B. KUMAR @ JAYAKUMAR @ LEFT. KR. @ S. KUMAR A

v.

INSP.OF POLICE TH. C.B.C.I.D.

(Criminal Appeal Nos. 980-981 of 2013)

OCTOBER 27, 2014 B

[H.L.DATTU, CJI., S.A. BOBDE AND ABHAY MANOHAR SAPRE, JJ.]

Penal Code, 1860 – ss. 302, 307, 342, 376, 394, 397 and 449 – Rape of PW1 and murder of her brother, 'M' – Attempt to murder PW1 and her relative PW2 – Robbery of jewellery – Conviction of appellant – Propriety – Held: Proper, as it was based upon cogent and reliable evidence – Appellant was greatly attracted to PW1 and came to her house driven by lust – He committed the murder of 'M' on the spur of the moment, since the latter saw him committing rape and further tried to make a phone call to someone outside – Similarly, appellant attacked PW2, who had seen him attacking 'M' and then attacked PW1 with a view to intimidate her. C D E

Sentence / Sentencing – Conviction of appellant for murder, attempt to murder and rape – Victims were minor children – Imposition of death penalty – Propriety – Held: Conduct of appellant was barbaric and inhumane – However, his main motive was not to commit murder but to satisfy his lust – Element of recklessness in appellant's actions not sufficient to attract the extreme penalty of death – Keeping in view the mitigating factors including appellant's conduct after commission of the crime, his case does not fall into the category of rarest of the rare – Appellant convicted for the remainder of his life for the offence of murder – Code of Criminal Procedure, 1973 – s.354(3) – Penology. F G

 H

A Partly allowing the appeals, the Court

HELD:1. From the evidence, it is clear that the appellant came to the house of PW1 driven by lust with the intention of satisfying his desires at the cost of the chastity of PW1. He was armed with an *aruval* (a sharp B edged weapon), which in all probability he intended to use to intimidate anyone who opposed him, since he was probably aware that there were no adults in the house. There is no doubt that he committed the murder of the deceased 'M' on the spur of the moment, since he was C enraged and infuriated when the boy had untied himself, seeing him committing rape and further that he tried to make a phone call to someone outside. It is also clear that it was in the same state of mind that he attacked P.W.2, who had seen him attacking the deceased 'M'. Similarly, D he then attacked PW1 with a view to intimidate her. The conviction recorded by both, the Sessions Court and the High Court, is based upon cogent and reliable evidence. Thus, the appellant has been found guilty beyond all reasonable doubt. [Paras 17, 18 and 22] [581-G-H; 582-E B, D; 585-H; 586-A]

2.1. The conduct of the appellant against the three minor children was barbaric and inhumane. However, the main motive of the appellant was not to commit murder but F to satisfy his lust. There was undoubtedly an element of recklessness in the appellant's actions, but that may not be sufficient in the circumstances of this case to attract the extreme penalty of death. [Para 19] [583-B, D-E]

2.2. As a matter of law, it is imperative for a Criminal G Court to consider vide Section 354(3) Cr.P.C., the 'special reasons' for imposing the death sentence. Two fundamental objectives of penology apply even in grotesque cases: (a) deterrence and (b) reformation. Other factors such as seriousness of the crime, the H criminal history of the appellant and also his propensity

to remorselessly commit similar dastardly crimes in the future, must be considered. In the present case, having assessed the mitigating factors including the appellant's conduct after the commission of the crime, it is clear that this case does not fall into the category of rarest of the rare. Consequently, the conviction and other sentences except the death sentence are hereby upheld. The appellant thus stands convicted for the remainder of his life for the offence of murder. [Paras 21, 23] [584-E; 586-B-D]

Bishnu Deo Shaw vs. State of West Bengal **(1979) 3 SCC 714: 1979 (3) SCR 355 and** *Rajendra Prasad vs. State of U.P.* **(1979) 3 SCC 646: 1979 (3) SCR 78 – held stood overruled.**

Bachan Singh vs. State of Punjab **(1980) 2 SCC 684 and** *Yakub Abdul Razak Memon vs. State of Maharashtra* **(2013) 13 SCC 1 – relied on.**

Raju vs. State of Haryana **(2001) 9 SCC 50: 2001 (3) SCR 409;** *Sunil Damodar Gaikwad vs. State of Maharashtra* **(2014) 1 SCC 129: 2013 (9) SCR 295; and** *Md. Mannan @ Abdul Mannan v. State of Bihar* **(2011) 5 SCC 317: 2011 (5) SCR 518 and** *Dalbir Singh vs. State of Punjab* **(1979) 3 SCC 745: 1979 (3) SCR 1059 – referred to.**

Case Law Reference:

2001 (3) SCR 409	**referred to**	**Para 19**
2013 (9) SCR 295	**referred to**	**Para19**
2011 (5) SCR 518	**referred to**	**Para 20**
1979 (3) SCR 355	**held stood overruled**	**Para 21**
1979 (3) SCR 78	**held stood overruled**	**Para 21**
1979 (3) SCR 1059	**referred to**	**Para 21**
(1980) 2 SCC 684	**relied on**	**Para 21**

A **(2013) 13 SCC 1 relied on Para 21**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 980-981 of 2013.

From the Judgment & Order dated 02.08.2011 of the High
B Court of Madras in R.T. No. 4 of 2010 and Criminal Appeal No. 161 of 2011.

P.C. Aggrawala, Revathy Raghavan for the Appellant.

Subramonium Prasad, AAG, M. Yogesh Kanna for the
C Respondent.

The Judgment of the Court was delivered by

S.A. BOBDE, J. 1. These criminal appeals have been filed by the appellant/accused against the final common judgment and order dated 02.08.2011 in Trial Case No. 4 of 2010 and Criminal Appeal No. 161 of 2011 passed by the High Court of Madras.

2. A sentence of death having been imposed upon the
E appellant, learned Sessions Judge, Nagapattinam, referred the matter for confirmation to the High Court under Section 366 of the Criminal Procedure Code, 1973 (hereinafter referred to as the 'Cr.P.C.'). The appellant preferred an appeal against conviction and sentences imposed upon him by the learned
F Sessions Judge, Nagapattinam. The High Court having dismissed the appeals the appellant stands convicted and sentenced to death, for house-trespass under Section 449; for wrongful confinement under Section 342; for rape under Section 376(1); for murder under Section 302; for attempt to murder
G under Section 307; for causing hurt during robbery under Section 394 and for robbery or dacoity with attempt to cause death under Section 397 of the Indian Penal Code [hereinafter referred to as "I.P.C."].

H 3. The appellant has been charged and convicted for

committing the rape of the prosecutrix and slitting her throat and decamping with jewellery; further for the murder of her brother, Manikandan, who saw him committing the rape and for slitting the throat of P.W.-2 Sangeetha, who saw him kill the boy.

4. According to the prosecution, the appellant, who had worked as a mason in the house of the parents of P.W.-1 Prosecutrix, gained access into the house on 04.10.2002. P.W.-11 Ramalingam and his wife P.W.-12 Maragatham had left the house in the morning. P.W.-1, the Prosecutrix, her relative P.W.-2 Sangeetha and the deceased Manikandan, her brother, were alone in the house. When the appellant rang the door bell and the deceased enquired, the appellant told him that he has left his iron bowl used for masonry work and wanted to take it back. Though the deceased told him that he could take it back after his father's return, the Prosecutrix intervened and said that he had been working in their house as mason and hence by so saying, she opened the door. The appellant was carrying an *aruval* which is a sharp edged curved weapon in his waist. The appellant upon entry, bolted the door immediately. When Manikandan, P.W.-1 Prosecutrix and P.W.-2 Sangeetha screamed, the appellant took his *aruval* from his waist and threatened the inmates not to shout by keeping the *aruval* on the neck of the deceased. He then gagged and tied the hands of P.W.-2 Sangeetha and Manikandan and confined them to the pooja room by tying them to the window with a saree. The appellant raised the volume of television and then went to the bedroom where P.W.-1 Prosecutrix was hiding. He pulled the mattress from the cot to the ground and tied her hands and legs and gagged her. He then removed her clothes and raped her.

5. By this time, the deceased managed to loosen the knot and came to the bedroom and saw the appellant committing rape on the Prosecutrix. He ran to the hall to make a call. On seeing this, the appellant angrily dragged Manikandan to the toilet and cut his neck with *aruval*, ultimately causing his death. In the meantime, P.W.-2 Sangeetha, who had also managed

A to untie the knot, came and saw the accused cutting the neck of Manikandan with *aruval* in the toilet. She went inside the pooja room and hid herself. But she had been noticed by the appellant, who went to the pooja room and cut her neck with the *aruval*, and thereafter she swooned. The appellant then went B to the bedroom and demanded the jewellery of the prosecutrix. She gave her ear-stud and chain and on further demand, she gave the bureau key and the appellant took away the other jewels from the bureau.

C 6. The prosecutrix and P.W.-2 Sangeetha went out and signaled for help. One Kannan (P.W.-13) and Raja (P.W.-7) stopped their scooter and noticed injuries inflicted upon P.Ws.-1 and 2 and they took them to the Sirkali Government Hospital in an auto-rickshaw.

D 7. They were examined by P.W.- 5 Dr. C. Elangovan, who confirmed a cut injury on the throat of P.W.- 1 Prosecutrix, measuring 10 x 4 cms, exposing underlying thyroid cartilage and blood vessels. He referred the prosecutrix for further treatment. He issued a wound certificate.

E 8. Dr. C. Elangovan also examined P.W.-2 Sangeetha and found a cut injury measuring 7 x 3 cms exposing underlying thyroid cartilage and blood vessels. He also referred her for further treatment.

F 9. A Crime No. 886 of 2002 was registered. P.W.- 22 Sub Inspector Murugavelu prepared and dispatched the First Information Report to the Court.

10. A thorough investigation was conducted. Finger prints G and photographs were also collected during the course of investigation.

11. A postmortem on the body of the deceased Manikandan was conducted. P.W.-5 Dr. C. Elangovan found the following injuries on the body of Manikandan:

H

"INJURIES

An incised wound in front of the middle of the neck 4 cm above Jugular notch, extending from right Sterno cleidomastoid region to left sternocledíomastoid muscle region 10 cms in length, 3 cm breadth and depth 2 cm. Left Sternocledíomastoid muscle was cut partially. Trachea was cut completely at the level 2 cm below cricoid cartilage. Right side internal Jugular vein and right common carotid artery cut completely. Oesophagus intact and exposed.

On opening Thorax - No fracture ribs. Hyoid bone intact. No foreign body in Larynx or trachea. Heart chambers empty. Heart C/S pale. Great vessels empty. Lungs C/S pale. On opening of Abdomen - Peritoneum intact. Stomach contained approximately 200 ml of partially digested food material. Stomach mucosa pale. Small intestine empty, mucosa pale. Liver, Kidney, Spleen C/S pale. No lacerations Urinary bladder empty. On opening head - No fracture of skull bones. Brain membranes intact. No haemorrhage. Brain matter pale. Spinal column No. fractures."

The doctor opined that the deceased appeared to have died of haemorrhage and shock due to injury to great vessels of the neck, 6 to 12 hours prior to postmortem.

12. The Trial Court considered the entire evidence and convicted the appellant for the offences of rape of the prosecutrix, murder of the boy Manikandan, attempt to murder the girl Sangeetha and the prosecutrix and also for robbery of jewels. The Trial Court found that the appellant who had been working in the house of the prosecutrix as a mason, entered the house on the ruse of wanting to take an iron bowl which he had left behind. The prosecutrix, P.W.-2 Sangeetha and the deceased boy Manikandan tried to raise an alarm because the appellant, upon entering their home, immediately bolted the

door from inside. He threatened the inmates with the *aruval* and asked them to keep quiet. Having tied Sangeetha and the boy Manikandan in the pooja room, he went to the bedroom and committed rape upon the prosecutrix. The deceased boy Manikandan, who had somehow untied himself, saw him do so and was about to make a phone call when the appellant caught the boy angrily and slit his throat with the *aruval*. Since he saw that P.W.-2 Sangeetha had seen him committing murder, he went to the pooja room and slit her throat. Then he demanded jewellery from the prosecutrix and left. He was apprehended after about six years. In the meantime it has been found that he entered into a marriage tie. P.W.-26 Devan, deposed that he had arranged the marriage of the appellant with one Sushila and after the birth of a female child, the accused, on the pretext of going to Salem, abandoned her.

13. The jewellery was recovered from a Pawn Shop. The owner of the shop testified that the appellant pledged M.Os. 2, 4 and 5 robbed jewels for which he gave a sum of Rs. 2,000/- and the accused put a signature on the pawn receipt. Another Pawn Shop owner P.W.-25 Chandran testified that the jewels M.Os 3 and 6 were pawned with him for a sum of Rs. 375/- and a pawn receipt was executed. Signatures on the pledge receipt were sent for examination and comparison to the Forensic Sciences Laboratory, Chennai which opined that both the signatures are of the same person i.e. the appellant.

14. The Trial Court thus convicted the appellant as stated above for rape, murder, attempt to murder and robbery. Since the Trial Court imposed the death sentence, the matter was referred to the High Court for confirmation. The appellant also filed an appeal against the conviction under the other offences. The High Court considered the entire evidence and having heard the appellant confirmed the findings and sentence of the Trial Court by a detailed judgment. In particular, the High Court also considered the question of the propriety of the death sentence and confirmed the same.

15. We have heard the learned senior counsel for the appellant Shri P.C. Aggarwala, and learned counsel for the State Shri Subramonium Prasad at great length. Having examined the entire evidence, we are satisfied that there is no error whatsoever in the conviction of the appellant for all the offences he has been charged with. There is clear and unimpeachable evidence of the prosecutrix herself, as regards the offence of rape, though it was argued that penetration was not proved. We find no merit whatsoever in the said submission. In view of the other evidence suggesting the rape, such as injuries on the private parts of the prosecutrix, moreover, there is nothing to cast any doubt at the version of the prosecutrix as regards the offence of rape. The injuries on her throat caused by a sharp edged weapon have been examined by the doctor. Her evidence in this regard is also unimpeachable. She has also deposed about the removal of jewellery which was subsequently found to have been pawned by the appellant in two pawn shops and was thereafter recovered. The evidence of P.W.-2 Sangeetha corroborated the deposition of the prosecutrix, both as regards the injury caused to the prosecutrix and decamping with the jewellery.

16. Similarly, there is no reason to doubt the evidence produced by the prosecution as regards the assault on Sangeetha with an *aruval* and slitting of her throat. Sangeetha, who is an injured witness had no reason to lie. Her presence in the house has also been explained. She is the daughter of the elder brother of the father of the prosecutrix and was staying with the family at the relevant time.

17. We thus have no hesitation in confirming the concurrent findings and facts recorded by the Sessions Court and the High Court. We find from the evidence that the appellant came to the house driven by lust with the intention of satisfying his desires at the cost of the chastity of the prosecutrix. He was armed with an *aruval,* which in all probability he intended to use to intimidate anyone who opposed him, since he was probably aware that there were no adults in the house. Since he had

worked as a mason in the house, he had noticed the prosecutrix to whom he felt greatly attracted. There is evidence to the fact that she looks older than her age. There is no doubt that he committed the murder of the deceased Manikandan on the spur of the moment, since he was enraged and infuriated when the boy had untied himself, seeing him committing rape and further that he tried to make a phone call to someone outside. There is thus little doubt, that he attacked the deceased with a view to ensure a safe escape from the scene of the crime and further, eliminating evidence against himself.

18. Having regard to the fact that he was initially content with tying up the deceased to keep him out of the way, he was infuriated later on at his insurgence. His motive in going to the place was not to commit murder, but was to satisfy his lust, as suggested by the learned counsel for the State. The appellant attacked the deceased boy because he suddenly panicked at the thought that he would be caught. It is also clear that it was in the same state of mind that he attacked P.W.-2 Sangeetha, who had seen him attacking the deceased. Similarly, he then attacked the prosecutrix with a view to intimidate her. We have no doubt that if it was truly his intention to do so, he could have killed all the three, who were much weaker than him, with the *aruval* at the outset, but he did not do so. We make these observations only by way of assessment of the predominant motive of the appellant in injuring his victims and killing one of them. Our observations do not detract from the fact that the injuries were caused during the course of and as a part of, a heinous crime of lust. The assault on the P.W.-2 Sangeetha and the prosecutrix certainly constitute an attempt to murder as found by the Sessions Court and the High Court. The appellant has thus been rightly convicted for the offences having regard to the nature of the injuries, their location and the weapon with which they were caused.

19. In the light of the above we may now consider whether the only penalty that could have been imposed on the appellant

for the murder of the deceased Manikandan was the death penalty. We do not intend to delve into the justification or propriety of the death penalty being on the statute book, since no such question has been raised. The only consideration is whether the circumstances of this case rightly attracted the death penalty. The Sessions Court has correctly criticised the manner in which the appellant committed the act of assaulting his victims and has described his conduct as barbaric and inhumane against the three minor children. The Sessions Court has observed that this conduct was against all the three minor children. There is little discussion in the judgment of the Sessions Court about the main motive and the reason for the appellant going to the house of the prosecutrix as the discussion mainly centers on the cruel way in which the appellant attacked his victims. We do not for a moment intend to suggest that there was anything justified in any of the appellant's actions, only that, as observed earlier, the main motive was not to commit murder but to satisfy his lust. There is undoubtedly an element of recklessness in the appellant's actions, but that in our view may not be sufficient in the circumstances of this case to attract the extreme penalty of death. In the case of ***Raju Vs. State of Haryana***[1] this Court dealt with a case of rape and murder, and considered the question whether it would constitute a rarest of the rare case. In that case, the accused caused injury to the deceased only when she threatened to disclose the incident. The Court held that the accused had no intention to commit the murder and thus in those circumstances, the case would not meet the standard of rarest of the rare. Furthermore, the Court noted that there was nothing on record to indicate that the accused would be a grave danger to the society at large. Accordingly, the Court proceeded to commute the death sentence to imprisonment for life. This view has been upheld recently by this Court in ***Sunil Damodar Gaikwad Vs. State of Maharashtra***[2].

1. (2001) 9 SCC 50.
2. (2014) 1 SCC 129.

20. The High Court has rightly noted the observations of this Court in ***Md. Mannan @ Abdul Mannan v. State of Bihar***[3]. This Court has observed that there is no hard and fast rule or parameter to decide this vexed issue, and also that crimes are committed in such different and distinct circumstances that it is impossible to lay down comprehensive guidelines to decide this issue. This Court observed that when the crime is committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indignation of the community and when collective conscience of the community is petrified, one has to lean towards the death sentence. But this is not the end. If these factors are present, the court has to see as to whether the accused is a menace to the society and continues to be so, threatening its peaceful and harmonious co-existence. The court has to further enquire and believe that the condemned accused cannot be reformed or rehabilitated and is likely to continue with his criminal acts.

21. Unfortunately, arguments on these aspects were not addressed before the Sessions Court or the High Court. As a matter of law it is imperative for a Criminal Court to consider vide Section 354(3) Cr.P.C., the 'special reasons' for imposing the death sentence. It is not sufficient for a Criminal Court to give reasons pertaining to the cruel and heinous acts of the accused, but the Court must consider the special reasons why it is of the opinion that in a particular case before it, the death sentence should be imposed. In ***Bishnu Deo Shaw Vs. State of West Bengal***[4], this Court held that the 'special reasons' necessary for imposing death sentence must relate not to the crime as such but to the criminal. A similar thought was expressed in ***Rajendra Prasad Vs. State of U.P.***[5] and also in ***Dalbir Singh Vs. State of Punjab***[6]. Subsequently, the

3. (2011) 5 SCC 317.

4. (1979) 3 SCC 714.

5. (1979) 3 SCC 646.

6. (1979) 3 SCC 745.

Constitution Bench in ***Bachan Singh Vs. State of Punjab***[7] explained that the phrase 'special reasons' must be read in reference to the crime as well as the criminal, thus overruling ***Rajendra Prasad's case*** and ***Bishnu Deo's case.*** Consequently, the majority view in ***Bachan Singh's case*** gave a wider interpretation to the term 'special reasons' by holding it to mean an amalgamation of the circumstances connected with both, the crime in question as also the criminal. This view was upheld by this Court recently, in ***Yakub Abdul Razak Memon Vs. State of Maharashtra***[8]. We are constrained to make these observations, since, one can hardly imagine a murder which is not cruel or heinous. In this case the party is bound to address the Court on the possibilities of reformation or otherwise of the appellant, particularly since for a period of six years after the incident and before he was apprehended, there is no evidence of the appellant having committed any other offence or crime.

22. Accordingly, this Court must also ascertain the mitigating and aggravating circumstances pertaining to the crime as also the criminal. Hence the Court will evaluate, whether the interplay of the above mentioned circumstances gives rise to the 'special reasons' as expressly contemplated under Section 354(3) of the Cr.P.C., which creates an onus upon the Court in cases of death sentence, to explain why the extreme penalty is attracted in that particular case. In all fairness it must be observed that the learned counsel for the appellant, having regard to the circumstances of this case, laid much greater emphasis on pointing out the impropriety and illegality of the death sentence rather than seeking to avoid the conviction. That is why, we have not found it necessary to deal with the details of the prosecution case and the evidence on the basis of which the appellant has been convicted. Suffice it to say, that we find the conviction recorded by both, the

7. (1980) 2 SCC 684.

8. (2013) 13 SCC 1.

A Sessions Court and the High Court, is based upon cogent and reliable evidence. Thus, we are of the opinion that the appellant has been found guilty beyond all reasonable doubt.

23. For the reasons stated above, we are of the view that the appeals must partly succeed. This Court must remain B mindful of the two fundamental objectives of penology which apply even in such grotesque cases: (a) deterrence and (b) reformation. Other factors such as seriousness of the crime, the criminal history of the appellant and also his propensity to remorselessly commit similar dastardly crimes in the future, C must be considered. In the present case, having assessed the aforesaid mitigating factors including the appellant's conduct after the commission of the crime, we observe that this case does not fall into the category of rarest of the rare. Consequently, the conviction and other sentences except the death sentence D are hereby upheld. The appellant thus stands convicted for the remainder of his life for the offence of murder.

Bibhuti Bhushan Bose Appeals partly allowed.