SUPREME COURT OF INDIA

Manoharan

Vs.

State by Inspector of Police, Variety Hall Police Station, Coimbatore

Crl.A.No.1174-1175 of 2019

(R.F.Nariman and Surya Kant,JJ.,)

07.11.2019

JUDGMENT

Surya Kant,J.,

1. These review petitions are directed against the judgment dated 01.08.2019 passed in *Manoharan v. State by Inspector of Police*[1], wherein this three-Judge Bench had affirmed conviction of the accused Manoharan for offences punishable under Sections 302, 376(2)(f) and (g) and 201 of the Indian Penal Code (in short "IPC") and by majority upheld the death sentence confirmed by the High Court.

2. Brief facts of the present case are as follows:

> 'X', a ten-year-old girl and 'Y', her 7-year-old brother were enrolled in Classes V and II respectively in a private school at Coimbatore and would commute around 7:45 a.m. in a pickup vehicle owned by one Kartikeyan (PW-2). On 29.10.2010 the children left as usual with their school bags and lunch boxes and stood about two-hundred feet away from their home, in front of the Vinayakar Temple. Around 8:00 a.m., PW-2 came to the designated pick-up spot but did not find the children there. He contacted the children's father, Ranjith Kumar Jain (PW-5), over mobile to enquire about their absence. Being in Hyderabad, PW-5 was unable to provide an immediate reply to the query of PW-2 and hence called his wife, the children's mother - Sangeetha (PW-8), who informed him that both X and Y had already left home. Since the father of the children (PW-5) was already on his way back to Coimbatore, he entrusted his wife to look out for the children and co-ordinate with the van driver. Sangeetha informed Karthikeyan that the children had already left the house, whereafter she along with her relatives Vijay Kumar (PW-1) and Sanjai (PW-6) started searching for the children.

3. Kamala Bai (PW-9), the paternal grandmother of the children had gone to a Jain Temple around 8:00 a.m. in the morning. Upon returning home at 10:30 a.m. and finding Sangeetha in panic, Kamala Bai informed her that the children had been picked up by a

former van driver and it was conjectured that the children must be in school. Vijay Kumar (PW-1) then went to the school and found that the children had however not reached. After a frantic but futile search, PW-1 lodged a police complaint (Ex. P1) with Vasuki (Sub-Inspector of Police, PW-42) at around 11AM under Section 363 of the Indian Penal Code (in short "IPC").

4. The Investigating Officer ("IO", PW-47), thereafter, took over investigation and recorded statements of the informant (PW-1), the school's principal - Anthony Raj (PW-10), as well as of the grandmother (PW-9) and the just returned father of the children (PW-5). First trace of the missing children was received at 6PM when Anthony Raj (PW-10) informed the IO (PW-47) that one Chinnasamy (PW-22) had called to inform that two school bags with identity cards bearing names of X and Y were found floating in and later fished out from the Parambikulam-Axhiyar Project ("PAP") Canal. A second lead came to the Police from Karthikeyan (PW-2) who received a call from his erstwhile employee - Anbu @ Gandhiraj (PW-7) who conveyed that one Mohanakrishnan had borrowed a Maruti Omni Van from him that morning. This aroused Karthikeyan's suspicion since Mohanakrishnan was his former employee whose services were terminated after it had been discovered that he was borrowing money from the parents whose children were being transported to school by PW-2's agency. The IO (PW-47) accordingly advised both Anbu (PW-7) and Karthikeyan (PW-2) to immediately alert the police whenever Mohanakrishnan came to return the Omni Van. At around 9:45PM, Anbu alerted the police that Mohanakrishnan had come to return the Van and he had also confessed to the kidnapping, rape and murder of the two missing children along with his friend Manoharan. Pursuant to the information received by Anbu, Mohanakrishnan was arrested and a confessional statement was recorded in the presence of Anbu (PW-7) and one Santosh Kumar (not examined as a witness). The Maruti Omni Van along with one Nokia Cellphone and the driving license of Mohanakrishnan were also seized. The IO consequently sent a report (Ex. P-30) for alteration of charge from under Section 363, IPC to Sections 364(A), 376, 302 read with Section 201, IPC which was received by the Magistrate at 11:45PM.

5. Having observed certain saliva and yellow-coloured stains on the seized van, the IO requisitioned forensic assistance of Sarvanan (PW-43), Deputy Director of Mobile Unit of Tamil Nadu Forensic Sciences Department. In the presence Sarvanan (PW-43), Anbu (PW-7) and one Santosh Kumar (unexamined), the van was thoroughly searched wherein a lady's underwear bearing the inscription "SBT Kidswear 75 c.m." with hair strands was recovered. Sarvanan (PW-43) further collected the betel nut saliva stains on the left door of the van with a cotton swab for chemical examination, as well as dried yellow-colour stains found on the seat and floormat, and the clothes (namely pant, half shirt and underwear) worn by Mohanakrishnan (Mahazar Exs. P-5 & P-6). Mohanakrishnan subsequently led a police team to the place where he claimed to have raped X as well as to Deepalapatti, the place from where the children had allegedly been pushed into the running waters of the PAP canal.

6. The girl child's body was found the subsequent morning in the PAP canal by villagers

near Palladam Taluk at 9:30AM, and the boy's body was later recovered from the canal around 12 kms from Deepalapatti. Postmortem was conducted by Dr. Jayasingh (PW-46) at the Coimbatore Medical College and Hospital, wherein the following injuries were recorded on X's body:

> “The body was first seen by the undersigned at 02.15 pm on 30.10.10. Its condition then was rigor mortis present all over the body. Post mortem commenced at 02.15 pm on 30.10.10. Appearances found at the postmortem:-
>
> Moderately nourished body of a female aged 10 yrs. Finger and toenails bluish in colour. The body wearing blue colour “T” shirt with white colour sticker named as “Suguna Rips” noted left side, black colour track suit with white line order, white colour socks and white colour shoes and rose colour shimmis. White colour frothy secretions noted over both nostrils and mout. Water suddening noted over both palms and soles.”

7. The following ante mortem injuries noted over the body:

> “1. Liner vertical scratch marks 4 in numbers in varying size noted over lateral aspect right elbow joint.
>
> 2. Transverse scratch abrasions 3 in number in varying size noted over lateral aspect of left upper forearm.
>
> 3.A scratch mark 3 in number noted over lower part of left arm.
>
> 4.Contusion 2x1 cm x 0.5 depth noted over in the posterior fourchettes and lateral wall of vagina. Hymen intact.
>
> 5. On examination of anus: - Anus found roomy measuring 3 cm in diameter and mucosal tear 1x0.5 cm x mucosal deep noted over left lateral aspect of the anus at the level of muco-cutaneous junction. On dissection of Thorax and Abdomen: Contusion 4 x 2 cm noted over anterior aspect of lower end of uterus. ”

8. Similarly, in Y's postmortem examination, the following ante mortem injuries were noted:

> “1. Bluish contusion 3 x 2 cm noted on middle of left side neck, 3
> cm left to midline.
>
> 2. Bluish contusion 3 x 2 cm noted over outer aspect of right forearm.
>
> 3. Bluish contusion noted over right side third intercostal space.
>
> 4. On dissection of scalp, skull and dura: sub scalpel contusion 20 x 10 cm noted

over bi frontal region and bi parietal region. Diffuse sub dural and sub arachnoid haemorrhages noted on both cerebral hemispheres.

5. On bloodless dissection of neck: contusion 4 x 3 cm noted on left side middle of neck. Hyoid bone found intact. "

9. The present review-petitioner, Manoharan (hereinafter "petitioner") who was stated to have perpetrated the crime along with Mohanakrishnan, was arrested on 31.10.2010 at 7AM, as recorded in Ex. D-4. Manoharan made a disclosure statement to the police (Ex. P-21) on the basis of which the IO (PW-47) recovered lunch box of Y from his house. Further, after being produced before the Magistrate the same day, the petitioner was sent to judicial custody.

10. A Test Identification Parade was conducted on request of the IO whereby Kamala Bai (PW-9) identified Mohanakrishnan as the driver of the van in which the children had been kidnapped. Subsequently, both the petitioner and Mohanakrishnan were medically examined on 04.11.2010 whereby samples of their blood and saliva were sent to the Tamil Nadu Forensic Science Laboratory for DNA Analysis. A potency test of the petitioner was conducted by Dr. J.R. Singh (PW-46), who in his medical report (Ex. P- 56) found him potent and further noticed signs of injury around his private parts.

11. During recovery proceedings under Section 27 of the Indian Evidence Act (in short "IEA"), whilst in police custody, Mohanakrishnan shot and wounded two police officers and was consequently shot dead by the Police on 09.11.2010. Thus, the trial against Mohanakrishnan was abated and the petitioner alone was left to be tried as an accused.

12. Succinctly, the prosecution's version of events is that Mohanakrishnan using a borrowed school van, picked up two children (X and Y) who were waiting to go to school at about 7:50 a.m. He further picked up his friend, Manoharan from his house at 9:30 a.m. and subsequently, they took the children to a remote location where after the girl child was raped and sodomised. Subsequently, Manoharan and Mohanakrishnan purchased cow dung powder (a poisonous substance) which was mixed in milk and then administered to the children to end their life. However, both the children spat out the substance and only ingested a small portion. Since poisoning did not work, Mohanakrishnan and the petitioner threw both the children into the turbulent waters of a nearby Canal, hence drowning them.

CASE HISTORY

13. Over the course of the trial, the prosecution examined forty-nine witnesses in all including persons who witnessed abduction, purchase of milk and cow dung powder and those having seen children in the custody of accused persons at various places. Further, various medical and forensic evidence were produced, proving drowning and rape as well as injuries on Petitioner's body. A 'last seen theory' was built by the prosecution, in addition to use of a confessional statement made by the petitioner under Section 164, CrPC. The Trial Court ultimately held the Petitioner guilty under Section 120- B, 364-A, 376, 302 r/w 34 and 201 IPC. Under Section 376, the Petitioner was awarded life sentence

and for offence under Section 302 IPC he was given death sentence.

14. The Madras High Court set aside conviction of Petitioner under Sec. 120-B and 364A IPC but confirmed the sentences under Sec. 376, 302 r/w 34 and 201 IPC. After considering aggravating and mitigating circumstances, the High Court confirmed death sentence awarded by the Trial Court.

15. Thereafter the Petitioner filed a Special Leave Petition under Article 136 whereby this Court dismissed his appeal and confirmed the death sentence by majority, observing that the case fell in the category of the 'rarest of rare' cases. After considering all evidence on record and contentions of the counsels, the majority opinion of this Court read as follows:
"In the circumstances, we have no doubt that the trial court and High Court have correctly applied and balanced aggravating circumstances with mitigating circumstances to find that the crime committed was cold blooded and involves the rape of a minor girl and murder of two children in the most heinous fashion possible. No remorse has been shown by the Petitioner at all and given the nature of the crime as stated in paragraph 84 of the High Court's judgment it is unlikely that the Petitioner, if set free, would not be capable of committing such a crime yet again. The fact that the Petitioner made a confessional statement would not, on the facts of this case, mean that he showed remorse for committing such a heinous crime. He did not stand by this confessional statement, but falsely retracted only those parts of the statement which implicated him of both the rape of the young girl and the murder of both her and her little brother. Consequently, we confirm the death sentence and dismiss the appeals."

16. Khanna J., in his minority opinion also upheld conviction under the various offences concerned, but dissented on the quantum of sentence, holding as follows:

> "I would, therefore, uphold and maintain conviction of the appellant under Sections 302, 376(2)(f) and (g) and 201 IPC and the sentences awarded under Sections 376(2)(f) and (g) and 201 IPC. To this extent the appeal is dismissed. In view of the aforesaid discussion and on balancing aggravating and mitigating circumstances, in my opinion, the present case does not fall under the category of "rarest of the rare" case i.e. there is no alternative but to impose death sentence. It would fall within the special category of cases, where the appellant should be directed to suffer sentence for life i.e. till his natural death, without remission/commutation under Sections 432 and 433 CrPC. To this extent I would allow the appeal. "

17. The Petitioner then filed the present petition for review of the said judgement and order dated 01.08.2019, which was heard at considerable length in open Court following the parameters evolved in *Mohd. Arif @ Ashfaq v. Registrar, Supreme Court of India*[2], wherein a Constitutional Bench of this Court held that in cases of death penalty, since the punishment is irreversible and Article 21 of the convict is violated, it is necessary to provide at least one opportunity for oral arguments on the question of sentence.

18. At the outset, it may be clarified that the scope of Review even in death penalty cases

has been narrowed down in *Vikram Singh v. State of Punjab*[3], laying down that review can only be on a glaring error apparent on the face of the judgement or order. A mere change or addition of grounds cannot be allowed at the stage of review. This Court thus held as follows:

> "23. In view of the above, it is clear that scope, ambit and parameters of review jurisdiction are well defined. Normally in a criminal proceeding, review applications cannot be entertained except on the ground of error apparent on the face of the record. Further, the power given to this Court under Article 137 is wider and in an appropriate case can be exercised to mitigate a manifest injustice. By review application an applicant cannot be allowed to reargue the appeal on the grounds which were urged at the time of the hearing of the criminal appeal. Even if the applicant succeeds in establishing that there may be another view possible on the conviction or sentence of the accused that is not a sufficient ground for review. This Court shall exercise its jurisdiction to review only when a glaring omission or patent mistake has crept in the earlier decision due to judicial fallibility. There has to be an error apparent on the face of the record leading to miscarriage of justice to exercise the review jurisdiction under Article 137 read with Order 40 Rule 1. There has to be a material error manifest on the face of the record with results in the miscarriage of justice. "

19. The above cited decision was reiterated in *Mukesh v. State of (NCT of Delhi)*[4] where also similar restrictive principles were applied and re-affirmed while considering the scope of review in death penalty cases. Reliance was placed on the dictum in *Kamlesh Verma v. Mayawati*[5], prescribing that Courts should refrain from re-appreciating the entirety of evidence only to arrive at a different possible conclusion, besides illustrating an inexhaustible list of instances where review shall not be maintainable. The relevant part reads as follows:

> "20.2. When the review will not be maintainable:
> (i) A repetition of old and overruled argument is not enough to reopen concluded adjudications.
> (ii) Minor mistakes of inconsequential import.
> (iii) Review proceedings cannot be equated with the original hearing of the case.
> (iv) Review is not maintainable unless the material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice.
> (v) A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected but lies only for patent error.
> (vi) The mere possibility of two views on the subject cannot be a ground for review.
> (vii) The error apparent on the face of the record should not be an error which has to be fished out and searched.
> (viii) The appreciation of evidence on record is fully within the domain of the appellate court, it cannot be permitted to be advanced in the review petition.
> (ix) Review is not maintainable when the same relief sought at the time of arguing the main matter had been negatived. "

20. It is, therefore, to be kept in mind that the scope of a Review is more constrained than that of an appeal. A party cannot be allowed to reurge the case on merits to effectively seek re-appreciation of evidence when the matter has already been decided earlier, even if on different grounds. Interference in the earlier judgement assailed in a Review is permissible only on the basis of an error apparent on the face of record or discovery of important new evidence which has a direct bearing on the ultimate outcome of the case and if not well appreciated, would cause manifest injustice.

21. Learned Senior Counsel for the petitioner, Mr. Siddharth Luthra has made a deft challenge to our judgment, through a multifaceted attack on both merits and procedure of the case. He forcefully urged for setting aside the conviction and in the alternate, requested commutation of the sentence of death.

VOLUNTARINESS OF CONFESSION & EFFECT OF RETRACTION

22. The arguments for the Petitioner begun with challenge to reliance by this Court on confessional statement of the accused. Mr. Luthra strenuously contended that strict compliance with the safeguards for recording a confessional statement as mandated under Section 164 are mandatory, as ruledin *Shivappa v. State of Karnataka*[6]. He strongly disputed the admissibility of the confessional statement made by the petitioner before a Magistrate on 20.11.2010 on the premise that:

> (a) Confession was coerced and involuntary, and in contravention of Section 163, CrPC and Section 24, IEA for first, the petitioner had been physically assaulted by the police whilst in custody, as evidenced through answer to Question 8 posed by the Magistrate during preliminary examination on 19.11.2010. Second, the petitioner was under severe psychological stress owing to the in-custody killing of the co-accused Mohanakrishnan on 09.11.2010; and third, circumstances surrounding confession were suspicious, for the IO (PW-47) moved an application stating that the petitioner was ready to volunteer a confession when he was in judicial and not police custody.
>
> (b)The Magistrate failed to comply with the mandatory procedure as prescribed under Section 164, CrPC since he did not inform the petitioner that he would not be sent to police custody after recording of the confessional statement.

23. In light of the vehement attempt at assailing the confessional statement as being non-voluntary and violative of the right guaranteed under Article 20(3) of the Constitution and in the alternate its reliance for having been retracted by the petitioner, it may be briefly noticed that on a conjoint reading of the confessional scheme comprising of Sections 163, 164 CrPC and Section 24 IEA as construed in a catena of decisions of this Court, it is obvious that even in the absence of an express provision for retracting a confessionary statement once made, the Courts have preferred a rule of prudence whereby in case of retraction, the Court reduces the probative value of such confessionary statements and seeks corroborating evidence.

24. Hence, the cornerstone of a valid confession in India is only whether such a statement was made in compliance with statutory provisions which mandate that the same must be before the Magistrate after compliance with certain safeguards meant to ensure voluntariness and lack of coercion by the police. This has been so noted by this Court in *Bharat v. State of U.P.*[7]:

> "7.... Confessions can be acted upon if the court is satisfied that they are voluntary and that they are true. The voluntary nature of the confession depends upon whether there was any threat, inducement or promise and its truth is judged in the context of the entire prosecution case. The confession must fit into the proved facts and not run counter to them. When the voluntary character of the confession and its truth are accepted it is safe to rely on it. Indeed a confession, if it is voluntary and true and not made under any inducement or threat or promise, is the most patent piece of evidence against the maker. Retracted confession, however, stands on a slightly different footing. As the Privy Council once stated, in India it is the rule to find a confession and to find it retracted later. A court may take into account the retracted confession, but it must look for the reasons for the making of the confession as well as for its retraction, and must weigh the two to determine whether the retraction affects the voluntary nature of the confession or not. If the court is satisfied that it was retracted because of an after thought or advice, the retraction may not weigh with the court if the general facts proved in the case and the tenor of the confession as made and the circumstances of its making and withdrawal warrant its user. All the same, the courts do not act upon the retracted confession without finding assurance from some other sources as to the guilt of the accused. Therefore, it can be stated that a true confession made voluntarily may be acted upon with slight evidence to corroborate it, but a retracted confession requires the general assurance that the retraction was an after thought and that the earlier statement was true...."

25. The objective behind such a provision has been explored by this Court in various decisions wherein it has been noted that provisions permitting use of confessionary statements in criminal trials were statutorily included as an acknowledgement of the possibility that in certain circumstances an accused may voluntarily confess to his offence(s).

26. From a chronological analysis of the confessional statement of Petitioner dated 20.11.2010 (Ex.P.18) as well as the preliminary examination held on 19.11.2010, it is apparent that the learned Magistrate - S.S. Sathiamoorthy (PW-28) duly complied with all procedural requirements for recording of a confessional statement and affirmatively satisfied himself of the voluntariness of the petitioner's confession:

> a. During preliminary examination, the petitioner informed the Magistrate that he was brought from Central Jail, Coimbatore on 19.11.2010, hence abridging the possibility of any coercion or influence by the police. Further, a perusal of the record shows that petitioner was last in police custody only on 11.11.2010 and hence there is no doubt that he had been in judicial custody for some time prior to

giving a confessional statement. Hence per *Abdul Razak Murlaza Dafadar v. State of Maharashtra*[8] it can be inferred that he was not under the influence of the investigating agency.

b. In reply to Question 8 during preliminary examination on 19.11.2010, when asked by the Magistrate whether someone tortured him, the petitioner does say that he was beaten by the police. However, when asked whether the "police tortured and compel you to give statement like this", the petitioner denied any such torture or compulsion. Similarly, when the Magistrate asked him whether he was told some sweet words such as "the confession statement will be beneficial or where you threatened by police or by anybody else that if statement was not given", the petitioner specifically denied the same. He also acknowledged the fact that he was not under compulsion to give a confession statement and that he was aware of the fact that such statement could be used against him. Further, when re-questioned by the Magistrate if the petitioner was tortured, he answered in the negative. Hence, not only was the petitioner inconsistent in his claims, but further it is evident that the alleged physical assault by the police, if at all, would have been committed weeks before the confession. Vague and passing claims of police assault, supposedly committed far before the confessional date, cannot be a ground for holding the confession as coerced.

c. After preliminary questioning on 19.11.2010, the petitioner was entrusted to the Prison Warden and sent back to judicial custody for reflection "after duly informing him that he was not under obligation to give confessional statement." The petitioner was re-produced before the Magistrate on the next day at 2PM and was again given an opportunity to change his mind and not confess. The Magistrate once more satisfied himself of the voluntariness of the petitioner and the absence of any police influence. Hence, it is clear that an adequate opportunity to recant was provided and the Magistrate ensured that any possible lingering effects of alleged beatings or psychological stress post encounter of co-accused, would have been mitigated. It is also apparent that the Magistarte duly informed the petitioner about the repurcussions of his confessional statement, and made no false assurance of it helping his case, as had been made in *State of Assam v. Rabindra Nath Guha*[9], which has erroneously been relied upon by Mr. Luthra.

d. The statement once recorded, was thereafter read out to the petitioner who signed it to be correct. The Magistrate signed the statement at 4:30PM on 20.11.2010, and afterwards sent the petitioner to judicial custody. The Magistrate thus was fully conscious of his statutory obligation and factually ensured that the petitioner was not sent to police custody post the confessional statement. It is further clear that the petitioner was kept in judicial custody for almost twenty months after the confession, over the course of which there was no likelihood of him being entrusted to police, and still no protest or attempt to retract the confession was made by him.

e. The fact that the application to record the petitioner's statement was moved by the

IO is inconsequential, as the petitioner was neither in police custody nor, as acknowledged by him, the police officials interacted with him during judicial custody. It is thus far-fetched to use the fact that police put forth the request for recording of confession to suggest that the confession was involuntary or secured at the behest of police.

27. Further, it is essential to note that the petitioner failed to put forth any protest against the confessional statement despite having multiple opportunities during the course of trial. This Court has held earlier in *Shankaria v. State of Rajasthan*[10] that retractions must be made by the accused as soon as possible, otherwise there would be a strong presumption of voluntariness in the confession.

28. The confession, in the present case, was not challenged during stage of framing of charge or over the course of examination of forty-seven prosecution witnesses, but instead only partly disputed through a letter written in secret just before petitioner's examination under Section 313 of the Code. It is thus evident that such retraction at the fag-end of the trial, was not natural but rather meticulously formulated, perhaps as a part of defence strategy. Hence, there remains no doubt about the voluntariness of the confession of 20.11.2010 or it being unaffected by subsequent retraction.

29. That apart, even if the confession dated 20.11.2010 were to be treated as being retracted vide letter dated 25.07.2012 (as adopted during examination under Section 313 of the Code), still the original confession can be relied upon. Coupled with corroborating evidence, conviction can also be secured on the strength of such confession. The rule regarding use of such retracted confessions was noted by this Court in *Subramania Goundan v. State of Madras*[11] as well as by a four-Judge Bench of this Court *in Pyare Lal Bhargava v. State of Rajasthan*[12], holding that:

> "A retracted confession may form the legal basis of a conviction if the court is satisfied that it was true and was voluntarily made. But it has been held that a court shall not base a conviction on such a confession without corroboration. It is not a rule of law, but is only a rule of prudence. It cannot even be laid down as an inflexible rule of practice or prudence that under no circumstances such a conviction can be made without corroboration, for a court may, in a particular case, be convinced of the absolute truth of a confession and prepared to act upon it without corroboration; but it may be laid down as a general rule of practice that it is unsafe to rely upon a confession, much less on a retracted confession, unless the court is satisfied that the retracted confession is true and voluntarily made and has been corroborated in material particulars. "

30. Still further, it is clear that even in the retraction statement, the petitioner has made substantial admissions which read together with prosecution evidence, are sufficient to convict him. Through the letter dated 25.07.2012, the Petitioner merely restates his confession with certain omissions and a few denials as compared to his earlier statement. Although he agrees to be at the place of the occurrence along with the now deceased

Mohanakrishnan throughout the incident, instead of admitting an equal role in commission of rape and murder, he portrays himself to be a mere helpless bystander. The petitioner has attempted to justify his retraction by stating that he had told the truth to the Magistrate but his statement was not read out to him and hence the Magistrate's affirmation under Section 164 of the Code is incorrect.

31. A comparison of the retraction with the confession dated 20.11.2010 further shows that it is merely an improvement. The Petitioner has admitted to all the general circumstances of the incident, i.e. having been present at the scene of all crimes, being friend of the co-accused and of the offences as claimed by the prosecution to have occurred. However, he merely contends that the crimes were committed by the co-accused and not by the Petitioner himself. Regardless thereto, there are sufficient inculpatory admissions in the letter dated 25.07.2012 to place a strong burden of proof on the Petitioner under Section 106 of the IEA.

32. Moreover, we must note that the petitioner has not been convicted by the Courts below or this Court, solely on the basis of his confession made under Section 164 of the Code. The confession has been corroborated by enough evidence and it would not be a stretch to state that even independent of such confessional statement, this Court would nevertheless have reached a firm conclusion of guilt.

Independent Re-appreciation of Evidence

33. The second contention raised by Mr. Luthra is that this Court decided the appeal without independently re-appreciating all the material on record. We are in strong disagreement with this contention. This Court critically analysed all the material witnesses and documents exhibited on record which were referred to during the course of arguments. A careful examination of such evidence lead to a unanimous finding of guilt against the Petitioner. It was noted by the majority that:

> “PW.20, PW.25 and PW.23 all saw the two accused together with the children at different times on 29.10.2010. Indeed, even if one were to read the confessional statement of the Appellant together with the retraction thereof, the fact that he purchased milk at 1.00 p.m. from PW.23 is clearly made out and the fact that Mohanakrishnan went to meet the tailor, was also admitted by him in both the original confessional statement as well as the retraction. It is clear therefore that the evidence of PW.20 and 23 are corroborated by the confessional statement and the retraction made by the Appellant and therefore the factum of the two accused being with the two children in the vehicle is clearly made out and thus the High Court’s conclusion that the last seen theory can be relied upon cannot possibly be assailed. ”

34. Such an independent re-appreciation was also conducted by Khanna J. in his minority opinion in para nos. 23 to 29. Inadequacy of Legal Representation

35. Mr. Luthra seeks to make a third core challenge by placing reliance on Article 21 of the Constitution of India, claiming that it mandates adequate and efficient legal assistance,

the denial whereof would amount to condemning one unheard.

36. There cannot be any quarrel with the cited proposition for it is a fundamental tenet of criminal jurisprudence, least not because of our Constitution, that every person has a right to effective legal assistance. In case an accused cannot afford the same, then it is the responsibility of the State to provide free legal aid, as definitively noted in *Hussainara Khatoon v. State of Bihar*[13]. However, we feel that such a right has been protected in the present case and the legal representation accorded to the petitioner was not inadequate.

37. At the outset, as noted in *State v. Navjot Sandhu*[14] judicial scrutiny of a counsel's performance must be careful, deferential and circumspect for not doing so would give rise to the dangerous possibility of convicts raising such pleas of inadequate legal assistance after adverse verdicts. It would also be useful to cite *Strickland v. Washington* [15] wherein the Supreme Court of the United States, laid down that to demand re-trial or acquittal on grounds of inadequate legal representation, the accused must show both that the assistance of the counsel was deficient per an objective standard of reasonableness as developed by customary practice, as well as that such deficiency has with a reasonable probability affected the outcome of the case, such that had he received adequate representation, the result would have been different.

38. It is clear that the petitioner has failed to demonstrate either of these legs in the present case. Although it is correct that seven counsels refused to defend the Petitioner and there was a resolution by the bar to not take up his brief, but the Trial Court ensured the services of a legal aid counsel who ably conducted petitioner's defence during the trial. The record reveals that from 23.02.2011 till 18.06.2012, no effective proceedings were held and post 18.06.2012, legal aid counsel Mrs. A. Sharmila appeared on behalf of the petitioner. The length and quality of cross-examination conducted by the court- appointed counsel testifies her legal acumen and professional ability. Hence, there can be no question on the adequacy of counsel's performance.

39. Notwithstanding the above determination, we must note that in the present facts no prejudice has been caused to the petitioner for want of adequate or proper legal assistance. Not only did the High Court reappreciate the entire evidence, but it also conducted another examination of the Petitioner under Section 313, CrPC. Furthermore, the High Court appointed a Senior Advocate, Mr. A Raghunathan, in addition to Advocate Smt. Vairam, to provide the best legal services to the Petitioner. Similarly, in appeal, this Court both re-appreciated the evidence and ensured due legal representation. Even in the present Review, the petitioner's interests are protected by an outstanding Senior Counsel and as a matter of abundant caution, we have also conducted an elaborate analysis. We thus do not find this to be a case of deficient legal assistance, affecting the Petitioner's rights under Article 21 of the Constitution.

40. The plea regarding absence of a counsel during proceedings before the Magistrate under section 164, CrPC resulting into any prejudice, are misconceived. What mandatorily is needed, as noted earlier, is that the Magistrate must satisfy himself of the voluntariness

of the statement and all the statutory safeguards which includes bringing the repercussions and the voluntariness of making confessions to the knowledge of the accused, must be meticulously complied with. It is pertinent to take note of the first Proviso to Section 164(1), added with effect from 31.12.2009, which specifies that:

> "Provided that any confession or statement made under this sub¬section may also be recorded by audio-video electronic means in the presence of the advocate of the person accused of an offence. "

(emphasis supplied)

41. Section 164 of the Code thus does not contemplate that a confession or statement should necessarily be made in the presence of the advocate(s), except, when such confessional statement is recorded with audio-video electronic means.

Discrepancies in arrest & recovery of evidence

42. The next contention of Mr. Luthra revolves around the date of arrest of the petitioner. According to him, the petitioner was arrested from his village Anglapurchi post-midnight on 29.10.2010 and not on 31.10.2010 at 7:00 a.m. The petitioner was not sent to custody after formal arrest till an alleged confession was recorded before the Village Administrative Officer, S. Ganesan (PW-30). Mr. Luthra relies upon the cross-examination of PW-47 where he is stated to have admitted that the petitioner was caught in his village after midnight of 29.10.2010.

43. Not only is the dispute re: the date of arrest immaterial for determination of petitioner's guilt in the present case, but we otherwise do not find any substance therein. First, the petitioner's arrest on 31.10.2010 at 7:00 a.m. is proved by Exhibit D4 which is duly signed by his father (DW-1). P. Ramasamy (DW-1) has admitted his signatures on the Exhibit D4, proving the date and time of the arrest. Second, the plea at best assumes violation of Section 167 of CrPC which mandates production of the suspect before the jurisdictional magistrate within 24 hours of arrest. The adverse impact of such assumed variation on the Judicial proceedings has also not been convincingly demonstrated. Mr. Luthra's contention would have carried some weight had it been a case of making confessional statement by the petitioner before the Judicial Magistrate on 30/31.10.2010, that is, when he was allegedly in police custody.

44. Mr. Luthra very ably made an attempt to cast doubt on the recovery of the underwear of the deceased girl as well as the presence of pubic hair of the Petitioner on the said underwear. It was argued that the underwear worn by the deceased remained in the custody of the police till 01.11.2010, therefore plantation of hair on the panty cannot be ruled out.

45. Firstly, such a plea is at variance from the submission made before the High Court where it was argued that police had planted the pubic hair on 04.11.2010. Secondly, there is no factual discrepancy in the prosecution case as may be seen from the following facts:

i. The police found Mohanakrishnan in the house of one A. Anbu (PW-7) on 29.10.2010 at about 9:45 pm. Pursuant to this, the Maruti Van was inspected by the police in presence of PW-7 and one Santosh Kumar. Appropriately, Mahazar (Ex.P.4) was prepared by the police incorporating details of seizure of van and presence of stains on its doors and floor mat.

ii. Thereafter, A. Sarvanan (PW-43), Deputy Director of Mobile Unit of Tamil Nadu Forensic Sciences Department was called by the IO (PW-47) at around midnight of 29/30.10.2010. PW-43 examined the van whereby the underwear of the deceased girl (MO-1) was found with hair strands. Cellophane tape was applied to the hair strands by PW-43, to keep them at their spot and the MO-1 was then put in a cover and sealed. Further, PW-47 sealed the same in an 'Angelform' brassieres cardboard box, obtained from vicinity and seized it as Mahazar (Ex.P.5).

iii. Accordingly, Ex.P.5 reached the Judicial Magistrate on 30.10.2010 along with Form 95 pertaining to the MO-1. This explains the delay of one day in production of Ex.P.5 before the Judicial Magistrate.

iv. Moreover, since 30.10.2010 was a Saturday, the Judicial Magistrate directed Ex.P.5 to be produced again on the next working day i.e. 01.11.2010. Hence, the box was re-produced before the Judicial Magistrate on 01.12.2010 and was then forwarded to Tamil Nadu Forensic Sciences Department for further analysis.

46. PW-43 prepared his report (Ex.P.38) and sent it to the IO for further forensic examination, wherein it was recorded that:

"a) A Pink coloured panty printed letters "SBT kids wear" "75cms" with pale brownish starchy like stains with small hair pieces on its inner surface was found beneath the back seat of the vehicle was identified, collected. The place where the hair pieces were seen were marked and pasted with cellphone tape in order to safety transport the vital cue materials for comprehensive Forensic analysis. "

47. Additionally, Mrs. Lakshmi Balasubramanian (PW-49), Deputy Director of DNA Division of the Forensic Science Department stated in her cross-examination that the underwear was received by her for examination, in a sealed parcel. She has said:

"It is correct to state that my first prerogative is to satisfy that the seal of the container in which the items received for testing, is not broken. It is correct to state that the items and the paper covers would be sealed with the Medical Officer's seal. The parcel received by me contained the Medical Officer's seal and not any Court seal. It is correct to state that in my report I have not mentioned that the seals were not broken.
XXX
By "correct seals", I mean that the same seal on the letter and the sample seal on the paper covers are the same."

48. Analysis of the depositions as reproduced above prove that the under wear was recovered and sent for forensic examination without any tampering. The seal on the parcel containing the underwear was still intact when PW-49 received it for forensic examination.

49. We find that the contention of the learned Senior Counsel, pertaining to non-production of the property room Register is of no force since it has not been raised before at any stage of the proceedings and thus cannot be allowed to be argued afresh at the stage of Review. Furthermore, casting a doubt on the identification of MO-1 by the father of deceased (PW-1) is also baseless and holds no ground. Merely because PW-1 did not dress his daughter on the date of the incident does not imply that he would not recognize a piece of clothing of his daughter. PW-1 has clearly deposed that MO-1 belongs to his daughter.
Erroneous conviction under section 376 ipc

50. In the judgment-under-review, it was argued by Mr. Luthra that even per the confessional statement, the accused only committed anal intercourse which is punishable under Section 377 IPC, and he has been wrongly convicted under Section 376 IPC. Such a plea, however, does not find support from the overwhelming evidence to the contrary. First, relevant portions of the confessional statement need to be extracted:

> "... I asked him to give me a chance. He asked me to do it with the girl. Seated from the front seat, Mohan saw. I went and saw the girl who was without a pant. I placed my penis on the front side when the girl cried saying it was paining. Then I did through backside through anus. Even that did not come good for me. Then I masturbated and brought out semen. ."

51. The confessional statement lucidly reveals that the accused placed his penis on the vagina of the deceased girl consequent to which she cried. This act of the Petitioner satisfies all relevant ingredients of Section 376 as it existed at the relevant time. The only dispute that remains is whether the Petitioner committed peno-vaginal penetration or not. However, the medical evidence shows that vaginal intercourse had been committed with X and that there was a contusion on the petitioner's private part. Relevant portions of the post-mortem of X as deposed by PW-46 are reproduced below:

> "... The anti-mortem injuries that had been caused on the body are:
> XXX
>
> 4) A contusion of 2 x 1 cm x 0.5 cm on the inner lower aspect of Vagina and the inner edge of uterus. Hymen was in tact.
>
> 5) When anus was examined, it was found to be bigger in size, 3 cm wide."

52. Furthermore, following the orders of Magistrate on 04.11.2010, Dr. Jeyasingh examined Manoharan and observed an injury on his penis in his report (Ex.P.56) as:

> "A dark colour contusion noted over proximal part of glands penis around urethral orifice. "

53. It is evident from the deposition of PW-46 that the vagina of X was penetrated. Also, Dr. Jeyasingh (PW-46), who conducted the autopsy on the body of X had stated in his final opinion (Ex.P.50):

> "The deceased would appear to have died of DROWNING. Injuries noted on the vagina and anus due to forcible sexual assault. "

54. Furthermore, the evidence of his pubic hair found in the girl's underwear coupled with DNA Report that those were his hair belies his plea of not having committed the ghastly crime. The DNA Report, as deposed by Mrs. Lakshmi Balasubramanian (PW-49), affirms the pubic hair found in the underwear of X to be that of the petitioner. Relevant portion of the statement of PW-49, delineating the DNA Report reads as follows:

> "Conclusion: From the DNA typing results of the above samples, it is found that the pubic hair in item [8] belongs to a human male individual and is that of alleged accused -2 Manoharan. The report DNA 220/2010 is given and signed by me. The said report with four annexures is marked as Ex.P.48B."

55. Considering the final opinion of Dr. Jeyasingh stating that the girl was subjected to sexual assault; injury on the penis of petitioner; recovery of dead body of X without underwear; recovery of underwear from the Maruti Van; father of X recognising the underwear; finding hair on the recovered underwear and matching of DNA of hair with that of Manoharan, we are of the view that even in absence of the confessional statement of the petitioner, it is established the petitioner committed offence under Section 376 IPC. The retraction dated 25.07.2012 may merely eclipse some part of the inculpatory evidence but cannot be construed to render the entire evidence exculpatory. Hence, we do not find any substance in the contention of Mr. Luthra and are of the view that the petitioner is justly convicted for offence under Section 376 IPC.

Erroneous reliance on POCSO

56. It was then urged that this Court ought not to have relied on a recent amendment to the Protection of Children from Sexual Offences (POCSO) Act, 2012 to justify death penalty, as the new law was non-existent on the date of occurrence and hence cannot be applied retrospectively in derogation to Article 20 of the Constitution.

57. Although the plea is attractive at first glance, it must be noted that the Petitioner has not been convicted or sentenced under the POCSO Act. Instead, only a passing reference was made to pinpoint whether the present case was rarest of the rare and whether it would shock the conscience of the society. It has been noted by this Court in *Macchi Singh v. State of Punjab*[16] and various other judgments that in order to uphold the guarantee under Article 21 and to reduce arbitrariness caused by discretion of judges in sentencing, it

should be the opinion of the society and not the personal opinion of the judge which should be considered whilst awarding sentence of death. Towards the same, a change in law during pendency of the case is an apt indicator of societal opinion as legislated by elected representatives. It is not the case here that Petitioner has not been convicted of an offence otherwise not punishable with death.

Sentencing

58. Lastly, Mr. Luthra impassionedly urged that this is not a fit case for award of death penalty, especially when, the death penalty has been confirmed only by way of 2:1 split decision. Relying on the minority opinion of Thomas J. in *Suthenraraja v. State*[17], he vehemently argued that in a case where one of the Hon'ble Judges did not deem it appropriate to award death penalty, that in itself ought to be a sufficient ground to commute death sentence in Review. He also urged this to be a case of 'residual doubt', as evolved in *Ravishankar v. State of Madhya Pradesh*[18], which is also a mitigating circumstance to be taken note of by the Court whilst considering whether the case falls in the category of "rarest of rare cases". He further argued that neither the High Court or this Court gave due weightage to mitigating circumstances such as:

> (i) Lack of adequate opportunity to place on record material/evidence of mitigating circumstances.
> (ii)Young age (less than 30 years) of petitioner, and aged parents.
> (iii)Absence of any previous criminal history.
> (iv) Backward socio-economic background.
> (v)Death ought not to be awarded in cases of circumstantial evidence.

59. At this juncture, it is necessary to highlight that the contention of Mr. Luthra urging that death ought not to be awarded in case of a single dissent, notwithstanding the opinion of the majority is unsupported in view of more than one decisions of this Court. In *Devender Pal Singh v. State of NCT of Delhi* [19] and also in *Krishna Mochi v. State of Bihar*[20] , a concurrent Bench had refused to review the death sentence which had earlier been upheld in appeal by two out of three judges of this Court. The reliance on Suthendraraja (supra) itself is erroneous for the proposition relied upon was delivered in a minority opinion, which was unsupported both by the order of the Court and also was disagreed with by Quadri J., who noted:

> "The ambit of Rule XL(1) of the Supreme Court Rules which provides grounds for review, as interpreted by this Court in P.N. Eswara Iyer v. Registrar, Supreme Court of India [(1980) 4 SCC 680] vis-a- vis criminal proceedings, is not confined to "an error apparent on the face of the record". Even so by the process of interpretation it cannot be stretched to embrace the premise indicated by my learned brother as a ground for review. That apart there are two difficulties in the way. The first is that the acceptance of the said proposition would result in equating the opinion of the majority to a ground analogous to "an error apparent on the face of the record" and secondly in a Bench of three Judges or of greater strength if a learned Judge is not

inclined to confirm the death sentence imposed on a convict, the majority will be precluded from confirming the death sentence as that per se would become open to review.

60. Further, even sans the aforesaid decisions, we are not inclined to accept such a reasoning for it is contrary to the established jurisprudence of precedents and interpretation of verdicts with multiple opinions. It is settled in law that dissenting opinions have little precedential value and that there is no difference in operation between decisions rendered unanimously or those tendered by majority, albeit with minority dissenting views.

61. Although Mr. Luthra's contention that the petitioner has not received adequate opportunity to place material regarding his circumstances is unsubstantiated, we have nevertheless re-considered sentencing. We have re-visited the mitigating circumstances against aggravating circumstances, as well as a report commissioned by this Court during the course of appeal and submitted by the jail superintendent which reveals that the conduct of the Petitioner is merely satisfactory and he has not undertaken any study or anything else to show any signs of reformation.

62. It has been made clear in the preceding parts of this judgment that the prosecution case has been established through numerous evidences in addition to there being a clear confession, which proves the Petitioner's guilt beyond any residual doubt. Conflicting versions have been deposed by the Petitioner and the defence witnesses, and no explanation to discharge the onus under Section 106 has been provided. Hence, it is not a case fit for application of the theory of "residual doubt" as noted in Ravishankar (supra). Accordingly, even the contention that death ought not to be awarded considering that the present case is one involving circumstantial evidence is unfounded. It is no longer res integra that there can be no hard rule of not awarding death in cases based on circumstantial evidence owing to recent developments in medical science and the possibility of abuse by seasoned criminals.

63. Furthermore, there is nothing to support the characterisation of the accused as being a helpless, illiterate young adult who is a victim of his socio¬economic circumstances. Far from being so, it is clear through the version of events that the accused had the presence of mind to craft his own defence and attempt to retract his confession through an elaborately written eleven page letter addressed to the Magistrate and had further received adequate legal representation.

64. Mr. Luthra's reliance on the retraction letter to contend that in so far as the statement shows that he stopped the co-accused from committing rape, is evident of the fact that he has remorse which entitles him to commutation, if not acquittal, is misplaced. As noted earlier, the retraction was extremely belated and only a defence to shield himself. Further, medical evidence has proved that rape was committed on the deceased girl. It is hence factually incorrect to state that the Petitioner prevented the co-accused from raping the girl and is nothing more than a belated lie at the end of the trial. Hence, the exculpatory parts ought to be excluded per *Nishi Kant Jha v. State of Bihar*[21].

65. Even observed devoid of any aggravating circumstances, mere young age and presence of aged parents cannot be grounds for commutation. One may view that such young age poses a continuous burden on the State and presents a longer risk to society, hence warranting more serious intervention by Courts. Similarly, just because the now deceased co-accused Mohanakrishnan was the mastermind whose offence was comparatively more egregious, we cannot commute the otherwise barbarically shocking offences of the petitioner. We are also not inclined to give leeway of the lack of criminal record, considering that the current crime was not just one offence, but comprised of multiple offences over the series of many hours.

66. Even if the cases involving confession merit some leniency and compassion, however, as was earlier noted in our majority opinion, the attempted retraction of the statement shows how the petitioner was in fact remorseless. Such belated retractions further lay rise to the fear that any remorse or repentance being shown by the petitioner now may be temporary and that he can relapse to his old ways. Irrespective of the underlying reasons behind such retraction, whether it be the fear of death or feeling that he was not getting any benefit of his earlier confession, but the possibility of recidivism has only been heightened and we can no longer look at the initial confession in a vacuum.

67. Rather, the present case is essentially one where two accused misused societal trust to hold as captive two innocent school-going children, one of whom was brutally raped and sodomised, and thereupon administered poison and finally, drowned by throwing them into a canal. It was not in the spur of the moment or a crime of passion; but craftily planned, meticulously executed and with multiple opportunities to cease and desist. We are of the view that the present offence(s) of the Petitioner are so grave as to shock the conscience of this Court and of society and would without doubt amount to rarest of the rare.

68. Hence, we find that there exist no grounds to review our judgment upholding conviction and death penalty. The review petitions are accordingly dismissed.

Judgment Referred.

[1](2019) 7 SCC 716
[2](2014) 9 SCC 737
[3](2017) 8 SCC 518
[4](2018) 8 SCC 149
[5](2013) 8 SCC 320
[6](1995) 2 SCC 76
[7](1971) 3 SCC 950
[8]AIR 1970 SC 283
[9](1982 Cri LJ 216.
[10](1978) 3 SCC 435
[11]AIR 1958 SC 66
[12]AIR 1963 SC 1094
[13](1980) 1 SCC 98
[14](2005) 11 SCC 600
[15]466 US 668 (1984)
[16]AIR 1983 SC 957
[17](1999) 9 SCC 323
[18](2019 SCC OnLine SC 1290
[19](2003) 2 SCC 501
[20](2003) 2 SCC 501
[21](1969) SCC. 1 347

ORDER

Sanjiv Khanna,J.,

69. I entirely agree and concur with the reasons given by my brother Surya Kant, J in dismissing the review petitions upholding the conviction of Manoharan under Sections 302, 376(2)(f) and (g) and 201 of the Indian Penal Code. On the question of sentence, I do not see any good ground and reasons to review my observations and findings in the minority judgment. Accordingly, the review petitions are dismissed.