BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.01.2019

Pronounced on : 13.03.2019

CORAM:

THE HONOURABLE MR. JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE B.PUGALENDHI

Referred Trial [MD] No. 1 of 2018

The Principal District and Sessions Judge,
Theni .. Referring Officer

Versus

Kattavellai @ Devakar .. Respondent

Reference made under Section 366 of Cr.P.C. seeking confirmation of the death sentence awarded by the learned Principal District and Sessions Judge, Theni in Special Sessions Case No.9 of 2013, dated 07.03.2018.

For Referring Officer : Mr. A. Natarajan,
Public Prosecutor
assisted by Mr. K.K. Ramakrishnan
Additional Public Prosecutor

For respondent : Mr.A.Joseph Jerry

JUDGMENT

R.SUBBIAH, J.

As against the award of death sentence, there are mixed opinion among the citizens of this Country. A majority of the citizen want the judicial system to deal the offenders of rape and murder with an iron hand, without showing any sympathy or mercy to them. They also want the Judiciary to take note of the plight and trauma that would have been undergone by the families of the victims silently. Contrarily, there are also voices that require the judicial system to soft pedal on the issue by resorting to reformative theory and to relieve the offender (s) from the gallows and

to view the offence committed by the accused with a humanitarian approach. In this context, several decisions have been cited before us by the learned Public Prosecutor as well as the learned counsel for the sole accused, supporting and opposing the award of death sentence imposed by the trial court in the judgment dated 07.03.2018, passed against the sole accused/respondent in Special Sessions Case No.9 of 2013 by the learned Principal District and Sessions Judge, Theni, which is the subject matter of this Referred Trial, seeking confirmation of this Court under Section 366 of Code of Criminal Procedure.

2. Before traversing into the case and counter case, a gist of the narrative of case of the prosecution would throw much light on the issues for consideration in this appeal. The accused/respondent in this case is alleged to have committed double murder, a murder for gain and another for lust of flesh. The brutality with which the crime has been committed, according to the prosecution, is that, the accused, soon after committing the rape and murder of the hapless victim girl, had indulged in an act of butchery and chopped her limbs and unleashed an act of terror. It is in this context the prosecution raises a hue and cry that the accused had done to death two young lovers, by clipping their dreams to fly high in their life journey together, without any provocation or any other motive to do so, therefore, he should not be visited with any other punishment other than the death sentence. The trial Court also, by accepting the case putforward by the prosecution held that the offence committed by the accused is barbaric, inhuman and gruesome and therefore, such an offence will fall within the definition of 'rarest of rare category' and awarded death sentence. It is in this background, we proceed to examine as to whether the trial Court is justified in inflicting a death sentence on the accused or such punishment imposed on the accused is required to be interfered

with by this Court.

3. The case of the prosecution is consciously narrated below:

(a) In the year 2011, the son of PW2 by name Ezhil Muthalvan (herein after referred to as "D1") was pursuing his first year B.A. degree course in an Arts College at Theni. The daughter of PW4 by name [redacted] (hereinafter referred to as D-2) was also pursuing B.Ed. course in a College for Women at Theni. Both D1 and D2 belonged to scheduled castes and they loved each other. On 14.05.2011, D1 took D2 in a motorcycle bearing Registration No.TN-60-D-6576 to Surli falls, without the knowledge of their parents. When D-1 and D-2 were in search of an isolated place to have a pleasant time. at about 11.30 am, they met PW5 and his lover by name Bhagiyalakshmi, who were sitting near a channel situate on the pathway leading to Kailasanathar Temple and having their tiffin. Thereafter, D-1 parked his vehicle on the road. Then, D1 and D2 went at a distance of 60 mt. away from the place of PW5 and his lover.

(b) At that time, the accused came to the place where PW5 and his lover Bhagiyalakshmi were sitting and threatened them with aruval to part with their jewels. PW5 stated that the jewels worn by his lover Bhagyalakshmi were imitation jewellery. However, the accused threatened PW5 and his lover to part with the jewels and accordingly, the jewels were given to him. When the accused received the jewels, noticing that they are imitated jewels, he hurled it towards them and abused Bhagyalakshmi for wearing imitated jewels. Thereafter, the accused proceeded to the place where D1 and D2 were sitting, which PW5 and Bhagyalakshmi have noticed. PW5 and Bhagyalakshmi also witnessed the accused having some conversation with D-1 and D-2. Fearing for their life and safety, PW5 and Bhagylakshmi fled away from that place thinking that the accused will let D-1

and D-2 scot free by merely threatening them.

(c) It is the further case of the prosecution that the accused threatened D1 and D2 with an aruval and demanded that the jewels worn by D2 be entrusted to him. When D1 and D2 refused to part with the jewel, the accused cut both side of the neck of D1 with aruval and brutally murdered him. When D2 attempted to flee away from the place of occurrence, the accused chased her, gagged her nose and mouth with a towel and made her to suffocate. Thereafter, the accused forcibly raped D-2, besides he cut her hands and legs brutally, which resulted in her death. After unleashing such an act of brutal crime on the hapless victims, the accused, robbed the gold chain, handbag and tiffin box and then fled away from the place occurrence.

(d) During late hours of 14.05.2011, PW4, who is the father of D2 searched for his daughter. On enquiry, PW4 came to know that D1 and D2 had a love affair and therefore, D-1 might have kidnapped his daughter. In order to cause an enquiry in that direction, in the early morning of 15.05.2011, PW4, along with his relatives went to the house of PW2, who is the father of D1 and enquired about his daughter. However, PW2 replied that his son (D-1) is also missing and did not return home since the previous day. Therefore, PW4 gave a complaint to the Sub Inspector of Police, All Women Police Station, Theni alleging that D-1 kidnapped his daughter (D2) and requested to trace her. For having received the complaint from PW4, Ex.P54, CSR Receipt No. 218 of 2011 was issued.

(e) On 15.05.2011, PW11, who was running a tea stall near Suruli falls, informed the Forest Officials that a Hero Honda Bike is stationed near his tea stall unclaimed for two days. On receipt of such information, PW1 – Thangaraj and PW6 Chelladurai, the then Forest Guards, came to the place where the two wheeler was stationed and informed their higher officials and the Sub Inspector of Police,

Rayappanpatti Police Station. After passing on such information, they have taken the two wheeler to the forest bungalow and stationed it there. On getting information about the unclaimed two wheeler from a local person, on 18.05.2011 at about 3 to 4 pm, PW2 along with his relatives went to the forest bungalow and found that the said vehicle belonged to him. Then, PW2 and his relatives requested PW1 and PW6 to give permission to enter into the forest to find out as to whether D1 is in the forest or not. Since it was late evening, PW1 and PW6 refused to allow them to enter into the forest and asked them to come in the morning.

(f) On the next day morning ie., on 19.05.2011, PW2, along with his relatives, came to the Office of PW1. PW1 and PW6 along with other officials searched in the forest area. On the way to Kailasanathar Temple at SS-10 E.B Post a foul smell emanated and on a search, they found a male dead body (D1) in a decomposed condition with the face lying down, with black shirt, black pant and shoes. They have also sensed that a foul smell which emanated from the northern side of the said place and therefore they proceeded towards that direction, where, at a distance of 10 meter, they found a female dead body (D2) in a decomposed condition lying with the face down with saree. Thereafter, PW1 came out of the forest and took PW2 and PW4 and his brother-in-law to identify the dead bodies. PW2 identified that the male dead body is his son (D1) and PW4 and his brother-in-law identified that the female body is the daughter of PW4 (D2). On the same day, PW1 proceeded to Rayappanpatti Police Station and gave a complaint (Ex.P1) in this regard. In Ex.P1, PW1 stated that there is suspicion over the death of D1 and D2.

(g) PW38 – the then Sub Inspector of Police, Rayappanpatti Police Station, on receipt of complaint (Ex.P1) from PW1, registered a case in Crime No.145 of

2011 (Ex.P27) under Section 174 Cr.P.C. for suspicious death and forwarded the same to the Judicial Magistrate Court, Uthamapalayam and also to the higher officials through PW39.

(h) On the same day, ie., on 19.05.2011 at 1.00 p.m., PW52 – the Inspector of Police in-charge of Rayappanpatti Police Station, took up the case for investigation, went to the place of occurrence, prepared observation mahazars - Ex.P4 (with regard to D1) and Ex.P6 (with regard to D2) and rough sketch – Ex.P57 (with regard to D1) and Ex.P58 (with regard to D2) in the presence of PW15 and one Rajkumar. Then, he conducted inquest on the dead bodies of D1 and D2 in the presence of Panchayatars. The Inquest reports of D1 and D2 were marked as Exs.P39 and P59 respectively. Thereafter, PW52 recovered two black colour hairpin, black colour hairband, broken green colour bangle, bloodstained earth, sample earth, red colour underwear (jatti), black colour bra, black colour petticoat, jacket, black colour jeans pant, black colour full hand shirt, black colour belt, a pair of cement colour canvass shoe and black colour watch under mahazars. PW52 enquired PW1, PW2, PW3, PW4 and others and recorded their statements. PW52 sent a requisition letter - Ex.P33 to the Government Hospital, Theni to conduct postmortem at the place of death of D1 and D2 inasmuch as the dead bodies were in a decomposed state.

(i) PW37- Dr.Juliana Jeyanthi came to the place of occurrence and conducted postmortem on the dead body of D1 on 19.05.2011 at 04.00 p.m. She found the following injuries on the dead body of D1:

> "1) A chop wound of size 36 cms x 12 cms through and through noted over the front, both sides and back of the neck leaving a tag of skin of the length 4cms at the right side of the back of the neck with the surrounding bruise injuring the underlying muscles, vessels, nerves and bones. Margins were regular.
> On dissection:

The wound passed downwards and inwards below the seventh cervical vertebra, vertebral column and spinal chord with the surrounding bruise."

(j) Ex.P34 is the postmortem certificate issued by PW37 for D1. She opined in her final opinion Ex.P35 that D1 would appear to have died of fatal injury No.1 and the death would have occurred 5 to 6 days prior to autopsy.

(k) On the same day, at 5.00 p.m. PW37 conducted postmortem on the dead body of D2. She found the following injuries on the dead body of D2:

"1) A chop wound of size 12 cms x 4.5 cms x 2.5 cms noted over the left side of the face extending from left eye to the left side of the chin with the surrounding bruise injuring the underlying muscles, vessels an nerves. Margins were regular.

On dissection:

The wound passed downwards and inwards injuring the underlying muscles, vessels and nerves, with the surrounding bruise.

2) A chop wound of size 12 cms x 4.5 cms x through and through noted over the right wrist joint, with the surrounding bruise injuring the underlying muscles, vessels, nerves and bones. Margins were regular. **Right hand was missing.**

On dissection:

The wound passed downwards and inwards injuring the underlying muslces, vessels, nerves and bones with the surrounding bruise.

3) Chop wounds of sizes 2 cms x 1.5 cms x through and through, 2 cms x 1 cm x through and through, 1.5 cms x 1 cm x through and through and 1 cm x 1 cm x through and through seen over **left second, third and fourth fingers** with the surrounding bruise injuring the underlying muscles, vessels, nerves and bones. Margins were regular.

On dissection:

The wound passed downwards and inwards injuring the underlying muscles, vessels, nerves and bones with the surrounding bruise.

4) A chop wound of size 23 cms x 10 cms x through and through noted over the middle of the right leg with the surrounding bruise injuring the underlying muscles, vessels, nerves and bones. Margins were regular. **The chopped right leg was missing.**

On dissection:

The wound passed downwards and inwards injuring the underlying muscles, vessels, nerves and bones with the surrounding bruise.

5) A chop wound of size 8 cms x 6 cms x through and through noted over the left ankle joint, with the surrounding bruise injuring the underlying muscles, vessels, nerves and bones. Margins were regular.

On dissection:

The wound passed downwards and inwards injuring the underlying, muscles, vessels, nerves and bones with the surrounding bruise.

6) A stab wound of size 4.5 cms x 3 cms x 2.5 cms noted over the back of the right arm with the surrounding bruise injuring the underlying muscles, vessels and nerves. Margins were regular. One end was pointed and the other end was rounded.

On dissection:

The wound passed downwards and inwards injuring the underlying muscles, vessels and nerves with the surrounding bruise.

7. Vaginal introits was torn (5cms x 3 cms x 2 cms) at 6'O clock position with the surrounding bruise injuring the surrounding muscles, vessels, nerves. Margins were irregular. Hymen was torn. Vagina freely admitted one finger."

(l) Ex.P36 is the postmortem certificate of D2. PW37, after completion of postmortem, took two vaginal swabs from the dead body of D2 for chemical examination and handed over the same to PW41 – the then Special Sub Inspector of Police, Rayappanpatti Police Station. She opined in her final opinion (Ex.P37) that D2 would appear to have died of fatal injury Nos.1, 2, 4 and 5 and the death of D-2 would have occurred 5 to 6 days prior to autopsy. She has further opined that injury No.7 indicates that she has been subjected to forcible sexual intercourse.

(m) After receipt of postmortem reports, on 20.05.2011, PW52 enquired PW37 and recorded her statements. Based on the postmortem reports, PW52 altered the first information report into one under Section 302 IPC and forwarded the alteration report (Ex.P60) to the Court and to the higher officials. On the same

day, PW52 recovered Hero Honda Bike (MO.1) under a mahazar and then, he forwarded all the recovered materials to the Court for judicial custody.

(n) On the same day, ie., on 20.05.2011, PW5, after knowing about the death of D1 and D2, went to Rayappanpatti Police Station and disclosed about the threat caused by the accused to him and his lover Bhagiyalakshmi on 14.05.2011. Taking a cue from such information divulged by PW5, the investigation officer proceeded with the investigation and searched for the accused.

(o) On 21.05.2011, PW52 enquired PW11 and PW13, and recorded their statements. On 27.05.2011, PW52 again enquired PW2 and PW4 and recorded their statements. On 28.05.2011 at 11.30 a.m. PW52 arrested the accused near Karunakkan Muththanpatti diversion on Surulifalls road in the presence of PW16 – Village Administrative Officer and one Manikandan. On such arrest, the accused gave a voluntary confession in the presence of the said witnesses stating that if he is accompanied by the police, he will produce the materials used for the offence ie., Aruval and towel; the materials snatched from the deceased ie., black colour bag and gold chain; and the clothes worn by him at the time of the occurrence ie., shirt and lungi. The admissible portion of the confession statement is marked as Ex.P8. Since the accused disclosed that he belongs to backward community and it came to be known that D1 and D2 belonged to Scheduled Caste community, PW52 altered the offences in the FIR into under Sections 302 (2 counts), 379, 376 IPC and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act and forwarded the alteration report – Ex.P61 to the Court and to the higher officials.

(p) On the same day ie., on 28.05.2011, PW54 – Deputy Superintendent of Police, Uthamapalayam, as per the direction of the Superintendent of Police, Theni, under Ex.P69, took up the case for investigation. Pursuant to the disclosure

statement (Ex.P8), the accused took the Police and witnesses to his house and produced the aruval (MO.18), green colour lungi (MO.20), blue colour half hand shirt (MO.21), towel (MO.22) and the same were recovered by PW54 under a mahazar (Ex.P9). Thereafter, the accused took the Police and witnesses near Karuppasamy temple situate on the way to Kailasanathar temple and produced a black colour hand bag (MO.23), Silver tiffin box (MO.24), a book printed by Ram publisher (MO.25) and PW54 recovered the same under a mahazar (MO.10). Then, the accused took the Police and witnesses to his mother-in-law's house (house of PW18 – Mayakkal) and produced a gold chain embedded with the letter "OM" and the same was recovered under a mahazar (Ex.P11). PW54 produced the accused to the Court for judicial remand and also forwarded the material objects under Form 95 to the Court and at his request, the material objects were sent for chemical examination by the Court, including the vaginal swabs taken from the dead body of D2. Then, he enquired PW5, PW16, PW17 and others, and recorded their statements. Since the said witnesses had only reiterated the statement made before PW52, he did not record their statements separately.

(q) In continuation of the investigation, PW54 sent requisition letters (Exs.P65 and P63) requesting PW53 – the then Judicial Magistrate, Bodinayakkanur to conduct identification parade and to record the statement of the witnesses PW5 and PW17 under Sections 164 Cr.P.C.. On 06.06.2011, the test identification parade was conducted in the presence of PW53 in which PW5 identified the accused thrice correctly. The identification parade report is marked as Ex.P67. The statement of PW5 recorded under Section 164 Cr.P.C. is marked as Ex.P2 and the statement of PW17 is marked as Ex.P12. Due to transfer, PW54 handed over the investigation to his successor - PW55.

(r) On 28.06.2011, PW55 took up the case for investigation. On

30.06.2011, PW55 enquired the Doctor (PW37), who conducted postmortem on the dead bodies of D1 and D2, and other witnesses. On 31.08.2011, as per the direction of the Superintendent of Police, Theni, PW55 handed over the investigation to the Deputy Superintendent of Police, CBCID (PW56).

(s) On 02.09.2011, PW56 took up the case for investigation and reexamined the witnesses. On 01.10.2011, he enquired the accused in the prison. After getting necessary permission from the Court, he collected blood samples of the accused in FTA card through PW37 and sent the same to the Forensic Lab for DNA typing and for comparison of the same with that of DNA typing found in the semen, which was found in the vaginal swab of D2. After comparison of DNA, PW34, the then Deputy Director of Forensic Department, submitted DNA reports Exs.P29 and 30, stating that the semen stain found in the vaginal swab of D2 is that of the accused. PW56 enquired PW34 and others and recorded their statements. After completion of investigation, he laid charge sheet against the accused.

4. Based on the above materials, the trial Court framed four charges under Sections 302 (2 counts), 376, 392 r/w 397 IPC and 3(2)(v) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act against the accused. In order to prove the charges, on the side of the the prosecution, as many as 56 witnesses were examined as PW1 to PW56 and Exs.P1 to P77 were marked, besides 29 Material Objects were exhibited as MOs.1 to 29. When the accused was questioned under Section 313 of Cr.P.C. with reference to the incriminating materials adduced by the prosecution, the accused denied his complicity in the crime and pleaded innocence. However, on the side of the accused, no one was examined and no document was marked.

5. The trial Court, after considering the oral and documentary evidence, has found the accused guilty of the charges under Sections 302 (2 counts), 376 and 392 r/w 397 IPC and accordingly, convicted and sentenced the accused. For more clarity, the conviction and sentence imposed by the trial court on the accused is detailed hereunder:

Conviction U/s.	Sentence	Fine amount
302 IPC (for D1)	To undergo imprisonment for life.	To pay a fine of Rs.2,000/-, in default to undergo simple imprisonment for two months.
302 IPC (for D2)	Sentenced to death by hanging	
376 IPC	To undergo imprisonment for life	To pay a fine of Rs.2,000/-, in default to undergo simple imprisonment for two months.
397 IPC	To undergo rigorous imprisonment for 7 years	To pay a fine of Rs.1,000/- in default to undergo simple imprisonment for one month.

6. Seeking confirmation of the said conviction and sentence, the learned Principal District and Sessions Judge, Theni made this reference under Section 366 of Cr.P.C.

7.0 The learned Public Prosecutor appearing for the State would submit that it is a case of circumstantial evidence, however all the circumstances projected by the prosecution were proved without any missing links. They are (a) missing of the deceased person on 14.05.2011 (b) death of the deceased is homicidal; (c) last seen theory; (d) test identification parade; (e) rape by the accused; and (f) motive and recovery of gold jewels and weapon and (g) DNA test report confirming that the blood samples of the accused matches the vaginal swab test of D-2.

7.1. The learned Public Prosecutor would proceed to contend that PW2 and PW3 are father and mother respectively of D1. PW4, who is the father of D2 has categorically stated in his evidence that on 14.05.2011 D-1 and D-2 were found missing from their respective houses. With regard to missing of D-2, PW4 gave a complaint on 15.05.2011 to All Women Police Station, Theni. Subsequently, PW2 and PW4 identified the dead bodies found in the Suruli forest area as that of D1 and D2 on 19.05.2011. PW4 had in fact given a complaint before the All Women Police Station, Theni on 15.05.2011 about the missing of D-2 and the same was registered in Crime No.30 of 2011 under Section 366 IPC. From the evidences of PW2 to PW4, the prosecution proved the missing of D1 and D2 from 14.05.2011.

7.2. He would next submit that PW37, who conducted postmortem on the dead bodies of D1 and D2, has categorically stated that the death of D1 and D2 are homicidal and that D2 was subjected to forcible sexual intercourse. To that effect, she has also given Postmortem reports of D1 and D2 (Exs.P34 and 36) and final opinion for the cause of death of D1 and D2 (Exs.P35 and P37). Based on the reports of PW37, the case was altered into one under Section 302 IPC under Ex.P60. Thus, through the evidence of PW37 and Exs.P34 to P37, the prosecution proved that the death of D1 and D2 are homicidal one.

7.3. He would further submit that PW5, who is an independent witness, categorically deposed in his evidence that on 14.05.2011 he along with his lover Bhagiyalakshmi went to Suruli falls by bus where D1 and D2 came in a two wheeler and after having some conversation with the deceased persons, they went 60 meters away from the place where D1 and D2 were eating tiffin. PW5 has further stated that the accused came there with aruval, which was marked as MO.18 and threatened them to give the jewels of Bhagiyalakshmi and that on noticing that the jewels are imitated jewels, the accused threatened them and sent them away. PW5

further deposed that he witnessed the accused going towards D1 and D2 and threatening them and then, he along with his lover left the place under the impression that the accused will let D1 and D2 free as it happened to him. To strengthen the said evidence, PW5 has also given a statement under Section 164 Cr.P.C. before the then Judicial Magistrate, Bodinayakkanur (PW53). Further, PW5 has thrice exactly identified the accused in the test Identification Parade conducted before PW53. PW53 also corroborated the same. In addition to that, PW25, who is a forest guide, deposed in his evidence that he saw the accused on the day of the occurrence with aruval (MO.18). From the above evidence of PW5, the prosecution clearly proved that he has lastly seen D1 and D2 alive along with the accused person at the scene of occurrence and the motive for the accused was to commit robbery. From the above evidence of PW25, the prosecution has proved that the accused was with weapon (MO.18) on the date of occurrence. Based on the evidences of PW5 and PW53 and Test Identification Parade report (Ex.P67), the prosecution has proved that the accused was lastly seen with D1 and D2.

7.4. He would further submit that PW37, who conducted postmortem on D1 and D2 has stated in her evidence that having found that D2 was forcibly raped in the postmortem examination, she collected cotton Vaginal swab from the private parts of D2. PW37 has stated in her cross examination that D2 was not raped by many persons. PW37 has further stated in her evidence that she examined the accused on 13.06.2011 and opined that the accused was found to be potential to have sexual intercourse with a woman and the said report is marked as Ex.P38. PW37 has further stated that she took blood samples in FTA card from the accused with the permission of the Court (Ex.P48) for DNA test. PW34 – the then Deputy Director of Forensic Lab, Chennai has categorically stated in her evidence that from comparative analysis of the test results, it is found that the seminal stains on the

cotton swab are that of the accused. Thus, the prosecution has proved that apart from the motive of robbery, the accused raped the helpless girl (D2) and through the DNA reports and the evidences of PW37 and PW34, the prosecution has successfully proved that it was this accused who committed rape on D2, after forcibly attacking D1 and D2 with aruval.

7.5. He would next submit that PW52 – the Inspector of Police on 28.05.2011 at 11.30 a.m. arrested the accused on suspicion in the presence of PW16, Village Administrative Officer and one Manikandan and on such arrest, he gave a voluntary confession in the presence of the said witnesses namely PW16 and one Manikandan, in which he stated that if police accompany him, he would produce the materials objects used in the commission of offence as well as the gold chain robbed from D-2. The admissible portion of the confession statement is marked as Ex.P8. In pursuance of the same, the accused took PW54 and other officials and witnesses to his house and produced the aruval (MO.18), green colour lungi (MO.20), blue colour half hand shirt (MO.21), towel (MO.22). Then the accused took the police officials near a Karuppasamy temple situate on the way to Kailasanathar temple and produced a black colour hand bag (MO.23), ever silver tiffin box (MO.24), a book printed by Ram publisher (MO.25). Then as per the confession statement, the accused had taken the police team to his mother-in-law's house (PW18) and produced a gold chain embedded with the letter “OM” and the same were recovered under mahazars. PW52 and PW54 have clearly stated about the arrest of the accused and recovery made based on the confession of the accused. PW16 has also corroborated the version of PW52 and PW54.

7.6. In addition to that, PW18, who is the mother-in-law of the accused, has stated in her evidence that the gold chain (MO.10) was given by her daughter viz., the wife of the accused, who was pregnant, in order to use the same for the

purpose of conducting bangles wearing ceremony to her and that she handed over MO.10 for pledging to PW17. PW17 has stated in her evidence that after receipt of MO.10 from PW18, she pledged the same with PW19 and received Rs.10,000/- cash. PW19 has stated that MO.10 was pledged by PW17. PW4, who is the father of D2, has identified that the gold chain (MO.10), which was worn by his daughter (D2) at the time of leaving the house. PW5 has also identified that it is the weapon – aruval (MO.18) used by the accused at the time of occurrence. PW37, who conducted postmortem, has also stated in her evidence that the injuries found on D1 and D2 can be caused by this weapon (MO.18). The accused has not given any plausible explanation with regard to the said recoveries. Thus, based on the evidences of PW4, PW5, PW16, PW17, PW18, PW19, PW37, PW52 and PW54 and recovery of material objects, the prosecution has categorically proved that it was this accused, who committed the offence of robbery, rape and brutal murder.

7.7. The learned Public Prosecutor would further submit that the motive of the accused was to snatch the gold jewellery worn by the deceased. PW37 categorically stated that D1 died due to the cut injuries on both side of the neck and D2 died due to cut injuries on both the hands and legs and that she was raped. He would next submit that after getting statutory bail, the accused absconded during trial and while attempting to arrest him, the accused attacked the Police and caused a cut injury and in this regard a case was registered in Crime No.202 of 2013 under Sections 353 and 307 IPC on the file of Velampalayam Police Station, Tirupur District. After trial, he was convicted and sentenced to undergo five years rigorous imprisonment in the case in S.C. No. 197 of 2014. Considering the nature of the injuries of D2, the commission of rape of D2 after brutally cutting her, the trial Court has come to the conclusion that this is a rarest of rare case which warrant imposition of death sentence to the accused.

7.8. The learned Public Prosecutor also submits that the accused had indulged in an act of butchery. After committing the offence of murder of D-1, he forcibly raped D-2. Not being satisfied with the rape and also robbing the jewels, he had cut the limbs of D-2. Even the Postmortem Doctor in her evidence has stated that the chopped right leg of D-2 was missing. The trial court, taking note of the above aggravating circumstance appearing against the accused, had concluded that the offence committed by the accused is inhuman, barbaric, gruesome and heart-breaking. Therefore, treating the offence committed by the accused as a rarest of rare cases, the trial court slapped death sentence on the accused. The learned Public Prosecutor would contend that the trial court is wholly justified in imposing death sentence on the accused taking note of the gravity and magnitude of the offence and he prayed for confirmation.

8.1. Per contra, the learned counsel appearing for the accused would submit that the incriminating circumstances projected by the prosecution against the accused are (a) Last seen theory; (b) Arrest, Confession and Recovery; (c) DNA Test; and (d) Test Identification Parade. However, the prosecution could not successfully prove the missing links in the chain of circumstances projected by it.

Last Seen Theory:

8.2. The first and foremost contention of the learned counsel appearing for the accused is that though PW5 stated that he lastly saw D1 and D2 alive with the accused, he did not disclose it to anybody till 20.05.2011 and he remain tight-lipped. Such conduct of PW5 in keeping mum for six days is nothing but unnatural. If really PW5 saw the deceased 1 and 2 on the fateful day or he witnessed the accused threatening them, he could have either informed it to any one soon thereafter or atleast on the next day. However, PW5 did not take any effort either

to contact the deceased or to inform any one about the so-called threat caused to them by the accused. Further, PW5 admitted that on 16.05.2011 he came to know that D2 did not attend the college. But, even thereafter, he has not disclosed anything to either of the family of the deceased or to his friends or close college mates. Further, the prosecution claimed that the accused demanded Bhagyalakshmi, lover of PW5 to part with the jewels and when it was entrusted, the accused allegedly hurled it towards them. When such being the case, the prosecution ought to have examined Bhagyalakshmi and her non-examination is fatal to the case. Such an act of withholding of her examination by the prosecution would invite adverse inference as contemplated under Section 114 (g) of Indian Evidence Act.

Arrest, Confession and Recovery :

8.3. The learned counsel for the accused would next submit that according to the prosecution, the accused was arrested on 28.05.2011 at 11.30 am under suspicion and on such arrest, he is said to have given a voluntary confession admitting his guilt. But PW31 – Dr.Chellapandian has categorically stated in his evidence that on 22.05.2011 the accused was admitted in the hospital by the Police and thereafter, he came to know through the Police that the said accused had been involved in this double murder case. Hence, the evidence of PW31 demonstrated that the arrest of the accused was much earlier rather than the claim of the prosecution. Since the arrest has become doubtful, the confession and recovery should be given a go-by and they could not be given any credence.

8.4. He would further submit that PW2, who is the father of D1, has stated in his evidence that the accused was seen by him in the police station within one week from the date on which the occurrence came to light and that the Police had

shown the jewels which they recovered from the accused. Thus, the evidence of PW2 runs contra to the prosecution case with regard to the arrest.

8.5. He would further submit that PW5 also has stated in his evidence that the accused was secured by the Police within a week from the date on which the occurrence came to light. Thus, the evidences of PW2, PW5 and PW31 clearly demonstrated that the manner in which the prosecution has projected their case with regard to arrest, confession and recovery are highly doubtful and based on the same, the trial court ought not to have convicted the accused.

8.6. He would proceed to submit that in this case, the prosecution relied upon two confession statements of the accused, which are unknown to Section 27 of the Indian Evidence Act. He would further submit that as per Section 27 of the Indian Evidence Act, the place where the materials used in the commission of offence were allegedly hidden has not been mentioned in the Confession Statement – Ex.P8 and therefore, it cannot be relied upon. Though his confession has lead to discovery of the hidden place where the material articles were concealed, such recovery is not in consonance with Section 27 of the Indian Evidence Act.

Test Identification Parade:

8.7. He would next submit that though PW5 identified the accused in Test Identification Parade conducted by PW53 on 06.06.2011, he has categorically admitted in his evidence that on 20, 21, 22.05.2011, the police showed many photographs of habitual offenders during enquiry. This evidence of PW5 makes it clear that photographs of accused have been shown to PW5 even prior to the Test Identification Parade. So the purpose of holding Test Identification Parade becomes an empty formality and meaningless. Thus, the prosecution did not prove this circumstances also in a manner known to law.

DNA Test :

8.8. He would further submit that according to the prosecution case, the vaginal swab of D2 was taken by PW37 on 19.05.2011 and it was handed over to the Police. But, after a lapse 40 days, it was sent to Forensic Lab for DNA Test. PW56 - Investigating officer also admitted that the vaginal swab was kept in the Police Station till it was sent to Lab. Hence, it is clear that the vaginal swab was kept in the Police Station without any preservation and the possibility of manipulation cannot be ruled out.

8.9. On 13.06.2011, PW37 has taken blood samples of the accused in FTA card for DNA test and handed over to the Police. But, as per Ex.P53, the FTA card was sent to the Forensic Lab only on 29.11.2011 ie., after lapse of five months and the DNA test was conducted only on 19.01.2012 by PW34. However, PW34 also admitted in his evidence that the semen and its sperms would be alive only for 72 hours. If that be so, the alleged report that the blood samples tallies during the DNA Test is nothing but a cock and bull story.

Death Sentence:

8.10. The trial Court imposed death penalty holding that the accused committed rape on D2, after cutting off her hand and legs before causing death. This reason is nothing but mere surmise, conjectures and imaginary and without any requisite evidence.

8.11. By relying upon the decision of the Hon'ble Apex Court in **Bishnu Prasad Sinha Vs. State of Assam**, reported in **2008 (1) SCC Crl. 766**, he would submit that the capital punishment cannot be awarded in a case of circumstantial evidence. By relying upon another unreported decision of the Hon'ble Supreme Court in **Sukhlal Vs. State of Mathya Pradesh, in Crl.A.Nos.1563 and 1564 of**

2018, he would further submit that the crime however heinous, brutal and diabolic in nature it may be so that “ipso facto” may not still fall under the category of “Rarest of Rare case”.

8.12. He would lastly submit that in this case, the chain of circumstances projected by the prosecution have not formed a complete chain and there are missing links in the chain and hence, the accused may be set free by giving the benefit of doubt to him.

9. We have given our anxious considerations to the rival submissions made on either side and perused the materials available on record.

10. The prosecution has alleged that two precious young lives were snatched away in a gruesome and merciless act committed by the accused not only for jewels but also for lust and therefore, the accused must be imposed the punishment of death. However, there is no eye witness to the offence said to have been committed by the accused and the case of the prosecution rests entirely on circumstances projected. It is well recognized rule of prudence in criminal jurisprudence that in such cases, the prosecution is bound to prove the circumstances projected by it beyond any reasonable doubt and the circumstances, so proved, should form a complete chain pointing unerringly to the guilt of the accused and that there is no other hypothesis, which is consistent with the innocence of the accused. Keeping this principle in mind, let us now go into the circumstances projected by the prosecution.

11. In this case, PW2 and PW3, who are father and mother respectively of D1 have categorically stated in their evidence that on 14.05.2011 at 8.00 a.m.,

D1 took Hero Honda Bike (MO.1) which belonged to PW2 and left their house by stating that he is going to play cricket with his friends, but thereafter, he did not return. PW4, who is the father of D2, stated in his evidence that D2 left the house at 8.30 a.m. stating that she is going to the College but thereafter, she did not return. On coming to know that D1 and D2 had a love affair, in the early morning on 15.05.2011, PW4, along with his relatives, went to the house of PW2 and enquired about D2, but PW2 and PW3 replied that his son D-1 is also missing since previous day and they are also searching for him. PW4 has further stated that thereafter, he gave a complaint alleging that D1 kidnapped D2 before the All Women Police Station, Theni and the same was registered in Crime No.30 of 2011. During trial, PW2 and PW4 have categorically deposed that on 19.05.2011 they found the dead bodies of D1 and D2 at Suruli Forest area and identified that they are D1 and D2. From the above evidences, it is clear that both D1 and D2 moved out of their house around 8 to 8.30 a.m. on 14.05.2011 and thereafter, they did not return to their house.

12. PW8, who was working in Surulipatti Toll Gate, has stated in his evidence that on 14.05.2011, MO.1 (Hero Honda Bike) entered into Suruli forest area and he made an entry of the same in the Entry Register – Ex.P3.

13. PW5, who is the star witness in this case deposed in his evidence that he knew D1 and D2; He further deposed that D-2 and his lover Bhagiyalakshmi are friends. According to PW5, on 14.05.2011 he along with his lover Bhagiyalakshmi went to Suruli falls by bus where D1 and D2 came in a two wheeler. After talking for a short while, PW5 and his lover went 60 meter away from the place where D-1 and D-2 sat to have tiffin. At that time, the accused came there with aruval, threatened

them to part with the jewels of Bhagyalakshmi. When Bhagyalakshmi entrusted the jewels in her possession with the accused, who, on noticing that they are imitated jewels, hurled it upon them. The accused also reprimanded Bhagyalakshmi for wearing imitated jewels besides holding out a life threat to them. In such circumstances, he along with Bhagyalakshmi left from that place. It is seen that PW5 has also given a statement under Section 164 Cr.P.C. before the then Judicial Magistrate, Bodinayakkanur (PW53) to that effect and he thrice identified the accused correctly in the Identification Parade conducted before Judicial Magistrate, Bodinayakkanur (PW53). PW53 also corroborated the same.

14. PW25, who is a forest guide, has deposed in his evidence that he saw the accused with aruval on the day of the occurrence. From the evidences of PW8, PW5 and PW25, it came to light that D1 and D2 entered Suruli forest area, on their own, by bike and that D1 and D2 loved each other. D1 and D2 were lastly seen alive by PW5 and his lover Bhagyalakshmi with the accused on the fateful day of the occurrence and the accused was with weapon (MO.18) on the date of occurrence.

15. The first and foremost contention of the learned counsel for the accused is that though PW5 stated that he lastly saw D1 and D2 alive with the accused, he did not disclose the same to anybody till 20.05.2011 and hence, the conduct of PW5 in keeping himself tight-lipped for six days is nothing but unnatural and further non examination of Bhagyalakshmi is fatal to the case of the prosecution. Further, PW5 admitted that on 16.05.2011 he came to know that D2 did not attend the college. But, even thereafter, he has not disclosed anything to either of the family of the deceased.

16. It is not in dispute that on 19.05.2011 alone, it came to light that D1 and D2 were brutally murdered. PW5 himself gave an explanation in his evidence that he did not inform about the occurrence to the Police till 19.05.2011 under the impression that the accused would have left D1 and D2 harmless and alive as it happened to him and his lover Bhagyalakshmi and that the D1 and D2 might have left the Town as planned to get themselves married. However, after knowing about the death of D1 and D2, on 20.05.2011, PW5 himself went to Rayappanpatti Police Station and informed about the threat from the accused to him, his lover Bhagiyalakshmi, D1 and D2. There cannot be any dispute that two individual cannot be expected to behave in the same manner to a situation. The conduct of PW5, who is a young man, not disclosing the fact of threat caused to him and his lover by the accused as well as similar threat to D1 and D2 to any one till 19.05.2011 ie., for 6 days from the date of occurrence cannot be said to be unnatural. Probably, PW5 would have apprehended that if it is disclosed, his lover affair with Bhagiyalakshmi would come to be known to every one including his family members. Such an explanation given by PW5 for not disclosing the incident appears to be quite natural. His further explanation that the accused would have left D-1 and D-2 unharmed as it happened to him and that they would have married each other is a plausible explanation. Thus, PW5, out of fear to face the consequences that would arise while disclosing the incident, might not have disclosed it till 19.05.2011. However, after knowing about the death of D1 and D2, he came out and disclosed the same. Though PW5 was cross examined at length, nothing has been elucidated in favour of the accused. More over, merely because the lover of PW5 viz., Bhagyalakshmi has not been examined by the prosecution, the evidence of PW5 cannot be discarded. The evidence of PW5 fully inspires the

confidence of the Court. Therefore, the first contention of the learned counsel appearing for the accused is rejected.

Arrest, Confession and Recovery :

17. The second submission of the learned counsel appearing for the accused is that PW31 has stated in his evidence that on 22.05.2011 itself the accused was admitted to the hospital by the Police and he came to know the fact through the Police that the said accused had been involved in this double murder case and therefore, the arrest was made much earlier to the arrest shown in the record.

18. It is seen that PW31 has stated in his evidence that while he was on duty at the Government Medical College Hospital, Theni, on 22.05.2011, at 11.30 p.m. the accused was admitted as in-patient stating that he had consumed poison and that he had given general treatment to the accused and on 25.05.2011 at 2.00 p.m., the accused was discharged from the hospital. However, in the cross examination, he has stated that the accused was brought by the Police personnel and he came to know that the accused was involved in this double murder case.

19. PW18, who is the mother-in-law of the accused, has stated in her cross examination that after completion of bangles wearing ceremony, a dispute arose, due to which the accused attempted to commit suicide by consuming poison and then, he was admitted in the Government Medical College Hospital, Theni. A perusal of Ex.P26 would show that PW32, the then Special Sub-Inspector of Police, Koodalur North Police Station had registered a case in Crime No.120 of 2011 with

regard to the suicide attempted by the accused. PW32 has stated in his evidence that on getting information that the accused, who attempted to commit suicide by consuming poison, is taking treatment in Kambam Government Hospital, he rushed to the said hospital and on enquiry, he came to know that the accused was taken to the Government Medical College Hospital, Theni for further treatment and thereafter, he went to the Theni Medical College Hospital where the accused was in unconscious stage. Therefore, PW32 recorded the statement of the mother of the accused and based on the same, he registered a case in Crime No.120 of 2011 under Section 309 IPC. Therefore, the presence of Police Personnel at the time of his treatment is of no consequence.

20. Though PW31, Doctor, who has given treatment to the accused for having consumed poison has stated that the accused was discharged on 2.00 pm on 25.05.2011, in his cross-examination, he has stated that he came to know about the involvement of the accused in a double murder case through the police. Therefore, according to the learned counsel for the accused, the evidence of Doctor, PW31 would demonstrate that the arrest of the accused was much earlier than the one claimed by the prosecution. Therefore, when once arrest become doubtful, then the confession of the accused cannot be given any credence.

21. On careful perusal of the evidence of PW31, we find that PW31 has given treatment to the accused for having consumed poison. In this regard, a case was also registered by the Gudalur North Police Station in Crime No. 120/2011 for the offence under Section 309 of IPC. Moreover, PW31 has not specifically stated as to when he came to know about the involvement of the accused in the double murder case. It is a common knowledge that had PW31 known about the

involvement of accused in the double murder case, he would not have discharged him from the hospital. Further, in this case, the evidence of PW31 was recorded on 16.06.2015 ie., nearly after four years from the date of occurrence and hence, he could have collectively made the said statement. Therefore, the evidence of PW31 cannot be given much importance.

22. The next submission of the learned counsel for the accused is that PW2 has stated in his evidence that the accused was seen by him in the Police Station after one week from the date on which the occurrence came to light and that the Police showed the jewels recovered from the accused and therefore, the arrest, confession and recovery were made earlier to the arrest shown in the record. It is seen that PW2 has stated in his evidence that about one week after seeing the newspaper when the accused was in the Kambam Police Station, the Police showed him the accused and also the jewels recovered from him. From the said evidence, it is clear that PW2 has not specifically stated that immediately after one week from the date on which the occurrence came to light ie., on 19.05.2011, he saw the accused, as stated by the learned counsel for the accused and therefore, the said contention is also liable to be rejected.

23. The next submission of the learned counsel for the accused is that PW5 has admitted in his cross examination that he had seen the accused in the Kambam Police Station within a week's time from the date on which the occurrence came to light and therefore, the date of arrest on record cannot be believed. It is seen that PW5 has stated in his cross examination that after 20.05.2011, he went to Uthamapalayam Police Station and stated about the threat made by the accused and in about a week's time, he saw the accused in the Police Station. Admittedly,

in this case, the accused was arrested on 28.05.2011. PW5 did not specify the date on which he saw the accused in the Police Station. Further, on 20, 21 and 22.05.2011, PW5 visited the Police Station and he was showed photographs of the habitual offenders by the Police. Even assuming that PW5 saw the accused in the Police Station within a week's time from 20.05.2011, it is only a stray statement made by him without specifying any date and without adding anything more. It is not known whether PW5 saw the accused in the police station within a week from 20.05.2011 or from the date of his arrest on 28.05.2011 and hence, it cannot be said that the arrest of the accused was prior to 28.05.2011. Therefore, the said submission of the learned counsel for the accused is also rejected.

24. It is the next submission of the learned counsel for the accused that two confession statements of the accused cannot be placed and relied upon under Section 27 of the Indian Evidence Act and therefore, they should be eschewed.

25. Admittedly, in this case, based on the confession statement (Ex.P8) given by the accused on the date of arrest ie., on 28.05.2011, the material objects were recovered from three places by the Investigating Officer under seizure mahazars - Exs.P9 to P11. However, on 31.05.2012 ie., one year after the arrest, a confession statement was recorded by the Police and the same was marked as Ex.P75. It is seen that in the first confession statement ie., Ex.P8, the accused implicated the persons by name Arjunan, Anbalagan, Francis and Viji, as if they also involved in this case. In the subsequent confession statement ie., Ex.P75, the accused has clarified that the said persons were not involved in this case and he alone committed the murder of D-1 and D-2 and he included the name of the said persons for the purpose of diverting the investigation. Admittedly, the confession of

an accused is a very weak piece of evidence. As per Section 25 of the Indian Evidence Act, no confession made to a Police Officer shall be proved as against a person accused of any offence. As per Section 27 of the Indian Evidence Act, confession leading to discovery of fact alone is admissible. As stated earlier, based on Ex.P75, no discovery of fact and recovery has been made and therefore, the same can be eschewed.

26. He would further submit that as per Section 27 of the Indian Evidence Act, the place where the material objects were hidden has not been mentioned in the confession statement – Ex.P8 and therefore, the confession and recovery were not made in accordance with Section 27 Indian Evidence Act and it cannot be put against the accused.

27. Although the interpretation and scope of Section 27 has been the subject of several authoritative pronouncements, its application to concrete cases in the background events proved therein is not always free from difficulty. It will, therefore, be worthwhile at the outset, to have a short and swift glance at Section 27 of the Indian Evidence Act and be reminded of its requirements. Section 27 reads as follows:

> "27.**How much of information received from accused may be proved.** - provided that , when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a Police officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved"

28. The object of Section 27 is to admit evidence which is relevant to the

matter under enquiry, namely the guilt of the accused, and not to admit evidence which is not relevant to that matter. The discovery of material object is of no relevancy to the question whether the accused is guilty of the offence charged against him, unless it is connected with the offence. It is, therefore, the connection of the thing discovered which render its discovery a relevant fact. The connection between the offence and the thing discovered may be established by evidence other than the statement leading to the discovery but that does not exclude the proof of the connection by the statement itself.

29. Section 27 embodies the doctrine of Confirmation by subsequent events. The fact investigated and found by the police consequent to the information disclosed by the accused amounts to confirmation of that piece of information. Only that piece of information, which is distinctly supported by confirmation, is rendered as relevant and admissible under Section 27 of the Act. The material objects might have already been recovered, but the investigating agency may not have any clue as to the "state of things" that surrounded that physical object. In such an event, if upon the disclosure made such state of things or facts within his knowledge in relation to a physical object are discovered, then also, it can be said to be discovery of fact within the meaning of Section 27.

30. As the information which is distinctly supported by confirmation, is rendered as admissible, this Court is of the view that pointing out a material object by the accused himself in the confession statement is not necessary. A person, who makes a disclosure, may himself lead the investigating officer to the place where the object is concealed. That is one clear instance of discovery of fact. As the scope of Section 27 is wider, even if the accused does not point out the place

where the material object is kept, the police, on the basis of information furnished by him, may launch an investigation which confirms the information given by accused. Even in such a case, the information furnished by the accused becomes admissible against him as per Section 27, provided the correctness of information is confirmed by a subsequent step in the investigation. At the same time, facts discovered as a result of investigation should be such as are directly relatable to the information. In respect of this aspect of the controversy, the Hon'ble Supreme Court in **State (NCT of Delhi) Vs. Navjot Sandhu alias Afsan Guru** [(**2005**) **11 SCC 600**], commonly known as the 'Parliament Attack case', after analysing various decisions in detail, including the decision of the Privy Council in **Pulukuri Kottaya Vs. Emperor** reported in **AIR 1947 PC 67**, has held in paragraph No.13 as follows:

> "... There is one more point which we would like to discuss i.e. whether pointing out a material object by the accused furnishing the information is a necessary concomitant of Section 27. We think that the answer should be in the negative. Though in most of the cases the person who makes the disclosure himself leads the Police Officer to the place where an object is concealed and points out the same to him, however, it is not essential that there should be such pointing out in order to make the information admissible under Section 27. It could very well be that on the basis of information furnished by the accused, the Investigating Officer may go to the spot in the company of other witnesses and recover the material object. By doing so, the Investigating Officer will be discovering a fact viz., the concealment of an incriminating article and the knowledge of the accused furnishing the information about it. In other words, where the information furnished by the person in custody is verified by the Police Officer by going to the spot mentioned by the informant and finds it to be correct, that amounts to discovery of fact within the meaning of Section 27. Of course, it is subject to the rider that the information so furnished was the immediate and proximate cause of discovery. If the Police Officer chooses not to take the informant- accused to the spot, it will have no bearing on the point of admissibility under Section 27, though it may be one of the aspects that goes into evaluation of that particular piece of evidence."

31. A Division Bench of this Court, after referring to various decisions, has also in the unreported decision in Dashwanth and others Vs. State of Tamil Nadu has held in paragraph Nos. 66 and 67 as follows:

> "66. Therefore, it is clear from the above ratio consistently laid down that the fact discovered embraces the place from which the object is produced and the knowledge of the accused as to this, and the information given must relate distinctly to this fact. Further, the conduct and concealment are incriminating circumstances. This conduct, substantiated by discoveries, constitutes evidence. The Supreme Court has further reiterated in a catena of decisions that point out a material object by the accused furnishing information is not a necessary concomitant of Section 27. Though in most of the cases the person who makes the disclosure himself leads the police officer to the place where an object is concealed and points out the same to him, however, it is not essential there should be such pointing out in order to make the information admissible under Section 27. It could well be that on the basis of the information furnished by the accused the investigating officer may go to the spot in the company of witnesses and recover the material object.
>
> 67. In the light of the above proposition, the confession of the accused could be treated as an information, leading to a discovery of fact, as mandated under Section 27 of the Evidence Act"

32. Here, in this case, the Police arrested the accused on 28.05.2011 in the presence of PW16 – Village Administrative Officer and one Manikandan. On such arrest, in the presence of the very same witnesses, the accused gave a voluntary confession – Ex.P8 in which he has confessed that "if the police accompany him, he would produce the materials used for the commission of offence ie., Aruval and towel; the materials snatched from the deceased ie., black colour bag and gold chain; and the clothes worn by him at the time of the occurrence ie., shirt and lungi and produce the same." The admissible portion of

the confession statement is marked as Ex.P8. Pursuant to the disclosure statement (Ex.P8), the accused took the Police and witnesses to his house and produced the aruval (MO.18), green colour lungi (MO.20), blue colour half hand shirt (MO.21), towel (MO.22) and the same were recovered by PW54 under a mahazar (Ex.P9). Thereafter, the accused took the Police and witnesses near the Karuppasamy temple situate on the way to Kailasanathar temple at Suruli forest and produced a black colour hand bag (MO.23), Ever silver tiffin box (MO.24), a book printed by Ram publisher (MO.25) and PW54 recovered the same under a mahazar (Ex.P10). Then, the accused took the Police and witnesses to his mother-in-law's house (house of PW18 – Mayakkal) and produced a gold chain embedded with the letter "OM" and the same was recovered under a mahazar (Ex.P11). The fact discovered from the above confession statement of the accused is that, as stated by him, he was holding the material objects relating to the offences. Now, it is to be seen as to whether there is link between the objects recovered and the offence.

33. It is seen that PW52 and PW54 have clearly stated about the arrest of the accused and recovery made based on the confession of the accused (Ex.P8). PW16 – the Village Administrative Officer has also corroborated the version of PW52 and PW54. In addition to that, PW18, who is the mother-in-law of the accused, has categorically stated in her evidence that the gold chain (MO.10) was given by her daughter, who is the wife of the accused and that she pledged the same with PW19 for the purpose of conducting Bangles Wearing Ceremony to her daughter. PW17 has also stated that MO.10 was given by PW18 for the purpose of pledging and accordingly, she pledged the same with PW19. PW19, who is working in a Cooperative Society, has also accepted the receipt of MO.10 from PW18. It is also seen that PW4, who is the father of D2, has identified that it was

this gold chain (MO.10) that was worn by his daughter (D2) at the time of leaving the house. PW5 has identified that it is the weapon – aruval (MO.18) used by the accused at the time of occurrence. PW37, who conducted postmortem, has stated in her evidence that the injuries found on D1 and D2 can be caused by this weapon (MO.18). As per Section 27 of The Indian Evidence Act, a confession leading to a discovery of a fact need not always be a material object and the fact leading to such discovery is also admissible in evidence. Therefore, the confession statement given by the accused is admissible in evidence and it is also in accordance with Section 27 of The Indian Evidence Act.

34. From the above witnesses and documents, we are of the view that the prosecution has clearly proved that there is a link between the material objects recovered ie., MO.10 and MO.18 from the accused and the offence committed. More over, in this case, as stated earlier, the material objects were recovered from three places. Especially, MO.10 – gold chain was recovered from PW18, who is the mother-in-law of the accused. Neither the wife of the accused nor PW18 claimed the ownership of MO.10 and this would further strengthen case of the prosecution as regards the involvement of the accused in this case. Therefore, the submission of the counsel for the accused that confession and recovery are not in accordance with law and the recovery of material objects on the basis of such confession cannot be relied upon is hereby rejected.

Test Identification Parade:

35. According to the counsel for the accused, PW5 has categorically admitted in his evidence that on 20, 21, 22.05.2011, the police showed him as many as photographs of the accused during enquiry and therefore, the Test

Identification Parade has become empty formality and meaningless.

36. PW5 has stated in his evidence that on 20, 21 & 22.05.2011, the Police asked identity of the accused by showing many photographs of the habitual offenders. Generally, considering the nature of the offences, the Police would show the photographs of the habitual offenders in order to find out the involvement of those persons. Here, in this case also, PW5 has stated that he was shown photographs of the habitual offenders. PW5 has not specifically stated that the photograph of the accused involved in this case was shown to him. Therefore, the identification of the accused by PW5 in the Test Identification Parade cannot be doubted. More over, PW53, who conducted Test Identification Parade, has categorically stated in his evidence that thrice PW5 identified the accused correctly.

DNA Test:

37. The next submission of the learned counsel for the accused is that the vaginal swab of D2 was taken by PW37 on 19.05.2011 and immediately, it was handed over to the Police. But, after a lapse 40 days, it was sent to Forensic Lab for DNA Test and therefore, there is a possibility of manipulation in the Police Station.

38. PW37 has stated in her evidence that on 19.05.2011, ie., the date on which the postmortem conducted, she took vaginal swab from the private part of the dead body of D2 and handed over the same to the Police. PW42, the then Head Constable attached to Rayappanpatti Police Station, has stated in his evidence that on 29.06.2011, the vaginal swab was stored at Ka.Vilakku Government Hospital and that after getting permission from the Court and receiving

the vaginal swab from Ka.Vilakku Government Hospital, he handed over the same to the Forensic Lab, Madurai. It is seen that in Ex.P21 - Vaginal Swab report itself, it is stated that "an envelope marked ,st i 21/F ... vaginal swab ... P.M.No. 214/11... dt.19.05.2011..." containing cotton swab was received here on 29.06.2011 through HC :T: 552 -Tr.Pandiarajan (PW42) under unbroken seals which corresponded with the sample sent". From the above evidence, it is clear that the vaginal swab was not kept in the Police Station itself and it was preserved in the Ka.Vilakku Government Hospital, till it was sent to the Forensic Lab and therefore, the possibility of manipulation in the Police Station does not arise. Hence, the above contention has no merit.

39. The next submission of the learned counsel for the accused is that there was delay of five months in sending the blood samples of the accused to the Forensic Lab and PW34, who conducted DNA test, candidly admitted that semen and its sperms would be alive only for 72 hours and therefore, the DNA report cannot be believed. It is seen that though the blood samples in FTA card were taken from the accused on 13.06.2011, it was preserved in the Government Medical College Hospital, Theni by PW37 and as per Ex.P52, only on 25.11.2011, it was handed over to PW48 by PW37. Then, from Ex.P53 it could be seen that it has been received by the Court on 25.11.2011 and then, it was sent to the Forensic Lab on 29.11.2011 to find out the perpetrator of the crime. PW34 – Forensic Expert stated in his evidence that the FTA card was received on 30.11.2011. From the above evidences, it is clear that the FTA card was not kept in the Police Station and it was preserved only in the controlled environment in the hospital for the said five months period.

40. Further, it is the submission of the learned counsel for the accused that PW34 candidly admitted in the cross examination that semen and its sperms would be alive only for 72 hours. In fact, a perusal of the cross examination of PW34 would show that it was a suggestion put forth by the defence and the same was denied by PW34. The learned counsel for the accused has misinterpreted the same as if the same was accepted by PW34. It is also seen that the defence has not put any specific suggestion to the expert witness viz., PW34 to the effect that due to long delay in sending FTA, the sperm cells would have died and by using that cells, it is not possible for DNA profiling.

41. Now-a-days, the scientific evidence like Deoxyribonucleic Acid (DNA) test is being universally portrayed as best evidence for establishing a live link between the accused persons and the victim of a crime and that DNA technology accurately identifies criminals. Further, DNA profiling is possible with the body parts of the dead person like bones, finger nails, even from hairs, etc. In the recent decision in "**Mukesh and others Vs. State (NCT of Delhi) and others**, reported in **(2017) 6 SCC 1**, after analysing various decisions with regard to DNA test, the Hon'ble Supreme Court has held that “in criminal trials, DNA profiling is now statutorily accepted under Section 53 (A) of the Cr.P.C. DNA report deserves to be accepted unless it is absolutely dented and if the sampling is proper and if there is no evidence of tampering of samples, the DNA test report is to be accepted. It is further held that DNA analysis is 100% accurate and at present, predominant forensic technique for identifying the persons. DNA is genetic blue print of life. No two persons except identical twins for identical DNA”.

42. In this case, though the defence has raised a doubt that the Vaginal

swab and FTA card were manipulated by keeping them in the Police Station and forwarding the same belatedly to Forensic Lab for analysis, but as discussed earlier, they were preserved only in Government Hospital and therefore, there is no possibility of any manipulation by keeping it in the Police Station. More over, a perusal of Exs.P29 and P30 would show that the cotton vaginal swab of D2 was received by the Forensic Lab on 22.08.2011 and the bloodstain in FTA card of the accused was received by the Forensic Lab on 30.11.2011. Therefore, there is no possibility of manipulation by any means. Further, there is also no possibility for the Doctors and experts to enter into conspiracy with the Police to implicate the accused in the crime. PW37, who examined the accused on 13.06.2011, opined that the accused was sexually potent to have sexual intercourse with a woman. PW37 has further stated in her cross examination that D2 was not raped by many. PW34 – the then Assistant Chemical Examiner cum Deputy Director of Forensic Department, who conducted the DNA test, has categorically stated in his evidence that from DNA test results, it is found that the seminal stains on the cotton swab are that of the accused. The defence has not brought anything in their favour by cross examining PW34. From the above evidences, the prosecution has clearly proved the chain of circumstance of the involvement of the accused in the commission of the offences.

Motive :

43. According to the prosecution, the initial motive for the occurrence was only to rob jewels, but subsequently, the accused committed the heinous crime of rape on the hapless girl - D2. The accused was stated to have been involved in robbery cases earlier and he is not a person without any past antecedent. The prosecution has proved through the evidence of PW5 that the initial motive of the

accused was to rob. The prosecution has further proved through DNA report that the accused developed his lustful motive to rape the helpless girl (D2) and committed the same.

44. Further, as the accused did not give any answer to the question put under Section 313 of Cr.P.C., this Court is of the view that an adverse inference can be drawn against the accused, as per the decision of the Hon'ble Supreme Court in **Lyngdoh vs. State of Meghalaya**, reported in **2016 (15) SCC 572.**

45. From the foregoing discussions, we conclude that the prosecution has proved the following circumstances:-

(a) On the date of occurrence, D1 and D2 left their respective house and came to the place of occurrence on their own by bike (MO.1).

(b) D1 and D2 were lastly seen alive by PW5 with the accused.

(c) The accused was seen with weapon by PW25 on the date of occurrence.

(d) The link between the recovery of MOs.10 and 18 from the accused and the offence.

(e) The offence of rape committed by the accused was proved through scientific evidence namely DNA report.

(f) Adverse inference against accused.

46. The above aspects clinchingly prove that the circumstances projected by the prosecution, in our considered opinion, formed a complete chain and it unerringly pointed towards the guilt of the accused. We firmly hold that the above offences were committed by none other than the accused in this case. There is no controversy that the murders of D-1 and D-2 and the robbery and rape of D-2 had

taken place in one and the same occurrence. Therefore, the person, who committed the robbery and rape, had committed the murders of D-1 and D-2 as well. From the recovery of the stolen articles, more particularly, the gold-chain and aruval from the custody of the accused and the fact that the accused was found in possession of MO.10 and MO.18 soon after the commission of robbery as well as the other stolen articles, as discussed above and the DNA reports, the presumption under Section 114(a) of the Evidence Act clearly goes in favour of the prosecution. The said legal presumption also duly corroborates the other evidences so as to hold that this accused alone committed the murder of D1 and robbery, rape and murder of D2. Thus, we firmly hold, without any shadow of hesitation, that it is only this accused and none else, who committed the gruesome murder of D1 and D2 and other crimes. Accordingly, the accused is liable to be punished.

Death Sentence:

47. It is the submission of the learned counsel for the accused that the trial Court imposed death penalty holding that the accused committed rape on D2, after cutting off her hand and leg. The trial court was carried away by this aspect of the matter to award death sentence without regard to the fact that it would not come within the category of “rarest of rare case”.

48. Imposing punishment is an important judicial function of the Trial Court, which is also a difficult task. The Court is expected to weigh both the aggravating as well as the mitigating circumstances. The Law on the subject of death penalty has been dealt with in several cases, including the most celebrated Constitution Bench Judgment in **Bachan Singh Vs. State of Punjab [1982 (3) SCC 24]**. The consistent view taken by the Hon'ble Supreme Court is that failure to impose quantum of punishment will amount to failure of justice. The perpetrators of

the crime deserve to be punished with adequate punishment and not either with lesser punishment or with excessive punishment, which would be disproportionate. The measure is in the hands of the Court. The Court should take into account all the mitigating as well as the aggravating circumstances to asses as to what is the quantum of punishment that would be appropriate.

49. In **Machhi Singh vs. State of Punjab** reported in **1983 (3) SCC 470 : 1983 (Crl) 280**, the Hon'ble Supreme Court had elaborately considered **Bachan Singh's**, principles. In Paragraph Nos.32 to 37 of the Judgment, the Hon'ble Supreme Court has elicited certain kinds of murders, which fall within the rarest of rare dictum, which are as follows:-

> "*32*. … It may do so 'in rarest of rare cases' when its collective conscience is so shocked that it will expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment when the crime is viewed from the platform of the motive for, or the manner of commission of the crime, or the anti-social or abhorrent nature of the crime, such as for instance:
>
> **I. Manner of commission of murder**
>
> *33*. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community. For instance,
>
> (*i*) when the house of the victim is set aflame with the end in view to roast him alive in the house.
>
> (*ii*) when the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death.
>
> (*iii*) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.
>
> **II. Motive for commission of murder**
>
> *34*. When the murder is committed for a motive which evinces total depravity and meanness. For instance when (*a*) a hired assassin commits murder for the sake of money or reward (*b*) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-à-vis whom the murderer is in a dominating position or in a position of trust, or (*c*) a murder is

committed in the course of betrayal of the motherland.

III. Anti-social or socially abhorrent nature of the crime

35. (*a*) When murder of a member of a Scheduled Caste or minority community, etc. is committed not for personal reasons but in circumstances which arouse social wrath. For instance when such a crime is committed in order to terrorise such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse past injustices and in order to restore the social balance.

(*b*) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

IV. Magnitude of crime.

36. When the crime is enormous in proportion. For instance when multiple murders say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

V. Personality of victim of murder.

37. When the victim of murder is (*a*) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder (*b*) a helpless woman or a person rendered helpless by old age or infirmity (*c*) when the victim is a person vis-à-vis whom the murderer is in a position of domination or trust (*d*) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons."

50. In **Swamy Shraddananda (2) vs. State of Karnataka** reported in **2009 (3) SCC (Crl) 113**, a three Judges Bench of the Hon'ble Supreme Court had an occasion to consider the above categories of murders enumerated few decades ago, in **Machhi Singh's** case. In Paragraph No.43 of the said Judgment, the Hon'ble Supreme Court has observed as follows:-

"A careful reading of the *Machhi Singh* categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of *Machhi Singh*, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the

> country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in *Bachan Singh*, therefore, we respectfully wish to say that even though the categories framed in *Machhi Singh* provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in *Bachan Singh* itself."

51. Keeping the above broad principles laid down by the Honourable Supreme Court, let us now go in to the facts of the present case. In this case, PW37, who conducted postmortem, has stated in her evidence that there are cut injuries on both sides of the neck of D1, which would go to show that the accused attempted to sever the head of D1. In respect of death of D2, PW37 has stated in her evidence that she found cut injuries on the face, right wrist joint, left hand 2nd, 3rd and 4th fingers, right leg, left leg ankle joint of D2 and that the chopped right hand and left leg were missing from the body of D2 and that, D2 was forcibly raped and vaginal introits were torn. The distance between the dead bodies of D1 and D2 was 10 meter, which would go to show that D2 attempted to escape from the accused and she would have been chased by the accused. The cut injuries on the left hand 2nd 3rd and 4th fingers would show that while attempting to escape from the accused and thwarting the attack, the said injuries on the fingers could have been caused. After inflicting such injuries, the accused could have forcibly raped her. Though the accused murdered D1 by attacking on his vital part ie., neck, he cut D2 on her hands and legs, after committing rape. In motor accident cases, we could see that even after accidental cut of hands and legs, the injured could survive. But

in this case, as the attack on D2 were not on vital parts, she would have suffered excruciating pain which would be more rather that of the one suffered by D1. The brutality of the attack on the young and helpless girl, after forcibly raping her, would show the inhuman act of the accused. The accused had preyed the young girl (D-2) who unfortunately got trapped with the accused and taking advantage of the situation, the accused had caused the offence of rape on her. Thus, we are shocked by the savagery of the offence unleashed by the accused towards the deceased 1 and 2 in this case. Such conduct of the accused would only show that he is an extremist and that he will be a menace to the society. The incident that the accused attempted to commit suicide during a family dispute would further strengthen the same. Such a person will deserve no leniency or sympathy and he should be punished without any impunity.

52. In addition to that the accused has no good antecedents. It is stated the accused was involved in the cases of robbery. It is seen that the accused after getting bail in this case absconded and when the Police attempted to arrest him, he caused a cut injury over the head of a Police personnel, for which a case has been registered in Crime No.202 of 2013 on the file of Velampalayam Police Station, Tiruppur and after trial, he was convicted for five years by the Chief Judicial Magistrate, Tiruppur in S.C.No.197 of 2014. It is seen that the accused is now aged about 30 years. Though the accused is young in age, that cannot be a mitigating circumstance for our consideration.

53. Further, the learned counsel appearing for the accused relying upon the decision of the Hon'ble Supreme Court in **Bishnu Prasad Sinha Vs. Stated of Assam** reported in **2008 (1) SCC Crl. 766** submitted that capital punishment cannot be awarded in a case of circumstantial evidence. The criminal law adheres

in general to the principle of proportionality in prescribing liability according to the culpability of each kind of criminal conduct. It ordinarily allows some significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Here, in this case, considering the peculiar facts and circumstances of the case, nature of the injuries caused on D2, the commission of rape and the antecedents of the accused, the ratio laid down in the above decision cannot be applied to this case.

54. Having evaluated the entire facts and circumstances of the case, on the touchstone of **Bachan Singh and Machhi Singh's** case etc., we hold that there can be no doubt that the entire occurrence resulting in the murder of D2 will fall within the rarest of rare category propounded by the Honourable Supreme Court. For having committed such gruesome, inhuman, barbaric and heinous offence, the accused cannot be imposed with any other punishment, other than death sentence and therefore we are inclined to confirm the death sentence imposed by the trial court on the accused.

55. In the result, the conviction and sentence passed by the trial Court is confirmed. The Referred Trial is answered in favour of the prosecution and against the accused.

[R.P.S. J.,] [B.P., J,]

13.03.2019

Index : Yes

Internet : Yes

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To

1.The Principal District and Sessions Judge,
Theni.

2.The Deputy Superintendent of of Police,
CB CID, Madurai.

3.The Additional Public Prosecutor,
Madurai Bench of Madras High Court,
Madurai.

4.The Record Keeper,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

R.SUBBIAH, J.
and
B.PUGALENDHI, J

gcg/rsh

Pre-delivery Judgment made in
R.T.[MD].No.1 of 2018

Dated: 13.03.2019