BIRJU

v.

STATE OF M.P.

(Criminal Appeal Nos.1352-1353 of 2012)

FEBRUARY 14, 2014

[K.S. RADHAKRISHNAN AND VIKRAMAJIT SEN, JJ.]

PENAL CODE, 1860:

s.302 IPC and s.27 of the Arms Act - Murder of a child aged 1 year - Conviction - Death sentence awarded by courts below, keeping in view a large number of criminal cases pending against accused - Held: Prosecution, by evidence of eye witness and medical evidence and FSL report, has successfully proved the cause of death and use of firearm by accused - The findings of trial court as affirmed by High Court that offences under s. 302 IPC and s.27 of the Arms Act have been made out against accused are concurred with - However, sentence of death is converted into one of imprisonment for 20 years without remission, over the period already undergone.

SENTENCE/SENTENCING:

Death sentence awarded by courts below - Based on criminal antecedents of accused - Held: Death was caused in retaliation to not meeting the demand of accused - It is not a rarest of rare case warranting capital punishment - Prior conviction will be a relevant factor, but in the instant case, accused has only been charge-sheeted and not convicted and, therefore, it is not a relevant factor for applying the RR test so as to award capital punishment - However, it may be relevant factor for awarding a sentence - In the instant case, when there are more than two dozen cases against accused of which three relate to offence of murder and two to attempt

A *to murder, it may have an impact on the sentencing policy, since the presence of accused could be a continuing threat to society and calls for longer period of incarceration - This is a fit case where 20 years of rigorous imprisonment, without remission, to the appellant, over the period which he has* B *already undergone, would be an adequate sentence and will render substantial justice - Criminal law - Motive.*

EVIDENCE:

Evidence of hostile witness - Held: Cannot be discarded C *as a whole and relevant parts thereof, which are admissible in law, can be used, either by prosecution or defence.*

CODE OF CRIMINAL PROCEDURE, 1973:

s.235(2) - Hearing on question of sentence - Held: In D *awarding sentence, in appropriate cases, while hearing the accused u/s 235(2) Cr.P.C., courts can also call for a report from the Probation Officer and examine whether accused is likely to indulge in commission of any crime or there is any probability of accused being reformed and rehabilitated -* E *Probation of Offenders Act, 1958.*

The appellant-accused was prosecuted for committing the murder of a child aged one year who was in the arms of his grand-father (PW-1), on the allegation F **that the appellant demanded Rs.100/- from PW-1 to purchase liquor and on refusal, he took over a country made pistol and fired a shot which hit the child, resulting into his death. The trial court convicted the accused and keeping the fact in view that he had 24 criminal cases** G **pending against him out of which 3 were murder cases and 2 were of attempt to murder cases, sentenced him to death. The High Court confirmed the conviction and the death sentence. It took the view that there was no probability that the accused would not commit criminal acts of violence and it would constitute a continuing** H

threat to the society and there would be no probability that the accused could be reformed or rehabilitated. A

Disposing of the appeals, the Court

HELD: 1.1 PWs 1 to 4 and 7 fully and completely supported the case of the prosecution. Their version is consistent and highly reliable. Eye witnesses' version is fully corroborated with post-mortem and FSL reports. PW6, of course, has been declared as hostile, but the evidence of a hostile witness cannot be discarded as a whole and the relevant parts thereof, which are admissible in law, can be used, either by the prosecution or the defence. [para 9] [1055-F-H; 1056-A] B C

Muniappan and Others v. State of Tamil Nadu 2010 (10) SCR 262 = (2010) 9 SCC 567 - relied on. D

1.2 Motive for committing the murder was evidently for getting the money to consume liquor for which, unfortunately, a child of one year became the casualty. PW10, the Doctor opined that the wound was caused by firearm and the deceased died within 24 hours of post-mortem examination. The prosecution has successfully proved the cause of death and the use of the firearm by the accused and this Court fully concurs with the findings of the trial court, affirmed by the High Court that offences under s. 302 IPC and s.27 of the Arms Act, 1959, have been made out. [para 10] [1056-D-F] E F

Shankar Kisnrao Khade v. State of Maharashtra (2013) 5 SCC 546 - referred to.

2.1 One of the factors which weighed with the High Court to affirm the death sentence was that the accused was charge-sheeted for commissioning of 24 criminal cases, out of which three were for offences punishable u/s 302 IPC and two were u/s 307 IPC. It is pertinent to G H

A note that the accused has only been charge-sheeted and not convicted and, therefore, that factor is not a relevant factor to be taken note of while applying the R-R test so as to award capital punishment. May be, in a given case, the pendency of large number of criminal cases against B the accused person might be a factor which could be taken note of in awarding a sentence but, in any case, not a relevant factor for awarding capital punishment. True, when there are more than two dozen cases, of which three relate to the offence of murder, the usual plea of C false implication by the defence has to be put on the back seat, and may have an impact on the sentencing policy, since the presence of the accused could be a continuing threat to the society and calls for longer period of incarceration. [para 14-15] [1059-B, F-H; 1060-A]

D 2.2 While laying down various criteria in determining the aggravating circumstances, two aspects, often seen referred to are: (1) the offences relating to the commission of heinous crime like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of E conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal conviction; and (2) the offence was committed while the offender was engaged in the commission of another serious offence. First criteria may F be a relevant factor while applying the R-R test, provided the offences relating to heinous crimes like murder, rape, dacoity etc. have ended in conviction. Prior record of the conviction will be a relevant factor, but that conviction should have attained finality so as to treat it as G aggravating circumstance for awarding death sentence. The second aspect deals with a situation where an offence was committed, while the offender was engaged in the commission of another serious offence. This is a situation where the accused is engaged in the H commission of another serious offence which has not

ended in conviction and attained finality. [para 16-17] [1060-B-G]

Bachan Singh v. State of Punjab (1980) 2 SCC 684, *Machhi Singh and others v. State of Punjab* 1983 (3) SCR 413 = (1983) 3 SCC 470 and *Rajendra Pralhadrao Wasnik v. State of Maharashtra* 2012 (2) SCR 225 = (2012) 4 SCC 37 - referred to.

2.3 In awarding sentence, in appropriate cases, while hearing the accused u/s 235(2) Cr.P.C., courts can also call for a report from the Probation Officer, while applying the Crime Test guideline No.3, as laid down in Shankar Kisanrao Khade's case. Court can then examine whether the accused is likely to indulge in commission of any crime or there is any probability of his being reformed and rehabilitated. [para 18] [1061-E-F]

2.4 In the instant case, the accused had full knowledge, if he fires the shot on the temporal area, it would result in death of the child of one year who was in the arms of PW1. The accused, of course, demanded Rs.100/- from PW1, which he refused and then he took out the pistol and fired at the right temporal area of the child, as retaliation of not meeting his demand and there is nothing to show that, at the time of the incident, he was under the influence of liquor. Consequently, while affirming the conviction, it cannot be said that it is a rarest of rare case, warranting capital punishment. Therefore the death sentence awarded by the trial court and confirmed by the High Court is set aside and the same is converted to imprisonment for life. [para 19] [1061-G-H; 1062-A-B]

2.5 However, this is a fit case to be placed under the third category of cases in which court can, while awarding the sentence for imprisonment of life, fix a term

of imprisonment of 14 or 20 years (with or without remission) instead of death penalty and can, in appropriate cases, order that the sentences would run consecutively and not concurrently. This a case where the accused is involved in twenty four criminal cases, of which three are for the offence of murder and two are for attempt to murder. In such circumstances, if the appellant is given a lesser punishment and let free, he would be a menace to the society. This is a fit case where 20 years of rigorous imprisonment, without remission, to the appellant, over the period which he has already undergone, would be an adequate sentence and will render substantial justice. Ordered accordingly. [para 20-21] [1062-B-F]

Swami Shraddanand (2) alias Murli Manohar Sharma v. State of Karnataka **2008 (11) SCR 93 = (2008) 13 SCC 767;** *Gurvail Singh v. State of Punjab* **(2013) 10 SCC 63- relied on.**

Case Law Reference:

2010 (10) SCR 262	**relied on**	**para 9**
(2013) 5 SCC 546	**referred to**	**para 12**
(1980) 2 SCC 684	**referred to**	**para 16**
1983 (3) SCR 413	**referred to**	**para 16**
2012 (2) SCR 225	**referred to**	**para 16**
2008 (11) SCR 93	**relied on**	**para 20**
(2013) 10 SCC 63	**relied on**	**para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 1352-1353 of 2012.

From the Judgment and order dated 28.06.2010 of the

High Court of Madhya Pradesh Bench at Indore in Crl. Death Ref. No. 1 of 2010 and Crl. Appeal No. 187 of 2010. A

Rana Ranjit Singh for the Appellant.

C.D. Singh, Anshuman Shrivastava for the Respondent. B

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are, in this case, concerned with the killing of a child aged one year who was in the arms of PW1, the grand-father, for which the accused was awarded death sentence by the trial court, which was affirmed by the High Court and these appeals have been preferred by the accused against the judgment of conviction and sentence awarded to him for the offences under Section 302 of the Indian Penal Code, read with Section 27 of the Arms Act, 1959. C D

2. The prosecution case, in short, is as follows:

PW1, the complainant was standing at the grocery shop of Kamal Bansal (PW2) on 13.12.2009 at about 8.15 PM for purchasing some goods. He was holding his grandson, Arman, aged one year in his arms. PW4, Jagdish, was also standing in front of the said shop. The accused-Birju, resident of the same locality, known as Rustam Ka Bagicha, came out there on a motorcycle. After parking the motorcycle, he went to Babulal and questioned him as to why he was standing there. Babulal replied that he had come to purchase some kirana. While so, the accused-appellant demanded Rs.100/- for consuming liquor. Babulal expressed his inability to give the money, on which, the accused abused him in the name of his mother and took out a country made pistol from his pocket and shot, which hit on the right temporal area of infant-Arman. Persons of the locality, which included Rakhi, daughter of the complainant, her aunt-in-law Sharda Bai and few other inhabitants of the area, reached the spot after hearing the sound. Son-in-law of the complainant, Jeevan, took Arman to E F G H

A the hospital and PW1 immediately reached the police station and lodged the first information report.

3. PW 12, the Station House Officer, reached the spot and prepared a spot map (Ext.P/2) and seized the blood stained B shirt of complainant Babulal vide seizure memo (Ext.P/3). Empty cartridge, motorcycle and used bullet were seized from the spot vide seizure memo (Ext.P/6). Inquest report (Ext.P/8) was prepared on the dead body, which was then sent for post-mortem examination. PW10 Dr. A.K. Langewar conducted the C post-mortem examination.

4. The accused was later nabbed and from his possession pistol was recovered and seized articles were sent for examination to the Forensic Science Laboratory, Tamil Nadu vide Ext.P/18-A. The investigation officer recorded the D statements of witnesses and completed the investigation and the accused was charge-sheeted under Sections 302, 327 and 398 of the IPC and Sections 25 and 27 of the Arms Act, 1959.

5. The prosecution examined 12 witnesses and produced E 19 documents and none was examined on the side of the defence.

6. As already indicated, after appreciating the oral and documentary evidence, the trial court found the accused guilty and held that the case of the accused falls under "rarest of rare" F category and awarded capital punishment, which was affirmed by the High Court. The accused was also convicted under Section 27 of the Arms Act and was sentenced to rigorous imprisonment for three years and a fine of Rs.1000/-, which was also affirmed by the High Court.

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7. Mr. Rana Ranjit Singh, learned counsel appearing for the appellant, submitted that the case on hand is not the one which falls in the category of "rarest of rare" warranting capital punishment. Learned counsel pointed out that even if the entire H prosecution case is accepted, the offence would be covered

under Section 304 Part II IPC. Learned counsel also pointed out that the accused had no intention to kill either PW1 or the child. The accused, at best, was under extreme mental or emotional disturbance and there will be no occasion for him to indulge in similar offence in future, and the possibility of accused being reformed could not be ruled out. Learned counsel also submitted that the trial court and the High Court have committed an error in awarding the death sentence on the ground that the accused was involved in various other criminal cases which, according to the counsel, cannot be an aggravating factor to be taken into consideration for the purpose of awarding the death sentence.

8. Mr. C.D. Singh, learned counsel appearing for the State, on the other hand, pointed out that the prosecution has proved the case beyond reasonable doubt. Learned counsel referred to the evidence of PW4 and PW7 and stated that they were eye-witnesses to the incident and there is no reason to discard their oral evidence. Learned counsel submitted that the murder was committed in cold blooded manner and evidence on record clearly shows that the accused has absolutely no regard for the life or limb of others. Learned counsel also submitted that there is no probability of reformation or rehabilitation of the accused. Learned counsel also submitted that, in the instant case, crime test, criminal test and R-R test have been fully satisfied and there is no reason to interfere with the death sentence awarded by the trial court and affirmed by the High Court.

9. PWs 1 to 4 and 7 fully and completely supported the case of the prosecution. PW1, the grand-father of the child, PWs 2, 3, 4 and 7 have depicted an eye-to-eye picture of what transpired on the fateful day. Their version is consistent and highly reliable. Eye witnesses' version is fully corroborated with post-mortem and FSL reports. PW6, of course, has been declared as hostile, but the evidence of a hostile witness cannot be discarded as a whole and the relevant parts thereof, which are admissible in law, can be used, either by the prosecution

A or the defence. Reference may be made to the judgment of this Court in *C. Muniappan and Others v. State of Tamil Nadu* (2010) 9 SCC 567. PW6, in his statement under Section 164 Cr.P.C. has stated that, on the date of the incident, he heard PW1 shouting "goli mar di", "goli mar di", which indicates that, B to that extent, the statement supports the prosecution. The incident, as already stated, happened in front of a grocery shop at about 8.15 PM on 13.12.2009 when PW1 was standing in front of the grocery shop of PW2. Accused, at that time, reached the spot and demanded Rs.100/-, which PW1 refused to pay C and, for that sole reason, he took out the pistol from his pocket and shot, which hit the temporal region of Arman, aged one year and he died.

10. Motive for committing the murder was evidently for getting the money to consume liquor for which, unfortunately, a D child of one year became the casualty. The country made pistol used for committing the offence was subsequently recovered. PW10, who conducted the post-mortem on the dead body of the child, noticed various injuries and reiterated that the bullet had pierced through the meningeal membranes and both the E lobes of the brain. PW10 Doctor opined that the wound was caused by firearm and the deceased died within 24 hours of post-mortem examination. The prosecution has successfully proved the cause of death and the use of the firearm by the accused and we fully concur with the findings of the trial court, F affirmed by the High Court that offences under Section 302 IPC and Section 27 of the Arms Act, 1959, have been made out.

11. We are now concerned with the question whether the case falls under the category of "rarest of rare", warranting the G death sentence.

12. We have held in *Shankar Kisnrao Khade v. State of Maharashtra* (2013) 5 SCC 546 that even if the crime test and criminal test have been fully satisfied, to award the death sentence, the prosecution has to satisfy the R-R Test. We have H

noticed that one of the factors which weighed with the trial court as well as the High Court to award death sentence to the accused was his criminal antecedents. The High Court while dealing with the criminal antecedents of the accused stated as follows:

> "14. The appellant is having criminal antecedent, which is clear from the statement of investigating officer (PW-12) Mohan Singh in paragraph 12, wherein he has deposed that the appellant is a notified bully in the concerned police station and as many as 24 criminal cases were registered against him by the police, out of which three cases of murder and two were attempt to commit murder. In all these cases, after investigation, appellant was charge sheeted for trial before the court of law. In cross-examination, this statement has been challenged by the defence. In paragraph 13 only question was put to this witness that along with the charge sheet list of criminal cases were not filed, on which witness replied that same is available in the case diary. After this answer, counsel for the appellant did not ask the Court to verify this fact and also no suggestion was given to this witness that appellant was not facing prosecution in all the above mentioned criminal cases. These facts are sufficient to hold that appellant was fully aware about the use and consequence of the deadly weapon like pistol, and when his demand was not satisfied; he used the same intentionally to commit murder of child, Arman. The injuries show that pistol was fired very accurately and bullet pierced through and through at the vital part of the body i.e. skull. When appellant was using firearm for causing injury to infant Arman, he must be knowing the consequence that because of use of such deadly weapon, there would be no chance for survival of a child aged one year."

13. Further, the High Court also, after referring to the various cases, where this Court had awarded death sentence,

A considered the present case as rarest of rare one and stated as follows:

"26. In the light of aforesaid legal position for considering whether the instant case falls within the category of rarest in rare case, we visualize the following circumstances :-

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i) The offence was not committed under the influence of extreme mental or emotional disturbance.

ii) Appellant is a quite matured person aged about 45 years. He is neither young nor old.

C

iii) Looking to his criminal antecedent i.e. he was charge sheeted for commission of 24 criminal cases, out of which 3 were under Section 302 of "the IPC" and 2 were under Section 307 of "the IPC", therefore, there is no probability that the accused would not commit acts of violence in future and his presence in society would be a continuing threat to society.

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E iv) `There is no probability or possibility of reformation or rehabilitation of the appellant.

v) In the facts and circumstances of the present case, accused/appellant cannot morally justify the commission of murder of child aged one year by him.

F

vi) There is no direct or indirect evidence available to say that accused acted under the duress or domination of another person.

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vii) The condition of appellant/accused was not such, which may show that he was mentally defective and the said defect impaired his capacity to appreciate the criminality of his conduct.

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viii) It is purely a cold blooded murder and evidence on record clearly showing the fact that appellant has absolutely no regard for life and limb of others." A

14. One of the factors which weighed with the High Court to affirm the death sentence was that the accused was charge-sheeted for commissioning of 24 criminal cases, out of which three were under Section 302 IPC and two were under Section 307 IPC, consequently, the Court held that there was no probability that the accused would not commit the act of violence in future and his presence would be a continuing threat to the society. The Court also took the view that there was no possibility or probability of reformation or rehabilitation of the accused. B C

15. We have in *Shankar Kisanrao Khade's* case (supra) dealt with the question as to whether the previous criminal record of the accused would be an aggravating circumstance to be taken note of while awarding death sentence and held that the mere pendency of few criminal cases, as such, is not an aggravating circumstance to be taken note of while awarding death sentence, since the accused is not found guilty and convicted in those cases. In the instant case, it was stated, that the accused was involved in 24 criminal cases, out of which three were registered against the accused for murder and two cases of attempting to commit murder and, in all those cases, the accused was charge-sheeted for trial before the court of law. No materials have been produced before us to show that the accused stood convicted in any of those cases. Accused has only been charge-sheeted and not convicted, hence, that factor is not a relevant factor to be taken note of while applying the R-R test so as to award capital punishment. May be, in a given case, the pendency of large number of criminal cases against the accused person might be a factor which could be taken note of in awarding a sentence but, in any case, not a relevant factor for awarding capital punishment. True, when there are more than two dozen cases, of which three relate to the offence of murder, the usual plea of false implication by the D E F G H

A defence has to be put on the back seat, and may have an impact on the sentencing policy, since the presence of the accused could be a continuing threat to the society and hence calls for longer period of incarceration.

B 16. We also notice, while laying down various criteria in determining the aggravating circumstances, two aspects, often seen referred to in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *Machhi Singh and others v. State of Punjab* (1983) 3 SCC 470 and *Rajendra Pralhadrao Wasnik v. State of* C *Maharashtra* (2012) 4 SCC 37, are (1) the offences relating to the commission of heinous crime like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal conviction; and (2) the offence was committed while D the offender was engaged in the commission of another serious offence. First criteria may be a relevant factor while applying the R-R test, provided the offences relating to heinous crimes like murder, rape, dacoity etc. have ended in conviction.

E 17. We may first examine whether "substantial history of serious assaults and criminal conviction" is an aggravating circumstance when the court is dealing with the offences relating to the heinous crimes like murder, rape, armed docoity etc. Prior record of the conviction, in our view, will be a relevant F factor, but that conviction should have attained finality so as to treat it as aggravating circumstance for awarding death sentence. The second aspect deals with a situation where an offence was committed, while the offender was engaged in the commission of another serious offence. This is a situation where the accused is engaged in the commission of another serious G offence which has not ended in conviction and attained finality.

18. In the instant case, the Court took the view that there was no probability that the accused would not commit criminal acts of violence and would constitute a continuing threat to the

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society and there would be no probability that the accused could be reformed or rehabilitated. In *Shankar Kisanrao Khade's* case (supra), while dealing with the criminal test (mitigating circumstances), this Court noticed one of the circumstances to be considered by the trial Court, while applying the test, is with regard to the chances of the accused not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated. We find, in several cases, the trial Court while applying the criminal test, without any material on hand, either will hold that there would be no possibility of the accused indulging in commission of crime or that he would indulge in such offences in future and, therefore, it would not be possible to reform or rehabilitate him. Courts used to apply reformative theory in certain minor offences and while convicting persons, the Courts sometimes release the accused on probation in terms of Section 360 Cr.P.C. and Sections 3 and 4 of the Probation of Offenders Act, 1958. Sections 13 and 14 of the Act provide for appointment of Probation Officers and the nature of duties to be performed. Courts also, while exercising power under Section 4, call for a report from the Probation Officer. In our view, while awarding sentence, in appropriate cases, while hearing the accused under Section 235(2) Cr.P.C., Courts can also call for a report from the Probation Officer, while applying the Crime Test guideline No.3, as laid down in *Shankar Kisanrao Khade's* case (supra). Court can then examine whether the accused is likely to indulge in commission of any crime or there is any probability of the accused being reformed and rehabilitated.

19. We have no doubt in our mind that the accused had the full knowledge, if he fires the shot on the temporal area, that is between the forehead and the ear, it would result in death of the child of one year who was in the arms of PW1. Appellant, of course, demanded Rs.100/- from PW1, which he refused and then he took out the pistol and fired at the right temporal area of the child, as retaliation of not meeting his demand and there is nothing to show that, at the time of the incident, he was under

A the influence of liquor. Consequently, while affirming the conviction, we are not prepared to say that it is a rarest of rare case, warranting capital punishment. We, therefore, set aside the death sentence awarded by the trial Court and affirmed by the High Court, and convert the same to imprisonment for life.

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20. We are, however, of the view that this is a fit case where we can apply the principle laid down in *Swami Shraddanand (2) alias Murli Manohar Sharma v. State of Karnataka* (2008) 13 SCC 767. In that case, this Court took the view that there is a third category of cases in which Court C can, while awarding the sentence for imprisonment of life, fix a term of imprisonment of 14 or 20 years (with or without remission) instead of death penalty and can, in appropriate cases, order that the sentences would run consecutively and not concurrently. Above sentencing policy has been adopted D by this Court in several cases, since then, the latest being *Gurvail Singh v. State of Punjab* (2013) 10 SCC 631. We have indicated that this a case where the accused is involved in twenty four criminal cases, of which three are for the offence of murder and two are for attempting to commit murder. In such E circumstances, if the appellant is given a lesser punishment and let free, he would be a menace to the society.

21. We are of the view that this is a fit case where 20 years of rigorous imprisonment, without remission, to the F appellant, over the period which he has already undergone, would be an adequate sentence and will render substantial justice. Ordered accordingly.

22. The appeals stand disposed of as above.

G R.P. Appeals disposed of.