SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com

In Ref. Vs. Suresh and ors.

In Ref. Vs. Suresh and ors.

SooperKanoon Citation : sooperkanoon.com/506306

Court : Madhya Pradesh

Decided On : May-12-2008

Reported in : 2008(3)MPHT547

Judge : Arun Mishra and ;Sushma Shrivastava, JJ.

Appellant : In Ref.;suresh @ Babu Gond and anr.

Respondent : Suresh and ors.;state of Madhya Pradesh

Judgement :

Arun Mishra, J.

1. The reference has been made by learned Sessions Judge, Hoshangabad under Section 366(1) of the Cr.PC for referring the death sentence imposed upon the accused namely Suresh and Mukesh as per judgment dated 22nd May, 2007 passed in Session Trial No. 301/2006 for commission of murder of Roop Singh and Shivpyari Bai on 5-6-2006. The appeal has also been preferred by the accused persons as against the impugned judgment whereby convicting them for commission of offence under Section 302,302/34 of the IPC.

2. Briefly stated prosecution case is that on 5-6-2006 at about 6.30 p.m. the accused persons committed murder of Roop Singh and Shivpyari Bai as they suspected them of practicing witchcraft resulting into death of brother of accused persons namely, Guddu. The report was lodged by Karan Singh at 7.30 p.m. at

Police Station Babai, which was recorded as merg intimation (P-15). Investigation was set in. Accused Suresh was armed with knife while accused Mukesh was armed with axe. On the aforesaid suspicion they committed murder of Roop Singh and Shivpyari Bai. Prosecution examined in all 12 witnesses. In defence 2 witnesses have been examined.

3. Accused abjured the guilt and contended that they have been falsely implicated in the case.

4. The appellants have been convicted and sentence to death by impugned judgment. Consequently, the appeal has been preferred and reference has been sent for confirmation of death sentence by the learned Sessions Judge.

5. Shri S.C. Datt, learned Senior Counsel appearing with Shri Siddharth Datt, for the accused appellants has submitted that it was not a case of imposition of death sentence in the facts of the instant case. It is not rarest of rare case. The age of the accused was young at the relevant time, they were of 21 and 19 years respectively. It is not a case involving depravity. It appears that they were under the stress that their brother has been killed by accused persons by exercising witchcraft. Consequently, Counsel has prayed that the death sentence could not have been imposed in the facts of instant case. He has also submitted that trial of accused Mukesh should have been conducted by the Juvenile Court. There was no jurisdiction of the Court-below to make trial of the accused Mukesh as his age was not above 18 years at the time of incident.

6. Shri R.S. Patel, learned Addl. Advocate General appearing on behalf of the State has submitted that the death penalty has been rightly imposed by the Court below in the facts of the instant case. Brutal murder of two persons was committed. Age of accused Mukesh was found to be at least 19 years in the ossification test and before Committal Court the report which was called from the medical expert was not challenged on behalf of the accused. In the course of trial no evidence in defence was adduced with respect to age.

7. First we come to question whether Court below was competent to make the trial of Mukesh as it is submitted by Shri S.C. Datt, learned Senior Counsel that at the

time of incident age of Mukesh was not more than 18 years. Counsel has referred to a photocopy of transfer certificate filed alongwith application for submitting the bail. Before Committal Court when enquiry was made with respect to age, report of ossification test was directed to be furnished. Report was received by the Committal Court regarding ossification test and determination of age of accused Mukesh on 7-10-2006. In the order-sheet of Committal Court it has been clearly mentioned that on behalf of accused Mukesh determination of age by ossification test was not challenged. Thus, the Committal Court has found that the age of the accused Mukesh was more than 18 years. In view of facts noted in the order dated 7-10-2006 of the Committal Court we find that determination of age of Mukesh by the Committal Court to be more than 18 years was proper. Similar finding has been recorded by the Trial Court also in Paragraph No. 67 of the judgment. Original transfer certificate is not on record, photocopy of transfer certificate filed with bail application has not been tendered on evidence, original certificate was not filed. No evidence was adduced as to age before Committal Court or in Trial Court on behalf of accused Mukesh, nor the age determined in ossification test was challenged. Thus, we find that the submission raised by Shri S.C. Datt, learned Senior Counsel appearing on behalf of the appellants to be untenable, same is hereby rejected.

8. The Counsel has not assailed the conviction rightly, but, still we deem it appropriate to appreciate the evidence in order to find out whether the conviction of the accused persons under Section 302 and 302/34 of the IPC is proper. First Information Report was lodged promptly within one hour of the incident, in which the accused persons named. The First Information Report was lodged and proved by Karan Singh (P.W. 8). We find on record statement of Vinesh Meena (P.W. 1) an eye-witness of the incident, he has clearly stated that at about 6.30 p.m. he came out after hearing hue and cry, he found that accused; Suresh and Mukesh were inflicting injuries on Roop Singh, when Shivpyari intervened she was followed by accused Mukesh and in the court-yard accused Mukesh inflicted injuries on her by axe. He has withstood the cross-examination, he has proved the seizure of control/blood stained soil and arrest of the accused etc., he is a neighbour of the deceased. There is nothing to disbelieve his statement. The version of Vinesh Meena (P.W. 1) has also been corroborated by Murli Yadav (P.W. 2), both

accused persons were inflicting injuries on Roop Singh and when Shivpyari came accused inflicted injuries on her also. Nothing could be brought in his cross-examination so as to impinge his testimony. No doubt about it that Radhelal Yadav (P.W. 6) has not supported the prosecution case, however, Karan Singh (P.W. 8) is the complainant and son of the deceased, he had lodged the First Information Report and has supported the version of aforesaid eye-witnesses; P.W. 1 and P.W. 2. Meena Bai (P.W. 9) has also stated that the accused persons had doubt that deceased used to practice witchcraft owing to that they have committed the murder of Roop Singh and Shivpyari Bai. She has also witnessed the incident. Dr. Anand Choudhary (P.W. 10) performed post-mortem examination, he has found as many as five injuries on the person of Shivpyari Bai, her neck and trachea was found to be cut. On the person of Roop Singh 8 injuries were found. Injuries were incised and punctured wound. There was fracture of occipital bone. The injuries were sufficient in ordinary course of nature to cause death. Investigation has been proved by R.P. Kusmakar (P.W. 12). Forensic Science Report also indicates that the injuries could have been caused by the weapon seized from the accused. Ocular evidence finds support from medical evidence also. In the facts and circumstances of the case there was overwhelming evidence against accused persons that they have committed murder of deceased Roop Singh and Shivpyari Bai as they had suspicion that the deceased used to play witchcraft and that has resulted into death of their brother; Guddu. Thus, their conviction under Section 302 and 302/34 of the IPC is found to be proper.

9. Coming to question of sentence: Shri S.C. Datt, learned Senior Counsel appearing on behalf of the accused persons has mainly raised the submission as to sentence. In Bachan Singh v. State of Punjab : 1980 CriLJ636 , in Paragraph No. 202 aggravating circumstances have been mentioned whereas in Paragraph No. 206 mitigating circumstances have been mentioned with respect to imposing of death sentence. Paragraph Nos. 202 and 206 are quoted below:

202. Drawing upon the penal statutes of the States in U.S.A. framed after Furman v. Georgia 33 L Ed 2d 346 : 408 US 238 (1972), in general, and Clauses 2 (a), (b), (c) and (d) of the Indian Penal Code (Amendment) Bill passed in 1978 by the Rajya Sabha, in particular, Dr. Chitale has suggested these 'aggravating

circumstances':

Aggravating circumstances: A Court may, however, in the following cases impose the penalty of death in its discretion:

(a) if the murder has been committed after previous planning and involves extreme brutality; or

(b) if the murder involves exceptional depravity; or

(c) if the murder is of a member of any of the armed forces of the Union or of a member of any police force or of any public servant and was committed-

(i) while such member or public servant was on duty; or

(ii) in consequence of anything done or attempted to be done by such member or public servant in the lawful discharge of his duty as such member or public servant whether at the time of murder he was such member or public servant, as the case may be, or had ceased to be such member or public servant; or

(d) if the murder is of a person who had acted in the lawful discharge of his duty under Section 43 of the Code of Criminal Procedure, 1973, or who had rendered assistance to a Magistrate or a Police Officer demanding his aid or requiring his assistance under Section 37 and Section 129 of the said Code.

206. Dr. Chitale has suggested these mitigating factors:

Mitigating circumstances: In the exercise of its discretion in the above cases, the Court shall take into account the following circumstances:

(1) That the offence was committed under the influence of extreme mental or emotional disturbance.

(2) The age of the accused. If the accused is young or old, he shall not be sentenced to death.

(3) The probability that the accused would not commit criminal acts of violence as would constitute a continuing threat to society.

(4) The probability that the accused can be reformed and rehabilitated.

The State shall by evidence prove that the accused does not satisfy the conditions (3) and (4) above.

(5) That in the facts and circumstances of the case the accused believed that he was morally justified in committing the offence.

(6) That the accused acted under the duress or domination of another person.

(7) That the condition of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

In Machhi Singh and Ors. v. State of Punjab : 1983 CriLJ1457 , the Apex Court has laid down that the extreme penalty of death need not be inflicted except in rarest cases of extreme culpability. Before opting for the death penalty the circumstances of the 'offender' also require to be taken into consideration alongwith the circumstances of the 'crime'. 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 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. A 'balance sheet' of aggravating and mitigating circumstances has to be drawn up and in doing so that 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. Reliance was placed on Bachan Singh' case.

In Lehna v. State of Haryana : [2002]1SCR377 , the Apex Court has referred Bachan Singh and Machhi Singh's decisions (supra), the Apex Court has laid down thus:

23. In rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death

penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(1) When the murder is committed in an extremely brutal, grotesque, diabolical, revolting, or distardly manner so as to arouse intense and extreme indignation of the community.

(2) When the murder is committed for a motive which evinces total depravity and meanness; e.g. murder by hired assassin for money or reward; or cold-blooded murder for gains of a person vis-a-vis whom the murderer is in a dominating position or in a position of trust; or murder is committed in the course for betrayal of the motherland.

(3) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, or in cases of 'bride burning' or 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(4) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(5) When the victim of murder is an innocent child, or a helpless woman or old or infirm person or a person vis-a-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community.

The Apex Court in the facts and circumstances of the case set aside the death sentence.

10. The Counsel has also referred the decision in Prajeet Kumar Singh v. State of Bihar : 2008 CriLJ3596 , in which the Apex Court has laid down that mental condition or state of mind of the accused is one of the factor that has to be taken into consideration on question of sentence. The Apex Court has laid down thus:

18. In Machhi Singh, a 3-Judge Bench following the decision in Bachan Singh, observed that in rarest of rare cases when the collective conscience of the community is so shocked, that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded. The community may entertain such sentiment in the following circumstances:

(I) 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.

(II) When the murder is committed for a motive which evinces total depravity and meanness.

(III) (a) When murder of a member of a Scheduled Caste or minority community etc., is committed not for personal reasons but in circumstances which arouse social wrath, (b) In cases of 'bride burning' and what are known as 'dowry deaths' or when murder is committed in order to remarry for the sake of extracting dowry once again or to marry another woman on account of infatuation.

(IV) When the crime is enormous in proportion. For instance when multiple murders, say of all or almost all the members of a family or a large number of persons of a particular caste, community, or locality, are committed.

(V) When the victim of murder is (a) an innocent child who could not have or has not provided even an excuse, much less a provocation, for murder, (b) a helpless woman or a person rendered helpless by old or infirmity, (c) when the victim is a person vis-a-vis whom the murderer is in a position of domination of trust, (d) when the victim is a public figure generally loved and respected by the community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

Counsel has also placed implicit reliance on the decision in Sushil Murmu v. State of Jharkhand : 2004 CriLJ658 , in which the Apex Court has laid down that in rarest of rare cases when collective conscience of the community is so shocked

that it will expect the holders of the judicial power center to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded.

11. Coming to facts of the instant case in the light of the principles laid down by the Apex Court, when we consider the aggravating factors it cannot be said that the murder involves exceptional depravity, though it was a case of brutal murder of two persons, however, when we consider mitigating circumstances the accused were young; accused Mukesh was aged 19 years while accused Suresh was aged 23-24 years at the time of incident and they had entertained a doubt that by playing witchcraft death of their brother; Guddu was caused by the deceased persons, it is not disputed that the accused entertained aforesaid doubt, we also find that it is expected that the accused can be reformatted and rehabilitated, we do not find any probability that they would commit such offence again. There was no past criminal history. It cannot be said that they would involvein commission of offence again.

12. Thus, the conviction of the appellants under Section 302 and 302/34 of the IPC for commission of murder of Roop Singh and Shivpyari Bai is hereby affirmed. We set aside the death sentence and instead of death sentence each of the accused is sentenced to undergo rigorous life imprisonment and fine of Rs. 10,000/- (Rupees Ten thousand) each and in default of payment of fine to undergo RI for 3 years. Both the sentences to run concurrently. On deposit of fine Rs. 7,500/- to be paid to L.Rs. of the deceased. The death reference is accordingly answered. The appeal as well as the reference are accordingly disposed of.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com