

THE HIGH COURT OF MADHYA PRADESH : JABALPUR**Criminal Reference No.2/2018***In Reference**Versus**Ashok Rajak***Criminal Appeal No.2540/2018***Ashok Rajak**Versus**State of Madhya Pradesh*

Smt.Sudha Pandit, learned counsel with Shri Shreyash Pandit, learned counsel alongwith Shri A.K.Jain, learned counsel as Amicus Curiae for the appellant/accused.

Shri A.P.Singh, learned Government Advocate for the respondent-State.

Division Bench :

Hon 'ble Shri Justice J.K.Maheshwari

Hon 'ble Shri Justice Akhil Kumar Srivastava

Whether approved for reporting: Yes/No

Law laid down:

Significant paragraphs:

J U D G M E N T**26.03.2019**

Per Akhil Kumar Srivastava, J.

This criminal reference has been made by First Additional Sessions Judge, Narsinghpur for confirmation of death sentence

awarded to the accused-appellant vide order dated 12.02.2018 passed in S.T.No.75/2017. Accused has filed the criminal appeal against death sentence. However, reference and appeal have been heard together.

2. It is undisputed fact that the deceased and the accused are related as mother and son.

3. The prosecution case, in brief, is that an information was received by the Inspector Rakesh Bharti (PW-5) on 1/1/2017 to the effect that there has been a fight in village Sakal. On this information, he reached to the place of incident where the complainant Barkha Rajak (PW-1) informed him that her husband are three brothers. The eldest brother is Dhaniram who resides in Bhopal, Lekhram resides in Gotegaon and her husband and the youngest brother Ashok Rajak (accused) reside in village Sakal, Narsinghpur. Her husband Rajkumar, mother-in-law Jhummak Bai (deceased), brother-in-law Ashok Rajak (Devar) and she reside together. She also stated that her brother-in-law Ashok use to fight with her mother-in-law Jhummak Bai and did not talk to her. Two days back, her husband had gone to Suhagpur for work.

4. On 1.01.2017, her mother-in-law Jhummak Bai, brother-in-law Ashok and she were in the house and brother-in-law was sleeping after having lunch. In the afternoon, at about 3:30 PM, Jhummak Bai woke up Ashok saying that he is sleeping till this time and then she went to the courtyard. Ashok woke up and with a stick in his hand went to the courtyard and said to Jhummak Bai 'why did you wake up me, I will not leave you today and started assaulting her head by the

stick. Jhummak Bai fell down and started shouting. Hearing the scream, complainant went to save her on which Ashok came to hit her also. She ran away from there and at the same time, Sandeep Patel, Bablu Sahu and other persons of the same locality came there. When they tried to save Jhummak Bai, accused-Ashok came to hit them too. Then Ashok (accused) struck on neck of Jhummak Bai with a spade due to which neck and head were severed. Thereafter, he dragged her towards Badi (fences) and thrown the severed head near the Badi. On the basis of the aforesaid information given by complainant Barkha Rajak, Dehati Nalisi (Exhibit P/1) was written and then Merg Intimation under section 174 of Cr.P.C (Exhibit P/2) was also written. Spot Map (Exhibit P/3) was prepared in presence of Bablu Sahu and Sandeep Patel. On the basis of Merg Intimation (Exhibit P/2), FIR vide crime no. 02/2017 for the offence punishable under section 302 of IPC was registered against the accused Ashok Rajak at police station Them, District Narsinghpur.

5. During investigation Shankar Lal Patel (PW-7) has taken the photographs of deceased and prepared the report (Exhibit P/17). Statement of witnesses was recorded and dead body of deceased Jhummak Bai was sent for post mortem to assess the reason for death at District Hospital Narsinghpur. On 02.01.2017, Dr. G.P. Chourasiya (PW-9) performed the autopsy and gave opinion that the cause of death is due to excessive bleeding from the injuries of the body. The death was within 24 hours from post mortem and in this regard post mortem report Exhibit P/18 was given. Accused was arrested and memorandum statement of accused (Exhibit P/8) was recorded wherein he informed that blood stained cloths were kept in room and

spade as well as stick used in the incident were kept in Badi. Cloths of deceased were also seized and all the articles were sent for forensic test to the forensic Science Laboratory, Bhopal. From the place of incident, blood stained soil, plain soil, blood stained spade, piece of wooden square plank, broken bangles and stick were seized vide Exhibit P/9 and P/10. After completion of the investigation charge-sheet was filed before the Court of Judicial Magistrate First Class, Narsinghpur which then was committed to the Sessions Judge, Narsinghpur.

6. Accused Ashok Rajak abjured the guilt and stated that he is innocent and falsely implicated in the offence, however, demanded trial but no defence witness has been produced in his defence by him.

7. To prove its case, the prosecution has examined as many as nine witnesses out of which one has been examined as Court witness.

8. Dr. G.C.Chourasiya (PW-9) has deposed that he was posted in District Hospital, Narsinghpur as Medical Officer. Post mortem letter alongwith dead body was produced by P.S.Themi in the night of 01.01.2017 at about 9:10 PM but due to night post mortem was not done and was conducted in the morning on 02.01.2017 at about 10:30 A.M. Examination report of deceased Jhummak Bai W/o Kunjilal is as under :

External examination:

Head and neck were separated from chest lying separately. Both limbs were fractured from thigh. On left forearm there was lacerated wound in the size of 6 cms x 3 cms out of which flesh

was seen. On the face there were multiple contusion and laceration and face was deformed. One incised wound in the size of 8 cms x 2 cms was found on the right wrist. Ribs were ruptured on both sides.

Internal examination :

Skull and vertebra were badly injured. Left and right lungs were lacerated and pale.

9. Doctor has opined that above stated injuries have been caused by hard and blunt object as well as hard and sharp object which were fatal in nature. In his opinion, mode of death was profuse bleeding due to injuries sustained by the deceased all over the body. Duration of death was within 24 hours from the time of post mortem. He has denied suggestions given by the defence that the injuries caused to the deceased were accidental. He has stated that the injuries are caused by assault. So on the basis of testimony of the Dr.Chourasiya, it is well established that the death of the deceased was homicidal in nature which has been caused by the injuries sustained to the deceased.

10. Now, to prove who caused the injuries to the deceased, prosecution has examined first informant namely Barkha Rajak (PW-1) and eye-witnesses namely Raju (PW-2) and Tularam (PW-3). Barkha Rajak (PW-1) is sister-in-law (Bhabhi) of the accused who has stated that on 01.01.2017 at about 3:30/3:45 PM she, her mother-in-law and her brother-in-law (Devar) i.e. accused had lunch and thereafter, accused Ashok slept in the Veranda. Her mother-in-law wake up the accused and then she went to the kitchen garden to pluck vegetables. At that point of time, accused woke up and assaulted the

Jhummak Bai by Danda on her head by saying that he will not let her alive. Due to assault of Danda deceased fell down. This witness Barkha Rajak forbid accused not to do so, on this accused ran to assault her. After that accused dragged the deceased towards fences and then keeping her head on a wooden plank struck spade on the neck of deceased due to which her head was separated from body, thereafter, he threw away head of deceased in fences. At that time people of adjoining houses had come. She has further deposed that she lodged Dehati Nalishi (Exhibit P-1) and Merg Intimation (Exhibit P-2). She has denied in her cross-examination that suggestions given by the defence that she has not seen the accused assaulting the deceased by Danda. Nothing could be elucidated even after long cross-examination of this witness by the defence.

11. Raju (PW-2) and Tularam (PW-3) are the eye-witnesses. These witnesses reside adjoining to the house of the deceased. Both have deposed in the Court that on 01.01.2017 at about 3:30/3:45 PM they heard noise of shouting. On hearing the noise both rushed to the house of the deceased and saw that the accused-Ashok Rajak hit Jhummak Bai by Danda due to which she fell down. The accused dragged the deceased towards fences and then kept her head on a wooden plank and after that struck spade on her neck due to which her head was separated from neck. Accused then threw away head of deceased in Badi. These witnesses have also deposed that they told accused not to do so but upon this the accused ran towards them to assault. In the cross-examination these witnesses have deposed that they tried to save Jhummak Bai but since accused ran towards them to assault, due to fear they could not save her.

12. Rakesh Bharti (PW-5) Sub-Inspector is the Investigating Officer of this case. He has deposed that he prepared spot map Exhibit P-3 before witnesses namely Bharkha, Babloo Sahu and Sandeep Patel. Accused gave memorandum statement Exhibit P-8. On his memorandum statement one full shirt and one full pant were seized and sealed vide seizure memo Exhibit P-9. Blood stained soil, blood stained spade, wooden plank and Danda were also seized from the spot vide seizure memo Exhibit P-10.

13. Bablu Sahu (PW-4) has supported the testimony of witness Rakesh Bharti (PW-5)-Investigating Officer. He has stated that the accused has given disclosure statement before him and on the basis of that disclosure statement police seized one white shirt and one pant and near dead body one blood stained spade, one wooden square plank, one wooden Danda which were seized vide Exhibit P-10 and accused was arrested vide arrest memo Exhibit P-11. Memorandum P-8, seizure memo P-9 & P-10 and arrest memo Exhibit P-11 bears his signature.

14. Dr.G.C.Choursaiya (PW-9) has deposed that on 27.01.2017 Officer Incharge Police Station Thembi had sent him one spade and Danda for following query :

1. Whether seized spade and Danda are stained in blood ?

He replied that seized spade and Danda were stained in blood.

2. Whether injury caused on the head of the deceased could be caused by Danda ?

He replied that injury caused on the head of the deceased could be caused by seized Danda.

3. Whether by the seized spade, neck could be cut and head could be separated?

He replied that by the seized spade, neck could be cut and head could be separated from the body.

15. After appreciation of testimony of above prosecution witnesses it has been proved beyond reasonable doubt that death of deceased Jhummak Bai was homicidal in nature and has been caused by accused-appellant Ashok Rajak. We, therefore, have no hesitation in confirming the conviction of the appellant-accused under Section 302 of IPC.

16. Learned counsel appearing on behalf of accused-appellant has argued that in the instant case there is nothing on record to indicate that the accused-appellant had any pre-meditated design to cause death of Jhummak Bai. It is further submitted that circumstances does not suggest that the offence committed comes within the ambit of rarest of the rare case for which nothing less than the death penalty would be inadequate. Learned counsel for the accused-appellant submitted that all that can be said is that the accused-appellant committed murder of deceased-Jhummak Bai.

17. Constitutionality of the death penalty for murder provided under Section 302 I.P.C. and the sentencing procedure embodied in Section 354(3) of the Criminal Procedure Code, 1973, had been considered in the case of *Bachan Singh Vs. State of Punjab [(1980) 2 SCC 684]*, on

reference by a Constitution Bench of Apex Court. Constitutional validity of the imposition of death penalty under Section 302 I.P.C. was upheld by the Apex Court. The same was reiterated in *Machhi Singh vs. State of Punjab [(1983) 2 SCC 470]*, which was subsequently consistently followed in other decisions of the Apex Court.

18. The Apex Court in Machhi Singh (supra) had the occasion to apply the decision in Bachan Singh (supra) having regard to the accused who was sentenced to death. While confirming the death sentence awarded to the said accused, the court culled out certain proposition from Bachan Singh (supra) as extracted below from Machhi Singh (supra).

"In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case:

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration along with the circumstances of the 'crime'.
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the

relevant circumstances of the crime, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

(iv) A balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised."

19. *In the present case, aggravating circumstances are :*

1. The victim was an old lady of 60 years.
2. She was mother of the accused/appellant.
3. Accused/appellant Exhibited complete absence of human feelings.
4. The manner in which the victim was murdered was inhuman and barbaric.
5. The nature of offence committed by the accused-appellant was not only horrifying but also shocking to the society.

Mitigating circumstances in the present case are :

1. There is nothing to show that there was any pre-meditation, plan or design to cause death of the deceased.
2. The accused-appellant has no criminal record.
3. The death of the deceased was caused in heat of passion due to anger.
4. The accused-appellant is of a young age.
5. The death was not a part of any conspiracy or having motive to do so.

6. There is nothing on record to show that the accused-appellant was a menace to the society.

7. There was nothing on record to indicate that the accused-appellant was not capable of reformation.

8. The condition of the accused-appellant shows that he was mentally defective and the said defect impaired his capacity to appreciate criminality of his conduct.

20. In view of the principles culled out from the above decisions let us find out whether that the present case would fall into the category of the rarest of rare case warranting death sentence. For interpretation of expression “rarest of rare case” we rely upon following decisions of Hon’ble Supreme Court in which death sentence was awarded by the trial Court and the High Court has affirmed death sentence but Hon’ble Supreme Court has held that the case does not fall under the category “rarest of rare case” and commuted the death sentence to life sentence.

In the case of *Mohd.Chaman vs. State of NCT of Delhi (2001) 2 SCC 28*, the Court after finding the commission of crime held that a girl of 1½ years was raped and killed but did not approve of the death sentence imposed on by the Courts below and imposed on him a life sentence as this Court found that the appellant is not a dangerous person to endanger the society and the case is not coming within the parameters of the ‘rarest of rare case’.

In the case of *Bantu vs. State of M.P. AIR 2002 S.C. 70*, the accused was sentenced to death for the rape and murder of a 6 year old child. In Para 8 of the said

judgment, the learned judges after considering the age of the accused and also the fact that he did not have any past criminal record held that the accused will not be a grave danger to society and further held that the case does not fall under the rarest of rare cases and death sentence was commuted to life sentence.

In *Surendra Pal Shivbalakpal vs. State of Gujarat (2005) 3 SCC 127*, a minor girl was raped and killed and the Sessions Court imposed death penalty and the High Court of Gujarat also affirmed the same. But Apex Court found that the case does not fall under the rarest of rare cases and considering that the appellant was 36 years old and has no previous criminal record, held that he was not a menace to society. Apex Court held that it was not a rarest of rare cases and confirmed the conviction but commuted the sentence from death sentence to life imprisonment.

In *Amrit Singh vs. State of Punjab AIR 2007 SC 132*, the accused was found guilty of rape of a minor girl and also of her death. Death occurred not as a result of strangulation but due to excessive bleeding from her private parts. In that case, the Trial Court sentenced the accused to death sentence which was confirmed by the High Court of Punjab and Haryana in a reference proceeding before it. In para 21 of page 136 of the judgment, Apex Court held that the imposition of death sentence in such cases was improper and it cannot be put in the category of rarest of rare cases and the Court imposed a sentence of rigorous imprisonment for life on that ground.

In the case of *Kulwinder Singh vs. State of Punjab AIR 2007 SC 2868*, prosecutrix was found to have been raped by the accused and on her protest, she was found to have been strangulated as a result of which she died. Another person, Joginder Kaur also died in the same incident as a result of injuries received from Gandashi blows inflicted on the neck by the accused. In that case, the death sentence was commuted to imprisonment for life as the Court found that it cannot be brought in the category of rarest of rare cases.

21. Dr. Ratnesh Kurariya has been examined as Court witness who has deposed that he has examined appellant-accused on 23.09.2017. Prior to him, Head of the Department of psychiatry of Medical College had examined the accused-appellant. Again he examined the accused-appellant on 14.10.2017, 25.11.2017 and 16.12.2017, he did not find any mental illness or abnormality. He has also deposed that appellant has committed murder of his mother under impulse since she was unnecessarily harassing him. As a labour he was earning Rs.5000/- per month which he used to give to the deceased. He has admitted in his cross-examination that appellant was constantly under observation for about one month and then he was admitted in mental illness ward.

22. On appreciation of evidence of Dr.Ratnesh Kurariya one can draw a conclusion that though the accused-appellant was not mentally unsound or psychophonic but was mentally disturbed and was not healthy as one should be as a normal human being.

23. On careful consideration of above aggravating circumstances appearing against the appellant and the mitigating factors which speaks in favour of the accused-appellant, we find that, after giving full consideration to the mitigating circumstances the deceased Jhummak Bai woke up the accused and the appellant-accused out of anger, in the heat of passion, without any pre-meditation assaulted the deceased and prior to assault neither any conspiracy was hatched nor any plan/design was made and the incident occurred suddenly out of impulse.

24. In the light of above discussion, though the offence is of murder by the accused-appellant of his own mother but cannot, in the circumstances, be termed as '*rarest of the rare*' case. We feel that the case does not fall within the category of rarest of rare case, therefore, in our view, present is not a case in which extreme penalty of death should be imposed.

25. For the aforesaid reasons discussed above and keeping in view the mitigating circumstances and the law laid down in the case of *Bachan Singh (supra)*, we hereby confirm the conviction of the appellant, however, in our view death sentence cannot be awarded to the appellant as the present case does not come within the parameters of rarest of rare case. So we decline to confirm the sentence of death imposed against the accused-appellant.

26. Apex Court in the case of *Mulla & another vs State Of U.P (2010) 3 SCC 508* has held in paragraph 85 as under :

“85. We are in complete agreement with the above dictum of this Court. It is open to the sentencing Court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The Court should be free to determine the length of imprisonment which will suffice the offence committed. Thus we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.

86. Here we like to note that the punishment of life sentence in this case must extend to their full life, subject to any remission by the Government for good reasons.

87. For the foregoing reasons and taking into account all the aggravating and mitigating circumstances, we confirm the conviction, however, commute the death sentence into that of life imprisonment. The appeal is disposed of accordingly.”

27. Accordingly, considering Apex Court judgment of Mulla & another (supra) we commute the death sentence awarded to the accused/appellant by the trial Court to life sentence extending to full life of the appellant subject to any remission or commutation at the instance of the Government for good and sufficient reason.

28. With the aforesaid modification of sentence, the criminal reference as well as criminal appeal are disposed of in above terms.

At the end, it is our duty to record the words of appreciation in favour of Amicus Curiae, who assisted this Court in the disposal of this case, however, his assistance is acknowledged.

Record of the trial Court be sent back for necessary action.

(J.K.Maheshwari)
Judge

(Akhil Kumar Srivastava)
Judge

navin/anand