

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRREF No. 2 of 2017

Judgment Reserved On : 17/05/2019

Judgment Delivered On : 14/11/2019

- In Reference Of State Of Chhattisgarh Through Police Chowki C.S.E.B., P.S. Kotwali, Korba, District Korba, Chhattisgarh

---- Appellant

Versus

- Shankar Haldhar S/o Jogendra Haldhar, Aged About 35 Years R/o 15 Block Korba, District Korba, Chhattisgarh

---- Respondent

CRA No. 1963 of 2017

- Shankar Haldhar S/o Jogendrar Haldhar, Aged About 35 Years R/o 15th Block, Korba, District Korba Chhattisgarh

---- Appellant

Versus

- State Of Chhattisgarh Through District Magistrate District Korba Chhattisgarh.

---- Respondent

For Accused/appellant : Shri Akhil Mishra & Shri D.K. Gwalre, Adv.
For Respondent/State : Shri Alok Bakshi, Additional Advocate General

Hon'ble Shri Justice Prashant Kumar Mishra

C A V JUDGMENT

1. CRREF No. 2 of 2017 is a reference under Section 366 of the CrPC for confirmation of death sentence awarded to accused Shankar Haldhar, who has been found guilty of committing offence under Section 302 (thrice) of the IPC with sentence of Death Sentence and fine of Rs.10,000/-, in default of payment of fine, additional RI for one year, as also under Section 27 (1) of the Arms Act with sentence of RI for 3 years and fine of Rs.5,000/-, in default of payment of fine, additional RI for 4 months.
2. Challenging the conviction and sentence, as afore-stated, the accused has preferred CRA No. 1963 of 2017. Both the matters were heard by the Division Bench comprising of Hon'ble Mr. Justice Pritinker Diwaker and Hon'ble Mr. Justice Sanjay Agrawal and reserved for judgment on 29.6.2018. The judgment was written by Hon'ble Mr. Justice Sanjay Agrawal maintaining conviction for both the offences and death sentence as well. When the judgment was placed for consideration before Hon'ble Mr. Justice Pritinker Diwaker, he agreed with the conviction part but differed on sentence part and proceeded to write his own judgment dealing only

with the sentence part. Hon'ble Mr. Justice Pritinker Diwaker eventually maintained conviction for both the offences but converted death sentence under Section 302 to life imprisonment till the end of his life without remission. The Hon'ble Judges thereafter directed to place the matter before Hon'ble the Chief Justice on administrative side as required under Sections 370 and 392 of the CrPC for obtaining opinion of the third Judge in the matter. The matter has thus been referred to me by Hon'ble the Chief Justice for according opinion as required under Section 392 of the CrPC.

3. Before proceeding to deal with the matter, it would be appropriate to appreciate the scope and jurisdiction available to a Judge who is to deliver his opinion upon difference of opinion amongst the Judges of Court of Appeal.
4. Section 392 of the CrPC deals with the procedure where Judges of Court of Appeal are equally divided. The provision is reproduced hereunder for quick reference:-

“392. Procedure where Judges of Court of Appeal are equally divided.- When an appeal under this Chapter is heard by a High Court before a Bench of Judges and they are divided in opinion, the appeal, with their opinions, shall be laid before another Judge of that

Court, and that Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow that opinion: Provided that if one of the Judges constituting the Bench, or, where the appeal is laid before another Judge under this section, that Judge, so requires, the appeal shall be re- heard and decided by a larger Bench of Judges.”

5. The scope of provision under Section 392 CrPC has fallen for consideration before the Hon'ble Supreme Court in a catena of cases. I shall briefly refer to some of the judgments.
6. In **Babu & Others Vs. The State of Uttar Pradesh**¹, it is held that Section (392 CrPC) contemplates that it is for the third Judge to decide on what point he shall hear the arguments, if any, and that postulates that he is completely free in resolving the difference as he thinks fit.
7. In **State of Andhra Pradesh Vs P.T. Appaiah and another**², the first Judge converted the offence from Section 302 to Section 304 Part-I of the IPC and the second Judge concluded that all the accused are liable to be convicted under Section 302/34 of the IPC. The third Hon'ble Judge to whom the matter was referred under Section 370/392 CrPC reached to altogether different conclusion by acquitting both the

1 AIR 1965 SC 1467

2 AIR 1981 SC 365

accused. Faced with this, the Hon'ble Supreme Court referred to the judgment in the matter of **Bhagat Ram Vs State of Rajasthan** {AIR 1972 SC 1502} to observe that “we are unable to agree that the learned third Judge in the instant case to whom it was referred under Section 429 overstepped the limits of his jurisdiction in deciding the case as he did.” In similar case, the Hon'ble Supreme Court reiterated the same position in the matter of **Tanviben Pankajkumar Divetia Vs. State of Gujarat**³.

8. In **Sajjan Singh and Others Vs. State of MP**⁴, the Hon'ble Supreme Court held thus in para-10:-

“10. Statement of law is now quite explicit. It is the third Judge whose opinion matters; against the judgment that follows therefrom that an appeal lies to this Court by way of special leave petition under Article 136 of the Constitution or under Article 134 of the Constitution or under Section 379 of the Code. The third Judge is, therefore, required to examine whole of the case independently and it cannot be said that he is bound by that part of the two opinions of the two Judges comprising the Division Bench where there is no difference. As a matter of fact the third Judge is not bound by any such opinion of the Division Bench. He is not hearing the matter as if he is sitting in a three-Judge Bench where the opinion of majority would prevail. We are thus of the opinion that Prasad, J. was not right in his approach and his hands were not tied as far as the

³ AIR 1997 SC 2193

⁴ (1999) 1 SCC 315

three appellants, namely, Gajraj Singh, Meharban Singh and Baboo Singh before him were concerned in respect of whom both Judges of the Division Bench opined that they were guilty and their conviction and sentences were to be upheld.”

9. It is thus settled by the Hon'ble Supreme Court that the third Judge can hear the Appeal afresh and deliver his own opinion which may altogether be different opinion than the two rendered by the differing Judges.
10. In view of this legal position, I have heard learned counsel for the parties on merits of the matter as well as on question of sentence on which the Hon'ble Judges have differed.
11. The prosecution case, briefly stated, is that the appellant committed cruelty and expelled his wife from his house before 2.9.2014. Deceased Sadhna Haldhar started residing as tenant in a separate house belonging to Shankar Tandon. At about 22.45 hours on 2nd September, 2014, the appellant went to the house of Shankar Tandon and requested him to persuade his wife to live with him. Thereafter the appellant and Shankar Tandon went to the house where Sadhna and children were residing. While Shankar Tandon was in his bath room, the appellant went to his wife's room. At this point, Shankar Tandon heard screams from the room

occupied by the appellant's wife Sadhna and immediately rushed there and knocked the door. The appellant opened the door after some time holding blood stained sword in his hand. Shankar Tandon found that 3 deceased persons namely, Sadhna, Kunal and Ku. Neha were lying in the room in a pool of blood.

12. Shankar Tandon lodged merg intimations Ex.-P/44, Ex.-P/45 and Ex.-P/46 respectively in respect of death of 3 deceased persons and thereafter lodged an FIR vide Ex.-P/43 with the concerned police for offences under Sections 302, 342 and 406 of the IPC. Inquest of the dead bodies were conducted vide Ex.-P/17, Ex.-P/19 & Ex.-P/21 and thereafter autopsy was conducted by Dr. Onkar Singh Kanwar (PW-3), who submitted his reports vide Ex.-P/24, Ex.-P/25 and Ex.-P/26. Dr. Kanwar noticed 3 cut injuries on the person of the deceased namely, Sadhna Haldhar whereas he noticed one cut injury each on minor Kunal, aged about 8 years and Ku. Neha, aged about 14 years. Cause of death was found due to excessive bleeding and the nature of death was homicidal. The appellant was taken into custody on 3.9.2014 after which

his memorandum statement was recorded vide Ex.-P/12 leading to recovery of sword and knife vide seizure memo Ex.-P/13. Seized blood stained articles were sent for chemical examination to FSL, Raipur and the FSL report (Ex.-P/38) was obtained.

13. The accused was tried for offences under Sections 342 (thrice), 302 (thrice), 459, 498-A and 326 of the IPC as also under Section 25/27 of the Arms Act.
14. The prosecution examined as many as 20 witnesses to bring home the charges. The accused abjured the guilt but did not examine any defence witness. Based on the evidence adduced by the prosecution, the trial Judge has convicted the accused under Sections 302 (thrice) of the IPC as also under Section 27 of the Arms Act. The accused was acquitted of the charges under Sections 342, 498-A, 459 and 326 of the IPC and under Section 25 of the Arms Act.
15. Challenging the impugned conviction and sentence, while arguing the appeal afresh, Shri Akhil Mishra and Shri D.K. Gwalre, learned counsel for the appellant, would argue that the trial Court has wrongly convicted the appellant by relying

on weak circumstantial evidence, without properly appreciating and marshalling the evidence in its true and proper perspective. They would submit that the evidence of prosecution witnesses particularly those of Shankar Tandon (PW-12) and Ku. Poonam (PW-7) are full of material contradictions, omissions and embellishment. Therefore, these witnesses are wholly unreliable. They would further submit that the disclosure statement (Ex.-P/12) is not fully proved. Taking the Court through entire evidence, they would submit that the appellant is entitled to be acquitted for all the 3 offences. In the alternative, they would submit that at the worst the appellant can be held guilty of committing murder of his wife Sadhna Haldhar and not of 2 children. They would also submit that in the facts and circumstances of the case, the trial Court has wrongly imposed death sentence without weighing the mitigating factors as against the aggravating factors. It is more so when there is material on record that the appellant is suffering from blood cancer.

16. Per contra, Shri Alok Bakshi, learned Additional Advocate General has supported the impugned judgment. He would

submit that when the room was locked, there is no possibility of any other persons entering the room and thus it is fully established that it is the appellant alone who committed murder of his wife and 2 children. According to him, disclosure statement, consequent recovery of the blood stained knife and sword, FSL report and the evidence of (PW-12) Shankar Tandon and Ku. Poonam Tandon (PW-7) fully establishes the guilt of the appellant. He would support the death sentence on submission that the present is a classic case of rarest of rare case.

17. Having heard learned counsel for the parties, I shall now deal with the evidence brought on record by the prosecution.
18. Out of 20 witnesses examined by the prosecution, 2 most important witnesses of the prosecution are (PW-12) Shankar Tandon and (PW-7) Ku. Poonam. Shankar Tandon is the landlord in whose house deceased Sadhna was residing as tenant with her children. This witness would depose that on the date of incident, the accused reached his house at about 9.30-9.45 pm and informed him that he wants to meet his wife and children. At this point of time, 2 children were

nearby Ganesh Pandal from where the appellant brought them with him and all of them had their dinner together. Thereafter the appellant locked the room. This witness heard unusual noise (voice) of deceased Sadhna Haldhar and her children. He therefore rushed near the room and knocked the door asking the accused as to what is he doing in the room. The accused then opened the door of the room and came out holding blood stained sword in his hand and all the 3 dead bodies were lying in a pool of blood. Looking towards the dead bodies of his wife and children lying on the floor, he uttered twice “call the police call the police”. This witness would further depose that he asked the appellant as to why he has killed them but left the spot out of fear and reached to his brother's house. The accused followed him holding sword. His brother informed the police who reached there in about 10-15 minutes time and took the appellant in custody. This witness has not been cross-examined on material aspect of the incident as stated in his examination-in-chief. Therefore, credibility of this witness remains intact. Otherwise also, this witness being the landlord of the house,

his presence on the spot is very natural.

19. Ku. Poonam Tandon (PW-7) is the daughter of (PW-12) Shankar Tandon. She would state that deceased Sadhna Tandon had dispute with her husband. She would clearly state that on the fateful day she had seen the accused talking to his wife persuading her to come along with him but his wife wanted to go with him next morning. It is further stated by this witness that the accused remained in the room after having dinner with his wife and 2 children. He shut the door after some time. This witness also heard filthy words spoken by the appellant. She also heard the cries raised by deceased Ku. Neha which stopped abruptly. She also heard the appellant telling his son Kunal as to what will he do being alive. "He will have to die" (बेटा तू जी के क्या करेगा, तुझे तड़प तड़प कर मरना पड़ेगा). This witness was so frightened that she was hiding herself under the cot in her house. She also heard the appellant asking her father (PW-12) Shankar Tandon to call the police. This witness too has not been cross-examined on material aspects.

20. (PW-6) Ramnath Tandon has proved memorandum

statement (Ex.-P/12) and consequent seizure of blood stained knife and sword (Ex.-P/13). He has also proved recovery of clothes and blood stained soil vide Ex.-P/14 and Ex.-P/15 respectively. Memorandum statement and consequent recovery has also been proved by (PW-10) Avinash Banjare.

21. (PW-1) Sunil Rai, father of the deceased, (PW-2) Gangaram, mother of the deceased and (PW-9) Shiv Kumar Rai, brother of the deceased, were not present at the place of occurrence. These three witnesses have otherwise turned hostile. However, PW-1 and PW-2 would speak about the cruelty committed by the appellant and demand of dowry to the deceased Sadhna Haldhar.

22. (PW-5) Ravindra Mandal is the brother of deceased Sadhna. He would depose that Sadhna (deceased) started residing separate in a rented premises 2 days prior to the incident, as she was dragged out of the house by the appellant. The incident was informed and narrated to him by (PW-12) Shankar Tandon. Pushpa (PW-3), mother of the appellant and Saraswati (PW-4), sister of the appellant have turned hostile without supporting the prosecution case. Similarly,

Shyam Haldhar (PW-11), *Bhanja* of the appellant, has turned hostile. Jwala Prasad Kaushik (PW-8) has medically examined the appellant. He has proved the MLC report (Ex.-P/22) of the appellant wherein he has found old injuries caused prior to 40-48 hours over the person of the appellant.

23. Dr. Onkar Singh Kanwar has found the following injuries over the dead bodies of deceased Kunal, Sadhna and Neha in his postmortem reports vide Ex.-P/24, Ex.-P/25 and Ex.-P/26:-

Injuries Found On Dead Body Of Deceased Kunal Haldhar (Ex.P/24)

- Eye, mouth semi open. The body was cold.
- Incised wound of size 3 cm x 1 cm x 1 cm over right side frontal region above ear.

Cause of death was shock due to severe haemorrhage and death was homicidal in nature.

Injuries Found On Dead Body Of Deceased Smt. Sadhna Haldhar (Ex.P/25)

- The body was cold. Eye, mouth semi-open.
- Incised wound of size 12 cm x 2 cm x 1 cm over the left ear up to frontal region.
- Incised wound of size 11 cm x 4 cm x 1 cm over the neck region.
- Incised wound of 9 cm x 3 cm x 1 cm over right eye

corner.

Cause of death was due to various incised wounds and death was homicidal in nature.

Injuries Found On Dead Body Of Deceased KU. Neha Haldhar (Ex.P/26)

- The body was cold. Eye, mouth closed.
- Incised wound of size 10 cm x 6 cm x 3 cm over the neck region.

Cause of death was shock due to severe haemorrhage.

24. Memorandum statement of the accused (Ex.-P/12) has been proved by (PW-10) Avinash Banjare. He has also proved seizure of sword and knife vide Ex.-P/13 & P/14 from near the drain i.e. the place of occurrence. (PW-19) Bharat Bareth has conducted investigation. He has proved the entire process of investigation.

25. It is apparent that there is no eyewitness to the crime, therefore, case of the prosecution rests on the circumstantial evidence. To bring home the guilt on the basis of circumstantial evidence, the prosecution is required to prove the entire chain of circumstantial evidence proving hypothesis of guilt of the accused to the exclusion of any other persons who might have committed the crime. The principle has been succinctly laid down by the Supreme Court

in the matter of **Sharad Birdhichand Sarda Vs. State of Maharashtra**⁵, in para-152 as under:

“152.A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:

(1)the circumstances from which the conclusion of guilt is to be drawn should be fully established.

It may be noted here that this Court indicated that the circumstances concerned ‘must or should’ and not ‘may be’ established. There is not only a grammatical but a legal distinction between ‘may be proved’ and ‘must be or should be proved’ as was held by this Court in Shivaji Sahebrao Bobade Vs. State of Maharashtra, (1973) 2 SCC 793 : (AIR 1973 SC 2622) where the following observations were made:

“certainly, it is a primary principle that the accused must be and not merely may be guilty before a Court can convict and the mental distance between ‘may be’ and must be’ is long and divides vague conjectures from sure conclusions.”

(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty.

(3)the circumstances should be of a conclusive nature and tendency.

⁵ AIR 1984 SC 1622

(4) they should exclude every possible hypothesis except the one to be proved, and

(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.”

26. In a very recent judgment in the matter of **Nathiya Vs. State represented by Inspector of Police, Bagayam, Police Station, Vellore**⁶, the Hon'ble Supreme Court reiterated the principles laid down in the matter of **Sharad Birdhichand Sarda** (Supra) and while relying on its earlier decisions in the matters of **Sujit Biswas Vs. State of Assam**⁷ and **Raja Vs. State of Haryana**⁸ further observed that in scrutinizing the circumstantial evidence, a Court is required to evaluate it to ensure that the chain of events is established clearly and completely to rule out any reasonable likelihood of innocence of the accused. It was underlined that whether the chain is complete or not would depend on the facts of each case emanating from the evidence and no universal yardstick should ever be attempted. That in judging the culpability of

6 (2016) 10 SCC 298

7 (2013) 12 SCC 406

8 (2015) 11 SCC 43

the accused, the circumstances adduced when collectively considered, must lead only to the irresistible conclusion that the accused alone is the perpetrator of the crime alleged. That the circumstances established must be of a conclusive nature consistent only with the hypothesis of the guilt of the accused.

27. When the settled principle as to the manner of proof of guilt in case of circumstantial evidence is tested in the facts and circumstances of the case at hand, the following circumstances would emerge from the facts proved by the prosecution:-

(i) Deceased Sadhna Haldhar had a dispute with her husband/appellant Shankar Haldhar.

(ii) Owing to the dispute deceased Sadhna along with her two children left the appellant's house and started residing in the tenanted premises belonging to (PW-12) Shankar Tandon one day prior to the date of incident.

(iii) Accused/appellant Shankar Haldhar reached the house of Shankar Tandon where deceased Sadhna along with 2 children was residing in the evening of fateful day and after having dinner with them, he was quarrelling with deceased Sadhna Haldhar for returning to his house to which she (Sadhna) was responding by saying that she would reach to his house next day. Thereafter the witnesses

heard the unusual noise (voice) from the house where only 4 persons (3 deceased and the appellant) were present.

(iv) When PW-12 shouted and knocked at the door, the accused/appellant opened the door and came out with sword and knife in his hand having pool of blood. The dead bodies of his wife and 2 children were lying on the floor in a pool of blood.

(v) Sword and knife have been recovered from him on his disclosure statement.

(vi) There is no plausible explanation whatsoever from the appellant as to under what circumstances his wife and two children were found dead particularly when no-one else except him was present in the room.

28. When husband and wife along with children are together in the house and others were found dead, the principle involving burden of proof of fact especially within knowledge as enshrined under Section 106 of the Evidence Act, 1872 would apply to the case at hand. The said provision provides that when any fact is especially within knowledge of any person, burden of proving that fact is upon him.

29. In the matter of **Suresh & Another Vs. State of Haryana {(2015) 2 SCC 227}**, the Supreme Court has held that under Section 106 of the Evidence Act it is for the person concerned

to prove any especial fact within his knowledge and if such especial fact is not disclosed, an adverse inference can be drawn.

30. The above discussion of the nature of proof against the appellant, the law applicable in the facts and circumstances of the case would manifest that the chain of circumstantial evidence is duly proved against the appellant pointing towards the only hypothesis of his guilt and there is no evidence that any other person might have committed the crime. The argument raised by learned counsel for the appellant that at the worst the appellant can be held responsible for committing one murder i.e. of his wife deserves outright rejection for the reason that there is no circumstance by which it can be proved that before the appellant murdered his wife, she already committed murder of her two children in front of her husband and being enraged with this, the appellant killed his wife. The background in which dispute between the husband and wife arose and thereafter she started living separate with her two children is sufficient enough to infer that deceased Sadhna

wanted to live with her children and not to commit their murder.

31. The issue now to be considered is whether imposition of death sentence by the trial Court deserves to be affirmed or not and if not, what would be the appropriate sentence in the given set of facts, commensurate to the nature and gravity of offence committed by the appellant.
32. The law relating to imposition of death sentence has been dealt by the Hon'ble Supreme Court in a catena of judicial pronouncements. In recent times there is makeshift in the Court's view restraining itself to impose death sentence. Award of death sentence is left open and permissible only in the category of rarest of rare cases.
33. In **Bachan Singh Vs. State of Punjab**⁹, the Hon'ble Supreme Court discussed its earlier pronouncements in the matters of **Jagmohan Singh Vs. State of U.P.**¹⁰, and **Rajendra Prasad Vs. State of UP**¹¹ to hold that normal rule is awarding of 'life sentence', imposition of death sentence being justified, only in the rarest of rare cases. Presently the issue of judging

9 (1980) 2 SCC 684

10 (1973) 1 SCC 20

11 (1979) 3 SCC 646

rarest of rare cases is an outcome of striking balance between the mitigating circumstances and aggravating circumstances. Thus award of death sentence is justified when aggravating circumstances qualitatively outnumbered the mitigating circumstances.

34. The entire law on the subject has been re-visited by the Hon'ble Supreme Court in the matter of **Mukesh and Another Vs. State (NCT of Delhi) and Others**¹² (popularly known as “Nirbhaya Case”). In the said matter, quoting **Machhi Singh Vs. State of Punjab**¹³, the Hon'ble Supreme Court held thus at para-491:-

“**491.** The principles laid down in *Bachan Singh case* [Supra] were considered in *Machhi Singh v. State of Punjab* [Supra] and were summarised as under: (*Machhi Singh case* [*Machhi Singh v. State of Punjab*, (1983) 3 SCC 470 : 1983 SCC (Cri) 681] , SCC p. 489 para 38)

“38. In this background the guidelines indicated in *Bachan Singh case* [*Bachan Singh v. State of Punjab*, (1980) 2 SCC 684 : 1980 SCC (Cri) 580] will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from *Bachan Singh case*[Supra] :

¹² (2017) 6 SCC 1

¹³ (1983) 3 SCC 470

(i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.

(ii) Before opting for the death penalty the circumstances of the “offender” also require to be taken into consideration along with the circumstances of the “crime”.

(iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.

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

35. The Hon'ble Supreme Court thereafter considered the concept of life imprisonment till the remainder of life at para-494 and then dealt with the list of aggravating and mitigating circumstances at para-495. Both paras-494 and 495 are

reproduced hereunder:-

494. A milestone in the sentencing policy is the concept of “life imprisonment till the remainder of life” evolved in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)* v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113]. In this case, a man committed murder of his wife for usurping her property in a cold-blooded, calculated and diabolic manner. The trial court convicted the accused and death penalty was imposed on him which was affirmed by the High Court. Though the conviction was affirmed by this Court also on the point of sentencing, the views of a two-Judge Bench of this Court, in *Swamy Shraddananda v. State of Karnataka* [*Swamy Shraddananda v. State of Karnataka*, (2007) 12 SCC 288 : (2008) 2 SCC (Cri) 322] differed, and consequently, the matter was listed before a three-Judge Bench, wherein a midway was carved. The three-Judge Bench, was of the view that even though the murder was diabolic, presence of certain circumstances in favour of the accused viz. no mental or physical pain being inflicted on the victim, confession of the accused before the High Court, etc. made them reluctant to award death sentence. However, the Court also realised that award of life imprisonment, which euphemistically means imprisonment for a term of 14 years (consequent to exercise of power of commutation by the executive), would be equally disproportionate punishment to the crime committed. Hence, in *Swamy Shraddananda (2)* [*Swamy Shraddananda (2)*

v. *State of Karnataka*, (2008) 13 SCC 767 : (2009) 3 SCC (Cri) 113] the Court directed that the accused *shall not be released from the prison till the rest of his life*. Relevant extract from the judgment reads as under: (SCC pp. 804-05, para 92)

“92. The matter may be looked at from a slightly different angle. The issue of sentencing has two aspects. A sentence may be excessive and unduly harsh or it may be highly disproportionately inadequate. When an appellant comes to this Court carrying a death sentence awarded by the trial court and confirmed by the High Court, this Court may find, as in the present appeal, that the case just falls short of the rarest of the rare category and may feel somewhat reluctant in endorsing the death sentence. But at the same time, having regard to the nature of the crime, the Court may strongly feel that a sentence of life imprisonment, subject to remission normally works out to a term of 14 years would be grossly disproportionate and inadequate. What then should the Court do? If the Court's option is limited only to two punishments, one a sentence of imprisonment, for all intents and purposes, of not more than 14 years and the other death, the Court may feel tempted and find itself nudged into endorsing the death penalty. Such a course would indeed be disastrous. A far more just, reasonable and proper course would be to expand the options and to take over what, as a matter of fact, lawfully belongs to the Court i.e. the vast hiatus between 14 years' imprisonment and

death. It needs to be emphasised that the Court would take recourse to the expanded option primarily because in the facts of the case, the sentence of 14 years' imprisonment would amount to no punishment at all.”

(emphasis in original)

495. After referring to a catena of judicial pronouncements post *Bachan Singh* [Supra] and *Machhi Singh* [Supra], in *Ramnaresh v. State of Chhattisgarh*¹⁴, this Court tried to lay down a nearly exhaustive list of aggravating and mitigating circumstances. It would be apposite to refer to the same here: (SCC pp. 285-86, para 76)

“Aggravating circumstances

(1) The offences relating to the commission of heinous crimes 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 convictions.

(2) The offence was committed while the offender was engaged in the commission of another serious offence.

(3) The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

(4) The offence of murder was committed for ransom or like offences to receive money or

14 (2012) 4 SCC 257

monetary benefits.

(5) Hired killings.

(6) The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

(7) The offence was committed by a person while in lawful custody.

(8) The murder or the offence was committed to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 of the Code of Criminal Procedure. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

(9) When murder is committed for a motive which evidences total depravity and meanness.

(10) When there is a cold-blooded murder without provocation.

(11) The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating circumstances

(1) The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional

disturbance or extreme provocation in contradistinction to all these situations in normal course.

(2) The age of the accused is a relevant consideration but not a determinative factor by itself.

(3) The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

(4) The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

(5) The circumstances which, in normal course of life, would render such a behaviour possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behaviour that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

(6) Where the court upon proper appreciation of evidence is of the view that the crime was not committed in a preordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

(7) Where it is absolutely unsafe to rely upon the testimony of a sole eyewitness though the prosecution has brought home the guilt of the accused.”

36. I shall now consider the aggravating and mitigating circumstances in the present case to determine as to whether present is rarest of rare case warranting imposition of death sentence or the appellant is liable to be awarded life imprisonment till the remainder of life.

37. The appellant has committed murder of his wife and two minor children in a most brutal and ghastly manner. The deceased persons were unarmed and weak being woman and children. There was prior dispute between the appellant and his wife, therefore, element of strong mens rea for commission of crime was running through his mind and nerves. As against this, when Shankar Tandon knocked the door and the appellant came out, the appellant confessed his guilt and did not try to flee or destroy evidence of crime. The appellant is suffering from blood cancer as has been found in his medical report dated 20.2.2018 submitted by the Director cum HoD, Department of Radiotherapy, Pt. J.N.M. Medical College and Dr. B.R. Ambedkar Hospital, Raipur. He is under treatment at the Regional Cancer Centre of the above institutions. At the time of preparation of report, his life

expectancy is stated to be about 7-10 years.

38. Thus, considering the mitigating factors, present is not considered to be a case falling within the term “rarest of rare case”. Therefore, death penalty awarded by the trial Court is not affirmed. Death sentence is set aside. Instead the appellant is awarded sentence of life imprisonment till the remainder of life.

39. In the result, CRA No. 1963 of 2017 is allowed in part. While maintaining the appellant's conviction under Sections 302 (thrice) of the IPC and under Section 27 (1) of the Arms Act, death sentence awarded to him is set aside and instead he is awarded life imprisonment till the remainder of life.

40. The Criminal Reference is answered accordingly.

Sd/-
Judge
(Prashant Kumar Mishra)

HEADLINES

The third Judge to whom Criminal Appeal is referred upon difference of opinion amongst two Judges of the Division Bench is entitled to hear and decide the matter afresh. The third Judge is not bound to follow one or the other judgment rendered by the Judges of the Division Bench.