanganabasappa (PW-1) on 30th December 2010 and informed him about their sighting. The inconsistency of dates, thus, can be explained as inadvertence or strained memory due to passage of time, not resulting in displacing the case against the appellant that the prosecution has made out.

16. On the question of recovery of the dead body on the basis of the appellant's disclosure statement, we have referred to the statements of Gadigeppa Talawar (PW-9), Hanamappa Talawar (PW-10), Rajesab Nadaf (PW-11), Shankarappa Tadasi (PW-12), Shrinivasreddi Ramanagouda Hosamani (PW-15) and B. Vijaykumar (PW-24). There is no room left for doubt that recovery of the dead body of R was based on the appellant's statement. The dead body was concealed in a gunny bag with two stones and immersed in the stream which had about midriff-high water. The fact that Gadigeppa Talawar (PW-9) and Hanamappa Talawar (PW-10) had deposed on almost identical lines does not, in any way, reflect a discrepancy, but rather a possible lapse on the part of the

court recording their evidence. In ***Shanti Devi*** v. ***State of Rajasthan***,[1] this Court had considered the factum of recovery of the body of the deceased at the instance of the accused as a strong circumstance for conviction of the accused. Similarly, in ***Ranjit Kumar Haldar*** v. ***State of Sikkim***,[2] recovery of dead body based on the disclosure statement of the accused was considered a very strong incriminating circumstance against her to maintain her conviction.

17. This brings us to the medical evidence and the question whether it supports the prosecution version that R was raped and murdered on 28th December 2010. Dr. Girish Maraddi (PW-20) had conducted the post mortem examination of R on 1st January 2011 at 10:00 a.m. His report is detailed and refers to cut lacerated wound over the vagina, anteriorly upto urethra, and the ruptured hymen. There was also soft tissue injury of the neck interiorly.

18. The report also states that the cause of death was asphyxia caused by strangulation and not due to drowning. To confirm the said position, PW-20 had conducted the lung floating test. The post mortem report states that the body was slightly decomposed and the skin had also peeled all over the body. Small and large intestines, as well as the lungs, were congested. The inquest *panchnama* (Exhibit P-2) records that the face seemed swollen and the skin on the body seemed to be torn here and there. It had also become black at some places. The body had swollen from neck to waist, and at some places the skin was torn and had turned black in colour. Similarly, legs had swollen and the skin had torn, turning black. The post mortem report (Exhibit P-11) records the time of death as 72-86 hours before the examination. This would corroborate with the prosecution version that R was raped and murdered on 28th December 2010.

19. To affirm our opinion as to the time of death we have studied the opinion expressed in Modi's Textbook of Medical Jurisprudence and Toxicology, 25th edition (2016), Chapter XV – '*Post Mortem Changes and Time of Death*'. At page 352, the treatise observes that the rate of putrefaction of body in water is more reliable than of body exposed to air as the temperature in water is more uniform and the body is protected from air. Ordinarily, the body takes twice as much time in water as in air to undergo the same degree of putrefaction. The process is retarded,

[1] (2012) 12 SCC 158, at para 17.
[2] (2019) 7 SCC 684

when a body is lying in deep water and is well-protected by clothing. However, it is hastened when the body is lying in water contaminated with sewage. Flotation of body takes place when gases of decomposition or putrefaction develop within the submerged body. In India, submerged body comes to the surface within 24 hours in summer and within two to three days or more, and sometimes in more than a week, in winter. In temperate climates a submerged body floats within a week in summer and in about a fortnight in winter. Power of flotation of a decomposed body is so great that in certain cases it may float to the surface in spite of being weighted with a heavy stone. The duration required for flotation of body depends upon the age, sex, the condition of the body, season of the year and water. Bodies which are light in weight have low specific gravity and, therefore, float sooner.

20. In the context of the present case, there is no dispute that the occurrence had taken place in late December, that is, in winter. We have undertaken a check to ascertain the temperature range in the village in late December. As per data, the temperature in the month of late December in Nargund (the taluka in which Khanapur village is located) is between 19 to 29 degrees, and the temperature in water would be certainly lower. Thus, it is clear that putrefaction of the body was retarded. But the body had not floated and risen to the surface. The fact that the body was swollen and was slightly decomposed, while the skin was discoloured, would indicate that the putrefaction process had indeed started. The post mortem report and the inquest *panchnama*, therefore, confirm the date when the crime was committed and fully corroborate and support the ocular evidence of Sanganabasappa (PW-1), Hanamappa (PW-4), Venkavva Patil (PW-5), Ajit Patil (PW-6), Yallapagouda Kagadal (PW-7), Bhimappa Talawar (PW-8), Gadigeppa Talawar (PW-9), Hanamappa Talawar (PW-10), Rajesab Nadaf (PW-11), Shankarappa Tadasi (PW-12), Shrinivasreddi Ramanagouda Hosamani (PW-15) and B. Vijaykumar (PW-24).

21. On an overall view of the evidence and witness statements adduced by the prosecution, the chain of circumstances affirmatively establishes the guilt of the appellant. Though the counsel for the appellant has painstakingly sought to highlight contradictions and inconsistencies in the prosecution's case, we believe that the same do not create a reasonable doubt in the mind of this Court. The five-fold test prescribed

A by Fazal Ali J. in ***Sharad Birdhichand Sarda v. State of Maharashtra***[3] are satisfied as the circumstances relied upon are fully established; they are conclusive in nature and tendency; the chain of evidence is so complete as not to leave any reasonable ground for conclusion consistent with the innocence of the appellant; the facts established are consistent only with the hypothesis of the guilt of the accused and exclude every hypothesis except the one proved. The decision of the High Court as well as the District and Sessions Court convicting the appellant for rape and murder of R etc., thus, is upheld.

22. Having established the culpability of the accused, we shall proceed to examine the issue of sentencing. As noted previously, the appellant has been sentenced to death for the offence under Section 302, which sentence has been confirmed by the High Court, along with prison sentences as set out in paragraph 1 of this judgment.

23. The impugned judgment reveals extensive study of case-law on part of the High Court in considering the death sentence imposed by the trial court. On an overall view of the facts and circumstances of the matter, the High Court was of the opinion that the sentence of death should be confirmed, that there were no mitigating circumstances to be found, and that there were many aggravating circumstances as the appellant was known to R, who reposed complete trust and faith in him and willingly allowed him to take her along, but she was raped and murdered in the most gruesome manner and her body was dumped into the stream. The court observed that "…*when an innocent and helpless girl of 5 was subject to such a 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 an ordinary person*." The motivation of the appellant, the vulnerability of the deceased R, the enormity of the crime and the execution thereof, the Court considered the case as falling in the "rarest of the rare" category, and warranting the sentence of death to deter others from committing atrocious crimes, and to give emphatic expression to society's abhorrence of such crimes.

24. Challenging the order on sentence, the appellant has argued that by passing a common order on conviction and sentencing, the High Court has contravened Section 235(2) of the Code of Criminal Procedure,

[3] (1984) 4 SCC 116

1973 (for short, 'CrPC') by not hearing the petitioner separately on sentencing. He has also submitted that the High Court failed to call for mitigating circumstances, that there were no aggravating circumstances, that the case does not fall into the category of 'rarest of the rare', that the appellant was only 25 years old who could be reformed and rehabilitated and is not likely to be a menace to the society, that the appellant has undergone a lengthy period in custody, that there is no material to suggest that the option of awarding life sentence was unquestionably foreclosed, and that death sentence should ordinarily be awarded when there is no other alternative left. In addition to the aforesaid, counsel for the appellant has also listed mitigating factors for commutation of death sentence to life imprisonment as under:

> "1) The murder was not committed in pre-planned manner. Though rape on a child of 5 years is itself a grave crime, the manner of the committing the crime cannot be said to be gruesome or diabolical.
>
> 2) There is no material led by the prosecution to show that the accused cannot be reformed. The State has not brought material to show that the accused is a continuing threat to society and the option of imposing life sentence is unquestionably foreclosed.
>
> 3) Young age of the accused is a mitigating factor.
>
> 4) Lack of criminal antecedent is a mitigating factor.
>
> 5) Conduct in jail has to be considered.
>
> 6) Social economic back ground has not been considered, including poverty and lack of education.
>
> 7) Perhaps the accused, being unaware of his right to lead evidence of mitigating circumstances, did not request for time for producing material on this aspect. Though it would not vitiate the sentence, there is sufficient material before this Hon'ble Court for making a further inquiry into the mitigating circumstances.
>
> 8) The accused is in death row for last 9 years since the judgment of trial court on 08.03.2012."

The counsel for the appellant has drawn our attention to a certificate issued by the Gandhi Research Foundation, Jalgaon which states that the appellant had participated in the 'Gandhi Vichar Sanskar Pariksha'

A 2017-18 organised by the Gandhi Research Foundation, Jalgaon. It appears from the website of the Foundation that it conducts a country-wide examination called "*GVSP (Gandhian Values for Sustainable Peace - Gandhi Vichar Sanskar Pariksha) to inculcate among the young generation the art of nonviolence in daily life*." Another
B certificate dated 22nd December 2016 issued by the Yogavidya Gurukul, a research institute recognised by Pune University, states that the appellant has successfully completed the course Yoga Pravesh. We have also taken on record the letter dated 4th September 2021 from Medical Officer, Central Prison Hospital, Belagavi addressed to an advocate, stating that the appellant has been diagnosed with Oral Generalised Sub-
C Mucosal Fibrosis which is in premalignant condition.

25. The statement of objection filed by the respondent State in the present appeal seeks to draw force from the observations of the High Court noted above. In addition, the respondent State has defended the death sentence on the grounds that the actions of the appellant constitute
D a grave and uncommon crime endangering the moral fabric of the society. The submission is that the matter falls in the category of 'rarest of the rare' cases as the appellant, under the pretext of giving biscuits, committed rape and murder of a five-year old girl, and threw her dead body into the stream. The deceased R could not have provided resistance,
E much less provocation for the crime. Relying on the data compiled by the National Crime Records Bureau which shows that an average of 77 acts of rape were committed daily in India in the year 2020, the counsel has sought a deterrent penalty for the actions of the appellant.

26. A perusal of pages 186 and 187 of this appeal would show that
F on the same day as conviction, the trial court imposed death sentence vide a common order. The appellant has submitted that this is in violation of Section 235(2) of the Code of Criminal Procedure, which mandates that the accused must be heard on sentence. In ***Santa Singh*** v. ***State of Punjab***,[4] when the accused was convicted and sentenced to death by one single judgment, a 2-judge bench of this court found that there was
G infraction of Section 235(2) of the Code of Criminal Procedure and set aside the sentence and remanded the matter to the Sessions Court. The aspect of remand was considered by a 3-judge bench in ***Dagdu and Others*** v. ***State of Maharashtra***,[5] wherein it was observed that the

[4] (1960) 4 SCC 190

H [5] (1977) 3 SCC 68

failure on the part of the trial court to hear the accused on sentencing does not necessarily entail a remand to that court. If the trial court has failed to do so and the accused challenges the same before the higher court, it would be open to the higher court to remedy the breach by giving a hearing to the accused on the question of sentence. More precisely, Goswami J. in ***Dagdu*** (supra) observed:

> "Whenever an appeal court finds that the mandate of Section 235(2) CrPC for a hearing on sentence had not been complied with, it, at once, becomes the duty of the appeal court to offer to the accused an adequate opportunity to produce before it whatever materials he chooses in whatever reasonable way possible."

Analysing several decisions of this Court on this issue, Uday U. Lalit, J., in ***Shatrughna Baban Meshram*** v. ***State of Maharashtra***,[6] observed that merely on account of infraction of Section 235(2) of the Code of Criminal Procedure, the death sentence ought not to be commuted to life imprisonment. But in light of the principle laid down in ***Dagdu*** (supra), we have afforded adequate and sufficient opportunity to the appellant to place all the relevant materials on record before us.

27. In ***Shatrughna Baban Meshram*** (supra), 67 judgments of the Supreme Court in the previous 40 years were surveyed wherein death sentence had been imposed by the trial court or the High Court for the alleged offences under Sections 376 and 302 of the Code, and where the age of victims was below 16 years. It was noticed that:

> "35.1. Out of these 67 cases, this Court affirmed the award of death sentence to the accused in 15 cases. In three (at Sl. Nos. 26-A, 33-A and 41-A) out of said 15 cases, the death sentence was commuted to life sentence by this Court in review petitions. Out of remaining 12 cases, in two cases (where review petitions were heard in open court in terms of law laid down in Mohd. Arif v. Supreme Court of India), namely, in cases at Sl. Nos. 51-A and 65-A, the death sentence was confirmed by this Court and the review petitions were dismissed. Thus, as on date, the death sentence stands confirmed in 12 out of 67 cases where the principal offences allegedly committed were under Sections 376 and 302 IPC and where the victims were aged about 16 years or below.

[6] (2021) 1 SCC 596

35.2. Out of these 67 cases, at least in 51 cases the victims were aged below 12 years. In 12 out of those 51 cases, the death sentence was initially awarded. However, in 3 cases (at Sl. Nos. 26-A, 33-A and 41-A) the death sentence was commuted to life sentence in review."

It appears from the above data that low age of the victim has not been considered as the only or sufficient factor by this Court for imposing a death sentence. If it were the case, then all, or almost all, 67 cases would have culminated in imposition of sentence of death on the accused. In the case of ***Bantu alias Naresh Giri*** v. ***State of Madhya Pradesh***,[7] where the appellant was accused of raping and murdering a six year old girl, this court noted that though his act was heinous and required condemnation, but it was not rarest of the rare, so as to require the elimination of the appellant from the society. There too, there was nothing on record to indicate criminal antecedents of the appellant or to show that he would be a grave danger to the society.

28. The learned trial court has recorded that the death sentence was awarded on the ground that "*the crime was committed in an extremely diabolical manner and that it was cruel, barbaric and revolting*." It has been rightly pointed out by the counsel for the appellant that the trial court merely noticed that the appellant was of young age (23 / 25 years) belonging to a very poor family, but has not considered these as mitigating factors. The High Court has noted that there are no mitigating circumstances at all. We find this observation incorrect. To begin with, it is clear that the appellant had no criminal antecedents, nor was any evidence presented to prove that the commission of the offence was pre- planned. As submitted by the counsel for the appellant, there is no material shown by the State to indicate that the appellant cannot be reformed and is a continuing threat to the society. On the contrary, it can be seen from the Death Sentence Prisoner Nominal Roll dated 17th July 2017 issued by the Chief Superintendent, Central Prison, Belgaum, that the conduct of the appellant in jail has been 'satisfactory'. We would consider the appellant's conduct in prison as expiation for his past deeds, also reflecting his desire to reform and take a humane turn. Furthermore, the young age of the appellant at the time of commission of the offence

[7] (2001) 9 SCC 615

(23 / 25 years),[8] his weak socio- economic background,[9] absence of any criminal antecedents,[10] non pre-meditated nature of the crime,[11] and the fact that he has spent nearly 10 years 10 months in prison have weighed with us as other extenuating factors, which add up against imposition of death penalty which is to be inflicted only in rarest of the rare cases. The respondent State has not shown anything to prove the likelihood that the appellant would commit acts of violence as a continuing threat to society; *per contra*, his conduct in the prison has been described as satisfactory. There is no doubt that the appellant has committed an abhorrent crime, and for this we believe that incarceration for life will serve as sufficient punishment and penitence for his actions, in the absence of any material to believe that if allowed to live he poses a grave and serious threat to the society, and the imprisonment for life in our opinion would also ward off any such threat. We believe that there is hope for reformation, rehabilitation, and thus the option of imprisonment for life is certainly not foreclosed and therefore acceptable.

29. Thus, we find sufficient mitigating factors to commute the sentence of death imposed by the Sessions Court and confirmed by the High Court into imprisonment for life, with the direction that the appellant shall not be entitled to premature release/remission for the offence under Section 302 of the Code until he has undergone actual imprisonment for at least thirty (30) years. While maintaining other sentences, we direct that the sentences shall run concurrently and not consecutively. We say so as the appellant has been sentenced to imprisonment for life for the offence under section 376 of the Code, which sentence is also imposed for the offence under section 302 of the Code.

30. For the aforesaid reasons, we uphold the conviction of the appellant for the offences under Sections 302, 376, 364, 366A and 201 of the Code and the sentences awarded for the offences under Sections 376, 364, 366A and 201 of the Code. The appeals are, however, partly allowed by commuting the death sentence to that of life imprisonment with the stipulation that the appellant shall not be entitled to premature release/remission before undergoing actual imprisonment of 30 years

[8] Purushottam Dashrath Borate v. State of Maharashtra, (2015) 6 SCC 652
[9] Mulla v. State of U.P., (2010) 3 SCC 508
[10] Purushottam Dashrath Borate v. State of Maharashtra, (2015) 6 SCC 652
[11] Mohan v. State of T.N., (1998) 5 SCC 336; Akhtar v. State of UP, (1999) 6 SCC 60

A for the offence under Section 302 of the Code and further the sentences awarded shall run concurrently and not consecutively.[12]

The appeals and all pending applications are disposed of.

Nidhi Jain Appeals disposed of.

[12] In view of the Constitutional Bench decision in ***Union of India*** v. ***V. Sriharan alias Murugan and Others,*** (2016) 7 SCC 1, the above direction would not affect the constitutional power of the President or Governor under Article 72 or 161 of the Constitution of India.