RAMESHBHAI CHANDUBHAI RATHOD

v.

THE STATE OF GUJARAT

(Criminal Appeal No. 575 of 2007)

JANUARY 24, 2011

[HARJIT SINGH BEDI, P. SATHASIVAM AND CHANDRAMAULI KR. PRASAD, JJ.]

Sentence/Sentencing: Death sentence or life imprisonment – In case of rape and murder of young girl of tender age – Difference of opinion between Judges on sentencing part – Pasayat, J. observed that the case fell within the category of the rarest of rare cases as the deceased was a helpless child of tender age and the appellant, being a watchman in the building in which she was residing was in a position of trust, and as the murder and rape was particularly brutal, the death sentence was the only adequate one – Ganguli, J. differed on this aspect and held that a sentence of life imprisonment was proper one in the light of mitigating circumstance particularly the young age of the appellant and the possibility that he could be rehabilitated and would not commit any offence later on – Held: There is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man – The broad principle is that the death sentence is to be awarded only in exceptional cases – The appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so – In the light of the findings recorded by Ganguli, J., it would not be proper to maintain the death sentence on the appellant – At the same time, the gravity of the offence, the behaviour of the appellant and the

fear and concern such incidents generate in ordered society, cannot be ignored – The death sentence awarded is commuted to life which must extend to the full life of the appellant subject to any remission or commutation at the instance of the Government for good and sufficient reasons – Crime against women – Penal Code, 1860 – s.302 – Code of Criminal Procedure, 1973 – s.235 r.w. s.354, s.433-A.

The trial court convicted the accused-appellant for raping and murdering a girl of tender age. The High Court upheld the conviction order. The judgment of the High Court was challenged by the appellant in the Supreme Court and after the grant of special leave, the matter was heard by Division Bench. The Bench delivered two judgments on 25th February 2009. The two Hon'ble Judges were of the unanimous opinion that the conviction of the appellant was to be maintained, however, a difference of opinion arose on the sentencing part. *Pasayat, J.* observed that the case fell within the category of the rarest of rare cases as the deceased was a helpless child of tender age and the appellant, being a watchman in the building in which she was residing with her parents, was in a position of trust, and as the murder and rape was particularly brutal, the death sentence was the only adequate one. *Ganguli, J.* however differed on this aspect and held that as there was some uncertainty with the nature of the circumstantial evidence and that mitigating circumstance particularly the young age of the appellant and the possibility that he could be rehabilitated and would not commit any offence later on, could not be ruled out, and that the statutory obligation cast on the trial court under Section 235 (2) read with Section 354(3), Cr.P.C. had been violated in as much that the appellant was not given adequate opportunity to plead that the sentence of life imprisonment was not proper. Accordingly, the matter came up before this Court only on the question of sentence.

Disposing of the appeal, the Court

HELD: 1. There is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out. The broad principle is that the death sentence is to be awarded only in exceptional cases. Both Hon'ble Judges had relied extensively on **Dhanonjoy Chatterjee's* case. In that case, death sentence was awarded by the trial court on similar facts and confirmed by the High Court and the appeal too was dismissed by this Court leading to the execution of the accused. *Ganguli J.* had, however, drawn a distinction on the facts of that case and the instant one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so. In the light of the findings recorded by *Ganguli, J.,* it would not be proper to maintain the death sentence on the appellant. At the same time, the gravity of the offence, the behaviour of the appellant and the fear and concern such incidents generate in ordered society, cannot be ignored. A via-media ought to be adopted in the light of the judgment of this Court in ***Ramraj's* and ****Mulla's* case. In these two cases, this Court had held that the term imprisonment for life which is found in Section 302, IPC, would mean imprisonment for the natural life of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A, Cr.P.C. It was held that the Court should be free to determine the length of imprisonment which would suffice the offence committed. Thus, despite

A **the nature of the crime, the mitigating circumstances can allow the court to substitute the death penalty with life sentence. In the instant case, the death sentence awarded to him is commuted to life with directions that the life sentence must extend to the full life of the** B **appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reasons. [Para 2] [835-E-H; 836-A-D-F; 837-B]**

*******Ramraj vs. State of Chhattisgarh* **(2010) 1 SCC 573;** ********Mulla & Anr. State of Uttar Pradesh* **(2010) 3 SCC 508 –** C **relied on.**

Bachan Singh vs. State of Punjab **1980 (2) SCC 684;** *Machi Singh vs. State of Punjab* **1993 (3) 470;** *Dhanonjoy Chatterjee vs. State of West Bengal* **1994 (2) SCC 220 –** D **referred to.**

2. Some observations were made by Ganguly, J. on the omission of the trial court in dealing with the question of sentence on the principles underlying Section 235 read E **with Section 354, Cr.P.C. The observations made were a little broad based on the facts of the instant case and would present insurmountable practical difficulties for a trial court. Even otherwise, the facts indicated that the appellant had been given enough time and opportunity** F **for pleading on the question of sentence. [Para 3] [837-D-E]**

Case Law Reference

1980 (2) SCC 684	**referred to**	**Para 1**
G **1993 (3) SCC 470**	**referred to**	**Para 1**
1994 (2) SCC 220	**referred to**	**Paras 1, 2**
(2010) 1 SCC 573	**relied on**	**Para 2**
(2010) 3 SCC 508	**relied on**	**Para 2**

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CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 575 of 2007.

From the Judgment & Order dated 16.02.2006 of the High Court of Gujarat at Ahmedabad in Confirmation Case No. 4 of 2005 with the Criminal Appeal No. 1221 of 2005.

Sudhir Kulshrehtha for the Appellant.

K. Enatoli Sema, Jesal, Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

HARJIT SINGH BEDI,J. 1. As the facts have been very comprehensively given in the order of Pasayat, J., we will only refer to such facts as are necessary for the disposal of the reference which has been made to us. Suffice it to say that the accused-appellant Rameshbhai Chandubhai Rathod, aged about 28 years, was employed as a watchman in Sanudip Apartments, Rander Road, Surat City. Flat No.A/2 was occupied by the complainant Nareshbhai Thakorebhai Patel, his wife, a son Brijesh, aged 16 years, and the deceased, a daughter, a Class IV student in Ankur School. The accused-appellant was residing with his wife Savita and two children in a one room tenement close by. On the 17th December 1999, the complainant and his wife went to Udhana at about 8.00 p.m. to attend a religious ceremony and on returning therefrom found that their daughter was missing. Frantic enquiries made by the family, bore no result. The complainant thereupon lodged a FIR at 2.30 a.m. on the 18th December 1999 with the Rander Police Station to that effect. The complainant nevertheless continued to search for the child and in due course ascertained from one Bipinbhai Bhandari, one of his friends, who told him that his (Bhandari's) old servant Bishnubhai had told him that he had seen the appellant taking the girl with him on his bicycle. This information was conveyed to the police by the complainant.

A The police made a search for the appellant but he could not be immediately found but was ultimately located the next day i.e. on the 19th December 1999 by Chandravadan Patel who spotted him sitting in an open space near the vegetable market. The appellant made an extra judicial confession to him B that he had raped and killed the child. The police was, accordingly, informed and they took the appellant into custody. The appellant also made a disclosure to the complainant as to the place of incident and the dead body was recovered from that place. On the completion of the investigation, the accused C was charged for offences punishable under Sections 363, 366,376,302 and 397 of the IPC and brought to trial. The trial court on a minute appreciation of the evidence which was exclusively circumstantial in nature, held that the case against the appellant had been proved beyond doubt, and accordingly convicted him and sentenced him to death for the commission D of the offence punishable under section 302 and to various terms of imprisonment for the other offences. The matter was, thereafter, referred to the High Court and the accused also filed an appeal challenging his conviction. The High Court confirmed the reference and dismissed the appeal. The High Court also E found that the case against the accused fell within the category of the rarest of the rare cases, as envisaged in *Bachan Singh vs. State of Punjab* 1980 (2) SCC 684 and *Machi Singh vs. State of Punjab* 1993 (3) SCC 470 as followed and clarified in a series of other judgments subsequently, particularly, in F *Dhanonjoy Chatterjee vs. State of West Bengal 1994 (2) SCC 220* and observing that in the balance sheet of the aggravating and mitigating circumstances, the former were pre-dominant, confirmed the death sentence. The judgment of the High Court was challenged by the appellant in this Court and after the grant G of special leave, the matter was heard by a Division Bench. The Bench delivered two judgments on the 25th February 2009 and while the two Hon'ble Judges were of the unanimous opinion that the conviction of the appellant was to be maintained, a difference of opinion arose as to the sentence that was to be H awarded with Pasayat,J. observing that the case fell within the

category of the rarest of rare cases as the deceased was a helpless child of tender age and that the appellant, being a watchman in the building in which she was residing with her parents, was in a position of trust, and as the murder and rape was particularly brutal, the death sentence was the only adequate one. Ganguli, J. however differed on this aspect and held that as there was some uncertainty with the nature of the circumstantial evidence and that the mitigating circumstance particularly the young age of the appellant and the possibility that he could be rehabilitated and would not commit any offence later on, could not be ruled out, and that the statutory obligation cast on the trial court under Section 235 (2) read with Section 354 (3) of the Cr.P.C. had been violated inasmuch that the accused had not been given adequate opportunity to plead on the question of sentence and also citing a large number of cases including those of rape and murder of young children, opined that a sentence of life imprisonment was the proper one. This matter has, accordingly, been referred to us only on the question of the sentence.

2. As already mentioned above, both Hon'ble Judges have relied on a number of cases which are on almost identical facts in support of their respective points of view. We notice that there is a very thin line on facts which separates the award of a capital sentence from a life sentence in the case of rape and murder of a young child by a young man and the subjective opinion of individual Judges as to the morality, efficacy or otherwise of a death sentence cannot entirely be ruled out. It is now well settled that as on today the broad principle is that the death sentence is to be awarded only in exceptional cases. Both Hon'ble Judges have relied extensively on *Dhanonjoy Chatterjee's* case (supra). In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguli,J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young

A man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so. We are, therefore, of the opinion that in the light of the B findings recorded by Ganguli,J. it would not be proper to maintain the death sentence on the appellant. At the same time the gravity of the offence, the behaviour of the appellant and the fear and concern such incidents generate in ordered society, cannot be ignored. We, therefore, feel that a via-media C ought to be adopted in the light of the judgment of this Court in *Ramraj vs. State of Chhattisgarh* (2010) 1 SCC 573 and *Mulla & Anr. State of Uttar Pradesh* (2010) 3 SCC 508. In these two cases, this Court has held that the term imprisonment for life which is found in Section 302 of the IPC, would mean D imprisonment for the natural life of the convict subject to the powers of the President and the Governor under Articles 72 and 161 of the Constitution of India or of the State Government under Section 433-A of the Code of Criminal Procedure. In *Mulla's* case (supra), this Court has said :

E "We are in complete agreement with the above dictum of this Court. It is open to the sentencing court to prescribe the length of incarceration. This is especially true in cases where death sentence has been replaced by life imprisonment. The court should be free to determine the F length of imprisonment which will suffice the offence committed. Thus we hold that despite the nature of the crime, the mitigating circumstances can allow us to substitute the death penalty with life sentence.

G Here we would like to note that the punishment of life sentence in this case must *extend to their full life, subject to any remission by the Government for good reasons.*

For the foregoing reasons and taking into account all the aggravating and mitigating circumstances, we H confirm the conviction, however, commute the death

sentence into that of life imprisonment. The appeal is disposed of accordingly." A

In arriving at its conclusion, the Court relied on similar observations made in the case of *Ramraj* (supra). We are, therefore, of the opinion that the appellant herein ought to be awarded a similar sentence. We accordingly commute the death sentence awarded to him to life but direct that the life sentence must extend to the full life of the appellant but subject to any remission or commutation at the instance of the Government for good and sufficient reasons. B C

3. As already noticed above, Ganguli, J. has made some observations on the omission of the trial court in dealing with the question of sentence on the principles underlying Section 235 read with Section 354 of the Cr.P.C. We are of the opinion that some of the observations made are a little broad based on the facts of the present case and would present insurmountable practical difficulties for a trial court. Even otherwise the facts indicate that the appellant had been given enough time and opportunity for pleading on the question of sentence. We accordingly dispose of this appeal in the above manner. D E

D.G. Appeal disposed of.