

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.02.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.JAICHANDREN

and

THE HONOURABLE MR.JUSTICE S.NAGAMUTHU

Referred Trial No.3 of 2015
and
Criminal Appeal No.70 of 2016

R.T.No.3 of 2015

Dipu

.. Accused

- Vs -

State represented by
The Inspector of Police,
Gudalur Police Station,
The Nilgiris District,
(Crime No.23 of 2012)

..Complainant

Prayer:- Referred Trial under Section 366 of the Code of Criminal Procedure on the Judgment of the learned Sessions Judge, Magalir Neethimandram, (Fast Track Mahila Court), Udhagamandalam at Nilgiris made in S.C.No.52 of 2012, dated 16.12.2014.

Crl.A.No.70 of 2016

Dipu

.. Appellant

- Vs -

State represented by
The Inspector of Police,
Gudalur Police Station,
The Nilgiris District,
(Crime No.23 of 2012)

.. Respondent

Prayer:- Appeal is filed under Section 374 of the Code of Criminal Procedure against the judgment passed by the learned Sessions Judge, Magalir Neethimandram, (Fast Track Mahila Court), Udhagamandalam at Nilgiris in S.C.No.52 of 2012, dated 16.12.2014.

For Accused /Appellant : Ms.S.S.Jhothivani

For Complainant/Respondent: Mr.S.Shanmugavelayutham
Public Prosecutor

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J U D G M E N T

(Judgment of the Court was delivered by S.Nagamuthu, J.)

The learned Sessions Judge, Magalir Neethimandram, (Fast Track Mahila Court), Udhagamandalam at Nilgiris by judgment dated 16.12.2014 in S.C.No.52 of 2012 has convicted the accused under Section 302 I.P.C. (on three counts) and imposed death penalty on him and she has also convicted him under Section 309 I.P.C. and has not imposed any sentence separately for the said offence. The learned Sessions Judge, has submitted the proceedings to this Court under Section 366(1) Cr.P.C. for confirmation of the death sentence.

2. The accused has come up with Criminal Appeal No.70 of 2016, challenging the conviction and sentence and that is how the Referred Trial No.3 of 2016 and the criminal appeal are before us for disposal.

3. The case of the prosecution in brief is as follows:

3.1. Three persons by name Mrs.Ammalu @ Radhamani, Ms.Ramya and Master Vishnu were murdered by the accused on 10.01.2012 between 04.00 to 5.00 p.m. The deceased are hereinafter referred to in this judgment as D1 to D3 respectively. D1 was the mother of D2 and D3. P.W.1 is the husband of D1 and father of D2 and D3. P.W.1 and all the three deceased were residing at Sri Madurai, Manali Village in Ooty District. P.W.1 has a brother by name Venugopal whose son is the accused. The house of the accused and that of the deceased were at a distance of about 50 fts. D1 was a housewife, D2 and D3 were students doing 10th standard and 7th standard respectively. The accused had studied up to 10 standard and for about three and half years, he discontinued his further studies and remained idle in his house.

3.2. It is further alleged that about one and half years before the occurrence, the accused attempted to misbehave with D1 by extending sexual overtures. D1 and P.W.1 informed Mr.Venugopal, the father of the accused and wanted him to castigate and warn the accused and to correct him. From that time onwards, the accused had ill-feeling against P.W.1 and D1 which is stated to be the initial motive for the accused to commit these murders.

3.3. One and half months before the occurrence, the accused had removed the fence between his father's land and that of P.W.1 and also set fire to the same. The tea plants were also burnt. P.W.1 questioned the accused as to why he had removed the fence and burnt the tea plants. The accused challenged P.W.1 and said that he could behave like that only and he would not change his attitude towards P.W.1 and his family members. This is stated to be the further motive for the accused to commit the murders of these three deceased.

3.4. Just four days prior to this occurrence, D1 was taking water from the Panchayat public tap. The accused also came there to take water from the tap. The accused attempted to take water first and quarreled with D1. When D1 questioned the accused, he warned her that he would cut her to death. D1 returned to her house and informed the same to P.W.1. P.W.1 and D1 decided to inform the father of the accused about the said occurrence and to warn him not to behave in such a disorderly manner. This is stated to be the immediate motive for the occurrence.

3.5. It is further alleged that on 10.01.2012, between 4.00 to 5.00 p.m., P.W.1 was not at his house, whereas, all the three deceased were in the house. It is alleged that the accused trespassed into the house and with a vettu kathi, he cut all the three deceased. Having sustained extensive injuries, all the three died instantaneously in their house. This was not witnessed by anybody as the occurrence was inside the house. In the said occurrence, the shirt of the accused was stained with blood of the deceased.

3.6. After having committed murders of all the three deceased, the accused returned to his house and attempted to commit suicide by consuming a poisonous substance known as "Trisel". However, this was noticed by the brothers of the accused and they cried for help. P.W.1 who had just arrived at his house, on hearing the said alarm raised by the brothers of the accused, rushed towards their house. P.Ws.2 to 5 who were neighbours also rushed towards the house of the accused. They asked the accused as to what had happened and why he had taken poison. The accused shouted that he had cut and killed D1 to D3. Then, the accused started running. P.Ws.1 to 6, tried to catch him hold but could not succeed. P.W.1 was shocked to hear from the accused that he had killed all the three deceased. He immediately rushed to his house and found that all the three were lying in a pool of blood. He found them all dead. The dead body of D2 along with her school bag containing her books and Identity Card was found near the entrance of the house. Inside the house, in the first room there were blood stains. When P.W.1 entered into the kitchen, he found the dead bodies of D1 and D3. He found extensive cut injuries on the bodies of all the three deceased.

3.7. P.W.7, is the former Village Panchayat Board President of Sri Madurai. When he was in his office around 5.15 p.m. on 10.01.2012, a few persons came to his office and informed him about the above occurrence. Immediately, P.W.7 rushed to the house of the deceased and confirmed that all the three had been killed. Immediately, he informed the Inspector of Police, Gudalur Police Station over cell phone about the said occurrence.

3.8. P.W.25, the then Inspector of Police, on receiving the said information through the cell phone from P.W.7, made

entry of the same in the general diary at 5.30 p.m. and immediately, rushed to the place of occurrence along with the Sub Inspector of Police. At 6.00 p.m. on reaching the place of occurrence, the Sub Inspector of Police Mr. Jayapaul P.W.18 recorded the statement of P.W.1 and handed over the same to P.W.25. On returning to the police station, he registered a case in Crime No.23 of 2012 under Sections 302 and 309 I.P.C. at 7.00 p.m. on 10.01.2012. Ex.P1 is the complaint and Ex.P43 is the F.I.R. He forwarded both the documents to Court and the same were received by the learned Magistrate at Ooty.

3.9. Then P.W.25, took up the case for investigation. He proceeded to the place of occurrence at 08.30 p.m. on 10.01.2012 and prepared an observation mahazar where D1 and D3 were lying (vide Ex.P2) and then he prepared an observation mahazar at the place where D2 was lying (Ex.P.3). Then he recovered the blood stained earth and other material objects at the place of occurrence under Exs.P4 to P7 under mahazar in the presence of P.W.8 and another witness. Then he conducted inquest on the bodies of all the three deceased, one after the other, and forwarded the same for postmortem.

3.10. P.W.13 Dr. Pushparaj conducted autopsy on the body of D3 on 11.01.2012 at 12.50 p.m. He found the following injuries:

"External injuries:- 1) Deep penetrating cut injuries of right side neck square shaped and left side elliptical shaped size of 16x8 cms depth could not be made out since the injury level crosses the vertebral column and vertebral column was detached. Nature of injury: Starts from right side postero - lateral junction of M shaped cut of vertical length and extends backwards crosses the neck at sub occipitally and travels to left side and downwards up to mid point of lower jaws i.e. 5 cms forward and down ward to angle of mandible and ends with a M shaped injury of vertical length 4 cms, all parts of the neck beyond vertebral column level are cut off from backwards. Eyelid: right closed, left opened, mouth: closed, Tongue: bitten between the teeth, jaws: clenched, teeth 7/7, 7/7, G.Organs: Normal to age, Abdomen: uniform, Thorax: No # of ribs, Heart: wt.200 gms, all chambers empty, lungs: wt right 350 gms, left 275 gms c/s pale, reddish frothy fluid oozes out, Hyoid bone: intact, Stomach: 200 ml of partially digested food particles+. Liver:1000 gms c/s pale, spleen:c/s pale, Kidney: wt 100 grams each, c/s pale, S.I; yellow chyme +. Bladder: empty, Head: No # of skull bones,

Membrane: Intact, No EDH/SAH/SDH, Brain: wt 1000 grams, c/s pale."

Ex.P.14 is the postmortem certificate and Ex.P.15 is his final opinion. He opined that the deceased could have died due to shock and hemorrhage due to multiple injuries.

3.11. On the same day at 2.00 p.m., P.W.13 conducted autopsy on the body of D2 and found the following injuries:

"External injuries: 1) Elliptical cut injury present above thyroid cartilage, starts with single edge in right from 5 cm below angle of mandible and travels forwards and left side and ends at 5 cm below angle of mandible left side with double edge i.e M shaped of size 13x7x4 cm depth crosses i.e cuts all the organs, vessels and vertebral column in anterior aspect and posterior aspect of vertebral wound were intact. 2) Elliptical cut injury over right angle of mandible 2x1x1 cms, 3) Elliptical cut injury over posterior aspect of right shoulder of 10x5x3 cms, 4) lacerated injury over right deltoid region of 5x1x1 cms, 5) Lacerated injury in right calvicular region of 5x1x1 cms. 6) cut injury in elliptical shape at posterior aspect of right wrist extending up to the thump of 15x5x3 cms, Eye lid: partially opened, Mouth: opened, Tongue: Inside the mouth, Jaws: clenched, Teeth: 7/7, 7/7 Mam Glands: well developed, G.Organs: normal to age, Hymen Intact, Abdomen: uniform, Thorax: No # of ribs, Heart wt.210 grams, all chamber empty, Lungs: Right wt 375 grams, Left 325 grams, c/s red frothy fluid ooses and pale, Hyoid Bone: Missing, Stomach: 100 ml of partially digested food particles + with black colour fluid, Liver wt.1000 grams, c/s pale, spleen:c/s pale, Kidney: each wt 100 grams c/s pale, S.I:yellow chyme + bladder:empty, Uterus: cavity empty, Head:No. # of skull bones, No.EDH/SDH/SAH, Membrane: intact, Brain wt.1100 grams c/s pale."

Ex.P17 is the postmortem certificate and Ex.P.18 is his final opinion. He opined that the death could have occurred due to shock and hemorrhage due to multiple injuries found on the body of the deceased.

3.12. P.W.23, Dr.Sameera conducted autopsy on the body of D1 on 11.01.2012 at 11.00 am and she found the following injuries:

"External injuries:- 1) Deep lacerated wound behind the neck exposing spine and spine cord, extending from right sternocleido mastoid, to the left side of neck measuring about 16x9x7 cms cutting through the muscles exposing vital structures. 2) Deep lacerated wound right shoulder measuring 9x4x2 cms. 3) Deep lacerated wound in the left shoulder measuring 3x2x1 cms, RM+ in all 4 limbs, Eye lids: partially opened, mouth - closed, Tongue: inside the mouth, jaws: clenched, Teeth: 8/8, 8/8, Abdomen: uniform, stomach: 300 grams undigested food materials, Liver: wt 1100 grams, c/s - pale, Kidney - each 120 grams c/s pale, small intestine - yellow colour chyme, Bladder - empty, uterus: c/s pale empty, Thorax - no rib fracture, Heart - wt.350 grams, all chamber empty, Lungs - c/s pale, Head - no fracture of skull bone, no EDH/SAH/SDH, Membranes - intact, Brain - wt 1100 gms, c/s pale."

3.13. Ex.P39 is the Postmortem certificate. She opined that the death was due to shock and hemorrhage due to the above injuries. Both the doctors opined that the injuries on the deceased could have been caused by a weapon like M.O.13 (vettu kathi).

3.14. During the course of investigation, P.W.24, was nominated by the Investigating Officer to nab the accused. On 11.01.2012, near Killur check dam bridge, the accused was found lying unconscious. P.W.24 took him in an ambulance, went to Gudalur Police Station, took a police memo and rushed him to the Government hospital at Gudalur.

3.15. P.W.13, Dr.Pushparaj examined the accused at 01.10.p.m. on 11.01.2012 at the Gudalur Government Hospital and admitted him as inpatient. Ex.P.41 is the accident register. At that time, the accused was conscious but drowsy. The accused told the Doctor that around 4.30 p.m. on 10.01.2012, he consumed an unknown poison at his house. The accused was discharged from the hospital on 17.01.2012, after full recovery. Ex.P.42 is the discharge summary. It was diagnosed that the accused had consumed organophosphate poison.

3.16. P.W.25, arrested him on 17.01.2012 at 01.10. p.m. at the Gudalur Government Hospital, as soon as he was discharged, in the presence of P.W.16 and another witness. On such arrest, he gave a voluntary confession, in which, he disclosed that he had hidden a shirt and dothi in a shed belonging to one Hariprasad. In pursuance of the same, he took the police and witnesses to the said place and produced

M.Os.32 to 35. On returning to the police station, he forwarded the accused to the Court and the material objects also to the Court. He collected the medical records, examined the Doctors and recorded their statements. On his request, the material objects were sent for chemical examination. On completing the investigation, he laid the chargesheet against the accused.

3.17. Based on the above materials, the trial Court framed charges as detailed in the first paragraph of the judgment, which the accused denied. In order to prove the case, on the side of the prosecution, as many as 25 witnesses were examined, 58 documents and 35 material objects were marked.

3.18. Out of the said witnesses, P.W.1 is the husband of D1 and father of D2 and D3. He has stated that one and half years before the occurrence, the accused had attempted to misbehave with D1 and D1 brought the same to his notice and therefore, he informed the parents of the accused to correct him. From that time onwards, according to P.W.1, the accused had developed ill feeling against P.W.1 and his family members. He had further stated that one and half months before the occurrence, the accused had set fire to the fence put up by P.W.1. Thus, he has spoken about the motive. He has further stated that on the date of occurrence, in the morning, he had gone for coolie work and when he returned in the evening by 5.00 p.m, he heard that the accused had taken poison. When he rushed to the house of the accused, in the dress worn by the accused, there were blood stains. When he enquired him, he told that he had killed D1 to D3, after saying so, he fled away from the scene of occurrence. P.W.2, has stated about the previous occurrences culminating in the motive. P.W.3, is the brother of P.W.1. He has stated that on the date of occurrence, at about 5.00 p.m. when he was working in his garden, behind his house, he heard a cry from the house of the accused. When he rushed there, he found the accused, his mother, P.W.1 and few others at the house. At that time, in the shirt and dothi worn by the accused, there were blood stains. When P.W1 and 3 enquired, according to him, the deceased told that he had killed D1 to D3 and at once, he took to heels from the scene of occurrence. He has further stated that, thereafter, P.Ws.1, 3 and others went to the house of the deceased and found the dead bodies of D1 to D3. P.W.4, is a close relative of P.Ws.1 and 3. He has also stated that at about 5.00 p.m. on the date of occurrence, one Pradesh, the brother of the accused, came to his house and informed him that the accused had taken poison. Immediately, he rushed there. At that time, he found the accused with blood stained shirt and dothi. P.W.4 has further stated that he was present when the accused told that he had killed D1 to D3. Then all of them rushed to the place of occurrence and found the dead bodies. P.W.5 has stated that on hearing about the occurrence, when he went to the place of occurrence, he

found the dead bodies of all the deceased. P.W.6 has stated that at 5.00 p.m. on the day of occurrence, he heard a cry from the house of the accused and she also rushed along with others, where she found the accused. She has further stated that her husband attempted to give salt water to the accused to give him stomach wash as he stated that he had taken poison. She has also stated that the accused disclosed that he had killed D1 to D3 and ran away from the scene of occurrence. When she went to the place of occurrence, she found the dead bodies of all the three deceased. P.W.7 has spoken about the preparation of an observation mahazar and a rough sketch and also recovery of material objects from the place of occurrence. P.W.8 has also spoken about the same. P.W.9 is the photographer, who has spoken about the photographs taken at the place of occurrence. P.W.10 has stated that he handed over the F.I.R. and complaint to the learned Judicial Magistrate at Ooty at 09.00 a.m. on 11.01.2012. He has explained that since the learned Judicial Magistrate at Gudalore, was on leave, he went to Ooty and handed over the F.I.R. to him. P.W.11 is the constable who carried the dead body of D1 to the hospital for postmortem. P.W.12, is yet another constable who has also stated that he took the dead body of D2 to the hospital. P.W.13 is also a constable, she has stated that she took the dead body of D3 to the hospital. P.W.14 is the forensic expert, who has examined the material objects and he has stated that there were blood stains on the dress materials more particularly on the dress materials of the accused. The grouping of the said blood stain was done and he had recorded that it was 'A' group, which tallied with the blood group of D2. P.W.15, is yet another police constable who has also spoken about the fact that D3 was taken to the hospital for postmortem. P.W.16, has spoken about the arrest of the accused and the consequential recoveries of the material objects viz., M.Os.32 to 35. P.W.17, is yet another witness who has spoken about the arrest of the accused, the disclosure statement made by the accused and consequential recovery of the material objects. P.W.18 was the then Special Sub Inspector of Police who recorded Ex.P1 on 10.01.2012, upon which, the case was later on registered. P.W.19 has stated that he found the accused unconscious and rushed him to the hospital for treatment. P.Ws.20 and 21 have spoken about the inquest held by them on the bodies of D1 and D3 respectively. P.W.22 the scientific officer who examined the visceral organs of the deceased and reported that there were no poisonous substances found in the visceral organs of all the deceased. He examined a container which was recovered from the place of occurrence and found that there were traces of Chloropyrifos poison in the same. Ex.P38 is his report. P.W.23 has spoken about the postmortem conducted by her on D1 and her final opinion regarding the cause of death. P.W.24 was the one who found the accused lying unconscious near Killur check dam bridge. According to him, he immediately took the accused to the police station and along with P.W.19 he took the accused to the hospital. P.W.25

has spoken about the investigation done.

3.19. When the above incriminating materials were put to the accused, he denied the same as false. However, he did not choose to examine any witness on his side or to mark any document. Having considered all the above, the trial Court convicted him and imposed death penalty on him for each count under Section 302 I.P.C. and no separate sentence was imposed for the offence under Section 309 I.P.C. For confirmation, the proceedings have been submitted to this Court by the trial Court and the appellant has filed the appeal challenging the said conviction and sentence of the trial Court.

4. We have heard the learned counsel appearing for the accused and the learned Public Prosecutor appearing for the State and we have also perused the records, carefully.

5. This is a case based on circumstantial evidence. In our considered view, the prosecution has succeeded in establishing the motive. P.W.1 has categorically stated that about one and half years before the occurrence, the accused misbehaved with his wife extending sexual overtures. Since the accused is none other than his brother's son, he informed his parents and wanted them to warn him. This has been spoken by other witnesses also. Regarding the burning of the fence also, P.W.1 has stated and the same has been spoken to by the other witnesses also. We do not find any reason to reject this evidence and we hold that the prosecution has succeeded in establishing the motive i.e. there was enmity between the accused and the P.W.1 and his family members.

6. The next circumstance is that all the three deceased alone were there in the house on the date of occurrence. In fact, D2 and D3 had just returned from the school. The occurrence had taken place by around 5.00 p.m. But the fact that all the three had been done to death was not seen by anybody. The dead bodies were lying inside the house of P.W.1. P.W.1 had gone for coolie work and when he was returning towards his house, he heard a cry of the family members of the accused. When he rushed there, sensing something untoward had happened, the accused was sitting in front of his house surrounded by his mother and others. At that time the accused was wearing a shirt and a dothi containing blood stains. This has been spoken by P.Ws.1 to 6. When they enquired him, about the blood stains, he disclosed that he had killed D1 to D3. Until then, the killing of the deceased was not known. Thus, for the first time the fact that all the three had been killed came to light, only on the statement made by the accused to P.Ws.1 to 6. This statement of the accused is nothing short of an extra judicial confession. We do not find any reason to reject this extra judicial confession made by the accused to P.Ws.1 to 6.

7. Next comes the conduct of the accused. After making the said extra judicial confession, he took to his heels from the place of occurrence. Though P.Ws.1 to 6, attempted to chase him, they could not reach him. Since P.Ws.1 to 6 had in their mind the disclosure statement made by the accused, that he had killed D1 to D3, they rushed back and went towards the house of the deceased. There they found the dead bodies of all the three deceased with extensive injuries all over the body. This conduct of the accused in fleeing away from the scene of occurrence also corroborates his extra judicial confession.

8. Thereafter, the accused was found lying unconscious near Killur Check dam bridge. P.W.24 found him and immediately, he rushed him in a van, reached the police station, took a police memo from P.W.19 and along with P.Ws.19 he rushed him to the hospital. By the time he reached the hospital, the accused became conscious, but he was drowsy. He told the Doctor that he had taken poison. But at that time, the bloodstained clothes were not found and he was wearing a different dress. While he was in the hospital, since he was undergoing treatment, he was not examined by P.W.25. After he was discharged from the hospital, he was arrested and on his confession, the bloodstained shirt and dothi were discovered, on the same being produced by him. The chemical examination revealed that the bloodstains in the dress of the accused tallied with the blood group of D2. This further corroborates the extra judicial confession given by the accused. The fact that he had taken poison has also been proved by medical records. The container which was recovered at the place of occurrence was examined by the Forensic expert, who has stated that it contained traces of Chlorpyrifos. Thus, the prosecution has proved that the accused had taken poison.

9. We are conscious of the legal position that an extra judicial confession by its very nature is a weak piece of evidence and unless it inspires the fullest confidence of the Court, the Court should look for corroboration from independent source. Here, in this case, the oral extra judicial confession given by the accused to P.Ws.1 to 6 draws corroboration from various other sources. First of all, the death of D1 to D3 had come to light out of the extra judicial confession. The discovery of this fact duly corroborates the extra judicial confession. The conduct of the accused in fleeing away from the scene of occurrence after making the above said extra judicial confession is yet another piece of evidence which duly corroborates the extra judicial confession. At the time of occurrence, he was found wearing a shirt and dothi which contained bloodstains. They were later on recovered based on the disclosure statement made by the accused and the blood group of the blood found on the same tallied with the blood group of D2. This is yet another piece of evidence which duly corroborates the extra judicial confession made by the accused. The fact that the accused

disclosed that he had taken poison has been scientifically proved by medical records. As we have already pointed out, motive has been established.

10. From these circumstances, it has been clearly established that it was this accused who caused the death of all the three deceased by stabbing them with knife (M.O.13). The prosecution has also proved that the accused had taken poison and attempted to commit suicide. Thus, the prosecution has proved beyond reasonable doubt that the accused had committed offences punishable under Section 302 IPC (3 counts) and Section 309 IPC.

11. Now the question is whether in the instant case, the death penalty imposed as a punishment for these murders could be confirmed.

12. It happens in this country, that the jurisprudence of death penalty is the subject matter of debate in various forums including the courts of law, both the higher as well as subordinate judiciary, from the Colonial British Rule, when section 302 of IPC was put in place in 1860. Post constitution, for about 66 years, the said debate is endless. There is one school of thought and perhaps, there is a cry among a section of civil society that the death penalty should be abolished as it grossly violates the human rights of the convict of his right of existence. Recently, even the Law Commission has gone to the extent of recommending to the Government to abolish the death penalty except in certain specified rarest of rare cases such as cases involving the security of the nation. Article 21 of the Constitution of India which has been considered as the heart and soul of the Constitution guarantees the right to life and liberty of every individual and it mandates that life and liberty cannot be deprived of except by following the procedure established by law. On the touchstone of Article 21, the constitutionality of the death penalty envisaged in Section 302 of IPC was tested by a Constitution Bench of the Hon'ble Supreme Court in Bachan Singh v. State of Maharashtra, 1980 (2) SCC 684 wherein the Hon'ble Supreme Court eventually upheld its constitutionality. However, the Hon'ble Supreme Court declared that generally, life sentence should be the rule and the death sentence should be an exception. The Constitution Bench has further held that the death sentence could be awarded only in rarest of rare cases.

13. Over a period of about 36 years, the Hon'ble Supreme Court, while dealing with the rarest of rare doctrine, as propounded in Bachan Singh case, cited supra, has been endeavoring to impress upon the judiciary as to what exactly is the rarest of rare case which warrants the extreme penalty of death. In this case, it is not our endeavour to catalogue all those judgments, post Bachan Singh case, as the same would only add to the length of this judgment. It is enough for us

to state that while deciding the quantum of punishment, the court is obliged to balance between the aggravating and mitigating circumstances and impose the appropriate punishment so as to do justice to the parties. There are a few judgments of the Hon'ble Supreme Court following "balance-sheet theory" so as to draw a balance-sheet between the aggravating and mitigating circumstances and there are also judgments of the Hon'ble Supreme Court taking a contrary view wherein the Hon'ble Supreme Court has held that comprehensively all the circumstances namely, aggravating as well as mitigating circumstances are to be taken into account. From the various judgments of the Hon'ble Supreme Court, commencing from Bachan Singh case, various principles have been culled out by the Hon'ble Supreme Court. Recently in Swamy Shraddananda (2) v. State of Karnataka, (2008) 13 SCC 767, the Hon'ble Supreme Court has identified certain factors which are to be taken into account by the Courts as follows:-

"(1) The court has to apply the test to determine, if it was the "rarest of rare" case for imposition of a death sentence.

(2) In the opinion of the court, imposition of any other punishment, i.e. life imprisonment would be completely inadequate and would not meet the ends of justice.

(3) Life imprisonment is the rule and death sentence is an exception.

(4) The option to impose sentence of imprisonment for life cannot be cautiously exercised having regard to the nature and circumstances of the crime and all relevant considerations.

(5) The method (planned or otherwise) and the manner (extent of brutality and inhumanity, etc.) in which the crime was committed and the circumstances leading to commission of such heinous crime."

14. In Shankar Kisanrao Khade v. State of Maharashtra, (2013) 5 SCC 546, the Hon'ble Supreme Court has held as follows:-

"In my considered view that the tests that we have to apply, while awarding death sentence are "crime test", "criminal test" and the "R-R test" and not the "balancing test". To award death sentence death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating

Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record etc. the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied, that is, the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is "society centric" and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged minor girls, suffering from physical disability, old and infirm women with those disabilities, etc. Examples are only illustrative and not exhaustive. The Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges."

15. In *Swamy Shraddhananda (2) v. State of Karnataka*, [cited supra], the Hon'ble Supreme Court has further elaborated as to how to go about to find whether a particular case falls within the category of rarest of rare case or not. In paras 34, 36, 43, 45 and 47, the Hon'ble Supreme Court has held as follows:-

"34. As on the earlier occasion, in *Bachan Singh* too the Court rejected the submission. The Court did not accept the contention that asking the Court to state special reasons for awarding death sentence amounted to leaving the Court to do something that was essentially a legislative function. The Court held that the exercise of judicial discretion on well-established principles and on the facts of each case was not the same as to legislate. On the contrary, the Court observed, any attempt to standardise or to identify the types of cases for the purpose of death sentence would amount to taking up

the legislative function. The Court said that a "standardisation or sentencing discretion is a policy matter which belongs to the sphere of legislation" and "the Court would not by overleaping its bounds rush to do what Parliament, in its wisdom, warily did not do".

35.

36. Arguing against standardisation of cases for the purpose of death sentence the Court observed that even within a single category offence there are infinite, unpredictable and unforeseeable variations. No two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. The Court further observed that standardisation of the sentencing process tends to sacrifice justice at the altar of blind uniformity.

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... ..

43. In Machhi Singh the Court crafted the categories of murder in which "the community" should demand death sentence for the offender with great care and thoughtfulness. But the judgment in Machhi Singh was rendered on 20-7-1983, nearly twenty-five years ago, that is to say a full generation earlier. A careful reading of the Machhi Singh categories will make it clear that the classification was made looking at murder mainly as an act of maladjusted individual criminal(s). In 1983 the country was relatively free from organised and professional crime. Abduction for ransom and gang rape and murders committed in the course of those offences were yet to become a menace for the society compelling the legislature to create special slots for those offences in the Penal Code. At the time of Machhi Singh, Delhi had not witnessed the infamous Sikh carnage. There was no attack on the country's Parliament. There were no bombs planted by terrorists killing completely innocent people, men, women and children in dozens with sickening frequency. There were no private armies. There were no mafia cornering huge government contracts purely by muscle power. There were no reports of

killings of social activists and "whistle-blowers". There were no reports of custodial deaths and rape and fake encounters by police or even by armed forces. These developments would unquestionably find a more pronounced reflection in any classification if one were to be made today. Relying upon the observations in Bachan Singh, therefore, we respectfully wish to say that even though the categories framed in Machhi Singh provide very useful guidelines, nonetheless those cannot be taken as inflexible, absolute or immutable. Further, even in those categories, there would be scope for flexibility as observed in Bachan Singh itself.

... ..
... ..

45. But the relative category may also be viewed from the numerical angle, that is to say, by comparing the case before the Court with other cases of murder of the same or similar kind, or even of a graver nature and then to see what punishment, if any was awarded to the culprits in those other cases. What we mean to say is this, if in similar cases or in cases of murder of a far more revolting nature the culprits escaped the death sentence or in some cases were even able to escape the criminal justice system altogether, it would be highly unreasonable and unjust to pick on the condemned person and confirm the death penalty awarded to him/her by the courts below simply because he/she happens to be before the Court. But to look at a case in this perspective this Court has hardly any field of comparison. The Court is in a position to judge "the rarest of rare cases" or an "exceptional case" or an "extreme case" only among those cases that come to it with the sentence of death awarded by the trial court and confirmed by the High Court. All those cases that may qualify as the rarest of rare cases and which may warrant death sentence but in which death penalty is actually not given due to an error of judgment by the trial court or the High Court automatically fall out of the field of comparison.

... ..
... ..

47. We are not unconscious of the simple logic that in case five crimes go undetected and unpunished that is no reason not to apply the law to culprits committing the other five crimes. But this logic does not seem to hold good in case of death penalty. On this logic a convict of murder may be punished with imprisonment for as long as you please. But death penalty is something entirely different. No one can undo an executed death sentence."

16. A reading of the judgments [cited supra], more particularly, Swamy Shraddhanand's case, would go to show that no two cases are exactly identical. There are countless permutations and combinations which are beyond the anticipatory capacity of the human calculus. The Court further has observed that standardization of the sentencing process tends to sacrifice justice at the altar of blind uniformity.

17. Applying these yardsticks as a measure to find whether this case falls within the category of rarest of rare case as propounded by the Hon'ble Supreme Court in Bachan Singh Case, we find that this is not such a case falling within the said category.

18. In this case, there are lot of mitigating circumstances. The conviction in this case is based on circumstantial evidence which is yet another factor to be taken into account. At the time of occurrence, the accused was hardly aged 20 years and he was an adolescent offender. He had no bad antecedents. After having committed the above crime, killing three people out of depression, the accused himself had attempted to commit suicide. Now, there are lot of chances for his reformation. But the trial Court, as it is seen in the judgment, had not taken into account these mitigating circumstances at all. The trial Court had gone only by the aggravating circumstances in particular, the brutality of the crime in which three helpless and hapless victims, including two children, were killed. The trial Court has failed to balance between the aggravating and mitigating circumstances. Having regard to these mitigating circumstance and applying the test propounded in Bachan Singh case and reiterated in the subsequent judgments including Shankar Kisanrao Khade case, we are of the view that sentencing the appellant to undergo imprisonment for life for each murder would meet the ends of justice. Having regard to the fact that he has killed two innocent hapless and helpless children also, we are of the view that he shall not be entitled for consideration for any remission for a period of twenty years from the date of the judgment of the trial Court.

19. In the result, the Referred Trial No.3 of 2015 and the Criminal Appeal in CrI.A.No.70 of 2016 are disposed of on the following terms:

(i) The conviction of the appellant under Section 302 I.P.C. (3 counts) and Section 309 I.P.C. are confirmed;

(ii) However the sentence of death imposed by the trial Court for the offence under Section 302 I.P.C. (3 counts) is set aside and instead the appellant is sentenced to undergo imprisonment for life for each count and to pay fine of Rs.5,000/- for each count for offence under Section 302 I.P.C. and in default, he shall undergo R.I for four weeks for each default.

(iii) It is further directed that the petitioner shall not be considered for any remission for a period of twenty years from the date of judgment of the trial Court.

(iv) The trial Court has not imposed any sentence for the offence under Section 309 I.P.C., against which there is no appeal filed by the State. Therefore, we do not disturb the conviction as well as the fact that no sentence has been imposed by the trial Court for the said offence.

(v) It is directed that the sentences shall run concurrently and the period of detention already undergone shall be given set off under Section 428 Cr.P.C.

msk/kk

Sd/-

Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1. The Sessions Judge,
Magalir Neethimandram, (Fast Track Mahila Court),
Udhagamandalam at Nilgiris.
2. The The Inspector of Police,
Gudalur Police Station,
The Nilgiris District.

3. The Public Prosecutor, Madras High Court.

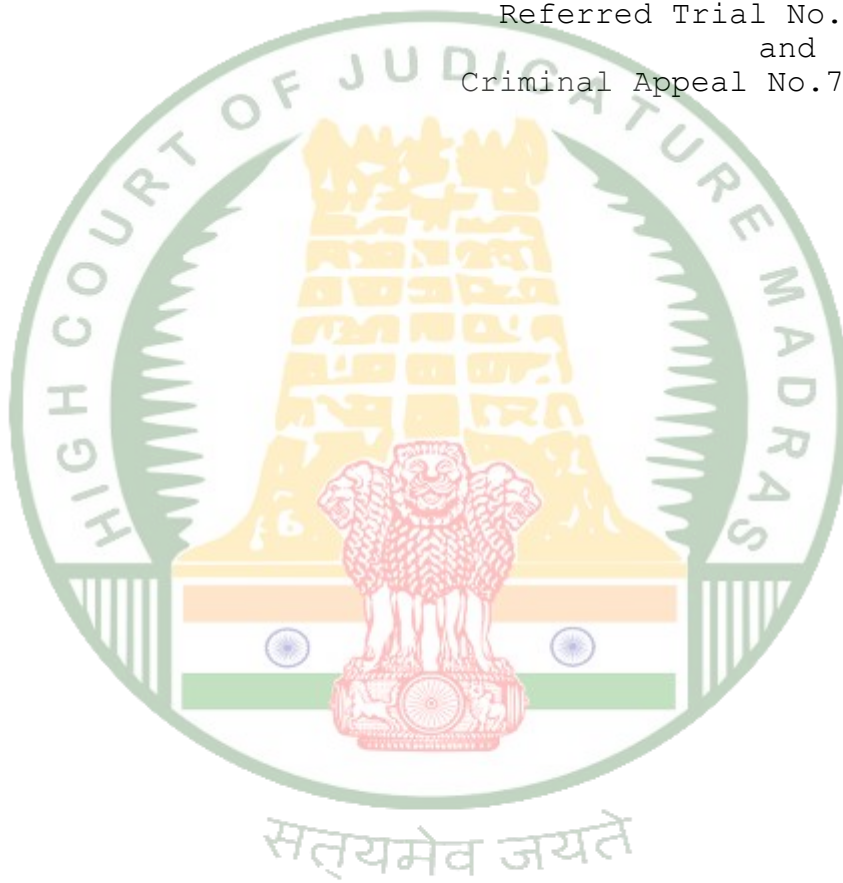
4. The Superintendent Central Prison, Coimbatore.

+ 1 cc to The Public Prosecutor, High Court, Chennai Sr 11041

+ 1 cc to Ms.S.S.Jhothivani, Advocate Sr 10873

KR/25/4/16

Referred Trial No.3 of 2015
and
Criminal Appeal No.70 of 2016



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