(2012) 10 AP CK 0019

Andhra Pradesh High Court

Case No: Criminal Appeal No. 921 of 2011 and Referred Trial No. 3 of 2012

Bandi Venkateswarlu	APPELLANT
Vs	
The State of Andhra Pradesh State of A.P. Vs Bandi Venkateswarlu	RESPONDENT

Date of Decision: Oct. 5, 2012

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 366
- Penal Code, 1860 (IPC) - Section 302, 307

Citation: (2013) 2 ALT(Cri) 254

Hon'ble Judges: P. Durga Prasad, J; N.V. Ramana, J

Bench: Division Bench

Advocate: D. Sangeetha Reddy, for the Appellant;

Judgement

Justice Sri. N.V. Ramana

1. The appellant-accused filed the Criminal Appeal questioning the judgment dated 24.03.2008 passed in S.C. No. 223 of 2010 by the VI Additional District and Sessions Judge (Fast Track Court-I), Markapur, Prakasham District, convicting him and sentencing him to undergo imprisonment for a period of ten years for the offence u/s 307 I.P.C. and sentencing him to death for the offence u/s 302 I.P.C. While the referred trial, u/s 366 Cr. P.C. is sent by the VI Additional District and Sessions Judge, for confirmation of sentence of death imposed by him against the appellant-accused for the offence u/s 302 I.P.C. The case of the prosecution, briefly stated is that P.W. 1, namely Bandi Rama Devi is a native of Gannepalli village, Ardhaveedu Mandal. She was given in marriage to the elder brother of the accused, namely Bandi Srinivasulu, who is working in Army at Nasik. They were blessed with two children-deceased, namely Pallavi and Jaswanth, who were aged 3 years and eight months respectively. P.W. 1 is residing in her in-laws house at Ardhaveedu. The

accused is also residing in that house. Two months prior to the incident, the wife of the accused, unable to bear his harassment, deserted him. On 02.02.2009, at about 8.10 p.m., while P.W. 1 was cleaning the utensils, the accused suspecting her fidelity, picked up a quarrel and with a view to kill her and her two children, beat her on her head with a pestle. As a result of the head injury, P.W. 1 fell on the ground. On hearing the cries of P.W. 1, her mother-in-law and neighbours, namely P.Ws. 6 and 7 and 8, rushed to the scene of offence. P.W. 5 also rushed to the scene of offence, and with a view to rescue P.W. 1, he snatched the pestle from the hands of the accused. The accused then picked up an axe from the verendah and beat her with its stick indiscriminately. He also beat the daughter of P.W. 1, aged three years on her head with the axe stick and caused bleeding injury. On seeing the same, P.W. 6, the mother of the accused, took the son of P.W. 1, namely Jaswanth, eight months old, into her hands to protect him from the hands of the accused. The accused snatched the boy from the hands of his mother and beat him with the axe stick indiscriminately and forcibly threw him on the floor hitting his head. P.W. 3 and 4, the neighbours, with a view to save the lives of P.W. 1 and the two children, shifted them to Government Hospital, Cumbum. The accused fled away from the scene of offence by taking the axe as well as the pestle from the hands of P.W. 5. Both the children succumbed to the injuries on the way to hospital. P.W. 1 was shifted to the Government Hospital, Guntur, for better treatment. As she sustained severed injuries on her head, she was ultimately taken to Peoples Trauma Hospital, Guntur, for further treatment. On the 8.00 a.m. P.W. 7 gave statement before S.I. of Police, Ardhaveedu, about the incident. Basing on the same, P.W. 18 registered a case in Crime No. 12 of 2007 u/s 307 I.P.C. and submitted the FIR to the Judicial Magistrate of First Class, Giddalur. He also examined P.Ws. 7 and 9 and recorded their statements. He then proceeded to the scene of offence and prepared observation report in the presence of mediators, namely P.Ws. 9 and 10. He also seized controlled soil, blood stained soil, broken bangle pieces and prepared a sketch of the scene of offence and got the scene of offence photographed through L.W. 10. On the same day, on receipt of information from Community Health Centre, Cumbum about the death of the two children, he added Section 302 I.P.C. and issued altered FIR. Thereafter, P.W. 15-Inspector of Police, Markapur, took up investigation. He examined P.Ws. 2 and 3 at the scene of offence. He held inquest over the dead bodies of the children-deceased in the presence of panchayatdars, namely P.Ws. 10, 11 and 13 and recorded the statements of P.Ws. 2, 3 and L.W. 5. After completion of inquest, he sent the dead bodies for post-mortem examination. On 03.02.2009 at about 2.30 p.m., on reliable information, he arrested the accused in the presence of P.Ws. 9 and 12 near Dibba Saheb Tomb in between Donakonda and Chimaletipalli village BT road, and on interrogation, the accused confessed his guilt and led them to the place where he kept the pestle and axe used in the commission of the crime. P.W. 15 seized them under a cover of seizure mazahar at the instance of the accused in the presence of mediators and arrested the accused. On 04.02.2009, he produced the accused before the Judicial Magistrate of First Class,

Giddalur, he remanded him to judicial custody.

2. On 17.02.2009, P.W. 15 visited Peoples Trauma Hospital, Gunture, where P.W. 1 was admitted for treatment of the injuries sustained by her, and examined and recorded her statement. He seized the material objects from the scene of offence and sent them to RFSL for analysis. L.W. 17-Scientific Officer, RFSL, Guntur, having analysed the material objects opined that blood is detected on all items, except controlled soil and that it is of human origin, and expressed his inability to find out the blood group. He also expressed his inability to ascertain whether the blood stains found on item No. 7 is of human origin. P.W. 16-Doctor, who treated P.W. 1 issued wound certificated opining that the injuries sustained by P.W. 1 are simple and injury No. 4 is grievous in nature. P.W. 17-Doctor, who conducted autopsy over the dead bodies of the deceased, issued post-mortem examination certificates opining that the cause of death of the deceased was due to shock and haemorrhage on accounts of the injuries sustained. According to the prosecution, the investigation made by P.W. 15 established that the accused suspecting the fidelity of P.W. 1 attempted to kill her and killed her children by beating them with a pestle and axe and thereby, he committed the offences under Sections 307 and 302 I.P.C.

3. The learned Sessions Judge framed charges against the appellant-accused for the offences punishable under Sections 307 and 302 IPC, The appellant-accused pleaded not guilty for the said charges and claimed to be tried.

4. To prove the guilt of the appellant-accused, the prosecution examined P.Ws.1 to 18 and marked Exs. P1 to P33 and M.Os. 1 to 5. No oral evidence was adduced by the accused in defence.

5. The learned Sessions Judge, having appreciated the entire evidence available on record, found the appellant-accused guilty of the offences punishable u/s 307 and 302 I.P.C., convicted and sentenced him to suffer rigorous imprisonment for ten years and to pay fine of Rs. 2000/-, in default to undergo simple imprisonment for three months, for the offence u/s 307 IPC; to death for the offence u/s 302 I.P.C. Questioning the said conviction and sentence, the appellant-accused, filed this criminal appeal and the reference u/s 366 Cr. P.C. is made by the learned Sessions Judge, for confirmation of sentence of death penalty.

6. We have heard the counsel for the appellant-accused and the Additional Public Prosecutor for the State and perused the judgment under appeal and other material available on record.

7. The point that arises for consideration in the present appeal is whether the prosecution could establish the guilt of appellant-accused for the offences punishable under Sections 307 and 302 I.P.C. beyond all reasonable doubt(sic), and if so, whether the case falls in the category of rarest of rare cases, justifying the sentence of death imposed by the Court, against the appellant-accused for the offence u/s 302 I.P.C., for causing the death of two children.

8. P.W. 1 is the injured, P.W. 2 is the mother of the deceased, P.Ws. 3 and 4 are witnesses to the incident, who shifted the injured and the deceased to hospital, P.W. 5 is also an eye witness to the incident. He snatched the pestle from the accused when he was beating P.W. 1, P.W. 6 is also an eye witness to the incident, P.W. 7 is also an eye-witness, who gave report to the police, P.W. 8 is also an eye witness to the incident, P.W. 9 is mediator to the scene of offence panchanama and inquest of deceased No. 2, P.Ws. 10 and 11 are mediator to the inquest, P.W. 12 is mediator to the arrest of the accused and recovery of crime weapon, P.W. 13 is mediator to the inquest, P.W. 14 is the Circle Inspector, who took investigation from his predecessor, namely P.W. 15 and filed charge sheet, P.W. 15 is the Inspector who conducted investigation, P.W. 16 is the Doctor, who treated P.W. 1 for the injuries sustained by her, P.W. 17 is the Doctor, who conducted autopsy over the dead bodies of the deceased and P.W. 18 is the S.I. of Police, who based on the report given by P.W. 7, registered the crime.

9. P.Ws. 3 to 13 turned hostile.

10. P.W. 1 is the injured. She stated that the accused and his parents used to quarrel with her frequently in the absence of her husband, insisting to attend agricultural field work in spite of her ill-health and having tender aged children. That on the date of occurrence, at about 8.30 a.m., she was cleaning the utensils in the front yard of their house. That the accused came from behind and beat her with a pestle on the back of her head and immediately, she fell down. The accused then beat her daughter-deceased No. 1 with pestle on her head and then he beat her son deceased No. 2 and threw him on the ground. That on receiving the injury, she became unconscious. By the time, she regained conscious, she found herself in the hospital. That she has not seen the deceased throwing her son on the ground by lifting him as by then she lost consciousness, but she had seen the accused beating deceased No. 1 with pestle. That the accused beat her thrice on her head with the pestle. Due to the injuries, she lost her hearing capacity of the left ear. She stated that the accused beat her for the only reason that she did not oblige him and his parents in attending the agricultural works in spite of her ill-health and tender aged children. The police did not examine her and that she can identify the pestle with which the accused beat her and that M.O. is the pestle. In her cross-examination, she stated that she was never sick before or after marriage. She stated that the accused first gave a blow on the back of her head, then on her forehead, she fell towards her back and was conscious till he beat her daughter. That she regained her conscious six months after the occurrence. She denied the suggestion that herself and the deceased fell on the ground from the terrace and received injuries. She stated that she was examined by the police at Guntur after she regained consciousness, and by the time, she was examined by the police, her voice was not clear. She denied the suggestion that she did not state before the police that the accused suspecting her fidelity attempted to kill her and the two children.

11. P.W. 2 is the mother of P.W. 1. She stated that the villagers of Adraveedu telephoned to their village and informed about the occurrence. That her daughter could not attend the agricultural works due to ill-health and having tender aged children, and it is for that reasons, the accused and his parents bore grudge against her.

12. P.W. 14 stated that he took up investigation of the case from P.W. 15 on 19.08.2008 and after verification of the investigation done by him and after obtaining RFSL report and post-mortem reports of deceased Nos. 1 and 2 and wound certificate of P.W. 1, he filed the charge sheet and that Ex. P22 is the RFSL report, Ex. P23 is wound certificate of P.W. 1 and Exs. P24 and 25 are post-mortem reports of deceased Nos. 1 and 2.

13. P.W. 15 spoke about the investigation done by him. In his cross-examination, he admitted that P.W. 1 did not state before him that the accused and his parents used to quarrel with her frequently for not attending the agricultural works. He also admitted that P.W. 2 did not state before him that the accused beat her and her children for the reason that she was not attending to agricultural works.

14. P.W. 16 is the Doctor, who treated P.W. 1 and issued Ex. P23-wound certificate.

15. P.W. 17 is the Doctor, who conducted autopsy over the dead bodies of the deceased and issued post-mortem certificates Exs. P26 and P27. He opined that the cause of death of the deceased is due to shock and haemorrhage due to injury to the vital organ brain.

16. P.W. 18 is the S.I. of Police, who registered the crime, based on the report given by P.W. 7.

17. Even though P.Ws. 3 to 13 turned hostile and did not support the case of the prosecution, but from the evidence of P.W. 1, who is an eye witness to the incident and a victim herself, stated that while she was cleaning the utensils in the front yard of their house, the accused came from behind and beat with a pestle on the back of her head and immediately she fell down. Then the accused beat deceased No. 1 with the pestle on her head. The accused then lifted deceased No. 2 and threw him on the ground. Thereafter, she lost consciousness. She regained consciousness while she was undergoing treatment at a private hospital in Guntur. She emphatically stated that she had seen the accused beating deceased No. 1 with pestle and that after beating deceased No. 1, he beat her thrice on her head, and that due to the head injuries received by her, she lost her hearing capacity of her left ear. She denied the suggestion that herself and deceased Nos. 1 and 2 fell to the ground from the terrace of their house and received injuries.

18. This evidence of P.W. 1 that she received head injury, is corroborated with the evidence of P.W. 16-Doctor, who examined her and issued Ex. P23-wound certificate. He stated that on 02.02.2009, P.W. 1 was admitted into their hospital, and on

examining her, he found the following seven injuries:

1. A sutured wound of size 4 cms. in length is present over the right temporal bone.

2. A sutured wound of size 4 cms. in length is present over the left mastoid region.

3. A sutured wound of size 2 cms. in length above the right eyebrow, C.T. scan shows that there are non-haemorrhagic temporal contusions in right temporal parietal frontal and left temporal parietal lobes.

4. There is soft tissues swelling over right temporal and frontal region.

5. There is mucosal thickening ethmoid, sphenoid and right maxillary sinuses.

6. There are fractures of right zygomatic arch, lateral wall of orbit, orbital plate of frontal bone on right side.

7. Left middle ear is opacified and there is longitudinal fracture of left petrous bone.

19. He stated that having examined P.W. 1, he issued Ex. P23-wound certificate and that injury Nos. 1 to 3 are simple, while injury No. 4 is grievous in nature. He stated that P.W. 1 was treated as an inpatient in the hospital till 21.02.2009, He admitted that he did not treat P.W. 1, but added that she was treated by a Neuro Surgeon. He, however, denied the suggestion that he did not examine P.W. 1 and that Ex. P23-wound certificate is manipulated.

20. Even though a suggestion was put to P.W. 1 by the defence that she sustained injuries when she fell from the terrace, but such suggestion was not put to P.W. 16 who treated P.W. 1.

21. The fact that deceased Nos. 1 and 2 died due to the head injuries sustained by them, is corroborated with the evidence of P.W. 17, who conducted autopsy over the dead bodies of deceased Nos. 1 and 2.

22. P.W. 17 in his evidence stated that on 02.02.2009 at the request of C.I. Markapur, he conducted post-mortem over the dead body of deceased No. 1 and noted the following external and internal injuries:

External Injuries:

1. A laceration of 12 x 6 cms with chips of bone on the left parietal region with brain matter draining out.

Internal Injuries:

1. Fracture of skull bones at the left parietal temporal region with maingal tear brain matter leaking.

2. Multiple fractures of skull bones.

23. He opined that the cause of death of the deceased is due to shock and haemorrhage due to injury to vital organ brain. That Ex. P26 is the post-mortem report given by him. This evidence of P.W. 17 corroborates with the evidence of P.W. 1 that deceased No. 1 was beaten with a pestle on her head and that it was the accused who beat.

24. P.W. 17, who also conducted post mortem over the dead body of deceased No. 2 stated that on the very same day, he conducted post-mortem examination at the request of C.I. Markapur on deceased No. 2, that the body was cool (stored in freezer) and that he noted the following external and internal injuries:

External injures:

1. Brownish discolouration right temporal region with bossing of the head.

2. Blackish contusion of 2 x 12 cms on the upper lip.

3. Brownish discolouration of the left frontal region extending to the eye brow.

4. Blackish discolouration of 3 x 2 cms on the lower eye lid.

5. Blackish contusion of 3 x 2 cms over left upper arm.

Internal injuries:

1. Dehisence of all the suture lines of the skull leading to bossing.

2. Fracture of occipital bone.

3. Meninges intact.

4. Brain matter normal with subdural haematoma subdural.

25. He opined that the cause of death is due shock and haemorrhage due to injury to vital organ brain. That Ex. P27 is the post mortem examination report given by him. The head injuries noted in Exs. P26 and P27 may be caused if the victim falls on any rough surface with sufficient force.

26. Even though P.W. 17 in his cross-examination admitted that the head injuries noted in Exs. P26 and P27-post mortem reports of deceased Nos. 1 and 2 may be caused if the victim falls on any rough surface with sufficient force, the fact remains, the defence did not adduce any evidence to show that deceased Nos. 1 and 2 fell on rough surface with sufficient force and received injuries, and on the other hand, P.W. 1, who received head injury, denied such suggestion, and it is her specific case that the accused beat her and deceased No. 1 with pestle and that the accused had lifted deceased No. 2 and threw him on the ground. Therefore, even if the suggestion made to P.W. 17 that the injuries sustained by deceased Nos. 1 and 2 could be caused if the victim falls on any rough surface with sufficient force is accepted, it can be safely said that deceased No. 2 had died due to the injuries sustained by him, when the accused lift him and threw him on the ground, as

spoken to by P.W. 1 in her evidence. Further, from Ex. P27-post mortem report given by P.W. 17, it is evident that deceased No. 2 suffered not only injuries on his head but also on other parts of his body.

27. Though the prosecution witnesses turned hostile, but no motive was attributed to P.W. 1 for the false implication of the accused. P.W. 1 being the injured and none other than the sister-in-law of the accused, her evidence cannot be doubted.

28. The motive for the accused to attack P.W. 1 and deceased Nos. 1 and 2 is that the accused and his parents insisted her to attend agricultural field work, which she did not attend due to her ill-health and tender age of the children. She stated that she complained against the accused to her parents about the harassment meted out to her by insisting her to attend agricultural work. She denied the suggestion that she never complained against the accused to his parents or to her parents and they never harassed her by insisting her to attend agricultural work. This evidence of P.W. 1 is corroborated with the evidence of P.W. 2, who stated that P.W. 1 could not attend the agricultural works due to ill health and tender age of children and it is for that reason, the accused and his parents bore grudge against P.W. 1 and it is for that reason the accused beat P.W. 1 and killed deceased Nos. 1 and 2. Hence from the evidence of P.Ws. 1 and 2, it can be said that the prosecution could prove the motive for the accused to kill P.W. 1 and in his attempt to kill P.W. 1, he killed deceased Nos. 1 and 2. The fact that the accused caused head injury to P.W. 1 and caused the death of deceased Nos. 1 and 2 by beating them with pestle on their head, stood proved by the prosecution beyond all reasonable doubt, with the evidence of P.W. 1-injured, who stated that the accused beat her and deceased No. 1 with pestle and lifted deceased No. 2 and threw him to the ground, which is corroborated with the medical evidence of P.W. 16-Doctor, who examined P.W. 1 and issued Ex. P23-wound certificate and P.W. 17-Doctor, who conducted autopsy over the dead bodies of deceased Nos. 1 and 2 and issued Exs. P26 and P27-post mortem reports. Hence, no exception can be taken to the finding recorded by the learned trial Judge that the accused is guilty of the offence punishable u/s 307 I.P.C. for attempting to kill P.W. 1 and of the offence punishable u/s 302 I.P.C. for causing the death of deceased Nos. 1 and 2.

29. The learned trial Judge having found the accused guilty of the offence u/s 307 I.P.C. for attempting to murder P.W. 1 and for the offence u/s 302 I.P.C. (two counts) for causing the death of deceased Nos. 1 and 2, imposed sentence of rigorous imprisonment for ten years for the offence u/s 307 I.P.C. and sentenced to death for the offence u/s 302 I.P.C. (two counts), treating the crime committed by the accused as falling within the category of rarest of rare cases.

30. The learned counsel for the appellant-accused submitted that death sentence cannot be imposed if there is any mitigating circumstance in favour of the accused and for imposition of such sentence all the circumstances must be aggravating. Relying upon the judgment of the Apex Court in Rajesh Kumar Vs. State through

Govt. of NCT of Delhi, the learned counsel contended that the mitigating factors, suggested by Dr. Chitale, which were set out in Bachan Singh Vs. State of Punjab, , must be given great weight in the determination of sentence. The said circumstances read as follows:

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 conditions of the accused showed that he was mentally defective and that the said defect impaired his capacity to appreciate the criminality of his conduct.

31. He submitted that the prosecution did not produce any evidence to prove that the appellant-accused does not satisfy Condition Nos. 3 and 4. The satisfaction of Condition Nos. 3 and 4 being of great importance because they must be given great weight in the determination of sentence, the learned counsel submitted that imposition of death penalty on the appellant-accused, in the facts and circumstances of the case, is bad and cannot be sustained.

32. In Rajesh Kumar v. State, the accused was sentenced to death for murdering two children aged four and a half years and eight months in a brutal and diabolical manner. He held the legs of the infant and hit the child on the floor and had slit the throat of the elder son with a piece of glass, which he obtained by breaking the dressing table glass. The accused was related to the victim''s family and being unemployed used to take money from the victim''s father. The motive for the accused to kill the children was that the father of the children refused to lend money. The Apex Court having considered the mitigating factors that should be taken into consideration while determining the sentence, held as follows:

In this connection the submission of the learned counsel that the State must by evidence prove that the accused does not satisfy Conditions 3 and 4 above is of great importance as this Court accepted that those submissions must be given "great weight in the determination of sentence". However, the categories of mitigating and aggravating circumstances are never close and no court can give an exhaustive list of such circumstances. For instance, a crime involving a terrorist attack may place the case under a completely different situation.

In the instant case, the State has failed to show that the appellant-accused is continuing threat to the society or that he is beyond reform and rehabilitation. On the other hand, in para 77 of the impugned judgment, the High Court observed as follows:

We have no evidence that the appellant-accused is incapable of being rehabilitated in society. We also have no evidence that he is capable of being rehabilitated in society. This circumstance remains a neutral circumstance.

It is clear from the aforesaid finding of the High Court that there is no evidence to show that the accused is incapable of being reformed or rehabilitated in the society and the High Court has considered the same as a neutral circumstance. In our view, the High Court was clearly in error. The very fact that the accused can be rehabilitated in the society and is capable of being reformed, since the State has not given any residence to the contrary, is certainly a mitigating circumstance and which the High Court has failed to take into consideration. The High Court has also failed to take into consideration that the appellant-accused is not a continuing threat to the society in the absence of any evidence to the contrary. Therefore, in para 78 of the impugned judgment, the High Court, with respect, has taken a very narrow and a myopic view of the mitigating circumstances about the appellant-accused. The High Court has only considered that the appellant-accused is a first time offender and he has a family to look after. We are, therefore, constrained to observed that the High Court''s view of mitigating circumstances has been very truncated and narrow insofar as the appellant-accused is concerned.

On the other hand, while considering the aggravating circumstances, the High Court appears to have been substantially influenced with the brutality in the manner of committing the crime. It is no doubt true that the murder was committed in this case in a very brutal and inhuman fashion, but that alone cannot justify infliction of death penalty. This is held in several decisions of this Court.

33. The Apex Court having held so, commuted the sentence of death to that of imprisonment of life, by referring to some of its earlier decisions wherein the sentence of death was commuted to that of imprisonment for life, even though in the said cases, the act of the accused was found to be heinous, unpardonable and condemnable.

34. It would be appropriate, to refer to the said decisions of the Apex Court, so as to consider whether the case on hand, falls within the category of rarest of the rare cases.

35. In Panchhi and others Vs. State of UP, , the accused murdered four members of his neighbour''s family comprising one adult male and female, an old lady and a child of five years of age in a most heinous, brutal and diabolical manner to fulfill their vengeance. The Apex Court though held that the murders committed by the accused were brutal, but commuted the sentence of death to that of imprisonment for life. In Dharmendrasinh @ Mansing Ratansinh Vs. State of Gujarat, , the accused suspected the character of his wife and under the belief that his two sons were not born of him, murdered those two innocent children. The Apex Court though held that the act of the accused was heinous, unpardonable and condemnable, but commuted the sentence of death to life sentence inter alia on the ground that the accused had no previous criminal record and the chances of repetition of such criminal acts at his hands making the society further vulnerable are not apparent. In Haru Ghosh Vs. State of West Bengal, the accused, who was a convict and serving sentence of life imprisonment, when out on bail while his appeal before the High Court was pending, murdered a woman and her child and severed the parts of the deceased, because her husband asked the accused not to sell illicit liquor in the locality. Even though the Apex Court held that the act of the accused in murdering two helpless persons for no fault on their part was a dastardly act, but commuted the sentence of death to that of imprisonment for life taking into consideration (1) there was no pre-mediation in the act of the accused, the action was on the spur of the moment as the accused did not come armed with any weapon, (2) it was unknown under what circumstances the accused entered the house of the deceased and what prompted him to assault the boy, (3) the cruel manner in which the murder was committed cannot be the guiding factor in favour of death sentence, and (4) the accused himself had to minor children.

36. Even though in the cases referred to above, the accused had eliminated more than two people, and in one case, the entire family, and even though the Apex Court, found such murders committed by the accused found to be brutal and heinous, but taking into consideration the mitigating circumstances, commuted the sentence of death to that of imprisonment of life.

37. It is settled proposition of law that award of death penalty is an exception and it should be awarded only in the rarest of the rare cases.

38. Under the old Criminal Procedure Code, ample discretion was given to the Courts to pass death sentence as a general rule and the alternative sentence of life could be awarded only in exceptional circumstances, and that too after recording special reasons for making this departure from the general rule. The Code of Criminal Procedure, 1973 has entirely reversed the said rule. Sentence of imprisonment for life is now the rule and capital sentence is an exception. It has also

made obligatory on the Courts to record special reasons, if ultimately, death sentence is to be awarded.

39. The question as to when death sentence has to be imposed has been a vexed question engaging the attention of the Courts considerably and consistently since a long time. No fixed yardstick or formula has been evolved for the same, and its imposition depends upon the facts and circumstances of each case, and the vision, understanding and view of the Judges has been found to be inseparable. The phrase "rarest of rare cases" still remains to be defined. While the concern for human life, the norms of a civilized society and the need to reform the criminal has engaged the attention of the Courts. It has equally been the view that sentence of death, has to be based on the actions of the criminal, rather than the crime committed. The doctrine of proportionality of the sentence vis-�-vis the crime, the victims and the offender has also engaged the attention of the Courts.

40. The Supreme Court in Bachan Singh v. State of Punjab has formulated certain guidelines while stating that they are only instructive and not exhaustive and laid certain guidelines as extracted in the above paragraphs. The Supreme Court further held that in rarest of rare cases, when the collective conscience of the community is so shocked that it will expect the holders of judicial power entitle to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty, death sentence can be awarded and community may entertain such sentence in the following circumstances and they are:

1. 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. For instance, (i) when the house of the victim is set aflame with the end in view to roast him alive in the house, (ii) When the victim is subjected to inhuman acts of torture or cruelty in order to bring about his or her death (iii) when the body of the victim is cut into pieces or his body is dismembered in a fiendish manner.

2. When the murder is committed for a motive, which evinces total depravity and meanness. For instance when (a) a hired assassin commits murder for the sake of money or reward (b) a cold-blooded murder is committed with a deliberate design in order to inherit property or to gain control over property of a ward or a person under the control of the murderer or vis-�-vis whom the murderer is in a dominating position or in a position of trust, or (c) a murder is committed in the course for betrayal of the motherland.

3. (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. For instance when such a crime is committed in order to terrorize such persons and frighten them into fleeing from a place or in order to deprive them of, or make them surrender, lands or benefits conferred on them with a view to reverse

past injustices and in order to restore the social balance. (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.

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 (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 age or infirmity (c) when the victim is a person vis-�-vis whom the murderer is in a position of domination or 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.

41. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed by way of test for the "rarest of the rare cases", if the circumstance of the case are such that death sentence is warranted, it is only then death sentence can be awarded.

42. The Supreme Court observed that relative weight has to be given to the aggravating and mitigating factors depends on the facts and circumstances of the particular case and more often, these two aspects are so intertwined that it is difficult to give a separate treatment to each of them. The Supreme Court further held that the extremely cruel or beastly manner of the commission of murder is itself a demonstrated index of the depraved character of the perpetrator and that is why, it is not desirable to consider the circumstances of the crime, and the circumstances of the criminal in two separate watertight compartments and further held that a real and abiding concern for the dignity of human life postulates resistance to taking a life through law''s instrumentality and that ought not be done save in the rarest of rare cases, when the alternative option is unquestionably foreclosed.

43. The Hon''ble Apex Court in Shankar @ Gauri Shankar and Others Vs. State of Tamil Nadu, , having considered what is the "rarest of the rare case" and when the death sentence can be imposed, observed that the choice as to which of the punishments provided for murder is the proper one in a given case will depend upon the particular facts and circumstances of that case, and the Court has to exercise its discretion judicially and on well recognized principles after balancing all the mitigating and aggravating circumstances of the case. The Court also should see whether there is something uncommon about the crime, which renders the sentence of imprisonment of life inadequate and calls for imposition of death

sentence.

44. From the above decision, it is the nature of the crime and the circumstances in which the offender has committed the crime, should reveal that the criminal is a menace to the society and the sentence of imprisonment of life would be inadequate. What circumstances bring a particular case in the category of the "rarest of rare cases" will vary from case to case depending upon the nature of the crime, weapons used and the manner in which it is perpetrated, the reason and motive for which it was committed.

45. In a criminal trial, when the prosecution seeks to make out a case for imposition of death sentence, the prosecution, undoubtedly has to discharge a very onerous burden. The prosecution must discharge this burden by demonstrating the existence of aggravating circumstances and the consequential absence of mitigating circumstances. In discharging such burden, the prosecution has to not only prove its case beyond all reasonable doubt, but also prove as to how the crime was committed, and the aggravating circumstances leading to an inference that the case falls within the category of "rarest of the rare cases" warranting imposition of death penalty. Thus the brutality of the murder must be seen along with all mitigating factors in order to come to the conclusion whether the case falls within the ambit of the "rarest of the rare cases".

46. Therefore, whether the acts of the appellant-accused, which resulted in attempting to kill P.W. 1 and killing of deceased Nos. 1 and 2, two minor and innocent children, fall within the category of rarest of rare cases, may be examined in the light of the evidence on record and the case law discussed above. Admittedly, the only evidence available on record to convict the appellant-accused for attempting to kill P.W. 1 and for causing the death of deceased Nos. 1 and 2 is that of P.W. 1. The appellant-accused is no other than the brother-in-law of P.W. 1. At the time of commission of offence, the appellant-accused was aged 32 years. He had no past criminal history. He is a first time offender. No doubt, by his actions, the appellant-accused attempted to kill P.W. 1 and in fact, caused the death of deceased Nos. 1 and 2, but what made him to act in such a manner has to be examined. The evidence of P.W. 1 shows that the appellant-accused and his parents bore grudge as she refused to attend agricultural work. No doubt, merely because P.W. 1 refused to attend agricultural work, is no ground for the appellant-accused to kill P.W. 1 and cause the death of deceased Nos. 1 and 2. However, P.W. 1 in her evidence further stated that the appellant-accused was not on good terms with his wife. Due to their strained relations, his wife and daughter were living separately from him. The fact that the appellant-accused had no company to share his feelings, might have created a sense of insecurity and lot of mental stress in him.

47. Though as discussed above, the incriminating circumstances proved by the prosecution unmistakably and inevitably lead to the guilt of the appellant-accused and the appellant-accused alone committed murder of the two children who are

aged about three years and eight months respectively and attempted to kill P.W. 1, but we are of the considered opinion that the prosecution could not establish the motive. Though the absence of or no proof of motive is not fatal and in a way the appellant-accused is not innocent, but it could not be ignored as to what exactly preceded the attack on P.W. 1 and the deceased is not known and what prompted the appellant-accused to inflict those injuries on P.W. 1 and her two children is also not clearly established by the prosecution, though the participation of the appellant-accused is proved. Considering the aggravating and mitigating circumstances, we are of the considered opinion that in the facts and circumstances of the case, this case does not fall within the category of the "rarest of the rare cases".

48. Having regard to the observations made by the Apex Court in Bachan Singh v. State of Punjab that a real and abiding concern for the dignity of human life postulates resistance to taking a life through law''s instrumentality. That ought not be done except in the rarest of rare cases where the alternative option of imposing lesser sentence of life, unquestionably foreclosed, we are of the view that in the facts and circumstances of the case, imposition of sentence of imprisonment for life to the appellant-accused would meet the ends of justice. In the result, we dispose of the reference made by the Sessions Judge u/s 366 Cr. P.C. and allow the criminal appeal filed by the appellant-accused, partly, as follows:

The conviction of the appellant-accused in S.C. No. 223 of 2010, imposed by the VI Additional District and Sessions Judge (Fast Track Court-I), Markapur, Prakasham District, for the offence u/s 307 I.P.C. for attempting to murder P.W. 1 and for the offence u/s 302 I.P.C. (two counts) for causing the death of deceased Nos. 1 and 2, by judgment dated 24.03.2008, is confirmed. The sentence of rigorous imprisonment imposed against the appellant-accused for the offence u/s 307 I.P.C. is confirmed. However, the sentence of death imposed against the appellant-accused for the offence u/s 302 I.P.C. (two counts) is commuted to that of imprisonment for life. He shall also pay fine of Rs. 2,000/- on each count, and in default, shall suffer simple imprisonment for six months. Both the sentences shall run concurrently.