IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

TUESDAY, THE 23RD DAY OF JULY 2024/1ST SRAVANA, 1946

D.S.R.NO.2 OF 2019

CRIME NO.1216/2013 OF RANNI POLICE STATION, PATHANAMTHITTA
AGAINST THE JUDGMENT DATED 15.02.2019 IN S.C.NO.182 OF 2014
OF THE ADDITIONAL SESSIONS JUDGE-I (SPECIAL COURT), PATHANAMTHITTA
ARISING FROM C.P.NO.24 OF 2014 OF JUDICIAL MAGISTRATE OF FIRST CLASS, RANNI

PETITIONER:

STATE OF KERALA
REPRESENTED BY THE INSPECTOR OF POLICE, RANNI.
[REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT
OF KERALA, ERNAKULAM.

BY SMT.AMBIKA DEVI S., SPECIAL PUBLIC PROSECUTOR

COMPLAINANT/RESPONDENT:

THOMAS CHACKO @ SHIBU,
AGED 46 YEARS, S/O.JAMES, MADATHETHU VEEDU,
MALARVADI JUNCTION, KEEKOZHUR MURI, CHERUKOLE
VILLAGE, PATHANAMTHITTA DISTRICT, PIN – 689650.

BY ADV.SRI.V.A.AJIVASS

THIS D.S.R. HAVING BEEN FINALLY HEARD ON 18.07.2024 ALONG WITH CRL.A.NO.218/2021, THE COURT ON 23.07.2024 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE A.K.JAYASANKARAN NAMBIAR

&

THE HONOURABLE MR. JUSTICE SYAM KUMAR V.M.

TUESDAY, THE 23RD DAY OF JULY 2024/1ST SRAVANA, 1946

CRL.A.NO.218 OF 2021

CRIME NO.1216/2013 OF RANNI POLICE STATION, PATHANAMTHITTA AGAINST THE JUDGMENT DATED 15.02.2019 IN S.C.NO.182 OF 2014 OF THE ADDITIONAL SESSIONS JUDGE-I (SPECIAL COURT), PATHANAMTHITTA

APPELLANT/ACCUSED:

THOMAS CHACKO @ SHIBU
AGED 50 YEARS
S/O.JAMES, RESIDING AT MADATHETHU VEEDU,
MALARVADI JUNCTION, KEEKOZHUR MURI, CHERUKOLE
VILLAGE, PATHANAMTHITTA DISTRICT, PIN - 689 650.
(CONVICT NO.3324, C.P. & C.H., VIYYUR CENTRAL JAIL).

BY ADV.SRI.V.A.AJIVASS

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED THROUGH THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY SMT.AMBIKA DEVI S., SPECIAL PUBLIC PROSECUTOR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 18.07.2024 ALONG WITH D.S.R.NO.2/2019, THE COURT ON 23.07.2024 DELIVERED THE FOLLOWING:

"C.R."

J U D G M E N T

Dr. A.K. Jayasankaran Nambiar, J.

The Criminal Appeal and Death Sentence Reference (DSR) arise from the judgment dated 15.02.2019 of the Additional Sessions Judge I (Special Court), Pathanamthitta in S.C.No.182 of 2014, by which the appellant/accused was found guilty of the offences under Sections 449, 323, 324, 436 and 302 IPC and sentenced to rigorous imprisonment and fine for various terms for the offences under Sections 449, 323, 324 and 436 IPC and sentenced to death and fine for the offence under Section 302 IPC.

The prosecution case:

2. The prosecution case in brief is that the accused is the elder son of M.T. Chacko [PW6] @ James. Bindhu [PW10] is the wife of Shybu, the younger brother of the accused. Shybu was employed abroad. Bindhu and her minor children namely, Melbin, aged 7, and Mebin, aged 3, were residing in the ground floor of their residential building namely 'Madathethu Veedu' and Chacko [PW6] and his wife Marykutty Chacko [PW7] were residing in the upper floor of the same building. The said residential building stood transferred by PW6 Chacko in the name of the appellant/accused. In connection with the division of the properties,

there had been dispute between the appellant/accused and his father Chacko, and consequently, the accused turned envious to his father. In addition, Bindhu and the wife of the appellant/accused also had become at loggerheads. Because of these family issues, the appellant/accused left his parental home and resided in a rented residence, but the dispute and enmity continued. Out of this enmity, the appellant/accused, with his intention to do away with Melbin and Mebin, came to his parental home on 27-10-2013 at about 7.30 a.m. and committed the murder of Melbin and Mebin by slitting their throat using a knife. When Bindhu tried to dissuade the accused, he had assaulted her and sprinkled chilly powder on her face. After committing the murder of the two children, the accused has set the house ablaze and also had attempted to commit suicide by poisoning.

Proceedings before the trial court:

3. The final report was submitted before the Judicial First Class Magistrate Court - I, Ranni, and on the appearance of the accused, committal proceedings were initiated as C.P.No.24 of 2014 since the offence was exclusively triable by the Sessions Court. On committal of the case, the case was made over to the Court of Additional Sessions Court I (Special Court), Pathanamthitta, for trial and disposal. As the accused was in custody, a legal aid counsel was appointed for him. As there was no ground to discharge the accused under Section 227 of the Cr.P.C., charges were framed against him under Sections 449, 323, 324,

436 and 302 of the IPC. When the charges were read over and explained to him, he pleaded not guilty. Thereupon, the matter proceeded for trial.

4. The prosecution examined PW1 to PW35 and marked Exts.P1 to P7, P7(a), P8 to P38, P38(a) and P39 to P42. MO1 to MO15 series were identified. On behalf of the defence, Ext.D1 was marked through PW1. No other witnesses were examined or documents marked. After the close of the evidence of the prosecution, the accused was examined under Section 313 Cr.P.C. to explain the incriminating circumstances appearing in the evidence against him, and he denied all the circumstances. Finding that there was no ground for acquittal under Section 232 of the Cr.PC., the accused was called upon to enter into defence and adduce evidence, if any. The accused, however, chose not to adduce any evidence. Thereafter, the trial court proceeded to hear the prosecution and the defence and found the accused guilty of the charges under Sections 449, 323, 324, 436 and 302 IPC. The accused was accordingly convicted under Section 235(1) Cr.P.C. and sentenced to rigorous imprisonment for a period of one year and to pay fine of Rs.5,000/-, in default of payment to undergo rigorous imprisonment for one month under Section 323 of IPC; rigorous imprisonment for a period of three years and to pay fine of Rs.5,000/-, in default of payment to undergo rigorous imprisonment for one month under Section 324 of IPC; rigorous imprisonment for a period of ten years and to pay fine of Rs.10,000/-, in default of payment to undergo rigorous imprisonment for two months under Section 436 of IPC; rigorous imprisonment for a

period of ten years and to pay fine of Rs.25,000/-, in default of payment to undergo rigorous imprisonment for six months under Section 449 of IPC; death, for the offence punishable under Section 302 IPC and accordingly, the accused shall be hanged by neck till he is dead. Fine of Rs.5,00,000/- (Rupees five lakhs only) also is imposed on the accused, in default of payment of fine, the same shall be recovered in accordance with law. The substantive sentences of imprisonment were to run concurrently and the fine, if realised, was to be paid to PW10 Bindhu as compensation under Section 357(1)(c) of the Cr.P.C. Set off was allowed under Section 428 of the Cr.P.C. for the period from 27.10.2013 till the date during which the accused had undergone detention in connection with the investigation, inquiry and trial of the case. A recommendation was also made to the District Legal Services Authority to pay appropriate compensation under Section 357-A of the Cr.P.C. to the parents of the deceased children. The death sentence imposed on the accused was subject to confirmation by this Court under Section 366(1) Cr.P.C., and it is for this purpose that the DSR is posted before us.

Arguments of counsel:

5. We have heard Sri.V.A.Ajivass, the learned counsel for the appellant/accused and Smt.Ambika Devi, the learned Special Public Prosecutor on behalf of the State in the Crl.A. as also in the DSR.

6. On behalf of the appellant/accused, it was argued that the evidence adduced in the instant case by the prosecution clearly suggests

that the appellant/accused was not in a fit state of mind at the time when he committed the acts that led to his conviction. In particular, reference was made to the depositions of PW1 Samuel Thomas, PW4 Shajan T. John, PW5 Geetha and PW6 Chacko, who described the appellant to have been in an agitated state with froth coming out of his mouth as he emerged from the house after committing the crime, to substantiate the said argument. It is further submitted that the absence of the required *mens rea* for committing a murder is also borne out by the evidence on record of the aforementioned witnesses, which also state that the appellant/accused did not try to escape from the scene of the crime. The depositions of the above witnesses state that after committing the crime, including setting on fire the house of PW6 Chacko/PW7 Marykutty Chacko, he came to the front of the house and was sitting there. It is also the case of the learned counsel for the appellant/accused that the factum of enmity between the wife of the appellant/accused and PW10 Bindhu, as alleged by the prosecution to be the motive for the murder, is not proved through any of the statements of the witnesses including those witnesses such as PW6 Chacko, PW7 Marykutty Chacko and PW8 Fr. Geevarghese, who have all spoken about a property dispute between the appellant/accused and his brother. In short, the attempt of the learned counsel for the appellant has been to try and show that the crime in question was not motivated in the manner alleged by the prosecution, and further that it was done without premeditation, and when the appellant was not in a fit state of mind to understand the consequences of his action. A feeble attempt was also made by the learned counsel for

the appellant/accused to suggest that it was not the appellant/accused but another person, who was employed in the KSEB and who had some relationship with PW10 Bindhu, who was responsible for the crime. In support of the said submission, the learned counsel sought to rely on a suggestion that was made to one of the witnesses during cross-examination.

7. Per contra, it is the submission of Smt.Ambika Devi, the learned Special Public Prosecutor that the attempt of the learned counsel for the appellant to establish that the accused was not in a sound state of mind at the time of commission of the offences, cannot be taken seriously. It is, in particular, pointed out that the commission of the crime was witnessed by PW10 Bindhu, who was the mother of the two young children aged 7 and 3, respectively, and who had to undergo the trauma of seeing her children being murdered in her presence. She points out that the children were murdered in the most brutal manner, and that too when they were of tender age and could not offer any resistance to the violent action of the appellant/accused. As regards the aspect of motive, she contends that in the face of the eye witness testimony of PW7 Marykutty Chacko and PW10 Bindhu as also the testimonies of PW1 Samuel Thomas, PW4 Shajan T. John, PW5 Geetha and PW6 Chacko, who have spoken to the conduct of the appellant/accused immediately after the crime, there was no necessity to analyse the motive, if any, that prompted the appellant to commit the crime. She also points out that there was no evidence adduced on behalf of the appellant at any stage of

the proceedings to establish that the appellant was not in a fit state of mind at the time of commission of the offences alleged against him.

Discussions and findings:

8. On a consideration of the rival submissions and a careful perusal of the evidence on record, we find that as regards the commission of the murder by the appellant/accused as also on the identity of the appellant/accused as the murderer, there cannot be much doubt. The appellant is the paternal uncle of the two deceased children. That there was a dispute within the family over sharing of property is evident from the depositions of PW6 Chacko, the father of the appellant/accused, PW7 Marykutty Chacko, the mother of the appellant/accused, PW10 Bindhu, the mother of the two deceased children and the wife of the younger brother of the appellant/accused. PW8 Fr. Geevarghese has also spoken to the existence of the dispute and his attempts at mediating the said dispute. We don't think there is any further evidence required to establish the background facts with regard to the enmity that subsisted between the appellant/accused and the family of the deceased children. Further, as found by the trial court in its judgment, the very fact that the appellant/accused had left the scene of occurrence - residence - despite the same being allotted to him by his parents and also that the dispute had necessitated the interference of a Priest of a Church, is suggestive of the intensity of the animosity between the accused and his family members and that it was this animosity that led him to live separately by leaving his aged parents in

their residence which was the scene of the crime. So also, the explanation given by the appellant/accused under Section 313 Cr.P.C., wherein, he states that during the time when he had gone out from the residence in connection with his avocation, his parents and PW10 Bindhu used the pick up quarrels with his wife, when read together with the testimonies of PW6 Chacko and PW7 Marykutty Chacko, both of whom state that there were disputes between the wife of the appellant/accused and PW10 Bindhu over the performance of their children in studies, shows that many disputes existed between the appellant/accused and his wife, on the one hand, and his parents [PW6 Chacko & PW7 Marykutty Chacko] and PW10 Bindhu on the other. The testimony of PW8 Fr. Geevarghese also reveals that the appellant/accused had been at loggerheads with his father in connection with sharing of the family property. In cross-examination, PW8 Fr. Geevarghese also testified that PW6 Chacko @ James told him that he could not live in the same house in harmony with the wife of the appellant/accused and also that he had been forced to give a petition before the police against threats raised by the appellant/accused to kill him. The animosity that existed between the appellant/accused and his family members including PW10 Bindhu was thus clearly established by the evidence on record.

9. The testimonies of the aforementioned witnesses also clearly bring out the fact that although the appellant/accused may have had a proprietary interest in the residential house, which was the scene of occurrence of the crime, the enmity that he harboured against the family

members led to his leaving the house and residing separately. The said evidence is significant when one considers the complicity of the appellant/accused in the offences alleged under Section 436 [Mischief by fire or explosive substance with intent to destroy house, etc.] and Section 449 [House-trespass in order to commit offence punishable with death] of the IPC. 'House-trespass' is defined in Section 442 of the IPC as criminal trespass by entering into or remaining in any building, tent or vessel used as a human dwelling or any building, used as a place of worship, or as a place for the custody of property. By way of an *Explanation*, it is clarified that the introduction of any part of the criminal trespasser's body is entering sufficient to constitute house-trespass. 'Criminal Trespass' is in turn defined in Section 441 of the IPC as meaning the entering into or upon property in possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remaining there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence. It follows, therefore that in the light of the hostility between the appellant/accused and his family members that is established through the evidence discussed above, even assuming that his entry into the residential property where the crime was committed was lawful to begin with, taking into account any proprietary interest he had in that property, his remaining there thereafter to commit the heinous crimes rendered him guilty of the offences under Sections 436 and 449 of the IPC. PW11 Babu Thomas, an employee of the petrol pump, had deposed that the

appellant/accused had come to the pump the day before the incident and had bought diesel in a plastic bottle. We therefore see no reason to interfere with the finding of the learned trial Judge holding the appellant/accused guilty of the said offences.

10. As regards the finding of the trial Judge regarding the commission by the appellant/accused of the offences under Sections 323 and 324 of the IPC, we find that the trial Judge has relied largely upon the eye witness testimony of PW10 Bindhu, who, in her deposition, clearly stated that before slitting the throat of Melbin, her elder son, the accused had caught hold of the boy and pressed MO1 knife against his neck and when she tried to persuade the accused against such action, he pushed her down, assaulted her and sprinkled chilly powder on her head. She went on to state that even after pushing her down the appellant/accused was holding the child. The struggles of the child are evidenced by Ext.P35 post mortem certificate that was marked through PW30 Dr. Jiju V.S., which clearly states that the incised wounds found on the left fingers of Melbin were defensive wounds. PW7 Marykutty Chacko has also deposed to the appellant/accused of having assaulted her and sprinkled chilly powder on her face while coming out of the house after the commission of the murders. The actions of the appellant/accused that are proved through the unimpeached eye witness testimony of PW10 Bindhu clearly justify the finding of the trial court as regards the guilt of the appellant/accused under Sections 323 and 324 of the IPC.

11. The eye witness testimony of PW10 Bindhu which narrates the entire gruesome incident that took place on that fateful day when the appellant/accused stormed into their residential premises and slit the throat of both her children, aged 7 and 3 years, respectively, and thereafter assaulted her and her mother-in-law [the appellant/accused's mother] is not demolished in cross examination and satisfies all the requirements that are stipulated in **Rai Sandeep v. State (NCT of Delhi) – [(2012) 8 SCC 21]** for qualifying as the evidence of a 'sterling witness'. The evidence of PW7 Marykutty Chacko, the mother of the appellant/accused is also to be treated as eye witness testimony, to the extent she deposes about the conduct of the appellant/accused after the commission of the murders of the two children. Towards proving that conduct, the depositions of PW1 Samuel Thomas, PW4 Shajan T. John, PW5 Geetha and PW6 Chacko are also reliable since they have not been impeached in cross-examination. On the aspect of commission of murder, we also have the evidence of PW16 M.T. Varghese, through whom Ext.P7(a) portion of the disclosure statement of the appellant/accused was marked which led to the recovery of the knife used for the commission of the murders. The said recovery satisfies the tests under Section 27 of the Indian Evidence Act and is yet another circumstance that would suggest the commission of the crime by the appellant/accused. This is notwithstanding the fact that the commission of the crime of murder by the appellant/accused is established beyond reasonable doubt through the unimpeached testimony of PW10 Bindhu,

who was the eye witness to the actual murder, and which evidence can by itself be the sole basis for conviction of the accused under Section 302 of the IPC. The testimonies of PW1 Samuel Thomas, PW4 Shajan T. John, PW5 Geetha and PW6 Chacko, who saw the appellant/accused immediately after the incident clearly suggest that the appellant/accused had consumed poison immediately after committing the murders. Even the accident-cum-wound certificate [Ext.P36] read with the deposition of PW32 Dr. Priya A.K., the Assistant Surgeon through whom Ext.P36 was marked, establishes this fact. It is also significant that the appellant/accused had also pleaded guilty in Crime No.1217/2013 where the charge against him was that he had consumed some poison with an intention to commit suicide and therefore liable to conviction under Section 309 IPC. The case of the prosecution that after committing the murder of the two children, the appellant/accused had also attempted to commit suicide by poisoning was therefore virtually admitted to by the appellant/accused. The forensic evidence that proves the complicity of the appellant/accused in the crime under Section 302 IPC consists of Ext.P42 report of Sreevidya K.V. [PW35], the Assistant Director (DNA), who finds that the blood on the knife that was recovered from the scene of crime was human blood, and Ext.P41 report of Sunitha V.B. [PW34], the Assistant Director (Serology) FSL, that finds that the blood on the shirt and dhothi worn by the appellant/accused on the date of the incident and that found on the clothes of the children on the same day belong to 'O' group.

12. Perhaps, the most important piece of evidence which, in the instant case, tilts the scales against the accused while finding him guilty of the offence punishable under Section 302 IPC are the post mortem reports, namely, Ext.P35 report in relation to the elder child Melbin and Ext.P9 report in relation to the younger child Mebin. Ext.P35 report was marked through PW30 Dr. Jiju V.S. and Ext.P9 report was marked through PW19 Dr. Deepu T. Both the doctors have deposed that the injuries that resulted in the death could be caused by MO1 knife that was recovered from the scene of crime consequent to the disclosure of the appellant/accused. The injuries that resulted in the death of the two children, as detailed in Ext.P35 and Ext.P9 reports, read as follows:

> Ext.P9:
>
> Incised wound 15.5x2.5 c.m., bone deep, horizontally placed across front of neck with its midpoint 3.5 c.m. above sternal notch. The right and left outer ends of the wound were placed 2 c.m. and 4 c.m. below the ear lobules respectively. There was a side cut 0.5x0.2x0.2 c.m. on the upper margin of the wound 2.5 c.m. inner to its left end.
>
> Underneath, the strap muscles on either side of neck, larynx at the level of thyroid laminae below the vocal cords, both carotid arteries, jugular veins and oesophagus were cut and separated, exposing the body of C-4 vertebra, which showed a horizontal cut 2x0.2x0.3 c.m. at its front aspect.
>
> Test for air embolism was positive.
>
> Ext.P35:
>
> Incised wound 8.5x2.5x3 c.m., oblique across the front of neck above the level of thyroid cartilage; its right end was placed 5 c.m. below ear lobe, Midpoint 6 c.m. below chin and left end 2 c.m. below angle of jaw bone. There was a side cut 0.8x0.3x0.2 c.m. on upper margin of the wound 1.5 c.m., inner to its left end. The strap muscles of neck, thyroid membrane jugular veins, right carotid artery oesophagus were cut and separated. Test for air embolism was done and found negative.

13. The sites of the fatal injury being the neck, when read together with the eye witness testimony of PW10 Bindhu that gives

details of the manner in which they were inflicted, shows very clearly that the *mens rea* required for categorising the offence under Section 300 IPC instead of Section 299 IPC, was proved beyond all reasonable doubt. We, therefore, do not find any reason to interfere with the finding of the trial Judge as regards conviction of the appellant/accused for the offences punishable under Section 302 IPC. We, therefore, uphold the finding of the trial court with regard to the finding of guilt and conviction of the appellant/accused under Sections 323, 324, 436, 449 and 302 IPC. We also do not deem it necessary to interfere with the sentence imposed on the appellant for the offences under Sections 323, 324, 436, and 449 of the IPC.

In view of the Crl.A. preferred by the appellant/accused as also the DSR that arises from the judgment of the trial court, we now proceed to consider the aspect of sentence imposed on the appellant/accused for the offence punishable under Section 302 IPC.

Sentencing:

14. The trial court sentenced the appellant accused to death for the offence punishable under Section 302 IPC. A fine of Rs.5,00,000/- [Rupees Five Lakhs] was also imposed on him with the rider that in default of payment of fine, the same shall be recovered in accordance with law. Since the appeal preferred by the appellant/accused, as also the DSR referred to us by the trial court require us to examine the issue of

legality of the imposition of the death sentence in the instant case, we deem it apposite to examine the law on the subject.

15. It is trite that criminal law, in general, adheres to the principle of proportionality while punishing criminal conduct based on culpability. It allows significant discretion to the Judge in arriving at a sentence in each case, presumably to permit sentences that reflect more subtle considerations of culpability that are raised by the special facts of each case. Accordingly, Judges have to embark upon a delicate balancing exercise of the aggravating and mitigating factors and circumstances in which a crime has been committed. In doing so, they must realise that there is no foolproof formula that would provide a reasonable criterion for determining a just and appropriate punishment in the infinite variety of circumstances that may affect the gravity of the crime.[1]

16. Any discussion on the circumstances under which a death sentence can be imposed on an accused found guilty of commission of the offence punishable under Section 302 IPC must begin with a reference to the case of *Bachan Singh*[2] where the Supreme Court laid down the following guidelines for courts to follow viz.

a. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability;
b. 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';

1 State of Punjab v. Rakesh Kumar – [(2008) 12 SCC 33]
2 Bachan Singh v. State of Punjab – [(1980) 2 SCC 684]

c. 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;

d. 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.

In order to apply the said guidelines, the court had to ask itself and answer the following questions viz.

a. Is there something uncommon about the crime which renders the sentence of imprisonment for life inadequate and calls for a death sentence ?

b. Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

17. If upon taking an overall global view of all the circumstances in the light of the aforesaid propositions and taking into account the answers to the questions above, the circumstances of the case are such that the death sentence is warranted, the court would proceed to do so.

18. Close on the heels of *Bachan Singh (supra)* came the case of *Machhi Singh*[3] where the court observed that the acceptance of the death sentence as a mode of punishment, by the community as a whole, was founded on the belief that if a person showed irreverence for life, he stood to lose the protection that the community offered him to live safely without danger to his life. Accordingly, in the rarest of rare cases, when the collective conscience of the community was so shocked that it would expect the holders of the judicial power centre to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining the death penalty, the death penalty would be imposed. The court then went on to enumerate some of the instances when it believed the community would entertain such a sentiment, as follows:

a. When the murder is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community;
b. When the murder is committed for a motive which evinces total depravity and meanness such as a hired assassin committing murder for the sake of money or reward, dowry deaths or a cold blooded murder committed for gaining control over property;
c. When a murder is committed of a member of the SC or minority community, not for personal reasons but in circumstances which arouse social wrath;
d. When the crime is enormous in proportion such as multiple murders of all members of a family or a large number of persons of a particular community; or

3 Machhi Singh v. State of Punjab – [(1983) 3 SCC 470]

e. When the victim of the murder is an innocent child who could not have provided any provocation or excuse for the murder or of a person who is a helpless woman or rendered helpless on account of old age or infirmity.

19. The view taken in *Machhi Singh (supra)* was doubted more than two decades later by a three judge bench of the Supreme Court in *Swamy Shraddananda*[4] where the court opined that the classification of categories of murders in which the community should demand death sentence for the offender, as delineated in *Machhi Singh (supra),* was made looking at murder mainly as an act of maladjusted individual criminals. Taking note of the horrendous crimes of different nature that were committed in the country in the decades since *Machhi Singh (supra)* the court held that the categories in that case cannot be taken as inflexible, absolute or immutable.

20. An attempt was later made by the Supreme Court in *Ramnaresh*[5] to lay down an exhaustive list of aggravating and mitigating circumstances. The list read as follows:

> *"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.

4 Swamy Shraddananda (2) v. State of Karnataka – [(2008) 13 SCC 767]
5 Ramnaresh v. State of Chhattisgarh – [(2012) 4 SCC 257]

(*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 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."

21. To the list of mitigating circumstances shown above, the case being dependent upon circumstantial evidence was added as yet another circumstance that had to be borne in mind while formulating the sentencing policy.[6] In *Wasnik*[7], the court clarified this further by stating that ordinarily, it would not be advisable to award capital punishment in a case of circumstantial evidence, but that there was no hard and fast rule that death sentence should not be awarded in a case of circumstantial evidence. The court considering the punishment had to observe the caveat in *Bachan Singh (supra)* that it is not only the crime but also the criminal that must be kept in mind, and any alternative option of punishment is unquestionably foreclosed. The reason for the second precaution is that the death sentence, upon execution, is irrevocable and irretrievable.

6 Ramesh v. State of Rajasthan – [(2011) 3 SCC 685; referring to Santhosh Kumar Bariyar v. State of Maharashtra – [(2009) 6 SCC 498; Sushil Sharma v. State (NCT of Delhi) – [(2014) 4 SCC 317; Cf. Shatrughna Baban Meshram v. State of Maharashtra – [(2021) 1 SCC 596 & Sundar @ Sundarrajan v. State by Inspector of Police – [2023 KHC 6287] – where the court held that the theory of residual doubt does not have a place in a case based on circumstantial evidence since the burden of proof to be discharged by the prosecution is already of a greater magnitude.

7 Rajendra Pralhadrao Wasnik v. State of Maharashtra – [(2019) 12 SCC 460]

22. In *Shankar Kisanrao Khade*[8], the court summarised the tests to be applied while awarding the death sentence as follows:

> "52. .... In my considered view, 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, 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 the 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 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."

23. The shift in policy towards a reformative and rehabilitative response to crime was fostered by an understanding that the criminal is not a product of only their own decisions but also a product of the State and society's failing, which is what entitles the accused to a chance of reformation. Noticing this, the court in *Wasnik (supra)* also undertook a survey of the law on the reform, rehabilitation and re-integration of a convict into society and observed that precedents on the issue clearly and unequivocally mandated that the probability (not possibility or improbability or impossibility) that a convict can be reformed and rehabilitated in society must be seriously and earnestly considered by the courts before awarding the death sentence; that this is primarily because it is one of the mandates of the 'special reasons' requirement of Section

8 Shankar Kisanrao Khade v. State of Maharashtra – [(2013) 5 SCC 546]

354(3) Cr.P.C and ought not to be taken lightly since it involves snuffing out the life of a person; that to effectuate this mandate, it is the obligation of the prosecution to prove to the court, through evidence, that the probability is that the convict cannot be reformed or rehabilitated. This can be achieved by bringing on record, *inter alia*, material about his conduct in jail, his conduct outside jail if he has been on bail for some time, medical evidence about his mental make up, contact with his family and so on. In fact, precedents[9] on the issue clearly suggest that while the burden of eliciting mitigating circumstances and considering them liberally and expansively is on the court, the responsibility of providing material to show that the accused is beyond the scope of reform or rehabilitation, thereby unquestionably foreclosing the option of life imprisonment and making it a fit case for imposition of death penalty, is one which falls squarely on the State/Prosecution. In *Rajesh Kumar*[10], the court even went to the extent of holding that the absence of any evidence adduced by the State to show that the convict was beyond reform and rehabilitation was, in itself, a mitigating factor.

24. In *Manoj*[11], the court felt it necessary to frame practical guidelines for the courts to adopt and implement while determining the probability of reformation and rehabilitation of an accused, till the

9 Santhosh Kumar Satishbhushan Bariyar & Ors. v. State of Maharashtra – [(2009) 6 SCC 498]; Rajesh Kumar v. State through Government of NCT of Delhi – [(2011) 13 SCC 706]; Chhannu Lal Verma v. State of Chhattisgarh – [(2019) 12 SCC 438; Anil @ Anthony Arikswamy Joseph – [(2014) 4 SCC 69]; Manoj & Ors. v. State of Madhya Pradesh – [(2023) 2 SCC 353]
10 Rajesh Kumar v. State through Government of NCT of Delhi – [(2011) 13 SCC 706]
11 Manoj & Ors. v. State of Madhya Pradesh – [(2023) 2 SCC 353]

legislature and executive formulated a coherent framework through legislation. The said guidelines read as follows:

> "**248**. There is urgent need to ensure that mitigating circumstances are considered at the trial stage, to avoid slipping into a retributive response to the brutality of the crime, as is noticeably the situation in a majority of cases reaching the appellate stage.
>
> **249**. To do this, the trial court must elicit information from the accused and the state, both. The state, must - for an offence carrying capital punishment - at the appropriate stage, produce material which is preferably collected beforehand, before the Sessions Court disclosing psychiatric and psychological evaluation of the accused. This will help establish proximity (in terms of timeline), to the accused person's frame of mind (or mental illness, if any) at the time of committing the crime and offer guidance on mitigating factors (1), (5), (6) and (7) spelled out in *Bachan Singh*. Even for the other factors of (3) and (4) - an onus placed squarely on the State – conducting this form of psychiatric and psychological evaluation close on the heels of commission of the offence, will provide a baseline for the appellate courts to use for comparison, i.e., to evaluate the progress of the accused towards reformation, achieved during the incarceration period.
>
> **250**. Next, the State, must in a *time-bound manner,* collect *additional* information pertaining to the accused. An illustrative, but not exhaustive list is as follows:
>
> *a*) Age
>
> *b*) Early family background (siblings, protection of parents, any history of violence or neglect)
>
> *c*) Present family background (surviving family members, whether married, has children, etc.)
>
> *d*) Type and level of education
>
> *e*) Socio-economic background (including conditions of poverty or deprivation, if any)
>
> *f*) Criminal antecedents (details of offence and whether convicted, sentence served, if any)
>
> *g*) Income and the kind of employment (whether none, or temporary or permanent etc);
>
> *h*) Other factors such as history of unstable social behaviour, or mental or psychological ailment(s), alienation of the individual (with reasons, if any) etc.
>
> This information should mandatorily be available to the trial court, at the sentencing stage. The accused too, should be given the same opportunity to produce evidence in rebuttal, towards establishing all mitigating circumstances.
>
> **251**. Lastly, information regarding the accused's jail conduct and behaviour, work done (if any), activities the accused has involved themselves in, and other related details should be called for in the form of a report from the relevant jail authorities (i.e., Probation and Welfare Officer, Superintendent of Jail, etc.). If the appeal is heard after a long hiatus from the trial court's conviction, or High Court's confirmation, as the case may be – a *fresh report* (rather than the one used by the previous court) from the jail authorities is recommended, for an more exact and complete understanding of the contemporaneous progress made by the accused, in the time elapsed. The jail authorities must also include a fresh psychiatric and psychological

report which will *further* evidence the reformative progress, and reveal post-conviction mental illness, if any."

25. The perceptible shift in judicial thinking, in the aftermath of the 262nd Report of the Law Commission of India that recommended an abolition of death penalty in all offences except those relating to terrorism, and one that is geared towards moving away from the awarding of death sentence as far as possible, can be gathered from para 47 of *Wasnik (supra)*, that reads as follows:

> "**47**. Consideration of the reformation, rehabilitation and reintegration of the convict into society cannot be over-emphasised. Until *Bachan Singh*, the emphasis given by the courts was primarily on the nature of the crime, its brutality and severity. *Bachan Singh* placed the sentencing process into perspective and introduced the necessity of considering the reformation or rehabilitation of the convict. Despite the view expressed by the Constitution Bench, there have been several instances, some of which have been pointed out in *Bariyar* and in *Sangeet v. State of Haryana* where there is a tendency to give primacy to the crime and consider the criminal in a somewhat secondary manner. As observed in *Sangeet* "In the sentencing process, both the crime and the criminal are equally important." Therefore, we should not forget that the criminal, however ruthless he might be, is nevertheless a human being and is entitled to a life of dignity notwithstanding his crime. Therefore, it is for the prosecution and the courts to determine whether such a person, notwithstanding his crime, can be reformed and rehabilitated. To obtain and analyse this information is certainly not an easy task but must nevertheless be undertaken. The process of rehabilitation is also not a simple one since it involves social reintegration of the convict into society. Of course, notwithstanding any information made available and its analysis by experts coupled with the evidence on record, there could be instances where the social reintegration of the convict may not be possible. If that should happen, the option of a long duration of imprisonment is permissible."

26. It would appear that later decisions[12] of the Supreme Court have emphasised on the possibility of imposing harsher sentences of imprisonment as a viable alternative to capital punishment. In *Swamy Shraddananda (supra)* the court had opined that if a court's option was

12 Sundar @ Sundarrajan v. State by Inspector of Police – [2023 KHC 6287]; Vikas Chaudhary v. State of Delhi – [2023 KHC 6429]; Digambar v. State of Maharashtra – [2023 KHC 6466]; Madan v. State of UP – [2023 KHC 6986]; Ravinder Singh v. State Govt. of NCT of Delhi – [(2024) 2 SCC 323]

limited only to two punishments, one a sentence of imprisonment which for all intents and purposes would be of not more than 14 years, and the other death, the court may feel tempted and find itself nudged into the disastrous course of endorsing the death penalty. It was in order to avoid the said consequence that the court introduced the possibility of awarding a sentence of life imprisonment that would ensure that a convict would not be released from prison till the rest of his life. The court went on to clarify that the formalisation of a special category of sentence, though for an extremely few number of cases, would have the great advantage of "having the death penalty on the statute book but to actually use it as little as possible and only in the rarest of rare cases". This was re-iterated in *Wasnik (supra)* where the court opined that directing imprisonment for a period greater than 14 years (say 20 or 25 years) could unquestionably foreclose the imposition of a sentence of death, being an alternative option to capital punishment, and in *Sriharan*[13] where the court approved an alternative third sentencing option in cases where the accused are convicted of serious and grave crimes which carried with it the option of capital sentence. Realising that a life sentence *per se* can lead to an early release of the accused upon their undergoing the minimum sentence prescribed under Section 433A, and highlighting that the asymmetry in the State rules with respect to minimum incarceration in different kinds of life sentences, the Constitutional courts (the Supreme Court and the High Courts only) were given the option of imposing special or fixed term sentences that were a

13 Union of India v. Sriharan @ Murugan & Ors. - [(2016) 7 SCC 1]

feasible alternative in capital cases where the court was of the opinion that (i) the death sentence was inappropriate, (ii) that there were elements in the crime and/or conduct of the criminal that warranted the imposition of a mandatory sentence beyond the minimum sentence of 14 years prescribed by the Cr.PC, and (iii) where the court felt, independently, that the serious nature of the crime and the manner of its commission warranted a special sentence whereby the State's discretion in releasing the offender, should be curtailed so that the convict is not let out before undergoing a specified number of years of incarceration. In *Shiva Kumar*[14], the Supreme Court had occasion to consider the issue of whether it was possible for a constitutional court to impose a modified sentence even in those cases where the trial court had not imposed a death sentence. Referring to the earlier decisions in *Swamy Shraddananda* and *Sriharan* it was held that even in a case where capital punishment is not imposed or is not proposed, the constitutional courts can always exercise the power of imposing a modified or fixed term sentence by directing that a life sentence as contemplated by 'secondly' in Section 53 IPC shall be of the fixed period of more than 14 years. The fixed punishment cannot be for a period of less than 14 years in view of the mandate of Section 433A of the Cr.PC.

28. It is in the light of the principles discussed above that we have to now examine the reports available before us in relation to the appellant/accused. While doing so, we have to bear in mind that our

14 Shiva Kumar @ Shiva v. State of Karnataka – [(2023) 9 SCC 817]

exercise is directed towards determining firstly, whether the trial court was justified in imposing the death penalty, as opposed to a sentence of life imprisonment, to the appellant/accused under Section 302 IPC ? and secondly, even if it was not, whether the appellant/accused should be sentenced by this Court for a fixed term sentence, without remission, for a period in excess of 14 years, by taking note of the serious nature of the crime and the manner of its commission ?

29. Pursuant to the order dated 07.02.2024 of this Court, we have received the following documents that would have a bearing on the sentence to be imposed on the appellant/accused in these proceedings:

(i) A report on mitigation investigation dated 17.07.2024 prepared by Sri.Ameen Sabik C.A., associated with Project 39A, National Law University, Delhi.

(ii) A communication dated 16.07.2024 from the Superintendent, High Security Prison, Viyyur as regards the conduct of the appellant/accused while in prison.

(iii) A report dated 12.07.2024 of Dr. Shijin A. Ummer, Assistant Professor, Psychiatry attached to the Department of Psychiatry, Government Medical College, Thrissur.

(iv) A report dated 20.05.2024 of the Probation Officer, Pathanamthitta District.

30. The Mitigation Investigation Report submitted on behalf of Project 39A provides the following conclusions to the study conducted by them on the appellant/accused:

> "47. Prolonged incarceration can have a negative effect on a person's physical and mental health. Over the course of his eleven years in prison, Thomas had demonstrated resilience, as seen by his capacity to change, adapt, and grow from the challenges life has thrown at him. He exhibits perseverance in holding out for a brighter tomorrow, one in which he can support his family, be a father to his children and a productive member of the society.
>
> 48. Looking at Thomas's life before incarceration, it is evident that he was exposed to extremely adverse experiences like poor socioeconomic circumstances, physical and emotional abuse, parental neglect etc. His early life experiences reveal a lack of protective factors such as a nurturing and loving family, education, and opportunities to learn and grow. There is also evidence to suggest an over exposure to risk factors such as growing up in a constrained environment, exposure to work environments at an early age etc The impact such exposure to risk factors has had on him is reflected in Thomas's reactions to stressful life events. Despite the extremely adverse circumstances that he was exposed to, he strived to work hard, get employment and be a support to his family. He has no prior criminal record and reportedly has utilised his time in prison productively. While I was not given access to prison records and documents pertaining to Thomas, it was evident from the interviews that he is not a hardened or habitual criminal and deserves to get a chance for reformation and rehabilitation. Assessing and analysing the information recorded and reported, it is evident that Thomas has adequate support from his family, a strong and goal directed ability to think and plan which can help him reintegrate back into society. His resilience shows that he can persevere in the face of adversity.
>
> 49. It is requested that the Hon'ble Court consider the several adversities Thomas has faced in his life, especially in his early childhood, the psychological impact these adversities had on him and how he has managed to develop ways to cope from them. He has a support system, his wife and children who are also dependent on him. His active engagement in prison, and no bad conduct report from the prison is indicative that the probability of reformation exists. He is not extremely culpable as shown by the multiple interviews with Thomas and his family. Thomas aspires to be a better person and, given the opportunity, to live a better life. As a brother, father, and spouse, he has always acted responsibly. When determining Thomas's sentence, it is important to weigh his significant reformation and the probability that Thomas will easily reintegrate into society while deciding on his punishment."

31. The report of the Superintendent, High Security Prison suggests that the appellant/accused is doing agricultural work in the prison; that he is asocial, and his behaviour to fellow prisoners is not upto

the mark although he has been abiding by the rules and regulations of the jail. The report of the Assistant Professor, Psychiatry shows that the appellant/accused does not suffer from any mental illness at present and that at the time of examination, he was conscious, co-operative, adequately kempt and groomed and that his psychomotor activity was normal. It also makes mention of the fact that he had expressed regret over the incident for which he was undergoing punishment. The Probation Officer's report indicates that on enquiries made with the family of the appellant/accused and persons in the locality, his mother and sister had requested for avoiding the death penalty to the appellant/accused. The neighbours and the Ward member did not express any personal opinion with regard to the sentence that should be imposed on the appellant/accused. The views of the appellant's wife and children could not be ascertained since they had shifted their residence to Mumbai. The views expressed by the brother of the appellant/accused, whose children the appellant/accused had murdered, were to the effect that the appellant/accused should receive the maximum punishment under the law.

32. On a consideration of the aforesaid material made available to us in the backdrop of the legal position that is discernible from the judgments of the Supreme Court on the imposition of death sentence, we are of the view that the facts in the instant case do not make it appropriate for classification under the head “rarest of rare” warranting imposition of a death sentence on the appellant/accused. That said, we

cannot lose sight of the heinous crime that was committed by the appellant/accused against two innocent children aged 7 and 3. The brutal manner in which the crime was committed on the children, who were the children of his own brother and in relation to whom he occupied a position of trust, certainly warrants a harsh punishment. Taking cue from the judgments of the Supreme Court which empower a constitutional court to substitute the death sentence imposed by the trial court with a fixed term sentence without remission, we feel that on the facts and circumstances in the instant case, a sentence of rigorous imprisonment for life with a mandatory period of 30 years without remission would serve the ends of justice and balance the conflicting interest of the appellant/accused, on the one hand, and the victim and the people at large on the other. We therefore modify the sentence imposed on the appellant/accused under Section 302 IPC to one of rigorous imprisonment for life with the further condition that he shall undergo mandatory imprisonment without remission for a period of 30 years. A fine of Rs.5,00,000/- [Rupees Five lakhs only] is also imposed on the appellant/accused, and in default of payment of which, he shall undergo rigorous imprisonment for a further period of one year. The fine amount, if realised, shall be paid to PW10 Bindhu, as compensation under Section 357(1)(c) of the Cr.P.C. Set off is also allowed in accordance with the provisions of Section 428 of the Cr.P.C. We also deem it appropriate to direct that if the compensation recommended by the trial court under Section 357-A of the Cr.P.C. has not been paid to the parents of the deceased children till date, the Kerala State Legal Services Authority

[KeLSA] shall take steps to disburse forthwith an amount of Rs.5,00,000/- [Rupees Five lakhs only] under Section 357-A of the Cr.P.C to the parents of the deceased children, from the Kerala Victim Compensation Scheme.

In the result, we confirm the conviction and sentence imposed on the appellant/accused by the trial court in respect of the offences under Sections 449, 323, 324 and 436 IPC. We modify the sentence imposed on the appellant/accused in respect of the offence punishable under Section 302 IPC, as above. Save for the aforesaid modification of the sentence in respect of the offence under Section 302 IPC, we uphold the impugned judgment of the trial court. The Criminal Appeal is thus partly allowed and the DSR is answered in the negative i.e. by refusing to confirm the death sentence.

Sd/-
DR. A.K.JAYASANKARAN NAMBIAR
JUDGE

Sd/-
SYAM KUMAR V. M.
JUDGE

prp/