NIRMAL SINGH AND ANR. A

v.

STATE OF HARYANA

MARCH 18, 1999

[G.B. PATTANAIK AND M.B. SHAH, JJ.] B

Penal Code, 1860 :

Sections 302/34—Murder—Punishment—Death Sentence—Rarest of rare cases—Individual role played by the accused persons—Considerations C *of—Murder of 5 members of a family of a witness whose evidence was responsible for the conviction of accused D in a prior rape case—Accused D had threatened during the trial of rape case that witness deposing against him would have to face dire consequences—Accused D killing all the five persons of the family by means of a kulhari—Nature of injuries* D *indicated that the act of accused D was an act of depraved mind and was most brutal and heinous in nature—Held, the act of accused D fell within the ambit of rarest of rare cases and hence deserved extreme penalty of death—However the act of accused N, brother of accused D, was limited to only 3 blows by means of a burchi on one of the victims only after D had given 3 or 4 blows, could not fall within the ambit of rarest of rare* E *cases attracting death penalty—Hence his sentence commuted to life imprisonment.*

Criminal Trial :

Appreciation of evidence—Trial for murder of 5 members of a family of F *a witness, PW 8, whose evidence was responsible for the conviction of one of the accused in a rape case—Evidence given by PW 8 in the rape case was the motive for the crime—Subsequently, PW 8 got married and on the fateful night she was staying at the rooftop with her husband PW 9—PWs 8 and 9 gave a vivid account of the entire incident which they had seen from the* G *rooftop—Evidence of the photographer that the police was at the spot at 8.00 a.m. while FIR recorded at 10.00 a.m.—Insertion of name of PW 9 in inquest report in a different ink—Evidence of witnesses cannot be discarded on such account particularly when the IO was not cross examined on this score—Fact that PW 8 who was responsible for the conviction of one of the accused was by coincedence and not knowingly by the accused persons—* H

A *Infirmity between medical evidence and oral evidence as to absence of 4 injuries on the body of the deceased not fatal to prosecution case particularly when witnesses had seen the incident from the rooftop—Held, presence of eyewitnesses, PWs 8 and 9 cannot be doubted nor their evidence has been impeached in any manner—Under such circumstances, conviction of the appellants unassailable.*

B

Accused D and N had committed the murder of 5 members (parents and two brothers and a sister of PW8) of a family and were convicted on the evidence of two eye witnesses PW8 and PW9 (husband of PW8). On an earlier occasion PW8 was raped by accused D and he threatened that if any C **body gives evidence during the trial of rape case, he would not be spared. But D was convicted on the evidence of PW8, the rape victim. After the conviction of D in the rape case, an appeal before the High Court was preferred and bail was granted. On release, the accused D along with his brother N murdered the five members of the family of PW8 quite unaware that in the meantime PW8 got married to PW9 and on the fateful night she was there** D **on the roof top along with her husband and the murders took place in their presence. The trial court on the evidence of PW8 and PW9 convicted the appellants D and N under Sections 302/34 and awarded death penalty to both the accused and the same was confirmed by the High Court on appeal. Hence this appeal.**

E

It was contended by the appellants that the evidence of PW8 and PW9 could not be relied upon for the FIR alleged to have been given by PWs8 and 9 had not been really given at 10.00 a.m and such timing was given by manipulation so as to secure the presence of these two eye witnesses for as per the evidence of the photographer, he reached the spot at 8.00 a.m. as per F **his evidence. Therefore, it could not be said that no information had been given till 10.00 a.m. In view of the above lacuna, it was further submitted that the evidence of village Sarpunch who was examined as defence witness 1 and who had gone with PW8 to lodge the FIR to the effect that neither PW8 nor her husband PW9 has seen the occurrence assumed great significance and the same piece of evidence has not been given its due weight.**

G

Partly allowing the appeal, this Court

HELD : 1. Having scrutinised the evidence of PW8 and PW9 there is nothing in their cross-examination for which either their presence can be doubted or their evidence can be impeached in any manner. Both the witnesses H **have given a vivid account of the entire incident which they had seen from**

the roof top. The assailants are not unknown to them, more particularly to PW8 as D had committed rape on PW8 and on the evidence of PW8 he had been convicted and sentenced to 10 years' rigorous imprisonment. As far as the infirmities in the evidence of the photographer that police was at the spot by 8.00 a.m. and the insertion of name of PW9 in the inquest report in a different ink as well as absence of number of injuries on K though eyewitness account is that 4 injuries had been given, the evidence cannot be discarded, particularly when the Investigating Officer has not been asked any question either as to how name of PW9 was on a different ink or about the First Information Report being given at 10.00 a.m. It is true that accused D was convicted on account of evidence of PW8 in the rape case but there is no material to indicate that accused had knowledge of presence of PW 8 in the house on the fateful night as by then PW8 had married and was in her in-laws house. Therefore, the fact that PW8 was left out by the assailants is by co-incidence; and not knowingly by the accused persons. So far as the infirmity between the medical evidence in the absence of 4 injuries on deceased K is concerned, the same cannot be held to be fatal to the prosecution case, more so, the witnesses having seen from roof top and in front of them 5 persons of the family are brutally assaulted by the two accused persons. In the aforesaid circumstances it is difficult to accept the contention that the evidence of two eye witnesses could be discarded by the Court. On the other hand having gone through their evidence it is found to be reliable on which Courts can easily act upon. Therefore, the conviction of the two appellants under Section 302/34 remains unassailable.

[7-H; 8-A-F]

2. So far as accused D is concerned, it is he who had given the threat on the previous occasion that if any body gives evidence in the rape case, the whole family will be wiped off. It is he who after being convicted in the said rape case preferred an appeal and obtained bail from the High Court and had totally misutilised that privilege of bail by killing those who were all members of the family of the witness whose deposition was responsible for his conviction in the rape case. It is he who had assaulted each of the 5 deceased persons by means of *a kulhari* and the injuries as found by the doctor would indicate that the act is an act of a depraved mind and is most brutal and heinous in nature. It is he who had consecrated the plan to put into action his earlier threat but he has taken the help of his brother N. In the facts and circumstances narrated, the act of accused D in giving brutal and merciless blows on the 5 deceased persons cannot but be held to be rarest of rare cases for awarding the extreme penalty of death sentence. [8-G-H; 9-A-B]

3. But so far as accused N, brother of D is concerned, the case stands totally on a different footing. D was a convict undergoing a sentence for ten years in rape case. There is nothing on record to suggest that N was having any past criminal antecedents or that there is a possibility that the accused would commit criminal acts of violence and would constitute a continuing threat to the society. The only aggravating circumstance is that he had come with his brother and had given 3 blows on deceased K only after D chased her and gave *kulhari* blows hitting on the neck while she was running and on sustaining that blow, she fell down and then D gave two to three blows on deceased K and only thereafter N gave *burchi* blows on the said deceased. It is no doubt true that the presence of N at the scene of the occurrence with a *burchi* in his hand has emboldened D to take the drastic action of causing murder of 5 persons of the deceased's family as a result of which the deceased's family was totally wiped off. But because of the fact that N has not assaulted any other person and assaulted the deceased K only after D had given 3 or 4 blows, the case of N cannot be said to be the rarest of the rare cases attracting the extreme penalty of death. [9-C-F]

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 46 of 1999.

From the Judgment and Order dated 29.9.98 of the Punjab & Haryana High Court in M.R. No. 4 of 1997.

R.S. Cheema, Ms. Kawaljit Kochar, Naresh Shekhawat, D.P. Singh and J.D. Jain for the Appellants.

Prem Malhotra and Ajay Siwatch for the Respondent.

The Judgment of the Court was delivered by

G.B. PATTANAIK, J. The two appellants Nirmal and his brother Dharampal, being aggrieved by the judgment of the Punjab and Haryana High Court in murder Reference No.4 have approached this Court. The High Court has affirmed the death sentence awarded against them by the learned Sessions Judge Shahpur for the brutal murder they committed by murdering the entire family of the deceased Tale Ram. The prosecution case in nutshell is, that Tale had three daughters Punam @Bimla, Nirmala and Neelam and two sons named Tinue and Parveen. Wife of Tale Ram was Smt. Krishna. Dharampal and Nirmal and distantly related to Tale Ram. In January 1991 a complaint was lodged by Punam that Dharampal had committed rape on her. In the said proceeding Dharampal had given a threat that if anybody gives evidence in the proceeding

then he will not be spared. Notwithstanding the aforesaid threat the victim Punam deposed in the Court and ultimately Dharampal was convicted by the learned Trial Judge and was sentenced to rigorous imprisonment for 10 years. Accused Dharampal preferred an appeal against the said conviction and sentence and the High Court after entertaining the appeal released him on bail by order dated 25th May, 1993. Dharampal furnished the bail bond on 4th June, 1993 and was released. Punam and her husband had come to village Shahpur Turk and were staying with Tale Ram on 9th June, 1993. On the same day after finishing their dinner both Punam and her husband went to the roof top of the house of Tale Ram and slept there. At about 3.30 a.m. hearing some voice from the courtyard where Punam's father and all other family members had taken rest Punam and her husband got up and they saw accused Dharampal was armed with Kulhari and accused Nirmal was armed with Burchi and they have been giving successive blows on all the family members who were sleeping down below in the courtyard. Punam and her husband were so terrified that they could not raise any alarm and after the two accused persons left the scene of occurrence they came down and found all the 5 family members namely, father Tale Ram, mother Krishna, sister Neelam and brothers Parveen and Tinue are dead. Punam then went to approach their neighbours but none came forward and she became unconscious. She regained consciousness at about 10.00 a.m. and then went to the village Sarpanch and accompanied by him went to the Police Station Shahpur and gave a report which was stated as First Information Report. On the basis of the said First Information Report the police registered a case and started investigation and on completion of the investigation chargesheet was filed. The accused persons were committed to the Court of Sessions and they stood their trial. The prosecution examined as many as 11 witnesses which includes two eye witnesses Punam-PW8 and her husband Rajkumar-PW9. The two doctors examined in the case are PWs 4 and 5. The defence was one of denial and two witnesses examined on behalf of defence one of whom was the village Sarpanch who allegedly had gone with Punam to lodge First Information Report. The learned Sessions Judge relying upon the evidence of the two eye witnesses PWs 8 and 9 came to the conclusion that they are the truthful witnesses and their version can be safely relied upon. Taking into consideration the aggravating circumstances as well as the mitigating circumstances, if any, and drawing up a balancesheet of the same and taking into consideration the manner in which the ghastly murder of five members of a family was committed by the two accused persons and being of the opinion that the accused are security risk the learned Sessions Judge came to hold that the case is one which satisfy the test of rarest of rare case and death penalty is the only

A B C D E F G H

A sentence which is awardable and accordingly awarded death sentence to both the accused Nirmal and Dharampal. The two accused persons preferred appeal to the High Court of Punjab and Harayana and a reference was also made for confirmation of death sentence which was registered Murder Reference No. 4. The High Court by the impugned judgment affirmed the conviction and B sentence passed by the learned Sessions Judge and dismissed the appeal preferred by the accused persons. The High Court recorded the finding that the murder of Tale and 4 family members of his family is pre meditated and was done in a calculated manner and is certainly a rarest of rare case where death sentence will be the only proper sentence which will commensurate with the gravity of the crime and the circumstances in which the same was C committed.

Mr. Cheema, the learned senior counsel appearing for the appellants contended that the evidence of the two eye witnesses cannot be relied upon as several features in the prosecution case indicate that the First Information D Report alleged to have been given by PWs 8 and 9 had not been really given at 10.00 a.m. but such timing was given by manipulation so as to secure the presence of the two eye witnesses PWs 8 and 9 in the house of deceased Tale who could be utilised as eye witnesses to the occurrence. In elaborating this submission the learned counsel urged that the prosecution evidence enfolded through the photographer who was examined as PW1 being that by E the time he reached at the spot at 8.00 a.m. the police persons were already there, therefore, it can not be said that no information had been given till 10.00 a.m. Mr. Cheema further urged that the four inquest reports in the present case itself would indicate that the name of Raj Kumar was in a different ink and thus obviously introduced later which would belie the prosecution case F that Raj Kumar and her wife Punam were in the house of the deceased on the fateful night. According to Mr. Cheema such serious lacuna in the prosecution case, creates suspicion in the mind have been brushed aside both by the Sessions Judge and the High Court and on the other hand witnesses Raj Kumar and his wife Punam have been held to be reliable witnesses on whose testimony the two brothers have been sentenced to be hanged. Mr. Cheema G also further contended that the presence of 4 wounds on the person of Krishna as deposed to by the eye witnesses is belied by the medical evidence and instead of entertaining doubt about prosecution case and coming to a conclusion that the prosecution does not come forward with a true version of the occurrence the Courts below have accepted the prosecution case and H have sentenced to death the two appellants.

Mr. Cheema also further contended that in the context of the aforesaid lacunae in the prosecution case the evidence of the village Sarpanch who was examined as defence witness no. 1 and who had gone with Punam to lodge the First Information Report to the effect that neither Punam nor her husband Raj Kumar has seen the occurrence assumes great significance and the said piece of evidence has not been given its due weight. Mr. Cheema also urged that the occurrence having taken place at 3.30 a.m. there is no explanation as to why the First Information Report was lodged only at 10.00 a.m. and it is unbelievable that either any of the villager or even Punam's husband did not dare to lodge the report. Mr. Cheema further urged that it is Punam who deposed in the rape case and said Punam was available in the house of the deceased Tale and yet she has been left out while others have been murdered and those who have been murdered did not lead evidence in the rape case. The learned senior counsel Mr. Cheema then urged that assuming the prosecution case as unfolded through the evidence of the two eye witnesses PWs 8 and 9 happened in the manner as ascribed, but the nature and the quality of evidence is such that the extreme sentence of death penalty could not have been imposed for taking the life of two persons. Mr. Cheema lastly urged that at any rate the threat, if any, had been given by accused Dharampal and the eye witnesses account of PWs 8 and 9 indicate that Dharampal had killed all the 5 persons and his brother Nirmal had accompanied him and given two blows on Krishna by means of a Burchi and, therefore, said Nirmal does not deserve the same sentence of death penalty as Dharampal.

The learned counsel for the respondent on the other hand submitted, that the eye witnesses account of PWs 8 and 9 corroborate each other and nothing has been elicitated in their cross examination for impeaching their testimony, as such the Sessions Judge and the High Court were fully justified in relying on their evidence. The learned counsel also urged that the murder in question being a calculated, deliberate and pre-planned action and was in pursuance to the earlier threat given by Dharampal and further the entire family of Tale Ram having been killed in a brutal manner both the appellants deserve the extreme penalty of death and there is no infirmity with the judgment of the High Court affirming the death sentence.

In view of the submissions made at the bar and because of the fact that the two appellants have been sentenced to death we have been taken through the evidence of two eye witnesses PWs 8 and 9. Having scrutinised their evidence with utmost care we have found nothing in their cross-examination for which either their presence can be doubted or their evidence can be

A impeached in any manner. Both the witnesses, namely, Punam and her husband Raj Kumar have given a vivid account of the entire incident which they had seen from the roof top. The assailants are not unknown to them, more particularly, to Punam as Dharampal had committed rape on Punam and on the evidence of Punam, he had been convicted and sentenced to 10 years' rigorous imprisonment. We have also taken note of the infirmities pointed out B by Mr. Cheema, the learned senior counsel for the appellant, namely, the evidence of the photographer that police was at the spot by 8.00 a.m. and the insertion of name of Raj Kumar in the inquest report in a different ink as well as absence of number of injuries on Krishna though eye witnesses account is that 4 blows had been given. But on such score the evidence cannot be C discarded, particularly when the Investigating Officer has not been asked any question either as to how name of Raj Kumar was on a different ink or about the First Information Report being given at 10.00 a.m. It is true that accused Dharampal was convicted on account of evidence of Punam in the rape case but there is no material to indicate that accused had the knowledge of presence of Punam in the house on the fateful night as by then Punam had D married and was in her in laws house. Therefore, the fact that Punam was left out by the assailants is by coincidence and not knowingly by the accused persons. So far as the infirmity between the medical evidence and the oral evidence on the absence of 4 injuries on deceased Krishna is concerned, the said cannot be held to be fatal to the prosecution case more so the witnesses E having seen from roof top and in front of them 5 persons of the family are brutally assaulted by the two accused persons.

In the aforesaid circumstances it is difficult for us to accept the contention of Mr. Cheema that the evidence of two eye witnesses could be discarded by the Court. On the other hand having gone through their evidence F we find them to be reliable on which Courts can easily act upon. In our considered opinion, therefore, the conviction of the two appellants under Section 302/34 remains unassailable. Coming to the question of sentence, however, we find that the High Court has not considered the individual role played by each of the appellants. So far as accused Dharampal is concerned, G it is he who had given the threat on the previous occasion that if anybody gives evidence in the rape case the whole family will be wiped off. It is he who after being convicted in the said rape case preferred an appeal and obtained a bail from the High Court and has totally misutilised that privilege of bail by killing 5 persons who were all members of family of Punam whose deposition was responsible for his conviction in the rape case. It is he who H has assaulted each of the 5 deceased persons by means of Kulhari and the

nature of the injury as found by the doctor would indicate that the act is an act of a depraved mind and is of most brutal and heinous in nature. It is he who had consecrated the plan to put into action his earlier threat but he has taken the help of his brother Nirmal. In the facts and circumstances narrated the act of accused Dharampal in giving brutal and merciless blows on the 5 deceased persons cannot but be held to be rarest of rare case for awarding the extreme penalty of death sentence. We, therefore, affirm the conviction and sentence of appellant Dharampal and dismiss his appeal and direct that the he should be hanged till death.

But so far as accused Nirmal, brother of Dharampal is concerned, the case stands totally on different footing. Dharampal was a convict undergoing a sentence of ten years in a rape case. There is nothing on record to suggest that Nirmal was having any past criminal antecedents or that there is possibility that accused would commit criminal acts of violence and would constitute a continuing threat to the society. The only aggravating circumstance is that he had come with his brother and has given 3 blows on deceased Krishna only after Dharampal chased Krishna and gave a Kulhair blows hitting on neck while Krishna was running and on sustaining that blow she fell down and then Dharampal gave two to three blows on Krishna and only thereafter Nirmal gave Burchi blows on said Krishna. It is no doubt true that from the presence of Nirmal at the scene of occurrence with a Burchi in his hand has emboldened Dharampal to take a drastic action of causing murder of 5 persons of Tale's family as a result of which Tale's family was totally wiped off. But the fact that Nirmal has not assaulted any other person and assaulted Krishna only after Dharampal had given her 3 and 4 blows, the case of Nirmal cannot be said to be the rarest of rare case attracting the extreme penalty of death. While, therefore, we uphold his conviction under Section 302/34, we commute his sentence of death into imprisonment for life.

This appeal is disposed of accordingly.

R.K.S. Appeal disposed of.