

SUPREME COURT OF INDIA

Sham @ Kishor Bhaskarrao Matkari

Vs.

State of Maharashtra

Crl.A.No.868 of 2006

(P.Sathasivam and B.S.Chauhan,JJ.,)

30.09.2011

JUDGMENT

P.Sathasivam, J.,

1. This appeal is directed against the common final judgment and order dated 03.05.2006 passed by the High Court of Judicature of Bombay, Bench at Aurangabad in Criminal Appeal Nos. 183 of 2004 and 391 of 2003 whereby the High Court dismissed the appeal preferred by the appellant-accused and allowed the appeal preferred by the State of Maharashtra, respondent herein and enhanced the sentence of life imprisonment to death which was imposed by the First Ad-hoc Additional Sessions Judge, Jalgaon in Sessions Case No. 160 of 2001.

2. Brief facts:

“a) Sham @ Kishor Bhaskarrao Matkari, the appellant- accused was residing with his brother Manohar Matkari (since deceased) and his family consisting of his wife, Meena (since deceased) and three children, namely, Akhilesh (since deceased), Monika (PW-7) and Vishwesh in a rented premises owned by one Pandurang Patil (PW-3). Manohar, the deceased was serving in the Railway Mail Service, Bhusawal. Dipak Narayan Thakur (the Complainant) was their neighbour.

b) On 28.06.2001, at about 9.00 to 9.15 p.m., when the Complainant came out of his house for collecting the clothes which were kept for drying, he noticed that some quarrel was going on between the appellant-accused and his brother Manohar in their house. He heard the accused saying to his brother Manohar that you raised hands on me today, I will see you later. Since it would be a dispute over the household matter, he neglected and went inside the house. In the midnight, at about 3.00 to 3.30 a.m., the Complainant heard some hue and cry from the house of Manohar. He also heard the cries of Meena, the wife of Manohar and the noise of beating and groaning of small child from the house. He also noticed the smell of leakage of gas and something

burning from the house of Manohar. Immediately, he informed Pandurang Patil (PW-3) - the landlord and also one Pitamber Choudhary, who was residing on the upper floor. Thereafter, all of them proceeded to the house of the deceased-Manohar. When they were going towards the house of the deceased, they saw the accused coming out of the house and when they enquired, the accused told that three thieves entered into their house and assaulted them. Thereafter, the accused demanded water for drinking. They also noticed that the hands and clothes of the appellant-accused were stained with blood. When they approached near the house of the deceased, they noticed smoke coming out of the house. Immediately, PW-3, the landlord, telephoned the police.

(c) On receipt of the information, the Inspector of Police, Dilip Shankarwar (PW-14) rushed to the place of occurrence immediately. He saw the appellant-accused sitting by the side of water tank and having suffered bleeding injury on his head. When enquired, the accused narrated the same story that 3 to 4 persons entered into their house and assaulted him, his brother, his brother's wife and children and they tried to burn his brother's wife and after taking household articles, they fled away. Since blood was oozing out from his head, PW-14 sent the accused to the hospital for treatment in a police jeep. When they entered into the house, they noticed smoke coming out of the room and Akhilesh, the son of Manohar, was lying in injured condition on the cot and blood was oozing from his head. They also noticed that Manohar, his wife Meena, daughter Monika and son Vishvesh were lying in injured condition on the floor of the house. They also noticed that Meena was partially burnt and a stone of big size and a gas cylinder with tube were lying near her body. PW-14 immediately sent the two injured boys and girl to the Municipal Hospital, Bhusawal in a police jeep. As Manohar and his wife were dead, their bodies were sent for post-mortem. At the same time, spot Panchanama (Ex.24) was drawn by PW-14 and he also seized the articles found lying there including wooden rafter having stains of blood and a big stone. Since the condition of injured Akhilesh was deteriorating, he was shifted to Civil Hospital, Jalgaon and he expired on 29.06.2001. Injured Monika and Vishvesh were shifted to Civil Hospital, Jalgaon. Later on, both were shifted to a private hospital at Aurangabad.

(d) A crime was registered being Crime No. 41 of 2001 for the offences punishable under Sections 302, 307 and 201 of the Indian Penal Code, 1860 (in short "IPC"). During the course of investigation, the Investigating Officer recorded the statements of Pandurang Patil (PW-3) and others. He also seized clothes of the deceased, Manohar, Meena and Akhilesh. Since the accused was detected as perpetrator of the crime, he was arrested. His nail clippings and blood samples were collected.

PW-14 also recorded the statements of Monika and Vishvesh, the injured children.

(e) After necessary investigation, charge-sheet was laid in the Court of Judicial Magistrate, First Class, Bhusawal, who committed the case to the Court of Sessions. The First Ad-hoc

Additional Sessions Judge, Jalgaon, after examining 16 witnesses including Monika, an injured minor girl as PW-7, by judgment dated 04/05.03.2003 convicted the appellant-

accused for the offence punishable under Section 302 IPC and sentenced him to imprisonment for life and to pay a fine of Rs.25,000/-, in default of payment of fine, to suffer rigorous imprisonment for two years and also sentenced him to suffer rigorous imprisonment for seven years for the offence under Section 307 IPC, and to pay a fine of Rs.1,000/-, in default of payment of fine, to suffer rigorous imprisonment for three months and acquitted him for the offence punishable under Section 201 IPC.

(f) Against the aforesaid judgment, the State of Maharashtra, respondent herein filed an appeal being Criminal Appeal No. 391 of 2003 before the High Court of Judicature of Bombay, Bench at Aurangabad for enhancement of sentence from imprisonment for life to death and the appellant-accused also filed appeal being Criminal Appeal No. 183 of 2004. Both the appeals were heard together and by a common impugned judgment dated 03.05.2006, the High

Court dismissed the appeal filed by the appellant-accused and allowed the appeal filed by the State and enhanced the sentence of life imprisonment to death. Aggrieved by the said judgment, the appellant-accused has filed this appeal before this Court by way of special leave petition.

3. Heard Mr. Tara Chand Sharma, learned counsel for the appellant-accused and Mr. Sushil Karanjkar, learned counsel for the respondent-State.

4. Learned counsel for the appellant though canvassed the ultimate conviction imposed by the trial Court and affirmed by the High Court mainly contended before us with regard to the death sentence awarded by the High Court. According to him, in view of several mitigating circumstances highlighted before the High Court, without adverting to the same, the High Court awarded the extreme penalty of death sentence which is not warranted in the facts and circumstances of the case. On the other hand, learned counsel for the State, by taking us through the relevant materials, submitted that in view of death of three persons and causing injuries to two, all in one family, the High Court was justified in awarding capital punishment (death sentence) to the appellant-accused.

5. We have carefully perused all the relevant materials and considered the rival submissions.

6. Very briefly, let us consider the prosecution case and the ultimate conviction under Sections 302 and 307 IPC. The appellant-accused was the real brother of Manohar Matkari-the deceased and was residing with him in a rented premise owned by Pandurang Patil, (PW-3). The said Manohar and his wife Meena were having three children. The incident took place in the night intervening 28/29.06.2001. Dipak Narayan Thakur (PW-1) was the neighbour of Manohar in one of the premises owned by Pandurang Patil, (PW-3) as tenant at the relevant point of time. According to PW-1, on the said night, at about 9.00 to 9.15 p.m.,

when he came out of his house to collect the clothes which were kept for drying, he noticed that some quarrel was going on between the accused and his brother Manohar in their house. In the mid-night, at about 3.00 to 3.30 a.m., PW-1 again heard some hue and cry from the house of Manohar. He also heard cries of the wife of Manohar and the noise of beating and groaning of small child from the house. He also noticed smell of leakage of gas and something burning in the house of Manohar. On noticing all these things, PW-1 rushed to his landlord, Pandurang Patil, (PW-3) and also woke up one Pitamber Choudhary, who was residing on the upper floor. It is further seen from his evidence that he then along with those persons proceeded towards the house of Manohar and saw the accused coming out of the house and when they enquired him, the accused told that three thieves had entered into their house and assaulted him, his brother, his brother's wife and their children. On hearing this, PW-3 informed the police over phone. The police arrived there within 10 minutes and took the accused to the hospital as he had sustained head injury. The police also took all the three children to the hospital in a police jeep. Thereafter, PW-1 entered the house of Manohar along with the police officers. They noticed that Manohar and his wife Meena were lying dead and Meena was partially burnt.

PW-1 narrated the incident to the police which was reduced into writing and treated as FIR (Ex.P-22).

7. When the appellant-accused was undergoing treatment in the hospital, on 30.06.2001, the Police Officer, Zillapeth Police Station, Jalgaon thought that the accused may not survive and sent a requisition to Muralidhar Sapkale, (PW-16) who was the Executive Magistrate working in Treasury Office, Jalgaon to record his statement. Pursuant to the same, PW-16 visited the Civil Hospital, Jalgaon and recorded the statement of the accused which is Ex.73. All were under the impression that on the death of the accused, the said statement will be treated as dying declaration. The said statement, Ex.73, contains confession on the part of the accused. The prosecution also relied on the statement of Monika, (PW-7), daughter of Manohar, who has stated to have seen the part of the occurrence.

8. Learned counsel for the appellant-accused has taken us through the evidence of PWs-1, 3, 7 and 16 and all other connected documents. We have already stated that Dipak Narayan Thakur, (PW-1) is residing in one of the premises adjoining to Manohar owned by one Pandurang Patil, (PW-3) as tenant, at the relevant time. PW-1 noticed the first occurrence, that is, between 9.00 to 9.15 p.m., namely, at the time of collecting his clothes which were kept for drying that some quarrel was going on between the accused and his brother Manohar. It was he who witnessed the second incident also, that is, in the mid-night, at about 3.00 to 3.30 a.m., in the house of Manohar. He not only heard the cries of Manohar but also heard noise of beating and groaning of small children from the house. He also noticed leakage of gas from the house of Manohar. It is further seen that on his information, PW-3, their landlord, and one Pitamber Choudhary, also joined and noticed the occurrence in the early morning. When PW-1 and PW-3 proceeded towards the house of Manohar, they saw the accused coming out of the house and when they enquired, the accused told that three thieves had entered into their house and they assaulted him, his brother, his brother's wife and their children. They also noticed blood stains in the hands and clothes of the accused.

PW-1 also informed that when they went inside the house in the morning along with the police and others, they noticed that Manohar and his wife Meena were lying dead and Meena was burnt to some extent. They also noticed a square sized stone weighing roughly 25 kgs. near the dead body. The two injured boys and girl were also taken to the hospital. Dr. Sandip Ingale (PW-6) and Dr. Sangram Narwade (PW-11), who conducted the post-mortem, were also examined. They also noted the injuries of all the three persons. We have already noted the statement of accused himself to the Executive Magistrate (PW-16) at the time when he was admitted in the hospital. Since he was alive, the statement recorded by the Executive Magistrate had been treated as statement under Section 164 of the Code of Criminal Procedure, 1973 (in short "the Code") and proceeded further. Though the said statement is not a dying declaration, however, the accused knowing all the seriousness confessed about the killing of his brother, his wife and their child and causing injuries to other two children. There is no reason to disbelieve the version of Monika (PW-7) who witnessed the occurrence, neighbours and landlord of Manohar (PWs 1 and 3) as well as the confessional statement of the accused before the Executive Magistrate. Considering the opinion of the doctors, (PWs-6 and 11), cause of death and recovery of a stone inside the house of Manohar where three different bodies were lying, we are satisfied that the prosecution has established its case beyond reasonable doubt for an offence under Section 302 IPC. The trial Court considering the fact that the murders were neither pre- meditated nor pre-planned on the part of the appellant, and a simple case of land dispute which led to altercation and murdering of three persons, imposed life imprisonment under Section 302 IPC and rigorous imprisonment for seven years under Section 307 IPC. The said conclusion is acceptable. About Sentence

9. Learned counsel for the respondent-State, by drawing our attention to the recent decision of this Court in *Ajitsingh Harnamsingh Gujral vs. State of Maharashtra*¹, submitted that the award of death sentence is appropriate in the facts and circumstances of this case. In that case, the accused was charged under Section 302 IPC for committing murders of his wife, his son and two daughters and the trial Court, after finding that four members from the same family were murdered and it was a rarest of rare case, imposed penalty of death upon the accused. The death sentence was confirmed by the High Court and the matter was taken up before this Court by way of appeal. This Court, after adverting to the earlier decisions as regards to award of death sentence including the principles enunciated in *Bachan Singh vs. State of Punjab*², *Machhi Singh and Others vs. State of Punjab*³, *C. Muniappan and Others vs. State of Tamil Nadu*⁴, and various other judgments, agreeing with the conclusion arrived at by the trial Court and the High Court and finding that all the requisites for death penalty as discussed and noted in the various decisions are satisfied, confirmed the same. Absolutely, there is no quarrel as to the propositions of law and principles laid down in those decisions and the ultimate conclusion in *Ajitsingh Harnamsingh Gujral* (supra). In the case on hand, the appellant-accused had no pre-meditated plan or mind to eliminate the entire family of his brother, he himself slept with the victims on the fateful night, due to land dispute quarrel started and ended with murdering three persons. In those circumstances and the background and no bad antecedents of the accused, the above decision relied on by the State is distinguishable and not helpful to the claim for retaining the death penalty.

10. When the matter was taken up before the High Court, both by the accused and the State, after thorough analysis, the High Court confirmed the conviction. As an appellate Court, the High Court once again analysed the prosecution evidence and the defence taken by the accused and finally concurred with the conclusion arrived at by the trial Court insofar as conviction under Sections 302 and 307 IPC are concerned. On going through all the materials, we are in entire agreement with the said conclusion.

11. In the appeal filed by the State for enhancement of sentence from life imprisonment to death sentence, from the evidence on record and considering the materials, the High Court identified the following circumstances for imposing extreme penalty of death:

"(i) The date and place of incident not disputed.

(ii) In the incident that occurred, admittedly, victim Manohar, his wife Meenabai and son Akhilesh lost their lives and as has been established on medical evidence, undoubtedly, these three victims died homicidal death. In that, victim Manohar and his wife Meenabai died on the spot

having suffered head injuries and in addition to that, so far as Meenabai is concerned, she suffered burn injuries, indicating that the assailant i.e. the respondent (original accused) before the Court, caused burns by setting her on fire by leaking the gas from Gas Cylinder.

(iii) The assault on victims by the respondent was aimed at midnight when the victims were fast asleep and as such they were defenceless, showing that the respondent acted dastardly and was completely depraved. The nature of the injuries, which were inflicted on the child, more particularly, the injuries on his head itself show that how the respondent acted brutally showing extreme depravity and ruthlessness.

(iv) The respondent was alone in the house during the time the occurrence took place at midnight. This is, in the sense, that there was no third person in the house, much less, having entered the house.

(v) As against this, the Respondent put forth a false story that 3 to 4 unknown persons entered the house and committed murders and murderous assault on the victims.

This plea of the respondent (original accused) was found to be false and misleading the investigating machinery.

(vi) The respondent (original accused), in his statement Ex.-73, has clinchingly stated that the victims were done to death by him, so also the injured children at the time and place of incident.

(vii) In the early morning, witnesses Dipak Narayan Thakur and Pandurang Patil noticed the respondent coming out of his house having his hands and clothes on his person stained with blood.

(viii) Though the respondent came up with the case that unknown persons assaulted the victims in the house, he remained silent in the house, though, in his presence, the victims were done to death and two small children suffered serious injuries.

(ix) The respondent did not raise hue and cry, though according to him, in his presence, unknown persons entered the house and assaulted the victims. He did not cause alarm to the persons in the vicinity, thereby exhibiting most queer and unnatural conduct.

(x) The witnesses, particularly, witness Dipak Thakur, in the Midnight, heard cries of a woman groaning in pain and early in the morning, saw the respondent coming out of the house with blood on his clothes and hands.

(xi) Both these witnesses Dipak Thakur and Pandurang Patil stated in their evidence that on that night, no third person from outside came to the premises, much less, entered in the house of the victims.

(xii) The respondent, in his statement Ex.-73, which is accepted and found to be truthful, candidly admitted to have assaulted the victims acting in a brutal manner out of vengeance arising out of the dispute over the property.

(xiii) The respondent did not deter, much less felt ashamed even while assaulting small children of his real brother when they were caught helpless, as they were sleeping when one of them was done to death and other two were injured.

(xiv) Admittedly, the earlier incident took place at about 08:30 p.m., which ended after quarrel and some beating by victim Manohar to the respondent. The later incident occurred at midnight when the victims were fast asleep. The respondent assaulted them one by one and what is shocking is that victim Monika had seen the respondent committing assault after assault on her father, mother and her brothers Akhilesh and Vishwesh.

(xv) It is seen that the murders have been committed and three persons were done to death in ruthlessness, showing that the respondent was totally depraved of and acted most beastly.

(xvi) Since the earlier incident took place at 08:30 p.m., and the accused, after taking meals at night, remained in the house and then at midnight, surreptitiously killed one by one and also caused murderous assault on the victims showing extreme brutality. This shows that the attack by the accused was predetermined, so also premeditated.

Therefore, it is a case of cold-blooded murders."

12. With the above aggravating circumstances put forth against the accused, various mitigating circumstances were also pressed into service and pointed out that the extreme

penalty of death is not warranted. It is pointed out that the accused is 38 years old and his antecedents are unblemished and not having any criminal tendency, there can be no apprehension even of danger to the society, it cannot be ruled out that rehabilitation of the accused is impossible and it is not a rarest of rare case causing for extreme penalty of death.

13. Taking into consideration of both aggravating and mitigating circumstances, the High Court, after finding that the accused having slept with the victims in the same house proceeded to assault one after another, it must be said that the assault was pre-meditated and the accused was determined to do the same, hence, it cannot be construed that the accused was on the spur of the moment, after having done to death his brother, brother's wife, the accused also gave murderous assault on their children and noting that it is a case of extreme culpability concluded that the sentence awarded by the trial Court of imprisonment of life is inadequate and it is a rarest of rare case where extreme penalty of death is called for accepted the appeal preferred by the State and enhanced the penalty of death by hanging.

Conclusion:

14. Since this Court, in series of decisions starting from Bachan Singh (supra) indicated various aggravating and mitigating circumstances, there is no need to refer to all those decisions. Though the appellant caused death of three persons, he had no pre-plan to done away with the family of his brother and the quarrel started due to the land dispute and, in fact, on the fateful night, he was sleeping with the other victims in the same house. In those circumstances and other materials placed clearly show that he has no pre-plan or pre-determination to eliminate the family of his brother. At the time of the incident, i.e., in the year 2001, the accused was 28 years old and was jobless. He is in jail since 30.06.2001 and in the death cell since the date of the judgment of the High Court that is on 03.05.2006. It is clear that he remained in jail for more than 10 years and more than five years in death cell. The materials placed on record show that the antecedents of the accused-appellant are unblemished as nothing is shown by the prosecution that prior to this incident, he was indulged in criminal activities. The appellant had no bad antecedents. We have already concluded that the murders were not pre-planned or pre-meditated. No weapon much less dangerous was used in commission of offence. As pointed out earlier, only on account of property dispute, the appellant went to the extent of committing murders. This is clear from the prosecution evidence and the conclusion of the trial Court. As rightly pointed out by the counsel for the appellant, there is no reason to disbelieve that the appellant cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continued threat to the society. Considering the facts and circumstances, it cannot be said that the appellant-accused would be a menace to the society. We are satisfied that the reasonings assigned by the High Court for awarding extreme penalty of death sentence are not acceptable. It is relevant to point out that the trial Court which had the opportunity of noting demeanour of all the witnesses and the accused thought it fit that life sentence would be appropriate. However, the High Court while enhancing the same from life to death, in our view, has not assigned adequate and acceptable reasons. In our opinion, it is not a rarest of rare case where extreme penalty of death is called for instead sentence of imprisonment for life as ordered by the trial Court would be appropriate.

15. In the light of the above discussion, while maintaining the conviction of the appellant-accused for the offence under Section 302 IPC, award of extreme penalty of death by the High Court is set aside and we restore the sentence of life imprisonment as directed by the trial Court. The appeal is allowed in part to the extent mentioned above.

Judgment Referred.

¹*JT 2011 (10) SC 465*

²*(1980) 2 SCC 0684*

³*(1983) 3 SCC 0470*

⁴*(2010) 9 SCC 0567*