DIGAMBAR

v.

THE STATE OF MAHARASHTRA

(Criminal Appeal Nos. 221-222 of 2022)

APRIL 28, 2023

[B. R. GAVAI*, VIKRAM NATH AND SANJAY KAROL, JJ.]

Criminal Law – 'Rarest of rare' case – When not – One 'P' was married but had a love affair with 'G' – This was opposed by her brother-'D', who along with co-accused-'M' committed the murder of 'P' and 'G' – Trial court and High Court holding the case to be 'rarest of rare', awarded death penalty and life imprisonment to 'D' and 'M', respectively – Correctness of – Held: No interference warranted with the concurrent findings of the Trial Court and the High Court that the accused appellants are guilty of offence punishable u/s.302, IPC – However, the present case cannot be considered to be 'rarest of rare' – Both the appellants do not have any criminal antecedents – Medical evidence further reveals that the appellants did not act in a brutal manner, inasmuch as there was only single injury inflicted on both the deceased – Appellant-'D' who has been sentenced to capital punishment, was a young boy of about 25 years at the time of the incident – Report of the Probation Officer as well as the Superintendent of the prison shows that he has been found to be well-behaved, helping and a person with leadership qualities – He is not a person with criminal mindset and criminal records – Trial court and High Court erred in holding the case to be rarest of rare and awarding capital punishment to 'D' – Though, his conviction u/s.302, IPC is maintained, the sentence of capital punishment is commuted to life imprisonment – However, life imprisonment awarded to 'M' is not interfered with – Evidence Act, 1872 – ss.106, 8 – Penal Code, 1860 – s.302 r/w s.34.

Criminal Law – Rarest of rare doctrine – Imposition of death sentence – Held: 'Rarest of rare' doctrine does not require that in such a case only death sentence has to be imposed – While considering as to whether the death sentence is to be inflicted or not, the Court will have to consider not only the grave nature of

* Author

crime but also as to whether there was a possibility of reformation of a criminal.

State of Uttar Pradesh v. Krishna Master and others **(2010) 12 SCC 324 : [2010] 9 SCR 563;** *Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka* **(2017) 5 SCC 415 : [2017] 2 SCR 62;** *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra* **(2002) 2 SCC 35 : [2001] 5 Suppl. SCR 612;** *Mohinder Singh v. State of Punjab* **(2013) 3 SCC 294 : [2013] 3 SCR 90;** *Sundar @ Sundarrajan v State by Inspector of Police* **Criminal Appeal Nos. 300-301 of 2011 – relied on.**

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal Nos. 221-222 of 2022.

From the Judgment and Order dated 13.12.2021 of the High Court of Judicature at Bombay at Aurangabad in CC No.1 of 2019 and CRLA No. 810 of 2019.

With

Criminal Appeal No. 280 of 2023.

Subodh S. Patil, Sudhanshu S. Choudhari, Mahesh P. Shinde, Ms. Rucha A. Pande, M. Veeraragavan, Advs. for the Appellant.

Chinmoy Khaladkar, Siddharth Dharmadhikari, Aaditya Aniruddha Pande, Bharat Bagla, Sourav Singh, Advs. for the Respondent.

The Judgment of the Court was delivered by

B. R. GAVAI, J.

1. The present criminal appeals arise out of the common Judgment & Order dated 13th December 2021 passed by the Aurangabad Bench of the Bombay High Court in Confirmation Case No. 1 of 2019 and Criminal Appeal Nos. 808 and 810 of 2019 whereby the High Court confirmed the death penalty and life imprisonment imposed upon the Accused No. 1-Digambar (Appellant in Criminal Appeal Nos. 221-222/2022) and Accused No. 2-Mohan (Appellant in Criminal Appeal No. 280/2023) respectively, for conviction for the offence punishable under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as "IPC") read with Section 34 IPC.

2. These Criminal Appeals arise from conspectus of facts adumbrated as follows:

2.1 Pooja (Deceased) was married to one Jethiba Hashanna Varshewar on 10th June 2017. Pooja was having a love affair with one Govind (Deceased) for the past 5 years. The Appellant/Accused- Digambar is the brother of Pooja.

2.2 On 22nd July 2017, Pooja left her matrimonial home without informing anybody. Thus, her husband had lodged a missing report at Bhokar Police Station on the same day.

2.3 The Accused Digambar, having knowledge of the love affair of Pooja and Govind, was suspicious that Pooja might have gone with Govind. Thus, on 22nd July 2017 itself, he called Govind on his mobile whereupon Govind informed him that Pooja was not with him and he can do whatever he wants. The Accused Digambar searched for Pooja at various places but she was not to be found. During the search, he called Govind twice or thrice and each time Govind informed him that Pooja was not with him. The Accused Digambar tried calling Govind in the night, but his phone was switched off and Digambar took this as an indication that Pooja was with him.

2.4 Next day, i.e., on 23rd July 2017, the Accused Digambar along with co-accused Mohan went to the house of the sister of Govind. In the said house, he found Govind as well as Pooja. The Accused Digambar assured Pooja that he will get her married to Govind since they both are in love for the past 5 years. Pooja was convinced with Digambar's assurance but she denied to go without Govind. Thus, the Accused Digambar and Mohan along with Pooja and Govind left that place on motorcycle.

2.5 Near Village Beltaroda, the Accused Digambar asked Pooja and Govind to wait for some time. The Accused Digambar visited his Aunt's house and picked up a sickle from there and concealed it near his waist. After coming back to the spot where Pooja and Govind were waiting for him, the Accused took the duo along with himself to his village. En route, he stopped his motorcycle near a canal and tried to convince them, but they were not ready to listen. At that time the Accused Digambar took out the sickle and

assaulted on Govind's throat. When Pooja tried to get hold of him, he removed the handle of the sickle and thrust the backside of the sickle in Pooja's neck. These attacks by the Accused Digambar resulted in death of the duo.

2.6 The Accused then rushed to the Bhokar Police Station and himself lodged the FIR No. 404/2007 that he has committed the aforesaid crime.

2.7 Pursuant to the investigation, chargesheet was filed and trial was conducted by the court of Additional Sessions Judge at Bhokar, Nanded. The Trial Court, vide its judgment dated 17th July 2019, convicted the Accused Digambar for the offences punishable under Sections 302/201/120-B of IPC and sentenced him to death penalty while the Accused Mohan was convicted for the offences punishable under Sections 302/201/34/120-B of IPC and sentenced to undergo life imprisonment.

2.8 The Accused Digambar had filed Criminal Appeal No. 810/2019 and the Accused Mohan had filed Criminal Appeal No. 808/2019 before the High Court. Confirmation Case No. 1/2019 was also lodged for confirmation of the death sentence imposed upon the Accused Digambar.

2.9 Vide the impugned judgment, the High Court confirmed the death sentence imposed upon the Accused Digambar and dismissed the Criminal Appeals.

3. We have heard Shri Sudhanshu S. Choudhari and Shri Subodh S. Patil, learned counsel appearing on behalf of the appellants and Shri Chinmoy Khaladkar, learned counsel appearing on behalf of the State.

4. Shri Choudhari submits that both the Trial Court and the High Court have grossly erred in convicting the appellant. He submits that the confessional statement made by the appellant Digambar to the Police could not have been relied on for resting the conviction. He submits that apart from the extra-judicial confession, there is absolutely no evidence to convict the appellants. He further submits that it is improbable that both the appellants and the two deceased travelled on one motor-cycle. Learned counsel submits that only on the basis of the evidence of last seen together, without there being any corroboration, the conviction could not have been recorded by the Trial Court.

5. Shri Subodh Patil also submits that the gap between the appellants being last seen in the company of the deceased and the deceased found to be dead is long enough to give benefit of doubt to the appellants.

6. Shri Choudhari submits that, in any case, the present case is not a fit case for sentencing the appellant-Digambar to death penalty. He submits that the present case cannot be considered to be a 'rarest of rare' case so as to award death penalty.

7. Shri Chinmoy Khaladkar, on the contrary, submits that the Trial Court as well as the High Court have rightly found that the appellants had committed the ghastly murder and awarded a capital sentence. He submits that the present case is nothing but a case of honour killing. It is submitted that since the accused were opposed to the deceased Pooja having an affair with deceased Govind, the accused have assaulted and killed the deceased. Learned counsel submits that applying both the crime and the criminal tests, interference with the capital punishment would not be warranted. He submits that the appellant-Digambar is not an illiterate person. He is an educated person and was also using a smartphone. It is submitted that the conduct of an educated person committing such a heinous crime cannot be pardoned. He, therefore, prays for dismissal of the appeals.

8. With the assistance of the learned counsel, we have scrutinized the material evidence on record.

9. The prosecution case mainly rests on the circumstances of the accused being lastly seen in the company of the deceased, and the death of the deceased occurring shortly thereafter.

10. Insofar as the last seen theory is concerned, the prosecution mainly relies on the evidence of P.W.5-Shankar and P.W.6-Santosh.

11. P.W.5-Shankar is brother-in-law of deceased Govind. He stated in his evidence that on 22nd July 2017 at about 6.00 a.m., Govind told him that Pooja called him on mobile phone. Pooja told Govind that she ran away to Nanded from her house and she called Govind at Nanded. He stated that, at about 6.00 p.m., Pooja came to his house. Thereafter, on the cell phone of his niece Punam, he contacted his brother-in-law Santosh (P.W.6) and told him that Pooja had come to his house. He stated that he tried to convince Pooja that her conduct was not proper and that he would call her father on mobile. However, Pooja told him

that he should not tell anybody because she would not leave Govind as she was in love with Govind since the last 5 years.

12. P.W.5-Shankar further stated in his evidence that on 23rd July 2017, in the morning at about 8.00 to 9.00 a.m., both the accused persons came to his house. Digambar told him that you know as to what type of person I am. When he asked about Pooja, P.W.5-Shankar told him that she was in the house. P.W.5-Shankar further stated that Digambar told him that he was aware that Pooja and Govind had a love affair since the last 5 years and, therefore, their marriage would be performed. P.W.5-Shankar told Digambar that such type of marriage was not possible because Pooja is already married. On this, Digambar told him that Govind was his friend since childhood and thus he would get him married to his sister, Pooja. Pooja told Govind that Digambar is her brother and she had faith on him that he would perform her marriage with Govind. P.W.5-Shankar stated that Pooja told that she will not leave Govind. At that point of time, accused No.2-Mohan abused them. Thereafter, both the accused and both the deceased had left on the motorcycle. Accused Mohan was driving the motorcycle, Pooja and Govind were sitting in between and Digambar was sitting behind them. He stated that after some time, he and his brother-in-law Santosh (P.W.6) proceeded towards Mudhol by autorickshaw. He called Govind on his cell phone and asked him where he was. Govind told him that he was ahead of village Beltaroda. He asked Govind to give cell phone to Digambar. However, Digambar switched off the cell phone without talking with him. He further stated that, at that time, his brother-in-law Santosh received phone call from Bhokar Police Station on his mobile, who informed him that his brother Govind and Pooja were killed in between village Divshi to village Nigva.

13. Though P.W.5-Shankar was thoroughly cross-examined, his statement, insofar as the accused and the deceased leaving together from the house of the said witness, is not shattered.

14. Similar is the evidence of P.W.6-Santosh, who is the brother of the deceased.

15. P.W.7-Sudam Kishanrao Thakre was a Police Head Constable, who was attached to the Bhokar Police Station at the relevant time. He, in his examination-in-chief, has stated that, on 23rd July 2017, at 1415 hours, he received phone call form LPC Mundhe, informing that a murder was committed of one girl and boy in between Divsi to Nigva. He went there

and saw that one girl was injured and when he inquired her about the boy, then she pointed her finger towards the river. He searched near river and he found one body soaked up in blood. He submitted that he intended to take the injured girl to the hospital. However, she succumbed to the injuries at the spot.

16. P.W.8-Sushil kumar Pralhad Chavan was the Police Sub-Inspector, who recorded the confessional statement of the accused-Digambar and conducted the investigation.

17. Though the extra-judicial confession of the accused-Digambar cannot be taken into consideration, however, his conduct of going to the Police Station and surrendering before the Police can certainly be taken into consideration in view of Section 8 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Indian Evidence Act")

18. It could thus be seen that the prosecution has established that the deceased and the accused persons left the house of P.W.5-Shankar together and soon thereafter the death of the deceased person had occurred. As such, the burden to show as to what happened after leaving the house would shift on the accused in view of Section 106 of the Indian Evidence Act. It is to be noted that what transpired after the accused left along with the deceased, is only within the knowledge of the accused. However, the accused persons have utterly failed to discharge the said burden.

19. In that view of the matter, we find that no interference would be warranted with the concurrent findings of the Trial Court and the High Court that the accused appellants are guilty of offence punishable under Section 302 of the IPC.

20. However, the only question that arises is, as to whether the present case could be considered as one to be 'rarest of the rare' so as to award death penalty.

21. In the case of ***State of Uttar Pradesh v. Krishna Master and others***[1], the accused had killed six persons and wiped of almost the whole family on the ground of saving the honour of the family. In the said case, though this Court found that the same would fall within the 'rarest of

1 (2010) 12 SCC 324

the rare' case, it commuted the capital sentence to the one to rigorous imprisonment for life and fine of Rs.25,000/- each.

22. This Court in the case of ***Gandi Doddabasappa alias Gandhi Basavaraj v. State of Karnataka***[2], wherein the accused had committed murder of his daughter, who was in the advanced stage of pregnancy, though upheld the conviction of the accused under Section 302 IPC, but commuted the sentence from capital punishment to imprisonment for life.

23. There are certain other precedents of this Court as to which cases would fall under the category of 'rarest of rare' case.

24. In the case of ***Prakash Dhawal Khairnar (Patil) v. State of Maharashtra***[3], the appellant was a Senior Scientific Assistant. He wiped out his brother's entire family. This Court found that this was done by him on account of frustration as his brother was not partitioning the alleged joint property. Though this Court held that the crime was heinous and brutal, but it could not be considered to be 'rarest of rare' case. This Court held that, it is difficult to hold that appellant is a menace to the society and that there is no reason to believe that he cannot be reformed or rehabilitated.

25. In the case of ***Mohinder Singh v. State of Punjab***[4], this Court observed thus:

> **"25.** It is well-settled law that awarding of life sentence is a rule and death is an exception. The application of the "rarest of rare" cases principle is dependent upon and differs from case to case. However, the principles laid down and reiterated in various decisions of this Court show that in a deliberately planned crime, executed meticulously in a diabolic manner, exhibiting inhuman conduct in a ghastly manner, touching the conscience of everyone and thereby disturbing the moral fibre of the society, would call for imposition of the capital punishment in order to ensure that it acts as a deterrent. While we are convinced that the case of the prosecution based on the evidence adduced confirms the commission of offence by the appellant, however, we are of the considered opinion that still the case does not fall within the four corners of the "rarest of rare" cases.

2 (2017) 5 SCC 415
3 (2002) 2 SCC 35
4 (2013) 3 SCC 294

26. In the said case, the accused had committed murder of his wife and daughter. However, this Court found that the said could not be considered to be 'rarest of rare' case.

27. Recently, this Court, in the case of ***Sundar @ Sundarrajan v State by Inspector of Police***[5], held that 'rarest of rare' doctrine does not require that in such a case only death sentence has to be imposed. This Court held that, while considering as to whether the death sentence is to be inflicted or not, the Court will have to consider not only the grave nature of crime but also as to whether there was a possibility of reformation of a criminal.

28. In the present case, both the appellants do not have any criminal antecedents. The appellant-Digambar, who has been sentenced to capital punishment, was a young boy of about 25 years at the time of the incident. The medical evidence would further reveal that the appellants have not acted in a brutal manner, inasmuch as there is only single injury inflicted on both the deceased. As such, we find that the present case cannot be considered to be 'rarest of rare' case. In any case, the report of the Probation Officer, Nanded as well as the Superintendent, Nashik Road Central Prison would show that the appellant-Digambar has been found to be well-behaved, helping and a person with leadership qualities. He is not a person with criminal mindset and criminal records.

29. The report of the Probation Officer, Nanded further states thus:

> "The Sarpanch and the people in the village stated that, the inter-caste marriage of Deceased friend Govind and Deceased sister Pooja was putting the social pressure and being angry about it, the subjected incidence was happened in sudden provocation by Digambar. Overall, everyone who were present during the Home Inquiry gave the good opinion about the behavior of Digambar baburao Dasre."

30. We are, therefore, of the considered view that the High Court as well as the Trial Court erred in holding that the present case would fall under the 'rarest of rare' case to award capital punishment to appellant-Digambar. We are, therefore, inclined to partly allow the appeals of appellant-Digambar. However, insofar as the appellant-Mohan, who has been

5 Review Petition (Criminal) Nos. 159-160 of 2013 in Criminal Appeal Nos. 300-301 of 2011 dated 21st March 2023

awarded a sentence of life imprisonment, is concerned, we find that there is no reason to interfere.

31. In the result, we pass the following order:

    (i) Criminal Appeal filed by appellant-Mohan is dismissed.

    (ii) Criminal Appeals filed by appellant-Digambar are partly allowed. Though the conviction of the appellant-Digambar under Section 302 IPC is maintained, the sentence of capital punishment is commuted to life imprisonment.

32. Pending application(s), if any, shall stand disposed of.

Headnotes prepared by: Divya Pandey *Result of the case:* Appeals partly allowed.
(*Assisted by:* Shevali Monga, LCRA).